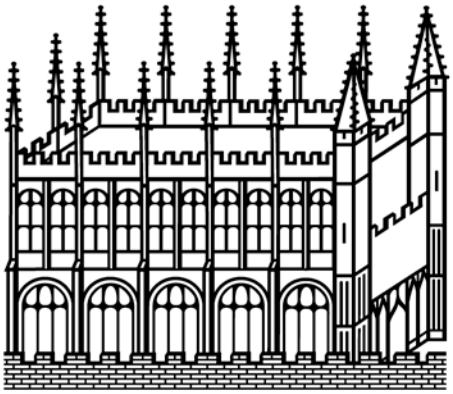

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

BY

WILLIAM HODGES, Esq. OF THE INNER TEMPLE,
BARRISTER AT LAW.

VOL. III.

FROM HILARY TERM, SEVENTH WILL. IV. 1837,
TO MICHAELMAS TERM, FIRST VICT. 1837,
BOTH INCLUSIVE.

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MEMORANDA.

After Hilary Term, Mr. Justice *Gaselee* resigned his seat on the bench, and on the 24th of *February*, *Thomas Coltman*, Esq., K. C., was appointed a Judge of the Court of Common Pleas in his room, and was knighted. He was first called to the degree of the coif, and gave rings with the motto—"*Jus suum cuique.*"

On the same day, *Francis James Newman Rogers* of Lincoln's Inn, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton*, jun., of the Inner Temple, Esq.; *John Evans*, of the Inner Temple, Esq.; and *Richard Budden Crowder*, of the Middle Temple, Esq.; were appointed his Majesty's Counsel.

A few days afterwards, *John Jervis*, of the Middle Temple, Esq., received a patent of precedence, to take rank before *Francis Whitmarsh*, Esq.; and the said *Francis Whitmarsh*, of Gray's Inn, Esq., and *Charles Purton Cooper*, of Lincoln's Inn, Esq., were appointed his Majesty's Counsel.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period of these Reports.

The Right Hon. Sir N. C. Tindal, Knt., C. J.
The Hon. Sir James Allan Park, Knt.
The Right Hon. Sir J. B. Bosanquet, Knt.
The Right Hon. Sir John Vaughan, Knt.
The Hon. Sir Thomas Coltman, Knt.

ATTORNEY GENERAL.

Sir John Campbell, Knt.

SOLICITOR GENERAL.

Sir Robert Mounsey Rolfe, Knt.

NAMES OF CASES

REPORTED IN THIS VOLUME.

R.

S.

T.

V.

W.

Y.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term, 1837.

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Jan. 30th.

KNIGHT *v.* WOORE.

In trespass for breaking a close, the defendant pleaded 1st, not guilty, 2nd, that all the king's subjects had a right of way, over the *locus in quo*, to carry goods and water, and 3rdly, a similar right limited to the inhabitants of M—. The jury found for the plaintiff on the first and second issues, and for the defendant on the third issue so far as it related to the carrying of *water* only:—*Held*, that this verdict was substantially in favor of the defendant, and that he was entitled to the general costs of the cause, including the costs of those witnesses who proved the defendant's claim as to the carriage of water, but disproved it as to the carriage of goods.

WHATELEY had obtained a rule *nisi* calling upon the plaintiff to shew cause why the prothonotaries' taxation of the costs in this action should not be reviewed. The action was in trespass, for breaking the gate of the plaintiff, and entering his close. The defendant pleaded—First, not guilty. Secondly, that the *locus in quo* was a public highway, and that all the king's subjects had a right to use it with horses and carriages to fetch and carry goods and water thereon; and thirdly, a like justification, alleging the right to be for the inhabitants of *Monmouth* to use the way for the same purposes. At the trial, a verdict was found for the plaintiff on the first and second issues; and for the defendant on the third issue, so far as it related to the carrying of water, but the jury negatived the defendant's right as to the carriage of goods.

The prothonotary allowed the plaintiff the costs of the first and second issues, and also the general costs of the cause; he allowed the defendants the costs of such witnesses as had proved the right to use the way for the carriage of water alone; but where the witnesses spoke to the defendants' right to carry goods and water, he did not allow any costs. He also disallowed the costs of maps prepared for the defendant, and counsels' fees for a consultation before the trial, as well as the defendants' attorneys' costs for attending at the trial.

R. V. Richards, shewed cause.—This question depends upon rule H. T. 2. W. 4, No. 74, which directs, that "No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded: and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." *Lardner* v. *Dick* (*a*) is in point. There it was held

(*a*) 2 Cr. & M. 389.

that where several issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of the issues found for him; but he is not entitled to the costs of his witnesses, unless their testimony was confined to the issues found for him. *Frankum* v. *The Earl of Falmouth* (*b*) is to the same effect.

Whateley in support of the rule. One principle is applicable to all the cases decided upon this rule of court, namely, that the party who substantially succeeds in the action is entitled to the general costs. That rule was acknowledged in *Richards* v. *Cohen* (*c*). *Frankum* v. *The Earl of Falmouth* (*b*) supports the present application, because the right to the water, upon which the plaintiff there relied, was found against him, and it was held that he was not entitled to the general costs of the cause, although the issues, on the plea of not guilty and another plea, were found in his favour. In *Eades* v. *Everatt* (*d*), *Parke*, J. says, "If the witness would not have been brought forward, except for the introduction of those counts in the declaration on which the party succeeded, he was substantially a witness on those issues; merely asking questions upon other counts upon which he really was not brought forward, is hardly sufficient to warrant his being considered as a witness on the latter counts."

TINDAL, C. J.—I am of opinion that upon this finding of the jury, the defendant is the person who is substantially entitled to the verdict in this case. This is an action of trespass, and three pleas are pleaded; and in the third plea the defendant sets up a right to use the road for the purpose of carrying water and goods. This plea is severed into two separate issues by the replication; one relating to the right to carry water, and the other to the right to carry goods. Now if the defendant has succeeded in establishing his right to carry either water or goods, he is the party who has really and substantially recovered in the action; and if he has put other pleas on the record which he has not established, he is sufficiently punished by being deprived of the costs of such pleas. Being then entitled to the general costs in the cause, is he entitled to the costs of those witnesses who spoke as to the right to carry goods as well as water? The circumstance that the witnesses spoke against the defendant's right upon one point, is no reason why he should not be allowed the expenses of such witnesses. This is the converse of the case of *Richards* v. *Cohen* (*c*), and the defendant is entitled to the general costs, upon the authority of that case and *Frankum* v. *The Earl of Falmouth* (*b*). The expenses of the maps, consultation, and attendance must also be allowed.

PARK, J.—The officers of the court are placed in a difficult situation in consequence of the new rule; but I agree that this taxation ought to be reviewed.

GASELEE, J. and VAUGHAN, J. concurred (*e*).

Rule absolute (*f*).

(*b*) 4 Dow. P. C. 65. 1 Har. & Wol. 337.
(*c*) 1 Dow. P. C. 533.
(*d*) 3 Dow. P. C. 687.
(*e*) Mr. J. *Bosanquet* was prevented, by indisposition, from attending the Court after the first day of this Term.
(*f*) See *Broadbent* v. *Shaw*, 2 B. & Ado. 940; *Probert* v. *Phillips*, 2 M. & Welsby, 40.

MORGAN and another, *v.* PEBRER.

Com. Pleas.

Jan. 20th.

1. A wager relating to the value of foreign funds is not illegal at common law; and therefore an action was held to be maintainable to recover differences paid by the plaintiffs on the depreciation of *Spanish* stock.

2. The stat. 14 Geo. 3, c. 48, is only applicable to gambling transactions arising on policies of insurance.

3. To a declaration in assumpsit for money paid to the defendant's use, &c. The defendant pleaded that the money was paid on account of a certain contract made between the plaintiff and defendant, relating to the purchase of foreign securities, whereon it was agreed that the defendant should repay the plaintiffs all advances made by him on account of the said securities, and should also, upon receiving reasonable notice, pay certain deposits, in case the securities should be depreciated; and that if the defendant neglected to pay such deposits, that then the plaintiff should be at liberty to sell the securities, and that the defendant should reimburse the plaintiff any losses occasioned by such re-sale. The plea then averred, that in contravention of this agreement the plaintiff had sold the securities without giving any notice to the defendant to pay further deposits:—*Held*, upon special demurrer, that the plea was bad as amounting to *non assumpsit*.

ASSUMPSIT.—The declaration stated, for that whereas heretofore, to wit, on, &c., in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 10,000*l.* of a certain foreign security, commonly called or known by the name of *Spanish Cortes* bonds; and also, in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 30,000*l.* of a certain other foreign security, commonly called or known by the name of *Spanish Scrip*, the defendant undertook and then faithfully promised the plaintiffs to indemnify and secure the plaintiffs against all losses, damages and expenses which they should or might incur, bear, pay, or sustain by reason of their purchasing the said securities for the defendant, by giving to, or depositing with the said plaintiffs, the value and amount of 10 *per centum* on the market prices of the said securities, so to be purchased by the plaintiffs for the defendant as aforesaid; and also, that in the event of the prices or value of the said securities, so to be purchased by the plaintiffs for the defendant, falling or coming lower than the value or amount of 10 *per centum* on the said market price, the said defendant would replace the said amount of 10 *per centum*, by giving or depositing with the plaintiffs, a further sum or amount of 10 *per centum* upon due notice, or that the said securities, so purchased by the plaintiffs for the defendant, should be sold; and the plaintiffs averred, that they, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on, &c., purchase for the defendant a large amount, to wit, 10,000*l.* of the securities called *Spanish Cortes* bonds, and also a large amount, to wit, 30,000*l.* of the other securities called *Spanish Scrip*, of all which the defendant had notice; nevertheless, the defendant disregarding and neglecting his promise and undertaking, did not nor would give or deposit, with the plaintiffs, the value or amount of 10 *per centum* on the market price of the said securities so purchased by the plaintiffs for the defendant, but neglected and refused so to do. And the plaintiffs, in fact, further said, that the prices or value of the said securities so purchased by them for the defendant, did afterwards, to wit, on, &c., fall or come lower than the value or amount of 10 *per centum* on the market price of the said securities. And that they, the said plaintiffs, afterwards, to wit, on, &c., gave the defendant due notice of such depreciation or fall in the value or prices of such securities, and requested the said defendant to replace the said sum or amount of 10 *per centum* on the market price of such securities, according to his promise and undertaking. Yet the said defendant not regarding his said promise and undertaking, but contriving and intending to defraud the plaintiffs in that behalf, did not nor would replace the said sum or amount of 10 *per centum* on the market price of the said securities, but neglected and refused so to do. And the said plaintiffs further said, that by reason of the defendant's neglect and refusal to replace the said sum or amount of 10 *per centum* on the market price of such securities, they, the plaintiffs, were obliged to sell; and did afterwards, to wit, on, &c., sell the said securities so purchased by them for the defendant as aforesaid, for less prices than those for which they had purchased the same for the defendant, to wit, at the price of 40¾ *per centum* for the security called *Spanish Scrip*, &c. being

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the best prices they could obtain for the same, and that the balance, or difference between the prices at which the said securities were purchased by the plaintiffs for the defendant, and those for which the said securities were sold, amounted in the whole to a large sum of money, to wit, the sum of 2,600*l.*, whereof the said defendant afterwards, to wit, on, &c., had notice; nevertheless the defendant had not, although often required so to do, as yet paid to the plaintiffs the amount of the said balance, or difference, or any part thereof, but had hitherto wholly neglected and refused so to do, and still neglected and refused so to do.—2nd count, for work done in buying and selling securities; 3rd count, for money lent; 4th count, for money paid to defendant's use; 5th count, for interest; and 6th count, on an account stated.

The defendant pleaded *Non-assumpsit*, and several special pleas (*a*). The eighth plea to the first count stated, that the said contract was a certain contract by the plaintiffs as brokers, of the defendant knowingly made and negotiated for the pretended purchase of certain public securities, to wit, 10,000*l.* public securities called *Spanish Cortes* bonds, and 30,000*l.* public securities called *Spanish Scrip*, to be delivered on a future day, to wit, &c., which was, in truth and fact, a wager made respecting the price and value of certain public securities, given by the lawful government of *Spain* to the national creditors of *Spain*, which country and the lawful government thereof, was then and still is in amity with this realm and his present Majesty, the now King of this realm, and the price and value of which securities depended upon the prosperity of the said country of *Spain*, and the maintenance of peace by *Spain* with this realm and other nations. And by the said wager, under pretence of a contract, the plaintiffs, as brokers for the defendant, agreed with certain other persons to the defendant unknown, that then, if the price and value of the said securities should be higher on the said future day than on the day when the said wagering contract was made, to wit, higher than 60 *per centum*, he, the defendant, should receive the amount of the difference between the value of the said securities, to wit, &c., on the day when the said contract was made, to wit, 60 *per centum*, and the higher value on the said future day; and if the price and value thereof should fall, the defendant should in like manner pay the amount of difference between the value on the said day when the contract was made as aforesaid, to wit, 60 *per centum*, and the value on the said future day.—Verification.

Thirteenth plea—to the 3rd, 4th, 5th, and 6th counts of the declaration, that the said money was paid and lent, &c., in respect and on account of a certain contract made thentofore, to wit, &c., by which the plaintiffs undertook, in consideration that the defendant, at the request of the plaintiffs, had employed them as his brokers, at a certain reward and commission; that they, the plaintiffs, would find money and purchase for the defendant a large amount of certain public securities, to wit, 10,000*l.* *Spanish Cortes* bonds and 30,000*l.* of *Spanish Scrip* upon the terms following, that is to say, that the plaintiffs should receive 5 *per centum* upon all payments made by them on account of the said purchase, and that they should hold as security for all payments the said securities; and that as an additional security, the defendant should deposit 10 *per centum* upon the market price of the said securities,

(*a*) Some of these pleas were framed on stat. 7 Geo. 2, c. 8, but the demurrer was abandoned as to those pleas, in consequence of the decisions in *Wells* v. *Porter*, 2 Hodges, 78; *Oakley* v. *Rigby*, 2 Hodges 42; and *Elsworth* v. *Cole*, 1 Mee and Welsby, 31.

and should, in case the securities should come lower in price, then, upon notice being given by the plaintiffs to the defendant, that he should from time to time deposit such a further amount as should, with the existing market price, maintain the deposit to the value of the securities at the time when the said contract was made, and 10 *per centum* thereupon; and that the plaintiffs should be repaid for all payments in the manner following, that is to say, that if the plaintiffs should, within a reasonable time after the making of the said purchase, give notice to the defendant to repay to them the amount of the payments made by them, he, the defendant, should, within a reasonable time after such notice, receive the said securities from the plaintiffs, and should repay to them all payments made by them with interest; or that if the securities should come lower in value then the said 10 *per centum* on the market price, and the defendant should, *on due notice being given to him by the plaintiffs*, neglect or refuse to deposit such additional sum as should keep up the deposit to 10 *per centum*, that the plaintiffs should be at liberty to sell the said securities and apply the proceeds to the repayment to them of any payments made by them; and that the defendant should reimburse the plaintiffs for any losses occasioned by such resale after notice as aforesaid.

The plea then averred, that the plaintiffs had purchased the said stock, and that the defendant had in all things, on his part, performed the agreement. That the defendant had deposited 10 *per centum* on the amount, and that the plaintiffs had not at any time given him notice to repay any advances made by them, or of any depreciation in value of the said securities; nevertheless, that the plaintiffs, in contravention of their said agreement, sold the securities and applied the proceeds in payment of such advance.—Verification.

Demurrer to pleas.—The causes of demurrer to the eighth plea were—That the plea did not shew that the contract was an illegal contract respecting securities for stock in the *British* public funds; and also because it appeared that it was a lawful contract respecting public securities of a foreign country; and also because it did not appear that the contract was in any respect a void or illegal contract.—The causes assigned to the *thirteenth* plea were that it contained a twofold answer to the counts in the declaration; to wit, an averment of the performance of the contract by the defendant, and also an averment of the non-performance of the contract by the plaintiffs; and also that the said plea was multifarious, and offered separate and distinct issues upon several independent facts; to wit, that the defendant paid, and that the plaintiffs received and accepted, a deposit of 10 *per centum* upon certain securities: and also that the plaintiffs had not given the defendant notice to repay the amount of any repayments or advances made by them: and also that the plaintiffs did not give the defendant notice of any depreciation or fall in the value of the securities purchased by them: and also that, in violation of their agreement, the plaintiffs had sold the securities purchased by them: and also that the plea amounted to the general issue, and tended to great and unnecessary prolixity of pleading: and also that the plea contained several distinct substantial matters of defence: and also that the plaintiffs could not take or offer any certain issue thereupon.

Bagley, in support of the demurrer.—This contract is said to be void at common law, as being an illegal wager. Wagers are not void at common

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law, except in some excepted cases. In *Da Costa* v. *Jones* (*a*), Lord *Mansfield*, C. J., says, "Indifferent wagers upon indifferent matters, without interest in either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of parliament: and the restraints imposed in particular cases support the general rule." In *Wells* v. *Porter* (*b*) and *Oakley* v. *Rigby* (*c*), this Court intimated that contracts relating to jobbing in *foreign* funds were not illegal at common law; and in *Elsworth* v. *Cole* (*d*), the Court of *Exchequer*, during the last term, expressed their approbation of those decisions. Nor does this contract involve anything which is contrary to public policy. In *Jones* v. *Randall* (*e*), it was decided that an action would lie to recover money won upon a wager, whether a decree of the Court of Chancery would be reversed or not, on appeal to the House of Lords; and it was said that some motive of fraud, or other *turpis causa*, must appear, in order to make the wager illegal; *Allen* v. *Hearn* (*f*). The fifteenth plea, which is pleaded only to the *indebitatus* counts, is bad, as amounting to the general issue Non-assumpsit. *Jones* v. *Nanney* (*g*) is precisely in point. That was an action of assumpsit for the work and labour of the plaintiff as an attorney. The defendant pleaded, as to all the demand except 90*l.*, that the work was performed in endeavouring to secure the defendant's return to parliament, under an agreement that the plaintiff should receive no remuneration, but only his disbursements, and that 90*l.* was a fair remuneration for the plaintiff on that occasion; and the plea was held bad, as amounting to non-assumpsit. In *Grounsell* v. *Lamb* (*h*) it was also held in an action of assumpsit for a machine sold and delivered, that the defendant might shew, under *non-assumpsit*, that the machine was manufactured under a condition that if it did not work, nothing should be paid for it. *Cousens* v. *Paddon* (*i*) is to the same effect. This plea is also bad for duplicity. It contains several answers to the declaration, either of which would be sufficient. The effect of this is, that the plaintiffs have great difficulty in framing their replication, because by selecting one of the allegations, they would be taken to have admitted the rest. The replication *de injuriâ* would not have been appropriate, because that is only applicable in assumpsit, when the plea admits the contract, and excuses its non-performance. *Whittaker* v. *Mason* (*k*). *Griffin* v. *Yates* (*l*).

Gale, contrà.—First, as to the demurrer to the thirteenth plea. The plaintiff might clearly have replied *de injuriâ*; or, if he had traversed one of the facts, the whole plea would have been in issue. Nor is the plea bad, as amounting to *non-assumpsit*. It admits that the plaintiff has a *primâ-facie* case, and then shows other circumstances which prevent him from recovering in the action. In *Gregory* v. *Hartnoll* (*m*), and the cases which have been cited on the other side, there was no such admission; there is nothing in the new rules of pleading to prevent the defendant from giving colour to the plaintiff's title, and afterwards avoiding it, *Carr* v. *Hinchliff* (*n*).

(*a*) Cowp. 729.
(*b*) 2 Bing. N. C. 722. 2 Hodges, 78.
(*c*) 2 Bing. N. C. 732. 2 Hodges, 42.
(*d*) Since reported. 2 Mee & Welsby, 31.
(*e*) Cowp. 37.
(*f*) 1 Term Rep. 56.
(*g*) 1 Mee and Welsby, 333.
(*h*) 1 Mee and Welsby, 352.
(*i*) 2 Cr. M. and R. 547. 1 Gale, 305.
(*k*) 2 Bing. N. C. 359. 1 Hodges, 321.
(*l*) 2 Bing. N. C. 579. 1 Hodges, 387.
(*m*) 1 Mee and Welsby, 183.
(*n*) 4 Barn. and Cress. 547. See *Cole* v. *Lesouef*, 2 Hodges, 75.

Secondly, The eighth plea contains an answer to the action, as it sets out a contract which is prohibited by stat. 14 Geo. 3, c. 48. The preamble recites that "it hath been found by experience that the making insurances on lives, or other events, wherein the assured shall have no interest, had introduced a mischievous kind of gambling." And this case is within the mischief which it was intended to remedy. *Atherfold* v. *Beard* (*a*) was an action upon a wager, whether the *Canterbury* collection of the duties upon hops for the year 1786 would amount to more than the collection for the preceding year; and it was held to be illegal because it was against the sound policy of the kingdom. *Buller*, J., was inclined to go further, and said, "If it were necessary to have recourse to it, I incline to think, with the opinion of this Court and that of the Common Pleas, that the Stat. of 14 Geo. 3 would reach the present case. For though the statute speaks only of policies, yet I think it may extend to cases like the present. For either the Courts must restrain that act of parliament to such cases as are in form of policies, which would entirely repeal the statute, or, by pursuing the spirit of the act, extend it to all cases. I think the latter is the true construction; for a policy is nothing but a promise, and it would be strange to determine that the party might do the same thing in one form, which the statute has expressly prohibited to be done in another." In *Good* v. *Elliott* (*b*) the same learned judge expressed a similar opinion upon the construction of this statute. *Paterson* v. *Powell* (*c*) decided that an engagement to pay a certain sum in case *Brazilian* shares should be done, at a certain sum, on a certain day, and subscribed by several persons, was a policy of insurance within the meaning of the statute.

Thirdly. This wager is illegal at common law. It has often been decided that wagers which have a tendency to produce public mischief, or inconvenience, are illegal. The authorities are all collected in *Gilbert* v. *Sykes* (*d*). That was an action on a wager, by which the defendant received from the plaintiff 100 guineas, in consideration of paying the plaintiff a guinea a day as long as *Napoleon Buonaparte* should live, which bet arose out of a conversation upon the probability of his coming to a violent death, by assassination or otherwise. *Ellenborough*, C. J., said, "This wager arose out of a conversation respecting the probability of *Buonaparte's* assassination; and these parties were not acting upon any remote speculation, when one of them thought that the mischief which was to destroy his life would happen within a hundred days from that time. If the wager in its terms had been upon the probability of a person's assassination within that period, I should not have considered such a question as proper to be tried in the form of a wager, which went to give any person an interest in the perpetration of so enormous an offence, and it matters little that this consideration was only an inducement to the bet more in the form of an annuity; the very computation of the price of such an annuity, little more than three months' purchase, shews that they contemplated a violent termination of the life. Upon the whole, therefore, not without some degree of doubt whether Mr. Justice *Buller* was not right, in saying that no wagers ought to be sustained where the parties have no special interest in the subject-matter; at any rate, where the subject-matter of the wager has a tendency injurious to mankind, I have no doubt in saying that

(*a*) 2 T. Rep. 610.
(*b*) 3 T. Rep. 701.
(*c*) 9 Bing. 320.
(*d*) 16 East, 150.

it ought not to be sustained." So here the consequence of contracts like the present may possibly give the parties an interest in interfering mischievously with the affairs of Spain, a nation at amity with this country. They may lead to such transactions in the funds of that State, as would materially affect the rate of exchange, and cause embarrassment in her financial concerns.

TINDAL, C. J.—The question before us is, whether the contract stated in this declaration is either bad at common law or under stat. 14 Geo. 3, c. 48. Unless we are prepared to decide contrary to *Good* v. *Elliott* (*a*), we cannot say that this is a wager which is illegal at common law. Wagers are not illegal except in particular cases; one of those cases is, whenever the wager is likely to be destructive to the interests of this country, or of any foreign country, but I am unable to see that the natural and necessary consequence of this contract is to bring it within that exception. I see therefore no ground for holding this contract to be bad at common law. As to the statute 14 Geo. 3, c. 48, that is not applicable to the case of a wager between one man and another; the object of that statute was to prevent gambling speculations, by parties who put their names to policies of insurance in which the assured had no interest. This contract is not therefore illegal under that statute. The thirteenth plea appears to me to be bad as amounting to the general issue. It states, that the money which the plaintiffs seek to recover arose out of a certain contract which is set out in the plea; and it states that there was a condition to be performed by the plaintiffs, which they neglected to perform. What is this but pleading non-assumpsit? Our judgment must be for the plaintiffs.

PARK, J.—As to the principal point, unless we were disposed to overrule *Good* v. *Elliott* (*a*), we could not hold this contract to be void at common law. No ground of immorality or impolicy has been shewn to warrant the Court in saying that this contract is illegal. With respect to the 14 Geo. 3, c. 48, I admit that the preamble is somewhat comprehensive, but it ought not to control the act itself, and that applies only to policies of insurance wherein the person on whose account such policy shall be made shall have no interest; and it goes on to say, that "every assurance" made contrary to the act shall be void. These words have a specific meaning, and by reference to the following sections, it is evident that a policy must be the foundation of the gaming. In *Good* v. *Elliott*, a second point was determined upon the construction of this statute; and the majority of the judges held that its provisions must be restricted to wagers relating to policies of insurance. I was not in the court when *Paterson* v. *Powell* (*b*) was decided: that was the case of a policy, and I fully concurred in that decision. On the other point relating to the thirteenth plea, I entertain no doubt.

VAUGHAN, J.—I am of the same opinion. *Good* v. *Elliott* (*a*) was very much discussed; it stood over for judgment, and the question was also discussed whether the statute 14 Geo. 3, c. 48, was applicable. That case has been acted upon ever since, and it is well established that wagers are in general

(*a*) 3 T. Rep. 693. (*b*) 9 Bing. 320.

legal. It is observed by Mr. J. *Grose*, in the course of his judgment, that if gaming contracts were illegal at common law, the 14 Geo. 3, c. 48, would have been unnecessary.

Judgment for the Plaintiffs.

DEVAS & an^r^. assignees of Bowring & Garard, Bankrupts, *v.* VENABLES and another.

Jan. 14*th.*

A. and B. who were traders in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings and to sell them at 25 per cent. under prime cost. The shopman called on the defendants and offered the goods for sale, without disclosing the names of his employers, but stating that the owners were in want of money. The defendant called at the lodgings and made several large purchases, paying the shopman for each parcel in cash and deducting the discount. A fiat in bankruptcy issued, and the assignees brought trover to recover these goods. The jury found that the bankrupts intended to defraud their creditors, and that the defendants had not made such inquiries as honest and prudent men would have done: *Held*, that the assignees of the bankrupts were entitled to recover back the goods sold both before and after the commission of the act of bankruptcy, and that the case was within the 82nd *sec.* 6 *Geo.* 4, *c.* 16.

TROVER, to recover certain goods, the property of the bankrupts; and a second count, stating the goods to be the property of the assignees. No question was raised on the four first pleas. The fifth plea stated that before the date of the fiat in bankruptcy against the bankrupts, the said bankrupts (the defendants not then having any notice of any act or acts of bankruptcy before that time or then committed by the bankrupts, nor then having any notice of any claim, right, or title of the plaintiffs as assignees, to the said goods and chattels) sold to the defendants, and the defendants then purchased of the bankrupts the said goods and chattels then in their possession, at and for divers sums of money amounting in the whole to a certain large sum of money, to wit, &c. And the defendants not then having any notice of any act of bankruptcy by the said bankrupts before that time or then committed, nor then having any notice of any claim, right, or title of the plaintiffs, as assignees, to the said goods and chattels, really and *bonâ fide* paid to the said bankrupts the said sum of money, as and for the price and purchase money of the said last-mentioned goods and chattels; which said sum had not, either before or after the commencement of the suit, been repaid by the bankrupts or by the said plaintiffs, as assignees, to the defendants. And the defendants, upon such purchase and payment of the said goods and chattels, then had and received the said goods and chattels, and had kept and detained, and still kept and detained the same in their possession by reason thereof; and the defendants, by reason of the said premises, had a claim and lien on the said goods and chattels for the said monies paid by them; and the defendants had detained, and still detained the said goods and chattels, for and by reason of the said claim and lien, as they lawfully might for the cause aforesaid, which was the said conversion in the said declaration mentioned;—concluding with a verification.

Replication.—That, upon the said sale and purchase in the said plea mentioned, the said bankrupts, fraudulently, and with intent to defeat and defraud their creditors, and in contemplation of bankruptcy, sold to the defendants the said goods and chattels at and for much less than the fair and proper prices and value thereof, to wit, at and for one half of the fair and proper prices and value thereof, and in a secret and clandestine manner, and otherwise than in and according to the regular and ordinary and tradesmanlike course of trade and dealing with respect to such goods and chattels, as the said goods and chattels so sold and purchased as aforesaid; of all which the defendants, at the time of such sale and purchase, and of the said payments in the said plea mentioned, had notice; *without this*, that the said payments in the said plea mentioned, or any of them, were really and *bonâ*

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fide made by the defendants to the bankrupts in manner and form, &c. (*a*) Conclusion to the country, and issue thereon.

At the trial before *Tindal*, C. J., at the *Guildhall* sittings after last *Michaelmas* Term, the following facts were in evidence:—The bankrupts were linen-drapers, and carried on an extensive retail business in *London*. In *September*, 1835, they directed *Kirby*, one of their shopmen, to take lodgings in *Goswell-road*, and large parcels of goods were removed from the shop to these lodgings, which consisted of a first floor and a kitchen, for the purpose of being secretly sold. *Kirby* then called upon the defendants, who were linen-drapers, carrying on business in partnership at *Whitechapel*, and represented to *May*, one of the partners, that he had a large quantity of goods to sell at a very cheap rate. *May* went to the lodgings and examined the goods, and, on the 31st *October*, agreed to purchase a parcel to the amount of 319*l.* 10*s.*, at 25 per cent. under the invoice price. *Kirby* stated that he was not the owner of the goods, but that he was selling for parties who wanted cash, but he did not disclose their names. The goods were sent to the defendants early in the morning, and *May* then paid *Kirby* the amount in cash, deducting the discount of 25 per cent.

Several other purchases were made by *May* under circumstances similar to the above; and upon one occasion *May*, upon seeing the invoice without the name of a seller, said to *Kirby*, "Come, shove us in the name of a seller:" whereupon *Kirby* inserted the words "Bought of *John Kirby*." The cost price of the goods was marked on each parcel in the usual manner, and on some of the last parcels, the name of the street, in which the bankrupts resided, was visible.

These sales took place at the under-mentioned dates, and the invoices and sums paid upon each parcel were as follows:—

	Date of Invoice.	Amount of Invoice.	Amount paid, less discount.
1st sale	31st Oct., 1835	£319 10	£236 5
2nd sale	2nd Nov.	273 10	200 0
3rd sale	6th Nov.	306 2	220 0
4th sale	16th Nov.	210 8	157 0
5th sale	16th Nov.	15 12	15 12
		£1125 2	£828 17

Kirby and the bankrupts were in collusion together to defraud the creditors of the latter, and they made large purchases upon credit at about the period of the above sales.

On the 1st *December*, 1835, a fiat in bankruptcy issued against the bank-

(*a*) By 6 *Geo.* 4, *c.* 16, *sec.* 82, it is enacted, "That all payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, by any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt, had not at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

rupts, upon an act of bankruptcy committed on the 6th *November*, and the assignees brought this action to recover the value of the goods thus purchased by the defendants. The jury found a verdict for the plaintiffs, damages 930*l.*

Bompas, Serjt., moved for a rule *nisi* to reduce the damages to the amount of the sales which took place subsequent to the act of bankruptcy. *Ward* v. *Clarke* (*a*) was a case like the present in many of its circumstances, and Lord *Tenterden*, C. J., there observed, "Where there is an unknown act of bankruptcy, and transactions have taken place *bonâ fide* in the ordinary course of dealing, it appeared to me unjust to vitiate these transactions on the ground of a fact unknown to the party, and I accordingly considered, in a decided case where goods had been bought in the usual way in a shop, that the transaction was valid. The Court afterwards confirmed that decision (*Cash* v. *Young*, 2 *B.* & *C.* 413). The question, therefore, seems to me to be, not whether the purchase by the defendants was fraudulent, but whether it was in the ordinary course of trade and dealing. In considering that, you may look to the antecedent transactions between the parties, although I think that these cannot be impeached in the present action; and from them it appears that the defendants have several times bought from the bankrupts at very low prices." In accordance with this doctrine, the mere sale of the goods for less than the full price, is not of itself sufficient to invalidate the sale, but some fraud must appear. *Baxter* v. *Pritchard* (*b*). When men in embarrassed circumstances sell goods at a reduced price for the purpose of obtaining ready money, it only raises an impression in the purchaser's mind that the seller is desirous of raising money quickly; but it does not necessarily follow that the purchaser must be acquainted with the seller's intention of defrauding his creditors, and here the defendants knew nothing whatever about the bankrupts. [*Tindal*, C. J.—Suppose a purchaser shuts his eyes, and is determined not to know any thing about the real owner? Here the defendants, by making a little inquiry, could have ascertained to whom the goods belonged.] The name of the street where the bankrupts carried on their business did not appear on the parcels of goods which were sold before the act of bankruptcy was committed. And in the same case of *Ward* v. *Clarke*, it was held that transactions which occurred before the act of bankruptcy, and before the petitioning creditor's debt occurred, could not be impeached. A question also arises on the construction of sec. 82, 6 G. 4, c. 16. The issue is taken on the averment that the *payments* were not really and *bonâ fide* made by the defendants to the plaintiffs. Here there was no doubt but that the payments were really and *bonâ fide* made, and that being so, it is immaterial whether the *sale* was fraudulent. The word sale does not appear in the section, and seems to have been studiously omitted, and it was the intention of the Legislature that the assignees should not recover the goods, and also retain the payments made to the bankrupts in respect of them. The former stat. 46 G. 3, c. 135, sec. 1, protects "all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt," *bonâ fide* made or entered into more than two months before the commission.

TINDAL, C. J.—This motion only seeks to retain the amount of the pur-

(*a*) 1 M. & Mal. 497. (*b*) 1 Ado. & Ellis, 456.

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chases made before the act of bankruptcy, as it is admitted that the assignees are entitled to a verdict upon the transactions which occurred after the act of bankruptcy. The question which was left to the jury arose principally upon the fifth plea, upon which the precise issue is, whether the payments were really and *bonâ fide* made by the defendants to the bankrupts, in manner and form as in the plea alleged. It is contended for the defendants, that the late Bankrupt Act has altered the law affecting this question. I thought at the trial that the words "really and *bonâ fide*" did not import the same thing; if it were so, the words "*bonâ fide*" would not have been added; and it seemed to me that the way was to consider whether the payments were made honestly and fairly in the course of an honest transaction, on a *bonâ fide* contract. I told the jury that this would depend upon two points: first, whether the bankrupts make these sales with intent to defraud their creditors, and the jury found that they did; secondly, I asked them whether the defendants had the knowledge, or the means of knowledge, of the circumstances within their reach, so that men of common prudence would have made inquiries. I advised the jury to look narrowly into the evidence upon this point, and I left it to them much in the same way that I should have left the evidence in a criminal case. The jury found their verdict for the plaintiffs, and I presume that they supposed that enough had transpired to put a prudent and honest man upon his guard, and I entirely concur in their verdict. The case turned principally on the evidence of the witness *Kirby*, who appears to have been concerned in a wicked scheme to enable the bankrupts to make a purse; but it did not appear that the defendants were acquainted with that fact. This witness stated that he took lodgings and deposited goods belonging to the bankrupts in two upper rooms and the kitchen; the goods were removed by a stranger to the lodgings at an early hour in the morning. He then called upon *May*, one of the defendants, and told him he had a lot of goods to sell under price; *May* afterwards came to the lodgings and agreed to buy a parcel of the goods at 25 per cent. under the cost price. The witness informed *May* that the goods were not his own. It appears that the parcels were sent to *May's* house between seven and eight o'clock in the morning, when *Kirby* was paid for them. A second purchase, under similar circumstances, took place a few days afterwards, which was followed by other transactions, and some of the goods had the wholesale and retail marks appended to them. Under these circumstances, I am by no means dissatisfied with the finding of the jury.

PARK, J.—I am clearly of opinion that the verdict was right.

VAUGHAN, J.—The first question is, whether the bankrupts intended to commit a fraud on their creditors? It is impossible to doubt but that such was their intention. As to the construction of the statute, I agree in the opinion which my Lord Chief Justice has expressed.

Rule refused.

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Jan. 14th.

DOE, d. THRING, *v.* ROE.

CHANNELL moved for judgment against the casual ejector. The notice at the foot of the declaration required the tenant to appear in *Michaelmas* Term last, and judgment might have been obtained against him in that Term. In the Court of *King's Bench* the rule is, that under such circumstances this motion may be made in the Term following the Term which is stated in the notice.

Where a declaration in ejectment directed the tenant to appear in *Michaelmas* Term, but judgment against the casual ejector was not moved until *Hilary* Term, the rule for such judgment is *nisi* only.

TINDAL, C. J.—The party may have searched the office, to see if judgment was obtained in *Michaelmas* Term, and finding that it was not, he may suppose the proceedings were at an end. You may take a rule *nisi*.

Rule *nisi* granted (*a*).

(*a*) The rule is similar in the *Exchequer*. See *Doe* d. *Reeve* v. *Roe*, 1 Gale 15.

Ex parte STEVENS.

TALFOURD, Serjt., moved that the officer of the Court should receive the certificate of an acknowledgment, made by a married woman, under stat. 3 & 4 Wil. 4, c. 74, sec. 85. The acknowledgment was taken in 1834, and the certificate and affidavit of the due taking were sent from *Norfolk* to *London* to be filed; but in consequence of an informality in the proceedings, they were returned to the country, and in the same year the acknowledgment was regularly taken, but through inadvertence, the documents were mislaid in the attorney's office, and had remained there until the present time. The parties, who were all alive, were now desirous that the certificate and affidavit should be filed, in pursuance of the statute.

An acknowledgment by a married woman was duly taken, but through inadvertence the parties did not send the certificate and affidavit to be filed, until two years afterwards, when the Court allowed them to be filed.

Per Curiam. Under the circumstances which have been stated, the certificate and affidavit may be filed.

PHILIP *v.* ARDEN.

Jan. 31*st.*

HODGES moved for judgment as in case of a nonsuit. The plaintiff had given notice of trial for *Hilary* Term, 1836, but having made default, the defendant moved for the costs of the day for not proceeding to trial, which were duly paid; but the plaintiff had not since taken any further steps to bring the cause to trial. It now appeared, by affidavit, that notice of the present motion had been given to the plaintiff's attornies, and that they stated, in reply to an inquiry whether they intended to instruct counsel, that they did not intend to oppose the motion, but that the defendant's attorney might make the rule absolute.

After the defendant had moved for the costs of the day against the plaintiff for not proceeding to trial, and three terms having again elapsed without any notice of trial, the defendant gave the plaintiff's attorney notice that he intended to apply for judgment as in case of a nonsuit; the attorney said that he should not oppose the motion. Under these circumstances the Court granted a rule absolute for judgment as in case of a nonsuit.

TINDAL, C. J.—Under these circumstances, you may take a rule absolute.

PARK, J., and VAUGHAN, J., concurred.

Rule absolute (*a*).

(*a*) See *Moseley* v. *Clarke*, 2 Dow. P. C. 66. *Whalley* v. *Fellowes*, 1 Hodges, 77.

Com. Pleas.
Jan. 27th.

DOE d. STONE *v.* ROE.

In moving for judgment against the casual ejector, it appeared that the tenants in possession of the premises, expressed their knowledge of the intent and meaning of the declaration in ejectment which was served upon them: *Held*, that it was unnecessary to shew that the declaration and notice was read over and explained.

R. V. RICHARDS moved for judgment against the casual ejector. The affidavit stated, in the usual terms, that the deponent had served the tenants in possession of the premises, with a true copy of the declaration in ejectment; but instead of shewing that the declaration and notice had been read over and explained to them, it was stated "that the tenants having expected to be served with the said proceeding, expressed their knowledge of the intent and meaning of the declaration and notice."

TINDAL, C. J.—I think that is sufficient.

Rule granted (*a*).

(*a*) See *Doe* d. *Downes* v. *Roe*, 1 Har. & W. 671.

NORRIS *v.* SALOMONSON.

Jan. 24th.
Where a witness met the drawer of a bill at the theatre the evening that it became due, and asked him whether he had heard of the dishonour of the bill, and he replied that he had, and intended to call and pay it, it was *held* that the defendant could not object that he had no notice of the dishonour of the bill.

ACTION on a Bill of Exchange by the indorsee against the drawer.—Plea, that the defendant had received no notice of the dishonour of the bill. At the trial before Mr. Serjeant *Arabin*, at the *Sheriff's* Court in *London*, a witness was called, who stated, that on the evening of the day on which the bill became due, he met the defendant at the theatre, when he asked him if he had heard of the dishonour of the bill? He replied, that he had received a very civil letter upon the subject of the dishonour, and that he should call and pay the bill. The witness could not recollect the precise words which were used by the defendant. The learned judge was of opinion that this was sufficient proof of the notice of dishonour, and a verdict was found for the plaintiff.

Gurney moved to set aside the verdict, and to enter a nonsuit, on the ground of misdirection. He submitted, upon the authority of *Hartley* v. *Case* (*a*), that there was no evidence to prove the notice of dishonour.

TINDAL, C. J.—This comes within that class of cases where strict notice of dishonour is waived by the defendant's own conduct (*b*). I think we ought not to disturb the verdict.

The other Judges concurred.

Rule refused (*b*).

(*a*) 4 Barn. & Cress. 339. (*b*) See *Phipson* v. *Kneller*, 4 Cowp. 285.

POWER *v.* HORTON.

Jan. 28th.
The Court refused to grant a new trial in the Sheriff's Court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was unnecessary. *Semble*, that the Court will not require an under-sheriff to make an affidavit of circumstances which occurred at the trial.

THOMAS obtained a rule *nisi*, calling upon the plaintiff to shew cause why there should not be a new trial. The action was brought to recover the amount of a builder's bill, and at the trial, before the under-sheriff of

Warwick, a verdict was found for the plaintiff, for 5*l.* 16*s.* 6*d.* The ground upon which the rule was moved, was that the under-sheriff refused to allow the defendant's attorney to cross-examine the plaintiff's witnesses.

Gale shewed cause, upon an affidavit made by the plaintiff's attorney and one of the witnesses, which stated that the under-sheriff had refused to allow the defendant's attorney to cross-examine certain labourers item by item, as to the reasonableness of the plaintiff's charges, these witnesses being examined for the mere purpose of proving that the work had been done; the reasonableness of the charges was proved by surveyors who had been subjected to cross-examination. It also appeared that the defendant called witnesses, who were examined as to the unreasonableness of the charges. The under-sheriff, upon an application being made to him, expressed his willingness to make an affidavit of the facts which occurred at the trial, if he should be required by the Court to do so.

Thomas was heard in support of the rule.

TINDAL, C. J.—No doubt, if the under-sheriff misconducted himself at the trial, the Court would interfere, but this is not a case of that description. It seems that the under-sheriff did prevent some cross-examination, but we must allow him to exercise some discretion in the management of a cause. Here, it appears that witnesses were called for the defendant, and the plaintiff nevertheless obtained a verdict. The rule must be discharged.

PARK, J.—I am of the same opinion. The under-sheriff would frequently be placed in a disagreeable situation if he were required to make an affidavit of the facts which occurred at the trial.

VAUGHAN, J., concurred.

Rule discharged.

BEESLEY'S BAIL.

Jan. 11th.
In an action against the acceptor of a bill of exchange, it is no objection to bail that he is the drawer of the bill.

ANDREWS, Serjt., opposed the bail upon the ground that one of the bail was the *drawer* of the bill of exchange, the subject of the action, defendant being the acceptor. He contended that the plaintiff, as indorsee, already had the drawer's security, he being liable to be sued on the bill.

W. H. Watson, in support of the bail.—The bail states, in his affidavit, that he is worth the sum required, over and above all his just debts, which includes his liability on this particular bill. There is no principle upon which to found this objection: it differs from the case of an acceptor becoming bail for the drawer, because the acceptor is there primarily liable to pay the bill.

BOSANQUET, J., referred to *Harris* v. *Manley* (*a*), *Mitchell's* bail (*b*), *Barnesdall* v. *Stretton* (*c*), and other cases referred to in *Arch. Prac.*, 168, 3rd edition.

Cur. adv. vult.

(*a*) 2 Bos. & Pul. 526.
(*b*) 1 Chitty Rep. 287.
(*c*) 2 Chitty Rep. 79.

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On a subsequent day, *Park*, J., intimated that the objection could not be supported. The case of *Barnesdall* v. *Stretton* (*a*) was decided upon the ground that the drawer was liable, as the drawer of another dishonoured bill.

Bail admitted (*b*).

(*a*) 2 Chitty Rep. 79.
(*b*) See also *Anonymous*, 1 Dow. P. C. 183. *Cross* v. *Williams*, 1 Tyr. 531.

HENRY *v.* BURBIDGE.

Jan. 28th.
In assumpsit by the indorsee against the drawer of a bill, if the declaration does not allege a promise to pay, it is bad on special demurrer.

DEMURRER to a declaration on a bill of exchange. The declaration stated, that the defendant had been summoned to answer the plaintiff by virtue of a writ issued on the 4th day of *November*, 1836. For that whereas the defendant, on the 15th *March*, 1836, made his bill of exchange in writing, and directed the same to one *Pearson*, and thereby required *Pearson* to pay to the order of the defendant 29*l.* 18*s.* 10*d.* four months after the date thereof, which period has now elapsed, and the defendant then indorsed the said bill to the plaintiff; that *Pearson* did not pay the said bill, although the same was presented to him on the day when it became due, whereof the defendant then had notice. And whereas also the defendant, on the 1st *November* last, was indebted to the plaintiff in 30*l.* for the price and value of goods then sold and delivered by the plaintiff to the defendant and at his request, and in 30*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them. And the defendant afterwards, on the day and year last aforesaid, in consideration of the last-mentioned premises respectively, then promised the plaintiff to pay the said last-mentioned several monies respectively to the plaintiff on request. Yet the defendant had disregarded his promises, and had not paid any of the said monies or any part thereof respectively, to the damage, &c.

Demurrer to the first count, which stated the following causes of demurrer: that it did not appear by the said first count that the bill therein mentioned became due or payable before the commencement of the suit; and that the words "which period has now elapsed," contained in that count, have reference to the date of the declaration, and not to the issuing of the writ; also, that the said first count contained no promise by the defendant to pay the monies therein mentioned, or any part thereof.

Whitehurst for the defendant abandoned the first ground of demurrer upon the authority of *Owen* v. *Walters* (*a*). As to the second point, this is an action of assumpsit, and it is necessary to allege a promise made by the defendant. [TINDAL, C. J.—It has been held, that the statement of an agreement between the parties imports a promise.] That was decided in *Mountford* v. *Horton* (*b*), but there the declaration stated, "that at the time of making the promise and undertaking thereinafter mentioned," divers goods were for sale, and then an agreement was stated between the parties. *Starkey* v. *Cheeseman* (*c*) may be relied on on the other side. There in an action

(*a*) 5 Dow. P. C. 324.
(*b*) 2 Bos. & Pull. N. R. 62.
(*c*) 1 Lord Raym. 538. 1 Salk. 129.

against the drawer of a bill, it was objected in arrest of judgment, that it was not stated in the declaration that the defendant promised to pay the money, and it was held that it was not necessary to lay an actual promise. That would be an authority in the present case, if this were an application to arrest the judgment, but the objection is now raised on special demurrer, and the plaintiff must shew his declaration to be strictly regular, and an assumpsit must appear. The rule T. T. 1 W. 4, which gives the forms of counts on bills of exchange, contains the following directions:—"If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration; and then in the general conclusion to say, promised to pay the said last-mentioned several monies respectively." From the framing of this declaration, it would seem as if this direction had been improperly observed in the present instance: but the forms which are given contain a promise to pay by the maker.

Martin, contrà.—Nothing depends upon the forms given by rule T. T. 1 W. 4, as they were issued merely for the purpose of diminishing the prolixity of pleadings, and were intended only as illustrations for framing pleadings in a more concise manner. *Starkey* v. *Cheeseman* (*d*) is directly in point. In *Bayley* on Bills (*e*), it is said, that the averment of a promise to pay is unnecessary, "in an action against either the acceptor of a bill or the maker of a note, and it may be doubted whether it is essential in any other." In *Wegersloffe* v. *Keene* (*f*), which was an action against an acceptor, *Fortescue*, J. remarks:—"There is another answer to the objection, and that is, that the plaintiff needed not set out any promise at all. *Lowther* v. *Conyers*, which was upon a promissory note, and they had left out *super se assumpsit*, and yet it was held well enough, for the law raises a promise." It is difficult to see any reason on principle why the rule should be different, in an action brought against a drawer. The drawing as well as the accepting of a bill imports a promise to pay.

TINDAL, C. J.—This being an action of assumpsit against the drawer of a bill of exchange, a promise to pay ought in strictness to be inserted in the declaration. Mr. *Justice Bayley* seems to have doubted whether it is necessary. *Starkey* v. *Cheeseman* (*d*) was decided after verdict, but it does not therefore follow that such an objection would not have been fatal on special demurrer. If the averment may be omitted in this case, I do not see why it may not be left out in a declaration for goods sold or money paid. In this case where the only proper form of action is in assumpsit, the promise ought to be stated.

PARK, J., and VAUGHAN, J., agreed.

Judgment for defendant.

(*d*) 1 Salk. 128. 1 Lord Ray. 538.
(*e*) 5 ed. 408.
(*f*) Strange, 214.

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Jan. 25.

The Skinners' Company *v.* JONES.

A., as principal, and *B.*, as surety, become jointly and severally bound to the plaintiffs; and the condition of the bond was, that *A.* should pay the first year's interest of the money lent, on the 1st *March*, 1833; and the third year's interest, with the principal sum, on the 1st *March*, 1835. *A* did not pay the first year's interest until the 30th *March*, 1833. *B.*, the surety, became bankrupt in *June*, 1833, and obtained his certificate in *August*, 1833. *A.* not having paid the principal sum in *March*, 1835, *B.* was sued on the bond, and he pleaded his certificate in bar:—*Held*, that the bond was forfeited before the bankruptcy, and that the subsequent payment of the interest did not waive the default—that the debt was therefore proveable against the estate of *B.*, and that his certificate was a bar to the action.

THIS was an action on a bond for 400*l.*, which recited, that the master and wardens of the Skinners' Company had advanced to one *James Butler* the sum of 200*l.* according to certain trusts reposed in them, the defendant consenting to be surety for the repayment of the same;—and the condition of the said bond was such, that if the said *James Butler*, his heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said master and wardens, their successors, or assigns, on the 1st day of *March* then next ensuing, the sum of 5*l.* of lawful English money, being the first year's interest on the said sum of 200*l.*, at the rate of 2*l.* 10*s.* *per cent. per annum*, and on the 1st day of *March*, 1834, the like sum of 5*l.* of like lawful money, being the second year's interest as aforesaid, and on the 1st day of *March*, 1835, the sum of 205*l.* of like lawful money, being the said principal sum of 200*l.* with the third year's interest as aforesaid; or in case the said *James Butler* should, during any part of the said term of three years during which he was to retain and hold the said sum of 200*l.* as aforesaid, fall into decay by riot or ill husbandry, or any dishonest or immoral conduct, then if the said *Francis Jones* (the defendant), his heirs, executors, or administrators, should well and truly pay, or cause to be paid, on demand, unto the said master and wardens, their successors, or assigns, the full sum of 200*l.* with interest for the same after the rate aforesaid, from the date of the above written obligation, or from the last day up to which the interest of the said sum of 200*l.* should have been paid, as the case should happen, then the above written obligation should be void, but otherwise should be and remain in full force and virtue. The declaration then stated, that although the said *James Butler* duly paid the said two several sums of 5*l.* each, being the first two years' interest as aforesaid, according to the said condition in that behalf, to wit, on the said 1st day of *March*, 1833, and 1st day of *March*, 1834; and although the day in and by the said condition appointed for payment of the said sum of 205*l.* elapsed long before the commencement of the suit, yet the said *James Butler* did not on the said 1st day of *March*, 1835, pay the said sum of 205*l.* according to the tenor and effect of the said condition in that behalf.—The defendant pleaded that *Butler* did not duly pay the interest which became due by virtue of the said writing obligatory and condition on the said 1st day of *March*, 1833, according to the form and effect of the said condition, but wholly neglected so to do, and therein failed and made default, whereby the said writing obligatory became forfeited; and that after the said writing obligatory so became forfeited as aforesaid, and before the commencement of the suit, to wit, on the 11th day of *June*, 1833, the defendant became bankrupt; and that the said debt in the declaration mentioned, and thereby demanded, became due and was payable, and the cause of action for or in respect thereof accrued to the plaintiffs before he, the defendant, so became a bankrupt as aforesaid.—Concluding to the country.

The plaintiffs joined issue, and by the consent of the parties the facts were stated for the opinion of the Court on the following

CASE.

By bond of the 1st *March*, 1832, stated in the declaration, the said

James Butler and the defendant became jointly and severally bound to the plaintiffs in 400*l.*, subject to the condition stated in the foregoing pleadings. The sum of 200*l.* therein mentioned was advanced as therein expressed, to the said *James Butler*, who paid the plaintiffs the first year's interest, viz., 5*l.* on the 30*th March*, 1833, and the second year's interest, viz., 5*l.* on the 5*th April*, 1834, but he has not paid the sum of 205*l.* which was payable on the 1st day of *March*, 1835, according to the said condition, or any part thereof. The defendant, being a trader, committed an act of bankruptcy on the 10th *June*, 1833, and a commission of bankruptcy was duly awarded and issued against him on the 11th *June*, 1833, and he was thereon duly declared a bankrupt, and on the 24th of *August*, 1833, a certificate of his conformity was duly signed and allowed. After the 1st *March*, 1835, several applications for payment of the 205*l.* were fruitlessly made to *James Butler*, but no application was made to the defendant, as his surety, for payment of that sum until the 20th *May*, 1835, nor did the defendant receive any notice from the plaintiffs that they should look to him for payment of either the principal or interest before the last-mentioned day. The plaintiffs never proved, or claimed, or attempted to prove any debt whatever on the estate of the defendant under the commission issued against him. The question for the opinion of the Court was, "Whether the bankruptcy and certificate of the defendant bar the claim of the plaintiffs in the present action?"

J. Henderson for the plaintiffs. — This is neither a debt due from the bankrupt at the time when he became bankrupt, nor a claim or demand made proveable by the 6 Geo. 4, c. 16, so as to be discharged by the certificate under the 121st section.

The distinction between a debt due from the bankrupt whether payable at the time of the bankruptcy or not, and a collateral engagement, as to which it was at the time of the bankruptcy doubtful, whether it would ever terminate in a debt, has been long established; *Ex parte Adney* (*a*), *Alsop* v. *Price* (*b*). It will be contended that the present case is distinguishable, on the ground that the bond had become forfeited before the bankruptcy. At the time of the bankruptcy nothing was payable; the first instalment payable on the 1st of *March*, 1833, having been already paid, and the other instalments not being payable till periods subsequent to the certificate. Admitting that *solvit post diem* could not have been pleaded to an action brought at the time of the bankruptcy, although all that was payable up to that time had really been paid, and that the lapse of the short time during which the principal delayed payment of the 5*l.* payable on the 1st of *March*, 1833, worked a forfeiture, still no capacity of proof on the surety's estate was acquired. The stat. of 8 & 9 W. 3. c. 11, s. 8, would have prevented the plaintiffs from recovering more than 1*s.* damages, for the breach which had taken place in non-payment on the very day, the sum then payable having been paid; and the judgment could not have been rendered available against the surety as to the sum now claimed, unless and until default was subsequently made by the principal in payment thereof.—If the *principal* had become bankrupt, there could be no question as to his discharge. As to him the sum now claimed was then *debitum in presenti, solvendum in futuro*. But from the surety, the amount

(*a*) Cowp. 460. (*b*) 1 Doug. 160.

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was not then a debt nor even certain to become one. What could the plaintiffs have proved on the bankrupt estate of the surety? Not the penalty, for that was never proveable (21 Ja. 1, c. 19, s. 9). Not the amount due on the 1st *March*, 1833, for that had been already paid. Not the future amounts, for it depended on the future will and power of the principal to pay at the day, whether they ever would become debts from the surety. If proveable at all, they could only be proveable as contingent debts under the 56th section of the Bankrupt Act. There are no doubt cases of annuity bonds where a forfeiture antecedent to the bankruptcy has been held to confer a right of proof, for there, as observed by Lord *Mansfield*, C. J., in *Wyllie* v. *Wilkes* (*c*), "you may have a value set on your annuity and come in as a creditor under the commission." The present is clearly not an annuity bond, though an annual payment of interest is provided, *Winter* v. *Mouseley* (*d*). A forfeiture has never been held to render proveable a claim incapable of valuation. On the contrary, in the case of *The Overseers of St. Martin-in-the-Fields* v. *Warren* (*e*), a bastardy bond having become forfeited before the bankruptcy of the obligor, an action founded on subsequent breaches was held not to be barred by the certificate of the bankrupt. Lord *Ellenborough* observed that "this was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and, therefore, in my opinion, not proveable under the commission. The case of an annuity is an exception to the general rule; there, indeed, the Courts have allowed the amount of the contingent debt to be valued and assessed; but there you may estimate the duration of life." So in *Clements* v. *Langley* (*f*), where, at the time of the bankruptcy, there had been a forfeiture by reason of the non-payment of certain interest, which was subsequently paid, the same distinction is recognised, and the judgment delivered by the judges there fully explains and supports this point of the plaintiff's case. Assuming that for the purposes of pleading the bond had become forfeited, the nature of the claim on the surety remained unchanged, and being contingent and incapable of valuation could not be proved.

That the contingency was such as could not be valued seems clear. How could the commissioner calculate the chances whether *Butler*, the principal, might or might not pay the sums to become payable in 1834 and 1835, or might sooner fall into decay and be called on for earlier payment according to the condition of the bond? An annuity has a tabular value. But by what process could the probability be measured in the present case? It was impossible for the commissioner to value the contingency on which the debt depended, and if it could not be valued it could not be proved. If any authority were wanting, a crowd of cases might be referred to, to shew that a claim which at the time of the bankruptcy was incapable of being ascertained in amount, is not barred by certificate, on afterwards becoming absolute. *Atwood* v. *Partridge* (*g*), *Boorman* v. *Nash* (*h*), *Yallop* v. *Ebers* (*i*), *Thompson* v. *Thompson* (*k*). Where it is incapable of valuation it is incapable of proof: *Lancaster Canal Co.* v. *Dilworth* (*l*), *Ex parte Davis re Wentworth* (*m*), *Ex parte Marshall* (*n*), *Ex parte Tindal* was the subject

(*c*) 1 Doug. 509.
(*d*) 2 Barn. & Ald. 802.
(*e*) 1 Barn. & Ald. 491.
(*f*) 5 Barn. & Adol. 372.
(*g*) 4 Bing. 209.
(*h*) 9 Barn. & Cres. 145.
(*i*) 1 Barn. & Adol. 698.
(*k*) 2 Bing. N. C. 168. 1 Hodges, 225.
(*l*) Montag. Rep. 27.
(*m*) Montag. Rep. 121 & 297.
(*n*) Montag. & Ayrton, 118 & 145.

of conflicting judgments (*o*), but was finally decided, on the ground that the contingency was capable of valuation (*p*), and that contingency was valued by an actuary (*q*).

The same circumstance, viz. the incapacity of valuation, seems equally to shew that the amount could not be proved under the first part of the 56th sec. of the Bankrupt Act, by which the commissioners are required to ascertain the value, and admit the proof—"*Lex neminem cogit ad impossibilia*," and if the value could not be ascertained, the proof could not be admitted. But it will be said that the case is within the second part of the clause, and that the contingency having now happened, the creditor may now "prove in respect of his debt, and receive dividends with the other creditors, not disturbing former dividends." It may be doubted whether this second part of the clause applies to any debts, which if the contingency had not happened, would not have been proveable under the first part. Where the legislature intended to confer on claims incapable of valuation, at the time of the bankruptcy, the capacity of being proved when the contingency ceased, it has done so in express terms, as in the instances of bottomry and respondentia bonds, and policies of insurance, by the 53rd sec. *Ex parte Grundy* (*r*) may be cited, but there the present point was not, as the case is reported, noticed in any way, but it certainly was not taken for granted at the bar, but as is understood from a gentleman engaged in the case, was strongly urged, and on account of its not being decided, an appeal would have been brought, if it had been practicable in bankruptcy. *Ex parte Lewis* (*s*) is very shortly reported. It is there stated that the reasoning was the same as in *Ex parte Tindal* (*o*) before the Vice-chancellor, whose decision on this point was overruled by the Lord-chancellor on appeal (*o*), and not sustained on the final hearing (*t*). In other respects the decision in *Ex parte Lewis* rests on that of *Ex parte Grundy*, where the point was never noticed by the court. In some cases in the court of review, opinions favoring to a certain degree the proposition, that debts not at the time of the bankruptcy capable of valuation are proveable when the contingency happens, have been expressed by the judges. Their judgment in the latest case of the sort viz. *Ex parte Simpson* (*u*), may be considered as embodying their views on this subject. Sir *Thos. Erskine* observes, "My opinion has always been, where the contingency on which the payment of a debt depends, happens before the declaration of a final dividend, and before the bankrupt has obtained his certificate, the creditor may and is bound, under the latter branch of the 56th sect., to come in and prove his debt under the commission, although at the date of the commission the debt was incapable of valuation." This, it should be observed, is a mere *obiter dictum*, the case being decided on another point.

Limited as the proposition is, in the words of the chief judge of review, to the case of debts becoming absolute before final dividend and certificate, it is needless in the present case to question his honor's dictum. Whether a final dividend had been declared before the 1st *March*, 1835, does not appear in the special case. The 109th section of the Bankrupt Act directs the decla-

(*o*) Montag. & M'Arthur, 415 & 422.
(*p*) 8 Bing. 402.
(*q*) Montag. & Bligh, 235.
(*r*) Montag. & M'Arthur, 293.
(*s*) Montag. M'Arthur, 426.
(*t*) 8 Bing. 402.
(*u*) Montag. & Ayrton, 563.

ration of a final dividend (unless any part of the estate be outstanding) in eighteen months after the commission. Here, when the contingency ceased, viz. on the 1st *March*, 1835, more than twenty months had elapsed since the fiat. No dividend can absolutely be considered as final, except one that pays all the creditors in full. But in the opinion of the chief judge of bankruptcy, the debt, to become capable of proof, must have become absolute before certificate as well as final dividend. Here the certificate was granted eighteen months before the contingency ceased. The defendant therefore must go a great deal further than this opinion of his honor does. He must contend that a debt, incapable of proof, by reason of its contingent nature, till long after certificate, is, whensoever the contingency may cease, proveable so as to be barred by the certificate. In the present case eighteen months had elapsed; suppose eighteen years had passed away, is the creditor who at the end of that time claims a debt which he never could claim before, to be told to look for payment to a fund which is already paid away to others, and in which while it existed he could not participate? Is he then to be invited, in the language of the clause, to "prove his debt, not disturbing former dividends?" Such a conclusion would be inconsistent with the spirit of the Bankrupt Act, which plainly contemplates the right of the creditors to share in the bankrupt's estate, and the right of the bankrupt to exemption from future liability, as correlative; and there is nothing in the letter of the act to constrain the Court to adopt such a construction.

Fish, contrà.—The only question is whether there was a debt due from the defendant to the plaintiffs at the time of the bankruptcy. If there was, the defendant is clearly entitled to the judgment of the Court, because it ought to have been proved against the estate, and that not being done, the defendant's certificate is a bar to the action. The bond became absolutely forfeited on the 1st *March*, 1833, when default was made in the payment of the interest then due, according to the condition. The defendant became bankrupt in *June*, 1833, and obtained his certificate in the *August* following. Now the payment of the interest on the 30th *March* was not equivalent to payment on the day required. At common law payment of the principal and interest after the day mentioned in the condition was no discharge, and stat. 4 Anne, c. 16, sec. 12, therefore enacted, that if the obligor had, before action brought, paid to the obligee the principal and interest due by the condition of the bond, though such payment was not made strictly according to the condition, yet it should nevertheless be pleaded in bar of the action. But this bond is not within the protection afforded by that statute, but it falls rather within the provision of 8 & 9 W. 3, c. 11; and in *Murray* v. *the Earl of Stair* (*v*), *Holroyd*, J. said, "It is perfectly clear, that if this bond be within the 4 & 5 Anne, c. 16, it is not within the statute of 8 & 9 W. 3, c. 11," which opinion was recognized by *Tindal*, C. J. in *Smith* v. *Bond* (*w*).

If it were necessary to discuss the cases which have been decided on the 56th sec. of 6 Geo. 4, c. 16, the defendant would rely on *Ex parte Winchester* (*x*), *Perkins* v. *Kempland* (*y*), *Ex parte Tindal* (*z*), *Ex parte Lewis* (*a*), *Thompson* v. *Thompson* (*b*).

(*v*) 2 B. & Cress. 93.
(*w*) 10 Bing. 132.
(*x*) 1 Atkyns, 116.
(*y*) 2 W. Black. 1106.
(*z*) 8 Bing. 402.
(*a*) 1 Mont. & M'Arthur, 426.
(*b*) 2 Deacon & Chitty, 126.

J. Henderson in reply.—The forfeiture of the bond worked no change in the nature of the debt, for the purposes of proof. At the time of the bankruptcy, the non-payment until some days after the 1st *March*, 1833, of the 5*l.* then payable, might have sustained a judgment, but under that judgment payment could not have been enforced as to the sum now in question against the surety, unless and until default was subsequently made by *Butler*; and his assignees were not in a worse situation than himself. No action was in fact commenced; but even if a judgment had been obtained against the surety, the only consequence would have been that he would have become a surety on record, instead of a surety by specialty. The debt still remained as contingent as ever; the judgment left it still as uncertain as it was on the bond, whether *Butler* would pay the future sums at the day; in which event, the defendant never would have been liable on the judgment in that respect. If the technical circumstance of the forfeiture of the bond makes no difference, then the principles recognized and established in *Thompson* v. *Thompson* (*c*), govern the present case. There, as here, the contingency was incapable of valuation at the time of the bankruptcy.

To adopt the conclusions urged for the defendant must in one way or other lead to manifest injustice and inconvenience. If, on the bankruptcy, the plaintiffs were admitted to proof of the sum now claimed, making only a rebate of interest, then the creditors of the surety would be deprived *pro tanto* of payment, in favor of those who were not, and might never become creditors. If a claim might have been made, and the dividend postponed till the contingency ceased, then the creditors would be delayed till it was ascertained whether *Butler* could or should pay at the days appointed, or fall into decay, and be sooner called on for payment, or be discharged by the obligees, by giving time or otherwise. If the debt is held proveable under the second branch of the 56th sec., then the plaintiffs are deprived of their remedy against the surety, without having the opportunity of that participation in the estate of the bankrupt, which is the condition and price of the discharge of the bankrupt.

TINDAL, C. J.—The question in this case is, whether this debt was proveable against the estate of the defendant at the time of his becoming bankrupt. It is not necessary to consider the various cases which have been decided upon the 56th sec. of 6 Geo. 4, c. 16; for, upon the best consideration which I can give to this case, I think that in point of law the bond had become forfeited before the bankruptcy, and that the debt might have been proved under the commission. The two obligors are jointly and severally bound, as if separate bonds had been given: the condition is, that if *Butler* should pay the first year's interest on the 1st *March*, 1833, and the second year's interest on the 1st *March*, 1834, and the third year's interest together with the principal sum, on the 1st *March*, 1835, then the obligation should be void; but otherwise should remain in full force and virtue. It is stated in the case that on the 1st of *March*, 1833, *Butler* made default in payment of the interest, and, in a court of law, the bond thereupon became forfeited. If things had remained in this state until the 11th of *June* following, the date of the bankruptcy, it could not have been contended that the bond had not become for-

(*c*) 2 Bing. N. C. 168. 1 Hodges, 225.

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feited. But it is contended for the plaintiffs, that in consequence of the first year's interest having been paid and accepted on the 30th of *March*, 1833, the legal effect of the default was thereby waived. I know of no principle of law to support that proposition. The very circumstance of the passing of the stat. 4 & 5 Anne, c. 16, shews that a plea of *solvit post diem* would be insufficient, and in *Com. Dig.* tit. "Accord" (A. 2), it is said, "So accord is no plea where a certain duty accrues by the deed merely: for a deed ought to be avoided by a matter of as high a nature. As in debt upon a bill or bond to pay money," citing 6 Co. 44 a. But the statute is only applicable when the principal and interest are paid together, and therefore this bond was void as against the obligors, because the event provided for did not take place. I am not prepared to say that a court of equity would not have interfered to prevent the party from proving the debt; I neither affirm it nor deny it. All that we are called upon to say is, that the legal construction of this condition is, that the bond became forfeited, and the penalty became the debt which was due, although only the money actually lent, minus the interest which was not due, would have been the amount proved against the estate. I am therefore of opinion that the debt being proveable, and it not having been proved, the certificate is a bar to this action, and our judgment must be for the defendant.

PARK, J.—I am of the same opinion. The case has been very ably argued, and at first I was inclined to think that this was a contingent debt. It is admitted that the bond was forfeited in *March*, 1833, and if at that time proceedings had been taken against the surety, the amount could have been recovered. What the Court of Chancery would have done I cannot say, but I think the bond being forfeited, the debt ought to have been proved under the commission, subject probably to a rebate of the interest which was not then due.

VAUGHAN, J.—Upon looking attentively at this case, I feel no difficulty in deciding it in favor of the defendant. The 121st sec. of the 6 Geo. 4, c. 16, directs that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission. That being so, the question is, whether this debt was proveable under the commission? The bond makes the first year's interest payable on the 1st *March*, 1833: default was made in that payment, as it was not paid until the 30th *March*, and the defendant became bankrupt on the 11th *June* following. Under these circumstances, it cannot be successfully contended that the default could be purged by a subsequent payment of the interest, and I am of opinion that this debt was proveable under the commission.

Judgment for the defendant.

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DOE, *d.* THOMAS, *v.* WATKINS.

Where an attorney who had money belonging to his clients, to invest on mortgage, examined the title of one who desired to borrow money on mortgage. It was held that the relation of attorney and client existed, and that the communication was privileged, although no money was lent, and the attorney made no charge for examining the title.

EJECTMENT.—At the trial of the cause at the last assizes at *Carnarvon*, the lessor of the plaintiff, after having given the defendant notice to produce a deed, which he failed to do, produced an abstract which contained a recital of the deed, as secondary evidence of its contents; and called Mr. *Church*, an attorney, to prove that he had examined the abstract with the original deed. The circumstances under which the witness had seen these documents were these: One *Williams* had mortgaged the premises, sought to be recovered, to the defendant; and *Williams* being desirous of paying off the mortgage debt, his wife applied to *Church*, and inquired whether he could effect a transfer of the mortgage. *Church* mentioned the name of one of his clients, who had money to invest, but he requested to see an abstract of the title to the premises. *Williams* accordingly obtained an abstract from *Jones*, his own attorney, and *Church* examined it with the title-deeds, which were in the defendant's possession. He then discovered a defect in *Williams's* title, and thereupon declined to proceed further in the business, and no money was advanced. *Church* did not make any demand upon *Williams* for his trouble in examining the deeds, &c. The lessor of the plaintiff in this action relied upon the defect in the defendant's title, which was thus discovered by *Church*.

The counsel for the defendant objected that the witness having been employed by *Williams*, as an attorney, the communications between them were privileged. The learned judge received the evidence, but reserved the point. A verdict was found for the defendant, and a rule *nisi* for a new trial was obtained, by the lessor of the plaintiff, upon another question of law which had been reserved.

Chilton shewed cause.—This was clearly a confidential communication, and ought not to have been disclosed. In *Turquand* v. *Knight* (*a*), decided last *Michaelmas* Term in the *Exchequer*, it was held that if the communication made, related to a circumstance so connected with the witness's employment as an attorney, as that the character formed the ground of the communication, it was privileged from disclosure. Here the relationship of attorney and client existed. In *Doe*, d. *Shellard*, v. *Harris* (*b*), *Parke*, J., said, "I am of opinion that the privilege applies to all cases where the client applies to the attorney in a professional capacity." And in a late decision in this Court, *Taylor* v. *Blacklow* (*c*), the cases upon this subject were considered. There the defendant was employed to raise money for the plaintiff, and he disclosed certain defects in the plaintiff's title, by which he sustained damage, and it was held that an action would lie against the attorney; and *Vaughan*, J., observed, "I think that the contents of these deeds were a privileged communication, which the defendant could not have been compelled to disclose. The law has been laid down too narrowly on that head by the counsel for the defendant;" and *Tindal*, C. J., intimated that he was of the same opinion on that point.

J. Evans and *E. V. Williams*, *contrà*.—*Taylor* v. *Blacklow* (*c*) is distin-

(*a*) Since reported. 2 Mee & Wel. 98.
(*b*) 5 Car. & P. 593.
(*c*) 3 Bing. N. C. 235.

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guishable, because there the client sustained special damage, and the relationship of attorney and client existed: but that is not so in the present case. The witness was attorney to the lender of the money, and *Jones*, who furnished the abstract, was *Williams's* attorney. And the decision in that case goes to this extent, that if the defendant had been a scrivener, he would have been liable to be sued. The real question is, whether this case comes within the dry rule of law which has been established, as to communications made to attorneys by their clients. It does not depend upon whether or not there has been a breach of confidence, and the term, "confidential" communication, is incorrect, because confessions made to clergymen, or others who are not of the legal profession, may be disclosed. Lord *Tenterden*, C. J., was of opinion that the privilege was limited to communications which related to a suit which had been or was about to commence (*d*), although in *Greenough* v. *Gaskell* (*e*), Lord *Brougham* was of opinion that the privilege was not so restricted. In *Sugden, Vend. & Pur.* (*f*), it is said that the privilege does not extend to communications from collateral quarters, although made to the attorney in consequence of his character of attorney; *Spenceley* v. *Schulenburgh* (*g*). So here the application came from a collateral quarter, and the scrutiny of the title by the attorney was in his character of attorney to his client, who had instructed him to lend the money on security.

TINDAL, C. J.—The question in this case is, whether *Church* was speaking of a transaction in which he was engaged as an attorney. It appears that he had various sums of money to lend, belonging to his clients, and that he was applied to by Mrs. *Williams* for a loan of money, to enable her husband to pay off a mortgage. Now I cannot perceive how it can less be said that she consulted him as attorney, because he held the money as the attorney of other persons. It appears that *Church* desired to be furnished with an abstract, which was accordingly sent to him. This was the employment of one attorney by the borrower and lender, which is by no means an unusual occurrence, and I think the attorney ought not to be allowed to disclose information which is thus obtained. Suppose the transaction had been completed; A bill of costs would have been made out by the attorney against *Williams*. He would have charged for inspecting the deeds and perusing the abstract, and probably would also charge the usual procuration-fee. If this had occurred, could it be said that the relation of attorney and client did not exist between these parties? If only one attorney is employed between a mortgagor and mortgagee, it would be a great evil if the attorney were allowed to disclose any defects which he might have discovered in the title of the mortgagor. This case seems to me to be within the principle laid down, at least in later times, and I think this evidence ought not to have been received; but the case must go down for a new trial.

PARK, J.—This case is like *Taylor* v. *Blacklow* (*h*). Reference is there made to a passage in *Com. Dig.* (*i*), which is exactly in point. It has been contended that *Church* was attorney for the lender of the money, but that point is met in my Lord Chief-Justice's judgment, in *Taylor* v. *Blacklow*.

(*d*) *Wadsworth* v. *Hamshaw*, 2 Brod. & Bing. 5. *Clark* v. *Clark*, 2 Moody & Mal., 3.
(*e*) 1 Mylne & Keene, 98.
(*f*) 2 Vend. & Purch. 299. 9th edit.
(*g*) 7 East, 357.
(*h*) 3 Bing. N. C., 235.
(*i*) Com. Dig. Tit. Action on the case, A. 5.

VAUGHAN, J.—I am of the same opinion. The question is, whether the relation of attorney and client existed, and I cannot understand the evidence except by supposing that it did exist. Nobody can doubt but that the attorney was professionally consulted for the purpose of raising a loan of money.

Rule absolute for a new trial, upon terms agreed upon.

RICHARDS and Wife, Executrix of PEGGY MANLEY, deceased, *v.* BROWNE, Executor of DENNIS WITHERS WADE, deceased, who was Executrix of WILLIAM BARRY WADE, deceased.

Jan. 23rd.

THE plaintiffs declared on a promissory note, bearing date the 12th of *April*, 1816, by which *William Barry Wade*, deceased, promised to pay *Peggy Manley*, deceased, 100*l.*, with lawful interest for the same. Also on an account stated, between *Peggy Manley*, deceased, and *Dennis Withers Wade*, as executrix of *William Barry Wade*. The defendant pleaded, First, That at the time of the commencement of the suit, and ever since, he had had no goods or chattels of *William Barry Wade*, deceased, at the time of his death in the hands of the defendant, as executor as aforesaid, or otherwise to be administered. And also that at the time of the commencement of the suit, and ever since, he had had no goods or chattels of the said *Dennis Withers Wade*, deceased, at the time of her death, in the hands of the defendant, as executor as aforesaid, to be administered. Secondly, No effects of the said *William Barry Wade*. Thirdly, Payments of several specialty debts due from *Dennis Withers Wade*, and an allegation of others outstanding. Lastly, Full administration of all the effects of *Dennis Withers Wade*, deceased. The plaintiffs replied to the first and last pleas, that at the commencement of the suit the defendant had in his hands effects of *William Barry Wade*, deceased, at the time of his death, to be administered.

At the trial before *Bolland*, B., at the last *Taunton* assizes, the following facts were proved or admitted. The plaintiff's wife was executrix of *Peggy Manley*, deceased. The plaintiffs sued, on a promissory note, for 100*l.*, given by *William Barry Wade* to *Peggy Manley* in 1816, the interest on which had been regularly paid by *William Barry Wade* during his life, and by *Dennis Withers Wade* after his death, up to the year 1831. *William Barry Wade* died in 1825, bequeathing to Miss *Dennis Withers Wade*, his executrix, his household furniture, for her life, and after her death, bequeathing it to Miss *Sarah Chapple*. *Dennis Withers Wade* died in 1832, leaving defendant her executor.

In *July*, 1831, *James Waldron*, the plaintiffs' then attorney, wrote to the defendant and his brother, on the subject of this promissory note, as follows:

" *Richards and Wade.*

"Gentlemen, " *Wiveliscombe*, 16th *July*, 1831.

" As I am apprehensive we have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim

The attorney of one who had a claim on a deceased person's estate, wrote a letter to the executrix, in which he stated that the creditor did not claim the debt from her as executrix, but that he claimed it from her individually, she having paid the interest from time to time. The executrix afterwards died insolvent, and it was held that this letter did not release her from her liability as executrix.

A testator bequeathed certain goods to his executrix for life, with remainder to B. absolutely. The executrix used the goods during her life, and after her death, her executor permitted B. to receive them. The executor of the executrix (who died insolvent) was afterwards sued for a debt due from the testator, who had bequeathed the goods, which the executrix had neglected to discharge; *Held* that she had not been guilty of a *devastavit* in her lifetime, and that her executor ought to have discharged the debt by selling the goods.

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from Miss *Wade* payment of this money as executrix or administratrix of *W. B. Wade*, Esq., but they claim from Miss *Wade* individually, Miss *Wade* having become liable, from payment of interest from time to time, of this debt.

"Yours, &c.,
"*James Waldron.*"

Waldron was not called as a witness, and there was no evidence of his authority to write the letter, except that he at that time acted as plaintiffs' attorney. The letter was not stamped, nor was there any evidence of payment made in consequence thereof. The plaintiffs had previously, in *May*, 1831, given the defendant and his partner, who were the attorneys of Miss *Wade*, the following receipt for one year's interest of the sum claimed in this action:

"1831, *May* 24.

"Received of Messrs. *R.* and *M. Browne*, by payment of Mr. *James Waldron*, the sum of five pounds, being for one year's interest of one hundred pounds, due from Miss *Dennis Withers Wade* to us on the 12th of *April* last

"*William Richards*,
"*Peggy Richards.*"

Upon the death of Mr. *Wade*, Miss *Wade* took possession of the furniture bequeathed to her for life, and upon her death, Miss *Sarah Chapple*, *with the consent of the defendant*, *took possession of the same furniture*, which had been bequeathed to her by the will of *William Barry Wade*. The plaintiffs proved that the furniture was then in the hands of Miss *Sarah Chapple*, and that it was worth 200*l*. A verdict was thereupon found for the plaintiffs, subject to the opinion of the Court on a special case, stating the above-mentioned facts. The question for the opinion of the Court was, whether, under the foregoing circumstances, the defendant was liable to pay the promissory note on which the plaintiffs sued.

Bere, for the plaintiff (*R. Bayly*, jun., was with him).—It is clear that the maker of the note was liable upon it, and that he left assets sufficient to pay it. If an executor assents to a specific legacy, and there is ultimately a deficiency of assets to pay the testator's debts, the executor is liable, and that although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate. *Williams's Law of Executors*, page 830. Here the defendant assented to the legacy received by Miss *Chapple*, and neglected to discharge the debt due from the testator. It will be contended that the letter written by Mr. *Waldron* discharged Miss *Wade* altogether as executrix, and made her liable only in her individual capacity; but if an action had been brought against her in her life-time as executrix, the letter would have afforded her no defence, and the defendant, as her representative, cannot be in a better situation. The letter is objectionable upon several grounds. First, It does not show any consideration. Secondly, There is no memorandum in writing to satisfy the Statute of Frauds. Thirdly, The letter only contained a proposition, and it does not appear whether it was afterwards acted upon, or whether the terms of it were acceded to; and Fourthly, If it be taken to be evidence to show a new contract substituted for the old one, then it required a stamp. Nor is there any plea to meet the Count

in the declaration on an account stated with Miss *Wade* as executrix, so that that there is an admission on the record that she was liable as executrix.

Another objection is, that under the plea of *plene administravit* the defendant could not prove that he had assented to the legacy to Miss *Chapple* without notice of an undischarged debt. That plea only puts in issue such payments as are made in the due course of administration; and if a debt of an inferior nature is paid before notice of the existence of a debt of a higher nature, it must be pleaded specially; and the same principle would be applicable in this case. In *Davis* v. *Blackwell* (*a*), it was held that if an executor paid legacies six months after probate, he could not plead such payment in discharge of an action on a covenant made by the testator; although in *Chelsea Water-works* v. *Cowper* (*b*), the Court refused to interfere after a lapse of thirty years. But in this case it is found as a fact, that immediately after the death of Miss *Wade*, the defendant allowed Miss *Chapple* to take possession of the furniture bequeathed to her by Mr. *Wade*, and that is equivalent to finding that the defendant has now the assets in his hands.

Erle, for the defendant.—First, If a creditor is guilty of gross laches, and further, if he by his own act induces the executor to administer the effects, he cannot afterwards make a claim upon the estate and sue the executor. Here the maker of the note died in 1825, and it is admitted that he was possessed of ample assets to pay the debt: in 1831 it appears, by the letter written to the executrix, that the plaintiffs considered that she was liable in her individual character. Now the plaintiffs seek to recover against her representative, *de bonis propriis*, on the ground that Miss *Wade* left assets belonging to the testator. But it ought to be satisfactorily shown why no demand was made during so long a period, upon the estate of W. B. *Wade*, the maker of the note. The omission to obtain payment, coupled with the letter, which is express in its terms, and which was written by the plaintiffs' attorney, clearly demonstrates that the plaintiffs had accepted Miss *Wade* as their debtor. The receipt, in 1831, is also given for money due from Miss *Wade*, not describing her as executrix. The effect of these transactions was therefore to discharge Miss *Wade* in her capacity of executrix, and as her estate is admitted to be insolvent, the plaintiffs are not entitled to recover. In *Skyring* v. *Greenwood* (*c*) it was held that the paymaster of a regiment, who had received an officer's pay, and in his yearly accounts had neglected to inform him that a reduction had been made by the *Board* of *Ordnance*, could not afterwards sue the officer for the amount of the increased pay which they had credited him with; and *Abbott*, C. J., said, "It works a great prejudice to any man if, after having had credit given him in account for certain sums, and having been allowed to draw on his agent, on the faith that those sums belonged to him, he may be called upon to pay them back." So here, after the plaintiffs had treated Miss *Wade* as their debtor, and had allowed her to treat the debt as being due from herself, it is too late to say now that any part of W. B. *Wade's* property are assets in the defendant's hands to pay the debt. In *Brooking* v. *Jennings* (*d*) it is said that debts upon simple contracts may be paid before bonds, unless the executors have timely notice given them of

(*a*) 9 Bing. 5.
(*b*) 1 Esp. N. P. C. 275.
(*c*) 4 B. & Cress. 281.
(*d*) 1 Modern, 175.

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those bonds. *Harman* v. *Harman* (*e*) also shows that the executor must have due notice given to him, or he will not be liable. It was upon the faith of the letter written by the plaintiffs' attorney that the defendant took a step in the administration, by allowing Miss *Chapple* to take the legacy, and every reasonable delay had then taken place. In establishing a rule on this point, there is a peril to be guarded against, because an executor may retain legacies in his hands for many years, saying that he fears that debts owing by the testator were still outstanding. [VAUGHAN, J.—I believe it is usual to take security from legatees.] But secondly, no assets belonging to W. B. *Wade* have ever come to the defendant's hands to be administered. The testator gave the furniture to Miss *Wade* for life, and the remainder to Miss *Chapple* absolutely. If this life estate had been in one who was not executrix, and the executrix had assented to the taking of the goods by the legatee for life, without first satisfying the testator's debts, it would clearly have been a *devastavit*, and the circumstance that the legatee for life was the executor, makes no difference. Miss *Wade's* conduct, in holding and using the furniture during her life, leads to a conclusive presumption that she assented to the legacy. If therefore the testatrix was guilty of a *devastavit* in her lifetime, then no assets belonging to her testator have come to the defendant's hands, and the defendant is not liable in this action. After the executrix had assented to the legacy, Miss *Chapple* might have maintained trover to recover this specific legacy, *Doe*, d. *Saye*, v. *Guy* (*f*); and there are authorities to show that the assent to the particular estate is also an assent to the remainder, *Hyde* v. *Parrat* (*g*), *Welcden* v. *Elkington* (*h*), *Lampet's* case (*i*).

Bere, in reply.—*Brooking* v. *Jennings* (*k*) shows that if an executor relies on the payment of a simple contract debt before notice of a debt of a higher nature, it ought to be specially pleaded. The same rule is applicable here, if the defendant relies upon his want of notice of the plaintiffs' demand. The question whether the letter amounted to a notice would then have been raised. The real question is, whether the defendant had not a sum of 200*l.* in his hands, with which he ought to have discharged the plaintiffs' demand.

TINDAL, C. J.—The defendant has relied upon two objections: First, that the plaintiffs have been guilty of laches, and have misled the defendant; and secondly, that Miss *Wade* was guilty of a *devastavit* in her lifetime, and that the defendant is not in that case liable, because he had no assets to administer. As to the first objection, I am ready to admit that if a creditor does, by letter, or in any other manner, mislead an executor, so as to make him take a course in the administration which is not strictly legal, the creditor cannot afterwards avail himself of that which was done at his solicitation; but this case is not within the reach of that principle. Miss *Wade* paid the interest to the plaintiffs during her life: she was executrix to her brother, the original debtor, and therefore the payments must be inferred to have been made, as executrix. It is true, there had been a communication by letter between the plaintiffs' attorney and Miss *Wade's* attorneys. We have not the correspond-

(*e*) 3 Modern, 115.
(*f*) 3 East, 120.
(*g*) 1 P. Wills. 3.
(*h*) Plowd. 521.
(*i*) 10 Rep. 47 a.
(*k*) 1 Modern, 175.

ence before us, to which the letter seems to have been an answer, and therefore we must be guided by the letter alone. It commences—"*Richards* and *Wade*," by which I should infer that some demand had been made by the plaintiffs on account of the promissory note. The letter then proceeds as follows: "As I am apprehensive we have in some measure misunderstood my clients' demand, I write to you by return of post. My clients do not claim from Miss *Wade* payment of this money as executrix or administratrix of *W. B. Wade*, Esq., but they claim from Miss *Wade* individually, Miss *Wade* having become liable, from payment of interest from time to time, of this debt." Now here is a reason given for the alteration of the liability, which is untenable in point of law. No consideration for the change appears, and even if it did, then there is no promise in writing to satisfy the Statute of Frauds; the consequence is, that this is a mere gratuitous statement that the writer intended to look to Miss *Wade* individually for payment. Suppose the day after this was written the parties had changed their minds, and had sued Miss *Wade* as executrix, this letter would have afforded her no defence. If, upon Miss *Wade's* death, the plaintiffs had sued the defendant as for a debt due from her personally, it would then have been said that she was only liable as the representative of her brother, and the plaintiffs would have been defeated; so that the defendant would have acquired a double answer to the claim, and the plaintiffs would have had no right of action at all. But from this letter, it is clear that the defendant had notice that the debt was outstanding; and the transaction stands clear of all the cases relating to laches. The defendant had actual notice; and there is no ground for contending that the plaintiffs were guilty of laches, or of misleading the defendant, and therefore there being this furniture, which the defendant might have retained or sold, to pay the debts, he did not duly administer the assets, and upon this point our judgment must be for the plaintiffs. We then come to the second question; and I am of opinion that it does not appear that Miss *Wade* committed a *devastavit*. If there be a legacy to A. for life, and afterwards to B., and the executor assents to the taking of the legacy by A., that is a very different thing, from a bequest in which the executor is the party to whom the life estate is given, because the executor in that case must take the property at all events; but when a party may take by a good title, or by a bad one, the law will presume that he took by the good title, until the contrary is shown. The plaintiffs are therefore entitled to judgment upon this point also.

PARK, J.—I am of the same opinion.

VAUGHAN, J.—It is only necessary to look at the issue which was raised; namely, whether there were not assets belonging to Mr. *Wade* to be administered. The facts are, that his executrix was possessed of goods belonging to him worth 200*l.*; and immediately after her death, Miss *Chapple*, by the express consent of the defendant, took possession of them; therefore this was a very precipitate administration of the assets.

Judgment for the plaintiffs.

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Jan. 24.

ABBOTS *v.* KELLY.

A *distringas* which issues more than four months after the date of the writ of summons, is irregular.

BAGLEY had obtained a rule *nisi* calling upon the plaintiff to show cause why a *distringas* should not be set aside, upon the ground that it had been issued more than four months after the date of the writ of summons. He cited *Sewell* v. *Brown* (*a*).

Talfourd, Serjt., showed cause.—*Sewell* v. *Brown*, was not an application to set aside the *distringas*, but the Court refused to grant one, because the writ of summons was not continued in pursuance of 2 Will. 4, c. 39, sec. 10.

TINDAL, C. J.—This writ might easily have been continued by *alias* or *pluries*. After four months the writ of summons ceased to be in force. The object of the *distringas* is to obtain an appearance to the writ of summons.

Rule absolute.

(*a*) 1. Hodges, 317. S. C. *Lemon* v. *Lemon*, 2 Scott, 506.

Jan. 25.

SHERMAN *v.* TINSLEY.

Where it appeared by the return of the sheriff to a writ of trial that it was executed a day after the return day, an application was made by the unsuccessful party who had appeared at the trial, to set the writ aside; but the Court intimated that in such a case they would amend the return if necessary.

THIS was a writ of trial directed to the sheriffs of London, returnable on the 19th of *January*. The cause was set down for trial on the 19th, but in consequence of a press of business it did not come on, and the Court was adjourned until the following day, when the defendant appeared by his attorney, and a verdict was found for the plaintiff. The sheriff's return stated that the writ was executed on the 20th *January*.

Chadwick Jones moved to set the proceedings aside, upon the ground that it appeared by the record that the judge had no authority to try the cause on the 20th. He contended that it was the usual practice, under similar circumstances, to re-seal the record.

TINDAL, C. J.—The defendant appeared by his attorney at the trial, and he cannot now say that the Court had no jurisdiction. At all events we should certainly allow the record to be amended, where the objection is so much against the justice of the case.

The other judges concurred.

Jan. 30.

LUCAS *v.* GOODWIN.

An affidavit of debt stated that the defendant was indebted to the plaintiff, for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant, *Held*, that the latter allegation had reference to the whole of the items, and that the affidavit was not defective.

WILDE, Serjt., moved for a rule *nisi* to discharge the defendant out of custody upon entering a common appearance, on the ground that the affidavit by which he had been held to bail was defective. It stated "that

the defendant was indebted to the plaintiff in £240 for materials found and provided, goods sold and delivered, and work and labour done and performed by this deponent to and for the use and benefit of the said defendant, and at his request." Here are three heads of demand, and it appears that only the work and labour was done for the use of the defendant, and at his request.

TINDAL, C. J.—The more natural construction of the affidavit is, that the latter words have reference to the whole of the items. I think it is sufficient.

PARK, J. and VAUGHAN, J. agreed.

Rule refused.

DOE, d. PHIPPS, *v.* ROE.

Jan. 31*st.*

SWANN moved for judgment against the casual ejector. The declaration in ejectment was intituled as of *Michaelmas* Term, in the *eighth* year of the reign of Wm. 4; the notice was dated 6th *Dec.* 1836, to appear in *Hilary* Term then next.

Where the date of a declaration in ejectment was wrongly stated, but the notice at the foot was correct, the Court granted a rule for judgment against the casual ejector.

PARK, J., doubted whether the rule ought to be granted, by reason of the mistake in intituling the declaration of the eighth year of the king, instead of the seventh; but having consulted the judges of the other courts, he subsequently granted the rule, upon the authority of *Doe*, d. *Gore*, v. *Roe* (*a*), and *Doe*, d. *Smithers*, v. *Roe* (*b*).

(*a*) 3 Dow. P. C. 5. (*b*) 4 Dow. P. C. 374.

DUMSDAY, dem^t^. *v.* Sir RICHARD HUGHES, Bart., ten^t^.

Jan. 20*th.*

WRIT of right issued 27th *Dec.*, 1834, returnable 26th *Jan.*, 1835. The demandant claimed certain lands in the county of Suffolk as his right and inheritance. The Count stated that *Shadrack Blundell* was seised of the tenements demanded on his demesne as of fee and right in the time of peace, in the time of the Lord George the Second, late King of *Great Britain*, by taking the esplees thereof to the value, &c.; and the said *Shadrack Blundell* on the 8th *June*, 1750, by indenture of bargain and sale, bargained and sold the premises demanded to *W. Farnworth* and *J. Salmon* for one year; and on the 9th *June*, 1750, by indenture of release between *Shadrack Blundell* of the first part, *Ann Slater* of the second part, *W. Farnworth* of the third part, and *J. Salmon* of the fourth part, in consideration of a marriage between *Shadrack Blundell* and *Ann Slater*, the said *Shadrack Blundell* released the premises demanded to the said *W. Farnworth* and *J. Salmon*, and their heirs, to the use of *Shadrack Blundell* until the marriage should take effect; and after the solemnization

A Count in a Writ of Right must show upon the face of it that the ancestor of the demandant had seisin of the tenements within sixty years from the teste of the Writ.

Where there was a life interest outstanding in an estate tail—*Held*, that the heir of the grantor who claimed on failure of the estate tail, had twenty years to bring an action of Formedon in reverter.

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thereof, (subject to a term of 99 years if *Shadrack Blundell* and *Ann Slater* should so long live) to the use of *Shadrack Blundell* for life. Remainder to the first and other sons of *Shadrack Blundell* and *Ann Slater*, in tail male. Remainder to their daughters, as tenants in common, with an ultimate remainder to the said *Shadrack Blundell* and his right heirs in fee. That afterwards, to wit, on the 10th *June*, 1750, the said marriage was duly solemnized, and on 1st *Jan.* 1753 the said *Shadrack Blundell* died without having had any issue, leaving the said *Ann* his wife him surviving, and thereupon the said *Ann* became seised of the said tenements in her demesne, as of freehold and right for life, in the time of peace, in the time of our said Lord George the Second, by taking the esplees thereof, to the value, &c., and continued and was so seised thereof in the time of peace, in the time of the Lord George the Third, late King of *Great Britain*, to wit, within 60 years now last past, by taking the esplees thereof, to the value, &c., and afterwards, on the 18th *October*, 1777, died so seised of the said tenements; whereupon the right of the said tenements descended and came to one *Mary Rushley* (formerly Mary *Blundell*), one *Elizabeth Blundell*, one *Jane Dumsday* (formerly *Jane Blundell*), and one *Hannah Gregory* (formerly *Hannah Blundell*), as cousins and heirs of the said *Shadrack Blundell*; that is to say, as daughters and co-heirs of one *Edward Blundell*, who was brother and heir of one *John Blundell*, who was son and heir of one other *John Blundell*, who was son and heir of one other *John Blundell*; which said last-mentioned *John Blundell* was father of one *Nicholas Blundell*, who was father of one *Shadrack Blundell*, who was father of the said first-mentioned *Shadrack Blundell*. That on the 1st *Jan.*, 1778, the said *Elizabeth Blundell* died without issue, and intestate, whereupon all her right and interest in the said tenements descended and came to the said *Mary Rushley*, *Jane Dumsday* and *Hannah Gregory*, as her surviving sisters and co-heirs. That on the 1st *Jan.*, 1779, the said *Jane Dumsday* died, leaving *John Dumsday* her son her surviving, whereupon all her right descended to the said *John Dumsday* as her son and heir. That on the 1st *Jan.* 1783, *Mary Rushley* died without issue, whereupon all her right descended to *Hannah Gregory* and *John Dumsday*, as sister, nephew, and co-heirs of *Mary Rushley*. That on 1st *Jan.* 1786 *Hannah Gregory* died without issue, whereupon all her right descended to *John Dumsday*, as her nephew and heir at law; whereby the right to the whole of the said tenements became vested in the said last-mentioned *John Dumsday*, and from him the right descended and came to the said *John Dumsday* the now demandant, as grandson and heir of the said *John Dumsday*, the son of the said *Jane Dumsday*; the said *John Dumsday*, the demandant, being the son of one other *John Dumsday*, who was the son of the said *John Dumsday*, the son of the said *Jane Dumsday*; and that such was the right of him the said *John Dumsday* the demandant, he offered, &c.

Demurrer to the Count:—The causes assigned were, First, That it did not appear that *Shadrack Blundell* was ever seised in fee of the tenements demanded, by taking *esplees* within 60 years before the *teste* of the writ.—Second, That it did not appear that *Ann Blundell* was ever seised in fee of the tenements demanded by taking the *esplees*.—Third, That it did not appear that the demandant deduced his title from any ancestor who was

seised in fee of the tenements demanded, by taking the esplees at any time within 60 years before the *teste* of the writ.—Fourth, That although the demandant deduced his title from *John Dumsday*, it did not appear that *Jane Dumsday*, his mother, was ever married, or that the said *John Dumsday* was issue of any marriage, or that the said *John Dumsday* was ever seised of the tenements demanded as of fee and right, or that he died so seised, or that he ever died.

J. Bayley, in support of the demurrer.—A former writ of right to recover lands under this title has already been set aside after argument on demurrer (*a*). This count does not allege a seisin in fee by the demandant's ancestor within 60 years before the *teste* of the writ. The statute 32 Hen. 8, c. 2, requires that this should appear. The preamble states:—"Forasmuch as the time of limitation appointed for suing of writs of right, and other writs of possession, and seisin of men's ancestors or predecessors, or of their own possession, or seisin by the laws and statutes of this realm heretofore made, limited, and appointed, extend and be of so far and long time past that it is above the remembrance of any living man truly to try and know the perfect certainty of such things as hath or shall come in trial, or do extend unto the time and times limited by the said laws and statutes, to the great danger of men's consciences that have or shall be empannelled in any jury for the trial of the same; and it is also a great occasion of much trouble, vexation, and suits to the king's loving subjects at the common laws of this realm, so that no man, although he and his ancestors, and those whose estate he or they have been in peaceable possession of a long season, of and in lands, tenements and other hereditaments, is or can be in any surety, quietness, or rest of and in the same, without a good remedy and reformation be had, made, and provided for the same;" and it is then enacted, "That no manner of person or persons shall from henceforth sue, have, or maintain any writ of right, or make any prescription, title or claim, of, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been and now is or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments within three-score years next before the teste of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made or had."

Here *Shadrack Blundell* died in 1753, and this writ was issued in 1834. It therefore appears that it is more than 60 years since the plaintiff's ancestor was in possession and took the esplees. In *Widdowson* v. *Earl of Harrington* (*b*), *Sir Thomas Plumer*, M. R., in speaking of sec. 2. 32 Hen. 8, c. 2. observes, "Now the statute speaks of actual seisin and possession, it is not merely a seisin in law. We know that a demandant in a real action must state a seisin in his ancestor by taking the esplees. In a remedial action, it is often only necessary to state when the title accrued, but where

(*a*) *Dumsday* v. *Hughes*, 3 Bos. and Pul. 453. (*b*) 1 Jac. & Walk. 547.

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the form of the action requires that the demandant should count on the seisin of his ancestor, he can only avail himself of the remedy when there has been a taking of the esplees within 50 years. The quotations from *Rastall's Enteries* prove that this form of pleading must be followed." And the same learned judge also says, after the case had been again argued (*c*), "Then what is the constant form of the writ? It is admitted that no precedent is to be found where the demandant does not count upon the seisin of his ancestor by taking the esplees. The plaintiff must therefore state that, if it is traversed he must prove it, and it is traversed here. But he cannot show that his ancestor has been seised within 50 years; he cannot therefore support the count, and, upon his own showing, he would be out of court." As to the seisin of *Ann Blundell*, she had only an estate for life in the premises under the marriage settlement, and the demandant, in a real action, must count on a seisin in the ancestor, which means a seisin in the person from whom there is a descent, *Dally* v. *King* (*d*); and on the death of the tenant for life, the remedy to recover the estate was a writ of formedon in the reverter, which ought to have been brought within 20 years—21 Jac. I. c. 16. Another objection is, that the count ought to have shewn that *Jane Dumsday* was married: as it now stands, it does not appear that *John Dumsday* is legitimate: nor does it state the death of *John Dumsday*.

Stephen, Serjt., *contrà*.—The former writ (*e*) was brought to recover different lands, and the objection to that count was, that it was not shewn how the lands descended to the four nieces and co-heirs of *Shadrack Blundell*. That defect has now been supplied. Now it is objected that the count does not shew a seisin in *Shadrack Blundell* by taking the esplees within 60 years. The answer is, First, that this need not be shown in any case; and Secondly, if it be necessary in general, it is not in this particular case.—First, the precedents are both ways. In *Rastall's Enteries* (*f*), the form is, that the ancestor was seised "*tempore regis nunc*," and the teste of the writ does not appear upon the record. To the same effect is the form in *Booth's* suit at law (*g*). In *Coke's Enteries* (*h*) the seisin is alleged to have been in the time of Philip and Mary, late King and Queen of England. And the more ancient authorities are to the same effect.—*Year Book*, tem. 10 Ed. 3, pl. 22. But, Secondly, at all events it was unnecessary to allege a seisin by *Shadrack Blundell* in this case, because there was an intervening life estate, and the heir of the grantor would be entitled to try his writ of right in such a case.—*Co. Lit.* 281. It would be unreasonable to say that the demandant would be barred for ever at the end of 20 years. The other grounds of demurrer cannot be supported. The precedents in the books do not contain allegations of marriages or deaths, *Booth*, 104; *Bracton*, 372; and the reason is that the expression "son and heir" includes everything which is necessary.

Bayley, in reply, was requested by the Court to confine his argument to the first point.—As to the precedents which have been referred to, it only

(*c*) 1 Jac. & Walk. 557.
(*d*) 1 H. Black. 1.
(*e*) *Dumsday* v. *Hughes*, 3 Bos. and Pul. 453.
(*f*) Tit. Droit, 241, 246.
(*g*) Lib. ii., p. 94, 104.
(*h*) Tit. Droit, 182

became necessary to aver a seisin within 60 years after the passing of the statute, and some of these precedents seem to have been adapted to the former state of the law; and as the Court would take judicial notice of the dates of kings' reigns, it would therefore be sufficient to shew that the esplees were taken in the reign of a king who had reigned within 60 years; but here it is manifest that the esplees were taken more than 60 years ago, because King George II. ceased to reign in 1760.

TINDAL, C. J.—I am of opinion that this count is bad, because it does not appear that the seisin of the ancestor was within 60 years from the issuing of the writ. I do not say that there must be an express allegation of that fact, because some of the precedents do not state it expressly; but it is impossible to read the statute 32 Hen. 8, c. 2, without seeing that it ought to appear affirmatively on the record, either expressly, or by a statement of facts from which it must be necessarily implied that there had been a seisin of the ancestor within 60 years. The statute enacts that no person shall maintain any writ of right of the possession of his ancestor "and declare and allege any further seisin or possession of his ancestor, but only of the seisin or possession of his ancestor which hath been and now is, or shall be seised of the said manor, within three-score years next before the *teste* of the same writ, &c.;" and the great distinction between this statute and the 21 Jac. 1, is, that the latter merely enacts that certain actions "shall be brought" within 20 years. If in a real action the tenant chooses to deny the seisin within 60 years, he tenders a demi mark to have the seisin inquired into; and sec. 6 of the statute shews that the allegation of seisin may be traversed or denied. In the precedents which have been referred to, the seisin is in some instances stated "*tempore regis nunc*, or *tempore regis nuper*." So, if this count had alleged a seisin in the reign of his present Majesty, or in the reign of his late Majesty George the Fourth, it would have sufficiently appeared that it was within 60 years; and I take that to be the reason why in those particular instances the counts were in that form. It was therefore the duty of the demandant to shew that his ancestor was seised within 60 years, and as he has not done so, he is not entitled to our judgment. But the matter does not rest here. The esplees are stated to have been taken in the time of King George II., which amounts to an express allegation that they could not have been taken within 60 years. It appears to me that there is also another ground which would prevent the demandant from enforcing his claim. It appears that the tenant for life was seised more than 60 years ago. Here then was an estate tail created, and the remedy was therefore by a writ of formedon. If the action were brought by the issue in tail, then by the statute W. 2., c. 1., *De Donis Conditionalibus*, it would be formedon in the descender. If by one who claimed the reversion of the estate in tail spent, then it would be by formedon in the reverter. Fitz. N. B., 546, cited in *Booth on Real Actions* (*i*), where it is said, "A formedon in reverter lieth where the donee in tail, or his heirs, dieth without issue, then the donor, or his heirs, may have this writ." Here there was a gift in tail, with the reversion to the grantor and his heirs, upon the determination of the estate tail, and the proper form of

(*i*) Bk. ii., cap. 19. Tit. *Formedon in Reverter.*

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writ would be formedon in reverter. It has been contended that this would be a hardship upon the heirs of the donor, because it gave him but 20 years to bring his suit; but the statute 21 Jac. 1 is express; and the law never gives two remedies.

VAUGHAN, J.—I am also of opinion that the count is defective, for the reasons which have been stated. A very able lawyer, the late *Mr. Roscoe*, has considered this point in his work on Real Actions (*k*). He says "it is necessary that the seisin should be shown in the count to have been within 60 years, if the suit be brought on the seisin of the ancestor."

PARK, J.—I agree in the judgment which has been delivered, but as I was sitting in another place during the argument, I shall merely express my assent to the judgment.

Judgment for the tenant.

(*k*) 1 Law of Actions relating to Real Property, 177.

LORYMER *v.* VIZEU.

Nov. 8 & *Jan.* 18.

Declaration in Assumpsit, on a charter-party, and in the first count the breaches assigned were, 1. The omission to supply a cargo. 2. The nonpayment of a large sum, to wit, 200*l.*, due for freight. In the second and third counts (*indebitatus assumpsit*) the plaintiff claimed 200*l.* for freight, and 200*l.* on an account stated.

The defendant pleaded, as to 476*l.* 14*s.* 7*d.* parcel of the sums of money in the declaration mentioned, payment and acceptance before action brought of that amount in satisfaction of all the damages sustained by the non-performance of the promises as to the said sum of 476*l.* 14*s.* 7*d.*:—*Held*, that the plea was bad for not shewing specifically to what parts of the plaintiff's demands it was pleaded.

ASSUMPSIT. The declaration stated that on the 27th *Sept.*, 1832, by a charter-party of affreightment then made, it was agreed that the ship *Kara* should proceed with a cargo to the Western Islands, and after discharging the same should receive other cargoes, and finally be discharged in the United Kingdom. And the defendant agreed to load the vessel and pay freight after the rate of 110*l.* per calendar month. Averment that the ship did accordingly sail with a cargo to the Western Islands. Breaches; *First*, that the defendant did not load the ship in the prosecution of the voyage according to the tenor of the charter-party. *Secondly*, that although the ship had been occupied in the voyage more than four months, and by reason thereof a certain large sum, to wit 200*l.*, was due for freight, yet the defendant refused to pay the said sum. *2nd Count*, Indebitatus assumpsit for 200*l.* for freight; *3rd Count*, Indebitatus assumpsit for 200*l.* due on an account stated. The declaration concluded as follows:—

And whereas the said defendant afterwards, in consideration of the premises respectively last mentioned, promised the said plaintiff to pay him the said two several sums of money respectively last mentioned upon request; yet he hath disregarded his said last mentioned promise, and hath not paid the said last mentioned two several sums of money, or either of them, or any part thereof, to the damage of the plaintiff of 300*l.*, and therefore he brings his suit, &c.

PLEA. And for a further plea in this behalf as to the sum of 476*l.* 14*s.* 7*d.*, parcel of the said several sums of money in the said declaration mentioned, the defendant saith that before the commencement of this suit, to wit, on the day and year first aforesaid, and on divers other days between that day and the commencement of this suit, he paid to the plaintiff divers monies,

amounting in the whole to the said sum of 476*l.* 14*s.* 7*d.*, in full satisfaction and discharge of all the damages by the plaintiff sustained, on occasion of the nonperformance of the said promises as to the said sum of 476*l.* 14*s.* 7*d.*, parcel of the said several sums of money in the said declaration mentioned, and the plaintiff then accepted and received the said sum of 476*l.* 14*s.* 7*d.* in full satisfaction and discharge of such damages.

Demurrer for the following causes: that it did not sufficiently appear in the said plea in respect of what counts or parts of the said declaration the same was pleaded, or whether the sum of money therein alleged to have been paid was paid in satisfaction and discharge of all the several causes of action in the declaration mentioned, or of some of those causes only; or if of some only, in respect of which of those causes of action, and by reason thereof the plaintiff was prevented from replying with certainty. That the plea did not sufficiently show when the said sum of money was paid; and also that the said plea was irrelevant, and an insufficient answer to any of the causes of action in the declaration, inasmuch as the payment therein mentioned was alleged to have been made before the defendant had committed any breach of any of his promises, the words "the day and year first aforesaid" referring to the time of the making of the charter-party in the first count mentioned. And also that the said plea was pleaded to the damages only, and not in bar of any part of the action.

Erle, in support of the demurrer. The plea, in its commencement, professes to be pleaded "as to the sum of 476*l.* 14*s.* 7*d.*, parcel of the said several *sums* in the declaration mentioned." There are three sums of 200*l.* mentioned in the body of the declaration, besides a sum of 300*l.* alleged by way of damages. It is, therefore, wholly uncertain whether the plea is intended to be an answer, to some extent, to the first breach for not supplying a cargo, as well as the rest, or to be confined to the second breach and the second and third counts.

The plea is objectionable, also, for not pointing out to how much of each part of the plaintiff's claim, to which it is pleaded, it is applicable. The plaintiff is not informed what portions of his demand are admitted, and, therefore, cannot know what evidence to be prepared with. According to the case of *Mee* v. *Tomlinson* (*a*), the plea is bad. It is true that the judgment in *Jourdain* v. *Johnson* (*b*) seems to be inconsistent with that decision; and *Patteson*, J. appears to have expressed his dissatisfaction with it (*c*). But *Jourdain* v. *Johnson* was determined upon a different point. *Marshall* v. *Whiteside* (*d*) may be cited as establishing that, in a plea of payment of money into Court, it is not necessary to state the particular portions of the plaintiff's claim, upon which the money is paid into Court, and as expressly overruling *Mee* v. *Tomlinson*. In the former case, however, the damages were unliquidated. But, even supposing that there may be no distinction in that respect, a plea in satisfaction of damages, by payments before action brought, is widely different from the new plea of payment of money into

(*a*) 1 Har. & Woll. 614 & 5 Nev. & Man. 624.
(*b*) 1 Gale, 312, 2 Cr. Mees & Rosc. 564 & 4 Dowl. Pr. Ca. 534.
(*c*) See 1 Gale, 379; 1 Mees & Wels. 191, & 4 Dowl. Pr. Ca. 770.
(*d*) 1 Gale, 379; 1 Mees & Wels. 188 & 4 Dowl. Pr. Ca. 766.

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Court, which is but a substitute for the old practice of payment of money into Court, under the common rule, upon the whole declaration; and it may be reasonable to continue the same privilege to a defendant under the new plea. The difference between a plea like the present, and a plea of payment of money into Court, is distinctly recognised by *Patteson*, J. in *Marshall* v. *Whiteside* (*e*.)

Whateley, contrà. The plea is expressly limited to 476*l.* 14*s.* 7*d.* parcel of the sums mentioned in the declaration, and proceeds to allege the payment of a correspondent amount in satisfaction of the damages arising from the nonperformance of the "*promises*" as to that sum. It is plain, therefore, that the plea points only to the sums mentioned in the declaration, to which the promises may be referred, and there can be no pretence for saying that it is doubtful whether it applies to the whole or to part only of the declaration.

As to the second objection.—In *Marshall* v. *Whiteside* (*e*), where there was a plea of payment into Court of one entire sum, upon two out of five breaches of covenant, without distinguishing how much was paid in respect of one, and how much in respect of the other, it was held to be good. That case overrules *Mee* v. *Tomlinson*, which is at variance with the judgment in *Jourdain* v. *Johnson* (*f*), and has been since disapproved of by *Patteson*, J., who concurred in the decision. It has been suggested, that there is a difference between a plea of payment of money into Court, and a plea of payment in satisfaction before action brought. The only difference is, that the one is against further maintenance of the action, because of a payment *after* action brought; and the other is in bar, because of a payment *before* its commencement. The plea of payment of money into Court is not to be regarded as a mere deviation from the principles of pleading, but as new in instance only, and to be used in conformity with those principles. The main object of the new rules was, not to introduce new principles of pleading, but rather to compel litigants to frame their pleadings agreeably to those principles which in modern times have been departed from. The decision in *Marshall* v. *Whiteside* (*e*) is, therefore, a decision, that a plea of payment need not particularise the portions of the demand to which it is to be applied. A plea of tender is always pleaded generally, as in the present instance. This plea is, in fact, a plea of *general* payments on account, which the plaintiff might appropriate as he pleased. The actual appropriation lies more in the knowledge of the plaintiff than of the defendant, who, from that circumstance, is under a greater difficulty as to the evidence on the trial than the plaintiff. Had the defendant pleaded payment of 200*l.* in liquidation of the claim on the second breach, the plaintiff on the trial might say, "No—you paid me the money generally; and, as I had a right to do, I applied that sum to the account stated." A debtor therefore, paying money generally on account, has a right to plead according to the fact; for if he pleads a specific appropriation, he may be defeated by an appropriation of which he was ignorant.

Erle, in reply. It is by no means clear, as it ought to be, whether the plea applies to the whole or to part only of the breaches stated in the declaration. *Marshall* v. *Whiteside* (*e*) is not an authority in favour of the plea, because

(*e*) 1 Gale, 379 & 1 Mees & Wels. 191; & 4 Dowl. Pr. Ca. 766.

(*f*) 1 Gale, 312; 2 Cr. Mees & Ros. 564 & 4 Dowl. Pr. Ca. 534.

there the plea was not a plea of payment in satisfaction, but a general plea of payment of money into Court, and the damages were unliquidated; and, therefore, were not capable of ascertainment without the intervention of a jury. But where the damages are liquidated, as they are in this case, at least as to the second and third counts, the defendant may know the amounts in respect of which he has made any payments. As to the argument derived from the doctrine of the appropriation of payments, it is the defendant's own fault if he has not prescribed the application of his payments.

TINDAL, C. J.—"For a further plea in this behalf" goes to the whole declaration; and the plaintiff ought to see distinctly to what portion of it the payment applies. It appears from *Com. Dig.*, tit. *Accord with satisfaction*, (*B.* 1.) that a plea of an accord to deliver, &c. in satisfaction of part of a debt, is not good (*g*).

It is said that Mr. *Justice Patteson* is dissatisfied with the determination in *Mee* v. *Tomlinson*; but he seems to think that the doctrine is still applicable to a plea of accord and satisfaction.

VAUGHAN, J., concurred.

Judgment for the plaintiff (*h*).

(*g*) The reference in *Com. Dig.* is to 4 *Co.* 3, where is the following passage:—"If the debtor gives the creditor a horse, or any other thing in satisfaction of part of his debt, it shall be a bar for no part, for the uncertainty." See *Vin. Abr.* tit. *Uncertainty*, pl. 4.

(*h*) PARK, J., was sitting at Chambers. This case was argued by *Erle* for the plaintiff in *Michaelmas* Term, and the Court then suggested that the defendant ought to amend, but the suggestion was not subsequently acted upon, and in this Term the case was again entered and argued.

ROBSON *v.* FALLOWES.

Jan. 13th.
In an action on a Bill of Exchange by indorsee against the acceptor, the defendant pleaded that the bill was accepted for the accommodation of the drawers, who had indorsed it without consideration; and that certain unlawful wagers and contracts were made between the indorsee and the plaintiff, relating to the then future price of *Spanish* Cortes Bonds, and thereupon it was unlawfully agreed between the plaintiff and the indorsee, that there should not be any actual or *bonâ fide* transfer of the said Stock, but that in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said Stock, at certain times, to wit, &c. that the said indorsee should pay the plaintiff the difference which might then be between the said respective prices; but that if the price should be more than the said specified price, then the plaintiff should pay the indorsee such difference or excess. The plea then averred that the Bill of Exchange was given to the plaintiff as a security for the balance which might become due under and by virtue of the said illegal wagers:—*Held*, that a variance at the trial in the proof of the price of the Stock was immaterial.

ASSUMPSIT on a bill of exchange, drawn by *William* and *Robert Allanson*, upon and accepted by the defendant, and afterwards indorsed by the drawers to the plaintiff. The defendant pleaded that the said Bill of Exchange was accepted by him, at the request of the drawers thereof, for the accommodation of the said drawers, and not for any consideration whatsoever; and that after the acceptance of the said bill of exchange, the said *William Allanson* and *Robert Allanson*, at the request of one *Henry Allanson*, indorsed the same to the said *Henry Allanson*, in order that the said *Henry Allanson* might apply the same for his own use; and that there was not any consideration whatever for the said indorsement by the said *William Allanson* and *Robert Allanson* to the said *Henry Allanson*; that afterwards

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and before the delivery of the said bill of exchange by the said *Henry Allanson* to the plaintiff, as hereinafter mentioned, to wit, on the 1st day of *May*, in the year 1835, certain unlawful wagers, and contracts in the nature of wagers, and refusals, were made and entered into between the said *Henry Allanson* and the said plaintiff, relating to the then future prices and value of certain public stock and public securities, to wit, *Spanish Cortes Bonds* and *Spanish Scrip* to a large extent, to wit, to the extent of 20,000*l.* thereof, whereby the payment of certain monies by the said *Henry Allanson* to the said plaintiff, or by the said plaintiff to the said *Henry Allanson*, was made to depend on the then future prices of the said *Spanish Cortes Bonds* and *Spanish Scrip*, and thereupon it was then unlawfully agreed between the plaintiff and the said *Henry Allanson* that there should not be any actual or *bonâ fide* sale or transfer of the said stock, but that in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said stock, and securities at certain times, to wit, the month of *June*, in the year aforesaid, that the said *Henry Allanson* should pay the said plaintiff the difference which might then be between the said respective prices; but that if the price of the said stock at these times should be more than the said specified price, then the said plaintiff should pay the said *Henry Allanson* such difference or excess; that afterwards, to wit, on, &c. the plaintiff requested the said *Henry Allanson* to give him some security for the balance which might thereafter become due to the said plaintiff, under and by virtue of the said wagers and contracts, and thereupon afterwards, and before any of the said times when the prices of the stock were to be taken as aforesaid, to wit, &c. the said *Henry Allanson* being possessed of the said bill of exchange, as aforesaid, delivered the same to the said plaintiff as a security for the said balance, which might become due to him the said plaintiff, under and by virtue of the said illegal wagers and contracts, and the plaintiff then took and received the said bill of exchange as such security as aforesaid, and that the plaintiff did not at any time give any consideration whatever for the said bill of exchange, except as aforesaid.

Replication.—That the defendant of his own wrong, and without the cause by him the said defendant in his said plea mentioned, broke his said promise in the said declaration mentioned, in manner and form as the plaintiff had above thereof complained against him; and this the plaintiff prayed might be inquired of by the country, &c.

At the trial before *Gaselee*, J., at the *London* sittings in *Easter* Term, the defendant gave evidence in support of the plea, but the witnesses did not prove that the sale of the stock was transacted at the price of 67*l.* 7*s.* 6*d.* as stated in the plea, but by the books which were produced, it appeared that the price was 67*l.* 2*s.* 6*d.* It was objected for the plaintiff that the price ought to be strictly proved, but the learned judge overruled the objection, reserving the point, and a verdict was found for the defendant (*a*).

Kelly obtained a rule *nisi* to set aside the verdict, and to enter a verdict for the plaintiff, upon the above ground of variance.

(*a*) Another objection was raised at the trial, viz., that jobbing transactions in Foreign Funds were not illegal, but the rule not having been moved to enter a verdict *non obstante*, the plaintiff's counsel were prevented from discussing this point, when the rule came on for argument. See *Morgan* v. *Pebrer* ante 3.

Talfourd, Serjt. and *Cleasby* shewed cause. The rule is, that it is not generally necessary to prove a fact precisely as laid, unless that particular fact be material; 1 *Phillips* on *Ev.* 214. In *May* v. *Brown* (*b*), the declaration stated that the plaintiff was an attorney, and had been employed as vestry clerk, and that whilst he was such vestry clerk certain prosecutions were carried on for certain misdemeanors, and in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated to the discharge of the expenses incurred; but that the defendant, to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, published a libel of and concerning the plaintiff, and of and concerning the matters aforesaid. It appeared on the production of the libel at the trial that the imputation was, that the plaintiff had applied the parish money in payment of the expenses of the prosecution *after it* had terminated; but the Court held that this was no variance. The rule was then laid down by *Abbott*, C. J., as follows:—

"It is a general rule that a variance between the allegation and the proof will not defeat a party unless it be in respect of matter which if pleaded would be material. If the variance be in respect of matter not essential to maintain the action or the plea, it is of no importance. Then the question to be considered is, whether the matter with respect to which the variance is alleged to exist, with reference to the libel itself, was in any degree essential to support the action?"

So here, the price of the stock was altogether immaterial; the only question at the trial was, whether the bill had been deposited to await the result of certain illegal bargains which had been transacted between the parties, and whether the price of the stock was 60*l.* or 65*l.* made no difference. This case is distinguishable from *Partridge* v. *Coates* (*c*), *Fox* v. *Keeling* (*d*), and other cases which relate to usury, in which there have been variances as to the time when money was alleged to be lent, because in such cases the time of forbearance is of the very essence of the offence.

Kelly, in support of the rule. It was necessary that this plea should set forth the particulars of the contract which was made between the parties. A general statement "that a certain illegal contract was made" would have been bad on special demurrer. The statement of some price was necessary, and as the price was of the essence of the contract, it ought to have been strictly proved. This case is therefore analogous to those which have been cited as to usurious contracts, where it is admitted that the time must be proved, as it is alleged in the pleadings. In *Tuck* v. *Tooke* (*e*), where fraud and covin was alleged by particular means, it was held not to be tantamount to an allegation of fraud and covin generally. If the price of the stock may be varied, why may not the defendant be also allowed to show that the transaction occurred in the transfer of English stock, and not of Spanish stock, as alleged in the plea?

TINDAL, C. J.—The plea has been substantially proved. I agree that when a contract is pleaded, and the terms of it are material, the party is not

(*b*) 3 Barn. & Cress. 113.
(*c*) Ry. & Moody, 155.
(*d*) 2 Ado. & Ellis, 670.
(*e*) 2 Barn. and Cress. 437.

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relieved from giving precise proof, although the terms are stated under a videlicet. But here the substance of the plea is, that a bill of exchange had been deposited with the plaintiff upon an illegal transaction between him and the depositor, and the plea then sets out the particulars of the contract; but it is perfectly immaterial for the purpose of the plea, whether 67*l.*, or a smaller or a larger sum, was the price agreed upon. The cases which have been cited are those which relate to usurious contracts, which were pleaded to avoid a bill or other instrument. In such cases the plea must state the precise terms of the contract, because the Court must see whether more than legal interest has been taken. There, the time of forbearance is of the very essence of the illegality, but here, it is immaterial whether one sum or another is stated; the substance of the plea is, that the contract was a time bargain and illegal, and the evidence proved that allegation.

PARK, J.—It is totally immaterial whether 67*l.* or 60*l.* is the sum stated. The cases of usury are different; there it is most material to state the particular circumstances.

VAUGHAN, J.—The allegation was substantially proved. This is a different case from those where time and price, and other particulars may be most material.

BOSANQUET, J.—I am of the same opinion.

Rule discharged.

Jan. 16th.

BETTERBY *v.* MC. LEOD.

1. A witness living at *Camberwell* was subpœned by the plaintiff to attend a trial at *Guildhall*, and the witness stated that he had been previously subpœned by the defendant, who had paid him a guinea as conduct-money, and the plaintiff then paid him but one shilling with his subpœna. An action was afterwards brought against the witness to recover costs incurred in consequence of his neglect to attend the trial; and the plaintiff alleged in the declaration that he had paid a reasonable sum with the subpœna:—*Held* that this averment was sufficiently proved, by showing the payment of the one shilling.

2. If when a cause is called on, a material witness is absent, the attorney is justified in withdrawing the record, and he is not bound to allow the trial to proceed, to take the chance of the arrival of the witness.

CASE against the defendant to recover damages sustained by the plaintiff in consequence of the defendant's neglect to appear in Court to give evidence in a cause of *Betterby* v. *Mc. Leod*, in which the defendant had been subpœned. The declaration stated the service of the subpœna upon the defendant, and averred that there was then "paid to the defendant, a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money for his costs and charges, in and about his attendance as a witness, according to the tenor and effect of the said writ of subpœna." The defendant pleaded, 1st. Not Guilty; 2ndly. That a reasonable sum of money had not been paid or tendered, when the defendant was subpœned. At the trial before *Tindal*, C. J. at the *Middlesex* sittings after *Trinity* Term, it was in evidence that the defendant did not attend at the trial of the cause, and that the plaintiff's attorney, being unable to proceed in consequence of his absence, was compelled to withdraw the record. The clerk to the plaintiff's attorney stated that when he subpœned the defendant at his residence at *Camberwell*, the defendant informed him that he had already been served with a subpœna by the defendant in the cause, and that he had received a guinea for conduct-

money with that subpœna; the clerk observed that, under those circumstances he supposed the witness would not require to be paid another guinea, to which the defendant replied "Certainly not," and he then received one shilling from the clerk. The jury found a verdict for the plaintiff.

Platt obtained a rule *nisi* for leave to enter a verdict for the defendant or for a new trial (*a*).

Talfourd Serjt. and *R. V. Richards* shewed cause, and contended that the allegation in the declaration was supported by the evidence; that after a witness had received a subpœna from one party in a cause, with a sufficient sum of money to enable him to attend at the trial, he has no right to take a further payment on receiving another subpœna from the opposite party. *Benson* v. *Schneider* (*b*).

Platt and *W. H. Watson*, in support of the rule. If the plaintiff relied upon a special agreement having been made with the witness to attend at the trial, without requiring any money to be paid, then that agreement should have been stated in the declaration, so that the dispensation might appear, *Jones* v. *Barkley* (*c*). But here the plaintiff has alleged that a reasonable sum of money was given, and the evidence clearly shows that only one shilling was received by the witness; and the payment of that sum does not amount to such a consideration as enables the plaintiff to sue the defendant in this form of action.

TINDAL, C. J.—There is no ground for saying that the verdict is not warranted by the evidence. As to the reasonableness of the sum which was paid to the witness, with the subpœna, that must be measured by the expense which was actually thrown upon him. Here the witness had previously received a guinea from the defendant in the cause, and that was an ample sum to cover any expense which he could be put to in attending at the trial; and it seems by the evidence that the witness himself considered that it was sufficient. The rule must be discharged.

The other Judges concurred.

Rule discharged (*d*).

(*a*) It appeared that the sittings commenced at half-past nine o'clock in the morning, at which time the cause was called on; the witness was then absent, whereupon the plaintiff's attorney immediately withdrew the record. In about a quarter of an hour the witness was in attendance, and in moving for the rule it was contended that the record was withdrawn prematurely, and that the cause ought to have proceeded, in which case the witness would have been in time to give his evidence; but the Court refused to accede to that argument.

(*b*) 7 Taunt. 272; 1 Moore, 76.

(*c*) 2 Doug. 684.

(*d*) The Reporter is indebted to a learned friend for the report of the above case.

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PONTET v. The BASINGSTOKE CANAL COMPANY.

Jan. 18th.

Where a Canal Company empowered by Act of Parliament to raise money at interest, upon the credit of the undertaking and the rates or duties thereof, and the Company by a deed-poll, under their common seal, assigned their property in the undertaking, and the rates and duties thereof, until a sum of money should be paid with interest, to be paid half-yearly, on certain days which were specified:—*Held*, that an action of covenant could not be maintained against the Company, to recover an arrear of interest due under a deed-poll.

PONTET, Exor. of J. Gaillard, decd., *v.* The Company of the BASINGSTOKE CANAL Navigation.

COVENANT. The Declaration stated that the defendants, on the 26th of *September*, 1793, according to the statute in such case made and provided, made their deed-poll sealed with their common seal, and thereby made known to all to whom those presents should come, That in pursuance and by virtue of an Act of Parliament made and passed in the 33rd year of the reign of His Majesty King *George* the Third, intituled "An Act for effectually carrying into execution an Act of Parliament of the 18th year of the reign of his present Majesty, for making a Navigable Canal from the Town of *Basingstoke*, in the County of *Southampton*, to communicate with the river *Wey*:" And also of an order made at a general assembly or meeting of the said Company of Proprietors, held by adjournment at the *Crown and Anchor Tavern*, in the *Strand*, *London*, on the 15th day of *April*, 1793: And in consideration of the sum of 100*l.* to them advanced and paid by the said *Joseph Gaillard*, the receipt whereof was thereby acknowledged, the said Company of Proprietors had granted and assigned, and by that present instrument or writing under their common seal, did grant and assign unto the said *Joseph Gaillard*, his executors, administrators, and assigns, all that the said navigation and undertaking, and the rates or duties granted and made payable by the said Act of the 18th year of the reign of His Majesty, and all their property, estate, right and interest therein; to hold the same unto the said *Joseph Gaillard*, his executors, administrators, and assigns, until the said sum of 100*l.*, together with interest for the same at the rate of 5*l.* per cent. per annum, to commence from the 24th day of *June*, then last past, and to be paid half-yearly (that is to say) on the 25th day of *December* and the 24th day of *June* in every year, should be fully repaid and satisfied. Breach: That the defendants did not keep their covenant in this; to wit, that the interest on the said sum of money was not paid according to the said deed, and that on the contrary thereof, afterwards, to wit, on the 25th day of *December*, 1834, a large sum of money, to wit, &c. became and was due and in arrear for interest upon the said sum for a long space of time, to wit, the space of 19 years before then elapsed, contrary to the force and effect of the said deed, &c. (*a*).

(*a*) By 18 Geo. 3. c. 75, several persons were united into and made a body politic and corporate, by the name of "The Company of Proprietors of the Basingstoke Canal Navigation" for carrying the purposes of the Act into execution, by which name they might have perpetual succession, and have a common seal, and also sue and be sued.

By 33 Geo. 3, c. 16, after reciting the last-mentioned Act, and that the said Company of Proprietors were by the said Act authorized and empowered to raise by contribution amongst themselves the sum of 126,000*l.* to defray the expenses thereof; and that the money which the said Company of Proprietors had raised and laid out and expended by virtue and according to the directions of the said Act, together with the interest and the debts which they had incurred, amounted to more than the sum they were by the said Act authorised to raise; and that the Works directed by the said Act were not completed: It was enacted that it should be lawful for the said Company of Proprietors, and they were thereby empowered from time to time, by virtue of an order made at any general assembly or meeting of the said Company of Proprietors, to borrow and take up at legal or less interest any sum or sums of money upon the credit of the said undertaking, and the rates or duties granted and made payable by the said Act, and by writing under their common seal to mortgage or assign over the said undertaking, and the said rates or duties, to the person or persons who should advance or lend such money, or his or their trustee or trustees, as a security for the money

The defendants pleaded several special pleas, to which the plaintiff demurred, and there was joinder in demurrer thereon. The defendants objected that the declaration did not show any covenant on which they could be sued.

Barstow, for the plaintiff. The defendants are liable for the payment of the interest reserved by the deed-poll, which they covenant to pay half-yearly. No express words are necessary to constitute a covenant. Any words in a deed, which show an agreement to do a thing, make a covenant. *Com. Dig.* tit. *Covenant* (A 2). The form of the deed-poll is given in the Act of Parliament, but the words are extended in this deed, because the express days, on which the interest of the money advanced should be paid, are inserted. The principal sum may be admitted to be secured on the rates alone. [TINDAL, C. J.—How can you collect a difference of intention as to the principal and the interest? the same words are used.] The interest is to be paid on a day certain, but the principal is not. It would be very unjust, if there be no remedy to recover the interest when it is not paid half-yearly. In *Vin. Abr.* tit. *Covenant* (C. 7), it is said, "if there are articles of agreement between A. and B., by which it is agreed upon a marriage intended between A. and C. that all the stock of C. shall remain in the hands of B. till A. shall make a certain jointure to C., *ipso* B. *annuatim solvendo* to A. *Interesse proinde secundum Ratam* 8*l. per centum.* If B. does not pay the said interest, an action of covenant lies against him upon these words, because every agreement by deed is a covenant; and otherwise, A. shall not have any remedy for the money." *Roll's Abr.* 519. *Bac. Abr.* tit. *Covenant* A.

Erle, contrà, was stopped.

TINDAL, C. J.—The Acts of Parliament are Public Acts, and they enable the Company to raise the money upon the credit of the undertaking, and the rates or duties granted; and it is distinctly said in sec. 3, that the creditors shall be creditors on the rates or duties in equal degree one with another. This is not, therefore, a security which gives the plaintiff any right of action in a Court of Common Law. It would be most destructive to the parties

so to be borrowed, together with interest for the same, and every such assignment should be according to the form following:—

By virtue of an Act of Parliament made in the 33rd year of the reign of King George the Third, intituled, &c. "We the Company of Proprietors of the said Navigation, in consideration of the sum of ——*l.* to us advanced and lent by A. B., do hereby grant and assign unto the said A. B., his executors, administrators, and assigns, all and singular our property in the said undertaking, and the rates or duties granted to us by the said Act of the 18th year of the reign of His present Majesty, to hold unto the said A. B., his executors, administrators, and assigns, until the said sum of ——*l.* with interest, at —— per centum per annum, for the same to be paid half-yearly, shall be fully repaid and satisfied. In witness whereof we have hereunto set our common seal this —— day of ——." And every such assignment shall be good, valid, and effectual in law."

By sec. 3, "Provided always, that the whole of the money to be raised by virtue of this Act shall not exceed the sum of 30,000*l.*; and all persons to whom any such mortgages, or assignments, or grants of annuity, as aforesaid, shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties in equal degree one with another, and no preference shall be given to any such creditors in respect to the priority of advancing their money or the dates of their securities, and that the interest of the money to be borrowed, and the annuities to be granted as aforesaid, shall from time to time be paid half-yearly to the several persons entitled thereto, in preference to any interest or dividends due or payable by the said Company of Proprietors, by virtue of the said recited Act."

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engaged, if they were held to be so liable. It appears to me that the terms of this contract are satisfied by giving the plaintiff security on the undertaking, and his remedy would be by taking possession of the rates, and satisfying his debt.

VAUGHAN, J.—I am of the same opinion. The clause in the statute, which declares that there shall be no priority, shews that the action would at all events be stopped by an injunction from a Court of Equity.

Judgment for defendant.

DOE, d. BATH, *v.* CLARKE.

Jan. 19th.

In Ejectment the lessor of the plaintiff claimed as heir-at-law of one *Bath*, through a younger son. The defendant who claimed an interest in the premises, set up as a defence, that the true heir of *Bath* was the grandson of his eldest son, and that he was then living; and to prove this the grandson was called by the defendant as a witness:—*Held*, that he was a competent witness.

EJECTMENT, tried before Lord *Abinger*, C. B., at the last *Guildford* Assizes. The lessor of the plaintiff claimed to recover certain rectorial tithes, as heir-at-law of one *Thomas Bath*, who died in 1746. It was in evidence that *Thomas Bath* had four sons, viz. *John*, the eldest, *Thomas*, *Andrew*, and *Henry*, and evidence was given that the lines of *John*, *Thomas*, and *Andrew* had failed altogether, and that the lessor of the plaintiff was great-grandson and heir-at-law of *Andrew*, the youngest son. For the purpose of shewing that the lessor of the plaintiff had no right to recover the premises, the defendant contended that the line of descent through *John*, the eldest son of *Thomas Bath*, was not extinct; and a witness was called, who stated that he was the grandson of this *John Bath*. The counsel for the lessor of the plaintiff objected that this witness was interested, and therefore incompetent; but the learned judge received the evidence, and a verdict was found for the defendant.

Platt obtained a rule *nisi* for a new trial, in pursuance of leave reserved, upon the ground that this evidence ought not to have been received.

Thesiger and *Channell* shewed cause. The general rule on the subject of interested witnesses is clearly laid down in 1 *Phillips* on *Ev.* 55:—"If the verdict can be used in evidence against the witness, in case the party for whom he is called should fail in the action; or if the witness can avail himself of the verdict, so as to give it in evidence in support of his own claims, this is a direct and immediate interest in the event of the suit, which will render him incompetent." This rule has been acted upon in *Bent* v. *Baker* (*a*), and many other cases. In *Smith* v. *Prager* (*b*), Lord *Kenyon*, C. J. said, "The case of *Bent* v. *Baker* (*a*) laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." Here the witness had no such direct and immediate interest

(*a*) 3 T. Rep. 27. (*b*) 7 T. Rep. 62.

in the result of the cause; the verdict would neither remove any liability nor would it procure any advantage affirmatively to the witness. A mere facility to substantiate a claim, which may be gained by a witness, will not disqualify him. That was determined in *Doe* d. *Nightingale* v. *Massy* (*c*), where the question was, whether the mother of a defendant in ejectment, who claimed to retain possession of the premises as heir-at-law to his father, was a competent witness for the defendant, and Lord *Tenterden*, C. J., said, "The question in this case was, whether the mother of the defendant was an incompetent witness, inasmuch as she would be entitled to dower if her husband were seized. On consideration we are all of opinion she was competent. She had no interest of which the law as to evidence takes notice, in the event of the suit. The judgment in the action would be no evidence of the husband's seisin. If he was seized she is equally entitled to dower, whether the premises be in the hand of the defendant or the lessor of the plaintiff." Then can this verdict be given in evidence for the witness on any future occasion in support of his own interest? It is quite clear that it cannot; *Nix* v. *Cutting* (*d*), is an express authority. That was an action of trover for a horse, and the question was, whether one *Denny*, who gave evidence on the part of the defendant, was an admissible witness. He stated that it was agreed between the plaintiff and himself, that he should take the horse as a security for the payment of 15*l.* deposited by him with the plaintiff, and that the horse should be sold at the next *Woodbridge* fair, if the money was not paid by that time: the money was not paid, and the witness sold the horse at *Woodbridge* fair to the defendant. A rule having been obtained for a new trial, on the ground that this evidence ought not to have been received, this Court confirmed the opinion of *Grose*, J., at *nisi prius*, that the evidence was admissible on the ground that the verdict would not be evidence in favour of the witness in any case. That case was subsequently fully confirmed in *Ward* v. *Wilkinson* (*e*), where it was held that in trover, a witness who was called for the defendant, was competent to prove the property in the goods to be in himself. This case is altogether distinguishable from *Doe* d. Lord *Teynham* v. *Tyler* (*f*), where a remainder man was held not to be a competent witness, because there the witness was interested in the result of the suit.

Platt in support of the rule:—The defendant's case depended entirely upon the existence of another heir-at-law, and although the defendant defended the action as landlord of the premises, it does not necessarily follow that he therefore claimed the inheritance. [*Tindal*, C. J.—The title of the witness was set up to shew that the lessor of the plaintiff had no right to the property; *non constat*, that the estate had not been conveyed away by the heirs of *John Bath*.] The defendant must have claimed by an adverse or a consistent title to that of the witness. If by a consistent title, then the defendant must claim to hold under the same title as the witness, but if he claims by an inconsistent title, then this verdict might be given in evidence in favour of the witness, to enable him to recover the mesne profits of the estate.

(*c*) 1 Barn. & Ado. 439.
(*d*) 4 Taunt. 412.
(*e*) 4 Barn. & Ald. 411.
(*f*) 6 Bing. 390.

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TINDAL, C. J.—It appears to me that this rule must be discharged. The lessor of the plaintiff claimed to recover in the action, as heir-at law, through the line of a younger son of *Thomas Bath*. For the purpose of defeating this claim, the defendant, who claimed an interest in the premises, offered to prove that *Thomas Bath* had an elder son, whose heir was still in existence, and it is not necessary to say that this evidence would have prevented the lessor of the plaintiff from recovering in the action, whether the defendant had any title or not. The defendant then called the grandson of that elder son as a witness, and the question is, whether this person was a competent witness. It is well established that the only ground of objection is where a witness has an immediate interest in the result of the suit, or where he may use the verdict in his own favour on any future occasion. First, had this witness any interest in the suit? If the defendant had shown that he was holding the property as tenant to the witness, then the effect of a verdict for the lessor of the plaintiff would be to turn the defendant out of possession, and the witness would in that case have been interested. Now the party who raised this objection should show this to be the case, but here there is no proof whatever that the witness was in any manner interested in the result of the suit.

Then could this verdict be used in the witness's favour in any future action? This is a verdict in favour of the defendant, and I cannot see how it could be used. It is said that the evidence given by the witness might be used in a subsequent action. I agree that his statements would be evidence *against* him; but they could not be used in his favour. The case, therefore, seems to me to fall precisely within the principle of *Nix* v. *Cutting* (*g*), and *Ward* v. *Wilkinson* (*h*).

PARK, J.—The rules of evidence have not been so well considered in the older, as in some of the more modern decisions. I remember the decision in *Bent* v. *Baker* (*i*), a case where great pains were taken, and the rule as then laid down by Mr. *J. Buller* was afterwards approved of by Lord *Kenyon*, in *Smith* v. *Prager* (*j*); and in *Doe* d. *Nightingale* v. *Massy* (*k*), the rule was again confirmed. This case seems to me to fall within that rule, and I concur with the rest of the Court.

VAUGHAN, J.—I am of the same opinion. The rule affecting this question is also to be found in *Doddington* v. *Hudson* (*l*). Here the witness had no such interest as would exclude his testimony. *Nix* v. *Cutting* (*g*), is also in point, and it does not seem to me that any distinction can be taken between the rule as to personal chattels and real property.

Rule discharged.

(*g*) 4 Taunt. 18.
(*h*) 4 Barn. & Ald. 411.
(*i*) 3 T. Rep. 27.
(*j*) 7 T. Rep. 62.
(*k*) 1 Barn. & Ado. 439.
(*l*) 1 Bing. 257.

VAUGHAN *v.* MENLOVE.

Jan. 23.

An action on the case was brought against the defendant for negligently and carelessly allowing a new rick of hay to ignite, whereby certain cottages belonging to the plaintiff were burnt. At the trial the judge in summing up told the jury, that it was not sufficient for the defendant to show that he had acted *bonâ fide*, and had done every thing he thought best to prevent an accident; but that he must prove that he acted as a prudent, not as a rash man would have done under similar circumstances, and that if they were satisfied the defendant had been guilty of gross negligence the plaintiff was entitled to a verdict:—*Held*, that this direction was correct, and a verdict which had been found for the plaintiff was ordered to stand.

CASE.—The declaration stated that before, and at the time of the grievance and injury hereinafter mentioned, certain premises, to wit, two cottages, with the appurtenances, situate in the county of *Salop*, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff; to wit, one thereof in the possession and occupation of one *Thomas Ruscoe*, as tenant thereof to the plaintiff, the reversion of and in the same, with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of one *Thomas Bickley*, as tenant thereof to the plaintiff, the reversion of and in the same, with the appurtenances then belonging to the plaintiff. And the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch also near to the said cottages; and the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, and put together, and then standing and being in and upon the said close of the defendant; and the plaintiff further saith that heretofore, to wit, on, &c. while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, to take fire, and break out into flame, and there had appeared, and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued dangerous to the said cottages; of which said several premises the defendant then had notice; yet the defendant, well knowing the premises, but not regarding his duty in that behalf, on the day and year aforesaid, and from thence until and upon a certain day, to wit, &c. wrongfully, negligently, and improperly kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could and might and ought to have removed or altered the same rick, so as to prevent the same from being and continuing so dangerous as aforesaid, and by reason whereof the said cottages for a long time, during all the time aforesaid, were in great danger of being consumed by fire. And the plaintiff further says, that by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant in so keeping and continuing the said rick or stack in a state or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on the day and year last aforesaid, and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant standing in the close of the defendant, and near to the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid; and so being near to the said rick or stack as aforesaid, were set on fire, and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and

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breaking out into flame by the said rick or stack, was thereupon then communicated into the said cottages, in which the plaintiff was so interested as aforesaid, which were thereby then respectively set on fire; and then, to wit, on the day and year last aforesaid, by reason of such carelessness, negligence, and improper conduct of the defendant, in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, the value of 500*l.*; and by means of the premises the plaintiff has been and is greatly and permanently injured in his said reversionary estate and interest of and in each of them, to the plaintiff's damage of 500*l.*; and thereupon he brings his suit, &c.

Pleas.—First, Not Guilty.—Second, that the said rick or stack of hay in the said declaration mentioned was not while the said cottages so were in the occupation of the said tenants thereof respectively, and while the reversion thereof respectively belonged to the plaintiff, likely to ignite, take fire, and break into flame, nor did there appear any just grounds to apprehend and believe that the same would ignite, take fire, and break into flame, nor was the same by reason of such liability, and of the state and condition of the said rick and stack of hay dangerous to the said cottages; nor had the defendant notice of the said premises in manner and form as the plaintiff hath in and by his said declaration in that behalf alleged. Conclusion to the country.

Third Plea.—That the said defendant did not, well knowing the premises in the said declaration in that behalf mentioned, wrongfully, negligently, or improperly keep or continue the said rick or stack of hay in a state and condition dangerous to the said cottages, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

Fourth plea.—That the said rick or stack of hay did not by reason of the carelessness, negligence, and improper conduct of the said defendant in that behalf, ignite, take fire, and break out into a flame, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

Fifth plea.—That the said cottages were not consumed, damaged and destroyed by reason of the carelessness, negligence, and improper conduct of the said defendant in that behalf mentioned, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

At the trial before *Patteson*, J., at the last *Shropshire* Assizes, the following facts were in evidence. The defendant had made a rick of hay near a barn which belonged to him, and the plaintiff was the owner of some cottages which were adjacent to the barn. The rick, which was made of grass carried in a damp condition, exhibited signs of being in a very heated and dangerous state for several days, and the neighbours warned the defendant that if he did not shift the hay, the rick would ignite, and they offered to assist in making a new rick. The defendant ordered a hole to be cut through the centre of the rick, but it continued to smoke for two or three days, and some of the bystanders urged him to take other preventive measures; but, after consulting other bystanders, who said that no danger

was to be apprehended, he refused to do so, and said "he would chance it." The rick subsequently ignited, and was burnt, together with the defendant's barn, in which was a quantity of corn, and the fire spread from the barn to the plaintiff's cottages, which were also destroyed. In summing up, the learned judge told the jury that it was not sufficient for the defendant to shew that he had acted *bonâ fide*, and had done everything which he thought best to prevent an accident, but that he must shew that he exercised reasonable caution, and that he acted as a prudent, and not as a rash man would do under similar circumstances. At the close of the summing up, his lordship added, that if the jury believed it was an accident, the defendant was entitled to a verdict; but if they thought the defendant had been guilty of gross negligence, then that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, damages 400*l.*

Maule obtained a rule *nisi* for a new trial, upon the ground of misdirection.

Talfourd, Serjt. and *Whateley* shewed cause.—This is not an application to arrest the judgment; and similar actions to this have been brought, and where the defendant has been guilty of carelessness, no objection has been made upon the ground that such an action cannot be maintained (*a*). The learned judge's summing up was perfectly correct. He referred the jury to the various issues which were raised, and particularly to that which related to the notice of the danger which was given to the defendant. It is clear that the defendant was put upon his guard by his neighbours, but, according to his own words, he chose "to chance it." This he might do as it respected his own property, but he was not justified in putting his neighbour's property in any danger. He knew that the hay was carried in such a damp and unwholesome state as was likely to produce spontaneous combustion, and that ought to have made him the more careful, when the rick presented an unfavourable appearance. The discussion of the degrees of caution and prudence, which is necessary in taking bills of exchange, which arose in *Gill* v. *Cubitt* (*b*), *Crook* v. *Jadis* (*c*), and other cases, is not applicable to the present case. Here the evidence was left to the jury upon the question of gross negligence, and they were fully warranted in finding their verdict in favour of the plaintiff. It is to be observed that the plea of Not Guilty, put the scienter of the defendant in issue, *Thomas* v. *Morgan* (*d*).

R. V. Richards in support of the rule.—No reliance was put by the plaintiff at the trial, upon the fact that the hay was improperly made, but it was rather assumed that the defendant had not been careless in that respect. Here the defendant's barn must have been burnt before the fire could spread

(*a*) *Talfourd*, Serj., mentioned a case tried before *Alderson*, *B.*, at the *Berks* Assizes, a few years ago, in which *Talfourd* appeared for the defendant, and *Maule* for the plaintiff. The plaintiff was the owner of a wood adjoining to the defendant's field, in which his servants were burning weeds, and in doing so they set fire to the wood. The learned Serjeant said that he did not object at the trial, that the action could not be maintained, but the question raised was, whether the defendant's servants had exercised due caution.

(*b*) 3 Barn. & Cress. 466.

(*c*) 5 Barn. & Adol. 509.

(*d*) 2 Cr. M. & Roscoe; 1 Gale, 172.

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to the plaintiff's cottages, and the defendant had therefore the strongest possible motive for adopting the best mode to preserve the rick from igniting. The defendant was not in the situation of a bailee for reward, and no contract can be implied between him and the plaintiff. As this case was left to the jury, it was difficult for them to understand the meaning of gross negligence, because they had been previously told that it was not sufficient if the defendant *bonâ fide* meant to do for the best. The degrees of prudence vary in different individuals, but a man who acts according to the best of his judgment, cannot be said to be guilty of gross negligence. In *Crook* v. *Jadis* (*e*), a distinction is taken between gross negligence, and the care to be taken by a prudent man; and *Patteson*, J., there said, "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicions of a prudent man." But here the question was so involved, that the distinction between the degrees of negligence was not put to the jury with sufficient accuracy.

TINDAL, C. J.—This is a case *primæ impressionis*, but I feel no difficulty in laying down the principle upon which it must be determined. It is not a case of bailment, but it depends upon the rule that a man must so use his own property that he shall do no hurt to his neighbour, and that rule is applicable not only where there is a direct injury, but also where the injury is occasioned through want of due care and caution. So here, although the defendant did not himself set fire to the rick, he is nevertheless intermediately the cause of its being fired, because it is a natural consequence of heaping up hay in a certain state, that ignition will take place. In *Turbervil* v. *Stamp* (*f*), a fire had been made in a field, and was so negligently kept that it burnt the corn in another close, and it was held that the defendant was liable. "For the fire in his field is his fire as well as that in his house: he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have showed it." So if experiments are made in trade, without due caution, and a fire is caused by combustion, no doubt there would be a remedy for a party who was injured, and there can be no doubt but that this injury may be the subject matter of an action on the case. Then it is said that the judge mistook the extent of the defendant's liability. The evidence was left to the jury upon the question of gross negligence; but it is contended that this was so mixed up with the observations as to ordinary care and prudence, that the jury could not properly entertain the question. It is said to be sufficient that the defendant should act honestly and *bonâ fide*, and it is objected that the degrees of prudence and care used by different individuals are so various as to afford a vague and uncertain rule, because it is impossible to say what the habits of various men may be. But this rule is universally acknowledged in the Law of Bailments, which in most instances agrees with the civil law, and in *Coggs* v. *Bernard* (*g*), Lord *Holt* speaks of the various degrees of diligence which are required in the different species of bailment. Speaking of one species, he cites *Bracton*, who says "*Talis ab eo*

(*e*) 5 B. & Ado. 910.
(*f*) Salk. 13.
(*g*) Lord Ray, 916.

desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet." This is said to be unintelligible: that is so, until the circumstances of each particular case are known; but when they are furnished, the application of the rule becomes clear; and in the present case I should have felt no hesitation in saying that the defendant was guilty of very gross and improper negligence.

PARK, J.—I am of the same opinion. A man must so use his own property that he shall not injure his neighbour, which is the principle upon which the *Berkshire* case, as well as *Turbervil* v. *Stamp* (*h*), was decided. As to the summing up of the learned judge, it was perfectly correct: it was properly left to the jury to say whether the defendant had been guilty of gross negligence; and no doubt the jury, after hearing that he had been warned of the danger over and over again, were perfectly satisfied that the charge of gross negligence was proved.

GASELEE, J., concurred.

VAUGHAN, J.—The principle upon which this case is decided is by no means new. Unless the jury had been satisfied of the existence of negligence, and gross negligence, they would have found a verdict for the defendant; but every witness proves that he was guilty of both. I agree that this rule must be discharged.

Rule discharged.

(*h*) Salk. 13.

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Jan. 24.
When further time to plead was given by the plaintiff's attorney upon being served with a paper which purported to be a judge's summons for time to plead: —*Held*, that the attorney was justified in signing judgment for want of a plea, after he had discovered that no judge's summons had been issued.

HUMFREY obtained a rule *nisi* to set aside a judgment, upon the ground that it was signed after the clerk to the plaintiff's attorney had given four days' time to plead.

Bompas, Serjt., shewed cause upon an affidavit, which stated that the consent to give four days' further time to plead was given in consequence of the defendant's clerk having served the plaintiff's attorney with a paper which purported to be a judge's summons to shew cause why the defendant should not have further time to plead; but that the plaintiff's attorney afterwards ascertained that no such summons had been obtained from a judge, and thereupon the plaintiff signed judgment. The affidavits were contradictory as to whether the defendant's attorney had acted upon the consent so given, by serving a copy of a judge's order for the time to plead, upon the plaintiff's attorney.

Humfrey contended that no fraud was intended by the defendant's attorney, and that it was not an uncommon practice for parties to attend to summonses which were not obtained at the judges' chambers, especially

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where the residences of the parties were so distant as to make it very inconvenient to obtain a summons.

TINDAL, C. J.—The defendant's attorney was guilty of a gross impropriety in fabricating this summons. It is a very serious matter; indeed it is a forgery of the judge's signature. The rule must be discharged with costs.

PARK, J., and VAUGHAN, J., concurred.

Rule discharged.

WILKINSON *v.* HALL and another (*a*).

Jan. 27—30.

The defendants entered into the following agreement:—"That they should become tenants of *Botolph* Wharf at 375*l.* a quarter, the tenancy to commence on the 14th of *June*, they paying a quarter's rent on that day; & that they should give security to pay one quarter's rent in advance as long as they should continue tenants;" and in a Bond given as a security for the rent it was recited, "That the defendants had become tenants of *Botolph* Wharf at the rent of 375*l.* a quarter, and had paid the first quarter's rent, and had agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they should hold the premises:"—*Held*, that this was a quarterly tenancy.

An estate was mortgaged in fee, subject to the usual proviso for redemption on payment of the principal and interest, on the 5th *June* 1834. It was further provided, that the mortgagor should not be entitled to call in the principal money before *December* 1840, if the interest was in the mean time regularly paid; and the mortgage deed contained a covenant that the mortgagor should hold, occupy and enjoy the estate until default should be made in payment of the principal or interest contrary to the before-mentioned provisoes: —*Held*, that this amounted to a lease of the premises by the mortgagee to the mortgagor until *December* 1840.

Whether a quarterly tenant, who wilfully holds over after his tenancy is expired, is liable to pay double value to his landlord under 4 Geo. II., c. 28.—*Quære.*

DEBT upon the statute 4 Geo. II., c. 28, s. 1, brought by the plaintiff claiming as one of the two tenants in common in fee, of a wharf and warehouses called *Botolph* Wharf, in the city of *London*, against the defendants as tenants of the same premises, to recover double the yearly value of one undivided moiety of the same premises, which it was alleged the defendants had wrongfully held over after the service upon them of notice to quit and demand of possession. The declaration contained two counts upon the statute (*b*): the first founded on a six months' notice to quit, which expired

(*a*) See *Wilkinson* v. *Hall*, 1 Hodges, 170.

(*b*) The first count of the declaration was as follows:—For that whereas the said defendants before and at the time of giving of the notice to quit and making the demand as hereinafter mentioned, and from thence until a certain day, to wit, the 14th day of *June*, 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, a certain quay or wharf and certain warehouses vaults and buildings, with the appurtenances, as tenants thereof to the said plaintiff; *that is to say, as tenants thereof for a term of years, that is to say, from year to year*, for so long a time as the plaintiff and the defendants should respectively please; and the defendants during all the time aforesaid held and enjoyed the other undivided moiety of the said tenements with the appurtenances as tenants thereof to one *William Stennett* (that is to say), as such tenants thereof for a term of years (that is to say) from year to year for so long a time as the said *William Stennett* and the said defendants should respectively please, the reversion of and in the said first mentioned one undivided moiety of the said premises with the appurtenances, during all that time belonging to the said plaintiff, and the reversion of and in the other undivided moiety thereof, during all that time belonging to the said *William Stennett*; and thereupon, heretofore, and whilst the said defendants so held and enjoyed the said first mentioned one undivided moiety of the said tenements with the appurtenances as tenants thereof to the said plaintiff, and the said other undivided moiety thereof as tenants thereof to the said *William Stennett* as aforesaid, and whilst the said reversion of and in the said first mentioned one undivided moiety thereof so belonged to the said plaintiff, and whilst the said reversion of and in the said other undivided moiety thereof so belonged to the said *William Stennett* as aforesaid, to wit, on the 11th day of *December*, 1833, he the said plaintiff and the said *William Stennett* and each of them gave notice in writing to the said defendants, and thereby demanded of and required the defendants to quit and

on the 13th day of *June* 1834, and claiming double value from that day to the 6th day of *April* 1835, when the defendants quitted possession. The second founded on a three months' notice to quit, which expired on the 13th day of *December* 1833, and claiming double value from that day to the before-mentioned 6th day of *April* 1835. The declaration also contained a count for use and occupation, claiming the single rent for six months from the before-mentioned 13th day of *December* 1833, to the before-mentioned 13th day of *June* 1834.

deliver up the possession of the said tenements, with the appurtenances, to them the said plaintiff and the said *William Stennett* or to either of them; that is to say, possession of the said first mentioned undivided moiety to him the plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof to the said *William Stennett* or the plaintiff, on the said 14th day of *June* 1834, provided the said defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises, that is to say, of the said first mentioned undivided moiety thereof, to the said plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof, to the said *William Stennett* or the plaintiff, at the end of the current year of their tenancies, which should expire next after the end of half a year from the time of their being served with the said notice. And the said plaintiff avers, that the said term and tenancy of the said first mentioned undivided moiety of and in the tenements with the appurtenances, the reversion of and in which so belonged to him the plaintiff as aforesaid, and the said term and tenancy of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid afterward, to wit, on the 14th day of *June* 1834, ended and were and each of them was duly determined by the said notice. And the said plaintiff in fact further says, that after the determination of the said tenancy of the said defendants of and in the said first mentioned undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the plaintiff as aforesaid, and after the determination of the said tenancy of the said defendants of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid, and whilst the defendants continued in possession of the entirety of the said tenements, with the appurtenances as aforesaid, and the said plaintiff was so entitled to the possession of the said first mentioned undivided moiety thereof; and whilst the said *William Stennett* was so entitled to the possession of the said other undivided moiety thereof as aforesaid, to wit, on the said 14th day of *June* 1834, the said plaintiff and the said *William Stennett* by a certain notice in writing then made and signed by him the plaintiff and the said *William Stennett* and delivered to the said defendants, demanded and required the said defendants to deliver the possession of the said tenements with the appurtenances to the said plaintiff and the said *William Stennett*, that is to say, the plaintiff thereby demanded and required the defendants to quit and deliver up the possession of the first mentioned undivided moiety of the said tenements with the appurtenances, to him the said plaintiff or to the said *William Stennett*, and the said *William Stennett* thereby required the defendants to quit and deliver up the possession of the said other undivided moiety of the said tenements with the appurtenances to him the said *William Stennett* or the plaintiff.

Averment.—That the defendants did not deliver up the possession of the premises according to the said notice and demand, but wilfully held over the same—concluding with an averment of the value of the premises, &c.

Second Count.—And whereas also, the said defendants heretofore and before the giving of the notice and making the demand in writing as in this count mentioned, to wit, on the 3rd day of *December* 1833, and from thence until a certain day, to wit, the 14th day of *December* in the same year, held and enjoyed one undivided moiety of certain tenements with the appurtenances, situate in the city of *London*, as tenants thereof to the said plaintiffs; *that is to say, as tenants thereof for the residue and remainder of a certain tenancy for a term of years* to them the said defendants theretofore, to wit, on the 12th day of *June* 1832, granted, the reversion of the one undivided moiety in this count first mentioned of the said tenements with the appurtenances in this count mentioned, during all that time belonging to the said plaintiff, and the defendants during all the time aforesaid held and enjoyed the other undivided moiety of the tenements in this count mentioned with the appurtenances, as tenants thereof to the said *William Stennett* for the residue and remainder of the said term, the reversion of and in the last mentioned moiety of the said tenements, with the appurtenances, during all that time belonging to the said *William Stennett*, and the said respective tenancies and terms afterwards, to wit, on the 14th day of *December* 1833, were and each of them was

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To the first count the defendants pleaded, first, that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the term or time in that count mentioned; secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff as in that count alleged; thirdly, that the plaintiff did not give such notice in writing to the defendants, or thereby demand of and require the defendants to quit and deliver up the possession of the said moiety of the premises as in that count alleged; and fourthly, that the supposed term and tenancy of the said moiety of the premises was not ended or determined as in that count alleged.

To the second count the defendants pleaded, first, that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the residue and remainder of the supposed tenancy and term of years in that count mentioned; secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff as in that count alleged; and thirdly, that the supposed tenancy and term of years of and in the said moiety of the premises was not ended or determined as in that count alleged.

And to the third count the defendants pleaded, that they never were indebted to the plaintiff as in that count alleged. Upon all these pleas issue was joined.

At the trial before *Tindal*, C. J., at the *London* adjourned sittings after *Trinity* Term 1835, the jury found as a fact the single yearly value of the entire premises to be 134*l*., which finding as to the value was to be binding on the parties. In other respects the jury, with leave of the learned judge, and by the consent of the said defendants, found a verdict *pro formâ* for the plaintiff, such verdict to be subject to the opinion of this Court upon the following

CASE:

On the 12th *June* 1832, the premises in question then belonging to his Majesty, and being then vested in the *Lords Commissioners of his Majesty's Treasury*, in trust for his *Majesty*, or the secretary for the time being to the said commission, for the use and service of his Majesty's Customs, the defendants entered into an agreement, of which the following is a copy:— "That Messrs. *Hall* should become tenants of *Botolph* Wharf at 375*l*. a quarter, the tenancy to commence on *Thursday* the 14th of *June*, they paying a quarter's rent on that day. That Messrs. *Hall* should give security to be approved of by the *Commissioners* of *Customs*, to pay one quarter's rent in advance as long as they continue tenants. That they should also give

determined and ended, and the said plaintiff and the said *William Stennett* after the determination thereof, to wit, on the 16th day of *December* 1833, duly demanded possession of the said tenements from the said defendants, that is to say, the plaintiff, the possession of the said undivided moiety in this count first mentioned of the said tenements with the appurtenances, and the said *William Stennett* possession of the said other undivided moiety of the said tenements with the appurtenances. And the plaintiff and the said *William Stennett* then gave a certain notice in writing to the said defendants, requiring them to deliver the possession of the said tenements to the said *William Stennett* or either of them; that is to say, the possession of the said undivided moiety in this count first mentioned of the said tenements with the appurtenances, to him the said plaintiff or to the said *William Stennett*, and the said *William Stennett* the possession of the other undivided moiety of the said tenements with the appurtenances to him the said *William Stennett* or to the plaintiff.

Averment.—That the defendants did not deliver up the possession of the premises according to the said notice and demand, but wilfully held over the same—concluding with an averment of the value of the premises, &c.

security to account for and pay over to the *Commissioners* of *Customs*, for the benefit of the assignees, such sums as they may receive for rent for goods due prior to the 14th of *June* immediately upon being required to do so. *June* 12th, 1832."

This agreement was signed by *W. J. Hall* as agent for and on behalf of the defendants, and by *J. G. Walford* as solicitor for the *Commissioners* of *Customs*, and agent for and on behalf of their secretary for the time being. On the 13th *June* 1832 the defendants, with one *Lawrence Thompson* as their surety, entered into a bond, of which the following is a copy:—

Know all men by these presents, that we, *William Hall* the elder, and *Thomas Spencer Hall* and *Lawrence Thompson*, are held and firmly bound unto our Sovereign Lord William the Fourth by the grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, defender of the faith, in the sum of 700*l.* of good and lawful money of *Great Britain*, to be paid to our said Lord the King, his heirs and successors; to which payment well and truly to be made we bind ourselves, &c.

Whereas the above bounden *William Hall* and *Thomas Spencer Hall* have this day become tenants to *Charles Andrew Scovell*, Esq., secretary to the Commissioners of Customs, in trust for his Majesty, of certain premises called *Botolph* Wharf, at the rent of 375*l.* a quarter; and whereas the said *William Hall* and *Thomas Spencer Hall* have this day paid to the said *Charles Andrew Scovell*, in trust for his Majesty, the sum of 375*l.* for the first quarter's rent, and have agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises; and whereas also there are certain sums due and payable for warehouse rent from certain parties, in respect of goods landed and warehoused at the said premises. Now the condition of this obligation is such, that if the said *William Hall* and *Thomas Spencer Hall* shall well and truly pay to the said *Charles Andrew Scovell* or his successors, the sum of 375*l.* on or before the first day of every quarter during which they hold the said premises, and shall at all times well and truly account to the said *Charles Andrew Scovell*, or to such person as he shall appoint for that purpose, for all sums received by them, or any of them, due and payable on account of warehouse rent as aforesaid, and shall permit and suffer the said *Charles Andrew Scovell*, or any person appointed by him, to inspect all books, papers and writings, in their or any of their custody relating to such last-mentioned sums, then this obligation to be void; otherwise to remain in full force and virtue.

By indentures of lease and release, bearing date 2nd and 3rd *December* 1833, the premises called *Botolph* Wharf were conveyed by the Lords of the Treasury and the Commissioners and Secretary of the Customs to the plaintiff, and to his partner *William Stennett*, their heirs and assigns, to the uses therein declared; that is to say, as to one moiety to such uses and upon such trusts as the plaintiff should by deed or deeds direct, limit, or appoint; and in default thereof, or if incomplete, to the use of the plaintiff and his assigns for life, remainder to one *John Knill Kinsman*, his executors, administrators and assigns, during the life of the plaintiff, in trust for the plaintiff, remainder to the use of the plaintiff, his heirs and assigns, for ever. Similar uses were limited and declared as to the other moiety in favour of *William Stennett*. The defendant then gave in evidence certain indentures of lease, appointment and release, bearing date respectively the 4th and 5th *December* 1832.

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By the latter deed the plaintiff and the said *William Stennett* did, and each of them did, in consideration of 13,000*l.*, direct, limit and appoint, that from and immediately after the execution thereof, the undivided moiety of each of them in the above-mentioned messuages and premises should remain and be to the use of *Wynn Ellis*, Esq., his heirs and assigns for ever (*c*),

(*c*) The following are the most material parts of this deed, which are not set out in the case. It will be seen that the Court was authorised to refer to the pleadings in the cause, and also to copies of the deeds.

"To have and to hold the said wharf or quay, hereditaments, and all and singular other the premises hereby released or intended so to be, with their appurtenances, unto and to the use of the said *Wynn Ellis*, his heirs and assigns, for ever; subject nevertheless to the proviso or condition for redemption thereof next hereinafter contained, that is to say, provided always, and it is hereby agreed and declared between and by the parties to these presents, that if the said *Thomas Wilkinson* and *William Stennett*, or either of them, or either of their heirs executors administrators or assigns, shall and do on the 5th day of *June* now next ensuing, well and truly pay, or cause to be paid, to the said *Wynn Ellis*, his executors administrators or assigns, the sum of 13,000*l.* of lawful money of *Great Britain*, together with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, to be computed from the day of the date of these presents, without making any deduction or abatement out of the said sum of 13,000*l.* or the interest thereof or any part thereof respectively for or in respect of any present or future taxes, charges, assessments, payments or impositions, or any other matter cause or thing whatsoever, then and in such case he the said *Wynn Ellis*, his heirs or assigns, shall and will at any time after such payment shall be so made as aforesaid upon the request and at the proper costs and charges of the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, reconvey the said wharf or quay and hereditaments hereby appointed and released, or intended so to be, with their appurtenances, to the use of the said *Thomas Wilkinson* and *William Stennett*, their heirs and assigns, as tenants in common, or in such manner as they respectively shall in that behalf order or direct, free from all incumbrances whatsoever made done or committed by the said *Wynn Ellis*, his heirs executors administrators or assigns. And the said *Thomas Wilkinson* and *William Stennett* for themselves jointly and severally and for their respective heirs executors and administrators, do hereby covenant promise and agree with and to the said *Wynn Ellis*, his executors administrators and assigns, that they the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, shall and will well and truly pay, or cause to be paid, unto the said *Wynn Ellis*, his executors administrators or assigns, the said sum of 13,000*l.* and the interest thereof, on or at the day or time mentioned in the aforesaid proviso for the payment thereof respectively, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents: Provided always, and it is hereby agreed and declared between and by the parties to these presents, that if the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, do and shall on the said 5th day of *June* now next ensuing, and on every 5th day of *June* and 5th day of *December* which will be in the years 1834, 1835, 1836, 1837, 1838, and 1839 respectively, and on the 5th day of *June* which will be in the year 1840, or within one calendar month next after each of the said days respectively, well and truly pay, or cause to be paid, unto the said *Wynn Ellis*, his executors administrators or assigns, half a year's interest for the said sum of 13,000*l.* after the rate aforesaid and without any deduction whatsoever, then and in such case it shall not be lawful for the said *Wynn Ellis*, his executors administrators or assigns, before the 5th day of *December*, 1840, to call in or compel payment of the said sum of 13,000*l.*, or of any part thereof; any thing in these presents contained to the contrary thereof in anywise notwithstanding: Provided always, and it is hereby further agreed and declared, between and by the parties to these presents, that if at any time or times, whilst the said sum of 13,000*l.* hereby secured as aforesaid, or any part thereof, shall remain due to the said *Wynn Ellis*, his executors administrators or assigns, half a year's interest shall be in arrear and unpaid for more than one calendar month after the time hereinbefore appointed for the payment thereof, and the interest being so in arrear, the said *Wynn Ellis*, his executors administrators or assigns, shall nevertheless neglect or forbear to call in or compel payment of the said sum of 13,000*l.*, or so much thereof as shall then be due, or shall accept interest for the same, or any part thereof, then and in such case the said *Wynn Ellis*, his executors administrators or assigns, shall not by such neglect or forbearance, or by such his or their acceptance of interest as aforesaid, be precluded or prevented from demanding recovering and receiving of and from the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, the payment of the said sum of 13,000*l.*, or so much thereof as

subject to a proviso for redemption thereinafter contained, for payment of the sum of 13,000*l.*, with interest, on the 5th day of *June* then next. It was by the same indenture further provided, declared, and agreed, that the said *Wynn Ellis* should not be entitled to call in the principal money by him advanced upon the said mortgage, before the 5th day of *December*, 1840, if the interest payable by the mortgagors in respect of such principal money was in the mean time regularly paid, according to the terms of the said deed. In the said last-mentioned deeds are also the following clauses or provisions: And that if the said sum of 13,000*l.* or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisoes or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said *Wynn Ellis*, his heirs, and assigns, at any time or times thereafter, into and upon the said wharf or quay, and hereditaments, thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever, of, from, or by the said *Thomas Wilkinson* and *William Stennett* respectively, or their respective heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance, in, to, or out of the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, or any part or parts thereof; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, and for ever discharged or otherwise, by the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, wills, entails, annuities, fines, issues, amerciaments, statutes, recognisances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, debts, and incumbrances whatsoever: Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said *Thomas Wilkinson* and *William Stennett* respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made, in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisoes or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption or disturbance whatsoever, of, from, or by the said *Wynn Ellis*, his heirs or assigns, or of, from, or by any other person or persons whomsoever,

shall then be due and the interest thereof; nor shall the said *Wynn Ellis*, his executors administrators or assigns, by such neglect or forbearance, or by such acceptance of interest as aforesaid, be precluded or prevented from immediately using any powers or remedies for recovering and compelling payment of the said sum of 13,000*l.*, or so much thereof as shall then remain due, and the interest thereof."

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lawfully or equitably claiming, or to claim, by, from, or under or in trust for him or them.

On the 7th *December*, 1833, a notice from the Lords of the Treasury and the Secretary of the Customs, and signed by them respectively, was served upon the defendants, of which the following is a copy:

Gentlemen,

We hereby give you notice, that we have sold and conveyed all that legal quay or wharf called or known by the name of *Botolph* Wharf, now in your occupation, at the rent of 375*l.* per quarter, to *Thomas Wilkinson* and *William Stennett;* and we hereby direct you in future to pay your rent to those gentlemen, and to consider them in every respect as your landlords. Dated this 7th day of *December*, 1833.

Prior to the conveyance, mortgage, and notice above stated, and while the negociations for such conveyance were proceeding, namely, on the 12th *Sept.*, 1833, a notice was served upon the defendants, of which the following is a copy:

Gentlemen,

Take notice that you are hereby required to quit on the 15th day of *Dec.* next ensuing the date hereof, or such other day on which the next quarter of your tenancy may expire, be the same the 12th, 13th, or 14th of next *Dec.*, or any other day, the peaceable possession of all that legal quay or wharf, called *Botolph* Wharf, and now in your tenancy or occupation. Dated this 12th day of *September*, 1833.

J. Ker, Secretary to the Commissioners of his Majesty's Customs on their behalf, and on their authority, and with the consent of the persons to whom the wharf is agreed to be sold.

The said *J. Ker* was the Assistant Secretary to the Commissioners of his Majesty's Customs, and acted at the Board for and on behalf of the Secretary, during his absence. On the 13th day of *September*, 1833, an order was signed with the initials of *Mr. Edward Steward*, who was acting chairman at the Board of Customs at that time, which order was to the effect following:

The solicitor having laid before the Board the form of a notice to be given pursuant to the Treasury order of the 11th instant, to Messrs. *Hall*, to quit *Botolph* Wharf, in consequence of Mr. *Wilkinson* having agreed to purchase the same,—Resolved, that the form of notice is approved; and the Assistant Secretary is hereby authorised to sign and give the above notice to quit to Messrs. *Hall*, of which the solicitor is to be apprised. The notice was signed by Mr. *Ker*, in pursuance of that order, Mr. *Scovell* the Secretary not being then present.

On the 16th day of *December*, 1833, the following demand of possession signed by the plaintiff, the said *William Stennett*, and the said *Wynn Ellis*, their mortgagee, was served upon the defendants:

To Messrs. *William Hall* and *Thomas Spencer Hall*, or whom else it may concern.

Take notice, that we the undersigned *Wynn Ellis*, *Thomas Wilkinson*, and *William Stennett*, hereby demand of and require you to deliver up to us,

or to some or one of us, the immediate and peaceable possession of all that quay or wharf called or known by the name of *Botolph* Wharf, pursuant to a notice to quit the same premises heretofore served upon you, bearing date the 12th day of *September*, 1833, and signed by *J. Ker*, therein described as Secretary to the Commissioners of his Majesty's Customs, on behalf of the said Commissioners, and by their authority and with the consent of the persons to whom the said wharf was agreed to be sold. And take notice, that in case of your neglect or refusal to deliver up the same pursuant to this notice, we shall hold you liable to pay to us, or to some or one of us, and shall, or some or one of us shall, proceed to recover from you double the value of the rent of the said premises, for such time as you shall continue to hold over the same after the date and delivery of this present notice and demand, according to the terms of the act in such case made and provided. And you are hereby further required to take notice, that this present notice and demand of possession of the aforesaid premises, shall not operate, or be taken or considered, and that the same is not meant as a waiver or abandonment of a certain notice to quit the above-mentioned premises heretofore served upon you, signed by us the undersigned, and bearing date the 11th day of *Dec.* 1833, in case the said notice so signed by the said *J. Ker* and served upon you as aforesaid, should not be legally sufficient to end and determine your tenancy of and in the aforesaid premises, on any of the days in the said last-mentioned notice specified. Dated this 16th day of *December*, 1833.

(Signed)

On the 11th *December*, 1833, the following notice to quit, mentioned in the foregoing demand of possession, and signed by the same parties, had been served upon the defendants:

To Messrs. *William Hall* and *Thomas Spencer Hall*, or whom else it may concern.

Take notice, that you are hereby required to quit and deliver up to us, the undersigned *Wynn Ellis*, *Thomas Wilkinson*, and *William Stennett*, or to the undersigned *Thomas Wilkinson* and *William Stennett*, or either of them, on the 14th day of *June* next, the peaceable and quiet possession of all that quay or wharf, called or known by the name of *Botolph* Wharf, and now in your tenancy or occupation, provided your tenancy thereof originally commenced at that period of the year, or otherwise that you quit and deliver up the possession of the said premises at the end of the current year, of your tenancy thereof, which shall expire next after the end of half a year from the time of your being served with this notice, and also provided your tenancy of and in the aforesaid premises shall not cease and determine on either of the 12th, 13th, or 14th days of this present month of *December*, by reason and in consequence or under or by virtue of a certain notice to quit the same premises heretofore served upon you, bearing date the 12th day of *September*, 1833, and signed by *J. Ker*, therein described as Secretary to the Commissioners of his Majesty's Customs on behalf of the said Commissioners, and by their authority and with the consent of the persons to whom the said wharf was agreed to be sold. And you are hereby further required to take notice, and we do hereby expressly declare that this present notice shall not operate

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or be taken or considered, and that the same is not meant as a waiver or abandonment of the said notice so signed by the said *J. Ker*, and served upon you as aforesaid, in case that notice is legally sufficient to end and determine your tenancy of and in the aforesaid premises, on any of the days therein specified. And we the undersigned *Wynn Ellis*, *Thomas Wilkinson*, and *William Stennett*, do hereby reserve to ourselves and any or either of us, full power of adopting and acting upon the said notice so already served upon you as aforesaid, and of holding you liable for the double value of the said premises in case you shall hold over the same or any part thereof after any of the days mentioned in the notice so served upon you as aforesaid, provided your tenancy shall be thereby determined. Dated this 11th day of *December*, 1833. (Signed)

The defendants did not quit or deliver up possession of the premises at the expiration of either of the notices to quit above set forth, and on the 1st *November*, 1834, an action of ejectment was commenced in the name of *John Doe*, on the three several demises of the plaintiff, *William Stennett*, and the said *Wynn Ellis*, for the purpose of recovering possession of the premises. That action was tried on the 23rd *December*, 1834, when the defendants by their counsel consented that a verdict should pass for the plaintiff in that action, subject to an order of the learned judge, that execution thereon should be stayed for five weeks from that day, and which order his Lordship was pleased to make: a verdict was taken for the plaintiff, and execution was stayed accordingly, and judgment in the said action of ejectment was not signed until the 18th *February*, 1835, and possession of the premises was obtained on the 6th *April*, 1835, under and by virtue of a writ of possession issued on the judgment. In the interval between the judgment and obtaining possession, application was made to the defendants to give up the possession. The premises being used for the purpose of landing goods, and there then being upon the premises many goods landed there upon which duties were due and payable to the Crown, and which goods could not legally be removed until the duties had been paid, and the goods in question belonging to many different individuals, the defendants did not give up an unincumbered possession of the premises; they however tendered possession thereof, with the before-mentioned goods thereon; which tender was objected to, and possession refused, on the ground that the same was not such a possession as the plaintiff in ejectment under his writ of possession was entitled to. The defendants have never paid any rent in respect of the said premises, either to the plaintiff or to his partner the said *William Stennett*.

Copies of the pleadings in this cause; of the indentures of lease and release of 2nd and 3rd *December*, 1833; of the indentures of lease appointment, and release of 4th and 5th *December*, 1833; and of the record of the judgment in ejectment of 18th *February*, 1835, in this case respectively mentioned, are annexed to, and are to be considered as parts of this case, and either party is to be at liberty to refer to them or either of them as such.

The defendants object that the plaintiff is not entitled to a verdict on any of the counts in the declaration. The objections to a verdict on either of the counts for double value are—

1st, That there was no proof whatever of any such tenancy as is stated in

the 1st or 2nd counts of the declaration, which tenancy the defendants having put in issue by their pleas, the plaintiff was bound to establish.

2ndly, That there was no evidence to prove, but on the contrary that the evidence, and particularly the deeds of the 2nd and 3rd of *December*, 1833, and of the 4th and 5th of *December*, 1833, disproved that the plaintiff was seised of the reversion at the times and in manner and form as in the 1st and 2nd counts alleged, which allegation the defendants having traversed, the plaintiff was bound to sustain.

3rdly, That the tenancy created by the agreement of the 12th of *June*, 1833, was not a tenancy for any term of life, lives, or years within the meaning of 4 Geo. 2, c. 28, so as to subject the defendants to an action for double value, if in other respects the requisites of that statute had been complied with.

4thly, That the tenancy created by the agreement of the 12th *June*, 1832, was not so put an end to as to entitle the plaintiff to sue for double value, either by notice to quit of the 12th *September*, or by that of the 12th *December*, 1833. That as respects the notice of the 12th *September*, there was no proof of any sufficient authority given to the party who signed the same, and because the notice if given by the authority of the persons then entitled to the reversion would not entitle a party to whom the reversion was conveyed after the giving the notice, and whilst it was running, to take advantage thereof, in order to sue for double value; and with respect to both notices, that if either of them determined the tenancy, still the reversion, at the time the tenancy was so determined, was not in the plaintiff, but in *Wynn Ellis*, who, if any one, ought to have sued. The defendants further object that if liable for double value at all, they were not liable for any time after the day of the demise, in the before-mentioned declaration of ejectment.

As to the count for use and occupation, the defendants object that the plaintiff could not recover, inasmuch as before the 15th day of *December*, 1833, the reversion of the premises had been conveyed to *Wynn Ellis*, and that the defendants were liable to him and not to the plaintiff. The questions for the opinion of the Court are, whether the four objections of the defendants to the claim for double value, and the objection to the claim for use and occupation above particularly stated, or any of them, are well founded?

Sir *F. Pollock* for the plaintiff.—The effect of the agreement made between the Lords of the Treasury and the defendants, was to create a tenancy in the premises from year to year, with a rent payable quarterly. But if that be not so, it must be held that it was a quarterly tenancy; and in either case the plaintiff is entitled to recover under the two first counts of the declaration. The statute 4 Geo. 2, c. 28, sec. 1, is applicable to the cases of "tenants for any term of life, lives, or years." Now in *Legg* v. *Strudwick* (*e*), it was held, that a parol demise to hold from year to year and *sic ultra quamdiu*, is a lease for two years; and *Timmins* v. *Rowlinson* (*f*) decided that a tenant from year to year, who had held over after giving a notice to quit, was liable to pay double rent under stat. 11 Geo. 2, c. 19, sec. 18. *Lit.* sec. 67. *Co. Lit.* 54 b. It is true that in *Lloyd* v. *Rosebee* (*g*), Lord *Ellenborough* seems to have been of opinion, that the stat. 4 Geo. 2, c. 28, does not apply to a weekly

(*e*) 2 Salk. 414. (*f*) 3 Burr. 1603. (*g*) 2 Camp. 452.

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tenancy, but that case never came before the Court in *Banco*, and needs confirmation. In *Wilkinson* v. *Colley* (*h*), the statute was held to be a remedial law, and was liberally construed. Then it is objected that the plaintiff had no reversion in the premises sufficient to satisfy the allegation in the declaration. It is well established that a tenant cannot set up the title of the mortgagee against the mortgagor, *Doe*, d. *Bristow*, v. *Pegge* (*i*); nor can a defendant who has come in under the plaintiff shew that his landlord's title is expired, *Balls* v. *Westwood* (*k*). In *The King* v. *St. Michaels* (*l*), Lord *Mansfield* said, that it was an affront to common sense to say the mortgagor is not the real owner of an estate; and that decision was recognised in *The King* v. *the Inhabitants of Edington* (*m*). But the deed of the 4th and 5th of *December*, 1833, contained a proviso, that the mortgagee should not be entitled to call in the principal money before the 5th *December*, 1840, if the interest was in the mean time regularly paid. Now this gave to the plaintiff a legal interest in the premises and the rents thereof, and must be construed as a lease for seven years. It must be taken that the interest has been regularly paid, and the mortgagee is therefore prevented, by this proviso, from maintaining an action of ejectment to recover the premises; nor could he recover the rents or profits. In *Evans* v. *Thomas* (*n*), it was said, that it had been adjudged that if one covenants and grants with another, that he shall have and hold his lands for so many years, it is a good and absolute lease. In the present case there is a covenant from the mortgagee that the mortgagor shall "have, hold, occupy, possess, and enjoy" the premises, until default should be made in payment of the principal money, "contrary to the aforesaid provisoes or agreements for the payment of the same." This would therefore enure as a lease, or an interest in the land equivalent to a lease, so as to entitle the mortgagors to bring ejectments in their own name. *Powsely* v. *Blackman* (*o*), *Richards* v. *Sely* (*p*), *Jemmot* v. *Cooly* (*q*).

As to the fifth objection it was held in *Soulsby* v. *Neving* (*r*), that after a landlord has recovered in ejectment against his tenant, he may maintain debt upon the statute for double the yearly value of the premises, during the time the tenant held over, after the expiration of the landlord's notice to quit.

Bompas, Serjt., *contrà*. (*Wilde*, Serjt. and *Channell* were with him.) The plaintiff is not entitled to recover upon either of the two first counts in the declaration. If reliance was placed upon the authority of the 67 sec. of *Littleton*, where it is said that "if tenements be let to a man for a term of half a year, or for a quarter of a year, &c. In this case, if the lessee commit waste the lessor shall have a writ of waste against him, and the writ shall say *quod tenet ad terminum annorum*," then this declaration is defective, because it is added "but he shall have an especial declaration upon the truth of his matter." Here the declaration does not disclose the true tenancy, which was a quarterly one, but the first count states that the defendants held "for a term of years, from year to year," and the second describes it as "a tenancy for a term of years." This was a quarterly tenancy, determinable on three

(*h*) 5 Burr. 2694.
(*i*) 1 T. Rep. 758.
(*k*) 2 Camp. 11.
(*l*) 2 Doug. 630.
(*m*) 1 East, 288.
(*n*) Cro. Jac. 172.
(*o*) Cro. Jac. 659.
(*p*) 2 Mod. 80.
(*q*) 1 Levinz, 170.
(*r*) 9 East, 310.

months' notice, similar to that in *Kemp* v. *Derrett* (*s*). If that be so, then the stat. 4 Geo. 2, c. 28, does not apply to this case; and *Lloyd* v. *Rosbee* (*t*) is an express authority upon that point. Lord *Ellenborough* there says, "This is a penal statute, and is to be construed strictly. A tenant from week to week I therefore cannot include in the description of 'tenant for life, lives, or years.' And I do not remember any instance of a tenant for a less time than a year being held within this Act of Parliament." The construction which has been put upon the mortgage deed cannot be supported. The only covenant for the redemption of the premises is that which is contained in the first proviso to pay the principal money in *June*, 1834, and then follows a covenant from the mortgagors to pay on that day. The second proviso will not operate at all in a Court of Law, although it may perhaps be noticed in equity. Upon the default to pay on the 5th *Jan.*, 1834, the estate of the mortgagee became absolute in law, and after default a mortgagor becomes a mere tenant at will, or sufferance, to the mortgagee, *Powseley* v. *Blackman* (*u*), *Smartle* v. *Williams* (*v*), *Moss* v. *Gallimore* (*w*); and the possession of the mortgagor is the possession of the mortgagee, *Birch* v. *Wright* (*x*), *Pope* v. *Biggs* (*y*). *Evans* v. *Thomas* (*z*), which has been relied upon, is rather an authority for the defendants, because it was held that a covenant to levy a fine, upon condition that if A. should pay 100*l.* within thirteen years to B. it should be to the use of B., did not amount to a lease. In *Drake* v. *Munday* (*a*), where it was decided that a grant amounted to a lease, an annual rent was reserved. Lastly, it is quite clear that this action must be brought by the party who has the legal estate vested in him, *Balls* v. *Westwood* (*b*), *Morgell* v. *Paul* (*c*), *Lumley* v. *Hodgson* (*d*).

Pollock in reply.—The agreement in this case shewed that a yearly tenancy was intended. If this had been the letting of a farm, then a yearly tenancy would have been presumed for the sake of protecting the tenant; but the same inconvenience may arise in the case of a wharf, because the traffic which is carried on is much greater at some periods of the year than at others. The objection, that the declaration ought to have been special, cannot be raised now, because it was not taken at the trial. Then according to the doctrine laid down in *Co. Lit.* 54 b, the holding for a quarter is evidence of a holding for years.

TINDAL, C. J.—This is an action of debt, and in the two first counts of the declaration the plaintiff seeks to recover double the value of certain premises; and the third count claims single rent, for six months, from the 13th day of *December*, 1833, to the 13th day of *June*, 1834. In the first count, for double value, the plaintiff alleges that the defendants held the premises for a term of years, that is to say, from year to year, for so long a time as the said plaintiff and the defendants should respectively please, and that by a notice to quit, this tenancy was determined on the 14th of *June*, 1834; and in the

(*s*) 3 Camp. 509.
(*t*) 2 Camp. 452.
(*u*) Cro. James, 659.
(*v*) 1 Salk. 245; 3 Lev. 387, S. C.
(*w*) Doug. 279.
(*x*) 1 T. Rep. 383.
(*y*) 9 B. & Cress. 251.
(*z*) Cro. Jac. 172.
(*a*) Cro. Charles, 207.
(*b*) 2 Camp. 11.
(*c*) 2 Man. & Ry. 303.
(*d*) 16 East, 99.

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second count it is stated that the premises were held for the residue of a certain tenancy for a term of years which ended on the 14th day of *December*, 1833. There is a plea of *non tenuit* to both these counts, and the first question is, whether either of these allegations of tenancy are made out: and I am of opinion that they are not. Taking the statement of the commencement of the tenancy under the Lords Commissioners of the Treasury, as it appears in the agreement, or in the recital in the bond, the construction appears to me to be that the premises were taken at a certain sum per quarter, and that a quarterly tenancy only was created. Look at the allegation contained in the bond. It recites that the defendants had become tenants to the Commissioners of Customs of *Botolph Wharf*, at the rent of 375*l.* a quarter: if it had rested there, the nature of the holding would be a matter of some doubt and uncertainty, but it goes on to state that the defendants had that day paid the sum of 375*l.* for the first quarter's rent, and had agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they held the premises: these words seem to carry the intention of the parties no further than a quarter of a year. If we look again at the situation of the parties, it is not improbable that the Commissioners of the Treasury should make such an agreement. Nothing could be more probable than that they would sell these premises, and how much more likely were they to do so, if they demised them only for a quarter of a year? But if the matter remained *in dubio*, the parties have themselves put this construction upon the agreement, for the Lords of the Treasury gave the defendants a notice to quit at the end of the next quarter of the tenancy. Therefore I think that the plaintiff is not entitled to recover upon the two first counts.

This makes it unnecessary to give our decision upon other points in the case. We need not say whether the statute 4 Geo. 2 does or does not apply to quarterly holdings: we neither affirm it nor deny it. I now come to the last count, for use and occupation. I agree that inasmuch as the defendants have never paid rent to the plaintiff, whilst he had the legal estate, they are not estopped from shewing in this action that the plaintiff had not the legal reversion in the premises. It appears that *Wilkinson* and *Stennett* purchased the premises on the 3rd of *December*, 1833, and on the 5th of *December* following, they conveyed the premises to *Wynn Ellis* by way of mortgage. The plaintiff had the legal estate vested in him between the 3rd and 5th of *December*, but there was no act of recognition on the part of the tenants. Now the question arises on the effect of this conveyance, and there can be no doubt but that it operated so as to vest the legal inheritance and fee-simple in the mortgagee, from the very day on which it was executed. But the question is, whether the proviso does not operate so as to create a lease of the premises from the mortgagor to the mortgagees, for seven years, and I am of opinion that it does so operate. After the first proviso for the redemption of the premises, there follows a covenant from the mortgagee that it should not be lawful to call in the principal money until the 5th day of *December*, 1840; and then there follows a proviso that it should be lawful for the mortgagors peaceably and quietly to occupy and enjoy the premises, and to take the rents and profits thereof for their own use, until default should be made in payment of the principal money or the interest thereof, contrary to the provisoes and the true intent and meaning of the indenture.

It is contended that this has reference only to the stipulation that the

principal money should be paid on the 5th day of *June* then next; but the first proviso, which is in favour of the mortgagee, was altered by the subsequent provision, that if the interest was regularly paid, it should not be lawful for the mortgagee to call in the principal money before the year 1840, and we must look at the meaning of the parties, as it is to be collected from the whole of the deed. The effect of it therefore seems to me to be, to give the mortgagors a lease for seven years, subject to be divested at the end of every half year, on the nonpayment of the interest. What injury could it be to the mortgagee that he should allow the mortgagor to remain in possession of the property, when he is certain that if the interest is not paid, he may enter and recover both principal and interest? I cannot see that any injury could result, and this case comes within the principle laid down in *Bacon's Abr.* tit. *Leases.* "That whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." I conceive, therefore, that there was in this case such an estate vested in the plaintiff, which has not yet been divested out of him, as to enable him to support the averment in the third count of the declaration.

PARK, J., concurred.

GASELEE, J., I have not been present at the arguments, and therefore I shall give no opinion.

VAUGHAN, J.—There is nothing in this case to shew a yearly taking of the premises. It seems to me clearly to amount only to a tenancy from quarter to quarter. A quarterly rent is reserved, and the penalty of the bond is only in double the amount of a quarter's rent. It is a great and a grave question, whether any thing less than a yearly tenancy is within the stat. 4 Geo. 2, but I forbear from giving any opinion upon it. As to the question whether the count for use and occupation can be maintained, I am of opinion that it can. The mortgage deed shews a studious attempt to give the mortgagors the legal right to hold the premises until 1840, unless default was made in payment of the interest; and I believe in modern times it has been usual to insert such special provisoes into mortgage deeds. What is necessary to support an action for use and occupation? The occupation by the defendant must be shewn, the value of the premises, and that the defendant occupied by the permission of the plaintiff. In this case the two first requisites are admitted to exist, and the last must be necessarily implied.

Judgment for the defendants on the first and second counts, and for the plaintiff on the third count.

Nov. 12.

JAMES *v.* SALTER and another (*a*).

The limitation affecting a right to recover a rent charge granted by will, is twenty years from the death of the testator, under 3 & 4 Wm. 4. c. 27, sec. 2.

REPLEVIN.—The declaration alleged that the defendants took and detained certain chattels in a dwelling-house and lands in the parish of *Uffculme*, *Devon*. The defendants avowed and made cognizance that the said dwelling-house, land, and premises in which, &c., heretofore to wit, on the 10th *November*, 1804, were the freehold premises of one *James Salter*, since deceased, late father of the defendant *Salter*, and continued so until and at the time of the decease of the said *J. Salter*; and that the taking of the said goods and chattels, as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said *J. Salter* deceased, bearing date the 3rd of *August*, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.*, given and bequeathed in and by the said will to the said defendant *Salter*, and charged and chargeable on the said freehold premises of the said *J. Salter*, deceased; and because the sum of 870*l.*, part of the said annuity, yearly rent, or sum of 30*l.* accruing due at *Christmas-day* last, was behind and unpaid for the space of twenty days after the said *Christmas-day*, the same having been lawfully demanded and not paid, the defendant, *Salter*, in his own right avowed, and the other defendant as bailiff to the defendant *Salter*, acknowledged, the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears according to the purport, tenor, and effect of the said will, concluding with a verification.—*Pleas* in Bar.—Secondly, that the said distress in the avowry and cognisance mentioned was not made at any time within twenty years next after the time at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant *J. Salter:* concluding with a verification. Thirdly, that the said distress was not made within six years after the said arrears, in respect of the said annuity, yearly rent, or sum of 30*l.* first became due—concluding with a verification.

Replication to the second plea,—That so far as the same related to 585*l.*, part of the money in the avowry and cognisance mentioned, the distress was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant *Salter*; and as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognisance mentioned, the defendants relinquished their avowry and cognisance and prayer of judgment, so far as the same related thereto.

To the third plea.—That the distress was made within six years next after the arrears in respect of the annuity, yearly rent, or sum of 30*l.* first became due. Issue was joined on both pleas. At the trial at the last *Devon* Assizes, the jury found a special verdict, which set out the will of *James Salter*, the father of the defendant *Salter*, by which it appeared that he had charged his freehold property with the annuity set forth in the avowry; that the said

(*a*) See *James* v. *Salter*, 1 Hodges, 405.

J. Salter, the father of the defendant *Salter*, died in the year 1804; that on the 17th *March*, 1835, the defendant *Salter*, and the other defendant as his bailiff, took the chattels in the declaration mentioned, as, for, and in the name of a distress, for the sum of 870*l.* for twenty-nine years' arrears of the said annuity, ending at *Christmas*, 1834, and that the defendant *Salter* never received any part of the said annuity.

Crowder for the plaintiff.—By sec. 2, stat. 3 and 4 Wm. 4, c. 27, it is enacted that "no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims: or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry, or distress, or to bring such action, shall have first accrued to the person making or bringing the same." By section 1 it is declared that the word "rent" shall extend to all annuities payable out of land: therefore it is clear that the present case is provided for by the second section, unless its operation is restricted by the words used in the third section. It was contended on a former occasion that it was so restricted, in consequence of the introduction of the words "other than a will," but a careful examination of the whole statute will shew that this construction cannot be supported. The third section declares, when the right shall be deemed to have accrued; first, when a party shall have been dispossessed; secondly, when the estate of a deceased person is claimed; and then follows the third branch, upon which the present question turns: "and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any interest (other than a will) to him or some person through whom he claims by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument." Now this section did not purpose to provide for every possible case which might arise under the second section; and it is obvious that in the case of an annuity granted by will, the right would first accrue on the death of the testator, and no explanation was required upon this point. If it be asked to what case the third branch of the third section is applicable, the answer is, that it contemplates the case of an estate or interest in possession, granted by an instrument, the terms of which leave it doubtful when it would take effect. But if it should be held necessary to shew that this case is included in the third section, then inasmuch as it must be taken that the statute intended to provide for this case, it might be brought within the fourth branch of the section, which is applicable "to an estate or interest in reversion, or remainder, or other future estate or interest." At all events, the 40th section includes the case of an annuity granted by will, as it is within the description of money charged upon or payable out of land; and the 42nd section is applicable to arrears, after any part of the annuity has been paid.

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Butt, contrà.—The second section must be taken in connexion with the third, and by the words "other than a will," the case of an annuity secured by a will is expressly exempted. The exemption was probably introduced to prevent the injustice which would result where a will was kept out of sight or lost, for many years. The form of the issue which is raised prevents the fortieth section from being prayed in aid, but if it could be, it would afford no answer, because it is only applicable to the case of conventional rents by parol, *Paget* v. *Foley* (*b*). As to the last issue the plea is not pleaded as a bar to the title to the annuity itself, but it merely alleges that the distress was not made within six years after the said arrears in respect of the annuity became due; now it is clear that the distress was made within that time.

Crowder was heard in reply.

Cur. adv. vult.

TINDAL, C. J.—The question which has been argued before us arises upon a special verdict found on the second and last issues raised between the parties to this action; the second issue being upon the question "whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognisance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof being arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant *John Salter*, and the last issue being upon the question whether the distress in the avowry and cognisance mentioned was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.* first became due. Of these two issues the first appears to us to be the principal, and indeed the only important one; for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant *Salter* to the annuity is altogether barred, and he cannot in any view of the case be allowed to recover the arrears for the last six years, to which only the pleadings on which the last issue is raised can be held to apply. The facts which are found by the special verdict on the two issues are few, and simple. That *James Salter*, the father of the defendant of that name, by his will, duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to *John Salter*, the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.* by four quarterly payments, to commence on the first quarterly day of payment after his decease, with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will, and that on the 17th *March*, 1835, the defendants distrained for 870*l.*, for twenty-nine years' arrears of the annuity ending at *Christmas*, 1834. Upon this state of facts it appears that the right to make a distress for the annuity first accrued to *John Salter*, the son, on the expiration of the twenty days next after the first quarterly day of payment subsequent to the testator's death, that is, at the very latest, some time in *April*, 1805. It also appears, that so far as there is any allegation on

(*b*) 2 Hodges, 32; 2 Bing. N. C. 679.

the record, on any finding by the jury, there was no payment or receipt of the annuity by the defendant *Salter*, before the distress was put in in *March*, 1835, for it was then put in by the defendant for the whole of the arrears since the death of the testator. And although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing from the record that no distress was made for twenty-nine years after the right to distrain first accrued. Now upon reference to the statute 3 and 4 W. 4, c. 27, it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made; the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The second section contemplates and provides for the case where the right or title to the annuity itself is disputed, and directs that no person shall make a distress for any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same. The forty-second section contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made for arrears due; and for that purpose directs that no arrears of rent shall be recovered by any distress but within six years next after the same respectively shall have become due. The second issue arises upon a plea in bar framed upon the second section. The last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the forty-second section. Now with respect to the second issue, it is manifest that the facts found in the special verdict will bring the case precisely within the provision of the second section of the act, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section does in terms exclude from the operation of the second the claim of any person whose right to a rent is derived under a will by reason of the words "other than by will," which are found in the third section; and when this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the judges then in Court that the present case was excluded from the operation of the second section, by reason of its not being comprehended within the third, which third section appeared to us upon a more hasty view to contain an enumeration of instances to which only the second section could be held to be applicable (*a*). For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother *Vaughan* entirely concurs with us) that this case is governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity. That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon

(*a*) See *James* v. *Salter*, 1 Hodges, 405.

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a more close examination of the third section, the object and intent of it seem to us to be no more than this, to explain and give a construction to the enactment contained in the second clause, as to the time at which the right to make a distress for any rent shall be deemed to have first accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances except those enumerated in the third section. Again, if the words "granted by any instrument other than by will" were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for the instance in the third section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, or other future estates or interests, is large enough to comprehend, and would comprehend all executory devises. And again, section 40 expressly provides for the case of any legacy; and indeed the words "by any instrument other than by will," carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz., the devise of an estate in possession in land, or of an estate in possession in a rent charge first created by the will, would be altogether unprovided for by the statute; for the third class of instances enumerated in section 3 describes the grant to be by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent, for the devisor who has by his will carved an estate in land, out of the estate whereof he was seized, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee, still less can the devisor who creates a new rent-charge by his will be said to have been in the receipt of the rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant *Salter* to the annuity is barred by the lapse of twenty years, since his right to distrain first accrued, and that the verdict upon the second issue must be entered for the plaintiff. As to the last issue, founded upon the limitation of six years, given by the forty-second section, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by

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such finding. For there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowants claim to a return of the cattle, &c. is completely barred, whatever may become of the other pleas in bar. Now taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due; for upon the last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years. We therefore think the verdict on the last issue must be entered for the defendant, but that upon the whole record the judgment must be for the plaintiff.

Judgment for the plaintiff.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term, 1837.

BOULTON *v.* WELCH.

April 27.

In an action on a bill of exchange by indorsee against indorser, the defendant pleaded that he did not have notice of the presentment of the bill to the acceptor, and of the non-payment thereof; and issue thereon:—*Held*, that proof of the delivery of the following letter from the plaintiff to the defendant, was insufficient to sustain this issue. "The promissory note for 200*l*. drawn by H. S., dated the 18th of *July* last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith."

ASSUMPSIT on a promissory note, made on the 18th of *July*, by *H. T. Stanley*, whereby he promised to pay to his own order 200*l*. three months after the date thereof; and indorsed by *Stanley* to one *Braddon*, who indorsed it to the defendant, and afterwards indorsed to the plaintiff. The declaration averred that *Stanley* did not pay the bill, although the same was presented to him on the day when it became due, "of all which the defendant then had due notice."

Plea—that the defendant did not have notice of the said presentment to the said *H. T. Stanley*, and of the non-payment by him of the said note *modo et formâ;* and issue thereon.

At the trial before *Park*, J., the plaintiff proved that before ten o'clock on the 22d of *October*, he had put a letter into the post, directed to the defendant, of which the following is a copy:—

"33, *Northampton Square*,
"22d *October*, 1836.

"Sir,—The promissory note for 200*l*. drawn by *Henry Stanley*, dated 18th of *July* last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith.

(Signed,) "*W. J. Boulton.*"

It was objected, on behalf of the defendant, that this letter did not contain sufficient notice of the presentment and dishonour of the note. The learned judge reserved the point, and a verdict was found for the plaintiff. A rule *nisi* was obtained for leave to enter a nonsuit upon the point reserved. *Hartley* v. *Case* (*a*), and *Solarte* v. *Palmer* (*b*), were cited.

(*a*) 4 Barn. & Cress. 339. 6 D. & R. 505. (*b*) 7 Bing. 530. 5 M. & P. 475. 1 Cr. & J. 417.

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Talfourd, Serjt., shewed cause.—In *Hartley* v. *Case* (*c*), there was only a request to pay, without any notice of dishonour; and in *Solarte* v. *Palmer*(*d*), the following letter, which was sent by the attorney of the holder, was clearly insufficient, because it contained a mere demand of payment.

"A bill for 683*l*., drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A., with directions to take legal measures for the recovery thereof, unless immediately paid."

In the present case, the letter contained notice of the presentment and non-payment by the drawer; and therefore both the cases relied upon are clearly distinguishable, and the Court will not extend those decisions further. By necessary intendment, which must be apparent to every mercantile man, the letter contains sufficient notice. [*Tindal*, C. J.—We must be guided by the precedents. A merchant could certainly entertain no doubt. *Bosanquet*, J.—*Solarte* v. *Palmer* (*d*) was confirmed in the House of Lords; and I remember hearing Lord *Eldon* say, that a judgment in the House of Lords was deserving of respectful attention, although it was decided by a majority of *one*, against the opinions of all the judges.]

Busby, *contrà*.—Upon the issue which is raised by these pleadings, and which is twofold, the letter is clearly insufficient. The plaintiff is bound to shew that the defendant had notice of the presentment, and also of the non-payment of the note. [*Tindal*, C. J.—I suppose the letter was sent to the special pleader, to enable him to frame this plea.] The letter does not contain any notice that the note was presented for payment; and the statement that it was returned to the plaintiff unpaid, is quite consistent with the fact of its being in the hands of a third party, who failed to present it in due time. The authorities are decisive to shew that the notice of dishonour should state the presentment and non-payment, as specific facts.

TINDAL, C. J.—I do not see how it is possible to distinguish this case from the two authorities which have been cited, without refining very subtilely upon the rule which they have established. The form of protest which is given by stat. 9 & 10 W. 3, c. 17, is "Know all men, that I, A. B., on the day of at the usual place of abode of the said have demanded payment of the bill, of the which the above is the copy, which the said did not pay; wherefore I, the said do hereby protest the said bill, dated the day of ." The two important points contained in the notice, are, first, that the payment was demanded; and, secondly, that the payment was not made. It seems to me that in the present case the notice is insufficient, and this rule must be made absolute.

PARK, J.—I am satisfied that an ordinary person would be able to collect from this letter, that the note had been presented and was unpaid; but after the two decisions which have been referred to, I cannot hold that this notice is sufficient.

(*c*) 4 Barn. & Cress. 339. 6 D. & R. 505. (*d*) 7 Bing. 530. 5 M. & P. 475. 1 Cr. & J. 417.

BOSANQUET, J.—I cannot distinguish this from the two cases which have been cited.

COLTMAN, J.—I am of the same opinion, and must say that too great a looseness is apparent, in the mode in which mercantile transactions of this kind are conducted.

Rule absolute.

TYLER *v.* CAMPBELL.

April 18.

BARSTOW moved for a rule to discharge the defendant out of custody, on entering a common appearance, upon the ground that the affidavit to hold to bail was defective. The affidavit stated that the defendant was justly and truly indebted to the plaintiff in 800*l.*, for so much money due from the defendant to the plaintiff, upon the balance of an account stated between the defendant and the plaintiff. This form differs from that which is given in *Tidd*'s Forms (*a*), where the account is alleged, as being "stated *and settled*" by and between the parties. It may be perfectly consistent that the plaintiff should believe that the defendant is indebted to him on an account stated between them, when he would nevertheless be unable to state that the account was settled. In *Visger* v. *Delegal* (*b*), Lord *Tenterden*, C. J. said, "There are certain forms of affidavits to hold to bail in common use, and generally known and understood. The safest course is, that individuals should conform to these and not depart from them, and then call upon the Court for such a construction as may remedy the fault."

An affidavit to hold to bail for money due from the defendant on the balance of an account stated, is sufficient, without stating that the account was stated *and settled*.

TINDAL, C. J.—The forms of the common counts in pleading, which have been promulgated by the judges, state no more than that the sum claimed is due on an account stated. As this affidavit in substance follows the allegations in those forms, I think it is sufficient.

BOSANQUET, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule refused.

(*a*) *Tidd*'s Forms, 9th ed. 78.

(*b*) 2 Bar. & Adol. 572.

ERNEST *v.* BROWN.

April 18.

DEBT for goods sold and delivered. *Plea*—Except as to 3*l.* 7*s.*, *nunquam indebitatus*, and a payment of 3*l.* 7*s.* into Court. The bill of particulars delivered by the plaintiff was as follows:—

For a cart sold - - -	£5	0	0
Deduct, paid by *N. Brown* - -	1	13	0
	3	7	0

In debt, under a plea of *nunquam indebitatus*, payment must be pleaded, although the plaintiff has given credit for the sum paid, in the bill of particulars.

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At the trial, before *Tindal*, C. J., at the *London* sittings after *Hilary* Term, the defendant offered evidence of the payment of 1*l.* 13*s.* to the plaintiff; but the learned judge refused to receive it, as there was no plea of payment on the record, and a verdict was found for the plaintiff, with nominal damages.

R. Alexander moved to set aside the verdict, and to enter a verdict for the defendant. The bill of particulars admitted the receipt of 1*l.* 13*s.*, and therefore it must be considered as if it was struck out of the demand. In *Coates* v. *Stevens* (*a*), *Parke*, B. observed, "You have no necessity to plead the payment of the sum of 10*l.*, as that was admitted by the particulars."

TINDAL, C. J.—That was in an action of assumpsit, which is very different (*b*). Here you say that you never were indebted to the plaintiff. Strong as the admission is, it is no more than evidence of payment; but it cannot be set up in bar of this action (*c*).

BOSANQUET, J.—The plea of ***nunquam indebitatus*** was framed, in order that payment might be pleaded. Here the debt was once due.

COLTMAN, J., concurred.

Rule refused.

(*a*) 2 Cr. M. & R. 118. 1 Gale, 75.
(*b*) *Shirley* v. *Jacobs*, 1 Hodges, 214.
(*c*) See *Brown* v *Daubeney*, 1 Har. & Wol. 646, where *Patteson*, J. came to a similar decision.

April 27.

CHOLMONDELEY, Executrix of HEBER, *v.* PAYNE and another.

The first count of a declaration set out a contract that the defendants, together with the auctioneer employed, would be responsible for the proceeds of the sale of certain books: the second count, that the defendants alone would be responsible:—*Held*, that these counts did not shew a distinct subject-matter of complaint, within Reg. 5, Hil. T. 4 W. 4.

F. ROBINSON obtained a rule *nisi*, calling upon the plaintiff to shew cause why one of two special counts in the declaration in this cause should not be struck out, under R. 5 & 6 Hil. T. 4 W. 4. The first count alleged that the defendants undertook to sell certain books, upon the terms of preparing catalogues, advertising the sales and settling with the auctioneers at a commission of twelve and a half per cent.; and that the defendant should be responsible, together with the auctioneers, for the proceeds of the sales, having power to give certain credit to the booksellers. The second count stated, that in consideration of the plaintiff retaining the defendants to sell upon commission, certain books, manuscripts, and prints, the defendants undertook to be responsible for the prices of the same; that the goods were sold, but that the defendants did not pay the money received by them.

An application had been previously made to a learned judge at chambers, who declined to make any order, but referred the matter to the Court.

Butt shewed cause upon an affidavit, which stated that the action was brought to recover two separate sums of 800*l.*, and that the plaintiff was advised that the two counts were necessary. The two counts disclose two different and distinct causes of action; and if it be doubtful whether the causes are distinct, the Court will not interfere. The new rule must be construed with reference to the Statute of Amendments, 3 & 4 W. 4, c. 42, s. 23,

and it is obvious that if the plaintiff failed at *Nisi Prius* in proving the first count, proof of the contract set out in the second count would not support the declaration; and the judge would not amend the record. [*Bosanquet*, J.—The rule directs that if a judge at chambers shall be satisfied that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of each count, he indorses upon the summons that he is so satisfied; and then if the plaintiff fails to establish a distinct matter upon each count, certain consequences follow. Are you willing to take both counts upon the usual terms?] The defendants are not in a situation to require this, because the counts are obviously distinct, and the judge at chambers has refused to interfere; and this Court has no jurisdiction to interfere, because the rules only direct application to be made to a single judge. [*Tindal*, C. J.—But here the judge refers the question to the Court.]

Robinson, contrà.—The first contract must be in writing, and the defendants must plead several long special pleas, which will be unnecessary if the other count were pleaded alone. At the trial, the judge will exercise his power of amending the record, as in *Hanbury* v. *Ella* (*a*), where the record was amended by substituting the word "guarantee" for "pay." The present case comes precisely within the terms of the first example in the rules: "Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." In *Jenkins* v. *Treloar* (*b*), a count for 4*d.* as toll for performing meterage, and a count claiming the same sum as a port duty, were held inadmissible.

TINDAL, C. J.—I cannot say that these counts disclose two distinct and different causes of action. The rule must be made absolute, subject to its being referred back to the learned judge: and if he is satisfied that a distinct matter of complaint is intended to be established, the usual indorsement may be made.

PARK, J.—I think we have no power to interfere; it must go back to the judge at chambers.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute to strike out the second count, with costs, unless the judge at chambers should exercise his discretion as directed by the rule (*c*).

(*a*) 1 Ado. & Ellis, 61. 3 Nev. & Man. 438.
(*b*) 1 M. & Wels. 16. 1 Gale, 360.
(*c*) See *Leuckart* v. *Cooper*, 1 Hodges, 16; *Lawrence* v. *Stevens*, 1 Gale, 164; *Thoroton* v. *Whitehead*, 1 Gale, 359; *Roy* v. *Bristow*, 1 Murphy and Hurlstone, 39.

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April 19.

BRITTON *v.* JONES, Administratrix of JONES.

Upon an issue whether an administratrix, had assets at the commencement of the suit, the plaintiff proved that the intestate, twelve months before his death, had purchased certain furniture, which was seen after his decease, in a house where he lived with the defendant, his sister. The defendant proved, that he was merely a lodger in the house.—*Held*, that there was *primâ facie* evidence of the possession of assets.

THIS was an action for money had and received by the intestate. *Plea.*—*Plene administravit. Replication.*—That the defendant had assets at the time of the commencement of the suit, and issue thereon.

At the trial before the under-sheriff of *Glamorganshire*, the plaintiff proved that the intestate, twelve months before his death, had purchased twelve mahogany chairs, which were seen after his decease in a house in which he lived, and where his name was on the door. The defendant, who was the intestate's sister, proved that he was in needy circumstances, and that he lived in the house as her lodger, with his mother. The under-sheriff held that there was evidence of the possession of assets, and a verdict for 4*l.* 4*s.* was found for the plaintiff.

E. V. Williams, moved to enter a nonsuit, upon the ground of misdirection. He contended that there was no evidence to go to the jury, unless it had been shewn that these goods came into the hands of the defendant.

TINDAL, C. J.—The only question is, whether the plaintiff did not make out a *primâ facie* case, and I think he did. It appears that the defendant was the intestate's sister; that she lived in the same house with him, and took out the letters of administration. The evidence which was offered might have been rebutted.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

May 6.

WILLIE *v.* PHILLIPS.

After a writ of summons was issued, but before it was served, the defendant paid the plaintiff the debt, but afterwards refused to pay the costs of the writ; whereupon the plaintiff's attorney delivered a declaration, and proceeded with the action. The court ordered the proceedings to be stayed on payment of the costs of the writ, but refused to make the defendant pay the costs of the declaration.

KELLY obtained a rule *nisi*, calling upon the defendant to shew cause why an order, made by Lord *Denman*, C. J., should not be set aside. On the 18th of *February* a writ of summons was issued against the defendant, and several ineffectual attempts were made to serve it. On the 25th of *February*, before the writ was served, the defendant paid the plaintiff's clerk the amount of the debt; but, upon application being made, he refused to pay the plaintiff's attorney the costs of the writ, whereupon, on the 3d of *March*, the writ having been previously served, and the defendant having refused to pay the costs of it, a declaration in the action was delivered Upon application being made the proceedings were ordered to be stayed without costs, which was the order complained of.

Wilde, Serjt., shewed cause.—When the debt was paid, the writ had not been served, and the plaintiff had no right to proceed to recover his costs.

Kelly, contrà.—It appears by the affidavits that the defendant was informed by the plaintiff's clerk, when he paid the debt, that a writ had been issued, and that he would be required to pay the costs of it, which he promised to do; and that application was made for payment of the costs, several days before the declaration was delivered, but the defendant refused to pay; the rule ought therefore to be made absolute.

TINDAL, C.J.—It appears to me that the order could not have been disturbed, if it had stayed proceedings on payment of the costs of the writ of summons. The writ was issued before the debt was paid, and therefore the costs of it ought to be paid by the defendant; but under the circumstances the plaintiff ought not to have gone on with the action. The order must be amended to stay the proceedings, on payment of the costs of the writ.

BOSANQUET, J. and COLTMAN, J., concurred.

Rule absolute accordingly.

POLE *v.* ROGERS.

May 8.

Under the Interrogatories' Act (1 Will. 4, c. 22), the court gave the parties a mutual power to cross-examine witnesses in *Paris* and *Boulogne*, *vivâ voce*, and directed that the cross-examinations should be taken down in writing, and returned with the commission.

THIS was an action on a life policy of insurance, and a judge's order had been obtained by the defendant, under stat. 1 W. 4, c. 22, for the examination upon interrogatories of certain witnesses, residing in *Paris* and *Boulogne*. A rule was afterwards obtained by the plaintiff, to shew cause why the order should not be amended, by giving a power to the plaintiff, his attorney, or agent, to cross-examine the defendant's witnesses *vivâ voce*.

R. V. Richards shewed cause.—*Duckett* v. *Williams* (*a*), is the only case where cross-examinations upon interrogatories have been allowed, and then it was done by the consent of both parties, who had a mutual right to cross-examine. Great inconvenience will arise if the present application is granted, because the defendant must incur the expense of sending out a counsel, or irregular questions will be put in the absence of a competent person. [*Tindal*, C. J.—It is a conflict between two inconveniences. The result will probably be, that a counsel on each side will attend.]

Wilde, Serjt., *contrà*.—It is very necessary, in a case of this description, to put questions which arise from the answers given to former questions: and by sec. 4 of the statute, the court has power "to give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examination, as may appear reasonable and just." Under the 13 Geo. 3, c. 63, which regulates the mode of taking examinations in *India*, *vivâ voce* cross-examinations have been permitted. As to the alleged inconvenience, it will be remedied in the manner suggested by the lord chief justice; and *Duckett* v. *Williams* (*a*) is an authority for making this rule absolute.

(*a*) Reported on another point, 1 Tyr. 502. 1 Cr. & J. 510.

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TINDAL, C. J.—I think this application, which appears to me to be a reasonable one, comes within the power given to us by the fourth section of the statute. There can be no difficulty in obtaining the attendance of counsel at *Paris* and *Boulogne*. The rule must be made absolute.

The rule was drawn up as follows:—

The plaintiff to join in the commission, and each party to deliver written interrogatories, and to be at liberty to put other questions *vivâ voce*; such other questions, with the answers, to be reduced into writing, and returned with the commission.

April 24.

DOE dem. RHODES *v.* ROBINSON.

A notice to quit was given by an agent, who had from time to time, received the rent of the estate, and paid the money into a bank to the credit of the landlord; but had always acted upon instructions received from the landlord's immediate agent: —*Held*, that without some further proof of authority the notice was insufficient.

EJECTMENT. The lessor of the plaintiff was mortgagee of certain premises in the county of *York*. At the trial before *Coleridge*, J., at the last assizes for the county of *York*, it appeared that Messrs. *Upton* and Son were the attornies and agents of the lessor of the plaintiff, and that they had employed a Mr. *Constable* to collect the rents of the mortgaged premises, who received the payment of two years' rent from the defendant. *Constable*, who was personally unknown to *Upton* and Son, received instructions from them, as to the management of the estate, and paid the rents he received into a bank, to the credit of the mortgagee. In pursuance of such employment, *Constable* signed and served the following notice to quit upon the defendant:—

"I hereby give you notice to quit the possession of the messuages, lands, tenements, and other hereditaments, which you now hold as tenant under the mortgagee in possession, of the estates of *John Chadwick*, situate in *Branhope*, at the expiration of your now current year, and that you leave the same in a tenantable state and condition. Dated this 20th day of July, 1835.

(Signed) *T. Constable*,
Attorney and Agent for the Mortgagee."

Constable, who was examined at the trial, stated that he had previously given notices to quit, to other tenants who had gone out of possession; that he knew nothing about the mortgagee, and received all his instructions from *Upton* and Son. It was objected, on behalf of the defendant, that *Constable* was but the agent of an agent, and as such, had no sufficient authority to give the notice to quit. The learned judge reserved the point, and a verdict was found for the lessor of the plaintiff.

Wightman obtained a rule *nisi* to enter a nonsuit, or for a new trial.

Sir *G. Lewin* shewed cause.—*Goodtitle* v. *Woodward* (*a*) decides this case. There it was held that where a notice was given, signed by a stranger, professing to be an agent for all the joint tenants, their subsequent recognition of his authority before ejectment brought, was sufficient; and *Abbott*, C. J. said, "The occupier having received notice to quit, purporting to be given on the part of all the lessors of the plaintiff, had then such a notice as he could act

(*a*) 3 B. & Ald. 689.

upon with certainty at the time it was given. The question is, whether the agent had authority to give the notice, and I am of opinion, that the maxim of law, *omnis ratihabitio retrohabitur et mandato æquiparatur*, applies here, and that the subsequent recognition by all the lessors of the plaintiff gives effect to the authority." *Doe* d. *Jolliffe* v. *Sybourn* (*d*) is to the same effect; therefore the bringing this action was a recognition of the notice which had been given. *Doe* d. *Mann* v. *Walters* (*e*) is distinguishable from the present case, because *Constable* had previously received rent from the defendant, and had therefore been recognized as agent to the mortgagee. At all events there was some evidence of an authority existing at the time, to go to the jury, and the rule would only be made absolute for a new trial.

Wightman, contrà.—The notice was given by the agent of the agent to the mortgagee, and there is no case which goes to the extent of supporting such a notice. That is the objection relied upon. No subsequent recognition was proved, and it has been held that bringing an action is not a sufficient recognition. *Doe* d *Mann* v. *Walters* (*e*). If it had been proved that the mortgagee had recognized the notice before the day of demise stated in the declaration, that would perhaps be sufficient. [*Tindal*, C. J.—Or, perhaps, if it were proved that the mort gagee had authorized his agent to employ *Constable*.] Perhaps it may be so. The notice must be such as the party receiving it can safely act upon. The mere fact that other parties had acknowledged *Constable* as agent by going out of possession, does not affect the defendant.

TINDAL, C. J.—If this verdict were allowed to stand, we should be carrying this case beyond any former decision, because it would be holding that a notice to quit, given by the agent of an agent, is valid, without any evidence of the authority which had been given by the lessor of the plaintiff. At the same time, I am far from saying that there was no evidence, and the rule must be absolute for a new trial, and not for a nonsuit.

BOSANQUET, J.—I am also of opinion that there must not be a nonsuit, because I think there was some evidence for the jury.

COLTMAN, J., concurred.

Rule absolute accordingly.

(*d*) 2 Esp. N. P. C. 677.

(*e*) 10 B & Cress. 626. S. C. 5 Man. & Ry. 357.

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April 25.

BLATCHFORD *v.* The MAYOR, ALDERMEN, and BURGESSES of PLYMOUTH.

Demise of a mill, together with the use of the stream of water running or flowing in the stream, excepting such part of the said stream as should be sufficient for the supply of such persons as the lessors had then already contracted, or should at any time thereafter contract, to supply with water. "Provided nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof twelve hours at least in each and every day of the said term:"—*Held*, that this did not amount to an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise.

The lessors covenanted that the lessee should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement; the lessee alleged as a breach, that the defendants drew and took, and caused and procured to be drawn and taken, from the stream, divers quantities of water, and interrupted the lessee in the use of the mill; the evidence was that the water was taken away by persons who claimed a right under contracts made by the lessors before they granted the lease of the mill and stream:—*Held*, that the breach was improperly

COVENANT. The declaration stated, that by an indenture of lease, dated the 30th of *March*, 1833, the defendants, by their then name of the mayor and commonalty of the borough of *Plymouth*, did demise, lease, grant, and to farm let, unto the said plaintiff, his executors, administrators, and assigns, a certain millhouse and mill, used for the grinding of corn and grain, commonly called or known by the name of the *Higher Grist Mill*, situate within the borough of *Plymouth*; with all and singular the mill-wheels, mill-stones, going and running gear, bolting-machine, and iron belonging to and used with the said mill, and all and all manner of other machinery, engines, utensils, implements, articles, and things whatsoever, then standing or being in or upon the said mill-house and mill; and also, a certain dwelling-house, with the appurtenances, together with the use of the stream of water, running or flowing in the leat or trench belonging to the said defendants, from the northern end of the said demised premises, into the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other waterworks therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all and all manner of other rights, privileges, advantages, easements, profits, commodities, and appurtenances whatsoever, to the said mill-house, dwelling-house, and premises, belonging or in any way appertaining; excepting and always reserving out of the said demise and grant unto the said defendants, their successors and assigns, so much and such part of the said stream of water, running or flowing in the said leat or tunnel, belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of *Plymouth*, and all such bodies politic and corporate, officers, and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever, as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat; *provided nevertheless, that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term* intended to be thereby granted, times of needful reparation and cleansing of the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted. To Hold the said mill-house, mill, machinery, implements, and utensils, and dwelling-house, with the use of the water running to the said mill, and the waterworks thereon, and all the premises thereby demised, with their and every of their rights, customs, liberties, privileges, advantages, members, and appurtenances whatsoever (except as before excepted),

unto the plaintiff, his executors, administrators, and assigns, for the term of twenty-one years, yielding and paying the clear yearly rent of 185*l.* And the said defendants did thereby, for themselves, their successors, and assigns, covenant, promise, and agree to and with the said plaintiff, his executors, administrators, and assigns, that he, the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements thereinbefore contained, should, and lawfully might, peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, machinery, dwelling-house, waterworks, and all and singular other the premises intended to be thereby demised, with their appurtenances, for the term of twenty-one years, thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever, of or by the said defendants, their successors or assigns, or any other person or persons whomsoever, rightfully claiming or to claim by, through, under, or in trust, for them, any, or either of them, or by their, any, or either of their acts, means, consent, default, privity, or procurement.

Breach.—That the said defendants, on the said 31st day of *March*, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken, from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream, which on those days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours, on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof. And the said defendants on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the said plaintiff in the use of the said mill-house, mill, and machinery, whereby the plaintiff during all the time aforesaid had been hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to him from the working of the said mill: to the damage of the plaintiff of 5,000*l.*

Plea.—That the defendants did not wrongfully and injuriously draw and take, or cause and procure to be drawn and taken, from and out of the said stream, the said quantities of the water thereof in the declaration mentioned, or any part thereof, although the residue of the water of the said stream, which on the said days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours, on any or either of the said days, although no casualty of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, on any breaking of the banks thereof, required the drawing or taking thereof; nor did the defendants wrongfully and injuriously hinder, deny, molest, or interrupt the plaintiff in the use of the said mill-house, mill, or machinery, in the manner and form as the plaintiff hath above alleged.—Issue was joined.

At the trial before *Alderson*, B., at the last *Devon* summer assizes, it was in evidence that the title of the defendants to the stream in question, rested on Stat. 27 Eliz. c. 20, which empowered the then corporation of *Plymouth* to dig a trench or leat from the river *Meavey*, for the purpose of conveying water to

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Plymouth, and the statute provided that compensation should be made to the owner of every mill standing upon the said river.

The *Higher Grist Mill* was the second of several mills driven in succession by the water in the leat, and when the lease, mentioned in the declaration, was granted to the plaintiff, four several classes of outlets existed, whereby water was taken from the leat, before it reached the *Higher Grist Mill*, viz.—

1. The proprietor of an ancient mill, on the banks of the *Meavey* river, called *Meavey Mill*, had always exercised a right to draw from the leat, by a hatch, called the *Miller's Hatch*, such a quantity of water as was necessary to work the mill. This right accrued in consequence of the corporation of *Plymouth* having neglected to make compensation to the owner of the mill, in pursuance of the said stat. 27 Eliz. c. 20.

2. By six pipes, or ox-eye bores, varying from three inches to three quarters of an inch in diameter, water was supplied from the leat, for the household use of a few persons residing in the neighbourhood. Several of these streams had existed for a very long period, and the corporation received, in some cases, small annual sums for the use of them: in other cases no compensation was received.

3. Two tan-yards were supplied from the leat; one by a pipe, two inches in diameter, for which the defendants received 10*l*. 10*s*. per annum, and the other by a pipe, one inch in diameter, at a yearly payment of 6*l*. 6*s*. Both these supplies had been granted by the defendants and their predecessors for many years.

4. By the stat. 5 Geo. 4, c. 49, which was passed to enable the commissioners for victualling his majesty's navy, to complete a victualling establishment at *Cremill Point*, near *Plymouth*, and to supply the establishment with water, the corporation of *Plymouth* were required to convey from the leat, by a sluice, or such other ways and means as they might judge proper, a supply equal to four hundred tuns daily, of pure, wholesome, fresh water, into the reservoir of the commissioners; in consideration whereof the corporation and their successors were entitled to receive a net annual rent or sum of 250*l*.: and in pursuance of this statute, the daily supply of four hundred tuns had been made, through a pipe which discharged the water into a reservoir, constructed by the government officers, on the banks of the leat.

The plaintiff had been yearly tenant of the *Higher Grist Mill* before the execution of the lease. With the above-mentioned exceptions, the entire stream of water in the leat, passed to the mill, and, although it was proved that there was not a sufficient quantity of water to work the mill twelve hours a day, it appeared, that since the execution of the lease the defendants had done no further act, in the way of diversion or otherwise, to lessen the quantity of water in the leat.

A verdict was found for the plaintiff, with leave reserved to the defendants to move to set it aside, and to enter a nonsuit, upon the ground that the lease did not amount to a grant of the water for twelve hours a day; and also that the breach of the covenant was improperly assigned.

Sir *W. Follett* obtained a rule *nisi* accordingly.

Wilde, Serjt., *Erle*, and *Moody*, shewed cause.—The proviso in this lease overrides the whole of the exceptions, and it amounts to a grant of the mill,

together with so much of the water as was necessary to work the mill twelve hours per day That is the effect of the clauses when taken altogether. The covenant for quiet enjoyment, provides against any interruption by the defendants, or by their "acts, means, consent, default, privity, or procurement;" and it is not denied that the water is supplied to other persons, by the consent, and for the profit of the defendants; nor that the water has failed to work the mill twelve hours a day. The defendants plead, that they did not wrongfully and injuriously draw the water from the stream, and upon that issue the evidence must be confined to a denial of the wrongful act, and not to matter of excuse. The word wrongful means, not contrary to the covenant, and it is immaterial whether the grant of the other diversions was before or after the execution of the lease to the plaintiff. The act for the supply of the victualling-office with water, must be considered, with reference to this question, as if it was a private act. *Brett* v. *Beales* (*a*), *The King* v. *Toms* (*b*), *Ludford* v. *Barber* (*c*). It is nothing more than a contract between the corporation of *Plymouth*, and the crown, enforced by an act of parliament. The obligations imposed by that statute, and the 27 Eliz. c. 21, are immaterial in the present case, because the corporation were bound to see that they could make this grant to the plaintiff. It can be no excuse to say that a prior grant was in existence, for the object of a covenant for quiet enjoyment is to give a security against paramount grants; and the existence of an incumbrance, created before the grant, is a breach of the covenant for quiet enjoyment. In Com. Dig. tit. *Fait*. E. 8, it is said, "Every exception is the act and words of the lessor, grantor, &c., and therefore shall be taken *strictè* against him." And the breach here is sufficiently assigned; in *Bac. Abr.* tit. *Covenant* (I.) it is laid down, "If A. covenants to permit B., his heirs, and assigns, to take and enjoy the rents, issues, and profits of certain lands, and in an action of covenant the plaintiff assigns for breach, that A. took the profits, and *non permisit* B. to enjoy, this breach is well assigned, for the taking the profits by A. is a special disturbance."

Sir *W. Follett*, *Crowder*, *Rowe*, and *Butt*, *contrà*.—The first question is whether there has been any breach of the covenant for quiet enjoyment. The plaintiff did not prove that any act was done by the defendants after the execution of the lease, whereby any part of the water was diverted from the stream. Covenants for quiet enjoyment have always been strictly construed; *Browning* v. *Wright* (*d*), *Merrill* v. *Frame* (*e*), *Hobson* v. *Middleton* (*f*), *Woodhouse* v. *Jenkins* (*g*), *Howell* v. *Richards* (*h*), *Spencer* v. *Marriott* (*i*). The water ran by the same way, and under the same circumstances, as it did before the lease was granted. It must be taken as a fact, that the plaintiff, by reason of his former occupancy of the mill, had notice of the existence of all the prior rights. *Ogilvie* v. *Foljame* (*k*). Inasmuch, therefore, as no act was proved to have been done by the defendants since the execution of the lease, they cannot, at all events, be sued for a breach of the covenant for quiet enjoyment. Nor could they be sued for not supplying the plaintiff with water sufficient to work the

(*a*) M. & Malkin, 421.
(*b*) 1 Doug. 405.
(*c*) 1 T. Rep. 93 a, note (a.)
(*d*) 2 Bos. & Pul. 13.
(*e*) 4 Taunt. 329.
(*f*) 6 B. & Cress. 295.
(*g*) 9 Bing. 431.
(*h*) 11 East. 643.
(*i*) 1 B. & Cress. 457.
(*k*) 3 Meriv. 65.

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mill twelve hours a day. It is not the true construction of the lease to say that it is a demise of sufficient water to work the mill for that period. The effect of such a construction would be to make the proviso enlarge the grant, which cannot be. The defendants merely demised that which they had a right to demise, and the exception expressly refers to the contracts which had been already made. If there were sufficient water, the plaintiff was to have the use of it for twelve hours each day, and any excess belonged to the defendants. There was no warranty that the water should flow for that period to the plaintiff's mill. The proviso was inserted to prevent the defendants from making any further grants, to the prejudice of the plaintiff's right to have the water twelve hours a day, if there should be a sufficient quantity. But they have made no further grants, and the demise was of the stream as it was then running; the proviso is, that such a quantity of water "should be left to flow," as should be sufficient to work the mill for twelve hours at least. The miller at the *Meavey Mill* had paramount rights, and the defendants were bound to supply the required quantity to the victualling office, under the 5 Geo. 4, c. 49. The ox-eye bores, by which the inhabitants were supplied, were very ancient, and must have been known to the plaintiff when he accepted the lease.

TINDAL, C. J.—This is an action on a covenant for quiet enjoyment of a mill and a mill-stream; and the objection raised on the part of the defendants is, that the subject-matter in respect of which the plaintiff sues, did not pass by the deed; and that even if it did, upon the breach which has been assigned, the plaintiff is out of Court. There are, therefore, two questions. First, whether the water did or did not actually form a part of the subject-matter of the demise. It is a lease by the defendants to the plaintiff of a certain mill and machinery, "together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the demised premises, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other water-works therein." Now, if the description had gone no further, I should have said that the intention of the parties was to demise the mill, and the use of the stream of water, precisely in the state in which it was flowing at the time of the grant. Then, as it is admitted that no alteration has been made by the defendants, there could be no ground of action. But it is contended that there is something engrafted into the lease, to shew that the plaintiff was to have the use of the water to work his mill twelve hours a day. Let us then examine the subsequent parts of the deed. First comes the exception:—"Except and always reserving out of the said demise and grant, unto the said defendants, their successors, and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of *Plymouth*, and all such bodies politic and corporate, officers, and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree, to supply with water from their said stream or leat." Now, if this exception had stood alone, it would be void, as being repugnant to the grant; because the defendants might have taken away all

they had granted. The meaning of an exception, as laid down in Co. Lit. 47 a, is that it is always a part of the thing granted, and of a thing *in esse*. *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* The following proviso is then inserted :—" Provided nevertheless that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof, for the space of twelve hours at least in each and every day in the said term intended to be thereby granted." The natural and proper object of this proviso was to ride over the former part of the deed, and to limit the lessors as to future grants ;—to prevent them from diminishing the quantity of the water by making further grants. Some limitation was needed, because it was stipulated that further grants might be made by the lessors. Therefore, it does not appear to me to be the just construction of the deed, to hold that there is any absolute grant of the water for twelve hours in each day ; and consequently the deficiency which occurred in the daily supply, does not form the subject-matter of an action.

But even assuming that there was a demise of that quantity of water, has there been any breach of the covenant for quiet enjoyment ? The covenant is that the plaintiff should and lawfully might, peaceably and quietly, have, hold, use, occupy, and enjoy, the said mill-house, mill, waterworks, and premises demised, for twenty-one years, " without any lawful hindrance, denial, molestation, or interruption, of or by the defendants, their successors, or assigns, or any other person or persons whomsoever, rightfully claiming or to claim, by, through, under, or in trust for them, any or either of them, or by their, any, or either of their acts, means, consent, privity, or procurement." There are, therefore, three particular classes of acts guarded against : acts of the defendants themselves ; acts done by other persons claiming under them ; and acts occasioned by their consent or procurement. The breach assigned is, that the defendants wrongfully and injuriously drew and took, and caused and procured to be drawn and taken, divers quantities of water from the stream, and hindered, denied, molested, and interrupted the plaintiff, in the use of the mill and machinery. The evidence was, not that the defendants had done or caused others to do, any act since the execution of the lease, but that nothing whatever was done, and that the quantity of water was diminished by persons who had prior rights under former grants. It appears to me that this description of evidence, would only be applicable to a breach, that persons having prior title under the defendants had impaired the plaintiff's enjoyment. To shew a breach of this covenant, something done by the defendants or by their privity, subsequent to the demise, ought to be proved. In Com. Dig. tit. *Pleader*, 2 V. (2), it is laid down that " the breach ought to be co-extensive with the import and effect of the covenant."

It is unnecessary to go into the effect of the rights which were given by the two acts of parliament, as the rule must be made absolute on the grounds already mentioned.

PARK, J., concurred.

BOSANQUET, J.—There are two principal questions in this case. First, as to the construction to be put upon the demise, which is the most material, because it relates to the rights of the parties. It has been contended for the

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plaintiff that the effect of the demise, the exception, and the proviso, when taken together, is, that there was a grant of twelve hours' water per day; but I think that is not the meaning of it. The demise is of the mill and the use of the stream of water running in the leat; then comes the exception, which reserves so much of the stream as should be sufficient to supply the inhabitants of *Plymouth* and certain public officers or other persons, as the defendants had then already contracted or should thereafter contract, to supply with water. The effect of this without any restriction would be derogatory to the grant, because it would enable the defendants to take the whole of the water. Then comes the proviso, that such a quantity of water should be left to flow as should be sufficient to work the mill at least twelve hours a-day. The sense of this must necessarily be to limit that which was to be done in future; it was to prevent the defendants from subsequently taking away more of the water, if the supply did not exceed the quantity necessary to work the mill twelve hours a-day. But if the stream at the time of the demise did not supply that quantity, there was no engagement to leave water enough to work the mill twelve hours a-day. If that be so, there is an end to the plaintiff's claim.

But supposing that to be doubtful; the question would then be, whether the defendants are liable to be sued for a breach of the covenant for quiet enjoyment. The plaintiff contends that the covenant relates to acts done by the defendants before the lease was made, whether in pursuance of acts of parliament or not. It is quite unnecessary to enter into the question as to the effect of the acts of parliament. because there are contracts made with private individuals, and if any one of them has been improperly supplied with water, the plaintiff would be entitled to recover, if the breach be properly laid. We must, therefore, consider whether the breach is properly assigned. The covenant is against the acts of the defendants, or any persons claiming under them, or acts done by their privity or procurement. How is the breach assigned? Not that certain persons claiming under the defendants, by contracts made prior to the demise, had disturbed the plaintiff in the enjoyment of the mill-stream, but that the defendants drew, and caused and procured to be drawn, certain quantities of water, and wrongfully and injuriously hindered the plaintiff in the use of the premises. Now it is clear that nothing has been done to alter the state of the water, since the date of the demise: it is contended that the defendants caused and procured the water to be drawn, but it appears to me that this form of breach does not meet the facts; and if the plaintiff complained of the former contracts, the breach ought to have been framed to meet that state of circumstances. I therefore agree that a nonsuit must be entered.

COLTMAN, J.—It would be sufficient to decide this case upon the form of the declaration, inasmuch as the breach is not properly framed: but as that does not touch the rights of the parties, it is necessary and just, to state our opinion upon the substantial question in the cause. I cannot but observe that it was improbable that the defendants should enter into such a contract as that contended for by the plaintiff. The plaintiff had been in the occupation of the mill, and was aware of the state of the stream, and he could not have supposed that the defendants intended to give up the benefits which were derived from the then existing contracts; but I should not decide the question

upon that ground, because it might be importing facts into the case which do not appear on the face of the deed. I therefore look at the deed. What was the subject-matter of the grant? The grant is of the mill and the use of the water; but a proviso, and still less an exception, cannot enlarge the extent of the grant. The deed is very inartificially drawn, and, as an exception must be part of the thing granted, it naturally raised an idea that the whole of the stream passed by the grant. It seems to have been introduced partly through ignorance, and partly *ex abundante cautelâ*. But taking the whole deed together, the grant to the plaintiff was of the use of the stream, as it was flowing at the time of the demise, and as nothing has been done to alter the state of the leat since that time, I agree that this rule must be made absolute.

Rule absolute.

JAULEREY *v.* BRITTON.

April 15.

In trover against a wharfinger, the Court allowed the following pleas: first, not guilty; secondly, that the goods were not the plaintiff's goods; and thirdly, that they had been deposited with the defendant by a third party, as a security for money advanced.

IN an action of trover against a wharfinger to recover certain goods, the defendant pleaded four pleas. First—not guilty; secondly, that the goods were the property of the plaintiff; and lastly, two pleas, which stated that the goods had been deposited with the defendant as a security for a bill which he had discounted for a third person. An application was made to a learned judge at chambers, who ordered the two last pleas to be struck out.

Hoggins moved that the whole of the pleas might be allowed.—The two last pleas shew a defence which can be supported under the provisions of the Factors' Act, 6 Geo. 4, c. 94, and they are essentially different from the two first. [*Vaughan*, J.—There is a case of *Leuckart* v. *Cooper* (*a*), where a lien under the Factors' Act was specially pleaded.]

W. H. Watson shewed cause in the first instance.—If the two last pleas are founded on the Factors' Act, they afford no answer to the action: and the plaintiff will be driven to a demurrer. In *Stancliffe* v. *Hardwick* (*b*), the effect of the plea of not guilty in trover was considered; and it seems that if there be a lien, there can be no wrongful conversion, and that the plea of not guilty is sufficient.

TINDAL, C. J.—We cannot go into a nice discussion on the effect of the Factors' Act. The pleas may be allowed; but as the application might have been made before, the amendment must be upon payment of costs.

BOSANQUET, J., and VAUGHAN, J., concurred.

Rule absolute accordingly.

(*a*) 1 Hodges, 16.

(*b*) 1 Gale, 127.

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April 28th.

GOWER and others *v.* VON DADELSZEN and another.

A contract was made for the sale of a cargo of good merchantable *Gallipoli* oil, consisting of 240 casks, containing 901 *salms* and 9 *pignatelles*, at 54*l.* per imperial ton of 7 and 1-5th *salms*. An action being brought against the defendant for not performing the contract, he pleaded that the said casks containing the oil were not well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, but were badly seasoned, and unfit and improper casks for such purpose: *Held*, upon demurrer, that the plea was no answer to the action, because it took issue upon that which was not of the essence of the contract, and because the objection went only to a part of the consideration.

DEMURRER to a plea. The declaration was in assumpsit, and alleged that it was mutually agreed between the plaintiffs and the defendants, that they, the plaintiffs, should sell to the defendants, who should buy of and from the plaintiffs, a certain cargo of good merchantable *Gallipoli* oil, then being the cargo of the vessel *Fortuna*, the captain whereof was one *Giovann Cafeiro*, and which vessel was then on her voyage from *Gallipoli* to *Falmouth* or *Plymouth*: the said cargo consisting of L. R. 240 casks, containing 901 salms and 9 pignatelles, at 54*l.* per imperial ton of 7 and 1-5th salms, and which then amounted in the whole to a large sum of money, to wit, the sum of 6756*l.* 17*s.* 2*d.* payable by cash less 2½ per cent. discount, and which discount then amounted to a large sum of money, to wit, the sum of 168*l.* 18*s.* 5*d.* on delivery of bill of lading on her arrival at *Plymouth* or *Falmouth*, to either of which ports the plaintiffs were, and agreed to pay freight, insurance, and gratuity; and if the said vessel should be lost on her voyage to *Falmouth* or *Plymouth*, the said agreement was to be void.

Averment—That the said vessel arrived on her said voyage, and at the time of such arrival had on board a cargo of good merchantable *Gallipoli* oil, consisting of L. R. 240 casks, containing 901 salms and 9 pignatelles, being the said cargo in the said agreement and hereinbefore mentioned, of which the defendants had due notice; and that thereupon, and within a short and reasonable time in that behalf after such arrival at *Plymouth* aforesaid, of the said vessel as aforesaid, they, the plaintiffs, tendered and offered to deliver to and leave with the defendants a certain bill of lading of the said cargo, being the bill of lading in the said agreement and hereinbefore mentioned, upon their, the defendants, paying to the plaintiffs the aforesaid price of the said cargo in manner aforesaid; and the plaintiffs were then ready, and willing and liable, to pay, and did in point of fact pay, the freight, insurance, and gratuity in the said agreement, and hereinbefore mentioned to be payable by them; and the plaintiffs were then ready and willing, and offered to the said defendants to deliver to them, the defendants, and requested them, the defendants, to accept and receive the said cargo at *Plymouth* aforesaid, upon their, the defendants, paying to the plaintiffs the aforesaid price thereof in manner aforesaid.

Breach—That the defendants did not, nor would, when so requested, as aforesaid, or at any other time, take, accept, or receive, the said bill of lading or cargo at *Plymouth*, or pay to the plaintiffs for the same cargo the aforesaid price, in manner or with the deduction and discount aforesaid, or any part thereof, but then wholly neglected and refused so to do, whereupon the said plaintiffs sold the said cargo by public auction, at a less price than the price in the said agreement mentioned, by 1032*l.* 4*s.* 4*d.*, which last-mentioned sum was thereby wholly lost to the plaintiffs, and they were then also obliged to expend, and did expend, 266*l.* 9*s.* 9*d.* in selling the said cargo; to the damage, &c.

The defendants pleaded, seventhly, that the said casks containing the said oil, in the said agreement and declaration mentioned, were not at the time of the making the said agreement and promise, in the said declaration mentioned,

or at the time of the arrival of the said vessel at *Plymouth*, or at the time the plaintiffs tendered and offered to deliver to, and leave with, the defendants, the said bill of lading of the said cargo, as in the said declaration mentioned, well seasoned or proper casks, for the purpose of containing good merchantable *Gallipoli* oil, according to the terms and within the true intent and meaning of the said agreement in the said declaration mentioned; but, on the contrary thereof, were badly seasoned, and unfit and improper casks for the purpose of containing such oil as in the said agreement mentioned: wherefore the said defendants did not nor would take, accept, or receive, the said bill of lading and cargo at *Plymouth* aforesaid, and neglected and refused to pay to the plaintiffs for the said cargo the said price, in manner and form as in the said declaration alleged; and this the defendants were ready to verify.

Demurrer for the following causes:—That the defendants had not traversed or attempted to put in issue any matter of fact alleged, or necessary to be alleged, by the plaintiffs in their declaration, but had introduced and attempted to put in issue a matter of fact not alleged, nor necessary to be alleged, namely, whether the casks containing the oil were, at the several times mentioned in the said plea, well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, according to the terms and within the true intent and meaning of the said agreement; without in their said plea shewing, or making it in any way appear, that the sufficiency or good quality of the casks was either expressly, or by necessary implication, warranted, or contracted, or agreed for, by the plaintiffs, in their said agreement; and that if it were the intention of the defendants, by their said plea, to set up any usage or custom by which the sellers of *Gallipoli* oil, under the circumstances in the declaration mentioned, are or would be held, even without any express agreement to that effect, to warrant, or contract, or agree, for the proper quality and sufficiency of the casks in which the same may be contained, to the purchasers thereof; and by a breach of which warranty, contract, or agreement, any contract of sale relating to such oil is rendered voidable by the purchasers thereof, and which usage or custom might therefore be deemed tacitly to have formed part of, and to have been incorporated with, the said contract, at the time of the making thereof, they should have expressly alleged the existence of such usage or custom, and that the said contract was made with reference and subject thereto; and also that it was not alleged in the said plea that the said oil was at all damaged or rendered unmerchantable within the meaning of the said agreement, by reason of the premises in that plea mentioned; and therefore that the said plea offered no justification or excuse for the nonperformance of the said contract, and was no answer to the declaration, but evasive and argumentative, and any issue raised thereon would be immaterial; and also for that the defendants had not only alleged and attempted to put in issue the insufficiency and bad quality of the said casks, at the time of the making of the said agreement, but also at the time of the arrival of the said vessel and of the tender of the said cargo, although it was quite immaterial and irrelevant to the purposes of this action what the state of the said casks happened to be at any other time than that of the making of the said agreement, unless the defendants had alleged in their said plea that the insufficiency and bad quality of the said casks, at the times of the said arrival or the said tender respectively, had been caused and occasioned by the default of the plaintiffs; and also for that the de-

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fendants do not, in and by their said plea, allege that the said casks were intrinsically and in themselves of any less value, by reason of their said insufficiency and bad quality, than they otherwise would have been, or that the defendants would have sustained any damage in respect thereof, by reason of their accepting the said cargo; and also for that the said plea did not allege that the defendants elected to avoid, or gave to the plaintiffs, at any time, any notice of their intention to avoid the said contract or agreement, by reason of the premises in the said plea mentioned, or otherwise; and also for that the said plea was in other respects informal and insufficient.

Joinder in demurrer.

Crowder, in support of the demurrer.—This is a sale of a cargo; and the contract is confined to the quantity of the oil, which is to be paid for by the ton, and not by the cask. It is clear that the casks were proper to contain the oil, because it is not averred that the oil was not in a fit state for delivery. The casks are not of the essence of the contract, but are a mere vehicle for conveying the oil, as bags are for conveying wool. The plea does not state that the oil was unmerchantable, or that there was any express or implied warranty as to the casks, or any fraud on the part of the plaintiffs. *Parkinson* v. *Lee* (*a*).

Maule, contrà.—The casks, as well as the oil, were the subject of the sale, and the meaning of the parties was that they should be proper casks of oil. If a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. *Gray* v. *Cox* (*b*), *Jones* v. *Bright* (*c*). If the casks were not of a merchantable quality, the purchaser has not got all that he is entitled to receive, and the plea is sufficient.

Crowder, in reply.—The cases relating to implied warranties do not apply, because the articles which were there objected to, were of the essence of the contract.

TINDAL, C. J.—I am of opinion that the seventh plea is no answer to the plaintiff's declaration. The contract is, that the plaintiffs should sell to the defendants a certain cargo of good merchantable *Gallipoli* oil, being the cargo of the vessel *Fortuna;* that is the subject-matter of the contract; all the rest is matter of description. The defendants by their plea admit that there was a cargo of good merchantable *Gallipoli* oil, but they object to that which is only accessory to the contract, and merely aver that the casks in which the oil was contained, were not well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, but were badly seasoned, and unfit and improper casks for containing such oil. Now it is quite evident, that any slight imperfections in particular casks would sustain this objection, and yet such a circumstance might make very little difference in the defendants' situation. I can conceive cases where casks or bottles may be in such a state, that the articles which they contained would be in such a condition as to afford an answer to an action; as if a pipe of wine were delivered in bottles, with every cork oozing; but in such cases the plea would be, that the wine was not in a merchantable state. But this plea taking issue on that which is not of the

(*a*) 2 East, 314. (*b*) 4 B. & C. 108. (*c*) 5 Bing. 533.

essence of the contract, has this vice, that it does not go far enough; and our judgment must be for the plaintiffs.

PARK, J.—It has been contended, by the counsel for the defendants, that this was a sale of the casks; but that is not so; it is a sale of the oil. It is also said that there was a warranty that the casks should be good and well-seasoned; but the cases which have been cited upon that point are quite different: there the commodity itself was sold; and it was held, that the thing sold should be fit for the purpose for which it was sold. But here no injury was sustained by the defendants, who did not even take the oil into their custody to examine it.

BOSANQUET, J.—The plea affords no answer to the action. This was a sale of a cargo of good merchantable *Gallipoli* oil, at so much per ton. A given quantity was sold, and it must be packed up and contained in something; and the contract describes it as being packed in 240 casks. The declaration avers the arrival of the vessel with a cargo of good merchantable *Gallipoli* oil, in the number of casks and containing the quantity mentioned in the declaration, and that the plaintiffs tendered the cargo to the defendants. The defendants' answer is, that the casks were badly seasoned, and were unfit and improper casks for containing such oil, but that is not a sufficient answer. Even if all the casks were defective in the number of hoops, so that a quantity of oil had been lost, that would not afford an answer to the action, unless the oil had been injured; because it does not go to the essence of the contract. Suppose a certain number of bales of cotton of a certain quality were sold, and that the cotton arrived of the quality required, with some of the bales rent; it would be of dangerous consequences to say that such a defect would avoid the contract.

COLTMAN, J.—This plea is no good answer to the declaration, because it does not go to the whole of the consideration. It was a sale of a quantity of oil, and I will even suppose it was a sale of the casks also. These two things were sold; but in objecting to the quality of the casks, the objection goes only to a part of the consideration. The matter is quite plain.

Judgment for the plaintiffs.

LINDSAY *v.* WELLS.

May 6.

In an action on a bill of exchange, the declaration described the plaintiff as "*Henry H. Lindsay.*" A rule was obtained by the defendant requiring the plaintiff to amend, by inserting his full name; but the cause of the omission being satisfactorily shewn, the rule was discharged.

IN an action on a bill of exchange a rule *nisi* was obtained, calling upon the plaintiff to shew cause why the declaration should not be amended, or otherwise set aside, for irregularity, on the ground that the plaintiff was described as *Henry H. Lindsay*.

W. H. Watson shewed cause.—The defendant ought to have applied to a judge at chambers to have the declaration amended, under sec. 11 stat. 3 & 4

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W. 4, c. 42. The bill of exchange describes the plaintiff as *Henry H. Lindsay*, and by sec. 12 of the same statute, it is expressly directed that in such a case it shall be sufficient to describe the party "by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full." The defendant would have been given the information which he now requires, but the action is brought by virtue of a power of attorney, given by the plaintiff in *America*, which is signed *Henry H. Lindsay*, and his agent in this country does not know his true name.

Thomas, in support of the rule.—The eleventh section of the statute only applies to the misnomer of *defendants*; that was the opinion of a learned judge, to whom application was made before this rule was obtained.

TINDAL, C. J.—As it is admitted, that this case is not within the terms of the eleventh section, we cannot interfere. The rule must be discharged.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

TIPPER *v.* BICKNELL and another.

The declaration stated, that H. R. was desirous of obtaining certain deeds deposited with W. B., and that H. R. applied to the plaintiff to accept certain bills, for his accommodation, to enable him to endorse the said bills to W. B. as a payment for his interest in the deeds, and H. R. offered to procure the defendants to undertake to deliver the said deeds to the plaintiff, on the payment of the bills so accepted; that the bills were accordingly drawn, and H. R. requested the defendants to undertake to deliver the deeds to the plaintiff; of all which the defendants had notice; and that thereupon, in consideration of the plaintiff accepting the bills, the defendants undertook and promised the plaintiff to deliver the said deeds to him when the bills should be paid. Averment, that the bills were accepted, and duly paid, but that the defendants had not delivered the deeds to the plaintiff, in pursuance of their undertaking:—*Held*, upon demurrer, that a sufficient consideration appeared to support the defendant's promise.

ASSUMPSIT. Demurrer to a declaration, which stated, that before the making of the agreement and promise of the defendants hereinafter mentioned, the defendants, on the occasion hereinafter mentioned, represented to the plaintiff, that certain mortgage-deeds and writings, to wit, &c. had been deposited with certain persons, to wit, the said *W. Bicknell* and one *W. Blewitt*; that at the time of the making the agreement and promise of the defendants next mentioned, one *Hugh Rowland* was desirous of purchasing and taking an assignment from the said *W. Bicknell* and *W. Blewett* of their interest in the said mortgage, at the sum of 500*l.*, to be paid by the said *H. Rowland*; and to obtain good bills to that amount, in order to satisfy the said sum of 500*l.*; and that thereupon, to wit, on, &c. the said *H. Rowland* requested the plaintiff to accept, for the accommodation of the said *H. Rowland*, two bills of exchange, to be drawn by the said *H. Rowland* upon the plaintiff, each for 250*l.*, and payable to the order of the said *H. Rowland*, at twelve months date, for the purpose of enabling the said *H. Rowland* to use the said bills for his own benefit, that is to say, for the purpose of enabling him to indorse the said bills to the said *W. Bicknell* and *W. Blewitt*, for the said sum of 500*l.*, to be paid as the consideration for the said assignment by *W. Bicknell* and *Blewitt* in the said mortgage; that the said *H. Rowland* then offered the plaintiff, as a security for the repayment of such monies as he might pay

upon the said bills, that he, the said *H. Rowland,* would cause and procure the defendants to undertake to deliver to the plaintiff the said deeds and writings, on the payment of such bills of exchange; that thereupon the plaintiff consented, and was ready and willing to accept such bills of exchange for the purpose and upon the terms aforesaid, and upon such security as aforesaid; that thereupon, to wit, on, &c. the said *H. Rowland* then drew the said bills of exchange upon the plaintiff, payable as aforesaid; that the plaintiff then agreed to accept the same for the purposes and upon the terms aforesaid, and upon such security as aforesaid, that the said *H. Rowland* then requested the defendants that, on the plaintiff's accepting the said bills as aforesaid, they, the defendants, would undertake to deliver to him the said deeds and writings, on the payment by him, the plaintiff, of the said bills, according to the tenor and effect thereof; of all which premises the defendants then had notice, and then represented to the plaintiff, that the said deeds and writings had been so deposited as aforesaid; that thereupon, in consideration of the plaintiff's accepting the said bills for the purpose and on the terms aforesaid, the defendants then undertook and promised the plaintiff to deliver to him, as such nominee of *H. Rowland,* the said deeds and writings, on the payment by him of the said bills of exchange respectively, according to the tenor and effect thereof.

Averment, That the bills were accepted by the plaintiff, and delivered to *Rowland,* who indorsed them to *Bicknell* and *Blewitt,* and that the bills were paid by the plaintiff when they became due, of which the defendants had notice.

Breach, That the defendants had neglected and refused to deliver the said deeds to the plaintiff, to his damage, &c.

Demurrer, and the causes assigned were, that the plaintiff had not shewn any consideration in law for the promise; and that it did not appear that the acceptance of the said bills by the plaintiff was given, or the said bills paid by the plaintiff at the instance of the defendants, or that the defendants in any way assented to the offer made by the said *Rowland* of the said deeds as a security; or that the plaintiff was induced to accept the bills of exchange by the offer of such security, or by virtue of any application by the defendants to him made so to do, or that the defendants were parties to, or in any way assented to the alleged arrangement; or that the said deeds were ever in the possession or control of the defendants; or that they had at any time any interest therein, or in the said mortgage, or the said assignment thereof, or in the payment of the said bills; or that the defendants had ever represented to the plaintiff that the deeds had ever come to the hands of them, the defendants; and for that the promise in the declaration was a mere *nudum pactum,* upon which no action could be sustained.

Joinder.

The margin of the paper-book was thus marked: "The plaintiff will contend, that the declaration shews a sufficient consideration for the defendants' promise that is to say, the obligation which the plaintiff imposed on himself by accepting the bills, although all the defendants may not have been thereby benefited. That it was not necessary to allege that the bills were accepted at the defendants' request, as the consideration for their promise was not executed, but concurrent or executing; and that the defendants were responsible to the plaintiff on their absolute engagement to deliver the deeds to him."

Crowder, in support of the demurrer.—The main question is, whether

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the declaration discloses any sufficient consideration for the defendants' promise. *Hugh Rowland* is the party who receives all the benefit. The bills were accepted for his accommodation, and the security which he offered, was that the defendants should deliver the deeds. There is no averment that any thing took place between the plaintiff and the defendants. In 1 *Williams' Saund.* 264 (1) it is said to be necessary to state that the service was done at the special instance and request of the party who was liable, but there is no such averment here. The statement that the defendants had received notice of the arrangement, is insufficient. If the defendants received no benefit by the arrangement, a subsequent notice of its existence could not render them liable. In *Price* v. *Easton* (*a*), the declaration stated, that W. P. owed the plaintiff 13*l.*, and that in consideration thereof, and that W. P. at the defendant's request, had promised defendant to work for him at certain wages, and who, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, the defendant undertook and promised to pay the plaintiff the said sum of 13*l.*; but it was held that the plaintiff was a stranger to the consideration, because he might have been entirely ignorant of the arrangement between W. P. and the defendant. That is this case.

Stephen, Serjt., *contrà*, was stopped.

TINDAL, C. J.—Taking the whole declaration together, it appears to me that a promise was made by the defendants, that on the plaintiff's accepting the bills they would deliver up the deeds, when the bills were paid. If this promise had been made in respect of a past act, the declaration would have been insufficient, because it would not appear to have been done at the request of the defendants; but all the parties appear to have been present together, and the acceptance of the bills, and the promise to deliver the deeds, was a simultaneous act. The judgment must be for the plaintiff.

PARK, J.—Upon the statement made in the declaration this was a simultaneous transaction.

BOSANQUET, J.—I also think that a legal consideration for the promise appears. *Rowland* desired to obtain the possession of certain deeds, which the defendants were willing to give up, upon obtaining payment of the bills which were to be accepted by the plaintiff. During this negociation, the bills were unaccepted, and then, it is stated that, in consideration that the plaintiff would accept the bills, the defendants undertook to deliver up the deeds when the bills were duly paid. The bills were accepted and subsequently paid; and there is abundant consideration to support the defendants' promise.

COLTMAN, J.—The argument for the defendants could only be supported by supposing a different state of facts from that which the declaration discloses. This is not the case of an executed contract; but the plaintiff was induced to accept the bills by the defendants' promise to deliver the deeds.

Judgment for the plaintiff.

(*a*) 4 B. & Ado. 433.

The Archbishop of CANTERBURY *v.* TUBB.

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May 8.

A creditor sued a surety for the breach of an administration-bond, given in pursuance of 22 & 23 Car. 2; without obtaining an assignment of the bond from the archbishop, or his permission to use his name; and the Prerogative Court having refused to allow the bond to be taken to the defendant, who had craved *oyer*, this court discharged a rule to set aside a judge's order, which had been obtained to stay further proceedings in the action, until the bond was brought to the defendant.

WILDE, Serjt., had obtained a rule *nisi*, calling upon the defendant to shew cause why an order made by *Gaselee*, J., should not be discharged; and why the defendant should not be deemed to have had sufficient oyer of the bond upon which the action was brought; or why the production of the bond to the defendant's attorney at the register-office of Doctors' Commons, at such time as this court should direct, should not be deemed sufficient oyer of the said bond, the plaintiff undertaking to pay the defendant the costs of attending to inspect the same. It appeared by the affidavits, that the defendant was one of the sureties of *Catharine Tubb*, to whom administration of her deceased husband's effects had been granted by the *Prerogative Court* of *Canterbury*, and who had given the usual administration-bond required by stat. 22 & 23 Car. 2 (*a*). One of the conditions of the bond was that the administratrix should exhibit an inventory of the deceased's effects, in the registry of the court; but she having failed to do so, and her place of residence not being known, *Crawley* and *Sharman*, creditors of the deceased, commenced an action of debt on the bond against the defendant, for a breach of this condition. No assignment of the bond was taken from the archbishop, nor had his authority to bring the action been obtained. The declaration made profert of the bond in the usual way, and the defendant demanded oyer, whereupon the attornies of *Crawley* and *Sharman*, gave the defendant a copy of an office copy of the bond, which was authenticated by the deputy registrars of the *Prerogative Court*, and produced the authenticated copy at the time of the service. An application was then made by the defendant to *Gaselee*, J., at chambers, to stay the proceedings in the action, until the original bond had been brought to the defendant's attornies office, and the learned judge made the order as prayed. *Crawley* and *Sharman* subsequently presented a petition to Sir *Herbert Jenner*, the judge of the *Prerogative Court*, praying that one of the officers of the court might produce the bond at the office of the defendant's attornies; but after the respective parties had been heard by their advocates and proctors, the petition was dismissed. The bond was deposited in the registry-office, and any person was allowed to inspect it on payment of one shilling.

R. V. Richards and *Arnold* shewed cause.—It was necessary in this case to make a profert of the bond upon which the defendant was sued; and the Courts have always required that the rule as to giving oyer, should be strictly observed. The practice has been said not to depend upon any particular rule of court, but on the general right of law, which the court cannot dispense with. *Soresby* v. *Sparrow* (*b*). Here the plaintiff has made profert of the bond, and has not shewn in the declaration, that the defendant is not entitled to claim oyer, which is the usual course when an excuse for its non-production is offered. *Tottey* v. *Nesbitt* (*c*), *Matison* v. *Atkinson* (*c*). The service of the copy was insufficient, because the original was in existence at the *Prerogative Office;* but the defendant was not bound to go there; it

(*a*) See 1 Williams' Exors. 332.
(*b*) 2 Strange, 1186. S. C. 1 Wils. 16.
(*c*) Cited in *Read* v. *Brookman*, 3 T. R. Rep. 153.

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was the duty of the plaintiff to bring the deed to the defendant. *Page* v. *Divine* (*d*). But there is a still stronger reason why the court will not interfere. The bond has been put in suit without any assignment from the Archbishop of *Canterbury*, and without his consent. The order of the *Prerogative Court* ought to have been obtained before the proceedings were commenced, *Archbishop of Canterbury* v. *Robinson* (*e*); and it is essentially necessary that this should be so, or the archbishop might be made liable to pay costs to an enormous amount. In the *Archbishop of Canterbury* v. *Tappen* (*f*), the bond had been pronounced to be forfeited before it was put in suit; and it has always been considered that the *Prerogative Court* alone has power over these bonds; if it were once determined otherwise, hundreds of actions would be commenced against innocent sureties. Nor would this court have any power to order the *Prerogative Court* to give oyer of the bond, as may be done in the case of a private individual, in whose hands it may happen to be. *White* v. *Earl of Montgomery* (*g*).

Wilde, Serjt., *contrà*.—No complaint is made by the *Ecclesiastical Court* authorities; but the question is whether a dispensation of the production of the bond has been shewn. A creditor is entitled *ex debito justitiæ* to sue upon the bond; that was held by Lord *Mansfield*, C. J., in the *Archbishop of Canterbury* v. *House* (*h*), who said, "that though a creditor had no concern in the latter part of the condition respecting the distribution of the surplus among the next of kin, yet he was most materially and principally interested in the administration, delivering in a true inventory, and in the due administration of the effects."

TINDAL, C. J.—This is a case *primæ impressionis*, and I am not satisfied that we have authority to subsitute this mode of giving oyer, for that which is in ordinary use. If we were to grant this rule, it seems to me that we should determine, on a mere point of practice, a most important question connected with the administration of ecclesiastical law; for we should be taking from the *Prerogative Court* the power of deciding whether an administration-bond should or should not be enforced. Although Lord *Mansfield* (*h*) held that a creditor was entitled to sue upon the bond, in the name of the archbishop, yet that must be taken with some qualification, as that he should permit his name to be used, or the archbishop might be otherwise liable to pay costs to an enormous amount. There will be no failure of justice in this case, because an application for a mandamus, to compel the production of the bond, will bring the nominal plaintiffs and the *Prerogative Court* face to face; at present we decide nothing as to the rights of the parties, and as this is the first question which has arisen on the point, the rule must be discharged without costs.

PARK, J. and BOSANQUET, J., concurred.

COLTMAN, J.—From the first I have had a strong opinion, that this motion

(*d*) 2 T. Rep. 40.
(*e*) 1 Cr. & Meeson, 181.
(*f*) 8 B. & Cress. 151.
(*g*) 2 Strange, 1198.
(*h*) Cowper, 140.

could not be acceded to. The grant of oyer of the bond must be the act of the *Prerogative Court*. If the creditor has a clear right to sue the defendant, and to use the archbishop's name, he will find means to have the bond produced.

Rule discharged.

PIERCY, demandant, *v.* GARDNER, tenant.

April 26.

1. A writ of intrusion may be maintained, for an intrusion made after the determination of an estate, *pur autre vie*.
2. A devisee is entitled to sue by a writ of intrusion.
3. The limitation for suing out a writ of intrusion is fifty years, under stat. 32 Henry 8, c. 2.

INTRUSION.—The writ demanded against *R. Gardner*, one-fourth part of one messuage, &c., which the demandant claimed to be his right and inheritance, and into which the said *R. Gardner* had not entry but by the intrusion which he had made into the same after the death of *Anna Maria Curtis*, who survived *Ann Piercy* deceased, and *Mary Powney* the younger deceased; of the entirety of which tenements *Richard Curtis* being seised in his demesne as of fee, gave and devised the same, amongst other tenements, to *Jonathan Gardner* and *Richard Piercy*, and their heirs; in trust, to receive and take the rents and profits thereof, and thereout to pay unto the said *Ann Piercy* a certain annuity or yearly payment during her natural life, and to *Mary Powney* a certain other annuity or yearly payment during her natural life; and in trust, to pay as well the overplus rents and profits thereof, as also to pay the whole of the rents and profits of the said devised tenements, when and as the same several annuities should respectively end and determine, unto the said *A. M. Curtis*; and the said *R. Curtis* did, in and by the said devise, direct, that from and after the decease of the said *A. M. Curtis*, the said *Jonathan Gardner* and *Richard Piercy*, and their heirs, should stand seised of the said devised tenements, subject to the said annuities, to the use of the children of the said *A. M. Curtis*, as the said *A. M. Curtis*, should by any deed, will, or writing whatsoever, to be by her, whether she should be covert or sole, from time to time limit, direct, and appoint; and for want of such limitation, &c. then that the said *J. Gardner* and *R. Piercy*, and their heirs, should stand seised of the said tenements, to the use of such children of the said *A. M. Curtis* as should survive her in tail; remainder to the use of such nephews and nieces of *R. Curtis*, in fee, as *A. M. Curtis* should appoint; remainder as to one-fourth part to the use of one *William Piercy*, and his heirs. And which said one-fourth part above demanded and so devised, after the death of the said *A. M. Curtis*, who survived the said *Ann Piercy* and *Mary Powney*, the said *A. M. Curtis* never having had issue, and never having made any appointment of the said tenements, ought to come and remain to the demandant, as son and heir of one *William Piercy*, who was son and heir of the said first-named *William Piercy*. The count, after reciting the writ, alleged that *Richard Curtis* was seised by taking the *esplees* within fifty years, and died seised on the 1st of *January* 1787, without revoking his will; whereupon and whereby, and under and by virtue of the said last will and testament of the said *R. Curtis*, the said *J. Gardner*, and *R. Piercy*, then and there became and were seised of and in the said tenements, with the appurtenances, upon the trusts, and to and for the intents and purposes in the said will expressed and declared. That the said *A. M. Curtis* and *Anne Piercy*, and the said *Mary*

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Powney, and also the said first-named *W. Piercy*, survived the said *R. Curtis*, and that the said *A. M. Curtis* survived *Anne Piercy* and *Mary Powney*, and the first-named *W. Piercy*, and afterwards, to wit, on the 1st of *January* 1806, died, never having had any issue, and never having made any limitation, direction, appointment, or gift of the said tenements so devised, or any part thereof, according to the form and effect of the said devise; and thereupon, by virtue of the said devise, the right to the said one undivided fourth part above demanded of and in the said devised premises, with the appurtenances, came to and remained to *W. Piercy* the younger, who was son and heir of the said first-named *W. Piercy*; that afterwards, to wit, on the 1st of *January* 1815, the said *W. Piercy* the younger died, upon whose death the right to the said one undivided fourth part above demanded of and in the said devised tenements, with the appurtenances, descended and came to the said demandant, as son and heir of *W. Piercy* the younger, and into which the said *R. Gardner* had not entry, but by the intrusion which he made into the same after the death of the said *A. M. Curtis*; and therefore he brought his suit, &c.

The tenant, having traversed a matter in one of the pleas which was not alleged in the count, the demandant demurred; and the tenant then objected to the validity of the count.

R. V. Richards, for the tenant.—There are three objections to the count. 1. *Anna Maria Curtis* took an equitable estate only; 2dly, Intrusion will not lie for a devisee; and, 3dly, If it does, it can only be maintained within twenty years. In *Coke Lit.* 277 (a), it is said, "Intrusion first properly is, when the ancestor died seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir an estranger doth interpose himself and intrude." And in *Fitz.* N. B. 203, the rule is laid down as follows:—"When tenant for life, or dower, or by curtesy dieth, seised of such estate for life, and after their death a stranger intrudeth upon the land, he in reversion shall have this writ against the intruder." A similar definition is adopted in *Booth* on Real Actions, 181. It appears from these authorities that intrusion does not lie for an entry after the determination of an equitable estate; there must be a legal estate. Then did *Anna Maria Curtis* take a legal life estate under the will of the testator? She did not; because as the premises were devised to trustees, to discharge the annuities and to pay the overplus rents and profits, they necessarily took the legal estate in the premises; according to the authorities collected in 1 *Powell on Devises* (*a*).

Secondly. The writ of intrusion lies only for a reversioner or remainder man, and not for a devisee. There is no authority to be found to shew that a devisee has ever brought this action, and there is no form of such a writ in the *Register* or in *Fitzherbert*. In *Romilly* v. *James* (*b*), this point was raised in argument, but the case was decided upon another ground. It was there contended that a devisee could not sue out a writ of intrusion, and the argument there used, is applicable to the present case. It is true that in *Eastman* v. *Baker* (*c*), a demandant claiming under an executory devise, re-

(*a*) *Jarman's* ed. page 222; see also *White* v. *Parker*, 1 Hodges, 112. *Doe* d. *Graterix* v. *Roe*, 1 Will. Wol. & Dav. 18.

(*b*) 6 Taunt. 263.

(*c*) 1 Taunt. 174.

covered on a writ of intrusion; but the attention of the court was not called to this question by the counsel on either side, and the case turned on the construction of a devise.

Thirdly. The period of limitation is twenty years, and therefore this action is commenced too late. This question depends on the construction of stat. 21 Jac. 1, c. 16. The former stat. 32 Hen. 8, c. 2, sec. 2, limited the right to a seisin or possession of the ancestor within fifty years; but by the general terms of the statute of *James*, writs of intrusion are included, and the period is limited to twenty years. That some descriptions of real actions are included in the statute is clear, as *formedons* are expressly mentioned. There is no authority upon this point, although it was noticed in argument in *Widdowson* v. *The Earl of Harrington* (*d*).

Stephen, Serjt., for the demandant.—Neither of the points made for the tenant can be supported. First, it may be admitted, that *Anna Maria Curtis* had only a trust estate, and it may be admitted further, that there must be a legal life estate existing, to support the demandant's case. But here the trustees were seised of a legal estate, *pur autre vie*, and upon the death of *A. M. Curtis*, *William Piercy*, the next in remainder, was in a situation to support an action, after the intrusion. The demandant now claims for an intrusion upon the determination of an estate, *pur autre vie*. *Jones* v. *Lord Say and Seale*, 8 Vin. Abr. 262. Nor can any authority be cited to prove that it is necessary to shew when the life estate was determined. It is immaterial how it was determined. Secondly, this action may be supported, as being in the nature of a writ of intrusion which is given by the stat. West. 2. That was contended in *Romilly* v. *James* (*e*), even in the case of an executory devise over, and the argument was not overruled by the court. In 2 *Reeves' Hist. Eng. Law*, 202, it is said, "that in cases where complainants were entitled to a writ in the chancery, grounded upon the fact of another, the complainants should not depart from the king's court without remedy, because the land was transferred from one to another: as because there was no writ in the register in the chancery to be adapted exactly to that special case, but the form of the writ was only to be had against the very person who actually raised the nuisance; so that, should the house, wall, or the like, which occasioned the nuisance, be aliened to another, a writ was denied. That justice might no longer be delayed for want of legal remedies, it was now enacted, that when a writ was granted in one case, and a thing happened in *consimili casû*, and needing a similar remedy, a writ should be made accordingly." And again (*f*):—"Not content with the writ of trespass in its old form, they endeavoured to make it more universal by enlarging its scope and modifying its terms, so as to adapt it to every man's own case; in doing which they availed themselves of the stat. of West. 2, authorizing writs to be framed in *consimili casû*." In *Eastman* v. *Baker*, (*g*), a writ of intrusion was brought by a devisee, and he recovered without objection being made that he was not entitled to such a remedy. In *Smith* v. *Coffin* (*h*) it was held that the right to bring a real action passed to the assignees of a bankrupt; yet no form of a writ given to assignees would be

(*d*) 1 Jac. & W. 547.
(*e*) 6 Taunt. 263.
(*f*) Vol. 3, page 80.
(*g*) 1 Taunt. 174.
(*h*) 2 H. Black. 445.

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found in the register. This shews that, to a certain extent, the old remedies are plastic.

With respect to the period of limitation, there can exist no reasonable doubt. The writ of intrusion is clearly provided for by the stat. 32 Hen. 8, and the period there assigned is fifty years. But the stat. of 21 Jac. 1, c. 16, does not expressly or impliedly relate to such writs. The only real actions to which that statute is applicable are the various kinds of *formedons*.

R. V. Richards, in reply.—*A. M. Curtis* is treated as the tenant for life in the count, and the pleadings ought to have been differently framed, if the demandant relied on the legal estate, *pur autre vie*, in the trustees. The trustees might have died before *A. M. Curtis*, and a special occupancy may have happened. Nor is it stated when the trustees died, or that they are dead.

Cur. adv. vult.

TINDAL, C. J.—The plea which was lastly pleaded having been held bad in the course of the argument, on the ground of its traversing a fact which is not alleged in the count, the tenant then proceeded to take objections against the sufficiency of the count itself, and the objections taken have been three in number. First, that *Anna Maria Curtis*, upon whose death the intrusion of the tenant is alleged to have taken place, appears upon the face of the count to be only an equitable tenant for life. Secondly, that the demandant makes title by devise, and not by descent. And lastly, that he has counted on a seisin of his ancestor within fifty years; whereas, as it is contended, a writ of intrusion is not maintainable, unless where the demandant can shew a seisin within twenty years next before the writ sued out. As to the first objection, it is to be observed, that as it is not raised upon a special demurrer to the count pointing out any want of form in the statement of the demandant's title, it must be considered as if it were taken upon general demurrer; in which case, by the statute 27 Eliz. c. 5, the judges are directed to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form, in any writ, declaration, or other pleading, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer. The question, therefore, becomes this,—whether the count shews upon the face of it a defective and insufficient title in the demandant to maintain the writ; or whether it shews a title which is good in substance, though set out informally, and without sufficient certainty. For whilst in the former view of the question the count must be held to be bad, in the latter the objection is not maintainable, not having been pointed out as cause of special demurrer. The objection relied upon is, that *A. M. Curtis*, upon whose death the intrusion of the tenant is alleged to have taken place, appears to have no more than an equitable estate for life; that is, in the eye of a court of law, no estate at all; and, consequently, that no intrusion, in the legal sense of that word, can have taken place, intrusion being the wrongful act of a stranger in taking the possession after the death of the tenant for life, to the prejudice of the reversioner or remainder-man. But looking at the statement of the title in the count, we find no allegation that *A. M. Curtis* was the tenant for life, upon whose death the intrusion took place; and looking at the legal con-

struction of the devise, and the circumstances which are stated in the count to have taken place, we think the necessary inference is that *Gardner* and *Piercy* were seised of the legal estate in the premises, during the life of the said *A. M. Curtis*, that is, that they were tenants for her life. For as to the nature of their estate, we cannot entertain a doubt that they may be considered as tenants *pur autre vie*, notwithstanding they are directed by the will to pay the profits over to the *cestui que vie*, precisely in the same manner as if they had been allowed to take such profits to their own use; the count, therefore, appears to us to be good in substance, provided the writ of intrusion be maintainable by him in remainder, for an intrusion made after the determination of an estate *pur autre vie*. And as to that question, it must be admitted that no precedent can be found in the entry-books of such a count; but, on the other hand, there is every reason by analogy and strong authority to shew that it may be maintained. The estate of tenant for term of life is defined by *Littleton* (s. 56), to be for term of the life of the lessee, or of another man; and it is obvious that the remedy by writ of intrusion would be very incomplete, if it would not apply to an intrusion after the determination of each instance of an estate for life; for if tenant for his own life assigns over to another, that other becomes directly tenant *pur autre vie;* and the remedy would fail. And the definition given of a writ of intrusion in *Finch*'s Law, p. 195, a book of high authority, expressly comprehends the case in question. "Intrusion," says *Finch*, "is after the death of tenant for life, be it a man's own life, or another man's in dower or by courtesy," &c., with which agrees in effect the book called *Termes de la Ley*:—"Intrusion is a writ which lies against him who enters after the death of tenant in dower, or any other tenant for life, and holds out him in reversion or remainder." The objection, therefore, appears to us to amount to no more than that the allegation of the determination of the legal estate for life in the trustees, upon the determination of which the intrusion took place, is not alleged with sufficient form and preciseness, and, consequently, to amount to ground of special demurrer only, so that it cannot be insisted upon in the present state of the pleadings. The second objection is one which, if it is good in point of law, may undoubtedly be taken advantage of on general demurrer, viz., that a demandant who claims title under a devise cannot maintain a writ of intrusion. No express authority has been cited for this proposition, though undoubtedly, on the other hand, no precedent can be found in the older books of entries of a count so framed; one reason for which may be, that until the statutes of devises, 32 & 34 Hen. 8, a remainder created by devise could never exist, except in cities and boroughs, where a custom to devise prevailed, and in those cases the customary writ of *ex gravi querelâ* would have been the proper remedy for an injury of the nature now complained of. (See Fitz. N. B. 459.) It is clear, however, that the writ of intrusion will lie where the demandant claims as a remainder-man; for the authority of Fitzh. N. B. 470, is express, that not only he in remainder shall have it, but the assignee of the remainder also. Now this remainder must have been created either by a deed of gift, or by devise; and an intrusion after the death of tenant for life is equally mischievous to him entitled to the remainder, whether it is created by the one mode or the other: even admitting, therefore, that the writ in the register does not apply to the case, we cannot see any impropriety in holding the case to fall within the provision made by the statute of *Westminster* 2, c. 24, that when a writ is

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granted in one case, and a thing happens in *consimili casû*, and needing a similar remedy, a writ should be made accordingly. And the case of *Eastman* v. *Baker* (*a*) must be considered as a precedent, the writ being drawn precisely in the same form with the present; for although the objection was never taken, yet it was apparent on the face of the count, and no one on the part of the tenant thought proper to take it. As to the objection on the Statute of Limitations, we are of opinion that the writ of intrusion falls within the statute 32 of Hen. 8, c. 2, and not within the statute 21 Jac. 1, c. 16. The second section of the former statute enumerates writs of entry upon disseisins done to any of his ancestors or predecessors, or any other action possessory upon the possession of any of his ancestors or predecessors, under which latter class of actions the writ of intrusion clearly falls. The statute of Jac. 1, on the other hand, does not apply to cases where the party is reduced to the necessity of bringing his real possessory action, but to cases where he has the right to make an actual entry without action brought, directing all such entries to be made within twenty years next after the right to enter has first accrued; and it is observable that as to writs of *formedon*, the limitation of fifty years, which had been fixed by the same statute of Hen. 8, is reduced to twenty years by an express enactment to that effect in the statute of 21 Jac. 1, the statute being altogether silent as to writs of intrusion, or any other possessory actions. Notwithstanding, therefore, the objections above taken against the count of the demandant, we think it good in law, and that judgment must be given in his favour upon the demurrer to the last plea.

Judgment for demandant on the last plea.

(*a*) 1 Taunt. 174.

April 19.

MORRISON and another *v.* HARMER and another.

In an action for libelling the plaintiffs in their business of selling a medicine, called *Morrison's* pills, by publishing that the defendants had crushed the self-styled *hygeist* system of wholesale poisoning, and that several of the scamps and rascals had been convicted of manslaughter; the defendants pleaded, as a justification, that the pills were composed of aloes and gamboge of a dangerous and poisonous nature, and that by impudent advertisements, the plaintiffs had pretended that the pills would cure all diseases if taken in sufficient quantities; and that two of the hygeists had been convicted of manslaughter for administering the pills:—*Held*, that the plea was sufficient, although it did not particularly justify the use of the words, scamps and rascals; also, that it was no objection that one of the patients who had died had taken a less quantity of pills than the hygeist had ordered; and that it was not necessary for the defendants to shew that they had entirely crushed the system.

CASE against the proprietors of the *Weekly Dispatch* newspaper, for a libel on the plaintiffs, in their business as manufacturers and sellers of certain good, wholesome, and lawful medicines, called *Morrison's Universal Vegetable Pills*, and for publishing that the said medicines were noxious, deleterious, and unwholesome; and for causing it to be believed that the plaintiffs were in bad and insolvent circumstances. The defendants pleaded a justification, as to the following part of the libel: "We may safely claim the merit of having crushed the self-styled hygeist system of wholesale poisoning, since we commenced exposing the homicidal tricks of these impudent and ignorant *scamps*, who had the audacity to pretend to cure all diseases with one kind of pills, which pills were composed of nothing more or less than *gamboge* and *aloes*. Several of the rot-gut *rascals* have been convicted of

manslaughter, and fined and imprisoned for killing people with enormous doses of their universal boluses;"—that long before, and at the time of the composing and publishing the said alleged libel, in the introductory part of this plea mentioned, the plaintiffs manufactured, compounded, and sold pills, by them denominated *Morrison*'s Universal Vegetable Medicines, at the said building and place, called by them the *British College of Health*, and also during that time styled and denominated themselves and others, who vended and administered the said pills, by the name and denomination of hygeists; that the plaintiffs during all the time aforesaid, and whilst they so manufactured and sold the said pills as aforesaid, were persons wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe or administer medicines of any kind; that the said pills so manufactured and sold by the plaintiffs were composed of certain medicinal substances called *gamboge* and *aloes*, both of which said substances were well known to chemists and medical men, and were in common and ordinary use; and one of which, that is to say, gamboge, when unskilfully compounded, was of a highly dangerous and poisonous nature; that the plaintiffs, in order to deceive and delude ignorant and credulous persons, without any sanction or authority whatsoever, appropriated to themselves and used the name and title of hygeists, as denoting themselves to be persons skilled in promoting and preserving health, whilst, in truth and in fact, they, the plaintiffs, were wholly unacquainted with medical knowledge of any kind, and utterly ignorant and unskilled upon the subject; and in like manner, to deceive and delude, denominated and called the said building or place, where they so manufactured and sold the said pills, "*The British College of Health;*" that during all the time aforesaid, the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements and handbills; and therein falsely, audaciously, and wickedly stated, asserted, and pretended, that the said pills so manufactured by them, as aforesaid, cured all diseases of every kind; and therein also audaciously and wickedly suggested and recommended, that persons affected with diseases should take great and enormous doses and quantities thereof, and thereby, by such false and fraudulent tricks and devices, contrived and endeavoured to procure and effect the sale of the said pills, and to induce ignorant and credulous persons to purchase the same; that one of the said advertisements and handbills, so published and dispersed by the plaintiffs, contained, amongst other things, the fraudulent, impudent, false, and delusive matters following, of and concerning the said pills, and the said plaintiffs, and the said trade and business carried on by them as aforesaid; that is to say, "Health secured by *Morrison*'s pills, the vegetable universal medicine of the *British College of Health*, which has obtained the approbation and recommendation of some thousands, in curing consumption, cholera morbus, inflammations, bilious, and all liver-diseases, gout, rheumatism, lumbago, tic-doloreux, king's evil, and all cutaneous eruptions. Nos. 1 and 2 are both aperient and purgative, and may be used indiscriminately; but experience has proved that No. 2 is the most efficacious in subduing many diseases. These diseases are fevers of all kinds, inflammations, asthma, small-pox, measles, hooping-cough, gout, cholic, in fine, all violent diseases or pain; and when the violence is over, Nos. 1 and 2 should be taken alternately till well, some days in small, and some days in large doses. It is keeping up the evacuations that effectually cures; every bleeding is pernicious, and a

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step towards premature infirmities and the grave. You cannot go wrong with them, by taking them at any time, day or night, or in any number, so innocent is their operation; but experience may point out the following rules, so as to render them more easy and serviceable; as an aperient and to prevent costiveness, the dose is from two to five pills at night or morning; or any time, night or day. Should you feel any uneasiness after two or three days' use, it is a sign your stomach and bowels are foul, and some large brisk doses should be taken so as to get rid of the offending humour, and persevere in that way as a brisk purgative; in either acute or chronic diseases the dose is from eight or ten pills to twenty or more, and, in urgent cases, should be repeated twice a day: night or morning is the most convenient when pursuing a course, otherwise, the best rule is to take them when one feels sickness, fever, or ague coming on; they afterwards require no attention or alteration as to diet, drink, exercise, or cold; the only thing is to continue them till well. During a course, if a patient feels any day not quite so well, let him reflect that he only wants more evacuations, and another dose will relieve him." The plea then averred, that one *Richard Richardson*, being sick, was persuaded and induced by one *Joseph Webb*, he being one of the said self-styled persons called hygeists, to take, and did take, large quantities of the said pills, as suggested and recommended in the said advertisements, as aforesaid; and by reason and in consequence thereof, afterwards died; and that afterwards, at the *York* assizes, the said *Joseph Webb* was indicted and convicted of manslaughter, for killing and slaying the said *R. Richardson*, by so administering, and persuading, and inducing him, to take the said pills, and was sentenced to be imprisoned. Then followed a similar averment of the conviction and imprisonment of one *Robert Salmon*, another of the hygeists, for the manslaughter of one *Mackenzie*, by persuading and inducing him to take the pills. By another plea, the defendants justified the charge of insolvency, which was made in the alleged libel; issue was joined on both pleas.

At the trial, before *Tindal*, C. J., it was in evidence that the defendants, the proprietors of the *Weekly Dispatch* newspaper, had published a series of attacks upon the *hygeian* system; and, by the *Stamp Office* returns, it appeared that at about the period when the libel was published, the quantity of pills sold had considerably diminished. The defendants proved that the pills were composed of *gamboge* and *aloes*, and that a large quantity of them could not be taken without endangering the patient's life. The trials and convictions of *Webb* and *Salmon* for the offence of manslaughter, as stated in the plea, were also proved; but the widow of *Mackenzie* said, that after her husband had been taking many pills, *Salmon* ordered him to take thirty-five more, shortly before he died, but that only twenty-five were administered. The medical witnesses were of opinion that his death would have been accelerated if he had taken the larger quantity.

The plaintiffs called many witnesses, who stated that they had taken immense quantities of the pills, in larger doses than those described by the defendants' witnesses as being sufficient to cause death; without experiencing any but the most favourable results.

The jury found a verdict for the defendants on the first issue, and for the plaintiffs, with 100*l.* damages, on the issue as to the insolvency.

Kelly moved for a rule *nisi*, for a new trial upon the first issue, or why judgment should not be entered for the plaintiff, *non obstante veredicto*.—[*Tindal*, C. J. Here there are two issues, one of which has been found for the defendants. Can you move for a new trial upon one issue only? I once looked for an authority upon that point, but could find none.]—Cases have been sent down for a new trial upon one only of several issues; if the court granted a new trial upon both issues, the plaintiffs would run the risk of losing their verdict upon the issue found in their favour. The grounds for the application for a new trial are these:—The libel alleges that the defendants had crushed the self-styled hygeist system, and the plea justifies that part of it; but no proof was offered at the trial to shew that the system had been crushed. It was, indeed, assumed that there had been some previous attacks upon the plaintiffs in former publications; but to support that particular portion of the plea the defendants were bound to shew that they had crushed the system altogether.—[*Tindal*, C J. There was evidence, that from some cause, the sale of the article had greatly fallen off. Does the allegation in the plea mean more than that they had done their utmost to crush the system?]—Another objection is, that the part of the plea was not proved which alleged the manslaughter of *Mackenzie*. There was no proof that the medicine was taken by *Mackenzie* in the manner suggested by the advertisements; but, on the contrary, the witness proved that the deceased had taken less than the number of pills ordered by *Salmon*. The plaintiffs are entitled to judgment *non obstante veredicto*, because the defendants do not justify the truth of the whole libel. The libel describes the plaintiffs as being scamps and rascals, which are clearly libellous epithets; but the justification contains no answer to that part of it. It may be taken as a fact that the defendants proved the whole of the justification which they pleaded, but, nevertheless, the plea does not contain an answer to this substantive portion of the declaration.

TINDAL, C. J.—No ground has been laid sufficient to induce the court to send this case down for a new trial. Two objections have been made; first, that there was no proof of the allegation that the defendants had crushed the self-styled hygeist system of wholesale poisoning; and, secondly, that the allegation in the plea as to *Mackenzie*'s death, was not only unsupported by the evidence, but was altogether at variance with it. But, it seems to me, upon a fair construction of the allegation, that there was enough proved to enable the jury to come to a conclusion, and therefore we ought not to disburb the verdict. As to the first objection, it was admitted at the trial, that the defendants had attacked the plaintiffs in former publications. The meaning of the statement in the allegation was, that the defendants had done their best to crush the system, not that they had entirely destroyed it. The second objection relates to the taking of the pills by *Mackenzie*. It is alleged, that he was persuaded to take large quantities, as suggested and recommended in the advertisements. The advertisements were in evidence, and the mode of taking the pills there pointed out, was to take care to take enough; perseverance in the use of the medicine is the general strain of the document. It appears that *Mackenzie* had taken a large quantity of the pills, and upon being afterwards directed by *Salmon* to take thirty-five, he took a smaller number. But the medical witnesses proved that if the patient had taken more, he would probably have died sooner. This was evidence for the jury, and if they thought

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that the non-compliance with *Salmon*'s directions did not hasten the death of the deceased, they were justified in finding a verdict for the defendants. We will look into the pleadings before we deeide upon the other part of the motion.

BOSANQUET, J.—I am of the same opinion. It is said that the defendants were bound to prove that they had crushed the system. The meaning of the statement was, that they had made strong attacks upon it, and it was for the jury to say, whether the diminution in the sale of the article was not to be partly attributed to those attacks. As to the other point, the advertisements recommend that large quantities of the pills should be taken, and it appears that the patient who died took them in large quantities; whether he took thirty-five or twenty-five was immaterial, except that according to the opinion of the witnesses, he would have died the sooner.

COLTMAN, J., concurred.

Rule for a new trial refused.

Cur. adv. vult.

TINDAL, C. J.—We have considered the objection raised on the part of the plaintiffs against the form of the defendants' first plea of justification, and we are of opinion, that there is no ground for the motion which has been made for judgment for the plaintiffs, *non obstante veredicto* on that plea. The objection which has been taken is this, that the first plea which proposes to justify the truth of so much of the libel as is set out in its commencement, contains no answer to part, and that, as it is contended, a material part of the libel so set out; inasmuch as the libel, as set out in the plea, applies to the plaintiffs, the opprobrious and scurrilous terms of scamps and rascals, for the application of which terms the plea does not offer any excuse or justification. Now, it must be admitted, that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence above contended for on the part of the plaintiffs would justly follow, for the plea upon that supposition would not contain an answer to so much of the declaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature, and the main and principal allegation in the plea of justification is, that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same. The question therefore is, whether the terms of abuse, which have been above referred to, carry the matter any further than this, the main charge. The words themselves in their vulgar use convey no other meaning than that of general reproach and invective, and we can only discover whether they have any particular meaning in this libel, by referring to the context of the libel, and to the allegations on the record. As to the word "scamp," the plaintiffs themselves have given the meaning

to it, for they allege in their declaration, that it is intended to be applied to them in the way of their aforesaid trade, business, and occupation, that is as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them; and the word rascals is associated with an epithet or adjunct, which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter. We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse, which may be found in the description or statement of such imputation. We think, therefore, the rule which has been applied for to permit the plaintiffs to enter up judgment *non obstante veredicto*, must be refused.

Rule refused.

TOLSON, demandant, *v.* WATSON, tenant.

May 6.

The tenant having demanded a view in *formedon* after a general imparlance, the demandant sued out a writ of *grand cape*. *Held*, that this was irregular, and that the demandant ought to have counter-pleaded or demurred.

THIS was a writ of *formedon*, issued on the 30th of *May*, 1835, and an appearance was entered upon the 31st of *October*. On the 28th of *April*, 1836, the demandant counted, and on the 4th of *May* the tenant demanded an imparlance to the first four days of *Trinity* Term, which commenced on the 22d of *May*. On the 25th of *May*, the tenant took out a summons for further time to plead, and a fortnight's time was obtained, but that being deemed insufficient by the tenant, on the 26th of *May* he demanded a view. On the 7th of *June*, the demandant treated the demand of view as a nullity, and issued a writ of *petit cape*; whereupon a rule *nisi* was obtained to set aside the writ of *petit cape*, and to have the view demanded.

Wilde, Serjt., and *Manning*, shewed cause against the rule, and *Steven*, Serjt., and *Peacock* were heard in support of it. The arguments sufficiently appear in the judgment of the court.

Cur. adv. vult.

TINDAL, C. J.—The question which has been argued before us, arises upon a rule obtained by the tenant, calling upon the demandant to shew cause why a writ of *petit cape*, issued by him, should not be set aside for irregularity, and why the defendant should not have the view; and the irregularity complained of is, that the writ was issued at a time when the tenant was in court, and had demanded a view. The demandant, on the other hand, contends, that the tenant was in no condition to demand a view; first, because the view is not demandable after a general imparlance; secondly, because the view was demanded before the day of appearance given by the imparlance, and consequently at a time when the tenant was not in court. As to the second ground of objection, upon reference to the dates of the proceedings, it appears to be unfounded; for the imparlance was granted on the 4th of *May*, to *Trinity*

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Term, which began on the 22d of *May*, so that the *quarto die post* would be the 25th, or as the 1st day of the term fell on a *Sunday*, supposing that day to be left out, the *quarto die post* must at latest have been the 26th, on which day the view was demanded. The only objection, therefore, which remains to the regularity of the view is, that it was demanded after a general imparlance; and we must confess that we should have felt ourselves involved in considerable difficulty, if we were called upon in the instance of probably the last writ of *formedon*, which will be brought before us, to decide a point in practice, which seems to have been *vexata quæstio* for near 300 years; as it appears by *Dyer*, fo. 210, b., that when this very point was moved, the court thought one way and the prothonotaries the other, and certainly the subsequent authorities are rather in favour of the opinion of the latter. We feel ourselves, however, relieved from this difficulty by the objection taken by the tenant, namely, that admitting the demand of view cannot be supported, yet the demandant is irregular in suing out the *petit cape*, a writ which can only be awarded where a default has been committed by the tenant, as is manifest from the authorities in *Booth*, tit. Default after Appearance; whereas here there has been no default; and upon reference to the authorities cited on the part of the tenant, we are of opinion, that if the demand of view is objected to upon any ground arising on matter of fact, the demandant should have put in a counter plea; or, if upon any matter of law, he should have demurred, and that the judgment given on a demurrer would not have been peremptory, but an award of the *respondeas ouster* only. The authorities to which we refer are the Year Book, 39 Ed. 3, p. 38.; 7 *Jenkin's* Cent. case 82; *Bro.* Abr. tit. Peremptorie, pl. 76, and *Bro.* Abr. tit. Aide, pl. 118. On the ground, therefore, that the demandant has treated this demand of view as a nullity, and has sued out a writ of *petit cape*, where he ought to have counterpleaded or demurred, we think his proceeding irregular, and that so much of the rule as calls upon us to set aside the writ of *petit cape* for irregularity, must be made absolute.

Rule absolute.

LUCAS *v.* GODWIN.

May 4.

ASSUMPSIT for work, labour, and materials. *Plea*, *non-assumpsit* and issue thereon.

At the trial before *Coltman*, J., at the last *Huntingdon* assizes, the following were proved to be the facts of the case. The plaintiff was a builder, and the defendant a farmer.

Early in the summer of 1836, the defendant informed the plaintiff that his

1. Where a contract stipulated that the plaintiff should be paid for building six cottages, "on the 1st January 1837, on condition of the work being done in a proper and workman-like manner, and to be completed by the 10th of October." *Held*, that after the work was done, and the day of payment had expired, the plaintiff was entitled to recover in *indebitatus assumpsit*, without declaring specially.

2. Where the defendant was charged with a fraudulent design to induce the plaintiff to build some houses upon the credit of his son, evidence was given that the defendant had represented that he and his son were entitled to receive some money from *America*, and that the *Stamford Mercury* contained an advertisement, which required them to go to a certain place to receive the legacy. *Held*, that a copy of the *Stamford Mercury* of a date which corresponded with the time when the representations were made, and which contained such an advertisement, was receivable in evidence.

3. Where a defendant was charged with having been a party to a fraud in making a contract in *June*, evidence of his conduct between that time and *January*, when the money was to be paid, and when his participation in the fraud was first discovered, was held to be admissible.

son, *Thomas Godwin*, who was a carpenter and wheelwright, had been left a legacy; and upon application being made to the plaintiff by *Thomas Godwin*, to build some cottages, the following articles were entered into between them:—

"Memorandum of an agreement, made this 25th of *June*, 1836, between Mr. *G. Lucas*, builder, on the one part, and Mr. *Thomas Godwin*, of *Fawcet*, in the county of *Huntingdon*, on the other; that is to say, the said *G. Lucas*, agrees to do all the bricklayers, plasterers, and slaters work, (exclusive of slating laths,) and brick floors, in six cottages about to be erected in *Fawcet* aforesaid, of the depth of twenty feet four inches each cottage, breadth thirteen feet outside measure, for the sum of 216*l.*, exclusive of stone foundations, the one-half of which, at the prime cost of the stone, is to be paid for by the aforesaid Mr. *T. Godwin*. Mr. *T. Godwin* also hereby agrees, on his part, to pay unto the aforesaid *G. Lucas*, the above sum of 216*l.*, on the 1st *January*, 1837, on condition of the work being done in a proper and workman-like manner, together with the amount of one-half of the foundations as before mentioned, and to be completed by the 10th of *October*, 1836."

Whilst the houses were building, the defendant frequently viewed the work, and gave trifling orders to the workmen; and expressed his approbation of it after it was completed. About the latter end of *September*, 1836, the defendant asked various persons whether they had seen an advertisement in the *Stamford Mercury*, respecting some property in *America* which had been left to him and his son. A newspaper was produced by one witness, who read over an advertisement, purporting to be inserted by one *Buck*, and the defendant said that he should go to *Spalding* to receive the money therein mentioned, and borrowed a horse of another witness for that purpose. He returned to his house the following day, and said that he and his son had received the money, and deposited it in the *Spalding* Bank. Some extra work was done in the cottages, and they were completed on the 15th of *October;* and in the middle of *December Thomas Godwin* was committed to prison on a charge of felony. The plaintiff, upon making inquiries then ascertained that the statement about the legacy, and the *American* property, was a mere fabrication; and he discovered that the land on which the cottages were built belonged to the defendant. The defendant was proved to have admitted that the money was never received at *Spalding*, and that his son was his agent, and in *January* the plaintiff treated him as principal in the contract. To shew that the defendant had been a party in a fraudulent attempt to get credit given to his son, the plaintiff offered in evidence the *Stamford Mercury* newspaper, dated the 23d *September*, which contained the following advertisement:—

"Mr. *Thomas Godwin*'s estate.—The administrator of the estate and effects of *Thomas Godwin*, formerly of *Crowlands*, *Lincolnshire*, mariner, on board his majesty's fleet, and late of *Philadelphia*, *America*, who died on the 5th of *July*, 1836, hereby gives notice that he is about to pay over the sum of 400*l.* to *Samuel Godwin*, late of *Crowlands*, in the county of *Lincoln*, yeoman, and his son, *Thomas Godwin*, formerly apprentice at *Rippingale*, in the said county, wheelwright, who are entitled to 100 acres of land, together with the house, barn, and other buildings thereon, situate at *Philadelphia*, *America*. If the above claimants will meet at the *White Hart*, *Spalding*, on the 27th of *September*, between the hours of eleven and two o'clock, they will be entitled to the same, by inquiring of Mr. *W. Buck*, administrator to the deceased."

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It was objected, that this newspaper was inadmissible in evidence, but the learned judge overruled the objection. It was also objected that the plaintiff must be nonsuited, because the contract ought to have been declared upon specially; this point was reserved, and the following questions were left to the jury. First, whether the defendant had authorized his son to make the contract; and, secondly, whether the plaintiff knew when the contract was signed, that the son was agent to his father. The jury returned a verdict for the plaintiff, and found that the defendant authorized the son to contract, and that the plaintiff did not discover that the defendant was a principal, until *January*, 1837.

Kelly obtained a rule *nisi* to enter a nonsuit: or for a new trial on the ground of the reception of the evidence; and also upon affidavits, upon the ground of surprise.

Byles and *Birch* shewed cause. First, this is not a contract upon a condition, and therefore the plaintiff was not bound to declare specially, In 1 *Will. Saund.*, 269 (a), it is said, "The general counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of the money." And in *Bull*, N. P. 139. "For though an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; yet when that is done it raises a duty for which a general *indebitatus assumpsit* will lie." So where a contract was made to build a house according to a plan, and the condition was broken, but the defendant nevertheless encouraged the plaintiff to proceed with the work, it was held that an action for work and labour might be maintained, *Burn* v. *Miller* (*a*). It is true that here the work was to be done by the 10th of *October*, and the money was not to be paid until the 1st of *January*; but it was proved that extra work was done, and the defendant did not shew that the work which was done after the 10th of *October*, was part of the contract work. But, in fact, the contract does not contain any condition at all; the payment of the money was made to depend upon the execution of the work in a proper manner, but that is not such a condition as to require a special declaration, because the law would imply that the work must be so done; and as it was proved that the defendant approved of the work, and promised to pay for it, then there was a waiver of the condition, if it ever existed, as in *Alexander* v. *Gardner* (*b*.) But if this objection to the form of the declaration could be sustained, then, upon the facts of this case, the plaintiff would be entitled to recover, without relying upon the contract at all. If goods are found in the possession of a man, he is *primâ facie* bound to pay for them; and he cannot set up in answer a fraudulent contract to which he was a party. Thus in *Hill* v. *Perrott* (*c*), it was held, that an action would lie for goods, which the defendant had gotten into his possession, and which he had by fraud procured the plaintiff to sell to an insolvent; and in *Biddle* v. *Levy* (*d*.), that where goods were supplied to a minor, upon a fraudulent representation of his father that he was about to relinquish his business in favour of his son, the father was held to be responsible in assumpsit for goods sold and delivered. As to the admission of the

(*a*) 4 Taunt. 745.
(*b*) 1 Bing. N. C. 671. 1 Hodges, 147.
(*c*) 3 Taunt. 274.
(*d*) 1 Stark. 20.

newspaper in evidence, it was properly admitted upon two grounds. First, as evidence, of the fact *per se*, that a newspaper with such an advertisement had been circulated in the neighbourhood; and, secondly, upon the ground that the defendant had connected himself with the false representations there made. He was proved to have heard it read by a witness, in his own house; and to have stated afterwards, that in consequence of the information contained in the advertisement, he had been to *Spalding* to receive the money, which he had deposited in the bank.

Kelly and *Gunning*, in support of the rule.—It may be admitted that if a contract is executed, and nothing remains to be done but the payment of the money, it is then sufficient to declare on the common counts; but here there was a special condition in the contract, requiring that the work should be done in a proper and workmanlike manner by the 10th of *October*, 1836. If the plaintiff relies upon a dispensation of the condition, then that ought to have been averred in the declaration, that the defendant might traverse it. Then was the newspaper properly received in evidence? The fraud charged by the plaintiff is, that the defendant and his son caused reports to be spread, that they were entitled to certain property, in order to induce the plaintiff to give credit to the son. But the advertisement was inserted in *September;* and the contract was made in the preceding *June*. In a criminal case, evidence shewing a conspiracy in *September*, would not prove a conspiracy in *June*. [*Tindal*, C. J.—It might throw light on the previous conduct of the parties.] And the defendant is proved to have spoken of *an* advertisement, but not of the particular advertisement which was received in evidence; nor was it proved that he referred to a newspaper which was published on the day of the date of that which was read in evidence. The defendant is said to have heard an advertisement read from a particular newspaper; the regular course would have been, to produce the original newspaper; or if its non-production could be satisfactorily accounted for, then an examined copy might have been produced. Before the 38 Geo. 3, c. 78, it was necessary in an action for libel, to prove the publication of the identical newspaper which contained the libel.

TINDAL, C. J.—I see no reason for disturbing this verdict. Three objections have been made: the first, to the form of the declaration; the second, because of the reception of the evidence; and the last, upon the ground of surprise. Upon referring to the contract, it does not appear to me—inasmuch as the work was perfected and the day of payment had arrived before the action was brought—that the plaintiff was bound to declare specially. The contract was executed. I do not think there was any condition in the contract which went to the whole right of action. *Godwin* agrees to pay the plaintiff, on condition that the work shall be done in a workmanlike manner, but that condition is implied in all contracts. Secondly, it was provided, that the work should be completed on a day certain. But that is no condition; it is rather a mere stipulation that the work shall be completed on that particular day; and if it is not so performed, the defendant may be entitled to recover damages. The second objection is, that the newspaper was improperly received in evidence. It is first said, that the date renders it inadmissible. That is not so. The question was, whether the defendant had

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not entered into a fraudulent contract; and it seems to me that as this was published before the houses were completed, the advertisement may be used to throw light upon the preceding transaction. No rule of law is violated by receiving such evidence, for the purpose of shewing that a conspiracy was in existence between the father and the son. It was for the jury to say what the effect of it was. It is then objected, that it was not shewn by the date of the advertisement, that it had any reference to the conversations and acts of the defendant. The witness stated that the conversation took place in the month of *September*, although he could not remember the precise day; the defendant then said that he was going to *Spalding*, to receive the money from *America*, and asked other witnesses if they had seen the advertisement in the newspaper. Then comes the newspaper, published in the neighbourhood, on the 23d of *September*, containing such an advertisement as that mentioned by the defendant. If there were any other advertisement, to which the defendant really referred, he ought to have proved its existence. Under such circumstances, I know of no reason why this evidence ought not to have been received. The third ground depends upon the affidavits, but they shew no sufficient grounds for granting this motion.

BOSANQUET, J.—I am also of opinion that this rule must be discharged. First, as to the form of the declaration, it was sufficient to frame it in *indebitatus assumpsit*. It is contended that this was a special and conditional contract, and should have been declared on specially. But it is, in fact, a contract executed, although the terms were not strictly complied with. The work was to be completed on the 10th, but was not actually done until the 15th of *October;* but this furnishes no answer, because it does not go to the whole consideration. It is contended that the completion by the 10th of *October*, makes a condition precedent, because the payment is made to depend upon it: but that is not so. It is also said that it is a condition that the work should be performed in a proper and workmanlike manner; but it could not be said that, because some small portion of the work was not so performed, the plaintiff was therefore entitled to receive nothing. Such a breach would only afford the ground to sustain an action for damages, against the party who sustained injury by the non-performance of the contract. Then comes the question as to the admission of the evidence. The real question at the trial was, whether the son was principal or agent in the contract. It is contended that the plaintiff gave the credit to the son in the first instance; and that appears to be the case, for the plaintiff did not discover until *January* that the son was not the principal. It therefore became very important to shew what the conduct of the defendant was, during the whole time that the plaintiff was treating the son as the principal; and upon that ground it appears to me that the evidence of the conduct of the defendant was material. Admitting, then, that such evidence was admissible, was the advertisement properly received in evidence? It seems to me that it was. The defendant had inquired whether an advertisement had been seen respecting his *American* property? It is unnecessary to recapitulate the various remarks made by the defendant upon this subject; it is sufficient to say, that he adverted in the conversations to those particular matters which are mentioned in the advertisement; and then a newspaper was produced, of about the date of the conversations, which tallies so precisely with the statements then made

by the defendant, that no doubt can be entertained but that he had referred to that particular advertisement. It seems to me that this was quite sufficient to make the evidence admissible.

COLTMAN, J.—With respect to the form of the declaration, if the stipulation for the completion of the work by the 10th of *October* be a condition, it does not go to the whole of the contract. But the ground on which I rest my judgment is this, that it is not a contract with such a condition; and therefore, the work having been executed, the general counts are sufficient. The ground upon which the evidence was received was, that it was admissible to shew a prior conspiracy between the parties, and I know of no rule of law to prevent its admissibility. The objection was also put upon another ground;—that there was no evidence to shew that the advertisement produced, was a copy of that which the defendant had referred to; but the witness spoke to a conversation which had taken place at about the time of the date of the newspaper. Then it is contended that this was but a copy of the newspaper, and that when the defendant spoke of a newspaper, it was with reference to a particular copy of it, and that the original ought to have been produced or accounted for; but the defendant spoke of an advertisement generally, not of a particular copy of the newspaper containing the advertisement. It is as when a person says that he has seen the name of another in the *Gazette;* he is speaking of the advertisement, and not of any particular copy of the *Gazette.*

Rule discharged.

Cox and others *v.* KING.

April 28.

By an inclosure act, commissioners were empowered to divide and allot certain open and common fields among the proprietors thereof; and it was declared that the several fields so to be allotted should be in lieu of and in full satisfaction and compensation of all rights and interests whatsoever, of the persons to whom the allotment was made; and it was declared that it should be lawful for the commissioners to allot and award any new allotments and old enclosures, in exchange for any other new allotments or old enclosures within the same parish, or any adjoining parish; so that such exchanges should be set forth in the award, and that they should be made with the consent of the respective proprietors of the land, to be testified in writing under their hands. A power was reserved to parties aggrieved, to appeal to the quarter sessions. The commissioners by their award, made in 1798, allotted to Sir *H. Mildmay*, in respect of an estate in the parish, two closes of land, late Mr. *Parsons*'s land. They also allotted to the said Mr. *Parsons* in respect of his freehold estate, two old enclosures, late Sir *H. Mildmay*'s, called *South Stearts;* also one allotment of arable land, called *Shortlands*, late a common field; and the commissioners did thereby consent to, approve of, and confirm the several exchanges made between the said Sir *H. Mildmay* and the said Mr. *Parsons.* It did not appear that any consent in writing was entered into between the parties; but *Parsons* entered into possession of the two closes, called *South Stearts* and *Shortlands*, and after his death, the trustees under his will, contracted in 1813, to sell the same:—*Held*, that the vendors could not, under the award and the act of parliament, make a good title to the purchaser.

THE following case was sent to this court by the Master of the Rolls. *John White Parsons*, late of *West Camell, Somerset*, was, from a period long anterior to, and at the respective times of the passing of the statute and of the execution of the award hereinafter mentioned, seised of an estate in fee simple of several closes, and *inter alia*, of a close of meadow-land, called *Shortlands*, containing by estimation three acres, and four acres and three yards of arable land, lying dispersed at several places in the west field of

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East Camell. By stat. 34 G. 3, intituled "An Act for the dividing, allotting, and enclosing, the several open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, in *East Camell*," after reciting that there were situate, within the parish and manor or lordship of *East Camell*, several open and common fields, common meadows, and stinted pasture, called common leaze, and other commonable lands and grounds, containing in the whole by estimation 650 acres, or thereabouts; that Sir *Henry Paulett St. John Mildmay*, and Dame *Jane* his wife, in her right, were lord and lady of the said manor or lordship, and that *Francis Newman, John Goodford*, a minor, *Thomas Horner Pearson*, clerk, vicar of the the said parish in right of his vicarage, *John Barrett, Constantine Crobrow, John White, Abel Willis, Henry Morris, John Hockey, John Lamb Cook, Thomas Carew*, and others, were owners and proprietors of all the said open and common fields, common meadows, and other commonable lands and grounds, (except the said stinted pasture); that the said several owners and proprietors were also entitled to rights of common thereon, during certain seasons of the year, and in certain shares and proportions; that the said Sir *H. P. St. John Mildmay* and Dame *Jane*, his wife, in her right, were also seised of, or entitled to, the said stinted pasture, called *Camell Leaze*, subject to the right of the said Sir *H. P. St. J. Mildmay*, and Dame *Jane*, his wife, and of certain other persons, to stock and stint the same with cattle, during a particular part of the year, and under certain restrictions; that the lands of the said respective owners and proprietors, in the said open and common fields and common meadows, lay intermixed and dispersed in several places distant from each other, and in small parcels, and in that respect were very inconvenient; that the same, and also the stinted pasture and other commonable lands and grounds, in their then present situation were incapable of any considerable improvement, and that it would be very advantageous to the several proprietors thereof, if the said open and common fields, and other commonable lands and grounds, were divided and inclosed, and specific parts and shares thereof allotted unto the said several proprietors, and persons interested in lieu of, and in proportion as near as might be, to their several and respective properties, rights, and interests; it was enacted that it should be lawful for the commissioners therein named, and they were thereby required, to set out, assign, allot, apportion, and divide, the open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed in manner following; that is to say, (after certain roads were provided for,) to set out, mark, ascertain, divide, and allot, by proper stakes, metes, and landmarks, all the residue and remainder of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed unto, among, and between the said Sir *H. P. St. J. Mildmay*, and Dame *Jane*, his wife, in her right, *F. Newman, J. Goodford, T. H. Pearson, J. Barrett, C. Crobrow, J. White, A. Willis, H. Morris, J. Hockey, J. L. Cook*, and *T. Carew*, their respective heirs, successors, and assigns, and all and every other the owners and proprietors of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed, in such quantities, shares, and proportions, and in such parts and places as by the said commissioners should be adjudged and determined to be a just com-

pensation and satisfaction for, and equal to, their several and respective lands, grounds, rights of common, stints, or cattle-gates, and other their rights and interests therein. Provided always, that the said commissioners should have due regard to the quality, situation, and convenience, as well as the quantity, of the several allotments, to be made by virtue of that act, and also to the situation of the messuages, buildings, and ancient enclosures of the several proprietors to whom such allotments should be made, so as to lay the allotments as convenient and commodious to the said several proprietors as the general partition and exchange of property would in the judgment of the said commissioners admit of; and that the several lands and grounds to be set out and allotted unto and for the person or persons who by virtue of that act should be entitled to the same, should be in lieu of and full satisfaction and compensation of and for his, her, and their several parcels of land, rights of common, stints, cattle-gates, and all other rights and interests whatsoever in and to the said open and common fields, common meadows, stinted pasture, and commonable lands and grounds thereby directed to be divided and enclosed; that when and so soon as the commissioners should have finished the said intended division and allotments of all the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and enclosed, they should prepare a draft of their award, which should express and specify the number of acres, roods, and perches, in statute measure, contained in the same lands and grounds, and also in the different plots and parcels thereof respectively which should be set out and allotted to each and every person and persons by virtue of that act, with the exact description of the situation, abuttals, and boundaries of the same, distinguishing the several tenures thereof; that the said award and all matters and things therein contained, and all such allotments of the said lands and grounds thereby directed to be divided and enclosed as should be set out and allotted by the said award of the said commissioners, should be final, binding, and conclusive to all and every person or persons interested therein, their and every of their heirs, executors, administrators, successors, and assigns respectively. Provided always, that the guardians, husbands, trustees, committees, or attorneys, or persons acting as guardians, trustees, committees, or attorneys, of or for any person or persons being minors, under coverture, lunatics, beyond the seas, or otherwise incapable by law to accept of their respective allotments, might, and they were thereby enabled and required to accept thereof, for the use of such person or persons so incapacitated as aforesaid.

And for the more convenient situation of the several farms, lands, allotments, and estates upon the said division and inclosure, it was enacted that it should be lawful for the said commissioners, and they were thereby authorised and empowered, to assign, set out, allot, and award any messuages, buildings, lands, tenements, hereditaments, new allotments, and old enclosures, within the said parish and manor, *in lieu of or in exchange* for any other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures, within the same parish, or any adjoining parish, township, or place, so that all such exchanges should be ascertained, specified, and set forth in the said award of the said commissioners, or in some deed or deeds to be executed by the commissioners, and enrolled or entered in the same place and manner as the said award, at any time within two years next after the date and execution

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of the said award, and so that such exchanges *should be made by or with the consent* of the respective owners, proprietors, or other persons, seised or possessed of, or interested in the lands or other premises which should respectively be so exchanged as aforesaid, or of the husbands, guardians, trustees, committees, or attorneys, for or on behalf of any such owners, proprietors, or other persons respectively, who should be under coverture, minors, lunatics, or beyond the seas, or under any other disability or incapacity of acting for themselves, *such consent to be testified by writing under their respective hands*, and so that all such exchanges of any messuages, lands, tenements, tithes, or other hereditaments, belonging to the vicarages of *East Camell* aforesaid, or any other ecclesiastical benefice, should be also made with the like consent in writing of the lord bishop of the diocese for the time being; and all exchanges so made should be for ever good, valid, and effectual in law, to all intents and purposes whatsoever, notwithstanding the want of sufficient title in the exchanging parties, or any will, settlement, limitation, or incumbrance affecting the premises which should be so exchanged as aforesaid: proviso, that if any person should think himself aggrieved by any matter or thing done in pursuance of that act, (other than by such orders and things as were thereinbefore declared to be final, binding, or conclusive,) then such person might appeal to any general quarter sessions of the peace for the county, within six calendar months next after the cause of complaint should have arisen.

The said *John White*, in the act named, afterwards assumed the surname of *Parsons*, and was the *John White Parsons* hereinbefore mentioned.

The said commissioners made their award, bearing date the 23d *January*, 1798, which recited, that the commissioners had made a just and impartial estimate of the respective rights of the owners and proprietors concerned and interested therein, and had deliberately heard, examined, and considered the several allegations made before them at their several meetings, by and on behalf of all parties interested, and had duly informed themselves of the rights and claims of the several proprietors, and of all matters and things relating to the said division and allotment necessary and proper to be weighed and considered, in order to do justice to all parties concerned therein; and had settled, ordered, completed, and finished the divisions and allotments of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, directed by the said act to be divided and allotted, and had caused the said several allotments to be severally admeasured, set out, dug, fenced, planted, and allotted unto and amongst the several owners and proprietors interested therein, in proportion to their several rights, shares, and interests therein, and that in making such allotments due regard was had as well to the qualities, conveniences, and situations, as to the quantities of land contained therein respectively, and also to the situation of the messuages, buildings, and ancient inclosures of the several proprietors to whom such allotments had been made, so as to lay the same as convenient and commodious to the several proprietors as the general partitions and exchange of property would in their judgment admit, and according to the true intent and meaning of the said act. Amongst other things, the award then set out and allotted unto Sir *H. P. St. J. Mildmay* and Dame *Jane*, his wife, for and in respect of an estate in the said parish, rented by the said *Abel Willis*, of the said Sir *H. P. St. J. Mildmay* and Dame *Jane*, his wife, among other lands,

one close of pasture, called *Ludwell Furze Close*, late Mr. *White Parsons*'s land, containing five acres, one rood, and sixteen perches, lettered and numbered in the plan, W. A. 467. It also allotted unto the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, for and in respect of an estate in the said parish, then or lately rented by *W. Canning* of the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, one close of arable land, called *Hill Close*, late said Mr. *White Parsons*'s, containing four acres and four perches, lettered and numbered in the plan C. B. 457. It also allotted unto the said *John White Parsons*, in respect of his freehold estate, two allotments of old inclosure, late Sir *H. P. St. J. Mildmays*, called *South Stearts*, containing sixteen acres one rood and thirty-nine perches, lettered and numbered in the plan W. 464, and 364; also one allotment of arable land, called *Shortlands*, late a common field, containing two acres three roods and twenty perches, lettered and numbered in the plan W. 372. The award proceeded as follows: "And we do hereby consent to, approve of and confirm the several exchanges made between the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, and the said *J. W. Parsons*; and also of all other exchanges made between any of the proprietors and owners of land in the said parish of *East Camell*, the same being in our judgment reasonable and adequate. The award was duly enrolled on the 25th of *August*, 1814.

There was no evidence of the assent in writing of the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, or either of them, or of *J. W. Parsons*, to any exchange, save as such assent might be inferred from the award itself. The said *J. W. Parsons* entered into the possession or receipt of the rents and profits of the additional two acres, three roods, and twenty perches of land, called *Shortlands*, and the said sixteen acres one rood, and thirty-nine perches of land, called the *Stearts*, immediately after the said award, and continued in possession thereof until the time of his death. The said *J. W. Parsons*, on the 23d of *September*, 1808, by his will, devised all his real property to trustees in trust to sell the same for the payment of debts and charges, and died shortly afterwards, leaving *H. W. Parsons* his heir at law. The trustees proved the will on the 17th of *May*, 1809, and entered into the possession or receipt of the rents and profits of all the said lands, called *Shortlands* and the *Stearts*, and ever since continued and still were in such possession. In pursuance of an order of the Court of Chancery, the master, on the 7th of *April*, 1813, offered for sale by public auction certain lands of the said *J. W. Parsons*, in five lots, and among them, in lot one, the said close of arable land, called *Shortlands*, containing by estimation six acres, more or less; and the said two closes of pasture land, called the *Stearts*, containing, by estimation, sixteen acres, more or less, and *William Leonard Thomas Pyle Taunton*, Esq., became the purchaser of the said lot one. By an order of the Court of Chancery, dated the 23d *February*, 1819, it was referred to the master, to inquire whether the plaintiffs in the cause could make a good title to the said premises so purchased by Mr. *Taunton*. The master, by his report made in this cause, bearing date the 7th of *May*, 1835, in pursuance of the said order of the 23d *February*, 1819, certified that he was of opinion, that the plaintiffs could make a good title to the premises.

Mr. Taunton objected to the report, because as to two pieces of land, part of the lands comprised in the purchase and particulars of sale described as two

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closes of pasture land, called the *Stearts*, no title was adduced except under the award of the said commissioners, made within sixteen years next before the purchase. That no power was given to the commissioners by the said act to allot or award any old inclosure to any person in respect of any freehold estate he might have had in the said parish, but only in lieu of or in exchange for some other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures, within the said parish, or some adjoining parish, township, or place; that by the said act it was expressly provided, that all such exchanges should be ascertained and set forth in the award of the commissioners, or in some deed or deeds to be executed by the commissioners, and enrolled or entered in the same place and manner as the said award; that by the said act it was also expressly provided, that all such exchanges should be made with the consent of the respective owners, proprietors, or other persons seised or possessed of, or interested in the lands or other premises which should respectively be so exchanged, or of the husbands, &c. for or on behalf of any such owners, proprietors, or persons who were under coverture, &c.; and that such consent should be testified by writing under their respective hands; that it did not appear that any exchange in respect of the said two allotments of enclosure, called the *Stearts*, was made or intended by the said commissioners in or by the said award, or that any such exchange was ascertained, specified, or set forth therein, or in any deed or deeds executed by the said commissioners, enrolled, or entered in the same place and manner as the said award, at any time within two years next after the date and execution of the said award, as required by the said act as aforesaid; that it did not appear that any messuages, buildings, lands, tenements, hereditaments, new allotments, or old enclosures, within the said parish and manor of *East Camell*, were assigned, set out, allotted, or awarded, in lieu of or in exchange for the said two allotments of old enclosures, called the *Stearts;* nor did it appear that any such consent of the respective owners, proprietors, or other persons seised or possessed of, or interested in the lands or other premises which might be alleged to have been so respectively exchanged or intended to be exchanged as aforesaid, or of any such husbands, &c. as was required by the said act, was at any time given or testified in writing, under the hand of Sir *H. P. St. J. Mildmay*, to whom the said two allotments were stated to have belonged, or under the respective hands of the respective owners, proprietors, or other persons, seised or possessed of, or interested in the lands or other premises which might be alleged to have been respectively so exchanged as aforesaid, or of any such husbands, &c.

The question for the opinion of the Court was, whether the vendors could, under the award of the commissioners and the act of parliament, make a good title to the said closes, pieces, or parcels of land, called the *Stearts* and *Shortlands*.

Wilde, Serjt., on behalf of the purchaser, relied upon the same objections as were raised in the objection to the report. He cited *Casamajor* v. *Strode* (*a*), *Bailiffs of Godmanchester* v. *Phillips* (*b*), *Wingfield* v. *Thorpe* (*c*).

(*a*) Mylne and Keene, 706.
(*b*) 5 B. & Ado., 198.
(*c*) 10 B. & Cress., 785.

Willcock, contrà.—By the provisions of the statute, the commissioners had power to deal with the old as well as the new enclosures, for the purpose of making a more advantageous distribution. The question is, whether it must not be presumed, that the commissioners took care that the necessary consent should be given when the exchanges were made. The statute required that exchanges should be made by the consent of both parties; and the approbation of all exchanges, which is expressed by the commissioners in their award, shews that such mutual consent had existed. *Shortlands* was a common field, and it must be taken *reddendo singula singulis;* that *Shortlands* was allotted in respect of the rights of common, and the *Stearts* in respect of the exchanges. There was no appeal against the award; and the Court will not presume that the commissioners have not done their duty. In *The King* v. *the Inhabitants of Haslingfield* (*d*), Lord *Ellenborough*, C. J., said, "The general rule is that where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn." Such was also the principle which governed the decision in *Williams* v. *East India Company* (*e*).

Wilde, Serjt., in reply.—The statute must be looked at, with reference to reversionary interests of other parties, besides those who might be living when the award was made. It does not appear what land is given in exchange for the *Stearts*. As no title can be made to the lands in question, except under the award, the Court will require that the award should appear to be made in pursuance of the powers with which the commissioners were invested.

Cur. adv. vult.

The following certificate was sent to the master of the rolls after *Trinity* Term:—

"This case has been argued before us by counsel: we have considered it, and are of opinion, that the vendors cannot, under the said award of the commissioners and the said act of parliament, make a good title to the said closes, pieces, or parcels of land, called the *Stearts* and *Shortlands*.

N. C. Tindal.
J. A. Park.
J. B. Bosanquet.
T. Coltman."

(*d*) 2 M. & Sel. 561. (*e*) 3 East, 192.

May 1.

YOUNG *v.* COLE.

The plaintiff, who was a stockbroker, sold for the defendant four *Guatemala* bonds, and paid him 298*l.*, the price for which they were sold. The vendee discovered, after two days, that the bonds were not stamped so as to make them saleable at the Stock Exchange; and he thereupon returned them to the plaintiff, who repaid the purchase-money, without conferring with the defendant. The plaintiff did not disclose the defendant's name when he sold the bonds, and it appeared that stockbrokers were treated as principals, and were liable to be expelled from the Exchange, if they failed in performing their contracts:—*Held*, that the plaintiff was authorized to rescind the contract, and that an action for money had and received was sustainable by the plaintiff, to recover back the 298*l.*, without declaring upon an implied warranty by the defendant, that the bonds were saleable.

ASSUMPSIT for work and labour as a broker, and for money paid, money had and received, and on an account stated. *Plea*—Non-assumpsit. At the trial before *Tindal*, C. J. at *Guildhall*, at the sittings after *Michaelmas* Term, the following facts were in evidence:—

The plaintiff was a broker on the Stock Exchange, and on the 26th of *April*, 1836, the defendant requested him to sell on his account four *Guatemala* bonds for 250*l.* each, and a sale having been effected to one *Briant* at 30 per cent., the defendant delivered the bonds to the plaintiff, and received a check for 298*l.* 15*s.* The following memorandum was signed by the plaintiff:—

Sold for *T. H. Cole*, Esq.

1000 *Guatemala* bonds, at 30	£300	0	0
Commission	1	5	0
	298	15	0

On the 29th of *April*, *Briant* returned the bonds to the plaintiff, upon the ground that they were unsaleable and good for nothing, by reason of their not having been stamped by the *Guatemala* government; and the plaintiff, after making inquiries as to the validity of the objection, repaid *Briant* the money which he had paid for the bonds, without conferring with the defendant before he rescinded the contract. The bonds were issued by the *Guatemala* government in 1826, and in 1829 an advertisement was inserted in the *London* newspapers, requiring the holders of the bonds to produce them to an agent of that government to have another stamp affixed; since that period, by the course of dealing on the Stock Exchange, all bonds which were sold had been stamped in pursuance of this notification. Inquiries were made, for the purpose of ascertaining if there was any agent of the *Guatemala* government in this country, who would affix the stamp to the bonds in question, but no agent could be found.

The practice on the Stock Exchange was proved to be, that if a broker contracted to sell an article of a particular description, and failed to do so, the contractee was entitled to recover back the amount from the broker; and if he made default in paying the money, he was liable to be expelled from the Exchange.

Before the sale of the bonds to *Briant*, the plaintiff and the defendant were both ignorant that an additional stamp was necessary to make the bonds marketable; and the plaintiff did not disclose the name of his principal when he sold the bonds to *Briant*. The defendant refused to return the 298*l.* 15*s.* to the plaintiff, but said in a letter which was in evidence, that if the bonds had belonged to him, he would have returned the money; but it did not appear that the bonds did not belong to him. The plaintiff, thereupon, brought this action.

It was objected, that the declaration was insufficient, inasmuch as it should have been drawn specially, on the implied warranty by the defendant, that the bonds were marketable; also, that the plaintiff was not entitled to rescind the

contract with *Briant* until he had first communicated the facts to the defendant. The jury found a verdict for the plaintiff.

Sir *F. Pollock*, in pursuance of leave reserved, obtained a rule *nisi* to enter a nonsuit upon the above grounds.

Wilde, Serjt., and *Ogle* shewed cause.—In *Child* v. *Morley* (*a*), it was held that a broker, who contracted with others for the sale of stock at a future day, by the authority of his principal, who afterwards refused to make good the bargain, could not, by paying the difference to such third person, maintain an action on an implied assumpsit against his principal for the amount; but Lord *Kenyon*, C. J., said, "that if the plaintiff had been bound as guarantee for the defendant, to the purchasers of the stock, there could have been no doubt but that he might have recovered his whole demand." In the present case, it was proved that the plaintiff would have been expelled from the Stock Exchange, if he had not returned the money which he had been paid. In such a case, when a demand is rightfully made upon a broker, he is bound to comply with it, without waiting to communicate with his principal. This is not a case of a voluntary payment, but the plaintiff was under a responsibility and compelled to pay the money. The bonds, in the state in which they were, were mere waste paper, and altogether worthless. This is one of a class of cases in which the courts have considered the article sold, as being of no value whatever; and therefore there was a total failure of consideration. *Bridge* v. *Wain* (*b*), *Jones* v. *Ryde* (*c*). In *Lucas* v. *Worswick* (*d*), it was held that money paid by the plaintiff, through forgetfulness of facts within his knowledge, could be recovered; which is stronger than the present case, because the plaintiff was not bound to know that a stamp was necessary. In *Street* v. *Blay* (*e*), which might be relied upon, the article which was sold was of some value. There are several cases where parties placed in circumstances of responsibility have been held to be entitled to recover back money which they had paid, *Austen* v. *Ward* (*f*), *Wilson* v. *Milner* (*g*), *Fisher* v. *Fallowes* (*h*).

Robinson, contrà.—It did not appear that the bonds were not binding on the state which issued them, notwithstanding a stamp was not affixed in pursuance of the advertisement. They were not, therefore, entirely worthless. It was merely proved that they were not saleable on the Stock Exchange. The plaintiff ought to have given notice of the objection to the defendant before he rescinded the contract, to give the latter an opportunity of endeavouring to have the stamp affixed. Nor could *Briant* have insisted on having the money returned, as he saw the bonds when he purchased them, and no fraud was imputed to the seller. And as the bonds were of some value, the action ought to have been brought upon the implied warranty that they were saleable. This is not a case where there was a total failure in the consideration, as in some of the cases cited; or where the party was compelled to pay over money, as in the cases relating to bailiffs and sheriffs. In *Street* v.

(*a*) 8 T. R. 610.
(*b*) 1 Stark. N. P. C. 504.
(*c*) 5 Taunt. 488.
(*d*) 1 Moo. & Robinson, 293.
(*e*) 2 B. & Adol. 456.
(*f*) 1 Ry. & Moody, 116.
(*g*) 2 Camp. 452.
(*h*) 5 Esp. 171.

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Blay (*i*), in speaking of the right of a vendee to rescind a contract altogether by returning an article to the vendor, Lord *Tenterden*, C. J., says, "It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue upon the warranty, unless there has been a condition in the contract, authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether." And the same rule is recognized in *Gompertz* v. *Denton* (*k*), 1 Wills. Saund. 269, b., *Patteshall* v. *Tranter* (*l*). Therefore the form of this action is misconceived. In *Parkinson* v. *Lee* (*m*), it was held, that upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the same, the law does not raise an implied warranty that the commodity should be merchantable; and, therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, such seller is not answerable though the goods turned out to be unmerchantable.

TINDAL, C. J.—It appears to me that this was properly considered as money received to the plaintiff's use. When the plaintiff delivered the 298*l.* to the defendant, it was his own money, and he was liable to *Briant* as a principal. It was delivered upon a certain understood state of facts, namely, that the securities were, *bonâ fide*, *Guatemala bonds*, and upon the faith and in consideration that they were properly stamped and saleable in the market. But it seems to me that the consideration has failed, as completely, as if the defendant had contracted to deliver gold coin to the plaintiff, and had afterwards handed over the same quantity of tokens. It is not a question of warranty; but it is the case of a delivery of a thing which is of no value whatever. The only question is, therefore, whether, after the plaintiff had made a contract with a third party, he could subsequently rescind it without giving notice to the defendant. Now there was no contract between the defendant and *Briant*; if the bonds had not been delivered in pursuance of the contract, an action for the non-delivery would have been brought against the plaintiff in this action, and not against the defendant, whose name was never disclosed as a principal. That would be so, if the case rested there; but it was also proved to be the universal practice at the Stock Exchange, to make the broker liable upon all contracts, and that would entitle him to rescind the contract afterwards, without consulting his principal. The defendant could not suffer, because, if any thing were done improperly, it would *pro tanto* afford a defence to any action similar to the present, which might be brought by the broker. There is another ground upon which the plaintiff is entitled to recover. It appears that, after the transaction, the defendant observed, in a letter to the plaintiff, "If these bonds were my own, you should be repaid the money, but they belong to another person." By this he put his own seal upon the transaction,

(*i*) 2 B. & Ado. 461.
(*k*) 1 Cr. & M. 209.
(*l*) 1 Har. & Wol. 178.
(*m*) 2 East, 314.

and ratified every thing which the plaintiff had done, for he did not prove that the bonds were not his own. The rule must be discharged.

PARK, J., concurred.

BOSANQUET, J.—I am of the same opinion. I agree with the cases which have been cited; but this is not a breach of a warranty, but a case where no consideration was given for the money which was paid. The bonds turned out to be but useless paper. Then, was this a voluntary payment made by *Young* to *Briant?* In *Child* v. *Morley* (*n*), it did not appear that the broker was under that sort of compulsion, which entitled him to call upon his principal to reimburse him after he had rescinded the contract; but here it was proved that, by the regulations of the Stock Exchange, the plaintiff would have been liable to be expelled if he had not returned the money, and that the broker is treated as a principal in the transaction. As between him and his principal he was still an agent, and was entitled to call upon the latter, for the money which he repaid when he rescinded the contract; and it appears to me that the declaration is sufficient. The defendant has also acknowledged his liability in the letter which he wrote to the plaintiff.

COLTMAN, J.—The first question in this case which we have to consider, is whether the plaintiff could rescind the contract, and I think it is clear that he could do so. It was understood between the parties when the contract was made, that *Guatemala* bonds, as known in the market, should be delivered. The only remaining question is, whether, as the plaintiff was only agent to the defendant, it was necessary that he should communicate with him before he rescinded the contract? I am of opinion that it was not. When the defendant gave the plaintiff authority to go to the Stock Exchange to sell the bonds, he also gave him an authority to rescind the contract.

Rule discharged.

(*n*) 8 T. R. 610.

VESTRIS's Bail.

April 21.

ARCHBOLD opposed the justification of the bail; and objected, that the defendant had previously given notice to justify bail, who were rejected by the judge; and now attempted to justify other bail, without having obtained the leave of a judge, in pursuance of R. T. 1 W. 4, reg. 1, s. 5, which directs "that the bail, of whom notice shall be given, shall not be changed without leave of a judge." It has been held, that this rule applies to bail put in by the sheriff, *Rex* v. *The Sheriff of Essex* (*a*); and to bail for prisoners in custody, *Stroud* v. *Kenny* (*b*).

The rule Trin. 1 W. 4, s 5, which requires that bail shall not be changed without the leave of a judge, applies to cases where other bail justify, in consequence of the rejection of the first bail.

Wightman.—The rule is only applicable where the bail has been changed, and not where they were rejected after having duly appeared to justify. The

(*a*) 4 M. & Scott, 247; 2 Dowl. P. C. 782. (*b*) Jervis, New Rules, 3d ed.

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parties here had notice that these bail would justify, and therefore there can be no surprise. [*Bosanquet*, J.—The rule was intended to preventt he practice of putting in sham bail in the first instance.] Here the bail were rejected, not because they were insufficient, but because they had been indemnified. The effect of holding that leave is required in this case, would be to inconvenience the sheriff in putting in other bail.

The Court allowed the case to stand over, until the practice of the other Courts was ascertained.

TINDAL, C. J.—We find that in both the other courts, after bail is rejected, the leave of a judge to change the bail is required. The bail must, therefore, be rejected.

BOSANQUET, J., and COLTMAN, J., concurred.

Bail rejected.

April 27.

Exparte RICE.

A charge by an attorney for searching for an old judgment, and advising his client as to the propriety of reviving it, is not a taxable item, under 2 *Geo.* 2, c. 23.

F. V. LEE, moved that an attorney's bill of costs might be referred for taxation, upon the usual terms. The only item which rendered the bill taxable, was a charge made by the attorney for searching for an old judgment in this court, and advising his client upon the propriety of reviving it. In *Sandom* v. *Bourne* (*a*), it was held, that a charge for preparing a warrant of attorney, rendered the bill liable to taxation. So a charge for attending a party, to advise him on an action which had been brought against him. *Smith* v. *Taylor* (*b*).

TINDAL, C. J.—The item in this bill is one degree removed from any of of those which have been held to render a bill taxable.

PARK, J., and COLTMAN, J., concurred. Rule refused (*c*).

(*a*) 4 Camp. 68.
(*b*) 7 Bing. 259.
(*c*) In Exparte *Bowles*, 1 Hodges, 143; charges for searching the *Warrant of Attorney Office*, and in *Pepper* v. *Yeatman*, 2 Har. & Woll. 116, for advising a client as to an execution on a judgment obtained against him, were held not to render the bill taxable. And see Exparte *Branson*, post, 132.

May 6.

HOLLIDAY *v.* LAWES.

Interlocutory costs payable to a plaintiff, may be set off, under *Hil.* T. 2 W. 4, 93, against the costs of a judgment of *non pros.* in the same suit, without being subject to the defendant's attorney's lien.

IN *Hilary* term, a rule was obtained by the plaintiff, calling on the defendant to shew cause, why the bail-bond should not be cancelled; which rule was discharged with costs, taxed at 15*l.*, on the 4th of *February*. On the 21st of *February*, the defendant was declared a bankrupt, and on the 10th *March*, the

defendant's attorney entered a judgment of *non pros.*, because the plaintiff did not proceed with the action, and on this judgment the costs were taxed at 9*l.*

Atcherley, Serjt., obtained a rule *nisi*, calling upon the defendant and his attorney, to shew cause why the plaintiff should not be at liberty to set off the costs taxed in his favour on the 4th *February*, against the costs of the judgment of *non pros.*; without reference to the lien which the defendant's attorney claimed to have upon the costs of the judgment.

Wilde, Serjt., shewed cause.—This question depends upon the rule Hil. T. 2 W. 4, 93, which directs, "that no set-off of damages or costs between parties, shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." The meaning of this is, that interlocutory costs, may be set off against interlocutory costs in the same suit, without prejudice to the attorney's lien. Here it is sought to set off the plaintiff's interlocutory costs, against final costs on a judgment obtained by the defendant. *Doe* d. *Hope* v. *Carter* (*d*), is an authority in favour of the defendant. [*Bosanquet*, J.—In that case the costs were probably incurred before the rule of court came into operation.] The case was decided in *Easter* Term, after the rule came into operation.

Atcherley, Serjt., *contrà*, was stopped.

TINDAL, C. J.—If a plaintiff recovered final judgment, and was liable to interlocutory costs in the suit, the plaintiff's attorney's lien would only extend to the balance payable to the plaintiff; so in this case, the claim of set-off ought to be allowed. It seems to come precisely within the rule.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(*d*) 1 Dow. P. C. 269.

WILLIAMS v. GESSEY.

April 19.

TROVER to recover a box containing wearing apparel. *Plea*—Not guilty.

At the trial, before *Bolland*, B., at the last *Oxford* assizes, it was in evidence, that the defendant kept the *Star* and *Garter* inn, at *Oxford*, and that carriers were accustomed to call there for such parcels as were left to be forwarded; but nothing was received, by the defendant, from the parties who left the parcels. The box of wearing apparel was taken to the *Star* and *Garter*, directed to a person at *Wichenford*, and the defendant was informed that it was to be left at the inn until the plaintiff called for it. A few hours afterwards, the plaintiff inquired for the box, but it could not be found; and the defendant's wife said, in her husband's presence, that she had no doubt but that he had sent it away by *Croft*, the carrier, by mistake. It was objected, for the defendant, that there was no evidence of a conversion; and the learned judge being of that opinion, the plaintiff was nonsuited (*e*).

Where a box was given to an innkeeper to be kept until it was called for, and when inquiry was made for it, the innkeeper's wife said, she supposed some of the carriers had taken it away by mistake:—*Held*, that this was no evidence of a conversion, and that trover could not be maintained.

(*e*) See *Williams* v. *Gessey*, 7 Car. & P. 777.

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WILLIAMS v. GESSEY.

F. V. Lee moved to set aside the nonsuit, and contended that there was evidence for the jury of a conversion by the defendant. The directions given were, that the box would be called for by the plaintiff; but the statement made by the wife, shewed that the defendant had forwarded it by the carrier. In effect, it amounted to such a demand and refusal as would entitle the jury to find that there was a wrongful conversion.

TINDAL, C. J.—It turned out that the statement made by the defendant's wife was incorrect, and that the defendant had not forwarded the box by the carrier. There was nothing to go to the jury; in all probability the box was stolen (*f*). Although the defendant might have been guilty of negligence, this form of action cannot be supported.

BOSANQUET, J., and COLTMAN J., concurred.

Rule refused (*g*).

(*f*) In trover against a carrier, a refusal to deliver is not evidence of a conversion, if it appears clearly, that the goods have been lost through negligence. Anon. Salk. 655; *Ross* v. *Johnson*, 5 Burr. 2825; *Owen* v. *Lewis*, 1 Vent. 223; *Hickman* v. *Hargreaves*, 1 Sel. N. P. 419, 8th ed.

(*g*) In another action, at the same assizes, a verdict was found for the plaintiff, under circumstances similar to the above; but in *Easter* Term, a rule *nisi*, which had been obtained by *Ludlow*, Serjt., to enter a nonsuit, was made absolute. Coram *Tindal*, C. J., *Park*, J., *Vaughan*, J., and *Coltman*, J.

May 8.

Exparte BRANSON.

Charges in an attorney's bill for drawing and enrolling the certificate of an acknowledgment, made by a married woman, and for fees paid on enrollment, under the Fines and Recoveries' Act, (3 & 4 W. 4, c. 74,) do not render the bill taxable within 2 Geo. 2, c. 23.

HOGGINS obtained a rule *nisi*, to refer an attorney's bill for taxation on the usual terms. The alleged taxable items were the following charges for business incurred under 3 & 4 W. 4, c. 74, (Abolition of Fines and Recoveries' Act.) "Drawing and engrossing affidavit verifying the certificate of taking acknowledgment—enrolling and office copy of certificate—attending to bespeak office copy of acknowledgment"—paid for the same—*Fearn* v. *Wilson* (*l*), *Luxmore* v. *Lethbridge* (*m*), and *Smith* v. *Wattleworth* (*n*), were cited. The attorney was not an attorney of this court.

Wilde, Serjt., shewed cause.—It is difficult to understand how it can be contended that this bill is subject to taxation. By 2 Geo. 2, c. 23, it appears that a bill must contain "fees, charges, or disbursements, at law or in equity," to render it liable to be taxed. Under the old proceeding by fine and recovery, there was a supposed cause in court, but now the proceeding amounts to a mere conveyance.

Hoggins, in support of the rule.—By sec. 89, 3 & 4 W. 4, c. 74, the Lord Chief Justice is authorized to make orders respecting the fees, which shall be payable for the proceedings required to be done by that act; and sect. 85, directs, that the certificate and affidavit shall be filed of record in the court. The Courts have always endeavoured to extend the operation of the 2 Geo. 2,

(*l*) 6 B. & Cress. 86. (*m*) 5 B. & Ald. 398. (*n*) 4 B. & Cress. 464.

c. 23, for the better protection of suitors. In *Winter* v. *Payne* (*o*), it was held, that the following items made a bill taxable, although the suit was not prosecuted, and no writ was issued:—"attending and taking instructions to commence an action; drawing and engrossing affidavit of debt and duty; attending you to get sworn thereto, and paid for oath;" and the Court said, "that the charges for making the affidavit and for swearing, were for proceedings in the court, as the oath must either be administered by the Court itself, or by some authority delegated by the Court; and that the act of parliament being beneficial to the subject, ought to receive a liberal construction." In *Smith* v. *Wattleworth* (*p*), it was decided, that an agent appointed to practise in the Insolvent Debtors' Court, is subject to have his bill taxed, under the provisions of the 2 Geo. 2, c. 23.

TINDAL, C. J.—This rule must be discharged. The stat. 3 Jac. 1, c. 7, required, that "all attornies and solicitors shall give a true bill unto their masters or clients, of all the charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they shall charge their clients with any the same fees or charges." Then the 2 *Geo.* 2, c. 23, sec. 23, enacts, "that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity," until a bill has been delivered, which is made subject to taxation. Both these statutes appear to me to have reference to fees, charges, and disbursements in the course of a suit; and the Court went very far in extending the operation of the statute, to a charge for a writ of *dedimus protestatem* (*q*). The title of the 3 & 4 W. 4, c. 74, is, "An Act for the abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance." An assurance, means a conveyance, and although certain steps are required to be taken in the court, they cannot in any way be considered as proceedings in a suit.

PARK, J.—The stat. 2 Geo. 2, c. 23, which is highly beneficial to suitors, has been carried to its utmost limits; but the charges in this bill have no reference to any suit at law or in equity.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged (*r*).

(*o*) 6 T. R. 645.
(*p*) 4 B. & Cres. 364.
(*q*) Exparte *Prickett*, 1 New Rep. 266.
(*r*) See Exparte *Bowles*, 1 Hodges, 143, and Exparte *Rice*, ante, 130.

CLARK, Assignee of the Sheriff of Middlesex *v.* VESTRIS.

April 22.

Where a defendant pleaded an issuable plea, after the plaintiff had taken an assignment of the bail bond, and the bail gave notice that the plaintiff was at liberty to proceed with the trial of the cause; and the bail was afterwards perfected in time to try at the second sittings in the Term, provided the defendant accepted short notice of trial:—*Held*, that the bail bond ought not to stand as a security, under R. H. T. 2 W. 4, V.

A RULE *nisi* was obtained on the 19th *April*, calling upon the plaintiff to shew cause why the proceedings on the bail bond in this cause, should not be set aside on payment of costs. It appeared that the defendant was

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arrested on the 28th *March*, and on the 6th of *April*, notice of justifying bail on the 8th, was given; but the bail did not justify. On the 5th *April*, the plaintiff declared in the action, *de bene esse: Venue, London;* and on the 6th gave a rule to plead; on the 8th *April*, he took an assignment of the bail bond. The bail finally justified on the 19th *April*. The first sittings in this term, for *London*, were on the 21st *April*, and the second sittings on the 28th. It appeared, by affidavit, that the defendant pleaded non-assumpsit and a set-off, on the 17th *April;* and that the bail gave notice to the plaintiff, that he was at liberty to proceed in the action, without prejudice to his right of proceeding on the bail bond.

Busby shewed cause.—The bail bond must stand as a security; because the plaintiff has lost a trial within the meaning of rule *Hil.* T. 2 W. 4. V, which orders, "that upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail bond on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial in a town cause, in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes." As the rule to plead was given on the 6th *April*, the plaintiff would have had sufficient time to give notice of trial for the first sittings in the term. By taking an assignment of the bail bond, after the default in justifying bail in due time, the plaintiff's proceedings in the original action were stayed. Tidd's Practice, 9th ed. 300. Therefore, it is evident that the plaintiff lost a trial at the first sittings. If it were established that, by giving a notice, the bail may compel the plaintiff to proceed in both actions at once, the rule would be rendered nugatory. The plaintiff is also too late to give eight days' notice of trial for the second sittings in the term. [*Tindal*, C. J.—How are you prevented from going to trial, if the defendant takes short notice of trial? A defendant is generally put under the strictest terms when he asks a favour of the Court.] It may be inconvenient to the plaintiff to give short notice of trial.

Henderson, contrà.—After the defendant had pleaded an issuable plea on the 17th *April*, the plaintiff might have proceeded to trial at the first sittings in the term; and the notice given by the bail would have have estopped them, from taking any advantage on the ground that the proceedings were stayed by the assignment of the bail bond. It ought to appear, that the plaintiff had lost a trial, at the time the rule *nisi*, to stay the proceedings, was obtained by the defendant. *Stride* v. *Hill* (*s*). Secondly, the plaintiff is now in time to go to trial at the second sittings in the term, provided that the defendant accepts short notice of trial, which he is willing to do. Therefore, the plaintiff has not been prevented from going to trial in the term, within the meaning of the rule (*t*).

TINDAL, C. J.—The plaintiff might have proceeded to trial, if he had been desirous of doing so; the defendant was completely in court on the 19th *April*, and although the plaintiff contends that, by taking an assignment

(*s*) 1 Gale, 431.

(*t*) See the *King* v. *The Sheriff* of *Shropshire*, 2 Har. & Woll. 319.

of the bail bond, the proceedings in the original action were stayed, still, under the circumstances of this case, as the defendant had pleaded, and the bail had consented that the action might proceed, the bail bond ought not to stand as a security. I think this rule must be made absolute, upon payment of the plaintiff's costs; the defendant undertaking to take short notice of trial for the second sittings.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

Exparte DU FAUR.

May 6.

An administrator appointed *pendente lite*, is entitled to call upon the late attorney of the deceased, to deliver up deeds and papers belonging to the deceased, which are in his possession.

A RULE *nisi* had been obtained, calling upon Mr. *Du Faur*, an attorney of this court, to give up certain deeds and papers to Mr. *Simpson*, administrator, *pendente lite*, of the estate of Mr. *Day*. It appeared that *Day* had, for many years, employed Mr. *Du Faur*, as his attorney, in which capacity the deeds and papers in question, had been deposited with him. *Day* executed a will and codicils, in which he had appointed certain executors; and the validity of these instruments was now in litigation in the Ecclesiastical Court; it also appeared that *Du Faur* claimed to be entitled to a legacy, under one of the codicils.

Talfourd, Serjt., and *R. V. Richards*, shewed cause.—This is not an ordinary application. The attorney is interested in the result of the proceedings which are now pending; and it may ultimately turn out, that the executors under the will, are entitled to the possession of these documents.

Wilde, Serjt., *contrà*, was stopped.

TINDAL, C. J.—I see no difficulty in making this rule absolute, as these deeds ought to be given up, the attorney being first paid the bill of costs due to him from the testator. The rights of an administrator, *pendente lite*, are considered in *Woollaston* v. *Walker* (*u*); and it appears that such an administrator has the same powers as one appointed during a minority; and the reason given is, that it would be very inconvenient, if no body could call in the effects pending the dispute, which often lasts many years. I cannot see how the party can be injured.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(*u*) 2 Strange. 918.

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May 6.

DOE *d.* CAPPS *v.* CAPPS.

The costs given to a plaintiff, in ejectment, against a mortgagor, after payment of the mortgage money, under 7 Geo. 2, c. 20; are taxed costs, as between party and party.

MOTION to review the prothonotary's taxation of costs. In an action of ejectment, brought by a mortgagee against the mortgagor, to recover certain mortgaged premises, the defendant paid the principal and interest due on the mortgage, in pursuance of 7 Geo. 2, c. 20; and the prothonatory, upon taxing the costs of the lessor of the plaintiff, allowed costs as between party and party. The rule was obtained upon the ground that, as the statute directed that the defendant should be discharged from the mortgage, if he "should pay all the principal monies and interest due on such mortgage; and also, all such costs as have been expended in any suit or suits at law or in equity upon such mortgage; such money, for principal, interest, and costs, to be ascertained and computed by the Court, where such action shall be depending, or by the proper officer, by such Court to be appointed for that purpose;"—it was clear that the lessor of the plaintiff was entitled to costs, as between attorney and client.

Wilde, Serj., for the motgagor, shewed cause.—It has been the universal practice of this court, to tax the costs under this statute, as between party and party, and not as between attorney and client (*a*). The term "costs to be ascertained," is well understood, in courts of law, to mean costs as between party and party (*b*). It is stated in an affidavit made by the defendant's attorney, that he has been informed by the officers of the King's Bench and Exchequer, that it is not the practice of those courts, to tax the costs under this statute, as between attorney and client.

C. Clarke, in support of the rule.—The affidavit upon which this rule was granted, states that Mr. *Bunce*, one of the masters of the King's Bench, informed the deponent, that it was not usual to tax the costs under this statute, as between attorney and client, but to tax them liberally; and such a taxation would entitle the plaintiff to more costs than on a taxation like this, between party and party. In *Nowell* v. *Roake* (*c*), it was held in an action for mesne profits, that the plaintiff was entitled to recover by way of damages, expenses incurred in a court of error, in reversing a judgment in ejectment; and that it was reasonable to tax the costs in error, as between attorney and client.

TINDAL, C. J.—If this were *res integra*, I should have been inclined to to read the statute liberally, so as to give the plaintiff a more complete indemnity; but as it appears to have been the practice of the Court, for so long a period, to tax the costs as between party and party, I am not disposed to interfere, and this rule must be discharged.

PARK, J.—I am of the same opinion; and it seems rather difficult to understand the meaning of taxing costs, liberally.

BOSANQUET, J., and COLTMAN, J., concurred. Rule discharged.

(*a*) Mr. Prothonotary *Watlington* stated, that this had been the practice in this court for many years.

(*b*) See *Grace* v. *Morgan*, 1 Hodges, 398.

(*c*) 7 B. & Cress. 404.

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April 18.

BOWMAN *v.* WILLIS.

In an action by a horse-dealer for the recovery of the price of a horse, which had been bequeathed to the defendant, and which he had sold after the death of the testator:—*Held*, that under 3 & 4 W. 4, c. 42, s. 26, the executor and residuary legatee was a competent witness, to prove that the horse had never been sold by the plaintiff, but was merely sent upon trial to the testator.

ASSUMPSIT for money had and received. *Plea*—Non-assumpsit. At the trial, before *Tindal*, C. J., at the *Middlesex* sittings, after *Hilary* Term, it was in evidence that the defendant's father had bequeathed certain horses to him, as a legacy: and that, since the testator's death, the defendant had sold one of the horses for 122*l.*, which was the sum sought to be recovered in this action. The plaintiff, who was a horse-dealer, asserted that the horse had only been sent upon trial to the testator, and that it had never belonged to him; and he called Mr. *Curtis*, who was the executor and residuary legatee under the testator's will, to give evidence of admissions made by the deceased, to that effect. It was objected for the defendant, that the witness was interested in the event of the suit, and was therefore incompetent; but the learned judge being of opinion that the case was within 3 & 4 W. 4, c. 42, ss, 26, 27, the objection was overruled, and a verdict was found for the plaintiff.

Talfourd, Serjt., moved for a new trial, upon the ground that the evidence ought not to have been received. The witness had a direct and immediate interest in the result of the suit. If a verdict were found for the plaintiff, the effect of it would be to increase the interest of the witness in the residuary estate of the deceased; and the statute 3 & 4 Wm. 4, c. 42, does not apply to a case like this, where the party has a direct and substantial interest in the event of the suit. *Smith* v. *Prayer* (*a*). [*Tindal*, C. J.—If the plaintiff had not sold the horse, how could the executor ever be liable?] If it should appear, that the horse was sold to the deceased, the price of it might be recovered by the plaintiff against the executor; it was, therefore, clearly the interest of the executor, who was also the residuary legatee, to prove that there had been no sale.

TINDAL, C. J.—This case appears to me to fall precisely within the meaning of the statute. There are cases where a witness may have a direct interest, independently of the verdict, as in the case of a tenant giving evidence to establish his lessor's title. But no immediate benefit will result to the witness, from the termination of this suit, one way or the other; it is only on the supposition that an action might be brought against the witness for the price of the horse, and that this verdict would be evidence in his favour, that his interest arises. Sec. 26 of the statute, provides that, if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him; such witness shall, nevertheless, be examined: but in that case, a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him. The fol-

(*a*) 7 T. Rep. 62. See *Doe* d. *Bath* v. *Clarke*, 2 Hodges, 48.

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lowing section directs, that the name of the witness shall be indorsed on the record, with the name of the party on whose behalf he was examined; and that such indorsement shall be sufficient evidence that such witness had been examined. If, therefore, the name of this witness were indorsed on the record, it would not be available to be used by the witness in his favour, in any action which might be brought against him; and I do not see how the interest or situation of the witness could be bettered by the plaintiff's recovering in this action.

BOSANQUET, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule refused (*b*).

(*b*) See *Yeomans* v. *Leigh*, 1 Murphy and Hurlstone, 87.

WEBB *v.* RHODES.

A tenant for life entered into an agreement to let an estate to the defendant; and the agreement, which was executed by the parties, at the office of the plaintiff, who was the intended lessor's attorney, stipulated that a lease and counterpart should be prepared by the attorney, at the expense of the defendant. The tenant for life died, after the lease was prepared, but before it was executed:—*Held*, that the defendant was liable to pay the attorney, half the costs of drawing the agreement; and the costs of an abstract of title, lease, and counterpart.

ASSUMPSIT for work and materials as an attorney, provided by the plaintiff for the defendant upon his retainer: and for money paid by the plaintiff to the defendant's use. *Plea*—Non-Assumpsit, and issue thereon. At the trial, before *Park*, J., at the last *Middlesex* sittings, the following facts were in evidence:—The plaintiff was an attorney at *Reading*, and the defendant was tenant of some land to Miss *Knight*, under a lease which had expired. The plaintiff was Miss *Knight's* solicitor; and on the 24th of *January*, 1834, Miss *Knight* and the defendant having met at the plaintiff's office, the following agreement, which was drawn up by the plaintiff, was executed by Miss *Knight* and the defendant. The yearly rent which the defendant agreed to pay, was less than the rent which he had formerly paid:—"Memorandum of an agreement made the 24th of *January*, 1833, between *M. A. Knight* of the one part, and *J. Rhodes* of the other. The said *M. A. Knight* agrees to let, and the said *J. Rhodes* agrees to take and rent, of and from the said *M. A. Knight*, all those several pieces of meadow or pasture land situate, &c.; and the parties agree that a lease shall be granted, commencing at *Michaelmas* next, for the the term of seven, fourteen, or twenty-one years, in case the said *M. A. Knight* shall so long live, at and under the yearly rent, &c., which lease shall contain the like covenants, conditions, and agreements, or such of them as shall be considered necessary, as the lease under which the said *J. Rhodes* now holds the said lands. And it is also agreed, that the said lease and also a counterpart shall be prepared by Mr. *Webb*, solicitor, *Reading*, at the expense of the said *J. Rhodes*." A draft of the lease was subsequently prepared and sent to the defendant, by the plaintiff; but the defendant having objected to some of the covenants, a correspondence upon the subject of the alterations took place between the plaintiff and the defendant's solicitor; and the lease having at length been approved by all parties, the defendant requested that it might be engrossed; but, before it could be executed, Miss *Knight*, who was only a tenant for life of the estate, died, and the lease remained unexecuted. The plaintiff charged the defendant with half the charge of preparing the

agreement; and the whole of the charges for preparing an abstract of the title, and for drawing and engrossing the lease and counterpart.

It was contended for the defendant that, under these circumstances, he was not liable to pay the plaintiff's demand; but a verdict was found for the plaintiff for 14*l.* 2*s.* 9*d.*, including 1*l.* 16*s.*, which was half the plaintiff's charge for the agreement.

Crowder, in pursuance of leave reserved, obtained a rule *nisi* to enter a nonsuit or to reduce the damages; upon the ground that there was no privity of contract between the parties.

Hoggins and *Neville* shewed cause.—In this case there was an actual retainer of the plaintiff by the defendant; and it appears, that when the agreement for the lease was executed, the defendant had not consulted with his own attorney. This circumstance distinguishes this case from others which may be cited, to shew that a retainer is necessary to entitle the attorney to recover his costs. Thus in *Pratt* v. *Vizard*(*a*), it was held, that costs of preparing a mortgage could not be recovered, because there was no privity between the parties. *Doe* d. *Peter* v. *Watkins*(*b*) shews that it is a very usual occurrence for an attorney to be engaged by two parties, for the purpose of saving expense. Then it is contended, that the defendant reaped no benefit from the services performed by the plaintiff; but this is not so; for it appeared that a reduction of rent was provided for in the new agreement. Nor could such an objection prevail, even if this were not so, because it was not through any fault of the plaintiff that the lease was not executed; on the contrary, if the defendant had not raised objections to the terms of the lease, it would probably have been executed before the death of the intended lessor.

Wilde, Serjt., and *Crowder*, in support of the rule.—It is obvious that the plaintiff was attorney to Miss *Knight*, and not to the defendant. The plaintiff is no party to the agreement between Miss *Knight* and the defendant; and therefore it cannot be said that it amounted to a retainer. In *Grissell* v. *Robinson*(*c*), where the lessor paid his attorney's bill for a lease which had been prepared, it was held, that the lessor was entitled to sue the lessee for the amount which he had so paid, it being proved to be the usage, that lessees should pay the expenses of the lease. So here the plaintiff ought, in the first instance, to have obtained payment from Miss *Knight;* and then her executors would have been the proper parties to sue the defendant, if he be liable at all. In *Rigby* v. *Dakin*(*d*), where one employed an attorney to raise money on mortgage, and the attorney employed another attorney, who agreed to advance the money on behalf of a client, but the negociation ultimately failed: it was held, that the attorney of the intended mortgagee could not sue the mortgagor for the costs, although it was proved to be the practice for the proposed borrower to pay the expenses which had been incurred. And, under the circumstances of this case, it is evident that the defendant obtained no benefit by the services of the plaintiff.

TINDAL, C. J.—I see no reason for disturbing this verdict. The question

(*a*) 5 B. & Ado. 808.
(*b*) 3 Bing. N. C. 421; 3 Hodges, 25, S. C.
(*c*) 3 Bing. N. C. 10; 2 Hodges, 138. S.C.
(*d*) 2 Young & J. 83.

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is, whether the jury were right in finding that there was a retainer of the plaintiff by the defendant. It is not a question whether he was retained as his attorney generally, but whether he was retained to perform this stipulated work. The first item in the charge is half the costs of preparing the agreement. When the parties met at the plaintiff's office, there was no joint purse out of which the expense of the agreement was to be paid; and what is the fair inference which arises, but that each shall pay half. Then the agreement contains a provision that a lease and counterpart shall be prepared by the plaintiff, at the expense of the defendant. Now, all the parties were present at that time; and it is the same as if the plaintiff had been a party to, and had signed the agreement; the effect of the transaction being, that the defendant consented that the plaintiff should prepare the lease, and that he, the defendant, would pay for it. This distinguishes this case from other cases which have been cited, and it is not brought within the principle they have established; and certainly, we should be anxious to avoid circuity of action, when it is possible. I agree that, in some cases, this cannot be avoided; but we should be slow to extend the necessity of putting parties to the inconvenience. As to the first objection, I therefore think that the jury were warranted in finding a verdict for the plaintiff. The next point is, that, as the lease and counterpart were never executed, the defendant obtained no benefit from the services of the plaintiff. But it was not the plaintiff's fault that the lease remained unexecuted; and it was known to all parties that the intended lessor was only tenant for life, and the principle, *Actus Dei nemini facit injuriam*, is applicable. Nor could it be expected, that the plaintiff intended to forego payment, if Miss *Knight* should happen to die before the lease was executed.

PARK, J.—I had no doubt at the trial, and I now think the verdict is right. The case must be considered much in the same way as it would have been if the plaintiff had been a party to the agreement. If he had been, it is impossible that he could have sued Miss *Knight* for the expense of preparing the lease. The cases which have been cited are not applicable.

BOSANQUET, J.—I am of the same opinion. The rule for a nonsuit could not be granted, if the plaintiff is entitled to recover anything. As to the charge for the agreement, it appears to me, that when the parties came together, to the same attorney, each became liable to half the charges. The principal question relates to the costs of the lease and counterpart; and I concur with the judgments which have already been delivered. It is expressly agreed that the documents shall be prepared at the expense of the defendant; and the plaintiff having afterwards prepared them, he would not have been entitled to require payment from Miss *Knight*, although he may have been, originally, her attorney. Then, as to the lease never having been executed, that was not the fault of the plaintiff; it was not executed, in consequence of the death of the intended lessor.

COLTMAN, J.—It appears to me that this case stands clear of any difficulty, provided the facts shew that there was a retainer to do the work. If there were, whether the work was completed or not, the plaintiff would be entitled to recover for the work which was done. And it seems to me that there was evidence from which the jury might infer a retainer. It seems that the plain-

tiff was originally attorney to Miss *Knight;* but it was for the defendant's benefit that he should not have another attorney; and it is a very common practice for an attorney to act for both parties, to save expense.

I give no opinion as to the first item in the bill, for half the expense of the agreement. Nothing appears to be stated as to the expense of preparing it; but, as a decision upon that point in favour of the defendant would only reduce the damages, I agree that this rule must be discharged.

Rule discharged.

BADEN *v.* FLIGHT.

April 26.

A declaration in covenant on a lease, alleged, that, after the making of the indenture, to wit, on the 25th *March*, 1836, 66*l.* 5*s.*, for two quarters of a year's rent, ending on the day and year last aforesaid, was due and in arrear, contrary to the indenture. Plea, that no quarter's rent, ending on the said 25th *March*, was due or in arrear, *modo et formâ*. *Held*, upon demurrer, that the plea was bad.

COVENANT. The declaration stated, that on, &c., by a certain indenture, the plaintiff demised unto the defendant a certain messuage, &c., to have and to hold the same unto the defendant, his executors, and administrators, from *Michaelmas* Day then next ensuing, for thirteen years and the half of another year, from thence next ensuing; yielding and paying therefore, yearly and every year during the said term, unto the plaintiff, his executors, administrators, and assigns, the yearly rent or sum of 132*l.* 10*s.*, by four equal and even quarterly payments, each and every year of the said term, that is to say, the 25th day of *December*, the 25th of *March*, the 24th of *June*, and the 29th of *September*, &c. And the defendant did thereby covenant that he would yearly and every year, during the said term thereby granted, well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the said yearly rent or sum of 132*l.* 10*s.*, upon the several days and times, and in manner thereinbefore mentioned and appointed for payment thereof; by virtue of which said demise the defendant entered, &c.; that after the making the said indenture, and during the said term thereby granted, to wit, on the 25th of *March*, 1836, a large sum of money, to wit, the sum of 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due, and still is in arrear, to the plaintiff, contrary to the tenor and effect, true intent and meaning, of the said indenture, and of the said covenant of the defendant by him in that behalf so made as aforesaid.

Plea—That no quarter's rent, ending on the said 25th of *March*, 1836, then became or was due or in arrear, by virtue of the said indenture in the declaration mentioned, or according to any of the provisos, agreements, covenants, or terms therein contained, or anything therein mentioned, in manner and form as the plaintiff had, in his declaration in that behalf, alleged; and of that the defendant put himself upon the country, &c.

Demurrer—For that the plea of *riens en arriere* is not admissible in an action for a breach of covenant for non-payment of rent on a specified day; that the plea ought to have shewn specifically, and with sufficient certainty, how that quarter's rent did not become due or in arrear, or how the defendant was discharged from the payment thereof; that it ought to have shewn how the quarter's rent was paid or discharged, instead of alleging, generally, that it was not due or in arrear; that, as a plea of satisfaction, the plea was bad and argumentative; that it was double, inasmuch as it put in issue, not only that

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the quarter's rent ever became due or in arrear, but also that it was due or in arrear at the time of the commencement of this suit; that the plea ought to have shewn specifically a performance, or excuse for the performance, of the said covenant to pay the quarter's rent.

Joinder in demurrer.

Channell was heard in support of the demurrer. He urged the grounds of demurrer which have been stated.

Hoggins, contrà.—The plaintiff avers in his declaration, that, on a certain day, two quarters' rent was due and in arrear; and the plea puts that fact in issue. The rent might not have been due on that particular day, and the defendant is entitled to traverse the statement.

TINDAL, C. J.—The substantial allegation in the declaration is this, that, during the term, two quarters' rent became due and in arrear; and though a particular day is named, that carries it no further. The defendant has no right to answer that no quarter's rent, ending on that particular day, was due or in arrear. *Hare* v. *Savil*(*a*) is an express authority that *riens en arriere* is no plea in covenant, because the plea confesses that the covenant is broken.

BOSANQUET, J., and COLTMAN, J., concurred.

Judgment for plaintiff.

(*a*) 1 Brownl. & Goldes, 19.

May 6.

OVERTON *v.* SWETTENHAM and another.

Upon a writ of false judgment from a county court, the sheriff returned a mere transcript of the proceedings which had taken place in the court below, so that it did not appear whether it had jurisdiction to try the cause, whereupon the Court remanded the transcript to be amended.

FALSE JUDGMENT from the County Court of *Denbighshire*. The action was brought in the county court, to recover 1*l.* 10*s.*, and a verdict was found for the plaintiff, subject to leave reserved for the defendant to move to enter a nonsuit, on the ground that the cause of action did not arise within the jurisdiction of the court. Upon the return of the writ of false judgment, the following proceedings were returned by the sheriff:—

"At the full county court, &c., before *Henry Hert*, &c., four lawful knights of the same county, *William Swettenham* and *Robert Evans Davies* complain against *Thomas Overton*, in a plea of debt of 39*s.* 11*d.*—11th *November*, 1835. Mr. *E. Jones* appears for defendant.—6th *January*, 1836. Declaration. Did grant to pay.—13th *March*, 1836. Motion for particulars.—25th *May*, 1836. Particulars filed.—22nd *June*, 1836. Defendant moved for further time to plead, and a week's time was granted.—30th *June*, 1836. Plea. General issue filed, with notice of set-off, for 2*l.* 2*s.*, for work and labour, care, diligence, attendances, and journies.—20th *July*, 1836. *Similiter*.

"At the ninth county court, holden, &c., on the 12th *October*, 1836, before, &c., cause tried, verdict for plaintiffs, damages, 1*l.* 10*s.*, but with permission for defendant to move the court, on the 7th *December* next, for leave to set aside the verdict, and enter a nonsuit; or, if the sheriff has no legal right to enter such nonsuit, then that the defendant may move the Court of King's

Bench, in next term, to set aside the verdict, and enter a nonsuit.—At the 11th county court, holden, &c., on the 7th *December*, 1836, rule for nonsuit refused.—19th *December*, 1836. Costs taxed at 12*l.* 9*s.* 6*d.*

Stephen, Serjt., obtained a rule nisi, calling on the plaintiff below to shew cause why this transcript of the proceedings below, should not be remanded to the sheriff, to be amended according to the facts of the case, if the pleadings therein referred to were delivered or set forth at length; or why the sheriff should not certify the practice of the county court, and shew what forms of pleading were, by the practice of that court, understood to be expressed by the said entries. It was suggested, that, as the proceedings were returned, it was impossible for the plaintiff above to shew, that the debt which had been recovered, was not incurred within the jurisdiction of the county court; and *Williams* v. *Lord Bagot* (*a*) was cited, where the Court of King's Bench ordered an inferior court to amend its record, according to the facts of the case, after an imperfect record had been annexed to a writ of error.

Jervis and *R. V. Richards* shewed cause, upon an affidavit, which stated, that it was not the practice in the county court to enter any of the proceedings at length; and that it was not usual to file or deliver any declaration; that by the entry, "Did grant to pay," is understood the old form of *concessit solvere*, formerly used in the local courts of *Wales*, and well known to run in a form containing the words, "and within the jurisdiction of this court.—The matter stated in the affidavit is an answer to this application. If a declaration is necessary, it is the duty of the plaintiff to prepare it; but the sheriff is not bound to expand the proceedings. [*Tindal*, C. J.—The sheriff tried this cause, upon the faith that something more was to be done. *Coltman*, J.—It is a common practice among magistrates to take mere minutes of their proceedings, and to put them into form afterwards.] The Court has no power to order a bad record to be amended; and if the declaration is incorrect, then it will be to the injury of the defendant in error.

TINDAL, C. J.—If this had been returned in the shape of a record, we should not have interfered; but this is obviously a mere note of what passed in the court below. This application is analogous to alleging diminution in a writ of error, where the party prays a writ to the justices who certified the record, to certify the whole of it. But as the defendant below is not entitled to allege diminution in this case, this rule must be made absolute, on payment of costs.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute (*b*).

(*a*) 4 Dow. & Ry. 315.

(*b*) See a form of a declaration in a county court, Tidd's Forms, 574, 9th ed. *Dunn* v. *Crump*, 3 Brod. & Bing. 309.

May 2.

STALEY *v.* LONG.

The party who virtually succeeds in an action is entitled to the custody of the postea; therefore, where, in trespass, a verdict, with one shilling damages, was found for the plaintiff on Not Guilty, and on an issue as to the property in the close; and a verdict for the defendant on an issue as to a right of way over the close, it was *held*, that the postea ought to have been delivered to the defendant.

TALFOURD, Serjt., obtained a rule nisi, calling upon the plaintiff to shew cause why the postea which had been delivered to him, should not be delivered to the defendant; to enable him to proceed with the taxation of costs in an action of trespass, for breaking and entering the plaintiff's close. The defendant pleaded, first, Not Guilty; secondly, that the plaintiff was not possessed of the close; and, thirdly, a right of way over the *locus in quo;* upon which issues were joined. A verdict was found for the plaintiff on the first and second issues, with one shilling damages; and for the defendant on the third issue.

Ludlow, Serjt., shewed cause.—The question is, whether, as the plaintiff has recovered damages upon two of the issues, he is not entitled to the custody of the postea. There can be no difference, in principle, between a verdict for a thousand pounds and for one shilling. In *Smith* v. *Edwards* (*a*), it was broadly laid down by *Coleridge*, J., that, if the plaintiff succeeds, and recovers damages on part of his cause of action, he is entitled to have the postea delivered to him. [*Park*, J.—In contemplation of law, the postea remains in court.]

Talfourd, Serjt., *contrà*.—The plaintiff has refused to produce the postea to the prothonotary, to enable him to tax the costs; and, as the costs to be received by the defendant exceed the amount of the plaintiff's costs, the plaintiff is interested in delaying the progress of the taxation. It is evident that the real substantial issue in the cause has been found for the defendant (*b*).

TINDAL, C. J.—The plaintiff has recovered a verdict on the two first issues, and the defendant on the third, which establishes the right of way over the plaintiff's close. It is evident that the great burthen of expense at the trial would arise upon the issue found for the defendant, because it involved the substantial question between the parties; and as the balance of the taxed costs must be very much in favour of the defendant, the plaintiff will be naturally slow in proceeding to tax the costs. It was a little slip on the part of the jury to give a shilling damages to the plaintiff, and it is because they have done so, that the officer of the court has thought that the plaintiff was entitled to the postea; but it seems to me, that the defendant is entitled to the custody of it; and this rule must be made absolute.

PARK, J., concurred.

BOSANQUET, J.—The plaintiff will be entitled to his costs on the first and second issues, which were unnecessarily put upon the record; but, as the defendant substantially succeeded in the action, the postea has been improperly delivered to the plaintiff; and this rule must be made absolute.

COLTMAN, J.—The postea ought to have been delivered to the party who substantially succeeded in the action.

Rule absolute.

(*a*) 1 Har. & Wol. 497.

(*b*) See *Knight* v. *Woore*, ante, p. 1.

DOE d. DAFFEY *v.* SINCLAIR.

May 8.

A defendant in custody for twelve months for the nominal damages in ejectment, and for costs beyond 20*l.*, is entitled to his discharge under 48 Geo. 3, c. 123.

MANSEL applied for the discharge of a prisoner, under 48 Geo. 3, c. 123, who had been in prison for more than twelve months, for the damages and costs of an action of ejectment. The damages were one shilling; costs, 2*l.*; and increased costs, 245*l.* 19*s.*, making, altogether, 248*l.*; for which sum the defendant had been taken in execution.

Butt appeared to shew cause in the first instance.—In *Doe d. Threlfall* v. *Ward* (*a*), it was certainly held, that a prisoner in custody on a judgment in ejectment was entitled to the relief given by the statute; but there the costs were less than 20*l.* But *Doe* v. *Reynolds* (*b*) is an express authority, that, in such a case, the statute does not apply; and Lord *Tenterden*, C. J., says, "I am of opinion, that this is not a case within the statute. The object of the statute was, to relieve persons in execution upon a judgment for a debt or damages. Here the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding is, to recover the possession of land, and not any debt or damages." This case was not cited in *Doe d. Threlfall* v. *Ward* (*a*).

TINDAL, C. J.—The words of the statute are decisive. It applies "to all persons in execution, upon any judgment, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment." The rule must be absolute.

PARK, J., BOSANQUET, J., and COLTMAN, J., agreed.

Rule absolute (*d*).

(*a*) 2 M. & Wels. 65.
(*b*) 10 B. & Cress. 481.
(*d*) See also *Doe* d.——, 1 Dowl. P. C. 69.

CONS *v.* KIRK.

May 4.

A writ of summons had been served in debt, and afterwards a declaration in assumpsit. The defendant did not apply to set aside the proceedings for irregularity, but, the plaintiff having signed judgment, in debt, for want of a plea, the Court set it aside, upon the ground that the defendant might have expected to receive notice of a writ of inquiry.

A RULE had been obtained to set aside a judgment, upon affidavits which disclosed the following facts:—

On the 13th of *March*, the defendant in the action was served with a writ of summons *in debt;* and, on the 21st of *March*, notice of a declaration *in assumpsit* for goods sold and delivered, was served, with a notice to plead. On the 25th of *March*, the defendant's attorney wrote to the plaintiff's attorney to inform him, that the defendant intended to pay the debt and costs, and requiring to know how the action then stood; but no answer was received. Judgment for want of a plea was signed on the 10th of *April*, in debt.

Addison shewed cause.—The defendant ought to have applied to set aside the declaration, for irregularity; and the letter of the 25th of *March* amounted

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to a waiver of the irregularity complained of. In *Smith* v. *Clarke* (*a*), it was held, that interlocutory judgment could not be set aside, because the notice of declaration was unnecessary. *Rutty* v. *Arbur* (*b*).

TINDAL, C. J.—When the defendant's attorney saw a declaration in assumpsit, he might reasonably suppose that execution would not issue, until a writ of inquiry had issued; and he might have been contented to wait, until he received notice of its execution. The plaintiff's attorney does not answer the letter of the 25th of *April*, to inform him how the proceedings then stood. The rule must be made absolute, the defendant undertaking not to bring any action.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(*a*) 2 Dow. P. C. 218. (*b*) 2 Dow. P. C. 36.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term, 1837.

BEALE and another *v.* S. SAUNDERS and C. SAUNDERS.

June 7

In assumpsit, the declaration stated, that the defendants had become and were tenants to the plaintiffs, of a brewery, and in consideration thereof, they undertook to repair the same. *Breach*—that the defendants suffered and permitted the premises to be ruinous and prostrated. A verdict was taken for the plaintiffs, subject to a special case, which stated the following facts:—In 1769, a lease of the premises in question was made to one *Uppom*, by a tenant for life, for a term which expired in 1830; and that lease contained a covenant from the lessee to repair the premises. *Samuel Sanders* became the assignee of the lease, and in 1795, he made an under-lease at an improved rent, and *Samuel Sanders*, during his life-time, and the defendants, after his death, paid the rents reserved in the lease of 1769, until 1827; and received the improved rent, payable under the lease of 1795, until 1830. The plaintiffs were assignees of the reversion, and, in 1830, the premises were in a very dilapidated state; but it was then ascertained, that the lease of 1769, was void, because the tenant for life had exceeded his power of leasing. *Held*, first, that as all the parties had treated the lease as being valid, the defendants were bound by the terms of it; and that they were liable to pay such an amount of damages, as would be sufficient to put the premises in repair at the expiration of the term; and that the declaration disclosed a sufficient consideration to support the promise; also, that the defendants were liable to pay the rent reserved in the lease of 1769, until its expiration, but that they were not liable for rent or dilapidations after 1830.

ASSUMPSIT upon an implied agreement, to repair a certain brewery and premises, called the *Wheat Sheaf Brewery*. The first count of the declaration stated, that the defendants *had become and were tenants* to the plaintiffs, of a certain brewery and premises, situate, &c.; and, in consideration thereof, they undertook and promised that they, the said defendants, should and would, at their proper costs and charges, from time to time and at all times thereafter, during their said tenancy, well and sufficiently repair, uphold, support, and maintain, mend, and keep, the said brewery and premises, and all and singular the erections and buildings then erected and built, and thereafter to be thereon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should require, (fire, which might happen to destroy the said premises or any part thereof, only excepted). That the defendants were and continued tenants of the said brewery and premises, to the

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plaintiffs, for a long space of time, to wit, from the time of making of the said promise and undertaking hitherto; nevertheless, that the defendants did not, nor would, after the making of their said promise and undertaking, well and sufficiently repair, uphold, support, maintain, mend, or keep, the said brewery or premises, in, by, and with all, and all manner of needful and necessary reparations or amendments, (fire only excepted); but, on the contrary thereof, the defendants, after the making of their said promise and undertaking, and during the continuance of their said tenancy, to wit, on the day and year aforesaid, and from thence hitherto, wrongfully and unjustly suffered and permitted the said brewery and premises to be ruinous, broken down, prostrated, and destroyed, and the same to remain and continue so ruinous, broken down, prostrated, and destroyed. There was a second count, for use and occupation of the same premises, and upon an account stated. The defendants pleaded the general issue, and three other pleas traversing the allegations, in the first count, but no question arose on the pleas; if any question should turn upon the declaration, or the form of it, or upon the pleas, they were to be deemed part of this case, and might be referred to accordingly. The cause was tried before *Tindal*, C. J., at *nisi prius*, at the sittings after *Hilary* Term, 1836, when a verdict was found for the plaintiffs, subject to the opinion of this court, on the following case:—

Theophilus Salway, being seized in fee of the premises in question, on the 12th *August*, 1756, by his will devised the same to his brother, *Richard Salway*, for life: remainder to his first and other sons in tail; remainder to the Rev. Dr. *Thomas Salway* for life; remainder to *John Salway*, son of the said *Thomas Salway*, for life; remainder to the first and other sons of the said *John Salway*, with remainders over; and which said devise contained the following power of leasing:—"that it shall be lawful for the said several tenants for life, when and as they shall respectively come into possession of my said estates, by virtue of the limitations aforesaid, to make leases thereof, for any term or number of years, not exceeding 21 years, at the best improved rents that can be gotten, without taking any fine for making the same; so as such leases be made to take place in possession, and do contain usual covenants; and I further empower the said tenants for life, when they shall respectively come into possession of my said estates, as aforesaid, to make leases of houses or ground in *London*, or the county of *Middlesex*, for any term or number of years, not exceeding 61 years, for the purpose of building, rebuilding, or substantially repairing the said estates; but without taking any fine, and so as there be reserved thereon the best rent that can reasonably be got, according to the nature and circumstances of the case, and so as such leases do contain all proper and reasonable covenants.

Theophilus Salway, after thus making his will, died on the 1st *May*, 1760; and *Richard Salway*, his brother, the first devisee for life, became possessed of the premises in question, under the said devise. On the 19th *July*, 1763, by indenture of lease of that date, the said *Richard Salway* demised the premises to one *James Whalley*, for the term of 21 years, at the yearly rent of 5*l.*; and afterwards, by indenture of lease dated the 6th *July*, 1769, made between the said *Richard Salway*, of the one part, and *George Uppom* and *Thomas Main*, of the other part, after reciting the indenture of lease dated the 19th day of *July*, 1763, and that by several mesne assignments, the term thereby granted had become vested in one *George Wheeler*, who had died; and that it

was then the property of his executors and executrix, who, by indenture of lease dated the 29th *January*, 1768, had demised the said premises, with the buildings thereon, to the said *George Uppom* and *Thomas Main*, for the residue of the said term of years, at the yearly rents, covenants, and agreements, in the underlease, last aforesaid mentioned; and also reciting, that the said *George Uppom* and *Thomas Main*, since the granting of the said lease to them, had erected several buildings on the said premises; and that, for the better carrying on of their trade of soap-boilers, they intended to erect several other buildings. It was witnessed, that the said *Richard Salway* did demise and let the said premises unto the said *George Uppom* and *Thomas Main*, their executors, administrators, and assigns; to have and to hold the same to them, their executors, administrators, and assigns, from the end and expiration of the term of 21 years, mentioned in the said hereinbefore recited indenture of lease, granted by *Richard Salway* to *James Walley*, for the term of 46 years, from thence next ensuing; yielding and paying, therefore, yearly and every year, during the said term of 46 years, thereby granted unto the said *Richard Salway*, his executors, administrators, and assigns, the yearly rent or sum of 10*l*., free of all deductions, by half yearly payments, on the 29th *March* and the 29th *September*, every year; the first payment to begin and to be made on the 29th *September*, next following the end and expiration of the said term of 21 years, granted by the said *Richard Salway*, to the said *James Whalley*; and the said *George Uppom* and *Thomas Main* for themselves, their executors, administrators, and assigns, did thereby covenant and grant to and with the said *Richard Salway*, his heirs, executors, administrators, and assigns, that they, their executors, administrators, or some of them, should and would, at their or some or one of their proper costs and charges, from time to time, and at all times thereafter, during the said term, well and sufficiently repair, uphold, support, sustain, maintain, pave, purge, scour, cleanse, empty, mend, and keep the said piece or parcel of land, and all and singular the erections and buildings then erected and built, or thereafter to be erected and built, on the said premises, with the appurtenances thereinbefore demised, and every part and parcel thereof, in, by, and with all and all manner of needful and necessary reparations, support, paving, purging, scouring, cleansing, emptying, and amendments, whatsoever, and that when, where, and as often as need or occasion should be and require; and the said piece or parcel of land with the erections and buildings thereon erected and built, or to be erected and built, and other the premises being so well and sufficiently repaired, supported, paved, purged, scoured, cleansed, emptied, and amended, at the end of the said term, or other sooner determination of that demise unto the said *Richard Salway*, his executors, administrators, and assigns, should and would peaceably and quietly leave, surrender, and yield up, (fire which might happen to destroy the said premises, or any part thereof, only excepted.)

Richard Salway died on the 25th *July*, 1775, and *John Salway*, (the Rev. Doctor *Thomas Salway* being dead,) became seized of the premises, as tenant for life; remainder to his first and other sons in tail as aforesaid: the said *John Salway* joined with his son, *Richard Salway*, in *May*, 1795, in suffering a common recovery of the said premises; and, by indenture dated 15th of *May*, 1795, it was declared, that such recovery should enure to the use of the said *John Salway* for life, with remainder to the said *Richard Salway*, his son in fee. On the 10th *June*, 1803, the said *John Salway* died, and on the 14th

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January, 1825, the said *Richard Salway*, being seized in fee, as aforesaid, of the premises, by his will devised the same to the plaintiffs, upon certain trusts in the will mentioned, and nominated them his executors. On the 10th *February*, 1825, the said *Richard Salway* died.

The lease of 1763, aforesaid, and the term of 21 years thereby created, and the indenture of 1769, aforesaid, and the term alleged to have been thereby created, as aforesaid, afterwards vested in one *Samuel Sanders*, by assignment.

By indenture, dated 28th *September*, 1795, made between the said *Samuel Sanders*, of the one part, and *John Oxley* and *Frederick Teush*, of the other part; reciting that, by an indenture of lease dated 5th *September*, 1781, it was witnessed, that in consideration of 150*l.*, and for other the considerations therein mentioned, the said *Samuel Sanders* did demise and lease to *James Haig*, *John Haig*, and *John White*, the premises in question; to hold the same from *Michaelmas*, then next, for 14 years, under the yearly rent of 76*l.*, payable quarterly, with a proviso, to grant a further lease at the expiration of the said term, upon certain terms, and reciting, that the right of renewal had become vested in the said *John Oxley* and *Frederick Teush*, who had requested the said *Samuel Sanders*, to grant them a lease for the term of 40 years, to be computed from the day of the said indenture of lease, which the said *Samuel Sanders* had agreed to do; and also, to grant them a further term of eight years and three quarters therein.

It is by the said indenture of the 28th *September*, 1795, witnessed, that in consideration of 372*l.* to the said *Samuel Sanders* paid, the said *Samuel Sanders* did demise the said premises unto the said *John Oxley* and *Frederick Teush*, with the buildings, then or thereafter to be built thereon; to hold the same unto the said *John Oxley* and *Frederick Teush*, their executors, administrators, and assigns, for the term of 34 years and three quarters, from *Michaelmas* then next, at the yearly rent of 76*l.*, which said last-mentioned lease contained a covenant, from the lessees, that they would repair the premises during the term, and quietly yield up the possession thereof, at the expiration thereof, with certain fixtures. The lease also contained a power of entry for the said *S. Sanders*, to view the state of the repairs, and a proviso, that if default should be made in doing repairs after notice, or in observing the covenants, then that the said *S. Sanders* might re-enter, and eject the occupier of the premises.

The said *Samuel Sanders* received the said rent of 76*l.* annually, until his death, which happened on the 10th *July*, 1815; the defendants received the said rent of 76*l.*, from that period until *Lady day*, 1830.

The said *Samuel Sanders*, deceased, paid the rent of 10*l.* reserved by the indenture of lease of the 6th *July*, 1769, from the year 1794, until his death; and the said defendants afterwards paid the said annual rent of 10*l.* to the said *Richard Salway*, until the death of the said *Richard Salway* in 1825, as aforesaid; and they afterwards paid to the plaintiffs the said rent, from that period until *Christmas*, 1827, since which time they have not paid any rent for the said premises. In 1828, one *Ayres*, who was then in possession of the said premises, began to pull down and destroy the buildings thereon, then erected. About *February*, 1829, one *Burton* got possession of the premises, and all the said buildings have since been totally annihilated and destroyed, and the place is now in the same state.

The question for the opinion of the Court is, whether the plaintiffs are or are not entitled to recover upon both or either of the counts of the said de-

claration; and if the Court shall be of opinion, that the plaintiffs are so entitled, then, inasmuch as the amount of damages is to be settled and determined by an arbitrator, named by the parties, another question for the opinion of the Court will be, upon what principle the said damages shall be calculated.

Archbold, for the plaintiffs. The lease of 1769 was not duly made under the power of leasing, given by the will of *Richard Salway*. It was, therefore, void, and the plaintiffs cannot now maintain covenant upon it (*a*); *Doe* d. *Pulteney* v. *Cavan* (*b*). But as the premises were held over, the defendants will now be treated as tenants from year to year, and as such they are liable to repair these premises. Here there has been both permissive and commissive waste. By the stat. of *Gloucester*, 6 Edw. 1, the lessor may have an action of waste, or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, Lit. sec. 67; and although a tenant at will would not be liable, Lit. sec. 71, yet a tenant from year to year, is within the meaning of this statute, 1 Saund. 323 b. In *Gibson* v. *Wells* (*d*), where it was held that an action did not lie for waste, the waste was permissive and not commissive, and the party sued was only tenant at will. *Brown* v. *Crump* (*e*) came on upon demurrer, and the plaintiff had not alleged any special agreement to take the farm, upon terms which the law would not imply, without a special custom or agreement; and it was not finally decided, but the plaintiff had leave to amend. *Herne* v. *Bembow* (*f*), is an authority to shew that the defendants may be liable upon an implied assumpsit. Secondly, the defendants are liable to all the terms which are to be found in the covenants of the lease of 1769. All parties have acted upon that lease, as if it were valid; the defendants and the previous assignees paid the yearly rent of 10*l.*; and when *Samuel Sanders* granted the under leases to *Oxley* and *Teush*, the covenants entered into by them, are similar to those which are contained in the lease of 1769; and, under those covenants, the defendants will be entitled to sue the assignees of *Oxley* and *Teush*. There are several authorities to shew that the defendants are bound by the terms of the void lease. In *Doe* d. *Rigge* v. *Bell* (*g*), it was decided, that if a landlord lease for seven years by parol, and agree that the tenant shall enter at *Lady Day* and quit at *Candlemas*, though the lease be void by the statute of frauds, as to the duration of the term, the tenant, nevertheless, holds under the terms of the void lease. So in *Richardson* v. *Gifford* (*h*), where it was proved, that the defendant took a house, by a written agreement, for three years and a quarter, and engaged to keep the premises in good repair during the time they should be in his occupation, but the agreement was neither stamped as a lease, nor signed by the parties, it was held, that the defendant was bound by the covenant to repair, though the agreement was void as to the duration of the term; and in that case, the defendant was also held liable upon a count in assumpsit, which stated that, in consideration that the defendant had become tenant to the

(*a*) In a former action, the plaintiffs declared on the covenant contained in that lease; but the defendants having demurred, upon the ground that the lease was not executed in pursuance of the power, the plaintiffs discontinued the proceedings, and brought the present action.

(*b*) 5 T. Rep. 567.
(*d*) 1 New. Rep. 290.
(*e*) 1 Marsh. 567.
(*f*) 4 Taunt. 764.
(*g*) 5 T. Rep. 471.
(*h*) 1 Ado. & Ellis, 52.

plaintiffs, upon the terms that he should keep the premises in tenantable repair, the defendant agreed so to keep them in repair during the tenancy. As to the mode of computing the damages, the plaintiffs are entitled, under the second count, to recover rent at the rate of 10*l.* per annum, from *Christmas*, 1827, when the last payment was made, up to the 19th of *July*, 1830, when the supposed lease of 1769, expired; and from that period, until the commencement of the action, the plaintiffs are entitled to recover such a sum of money as the premises would have let for, if they had been yielded up in good repair in *July*, 1830.

Wightman for the defendants.—It may be assumed, for the purpose of argument, that the defendants held under all the terms of the lease of 1769; but if that were so, the declaration would be insufficient to charge the defendants. It merely avers that they, the defendants, became tenants to the plaintiffs, and that, in consideration thereof, they undertook to repair the premises. But that consideration is not sufficient to support the promise. The defendants are tenants at will, or, at most, tenants from year to year, and the only obligation which the law implies under such a holding is, that the premises shall be used in a tenant-like manner. But the law will not imply a contract to keep them in repair. *Anworth* v. *Johnson* (*i*), *Torriano* v. *Young* (*k*), *Horsefall* v. *Mather* (*l*). A declaration is never framed as this is, when such liabilities as this case discloses, are sought to be enforced (*m*). [*Tindal*, C. J.—We are to look at all the facts in the case: this would be a proper argument in arrest of judgment.] If the facts of the case are not sufficiently shewn in the declaration, to make the defendants liable in this action, they are entitled to urge the objection, as if this were a motion in arrest of judgment. This is an antecedent consideration which is clearly insufficient; and no executory contract to repair, is alleged in the declaration. *Brown* v. *Crump* (*n*) is an express authority. There a declaration that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the premises in repair, was held to be insufficient; because, these obligations did not arise out of the bare relation of landlord and tenant. *Gibson* v. *Wells* (*o*), and *Herne* v. *Bembow* (*p*), are authorities to shew that an action on the case does not lie for permissive waste. Here the declaration charges the defendants with permissive waste, but the facts shew commissive waste. Nor is any connexion shewn in the case between *Samuel Sanders*, who died in 1815, and the defendants. The only facts which affect them are, that they paid and received the rents of the premises after his death; but it is not stated in what character or under what circumstances these acts were done. [*Tindal*, C. J.—A very strong inference is raised, that they claimed an interest in the premises.] It is stated that, in 1828, one *Eyers* pulled down the buildings, but how *Eyers* came into possession does not appear; for any thing which is stated, he might have been assignee. Why are the defendants to be held liable for the acts done by

(*i*) 5 Car. & P. 239.
(*k*) 6 Car. & P. 8.
(*l*) Holt's N. P. C. 9.
(*m*) See 2 Chitty, on Pleading, 193, note (*k*), 6th ed.
(*n*) 1 Marsh, 567.
(*o*) 1 New Rep. 290.
(*p*) 4 Taunt. 764.

Eyres?—At all events, the defendants cannot be held to be liable for any of the damages which are alleged to have been sustained after *July*, 1830, when the lease expired. There is nothing stated from which it can be inferred, that the defendants held over after the expiration of the term.

Archbold in reply.—There ought to have been a special demurrer, if the form of the declaration were objected to, and then the plaintiffs would have had leave to amend, if an amendment were necessary. But now the Court is required to give an opinion upon all the facts which are stated in the case.

TINDAL, C. J.—The way in which this case ought to be considered, is this, that the defendants are found in possession of the premises, under a lease which is void, in consequence of not having been made in pursuance of the power contained in the will of *Theophilus Salway*. It appears that the defendants and one *Samuel Sanders* had for several years paid the rent reserved by that lease; and the consequence is, that though the lease was void, they must be taken to have held the premises subject to the terms and conditions specified in it. Therefore, we get rid of the difficulty which has been raised by the defendants' counsel, namely, that a tenant from year to year, is not liable for permissive waste. The original lease was granted in 1763, and then another lease to expire in 1830, subject to a yearly rent of 10*l.* It is stated in the case, that first, the original lessee, then *Samuel Sanders*, and afterwards the defendants, paid the rent of 10*l.* until 1827; and also, that *Samuel Sanders* made an under lease of the premises, at an improved rent in 1795, and that the defendants received that improved rent until 1830. Putting these facts together, the fair inference is, that the defendants considered that they were going on under the terms of the lease of 1769; and, therefore, I am of opinion, that the first count of the declaration is made out in evidence, and there must be a verdict for the plaintiffs. *Powley* v. *Walker* (*q*) is an authority to shew that the mere relation of landlord and tenant, is a sufficient consideration for a promise to manage a farm in a husband-like manner. It is clear, that the investigation of the damages can extend no further than to *July*, 1830. If strangers have entered since that period, the defendants are not liable for their acts. As to the damages to be recovered under the second count, it appears that the defendants have continued to receive the improved rent of 70*l.* until the term of 1795 expired, and that they have paid the rent of 10*l.* until 1827. They are, therefore, liable to pay 30*l.* for the remaining three years' rent, up to 1830.

PARK, J.—Although this lease of 1769 was void, the defendants must be taken to have held under the terms contained in it, just as if the lease had been valid. It is similar to the case of a party who holds over, after a lease has expired. As to the amount of rent to be received, I agree that it must be calculated up to the expiration of the term; and the repairs must also be calculated according to the damages which were sustained at the same period. I entirely concur in the decision of *Powley* v. *Walker* (*q*).

VAUGHAN, J.—*Doe* d. *Rigge* v. *Bell* (*r*), is a very strong authority in favour

(*q*) 5 T. Rep. 373.

(*r*) 5 T. Rep. 471.

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of the plaintiffs. This is not unlike the common case of a tenant remaining in possession of premises, upon the same terms as are contained in a lease which has expired.

COLTMAN, J.—I am of opinion, that the plaintiffs have a substantial ground of action, upon which they are entitled to recover. The defendants must be treated as holding under a void lease, which all parties have treated as a valid lease. Although an action of covenant could not be maintained, yet, as the defendants continued to occupy the premises, on the terms contained in the lease, the plaintiffs are entitled to have the premises delivered up to them, at the expiration of the term, in the state provided for by the covenants. A further question arises, as to the sufficiency of the declaration, which is not free from some doubt and difficulty; but I think, considering the objection as taken after verdict, that the declaration is sufficient. Cases have been cited to shew that, although from the mere relation of landlord and tenant the law will imply certain liabilities; yet, that it is doubtful whether more will be implied than that the premises shall be used in a husband-like manner. Here it is expressly averred, that the defendants had become and *were* tenants to the plaintiffs. The only objection taken to the declaration is, that it is founded on a past consideration, but this is a continuing valuable consideration; and I cannot see why it may not be sufficient to support an express promise to repair, although it may not be sufficient to support an implied promise.

Judgment for the plaintiffs.

June 6.

D'OYLEY *v.* ROBERTS.

In an action for slander, by an attorney, the declaration stated that the defendant published of and concerning the plaintiff, and of and concerning him in the way of his profession, these words, "He has defrauded his creditors, and has been horsewhipped off the course at *Doncaster*;" it was in evidence that the plaintiff was accustomed to bet at horse-races, and the jury found that the words were not spoken of him as an attorney, but that the slander had a tendency to injure him morally and professionally. A verdict was found for the plaintiff, and a rule *nisi* having been obtained to enter a nonsuit, the Court *held*, that the defendant was not entitled to a nonsuit, but they arrested the judgment.

SLANDER. The declaration stated, that the plaintiff was a person of good name and credit, and that he was an attorney of the King's Bench, and had always, and still did, use, exercise, and carry on, the profession and business of an attorney, with honesty, integrity, credit, and reputation, and had not ever been guilty, or, until the committing the grievances by the defendant, as thereinafter mentioned, been suspected to have been guilty of the fraud, dishonesty, or misconduct, as thereinafter mentioned to have been charged or imputed to him, by the defendant; by means of which said premises the plaintiff had acquired the esteem and good opinion of his clients and neighbours, to whom he was in anywise known: and also, by reason of the aforesaid premises, the plaintiff, in the way of his said profession and business, was daily and honestly acquiring great gains and profit therein; yet the defendant, well knowing the premises, but greatly envying, &c., and contriving, and falsely and maliciously intending, to injure the plaintiff in his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst his clients and neighbours, and to injure the plaintiff in his said profession and business of an attorney, as aforesaid; and to cause it to be suspected and believed, by those clients and neighbours, that

the plaintiff had conducted himself improperly, fraudulently, and dishonestly, and to vex, harass, oppress, and impoverish, and wholly ruin, the plaintiff, heretofore, to wit, on, &c., in a certain discourse which the defendant then had, of and concerning the plaintiff, and of and concerning him in his said profession and business, in the presence of divers good and worthy subjects of our lord the now king, then, in the presence and hearing of such subjects, falsely and maliciously spoke and published, of and concerning the plaintiff, *and of and concerning him in the way of his said profession or business*, the false, scandalous, malicious, and defamatory words following, that is to say, *He* (meaning the plaintiff) *has defrauded his* (meaning the plaintiff's) *creditors, and he* (meaning the plaintiff) *has been horsewhipped off the course at Doncaster.* By means of the committing of which said several grievances, by the defendant, as aforesaid, the plaintiff had been and was greatly injured in his aforesaid good name, fame, and credit; and also greatly injured in his said profession and business, and brought into public scandal, infamy, and disgrace, with and amongst his clients and neighbours, insomuch that divers of these clients and neighbours had, on account of the committing of the said grievances, suspected and believed, and still did suspect and believe, the plaintiff to be a person guilty of fraud and dishonesty, and to have acted improperly and dishonestly in his said profession and business of an attorney, as aforesaid; and had, by reason thereof, wholly refused to have any acquaintance or discourse with the plaintiff, or to employ or have any transactions with him in the way of his profession or business, as they were accustomed before to have, and otherwise would have had: and, in particular, by means of the premises, one, who before the committing of the said grievances had been accustomed to retain and employ the plaintiff in his said profession and business, and who would otherwise have continued to retain and employ him in his said profession and business, for profit and reward to the plaintiff, in that behalf, had from thence hitherto, ceased to retain and employ, and would not thereafter retain and employ, the plaintiff in his said profession and business; and, by reason of the premises, the plaintiff had been greatly vexed, &c., and had lost great gains in his said profession, to the damage, &c.

Plea—not guilty.

At the trial, before *Parke*, B., at the last *Gloucester* assizes, the plaintiff proved the speaking of the words by the defendant, but failed in giving evidence of any special damage. It appeared that the plaintiff was an attorney, but that he frequently attended races and steeple-chases, where he was accustomed to bet, and sometimes to ride a race himself. The learned judge left two questions to the jury: first, whether the words were spoken of the plaintiff as an attorney; and, secondly, if they were not, whether the slander had a natural tendency to injure him in his business as an attorney. The jury found that the words were spoken of and concerning the plaintiff, but not of and concerning him in his business of an attorney; and that the words had a natural tendency to injure him morally and professionally. A verdict was entered for the plaintiff, with 50*l.* damages.

Godson obtained a rule *nisi* to enter a nonsuit, in pursuance of leave reserved: upon the ground that the words were not actionable in themselves, and that, as the jury had found that they were not spoken of the plaintiff as an attorney, the action could not be maintained.

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Talfourd, Serjt., and *Busby*, shewed cause.—The defendant might have demurred to that portion of the declaration, in which the plaintiff represented himself to be aggrieved in his character of an attorney, as in *Wyatt* v. *Harrison* (*a*). But now, as the jury have found that the words were spoken by the defendant, and that they had a tendency to injure the plaintiff morally and professionally, the verdict must stand. A person who fills any office, is supposed to possess qualifications for performing his duties; and the rule laid down in *Onslow* v. *Horne* (*b*), is, that "words are actionable, when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, or businesses, and do or may probably tend to their damage." That rule was certainly qualified in *Lumby* v. *Allday* (*c*). In that case, *Bayley*, B., said, "Every authority I have been able to meet with, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." But this case comes within the latter part of that principle, because it is alleged that the words were spoken of the plaintiff as an attorney. [*Tindal*, C. J.—Here the jury have negatived that the slander was spoken of the plaintiff as an attorney.] In *Stanton* v. *Smith* (*d*), it was held to be actionable to say of a tradesman, "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at 5*s*. in the pound," although there was no colloquium of his trade. *Whittington* v. *Gladwin* (*e*), *Southam* v. *Allen* (*f*). In 1 *Vin. Abr.* tit. Actions for Words, (S. a. 2,) it is said "that the words 'you are well known to be a corrupt man, and to deal corruptly,' being spoke of a sworn attorney, are actionable, because it touches him in his oath, and also in the duty of his profession, whereby he acquires his living,"

Godson and *W. J. Alexander*, *contrà*.—The latest authorities shew that this action cannot be maintained. In *Ayre* v. *Craven* (*g*), it was held that, in an action for defamation, for words charging a physician with adultery, it is not sufficient to state that the misconduct was imputed to the plaintiff in his profession, but the declaration ought to set forth in what manner such misconduct was connected by the speaker with that profession; and, therefore, where the declaration alleged that words containing such an imputation, were spoken of and concerning the plaintiff carrying on the profession of a physician, and of and concerning him in his profession, without more, judgment was arrested. If the defendant should not be entitled to a nonsuit, then, according to the decision in *Lumby* v. *Allday* (*c*), the Court will allow the defendant to arrest the judgment. [*Tindal*, C. J.—I do not see that it would make any difference to the plaintiff, if we were now to consider this as a motion in arrest of judgment.] The cases which have been cited, as to words spoken of tradesmen, are not applicable. The plaintiff is not described as a money scrivener, but as an attorney; and as such he is not liable to the bankrupt laws, nor is he necessarily supposed to have any creditors. In *Richardson* v. *Allen* (*h*), it was held, that to say of a man that he had defrauded a mealman of a roan horse was not actionable.

(*a*) 3 B. & Ado. 871.
(*b*) 3 Wilson, 186.
(*c*) 1 Tyr. 217.
(*d*) 2 Lord Ray. 1480.
(*e*) 5 B. & Cress. 180.
(*f*) Sir T. Raymond, 231.
(*g*) 4 Nev. & Man. 220; 2 Ado. & Ellis, 2.
(*h*) 2 Chitty, Rep. 657.

TINDAL, C. J.—We must consider this case as if the rule were drawn up in the alternative for a nonsuit, or in arrest of judgment. I cannot see any ground for granting a nonsuit, because there was evidence to go to the jury. But if the verdict were entered for the plaintiff, then I am of opinion that the judgment must be arrested. The plaintiff was an attorney, and the declaration states that he carried on his business of an attorney, with honesty, integrity, credit, and reputation. The rule to be found in Comyns's Digest, tit. Action upon the Case for Defamation, D. 27, is, "that words not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office. Mod. Ca. 202, Ray. 75." Now the words in this case are, "He had defrauded his creditors, and he has been horsewhipped off the course at *Doncaster*." These words have no reference or bearing upon the defendant's character, as an attorney, or in any other profession. It is contended for the plaintiff, that these words have a natural tendency to injure him in his character of an attorney; that is true, but the same may be predicated in any case where words of abuse are uttered. This case falls within the principle laid down in *Ayre* v. *Craven* (*k*), and therefore the judgment must be arrested.

PARK, J.—I have always considered the principle laid down in Comyns's Digest to be correct. Here the words are alleged to have been spoken by the defendant, of and concerning the plaintiff in the way of his profession, but the jury have negatived that allegation. That being so, there are words of great abuse used by the defendant; but not so severe as in many of the cases mentioned, by Lord *Denman*, in the judgment in *Ayre* v. *Craven* (*k*). There it is said, "Some of the cases have proceeded to a length which can hardly fail to excite surprise: a clergyman having failed to obtain redress for the imputation of adultery (*m*), and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution (*n*); such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay."

VAUGHAN, J.—I am of the same opinion. When the jury found that these words were not spoken of the plaintiff as an attorney, the defendant was entitled to a verdict.

COLTMAN, J.—I am of the same opinion. The only case cited, which seems to me to support the argument for the plaintiff, is *Stanton* v. *Smith* (*o*), but that is a solitary case, at variance with previous and subsequent decisions.

Rule absolute, to arrest the judgment.

(*k*) 4 Nev. & Man. 220; 2 Ado. & Ellis, 2.
(*m*) *Parrat* v. *Carpenter*, Noy. 64, S. C. Cro. Eliz. 502.
(*n*) *Wharton* v. *Brook*, 1 Vent. 21.
(*o*) 2 Lord Ray. 1480.

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June 12.

DELEGAL *v.* HIGHLEY.

1. In an action for causing a malicious charge of fraud to be made against the plaintiff before a magistrate, the defendant pleaded that he caused the charge to be made upon and with a reasonable and probable cause; and then the plea proceeded to state what that reasonable and probable cause was, and certain facts and circumstances were stated; upon special demurrer, the plea was held bad, on the ground that it was not expressly stated that the defendant had the knowledge of the facts and circumstances at the time when the charge was made.

2. It is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings; and a remark made by the clerk to the magistrate, forms no part of the proceedings which may be published.

3. In an action for publishing a libel, which stated that the defendant had been charged with a fraud before a magistrate, the only justifications which the law admits, are, first, that the charge itself was a true charge; or, secondly, that the publication contained a true, full, and faithful account of proceedings in a court of justice; and if such proceedings are published, the terms of the accusation should be stated, not merely the result of it; because, if the terms in which it was preferred were stated, it might carry with it, its own refutation or explanation.

DEMURRER.—The declaration stated that the plaintiff was a commission merchant, and had always conducted himself honestly, &c., yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to vex, harass, and oppress him, on the 24th day of *October*, 1835, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured one *John Henley* to make before *Henry Winchester*, Esq., at the *Mansion House*, in the city of *London*, the said *Henry Winchester* then being mayor of the said city, &c., a certain complaint, charge, and accusation, against the plaintiff, to wit, that he, the plaintiff, then improperly detained two blank bill-stamps, having the signature thereon respectively of the said *John Henley*, and that he the plaintiff had fraudulently obtained the said signature of the said *John Henley* to the said blank bill-stamps respectively: and thereupon the defendant then falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the plaintiff to be, and the plaintiff was thereupon summoned to appear, and did on such summons, to wit, on the 26th day of *October*, necessarily appear at the said *Mansion House*, to wit, to answer the matters of the said complaint, charge, and accusation: and thereupon, to wit, on the day last aforesaid, the defendant falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said *John Henley*, to prosecute and continue the said complaint, charge, and accusation, before the said *Henry Winchester*, then being, &c., until the said *Henry Winchester*, then being, &c., to wit, on, &c., having heard and considered every thing that was alleged and said, touching the said complaint, charge, and accusation, wholly acquitted and discharged the plaintiff therefrom, and then dismissed the said summons; by means of which, &c.

The second count contained the usual introductory averments of character, and stated that the plaintiff had been summoned to the *Mansion House* on the charge made by *Henley*, as stated in the first count; yet the defendant, contriving and wickedly and maliciously intending to injure the plaintiff in his good name, &c., and to cause it to be suspected and believed, that he had been guilty of fraudulently obtaining the signature of one *John Henley*, to two blank stamped bills, and that he the plaintiff had been taken into custody on a criminal charge, in respect of such fraud and misconduct, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff; on the 27th day of *October*, falsely, wickedly, and maliciously, did compose and publish of and concerning the plaintiff, and of and concerning the said proceedings, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, mali-

cious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning the said proceedings of and before the said *H. Winchester*, that is to say,

"POLICE. *Mansion House.*—On Monday, *Charles Delegal*, Irish provision agent, 39, *Clement's Lane, Lombard Street*, was charged, before the lord mayor, with having fraudulently obtained the signature of *John Henley*, a youth under twenty years of age, to two blank stamped bills. Mr. *Flower* stated the case to his lordship, and called *John Henley*, who said he was induced by *Delegal* to come from *Manchester*, to attend in a shop *Delegal* was about to open in the *New Cut, Lambeth*. After he had been a few days in town, he was desired by *Delegal* to go to his counting-house, in *Clement's Lane, Lombard Street*, where some papers were given him to copy; *Delegal* then placed before him two pieces of paper, in which he desired him to write his name across, which he did, thinking *Delegal* wished it as a specimen of his handwriting; but when *Delegal* removed them, he then saw the stamps which had been hidden under some other papers. He had since asked *Delegal* about them, but received evasive answers. *Charles Delegal* produced several letters which the lord mayor refused to look at. He then stated that one was only a memorandum which had been destroyed, and produced a mutilated portion of it with the name of the complainant written on it; the other was a bill which had likewise been destroyed; and called *Russel*, who swore that he saw the bill destroyed a week ago. *Mr. Hobler, the chief clerk, observed, that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange.* The Lord Mayor said, that as it had been shewn that both the bills had been destroyed, the complainant need be under no further apprehension, and *Delegal* was discharged."

Pleas—To the first count, the defendant pleaded, secondly, that he caused and procured the said *John Henley*, to make before the said *Henry Winchester*, Esq., the said complaint, charge, and accusation against the plaintiff, in the said first count mentioned, and caused and procured the plaintiff to be summoned to appear at the said *Mansion House*, and the said *John Henley* to prosecute, and continue the said charge, complaint, and accusation, upon and with a reasonable and probable cause; that is to say, because, therefore, to wit, on the 1st day of *August*, 1835, the said *John Henley*, being a son of the sister of the wife of the plaintiff, who was also a sister of the wife of the defendant, had agreed with the plaintiff to become a shop-boy, in a certain shop of the plaintiff's, to wit, in the parish of *Lambeth*, in the county of *Surrey*; he the said *John Henley*, being then under the age of twenty years; and afterwards, to wit, on, &c., he the said *John Henley*, so being such shop-boy of the plaintiff, and under twenty years, at the request of the plaintiff, went to his counting-house, being in *Clement's Lane, Lombard Street*, in the city of *London*, and so being in the said counting-house, the plaintiff then placed before him, the said *John Henley*, two slips of blank paper, and then desired him, the said *John Henley*, to write his name across, without acquainting him with the purpose thereof; and the said *John Henley* did, then being such shop-boy, and under the age of twenty years as aforesaid, at the said request of the plaintiff, write his name across the said slips of blank paper respectively, he, the said *John Henley*, then being ignorant that the said slips of blank paper were stamped, and thinking

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that the plaintiff wished only to see a specimen of the handwriting of him, the said *John Henley;* that the said slips of blank paper, at the time when the said *John Henley* so wrote his name across them as aforesaid, were severally stamped as bills of exchange, with certain stamps of our lord the *King;* but that the said *John Henley* did not, nor could at the time he so wrote his name as aforesaid, know of or see and observe the said stamps, because they were hidden by certain other papers when the said slips of paper were so placed before him by the plaintiff as aforesaid; that afterwards, to wit, on, &c., the said *John Henley* requested the plaintiff to inform him what the said slips of paper were, but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said *John Henley*, or any part thereof; that afterwards, to wit, on, &c., one *Harriet Henley*, being the mother of the said *John Henley*, requested the plaintiff to inform her what the said slips of paper were, but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said *Harriet Henley*, or any part thereof; wherefore the defendant saith, that he had reasonable and propable cause to believe, and did believe, that he, the plaintiff, before and at the time of making of the said charge and complaint, improperly detained the said two blank bill-stamps, having the signature thereon respectively of the said *John Henley;* and that he, the plaintiff, had fraudulently obtained the signature of the said *John Henley*, to the said blank bill-stamps respectively. Conclusion with a verification.

Fourth plea, to the second count—Except as to so much of the said count as charged, that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge;—that before the composing and publishing of the libel in the said second count mentioned, to wit, on, &c., the plaintiff was charged before the said *Henry Winchester*, so then being lord mayor as aforesaid, with having fraudulently obtained the signature of the said *John Henley*, being a youth under twenty years of age, to two blank stamped bills; that upon the said charge, one Mr. *Flower* did then state the case to the said lord mayor, &c. (The plea then alleged, that all the circumstances mentioned in the libel, occurred during the investigation before the lord mayor.) And the defendant further saith, that he composed and published the said libel without malice, and that the same contains a true and full account of all that which took place before the said lord mayor, touching the said charge and complaint, without any suppression, alteration, omission, or misrepresentation whatever; therefore, he, the defendant, composed and published the said libel in the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion with a verification.

Fifth plea—As to so much of the said second count as related to composing and publishing a certain part of the said libel, with intent to injure the plaintiff in his good name, fame, and credit, that is to say,

"POLICE. *Mansion House.*—On Monday, *Charles Delegal, Irish* provision merchant, 39, *Clement's Lane, Lombard Street*, was charged before the lord mayor, with having fraudulently obtained the signature of *John Henley*, a youth under twenty years of age, to two blank stamp bills."

That before the composing and publishing of the said libel, to wit, on, &c.,

the said plaintiff was charged before the said lord mayor, at the *Mansion House*, with having fraudulently obtained the signature of the said *John Henley*, then being a youth under twenty years of age, to two blank stamped bills, wherefore the defendant composed and published the libel in the introductory part of this plea and the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion with a verification.

Sixth plea, to the second count of the declaration; except as to so much of the said count, as charged that the defendant composed and published the libel therein mentioned, intending to cause it to be believed, that the plaintiff had been taken into custody on a criminal charge;—that before the composing and publishing of the said supposed libel, in the said second count of the declaration mentioned, to wit, on, the 1st day of *August*, in the year of our Lord, 1835, the said plaintiff did fraudulently obtain the signature of the said *John Henley*, &c.; that the plaintiff was charged, before the said lord mayor, with having fraudulently obtained the signature of the said *John Henley*, to the said two pieces of paper so stamped as last aforesaid; and on the said charge, the said Mr. *Flower* did state the case to the said lord mayor, &c. (The plea then proceeded to allege the truth of all the statements contained in the libel,) wherefore the defendant did compose and publish the same libel, in the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion, with a verification.

Demurrer—to all the pleas, on several grounds, and *joinder*.

The points marked for argument by the plaintiff were—To the *second plea*, that it did not shew that the plaintiff was guilty, or that the defendant had reasonable cause to believe he was guilty; or that the defendant knew of the circumstances stated in the plea, as being reasonable and probable cause; that the plea was too general; that it amounted to the plea of not guilty; and that it improperly concluded with a verification.

To the *fourth plea*—That it improperly attempted to exclude the consideration of the intent of the libel, from the question as to the justification of it; and that it did not sufficiently deny or confess and avoid the libel as charged; that it was a plea to the whole declaration, though, in the introductory part thereof, it was pleaded as to part only; that the plea did not justify the whole matter to which it was pleaded; that it was no justification in law for the publication of a libel, that the publication complained of, stated only what had actually taken place on a hearing before a police magistrate; that the account was manifestly coloured and untrue; and that no justification, by reason of any right of the public to information, or otherwise, was shewn.

To the *fifth* and *sixth pleas*, similar objections to the last-mentioned, were stated; and to the *sixth plea*, it was further objected, that the truth of the imputation, that the plaintiff did obtain the signatures as stated, was no justification for stating that the plaintiff had been charged therewith before the lord mayor, and the charge heard, &c., and that the plea was double and contained superfluous matter.

The arguments of counsel, are stated upon those points only, which were determined by the Court.

Henderson, in support of the demurrer, relied upon the objections already mentioned.—As to the second plea, it does not disclose any reasonable or pro-

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bable cause for preferring the charge against the plaintiff, because it was quite consistent with every thing which is stated in the plea, that the defendant had no knowledge of any of the circumstances of the case, until after he had preferred the charge. A contemporaneous knowledge ought to have been shewn, so that it might appear, that the defendant had reasonable and probable cause at the very time when he made the charge; and he ought also to have stated the facts and circumstances upon which he relied, as amounting to reasonable and probable cause.

E. V. Williams, contrà.—The second plea discloses circumstances which are sufficient to shew, that the defendant had reasonable and probable cause for making the charge; and although the same facts might have been proved, under the plea of not guilty, there are abundance of authorities to shew that this is not a ground of demurrer. If the plaintiff objected to the second plea on this ground, an application ought to have been made to a judge at chambers, to strike out one of the pleas. Nor was it necessary that the defendant should believe, that the plaintiff was guilty at the time he made the charge. It is not required that a party should have a conviction of the guilt of another in his mind, when he makes a charge against him. It is sufficient if the facts would raise such a suspicion in the mind of a reasonable man, as would fairly induce him to put the case in the course of a criminal inquiry. In many cases, charges are investigated with a laudable and innocent intention. But the question, whether it is necessary to aver that the defendant had the knowledge of the facts when the charges were made, does not arise in this case; because in the plea, the facts are alleged to have taken place in *August*, and the declaration avers that the charge was made before the lord mayor, in *October*. In the plea, the defendant alleges that he prosecuted the complaint "upon and with a reasonable and probable cause, that is to say, because, theretofore, to wit, on the 1st day of *August*, the said *John Henley*, being a son, &c." It must be taken, therefore, that the cause preceded the effect. That the parties are bound by the dates which are stated in the pleadings, appears by *Owen* v. *Waters* (*a*).

Henderson was heard in reply.

Cur. adv. vult.

TINDAL, C. J.—The first count in the declaration is framed in the usual form, for causing and procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon, without any reasonable or probable cause. The second plea which is pleaded to that count only, alleges, in terms, that the defendant caused and procured the charge to be made, "upon and with a reasonable and probable cause," and then proceeds to state what that reasonable and probable cause was; and in so doing, alleges the several facts and circumstances attending the transaction out of which the charge before the lord mayor arose. To this plea there is a special demurrer, alleging, as one ground of objection, that it contains no allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on, those facts and circumstances. And we

(*a*) 2 M. & W. 91.

are of opinion that the plea is bad, not in form only, but in substance, on this ground of objection. The gravamen of the declaration is, that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and, under the plea of not guilty, the plaintiff must have failed at the trial, if he had not proved that the facts of the case had been communicated to him; or at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt, in the mind of any reasonable man, previous to the charge being laid before the magistrate. This was held by the Court of King's Bench, in the course of last term, upon a motion for a new trial, in a case of *Docwra* v. *Hilton*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defence, that which is so important in proof under the plea of not guilty, viz.—that the knowledge of certain facts and circumstances, which were sufficient to make him, or any reasonable person, believe the truth of the charge which he instituted before the magistrate, existed in his mind, at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas it is quite consistent with the allegations in this plea, that the charge was made upon some ground, altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge, for the first time, since the charge was made. Upon this ground, we hold the second plea to be insufficient in law. The second count of the declaration is for the composing and publishing of a false and malicious libel; the libel consisting of the publication in a newspaper of a police report of the same proceedings, before the lord mayor, which form the subject matter of the first count. And the fourth and sixth pleas are each pleaded to the second count, "with the exception of so much of the count as charges that the defendant composed and published the libel therein mentioned, intending to cause it to be believed, that the plaintiff had been taken into custody upon a criminal charge." To this plea, various objections have been assigned for cause of special demurrer, and have been urged in argument before us. We think, however, an objection appears upon the face of the plea, which renders it unnecessary for us to give any opinion, either upon the formal objections which have been urged against its validity, or on the more general question which has been raised, viz.—whether the publishing of a fair and correct account of proceedings exparte, upon a charge before a magistrate, is or is not, a privileged publication. For each of these pleas alleges as a ground of justification, "that the supposed libel contains a full and true account of all that took place before the lord mayor, touching the said charge or complaint." But it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings. The principle is so laid down in the case of *Lewis* v. *Clement* (*b*), and in other cases. But in the libel set out in the declaration, after the statement of the evidence given before the lord mayor, an observation is inserted of Mr. *Hobler*, the chief clerk, "that

(*b*) 3 B. & Ald. 702.

it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange." This appears to us to be a substantive reflection on the character and conduct of the plaintiff, which is altogether unwarranted, in two respects; it was not made in the course of any judicial proceeding, by any one whose duty called upon him to make it; it was uttered by a person who, for this purpose, must be considered as an entire stranger, it is the same as if made by any bystander in the court. Again, it was not warranted by the facts which were brought in evidence against the plaintiff, which amounted not to a charge of obtaining signatures to blank bills of exchange, but to a charge of obtaining the signature of a young man, to two blank pieces of paper which had been stamped with stamps, for bills of exchange. The libel, therefore, contains a serious reflection on the character of the plaintiff, which the privilege set up in the fourth plea, supposing it to exist, does not extend to justify,—a reflection, the truth of which is not justified by the facts stated in the sixth plea; and on those grounds, we think both these pleas are bad. The fifth plea is pleaded to the publication of a certain part of the libel, which is thereby separated and divided from the rest; namely, that part which states that the plaintiff was charged, before the lord mayor, with having fraudulently obtained the signature of a youth, under twenty years of age, to two blank stamped bills, with the intent to injure the good name and reputation of the plaintiff. There can be no doubt, but that the publication of the fact, that such an accusation was made against the plaintiff, is calculated to injure him in his good name and reputation, and that the defendant is therefore called upon to justify such publication; and the only justifications which the law admits, to the publication of an accusation of this nature, are two; first, that the accusation against the plaintiff was founded on facts, which make the charge itself a true charge; and secondly, that the publication was justified by the occasion, viz.—that it is a true, full, and faithful account of proceedings in a court of justice. The plea in question sets up neither of these grounds of defence. It is merely an assertion than an accusation was made by some third person, reflecting on the character of the plaintiff. Even whilst the *Earl of Northampton's* case (*c*) was held to be law to its full extent, the repetition of a slander by a third person was no justification, unless the party gave the plaintiff a ground of action against such third person, by naming the original author of the slander at the time; nor, it would seem, unless he averred in his justification, his belief that the accusation was true; per *Bayley*, J., in *Macpherson* v. *Daniel* (*d*). But the case of *De Crespigny* v. *Wellesley* (*e*), furnishes an authority that this doctrine does not extend to the publication of a written libel; and that where such libel consists in publishing the fact of an accusation having been made against another, the defendant must shew the accusation to be true. The justification in the present case, in fact, amounts to no more than a republication of the libel itself. If the libel is to be taken as containing a publication of legal proceedings—as might be surmised from the whole of the libel as stated in the declaration—then the plea is bad, because it omits to state that it is a true and accurate report, containing the whole of what passed on that occasion. The terms of the accusation should be stated, not merely the result of it; for if the terms in which it was preferred were stated, it might carry with it, its own refutation or explanation. (See *Saunders* v. *Mills* (*f*),

(*c*) 12 Rep. 134.
(*d*) 10 B. &. C. 270.
(*e*) 5 Bing. 405.
(*f*) 6 Bing. 213; 2 M. & P. 529.

Flint v. *Pike* (*g*), *Smith* v. *Thomas* (*h*),) and still further, it appears on this very record, that the libel justified is, in fact, a part of a legal proceeding only, viz. the charge; which the defendant is not justified in publishing alone. (See *Rex* v. *Lee* (*i*), *Rex* v. *Dicken* (*k*).) We, therefore, think the fifth plea bad also; and upon the several pleas above demurred to, we give our

Judgment for the plaintiff.

(*g*) 4 B. & C. 473.
(*h*) 2 New Cases, 372; 1 Hodges, 353.
(*i*) 5 Esp. 123.
(*k*) 2 Camp. 563.

YAPP, Assignee of PARTINGTON, an Insolvent, *v.* HARRINGTON.

June 9.

TROVER to recover certain goods belonging to the insolvent, which were sold by the sheriff, under a writ of *fi. fa.*, issued by the defendant. At the trial, before *Patteson*, J., at the last summer assizes for *Worcester*, the following appeared to be the facts of the case. On the 6th *April*, 1833, the insolvent gave the defendant a warrant of attorney for 300*l.*, and in *Trinity* Term, 1835, judgment was signed; an execution issued, and the amount of the debt and costs was levied under a *fi. fa.*, by a sale of the goods which took place on the 5th and 6th *November*. On the 5th *November*, the insolvent was arrested, at *Cheltenham*, on mesne process, under a warrant which was directed to one *Surman*, and his assistants. After the arrest, *Surman* gave the insolvent into the custody of *Johnson*, his assistant, by whom he was taken to a beer-house, where he remained in the custody of *Johnson;* but he was frequently left to the care of one *Newman*, a friend of the sheriff's officer; and on several occasions, he was allowed to walk about the town, in *Newman's* company. The insolvent remained in custody, under these circumstances, until the 12th *November*, when he was taken to *Gloucester* gaol by the sheriff's officer. On behalf of the plaintiff it was contended, that the sale of the goods, on the 5th and 6th *November*, was void, under the 7 Geo. 4, c. 57, sec. 34, which enacts, that no person shall, "after the commencement of the imprisonment" of a prisoner, avail himself of any execution, issued upon any judgment. On the other hand it was alleged, that the case was not within this section, because the imprisonment of the insolvent did not commence until the 12th *November*, when he was taken to prison. The learned judge refused to nonsuit the plaintiff, but left the case to the jury, directing them to find whether, after the arrest, and before the insolvent was taken to prison, he was in the custody of the sheriff's officer. The jury found that the insolvent was not in the custody of the sheriff's officer, but of a friend of the sheriff's officer. Verdict for the defendant.

In *Michaelmas* Term, *R. V. Richards* obtained a rule *nisi*, to set aside the verdict, and to enter a verdict for the plaintiff.

By the general Insolvent Act 7 Geo. 4, c 57, sec. 34, it is enacted, that no creditor shall, after the commencement of the imprisonment of a prisoner, "avail himself of any execution, issued or to be issued." —*Held*, that where an actual imprisonment within the walls of a prison, follows upon an arrest for debt, as one continuous act, within the usual time allowed and required by law, then the arrest must be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by law, takes place before the actual commitment to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner; then not the arrest, but the actual coming within the walls of a prison, is the commencement of such imprisonment.

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Talfourd, Serjt., and *Busby*, shewed cause.—The sale of the goods took place before the commencement of the insolvent's imprisonment, and therefore, the defendant was entitled to the verdict. It is clear, under the 10th section of the statute, that no person is entitled to present a petition for his discharge, unless he is "in actual custody within the walls of any prison," and by the 12th section it is provided, that the act shall not extend "to any person who shall not be at the time of filing his or her petition, and during all the proceedings therein, in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any court or otherwise." The words "after the commencement of the imprisonment of such prisoner" in the 34th section, have reference to the same species of imprisonment as the former sections; or, at all events, to a lawful imprisonment in the custody of the sheriff. But here, the insolvent was not in any continuous lawful custody. The sheriff's officer was not authorized to keep the insolvent at a beer-house, from the 5th until the 12th of *November;* or to give him into the custody of *Newman*, who is expressly found not to be the bailiff's assistant; and the sheriff was clearly liable to be sued for an escape. The 30th and 31st sections of the statute will be relied on by the other side, because the words there used are, "at the time of his arrest, or other commencement of such imprisonment." But that only shews, that in some cases the arrest may be the commencement of the imprisonment; and it is a strong argument in favour of the defendant, that if such a construction was intended in the 31st section, the same words would have been used. In *Tribe* v. *Webber* (*b*) it is said, that where A. being arrested puts in bail, afterwards he surrenders in discharge of his bail, and is above two months in prison, he is a bankrupt only from the time of his surrender, not from the time of his arrest. *Barnard* v. *Palmer* (*c*) is to the same effect. In *Sims* v. *Simpson* (*d*) it was decided that, under the Insolvent Debtor's Act, there is not that relation to the first day of the insolvent's imprisonment, that there is, under the late Bankrupt Act, to the act of bankruptcy.

R. V. Richards, contrà.—The object of the 34th section is, that the property of a person who is about to take the benefit of the statute, shall be fairly divided amongst his creditors. By the 10th section, a person within the walls of a prison, may apply by petition for his discharge within fourteen days after the commencement of his actual custody; but the words "within the walls," are expressly introduced to prevent debtors who were merely within the rules of the prison, from taking the benefit of the act. It is not contended, if, as was done in the cases cited, a debtor is arrested and gives bail, that the arrest may then be considered as the commencement of an imprisonment; but it was the intention of the legislature, when a man's affairs were so embarrassed as to prevent him from obtaining bail, that his property should then be fairly distributed. The 30th, which is the key to the subsequent sections, shews very clearly that the commencement of the imprisonment must be considered with reference to the time of arrest. It enacts, that if any person who shall petition the court for his discharge from imprisonment, under the act, "should, at the time of his or her arrest, or other commencement of such imprisonment," have goods in his possession, they shall be treated as being his property. So

(*b*) Bull. N. P. 38.
(*c*) 1 Camp. N. P. C. 509.
(*d*) 1 Bing. N. C. 306; and see *Gye* v. *Hitchcock*, 4 Ado. & Ell. 86.

by the 31st section, certain distresses for rent are not available, when made "after the arrest or other commencement of the imprisonment" of the insolvent. The arrest was lawfully and properly made, otherwise the sheriff could not be liable to be sued for an escape; and it must be taken that the imprisonment commenced at the time of the arrest. And admitting, for the sake of argument, that for a day or two the insolvent was not in the custody of the sheriff, then as the plaintiff was not a party to the irregularity, and as the arrest was clearly lawful, the plaintiff ought not to suffer from the wrongful act of a third party. Another point which may be contended is, that although a bailiff must be expressly named in the warrant, he may, after he has legally arrested the party, lawfully give him into the custody of an assistant.

Cur. adv. vult.

TINDAL, C. J.—The principal question raised in this case for our consideration turns upon the proper construction to be put upon the 34th section of the General Insolvent Act, which limits the time after which no one shall avail himself of any execution, upon a judgment signed under a warrant of attorney, or a *cognovit actionem* given by a prisoner who petitions under that statute. The words of that section are, that no person shall avail himself of such execution "after the commencement of the imprisonment of such prisoner." On the part of the plaintiff it is contended, that the arrest of the debtor is, within the meaning of this section, the commencement of his imprisonment. On the part of the defendant it is, on the other hand, contended, that looking at the whole act, "the commencement of his imprisonment" is the first moment of the debtor's being actually committed to the walls of the prison, from which moment his right to petition under the statute takes its commencement. If the answer to this question had depended upon the 34th section alone, there would have been little difficulty in the case. The words themselves, in their natural sense, import the being actually in prison; and such construction of the word "imprisonment" appears to be warranted by reference to the 10th section of the act, which describes the persons who shall be capable of taking the benefit of the act, as "persons in actual custody within the walls of any prison," and still more by reference to the 12th section, which expressly enacts, that the statute shall not extend to any person "who shall not be, at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment." And it is a further argument in favour of this construction of the section, that the actual imprisonment of the debtor within the walls of the prison, is a fact that may well be presumed to be notorious to his creditors, after which any creditor holding a warrant of attorney must be considered as taking proceedings thereon at his own peril; whereas the precise time of the actual arrest of the debtor, may be often a fact involved in obscurity and uncertainty. The difficulty, however, arises from the introduction of the word "arrest" in sections 30 and 31. The 30th section, (which contains the provision as to the insolvent having goods in his possession, order, or disposition, by the consent of the true owner,) begins by enacting, that if any person who shall petition for his discharge from imprisonment under the act, "shall, at the time of his arrest, or other commencement of such imprisonment," by the consent of the true owner, have in his possession, &c. And the plaintiff contends, and we think

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justly contends, that the statute does in this instance expressly declare, that the arrest of a prisoner is one of the modes by which his imprisonment may be commenced. And again, the 31st section gives room for the same observation, as it contains provisions with respect to distresses for rent made "after the arrest or other commencement of the imprisonment of any person who shall petition under the act." That in each of these two sections, and for the purposes contained in these sections, the arrest of the prisoner is made the limit of time after which certain consequences, therein respectively specified, are to follow, must, we think, be admitted; nay, further, it must be admitted also, that the arrest of the prisoner is one of the modes by which his imprisonment may be commenced for the purposes of these sections. Whether the insertion of the word "arrest," as one of the modes of the commencement of the imprisonment of the debtor, in the 30th and 31st sections, and the omission of that word in the 34th, the section now under consideration, arose from inaccuracy, or from any intended distinction with respect to the subject-matter in those respective sections, may be the subject of some doubt, though it certainly is very difficult to see any reason for any such intended distinction. And, upon the whole, we think the proper construction of these sections is, that where the actual imprisonment within the four walls of the prison follows upon the arrest, as one continuous act, within the usual time allowed and required by law and the course of practice, there the arrest shall be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by the due course of law, takes place before the actual commitment of the defendant to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, or any other cause of the same nature, there, not the arrest, but the actual coming within the walls of the prison, is, within the meaning of the statute, the commencement of such imprisonment. For we think great uncertainty might arise as to the right of creditors and the validity of transactions, honest in themselves, if they were made to depend upon the happening of events of which the creditors had no notice; and in the particular case, it would seem to be unreasonable, that an execution under a warrant of attorney, for any thing that appears to the contrary, given *bonâ fide* and for a valuable consideration, should be held to be voidable where it was completed before the actual imprisonment of the debtor, because such execution was not executed until after the original arrest made, in a case where the insolvent was not committed to actual imprisonment in the county gaol, until after an unreasonable and unjustifiable delay. And this circumstance it is which appears to us to distinguish the present case from that of *Stevens* v. *Jackson* (*a*) and others, in which case the delay of a week between the arrest of the bankrupt in his own house, and his committal to prison, was accounted for "by his having been arrested in bed dangerously ill and incapable of being removed," during all which interval the bailiff's follower kept the key of his house. Such a delay may well have been considered as reasonable under the circumstances; the duty of the officer, as observed by Mr. Justice *Heath*, even where the prisoner is taken in execution, being only to carry him to prison "within reasonable time." But, in the present case, the arrest of the insolvent at *Cheltenham* takes place on the 5th of *November*, and the commitment to *Gloucester* gaol is delayed until the 12th, and in the interval it is expressly

(*a*) 1 Marsh. 469.

found by the jury that he was in custody, "not of the sheriff's officer, but of a friend of the sheriff's officer," without any excuse suggested for the delay. We cannot, therefore, consider this intervening imprisonment as a legal imprisonment continuing from the first arrest; and on that account we think the arrest was not, in this case, the commencement of the imprisonment, within the meaning of the act; and that, the execution having been completed before the insolvent was actually committed to the county gaol, it is not avoided under the 34th section, as an execution after the commencement of the imprisonment of the insolvent.

Rule discharged.

SCOTT *v.* MILLER.

May 23.

In an action for money had and received, brought by a ship-owner against his captain, the plaintiff offered evidence of the payment of a bill of exchange drawn by the defendant in a foreign port, in favour of a broker, on account "of disbursements for the ship." There was evidence that the ship had undergone some repairs in the port. *Held*, that proof of the payment of the bill was inadmissible in this form of action, in the absence of evidence that the money had ever come to the defendant's hands.

ASSUMPSIT for money had and received by the defendant, to the use of the plaintiff. *Plea*—Non-Assumpsit. At the trial, before *Tindal*, C. J., at the *London* sittings, the following appeared to be the facts of the case. The plaintiff was the owner of the ship *Countess Dunmore*, and the defendant had been employed as captain, on a foreign voyage. A dispute having arisen respecting the ship's accounts, and respecting a claim of primage by the defendant, which the plaintiff resisted, the present action was brought. Amongst other evidence, the plaintiff offered to prove the payment of a bill of exchange for 137*l.* 1*s.* 6*d.*, which had been drawn by the defendant at *Rio de Janeiro*, upon Mr. *Halket*, the plaintiff's agent in *London*, whilst the vessel was there, undergoing some repairs. It appeared that the vessel had been obliged to put into *Rio*, in consequence of having received damage at sea, and that she remained there for some days, whilst under repair. The following is a copy of the bill:—

"*Rio de Janeiro*, the 12th *August*, 1833, for 137*l.* 1*s.* 6*d.* At fifteen days' sight, pay this first of exchange to the order of Messrs. *Hudson, Weguelin*, and Co., the sum of one hundred and thirty seven pounds, one shilling, and sixpence, sterling, value in disbursements of Bk., *Countess Dunmore*, which place to account as per advice.

"To Mr. *David Halket*, "*John Miller*."
"19, St. *Helen's* Place."

Messrs. *Hudson, Weguelin*, and Co. were brokers at *Rio*, but there was no evidence to shew that they had been employed to repair the vessel. No letter of advice was produced. It was objected, on behalf of the defendant, that this evidence was inadmissible in an action for money had and received, because there was nothing to shew that the money for which the bill was given, or any part of it, ever came to the defendant's hands. The learned judge received the evidence, and the jury found a verdict for the plaintiff, for 125*l.*

Wilde, Serjt., obtained a rule *nisi* for a new trial, on the objections which were taken at the trial. He contended, that, as there was evidence to shew that the plaintiff's vessel had been repaired at *Rio*, the necessary inference was,

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that the bill had been drawn for the purpose of meeting the necessary expenses of the vessel (*a*).

Bompas, Serjt., and *Whateley*, shewed cause.—It is evident that the defendant received value for the bill of exchange, and that it was drawn on account of the ship's disbursements. He is, therefore, bound to shew how he has expended the money. It does not appear that the whole amount of the bill was expended in repairing the vessel; and the fact that the payees are brokers, shews that it could not have been given on account of the repairs. The defendant has followed the usual mode of raising money, in a foreign port in which the ship-owner has no regular agent. But for this purpose the payee ought to be treated as the ship-owner's agent, who has advanced money; and by paying the bill, the plaintiff has recognized the agency. If the defendant's excuse is, that the money has been disbursed in repairing the ship, then he ought to shew that the repairs were done. A ship-owner is only liable for necessary repairs; and, therefore, the defendant ought also to shew that they were necessary. *Rotcher* v. *Busher* (*b*), *Palmer* v. *Gooch* (*c*), *Bogle* v. *Atty* (*d*), *Thacker* v. *Moates* (*e*). If it should be decided that the captain of a ship is not bound to shew how the money has been disbursed under such circumstances as these, then the owners may be sued by the parties who repaired the ship, and so be compelled to pay twice. [*Tindal*, C. J.—What evidence is there that the bill had ever been converted into money by the defendant? It is drawn on account of the ship's "disbursements," and is duly paid by the plaintiff when it is presented.] In strictness, the plaintiff was not bound to pay the bill; but the practice of paying such bills has prevailed, for the general convenience of ship-owners. The defendant is bound to shew how the amount has been disbursed, and he will suffer no injustice if he is compelled to do so; because, if the money was properly expended, he will be allowed to pass the amount to his credit, in the accounts.

Wilde, Serjt., and *Cleasby*, in support of the rule.—It appears by the cases which have been cited, that the owners of a ship are liable to pay for necessary repairs, and also for other disbursements. This bill is drawn on account of the ship's disbursements, and the amount having been paid by the plaintiff, it is evident he did not consider that the defendant had exceeded his authority; and even if the defendant has acted improperly, he may be liable in another form of action. The objection is, that the proof of the payment of this bill, is not evidence in an action for money had and received. In *Case* v. *Roberts* (*f*), it was decided, that an action for money had and received would not lie to recover back a sum paid upon trust for a specific purpose, unless it was first shewn that the trust was closed, and that a balance remained in the hands of the trustee. And in *Harvey* v. *Archbold* (*g*), it is said, that in this form of action the plaintiff must give evidence of a particular sum to which he is entitled. Here there is evidence that the ship was repaired at *Rio*, and that other charges were incurred, but there is nothing to shew that any part of the

(*a*) The rule was also granted upon a question as to the defendant's right to primage, but no judgment was pronounced on this point.
(*b*) 1 Stark. N. P. C. 27.
(*c*) 2 Stark. N. P. C. 428.
(*d*) 1 Gow. 50.
(*e*) 1 Moo & Rob. 79.
(*f*) Holt's N. P. C. 500.
(*g*) 3 B. & Cress. 626.

proceeds of the bill ever came into the defendant's hands. It is not sufficient to shew, by inference, that the money might have come into the possession of the defendant. In *Nightingale* v. *Devisme* (*h*), Lord *Mansfield*, C. J., held, that proof of a transfer of stock to the defendant, would not support an action for money had and received.

TINDAL, C. J.—I think this case must be submitted to the consideration of another jury. The form of the bill of exchange implies that it was drawn on account of disbursements in respect of the plaintiff's ship; and we think there should have been some evidence that the money came to the defendant's hands. The plaintiff is not without a remedy, because he may sue the defendant for fraud or misconduct, if the circumstances of the case warrant such a proceeding. This rule must be made absolute.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(*h*) 5 Burr. 2589.

The EAST INDIA COMPANY *v.* BAKER, Secretary to the East India Dock Company.

June 7.

The *East India* Dock Act provides for a return of dock-duties to such of the E. I. Company's ships as have completed "their regular number of voyages." *Held*, that this refers to the last voyage, being more than six, which is made by any ship.

THIS action was brought to recover from the *East India* Dock Company certain sums of money, which the plaintiffs contended ought to be repaid to them by virtue of the statute 43 Geo. 3, c. CXXVI., upon the *Thomas Grenville* and seven other ships, the property of the *East India* Company. The following case was submitted to the Court, by consent:—

The *East India* Dock Company was constituted by the statute 43 Geo. 3, c. CXXVI., (public and private act,) and was thereby empowered to make docks for the reception of *East India* ships.

By section 91 it was enacted, that there should be payable to the *East India* Dock Company, for every ship entering into and using any dock, &c., the several respective rates following, (that is to say,)

1. For every such ship, (except country ships, thereinafter described,) entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the said docks, the rate or sum of 14*s*. per ton, to be paid within ten days after such ship should be cleared inwards.

2. For every ship built in the *East Indies*, (called country ships,) and navigated by *Lascars*, entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the said docks, the rate or sum of 12*s*. per ton; the last-mentioned rate being 2*s*. per ton less than the rate on other ships, in consideration of the expenses of and in the maintenance of the *Lascars*, whilst such country ships are unloading.

3. For every ship loading outwards in the said docks, being a new ship, or not having, upon her last arrival, unloaded inwards therein, the rate or sum of 4*s*. per ton, to be paid before such ship should depart from the docks.

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4. That in case any such *British* or other ship, having unloaded her cargo in the said docks, should remove before loading any cargo outwards, and should not load any cargo outwards, there should be allowed and returned in respect thereof the sum of 2*s.* out of such 14*s.* or 12*s.* respectively.

5. And that, in case such ship *should have completed her regular number of voyages*, or should not be continued in the *East India* trade, there should be allowed and returned in respect thereof, for the last voyage of such ship or vessel in such *East India* trade, the sum of 4*s.* out of every 14*s.* or 12*s.* respectively, to be repaid within one calendar month after such ship or vessel should be removed from the dock.

By section 99, power was given to reduce or discontinue all or any of the rates thereby granted and made payable, and also to advance or revive the same again, in such manner as to the *East India* Dock Company, should from time to time seem meet and expedient, so as the said rates, when so advanced or revived again, did not exceed the rates thereinbefore granted.

By section 63, all ships in the *East India* trade were required to unload at those docks, with certain exceptions; which privileges and restrictions, it was enacted by section 110, should not continue in force for longer than the term of twenty-one years, to commence on the day that any rate granted or made payable by this act for or in respect of any ship or vessel entering the said docks, should have been demanded or taken.

These exclusive privileges expired on the 2nd of *October*, 1827.

In pursuance of the power above-mentioned, an abatement was made in 1818, of 2*s.* per ton in the rates payable under the first clause of section 91; from which time the rates were received, with that abatement, until the expiration of the exclusive privileges above-mentioned, when an agreement was come to between the two companies, for the *East India* Dock Company to load and unload all the *East India* Company's own or chartered ships, and to perform certain other services for the *East India* Company, in consideration of an annual payment of 36,000*l.*, for the term of six years from the 3rd of *October*, 1827. No mention or allusion is made by this agreement to the return of any rate. This agreement was subsequently always acted upon.

The statute 9 G. 4, c. 95, (public and private,) passed *June* 19, 1828, intituled, "An Act to consolidate and amend several Acts for the further Improvement of the Port of *London*, by making Docks and other Works at *Blackwall*, for the Accommodation of *East India* Shipping," recites and repeals the statute 43 Geo. 3, c. CXXVI., but continues the *East India* Dock Company; and by sections 7 & 8 enacts, "that all contracts, covenants, agreements, engagements, and securities, which, at the time of the passing of this act, shall have been entered into, or given to or by the directors of the said company, under the authority of the said recited acts, shall continue, and may be enforced in the same manner as if the said recited acts had not been repealed; and that all debts, rates, damages, and other monies which, at the time of the passing of this act, shall have been owing to, from, or by them, and shall and may be sued for, recovered, and received, in the same manner as if the said recited acts had not been repealed." By s. 118, the *East India* Docks' Company are authorized to receive other rates, appointed by them, not exceeding 10*s.* per ton.

In explanation of the phrase, "regular number of voyages," mentioned in the clause on which the plaintiffs' claim is founded, it is requisite to state, that,

by sec. 1 of the statute 39 Geo. 3, c. 89, (public act,) intituled, "An Act for regulating the Manner in which the United Company of Merchants of *England* trading to the *East Indies* shall hire and take up Ships for their regular Service," it is enacted, that, after the passing of that act, the said company shall employ in their regular service no ships but such as shall be contracted for, to serve the said company as they shall have occasion to employ them in trade and warfare, or any other service, for six voyages to and from *India* or *China* or elsewhere. At the time of the passing of this act, the usual period of a vessel's lasting in that trade, was the expiration of the performance of the voyages last-mentioned, when it was usually broken up, and the phrase "regular number of voyages," has from that time meant six voyages between *England* and *India* or *China*, and back again.

By the statute 43 Geo. 3, c. 63, (public act,) passed to explain and amend the last-mentioned act, by section 2, after reciting that it had been found that ships might be repaired and made fit to perform more than six voyages to and from the *East Indies*, in the service of the *East India* Company, it is enacted, that it shall and may be lawful to and for the court of directors to receive tenders for any ship or ships which have been or may be engaged in the service of the said united company, and to hire and take up such ship or ships for one or more voyage or voyages to and from the *East Indies* in the service of the said company, beyond and after the performance of the number of voyages for which any such ship or ships respectively had been or shall be contracted to serve the said company. This statute received the royal assent at the same session as the 43 Geo. 3, c. 126, but at a prior part of it.

The *Thomas Grenville* arrived from her sixth voyage, in the docks, in 1818, before the abatement of 2*s*. per ton was made, and then and previously paid under clause 1. She afterwards paid the reduced rate of 12*s*. per ton until the agreement above mentioned was made. This ship and all the others, continued in the trade until the time of passing the act 3 & 4 W. 4, c. 85, which put the company's right to trade in abeyance for twenty years.—Sec. 203.

The questions for the opinion of the Court as to her, are—

1. Whether the *East India* Docks' Company ought not to have returned and repaid 4*s*. per ton, under clause 5, on the expiration of her sixth voyage?

2. Whether, in addition to such return, she had not a right to a loading on her next subsequent voyage, free of dock charges; or, if not loaded outwards again, to a further return of 2*s*. per ton under clause 4?

3. If she had no such additional right, whether the *East India* Dock Company had a right to 4*s*. per ton, or 2*s*. per ton, or what other sum, for her loading in the docks for that next subsequent voyage?

The facts and questions respecting the other ships, were similar to those already stated.

Spankie, Serjt., (with whom was *Manning*,) for the plaintiffs.—The 39 Geo. 3, c. 89, must be referred to for the purpose of shewing the meaning of the words "regular number of voyages," which are used in the 91st section of the 43 Geo. 3, c. CXXVI. The former statute enacts, that the *East India* Company shall employ in their regular service no ships but such as shall be contracted for to serve for six voyages, to and from *India* or *China;* and it is found in the case that, at the time of the passing of the act, a vessel usually lasted for six voyages, after which she was broken up. The *Thomas Grenville* was, therefore, clearly entitled to a return of 4*s*. per ton on the sixth voyage.

Sir *W. W. Follett*, (with whom was *Cowling*,) *contrà*.—It is true that the 39 Geo. 3, c. 89, prevented the *East India* Company from sending a ship more than six voyages to *India* or *China;* and, in consequence of that restriction, it may be granted, that the term "regular number of voyages" had reference to the number of voyages allowed by that statute; but the 43 Geo. 3, c. 63, which removed this restriction, and allowed the *East India* Company to send a ship for more than six voyages, put an end to this construction; and the term must now be taken to mean the number of voyages beyond six, for which the ship may happen to be hired. And it is very important to remember, that when the Dock Act, 43 Geo. 3, c. CXXVI., received the royal assent, the 43 Geo. 3, c. 63, was in force, because it had previously received the royal assent. If, therefore, the statutes are to be referred to for the construction of the term, it certainly could not mean six voyages. The question is, whether, the *Thomas Grenville* having received all the benefits of the docks, inward and outwards, after she returned from her sixth voyage, the dock company are not entitled to full remuneration for the services performed? A reference to the statute, without considering extrinsic circumstances, will clearly shew that they are. The deduction under the 5th branch of the section is only to be made when a ship has completed her regular number of voyages, or, in other words, when she was to be broken up, as was formerly the case; or when she should cease to be continued in the *East India* trade. In either case it was contemplated that the ship had performed her last voyage in the *East India* service. But on the return of the *Thomas Grenville*, from her sixth voyage, she unloaded in the docks, and also took in a cargo for the seventh voyage; therefore she is not brought within the letter or the spirit of these words. [*Tindal*, C. J.—It is stated in the case, that, since the 39 Geo. 3, c. 89, "the phrase 'regular number of voyages' has from that time meant six voyages between *England* and *India* or *China* and back again."] It was not intended that the question should be concluded by that statement. [*Tindal*, C. J.—It ought to have been found that this was the meaning of the phrase until the new statute was passed (*a*). I do not mean to say that the question is not still open.] If the argument on the other side should prevail, then if a ship is entitled to a return of 4*s*. per ton on her return from the sixth voyage, she would be also entitled to a similar deduction upon every succeeding voyage.

Spankie, Serjt., was heard in reply.

TINDAL, C. J.—The main and important question is the first which has been submitted to us; and when that is answered, the answers to the others seem to follow as a corollary. It is, whether the defendant ought not to have returned 4*s*. per ton to the plaintiffs, under the provisions of the Dock Act, when the *Thomas Grenville* returned from her sixth voyage. That question will depend upon the proper construction of the fifth clause in the 91st section of the act, which provides, "that, in case such ship should have completed her regular number of voyages, or should not be continued in the *East India* trade, there should be allowed in respect thereof, for the last voyage of such ship in such *East India* trade, the sum of 4*s*. per ton." The question then is,

(*a*) The Court intimated to the counsel for the plaintiffs that such an alteration should be considered to have been made; but *Spankie* declined to consent.

what was the meaning of the term "regular number of voyages" at the time the act passed? Now, by a reference to the title and enactments of the 39 Geo. 3, c. 89, there can be little doubt but that, under that statute, it meant six voyages from *England* to *India* or *China;* and if there had been no alteration made down to the time when the Dock Act received the royal assent, I should have entertained no doubt but that six voyages were intended. But it appears, that about a month before the Dock Act was passed, a statute was made to amend the provisions of the 39 Geo. 3, c. 89, and both these statutes must now be construed together. The 43 Geo. 3, c. 63, after reciting the former statute, and that ships might be repaired and made fit to perform more than six voyages, enacts, that it should be lawful for the court of directors to hire ships for one or more voyages, after the performance of the voyages for which the ship had previously served. If the two enactments had occurred in one statute, I should have had no doubt that, by the latter, an extension of one or more would have been given to the number six; but here the intention of the legislature is manifest, because the addition to the former number is given in a separate act. I should therefore say, that the meaning of the words "regular number of voyages" does not mean six, but such an addition to that number, as the *East India* Company may engage the ship for. And the reason of the matter goes hand in hand with the strict reading of the law, because, on the return of the ship from her sixth voyage, if she were engaged for future voyages, the Dock Company would incur all the expense of unloading and loading, just as if she had returned from an ordinary voyage. A difficulty would also arise by any other construction as to what payment the ship should make on her seventh or subsequent voyages; for it would seem to be unreasonable to require the deduction on every voyage. I am, therefore, of opinion, that the *Thomas Grenville* was not entitled to a return of 4*s*. per ton on the completion of her sixth voyage. As to the second question, it is almost unnecessary to say, that she had not a right to a loading on her next voyage free of dock charges; and the third question becomes altogether useless.

PARK, J.—This question depends altogether on the meaning of the words which have been referred to, and equity goes along with the construction which they have received.

VAUGHAN, J.—I am of the same opinion. The return of the 4*s*. per ton is only to be made when the ship has returned from her last voyage in the company's service. That appears from the context, "or should not continue in the *East India* trade," meaning, if she should not then have been the regular number of voyages. Until the 43 Geo. 3, c. 63, made the number to depend upon the choice of the *East India* Company, it seems that six voyages were considered the regular number.

COLTMAN, J.—I am of the same opinion. It is true that the parties who claim the repayment of this money must clearly establish their title to it. The whole question arises on the meaning of the words "regular number of voyages." The case finds that the term means "six voyages;" but we are not bound by the popular meaning, if we find it inconsistent with the provisions of an act of parliament. If the 43 Geo. 3, c. 63, had not passed, it would be quite clear what the meaning was; but I think we may now fairly construe the

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two statutes together, and say that it means the whole number of voyages which the vessel may be engaged to perform. The clauses in the 91st section will then stand quite consistent with each other.

Judgment for the defendant.

June 7.

CLOWES and others *v.* WILLIAMS.

Debt does not lie by the indorsee of a bill of exchange against the acceptor.

DEMURRER. The declaration stated that the defendant had been summoned to answer the plaintiffs, by virtue of a writ issued on, &c., out of the Court of our lord the king before his justices at *Westminster*. For that whereas one *W. B. Clarke*, on the 20th day of *August*, in the year of our Lord 1836, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *W. B. Clarke*, 20*l.* value received, three months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and the said *W. B. Clarke* then indorsed the same to the plaintiffs; and the defendant then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof and of the said acceptance and indorsement; whereby, and by reason of the non-payment of the said several monies respectively, an action hath accrued to the plaintiffs to demand and have of and from the defendants the said several monies respectively, amounting to the sum of 40*l.* above demanded; yet the defendants hath not paid the said sum above demanded, or any part thereof; to the plaintiffs' damage of 40*l.*; and thereupon they bring their suit, &c.

The defendant demurred to the first count, and pleaded *nunquam indebitatus* to a second count in the declaration.

Barstow, in support of the demurrer, contended that an action of debt is not maintainable by the indorsee of a bill of exchange against the acceptor.

Wallinger, contrà, admitted that the ground of demurrer was good if applied to a declaration in debt; but he contended, that the first count of the declaration was, in substance, a count in assumpsit. He cited *Brill* v. *Neale* (*a*).

TINDAL, C. J.—Both parties may be allowed to amend. There may be some doubt whether the declaration is not framed in debt, although it contains words of promise. The conclusion is wrong certainly.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Both parties agreed to amend their pleadings without costs.

(*a*) 3 B. & Ald. 208.

CAPPER and others *v.* FORSTER.

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A ship was chartered to proceed to *Rio Nunez*, and take on board a full and complete cargo of lawful merchandize, freight to be paid upon certain enumerated articles, according to the terms mentioned in the charter-party, "all or either at the option of the charterer," the charterer to have the liberty of filling up the vessel at *St. Mary's*. The charterer put on board about one-seventh of a cargo of the goods enumerated, at *Rio Nunez*, and about the same quantity at *St. Mary's*, and at the latter place the cargo was completed with 84 loads of teak wood, which was not an enumerated article, at 4*l.* per ton. It appeared that the charterer paid for the whole freight 593*l.*, but that a cargo consisting of average quantities of all the enumerated articles, would have produced 668*l.*, whilst a cargo of palm oil, one of the enumerated articles, would only have produced 452*l.* *Held*, that the plaintiffs were entitled to recover freight to the amount of 668*l.*; and that the charterer did not fill up a full and complete cargo of lawful merchandize.

ASSUMPSIT on a charter-party. The declaration stated, that by a certain memorandum for charter, made between the plaintiffs, as owners of the ship *Flora*, of the one part, and the defendants of the other part, it was mutually agreed that the ship should, with all convenient speed, receive and take on board whatever lawful goods and merchandize the charterer might cause to be sent alongside, *and therewith proceed to* Rio Nunez, *and discharge the same at the factory of the charterer's agent*, and having so discharged her outward cargo, *should reload a full and complete cargo of lawful merchandize, which the said merchant bound himself to ship*, not exceeding what she could reasonably stow and carry, over and above her tackle, &c., and, being so loaded, should therewith proceed to *London*, and discharge at one of the regular docks, at the option of the charterer, on being paid freight as follows, in full, for the above voyage, viz.:—For gum, beeswax, ivory, and palm oil, 4*l.* per ton, at 20 cwt. net, at the king's beam; hides, at 7*l.* per ton of 20 cwt. net, at the king's beam; paddy or rice, 3*l.* per ton, net weight; bullion, 1 per cent.; all or either at the option of the charterer, in full, and in lieu of all port charges and pilotage, as customary; the act of God, &c., always excepted; one half of the freight to be paid in cash on unloading and right delivering of the cargo, and the remainder by an approved bill at three months then following; thirty-five running days to be allowed to the said merchant, if the ship were not sooner despatched for loading, at the places of loading on the coast of *Africa*, and ten days on demurrage, over and above the said lay days, at 4*l.* per day. Should the quantity of paddy exceed eighty tons, 20*s.* per ton extra freight was to be paid on the surplus; and the quantity of hides was not to exceed fifty tons; the charterer to have the liberty of shipping whatever goods he might send outwards free of freight, but paying the difference of the ship's expenses in taking in cargo and going in ballast; and the vessel to call at *St. Mary's* on her homeward voyage for clearance for *England*, the charterer paying her port charges and her pilotage in and out of the River *Gambia*. Should paddy or rice be shipped, the charterer was to find dunnage; *and should the vessel not be full at* Rio Nunez, *the charterer was to have the liberty of filling her up at* St. Mary's. The parties were bound under a penalty of 700*l.* for the due performance of the agreement.

Breach—That the defendant did not load such full and complete cargo at *Rio Nunez* aforesaid; but, on the contrary thereof, loaded at *Rio Nunez* a small part only of a full and complete cargo, to wit, one seventh part only of such full and complete cargo, and then wholly refused to load at *Rio Nunez* any further or greater cargo therein. That after the defendant had loaded on board the said ship at *Rio Nunez* such cargo as aforesaid, to wit, on, &c., the plaintiffs sailed and proceeded with the said ship, by the order and direction of the defendant, to *St. Mary's*, in the said memorandum of charter mentioned, and afterwards, to wit, on, &c., arrived with the said ship at *St. Mary's* aforesaid, and were there ready and willing to suffer and allow the defendant to fill up and complete a full and complete cargo for the said ship of all such lawful

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merchandize as in the memorandum of charter was mentioned, according to the terms of the said memorandum, and then requested him so to do; nevertheless the defendant did not fill up at *St. Mary's* such full and complete cargo of lawful merchandize, and then filled up a small part only of the said ship with such lawful merchandize as she could have reasonably stowed, and then wrongfully and improperly filled up the said ship at *St. Mary's* aforesaid with a certain large quantity of merchandize, other than according to the true intent and meaning of the said memorandum of charter, to wit, with timber and wood; by means of which several premises, the plaintiffs not only lost and were deprived of a large sum of money, to wit, the sum of 600*l.*, which they might and would have made by having such full and complete cargo of lawful merchandize loaded on board the said ship at *Rio Nunez* and *St. Mary's* aforesaid, according to the terms of the said memorandum of charter, but also, by means of the loading on board the said ship at *St. Mary's* aforesaid such cargo of timber and wood, the said ship was then greatly broken, &c.

And the plaintiffs further said, that a large sum of money, to wit, 1000*l.*, became and was due and payable from the defendant to the plaintiffs for and in respect of the freight of goods, wares, and merchandizes, shipped and loaded on board the said ship, according to the true intent and meaning of the said memorandum, and carried and conveyed therein in the said voyage in the said memorandum mentioned.

Counts for freight generally, and on an account stated.

Pleas—To so much of the breach in the first count mentioned as related to the not loading a full and complete cargo at *Rio Nunez*, that the defendant could not load a full and complete cargo at *Rio Nunez* as was mentioned in the said memorandum of charter. Conclusion to the country.

Secondly, as to so much of the breach in the first count mentioned, as related to the defendant not filling up at *St. Mary's* a full and complete cargo of lawful merchandize, that the defendant did, within the said lay days, fill up at *St. Mary's*, in the memorandum of charter and declaration mentioned, a full and complete cargo of lawful merchandize, according to the true intent and meaning of the said memorandum of charter, and did not fill up the said ship at *St. Mary's* aforesaid with any merchandize whatsoever, other than according to the true intent and meaning of the said memorandum of charter. Conclusion to the country.

Thirdly, as to so much of the breach of the promise in the first count mentioned as related to the non-payment of 538*l.* 17*s.* 11*d.*, parcel, &c., that after the said sum of 538*l.* 17*s.* 11*d.* became due and payable from the defendant to the plaintiffs in respect of freight, as in the declaration stated, and before the commencement of this suit, to wit, on, &c., an account was had and stated by and between the plaintiffs and defendants of and concerning the said sum of 538*l.* 17*s.* 11*d.*, and upon that accounting the plaintiffs were found to be in arrear, and indebted to the defendant in the sum of 98*l.* 17*s.* 6*d.*, which was then upon that account allowed to the defendant in account against the said sum of 538*l.* 17*s.* 11*d.*; and the residue of the said last-mentioned sum, to wit, 440*l.* 0*s.* 5*d.*, was then paid by the defendant to plaintiffs, and accepted by them in full satisfaction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, after allowing the said set-off of 98*l.* 17*s.* 6*d.*, and of all damage in respect of the said breach of promise, so far as related to the said sum of 538*l.* 17*s.* 11*d.* Conclusion with a verification.

Pleas to the two last counts, non-assumpsit.

The *replication* joined issue on the first and second pleas to the first count, and traversed the allegations in the third plea.

At the trial, before *Tindal*, C. J., at the last sittings at *Guildhall*, it was in evidence that the *Flora* had been despatched from *London* to *Rio Nunez*, in pursuance of the charter party. On her arrival at *Rio Nunez*, the charterer's agent informed the captain, that another vessel, the *James*, which was loaded with a cargo of the articles enumerated in the charter-party, had been recently dispatched for the charterer, and had taken the goods intended to be sent by the *Flora*. Only 153 quarters of paddy and a box of gold dust, being about one-seventh of a full cargo, was put on board at *Rio Nunez*. The *Flora* afterwards proceeded to *St. Mary's*, and there the charterer put on board 205 quarters of paddy and 600 hides, and completed a full cargo, under a protest by the captain, with 84 loads of teak wood, the staple commodity of the place, at the freight of 4*l.* per load. Evidence was given to shew that a full cargo of palm oil, at 4*l.* per ton, would have produced a freight to the amount of 452*l.*; and a full cargo of all the articles enumerated in the policy, in average quantities, 668*l.* It appeared that the defendant had paid 593*l.* 18*s.* 6*d.*, on account of the freight. The jury found a verdict for the plaintiff for the further sum of 74*l.* 1*s.* 6*d.*

Taddy, Serjt., obtained a rule nisi for a new trial, or to reduce the damages. He contended, first, that the defendant was not bound to load a full and complete cargo at *Rio Nunez;* secondly, that teak wood was a cargo of lawful merchandize, and that the charterer was not obliged to ship such goods only, as were mentioned in the charter-party; and, thirdly, that if such was not the proper construction of the charter-party, then that the damages were improperly assessed.

Wilde, Serjt., *Talfourd*, Serjt., and *R. V. Richards*, shewed cause.—Issues have been taken upon the allegations in the declaration, and therefore it is too late to object to the mode in which the breaches are assigned. It is obvious that the principal destination of the ship was *Rio Nunez*; and if the *James* had not been previously despatched, her cargo would have been put on board the *Flora*. Although the ship had liberty to touch at *St. Mary's*, to complete her cargo, it was not thereby intended that she should take a small quantity of goods on board at *Rio Nunez*, and then complete her cargo with articles so much less advantageous to the owner, than a shipment of a general cargo would have been. If the ship had come home empty, the rule of law as to payment of freight, is well established. In such a case, the charterer would be liable to pay the amount of the freight of an average quantity of all the articles which are enumerated. *Thomas* v. *Clarke* (*a*), *Wallace* v. *Small* (*b*); Abbot on Shipping, part 3, chap. 7. In the former case it was contended, as here, that the charterer was at liberty to select one of the enumerated articles which would have yielded the smallest sum to the ship owner; but *Abbot*, C. J., refused to direct the jury to find the damages upon that principle. The same rule must be applicable to this case. *Moorsom* v. *Page* (*c*) is

(*a*) 2 Stark. N. P. 450.
(*b*) Cited in *Irving* v. *Clegg*, 1 Bing. N. C. 55.
(*c*) 4 Camp. 103.

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distinguishable. In that case the freighters were at liberty to put on board other goods besides those which were enumerated, and therefore it was held, that they were not necessarily bound to ship any copper, although that was one of the articles mentioned in the policy.

Taddy, Serjt., and *Wightman, contrà*.—By the terms of the charter party, the freighter had the option of shipping any of the enumerated articles; and it appears that a cargo of palm oil would not have produced the amount which the defendant has paid into court. Palm oil is an article which produces a fair average profit to the ship owner. It is clear that a cargo of any one of the enumerated articles might have been brought home. In *Moorsom* v. *Page* (*e*), where, by a charter-party, the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, it was held, that he having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, for the want of it, the ship was obliged to keep in her ballast, and did not take so advantageous a freight as she otherwise would have done; and the authority of this case is recognised in *Irving* v. *Clegg* (*f*). Then, upon the two first issues which are raised, the verdict ought to be entered for the defendant, because, as to the first, the defendant was not bound to load and complete a full cargo at *Rio Nunez*. As to the second issue, it appears that a full cargo of lawful merchandize was shipped at *St. Mary's*, and the terms of the policy are, that the ship should reload "a full and complete cargo of lawful merchandize." If the vessel was injured by the timber, that would only be the ground of a cross-action.

Cur adv. vult.

TINDAL, C. J.—This was an action of assumpsit, brought on a memorandum for charter made between the plaintiffs as owners of the ship *Flora*, of the one part, and the defendant, of the other part: and upon the issues joined on three breaches assigned in the declaration, the jury found as to the first, that the defendant might have loaded a full and complete cargo at *Rio Nunez;* upon the second, that the defendant did not fill up at *St. Mary's* a full and complete cargo of lawful merchandize according to the true intent and meaning of the said charter, and upon the last, that there is still due to the plaintiffs, from the defendant, the sum of 74*l.* 1*s.* 6*d.* for freight under the charter. There were other issues joined upon the pleadings, to which it is unnecessary to advert, as the principal question before us turns upon the principle upon which the amount of the damages ought to be calculated, reference being had to the proper construction of the charter-party. The defendant has brought the case before us upon a rule calling either for a new trial or for the reduction of the damages given by the present verdict. With respect to the new trial, the defendant contends, that, as to the two first issues, the verdict ought to have been found in his favour. The breaches might possibly have been more aptly and precisely assigned with reference to the terms of the charter, but, as the defendant has thought proper to take issue and go to trial upon them, as framed in the declaration, we cannot think them so deficient in form or so ill adapted to the case, as to be objectionable on that ground in

(*f*) 1 Bing. N. C. 53.

this stage of the proceedings. And upon the evidence given at the trial, we see no ground to disturb the verdict. As we understand the charter, it contemplates a voyage to *Rio Nunez*, at which place it was intended both by the ship-owners and the merchant that the outward cargo should be discharged, and the homeward cargo put on board, such homeward cargo being intended to consist of the enumerated articles, or of some of them, with liberty, however, of filling up the vessel at *St. Mary's*; that is, of supplying at the latter place any deficiency of the contemplated cargo, which they might be unable to procure at *Rio Nunez*. That *Rio Nunez* was her place of destination appears manifest from the provision that she was to discharge her outward cargo at the factory of the merchant's agent there, and having so discharged her outward cargo, was to reload a full and complete cargo of lawful merchandize, which the merchant binds himself to ship. This is the direct obligation into which the merchant enters; the filling up at *St. Mary's* is only a liberty given to him in his own ease, and for his relief in case he should be unable to comply with his direct obligation. And we think this provision in the charter points so specifically to *Rio Nunez* as the port of discharge and reloading of the homeward cargo, that we cannot give to the mention of ports of loading on the coast of *Africa*, or the liberty of filling her up at *St. Mary's*, the force of altering or controlling the primary intention of the charter. And upon the evidence before the jury of what had taken place at *Rio Nunez* just previous to the arrival of the *Flora*, we cannot think them wrong in finding the first issue for the plaintiffs: they probably, and not unreasonably, thought, that the cargo which had been recently forwarded by the defendant's agents by another ship, the *James*, might have been sent by the *Flora* if those agents had been inclined so to send it.

And as to the second issue, upon the construction we have already put upon the charter-party, we think the jury right in finding, that the loading nearly a complete cargo of lumber at *St. Mary's*, although it was the staple commodity of that place, was not a filling up with lawful merchandize, according to the intention of the parties, and that the verdict upon that issue also ought not to be disturbed. The real question, however, between the ship-owners and the merchant, arises upon the amount of damages which the jury have found by their verdict, which damages, whether they be considered as the measure of the injury sustained by the plaintiffs upon the two first breaches, or as the sum due for the freight of the cargo actually brought home upon the third breach, is immaterial. The plaintiffs, on the one hand, contend that upon the legal construction of the charter, they are entitled to an amount of freight which would have been earned if the ship had brought home a cargo consisting of average quantities of all the enumerated articles; the defendant, on the other hand, contends that the ship-owners are only entitled to freight for the timber actually brought home upon a *quantum meruit;* or to the freight due upon a full cargo of any one of the enumerated articles, at the option of the merchant, or at the very utmost to the freight due upon a full cargo of any one of the articles for which a middle rate of freight is charged; such, for instance, as palm oil; under any of which modes of adjustment, the plaintiffs, as it is admitted, are over-paid. Now if the ship had returned empty, we think the question now raised must be considered as settled. The opinion expressed by the very learned and accurate writer of the law of ships and shipping, re-

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ferred to in the course of the argument, and the case of *Thomas* v. *Clarke* (*b*), the decision of which was not appealed from by any motion to the Court, appears to us to lay down and establish a rule, which is at once just and reasonable, and may fairly be inferred to meet the intentions of the contracting parties. And we can see no real distinction to be made between the application of this rule to the case where the ship returns empty, and where she returns with a cargo of articles altogether, or in a very large proportion, of a different nature and quality from those enumerated in the charter, and between which cargo brought home, and the enumerated articles, there is no common measure whatever. In both cases, the original intention and expectation of the parties, at the time the charter was entered into, as to the amount of freight which would become payable for the voyage, must have been founded upon the assumption that the ship would bring home a cargo, consisting of all or some of the enumerated articles; in both cases, therefore, there exists the same necessity of applying the rule above laid down, which necessity is grounded on the consideration that, unless you adopt this rule, you have no other guide whatever; the liberty to fill up with other lawful merchandizes being understood by us to mean other lawful merchandizes *ejusdem generis*, at least so far as the calculation of the freight is involved in that construction. And as the question of the amount of damages, or the amount of freight, whichever it is to be cousidered, was left to a special jury of merchants in the city, who have adopted that rule of calculation with respect to the breach of a mercantile contract, it is sufficient for us to say we cannot feel ourselves authorized either to reduce such amount, or to direct a new trial.

Rule discharged.

(*b*) 2 Stark. N. P. C. 450.

CUNLIFFE and others *v.* WHITEHEAD.

May 31.

In an action against the acceptor of a bill of exchange payable to the drawer or his order, the declaration alleged that the drawer indorsed the bill to one S. and that S., delivered the same to the plaintiff. *Held*, upon demurrer, that no title to the bill was shewn to be in the plaintiff.

DEMURRER. This was an action of assumpsit on a bill of exchange. The declaration stated that one *William Fraser*, on the 18th *July*, 1833, at *London*, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay, to the said *W. Fraser's* order, 1500*l*., value received, five months after the date thereof, which period had elapsed; that the defendant accepted the said bill; and that the said *W. Fraser* then indorsed the same to Messrs. *Salamonson, Fraser*, and Co.; and that the said Messrs. *Salamonson, Fraser*, and Co. delivered the same to the plaintiffs; of all which the defendant had due notice, and promised the plaintiffs to pay the amount of the said bill, according to the tenor and effect thereof and of his said acceptance thereof.

Demurrer, upon the ground that the declaration did not state that the bill had been indorsed to the plaintiffs.

Crompton, in support of the demurrer.—The question is, whether the bare allegation of the delivery of the bill to the plaintiffs is sufficient. It is only under peculiar circumstances that the property in a bill passes by delivery.

Here the bill was payable to *Fraser's* order; and *Salamonson* and Co., the indorsees, could only pass it to the plaintiffs, by an indorsement. *Clark* v. *Pigot* (*a*) is not recognised as law.

Bompas, Serjt., *contrà*.—Before the new rules of pleading, the defendant could give all matters in defence in evidence, under the general issue; and then the plaintiffs might have alleged that *Fraser* indorsed the bill to them; but now the defendants would have pleaded that no consideration passed between *Fraser* and the plaintiffs. It is not necessary to contend that the mere delivery of the bill to the plaintiffs is sufficient. The question is, whether the plaintiffs may not have a good title to the bill, consistently with the allegations in the declaration. It may appear, at the trial, that the indorsement from *Fraser* to *Salamonson*, was so qualified as to entitle the plaintiffs to recover. Thus a bill may be made payable to the use of a third party. The plaintiffs were strictly confined to use the language given in the forms of the new rules; and, therefore, they were compelled to state the indorsement generally; or, if the indorsement by *Fraser* were a general indorsement, then a mere delivery would pass a title to all subsequent holders of the bill, as a bill payable to bearer.

Crompton, in reply.—An indorsement to *Salamonson* and Co., is an indorsement to them or their order, and they could only give a title to their indorsee by an indorsement. If the indorsement were not so, the plaintiffs ought to have shewn it expressly in the declaration.

TINDAL, C. J.—I think, whatever construction may be put upon the new rules, it is clear that they never were intended to effect any alteration in the law merchant, or to make a bill of exchange pass by delivery, which would only pass before, by indorsement. The question arises on the bill as it is described in the declaration. It appears that the action is brought against the acceptor of a bill of exchange, payable to the order of *Fraser*. It is clear that an indorsement by *Fraser* would be necessary; and accordingly, it is averred, that *Fraser* indorsed the bill to *Salamonson*, *Fraser*, and Co. Now, pausing here for a moment, there was a time when the omission of the words "or order," in the indorsement, was thought to render the indorsement restrictive; but *Edie* v. *The East India Company* (*b*) settled that qusstion, and decided that the bill was negotiable by indorsement when in the hands of the indorsee. The question then is, whether, upon looking at the allegations in the declaration, we can consider the indorsement by *Fraser* to be any more than an indorsement to *Salamonson* and Co., or their order; and it seems to me that, in contemplation of law, that is the effect of the statement; and if that be so, it is clear that an indorsement from *Salamonson* and Co. to the plaintiffs was necessary. It is contended that, since the new rules, it must be taken that the indorsement by *Fraser* was an open indorsement, which would operate so as to make the bill pass by a mere delivery: such however is not the legal inference; and as to the argument that the plaintiff has been misled by the new rules, it appears to me that the difficulty has been raised, by not adhering to the precedents which are there given; inasmuch as they all contain an allegation of the indorsement of the bill. Perhaps the facts of the case are such,

(*a*) 1 Salk. 126. (*b*) Burr. 1216.

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that no allegation of an indorsement could be made. It is, however, sufficient to say, that, as there was an actual indorsement to *Salamonson* and Co., the right to bring this action cannot pass to the plaintiffs by a mere delivery of the bill.

PARK, J.—I am of the same opinion. This is the first time I ever saw a declaration framed in this manner. In all the precedents given in the new rules, the transfer of such a bill is stated to be by indorsement.

VAUGHAN, J.—It is not intended by the new rules, to alter the law upon this subject. The simple question is, whether this appears to be an open or a restricted indorsement; and even if this were equivocal, the defendant would be entitled to our judgment.

COLTMAN, J.—This question turns on the meaning of the allegation, that *Fraser* "indorsed the bill to *Salamonson, Fraser,* and Co." It may mean that *Fraser* simply wrote his name; or that he made it payable expressly to their order. It seems rather to point to the former mode of indorsement; but the statement is equivocal. However this might be, if the declaration had alleged a subsequent indorsement to the plaintiffs, then a good title to the bill would have been made out, but I presume that no such indorsement was made; therefore, as the right to bring this action could not be given by a mere delivery of the bill, our judgment must be for the defendant.

Judgment for the defendant.

May 23.

BAYLEY *v.* HOMAN.

In an action for a breach of covenant in not delivering up a messuage in repair at the expiration of the term, the defendant pleaded, that after the covenant was broken, an agreement was entered into between the plaintiff and defendant, that in consideration that the plaintiff had became tenant from year to year, and had promised to repair the premises before the 12th of *April*, he, the plaintiff, would give time for the reparation, without bringing an action in the meantime, yet that the plaintiff wrongfully commenced the suit, before the 12th of *April*. *Held*, that this plea was bad—first, because it was a plea of an accord executory only, and not executed; secondly, that there was no good consideration laid for the defendant's promise to repair, or for the plaintiff's promise to forbear to sue for the breach of covenant.

THIS was an action of covenant for not repairing a messuage, brought by the assignee of the reversion, against the assignee of the term. The breach assigned was, that the defendant did not, after the assignment and during the continuance of the demise, well and sufficiently repair the messuage and did not, at the end of the term, leave the same so well and sufficiently repaired; but during the demise, to wit on the 1st of *January*, 1835, and from thence until the end of the term, suffered and permitted the said messuage, to be ruinous and in great decay for want of repairing the same, and the defendant, at the end of the term, left, surrendered, and yielded up the premises, unto the plaintiff, so badly and insufficiently repaired.

Plea—That after the said covenant had been broken by the defendant, and after the expiration of the said term, and long before the commencement of this suit, to wit, on the 26th day of *December*, 1836, the said messuage being

so ruinous and in decay, as in the declaration alleged, it was agreed by and between the plaintiff and the defendant, and the plaintiff also then promised the defendant, that, in consideration that the defendant, at the request of the plaintiff, had become, and then was, the occupier of the said messuage, and held the same as tenant thereof from year to year, at and under a certain yearly rent therefore payable by the defendant to the plaintiff, and had also at the like request of the plaintiff, promised the plaintiff well and sufficiently to repair and amend the said messuage in the manner required by the said indenture in the declaration mentioned, on or before the 12th of *April*, 1836, he, the plaintiff, would forbear and give to the defendant until the said 12th of *April*, 1836, for the due reparation and amendment of the said messuage, in the manner required by the said indenture, without, in the mean time, commencing or prosecuting any action or suit against the defendant in respect of the said breaches of covenant in the declaration mentioned, or any part thereof; and that in case the said messuage should be so well and sufficiently repaired and amended as aforesaid on the said 12th of *April*, 1836, he the plaintiff, would then relinquish and forego all claim and demand whatever of him, the plaintiff, upon or against the defendant, in respect of the said breaches of covenant or any part thereof. The plea then averred, that although from the time of the making the said agreement and thenceforth until the commencement of this suit, the defendant, who during all that time remained tenant of the said messuage to the plaintiff as aforesaid, was always ready and willing to perform and fulfil the said agreement on his part, and well and sufficiently to repair and amend the said messuage in the manner required by the said indenture, so that the same should be so well and sufficiently repaired and amended by and on the said 12th of *April*, 1836, whereof the plaintiff had notice, yet the plaintiff, not regarding his said agreement and promise, wrongfully commenced his suit in that behalf against the defendant before the said 12th of *April*, 1836, to wit, on the 6th of *April*, 1836; and that the defendant was ready to verify.

At the trial, a verdict was found for the defendant, and in *Easter* Term, *Stephen*, Serjt., obtained a rule *nisi*, to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the plea did not disclose any legal bar to the action.

Talfourd, Serjt., and *Gurney*, shewed cause.—The defendant is entitled to retain the verdict. The plea shews that the plaintiff entered into an agreement with the defendant, which constituted a new contract between them; and the action on the covenant was suspended. *Good* v. *Cheesman* (*a*), *Stracey* v. *The Bank of Euyland* (*b*). In Com. Dig. tit. Accord, (B. 4.) it is said, that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; and that principle was acted upon in *Cartwright* v. *Cooke* (*c*). In *Alden* v. *Blague* (*c*), in an action for breach of covenant to repair, the defendant pleaded that he made an agreement with the plaintiff to pay thirty shillings in satisfaction, which he had received; and it was held that the plea was good, although it was objected that the action, being grounded upon a deed, could not be discharged unless by deed. In

(*a*) 2 B. & Ado. 328.
(*b*) 6 Bing. 754.
(*c*) 3 B. & Ado. 701.
(*d*) Cro. Jac. 99.

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Case v. *Barber* (*e*), it is said that although in former times the pleading an accord without execution in the whole, is not good, according to *Peytoe's* case, yet now the law being taken that mutual actions lie on such agreements, such plea shall be allowed.

Stephen, Serjt., *contrà*.—This plea cannot be good as a plea in accord and satisfaction, because no satisfaction is shewn, and accord without satisfaction is no plea. In *Allen* v. *Harris* (*f*), it was expressly held, that an accord is no bar before execution; and it is said by the Court, "And the books are so numerous that an accord ought to be executed, that it is impossible now to overthrow all the books." In *Lynn* v. *Bruce* (*g*), *Eyre*, C. J., said that this last-mentioned case was decided upon sound principles. "*Interest reipublicæ ut sit finis litium;* accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent." In *Peytoe's* case (*h*), it is laid down, that every accord ought to be full, perfect, and complete; for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed. *Rayne* v. *Orton* (*i*), *James* v. *David* (*k*), *Adams* v. *Tapling* (*l*). Another objection is, that the defendant has not shewn any good consideration for the granting of further time to repair. The defendant had become yearly tenant of the premises before he made the promise; and, therefore, the tenancy is no consideration for the promise to repair. If this is not to be treated as a plea in accord and satisfaction, but as the substitution of one agreement for another, then the plea is bad, because the substituted agreement is not under seal. If the plaintiff has agreed to give the defendant further time to repair the premises, that is only ground for a cross action. The decision in *Good* v. *Cheesman* (*m*) could not have been intended to break in upon the general rule which has been established; but that case was determined on the ground that it would have been a fraud on the other creditors to depart from the agreement.

Cur. adv. vult.

June 9. TINDAL, C. J.—The motion which has been made by the plaintiff for judgment, *non obstante veredicto*, raises the question whether the plea is a legal bar to the action? The plea alleges, that after the covenant for repairing and leaving in repair had been broken by the defendant, and damages for such breach had been incurred, an agreement was entered into between the defendant and the plaintiff, that in consideration that the defendant, at the request of the plaintiff, had become tenant of the premises from year to year, under a certain rent, and had also, at the like request of the plaintiff, promised the plaintiff to repair the demised premises before the 12th of *April* then next,—he, the plaintiff, would forbear and give time to the defendant, until the said 12th of *April*, for the reparation, without bringing an action in the meantime, and that in case the premises should be well and sufficiently repaired on the said 12th of *April*, then that he, the plaintiff, would relinquish all claim and demand in respect of the said breaches of covenant. If the de-

(*e*) Sir T. Jones, 158.
(*f*) 1 Lord Ray. 122.
(*g*) 2 H. Black. 319.
(*h*) 9 Rep. 79. b.
(*i*) Cro. Eliz. 305.
(*k*) 5 T. R. 141.
(*l*) 4 Mod. 88.
(*m*) 2 B. & Ado. 328.

fendant had been able to aver in the plea, that the premises had been well and sufficiently repaired before the 12th of *April*, and the action had not been commenced until after that day, there would have been no doubt but that the plea would have been good, as a plea of accord executed and satisfaction. But the plea as it stands, stating it the most favourably for the defendant, is the plea of an accord which is executory only, and not executed. It appears, by a long train of authorities, commencing with that in Dyer, 356, that a plea of accord, to be a good plea, must shew an accord which is not executory at a future day, but which ought to be executed and has been executed before the action brought. The same law is laid down in Roll. Abr. 129, Accord, pl. 11, 12, 13. Again in *Peytoe's* case, 9 Rep. 79, where it is broadly stated by the Court that in an accord, if the thing is to be performed at a day to come, an averment of tender and refusal is not sufficient, without actual satisfaction and acceptance. In *Allen* v. *Harris*(*n*), the Court say, the books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the books; but if it had been a new point it might have been worthy of consideration. In the next case in order of time, *Lynn* v. *Brace*(*o*), the same principle is upheld by *Eyre*, C. J., and the court of Common Pleas; and in *Jones* v. *David*(*p*,) by Lord *Kenyon* and the Court of King's Bench; and, we think, this current of authority is too strong to be met by the doubts expressed by the Court in *Case* v. *Barber* (*q*), that though, in former times, the pleading upon accord without execution, in the whole is not good, according to *Peytoe's* case, yet now the law being taken that mutual actions lie on such agreements, such plea shall be allowed independently of the circumstance that the plea of accord, in that case, was not held to be good for want of consideration for the defendant's promise. But, as to the case of *Good* v. *Cheeseman*(*r*), in which evidence of an accord, though not executed, was held to be a good answer to the action, it may be considered as standing upon its own peculiar ground; the agreement in that case, amounting to a valid new contract between the other creditors and the debtor, capable of being immediately enforced; we think, therefore, if this plea amounted to a plea of an accord executory, made upon mutual promises, it must, upon the authorities above referred to, be held to be bad. But the plea appears to to be open to another objection, namely, that there is no good consideration laid either for the defendant's promise to the plaintiff to repair the premises, before the 12th of *April*, or for the plaintiff's promise to the defendant to forbear to sue until that day. The defendant was liable to damages under the covenant, immediately, for not repairing; and, therefore, the promise by him to repair before the 12th of *April* can be no consideration for the plaintiff's promise to forbear. And the defendant's promise to repair by the 12th of *April* is not made until after the new tenancy is actually contracted; and, therefore, such tenancy is no consideration for his subsequent promise. Upon this ground, therefore, independently of the former, we think the plea bad; for no action could be supported, either against the plaintiff or the defendant, upon the substituted contract stated by way of accord.

Judgment for plaintiff, *non obstante veredicto*.

(*n*) 1 Lord Raym. 122.
(*o*) 2 H. Bl. 317.
(*p*) 5 T. R. 140.
(*q*) Sir T. Jones, 158; Sir T. Raym 452.
(*r*) 2 B. & Adol. 335.

June 9.

PASCOE and another *v.* J. PASCOE the younger.

In replevin, the defendant avowed for rent in arrear, and the plaintiff pleaded in bar, that by the demise in the avowry mentioned, the avowant demised and transferred the premises to the plaintiff for all the residue of the avowant's estate, term, and interest in the same, and that the avowant had not, at the time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant rejoined, that by an award made in an arbitration between the plaintiff and defendant, a power for distraining upon the premises for rent, was given to the defendant: *Held*—first, that the plea alleged with sufficient certainty, that the avowant, at the making of the demise, did not reserve any reversion in himself. Secondly, that the rejoinder was insufficient, because it did not appear that the arbitrator had any authority to give the defendant the power of distraining.

DECLARATION in replevin for taking goods. *Avowries*—first, that the plaintiffs, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the time when, &c., held and enjoyed the premises, in which, &c. as tenants thereof to *J. Pascoe* the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made, at and under the yearly rent of 32*l.*, payable half-yearly; and because 80*l.* of the rent aforesaid, at the time when, &c., was due, he, the defendant, well avowed the taking of the goods as a distress.—Second—that the plaintiffs, for two years and upwards next before the time of making the agreement hereinafter mentioned, held and enjoyed the premises as tenants thereof to the said *J. Pascoe* the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 36*l.*, payable half yearly. That before the making of the said agreement, to wit, on, &c., the said *J. Pascoe* the younger, had caused to be distrained, on the said premises, divers goods and chattels, for the sum of 36*l.*, arrears of rent then due; and the plaintiffs had replevied the said goods, and commenced an action against the said *J. Pascoe* the younger, in the Sheriff's Court of Cornwall, which action was afterwards removed to the Court of King's Bench, and was then pending; that disputes and differences having arisen between the said parties, relative to the said distress, an action at law and other matters relative to the premises, particularly as to the amount of the yearly rent which should be paid for the said estate—the plaintiffs and *J. Pascoe* the younger, for the ending and determining thereof, did, before the said time when, &c., to wit, on, &c., by a certain agreement in writing, mutually and reciprocally agree with each other, that, as well the matters aforesaid as all other matters in difference between the said parties, and more particularly the amount of the rent which should be paid for the said premises, should be and the same were thereby submitted and referred to the award, final end, and determination of *Robert Julian*, whose award was to be final and conclusive, both at law and in equity, as well on the part of *J. Pascoe* the younger, as on the part of the plaintiffs, to settle and ascertain the same, and to award, order, and determine, by his award, what he should think fit to be done and performed by the said parties respectively, respecting the several matters aforesaid. That the said *R. Julian*, having heard the allegations and proofs of both the parties, did afterwards, and before the said time when, &c., make and publish his award, under his hand and seal, upon and concerning the premises aforesaid; and did thereby, (amongst other things,) award, order, and determine that, from *Midsummer* then last, the plaintiffs should pay to *J. Pascoe* the younger, for the premises in which, &c., 32*l.* per annum, instead of 36*l.* per annum before paid, by half yearly payments, at *Christmas* and *Midsummer* in every year, so long as they should continue to hold the said premises; and that the said *J. Pascoe* the younger should have power of distress for recovery of the said rent of 32*l.* That the plaintiffs, from the time of making the said award, until and at the time when, &c., as tenants thereof to the said *J. Pascoe* the younger, at the

said yearly rent of 32*l.*, payable half yearly on, &c., and that the said *J. Pascoe* the younger, by means of the premises, had for and during all the time last aforesaid, such power of distress as aforesaid; and because 64*l.* arrears of the rent aforesaid, at the said time, when, &c., was due, he the defendant well avowed the taking of the goods as a distress.

Pleas in bar to each of the avowries and cognizances:—That by the said demise, in the said avowry mentioned, the said *J. Pascoe* the younger did demise and transfer the said premises, in which, &c., unto the plaintiffs, for all the residue and remainder of his, the said *J. Pascoe* the younger's, estate, term, and interest, in the same, and that the said *J. Pascoe* the younger had not then, or at the said time, when, &c., or at any time during the said demise to the plaintiffs, any reversionary estate, term, or interest, of or in the premises with the appurtenances, in which, &c., or any part thereof, expectant upon or to take effect upon, or at any time after the expiration of the term granted to the plaintiffs by the said demise; and that the plaintiffs were ready to verify, &c.

In the replications to the pleas in bar, the avowant relied on the power of distress given to him in the award, as set forth in the second avowry.

Rejoinder—That it was not referred to the said *R. Julian*, whether the said *J. Pascoe* the younger, should have power of distress for recovery of the said rent; with a conclusion to the country.

Demurrer; and the causes assigned were, that the plaintiffs had in the rejoinders stated and attempted to put in issue a fact not alleged by the defendant in his replication, and wholly irrelevant and immaterial, to wit, that it was not referred to the said *R. Julian*, whether *J. Pascoe* the younger, should have a power of distress for recovery of the said rent of 32*l.* per annum; and also, for that the said rejoinders containing new matter, the plaintiffs should have concluded the same with a verification.

Joinder in demurrer.

The demurrer was argued by *Stephen*, Serjt., for the defendant, and *Ogle*, for the plaintiffs, in *Hilary* Term, 1837.

Cur. adv. vult.

TINDAL, C. J.—In this replevin the defendant has made two avowries and cognisances. The first is in the general form given by the statute 11 G. 2. c. 19, that the plaintiffs held the premises in which, &c., as tenants to *Pascoe* the younger, under a demise thereof to them made for a certain term, and then avows for two years' rent in arrear. To this avowry the plaintiffs have pleaded in bar, that by the demise in the avowry and cognisance mentioned, *Pascoe* the younger demised and transferred the premises in which, &c., to the plaintiffs, for all the residue and remainder of his, (the lessor's,) estate, term, and interest, of, and in the same: and that he the said *Pascoe* the younger, had not then, or at the said time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant has replied to this plea in bar, a power of distress given to *Pascoe* the younger, by the award of an arbitrator to whom certain disputes and all matters in difference between him and the plaintiffs, had been referred; the plaintiffs in their rejoinder to this replication allege, that it was not referred to the arbitrator, whether the defendant, *Pascoe* the younger, should have a power of distress; to which rejoinder the defen-

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dant demurs specially. Upon this state of the pleadings, it is obvious that the defendant's replication to the plea in bar, would be bad upon general demurrer, on the ground of departure; the defendant in his avowry and cognisance, relying upon the common law right to distrain as for rent service, and in his replication setting up a power of distress given under an award. The question, therefore, so far as the first avowry and cognisance are concerned, becomes this, whether the plea in bar affords any legal answer thereto. This question is to be determined, as if it were upon a general demurrer to the plea in bar, and, therefore, no objection can be available, which amounts to matter of form only, such as that the plea in bar is in effect no more than the general traverse *non tenuit* or *non demisit;* and looking at the substantial allegations in the plea in bar, we think it alleges with sufficient certainty, that *Pascoe* the younger, at the time of making the demise, did not reserve any reversion in himself, and, consequently, without any express provision for that purpose, has no remedy by distress. The authorities to this point are collected in Bacon's Abr. tit. Distress, (A.) And as to the argument that the plea in bar is incongruous, inasmuch as it admits a demise, but sets up an assignment, we cannot distinguish it from that in *Preece* v. *Corrie* (*a*), which was held to be a good plea in bar; nor from the authority of the decision in *Parmenter* v. *Webber* (*b*), where the assigning of the landlord's whole interest in a term to the plaintiff, was held to be evidence which supported the plea of *non tenuit*. For, although it is true that this rent may be a rent seck, and that the remedy is the same under the statute, for a rent seck as for a rent service, yet the avowry is for a rent service, at common law, and not for a rent seck. So far, therefore, as re-relates to the first avowry and cognisance and the pleadings dependant thereon, we think the plaintiffs are entitled to judgment. The second avowry and cognisance rests upon a power of distress given by an award, under an agreement, entered into between the plaintiffs, and the defendant *Pascoe* the younger, by which certain disputes and differences relative to a distress which had been then made, and an action at law then depending, and all other matters in difference between the said parties, were submitted to the arbitration of Mr. *Julian*. The plaintiffs plead in bar to this, the very same matter which they had pleaded in bar to the first avowry, viz , that *Pascoe* the younger had demised to them, all the residue and remainder of his own estate, term, and interest in the premises in which, &c., and that he had no reversionary interest in himself. To this plea in bar, the defendant replies the very same matter as that contained in the second avowry, viz., the power of distress given by the arbitrator; and the plaintiffs rejoin thereto, that the giving such power of distress was not a matter within the submission. Upon this state of the pleadings, arising on the second avowry and cognizance, the rejoinder must be given up, as being a departure from the plea in bar, and the question of law must be taken to stand as if there had been a general demurrer by the defendant, to that plea in bar. In that view of the case, the facts admitted on the record would be, that *Pascoe* the younger had originally demised to the plaintiffs, the premises in question, at the rent of 36*l*. per annum, but that, upon such demise, he had parted with the whole of his estate and interest, and left himself no reversion; and that a distress had been put in for one year's rent, due under such demise, which the plaintiffs had replevied, and the action for replevin had been removed into the Court of King's Bench, and was still pending. It would also appear upon the record, that disputes and differences

(*a*) 5 Bing. 24. (*b*) 2 B. Moore. 656.

had arisen and were subsisting, between the parties, as to the distress and action at law, and other matters relative to the said tenement, particularly as to the amount of the yearly rent which should be paid for the said estate; and that the parties agreed to refer as well the matters aforesaid, as all other matters in difference between them, to the award of Mr. *Julian*. The question, therefore, becomes this, whether, under such submission, the arbitrator had authority to give a power to distrain for the rent newly fixed by him, which power of distraining the landlord did not possess as to the rent originally created by the demise. And we think the arbitrator's authority to give this power ought either to appear by the express words of the submission, or that it should be brought within the general words of the submission, by a distinct averment on the record, that the question as to the power of distress, was one of the matters in difference between the parties to the submission. There is scarcely any conceivable addition to the landlord's powers, which the arbitrator might not have given, unless he is held to be restrained by those two considerations—a power to enter for non-payment of rent, or non-performance of covenants, might be given by the same authority as a power to distrain. Upon the single ground, therefore, that we do not see that the arbitrator had any authority to give the power of distress, for the rent newly fixed by him, and which, in all other respects, came in the place of the former rent reserved by the demise, we think the second avowry and cognisance cannot be supported, and that there must be judgment on that also for the plaintiffs.

Judgment for the plaintiffs.

BRAMAH and another *v.* ROBERTS and seven others.

Nov. 22 & 23.

ASSUMPSIT on a bill of exchange for 500*l.*, drawn by one *William Clare*, and accepted by the defendants, payable to his order, and indorsed by *Clare* to the plaintiffs. *Pleas*—first, by *E. M. Roberts*, *Lewis Roberts*, and *William Clare*, three of the defendants—that *Clare* did not indorse the bill to the plaintiffs; second, by *Baker*, *J. Foster*, *G. H. Foster*, *Lyal*, and *Blakesley*, the remaining five defendants, that they did not accept the bill of exchange *modo et formâ*.

At the trial, before *Tindal*, C. J., the following appeared to be the facts of the case:—In *May*, 1831, a company was advertised, by the title of The South Metropolitan Gas Light and Coke Company, and shareholders were requested to pay a deposit of 1*l.* per share to certain bankers; and an account was opened by the bankers, with the defendants, *E. M. Roberts*, *L. Roberts*, *Baker*, *Clare*, and others, who were styled directors of the company. A secretary was also appointed. Many of these deposits were paid in 1830 and 1831, and the directors commenced the erection of a suitable building for carrying on the

1. A bill was drawn by one of the directors of a company called The South Metropolitan Gas Light and Coke Company, upon himself and the other directors, payable to his order, and accepted by another director, as chairman to the company. *Held*, that the body of directors were not liable to be sued on the bill; that the right of one director to draw a bill upon the rest, and the power of one director to accept a bill for himself and the others, is not a right or power *implied* by law, like that which belongs to a member of an ordinary partnership; but that the right must depend upon the powers given by the charter or deed or agreement, under which the company is established, or some other agreement between the parties; and, further, that the plaintiff who seeks to enforce payment of the bill must shew the existence of such a power.

2. Where it appeared that the directors of the company had given bills of exchange, accepted by one or more directors, before the defendants became directors; but, since that period, no such bills had been accepted; and the jury found, upon these and other facts, that there was no *express* authority given by the new directors, to draw or accept bills, the Court refused to grant a new trial.

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manufacture of gas. The persons who supplied the materials and other articles for the building, were paid by bills of exchange, usually at long dates, drawn by the creditors upon certain of the directors. These bills were sometimes drawn upon *Roberts* and two directors, and accepted by *Roberts* alone; and sometimes upon three directors, all of whom wrote their acceptances. Fifteen of these bills were produced at the trial. The undertaking not being prosperous, a balance was struck at the bankers, in *February*, 1832; and no further proceedings were taken until *April*, 1833, when the defendants, Messrs. *Foster*, *Lyle*, and *Blakeley*, joined the concern, and became directors. Several of the bills which were then unpaid were discharged, and further measures were taken to carry on the object of the company; but no more bills were drawn, and all payments were made in cash. Two of the creditors who had formerly received bills, stated that they had heard that no more bills were to be given by the company. A new account was opened at the bankers; and in pursuance of instructions received by them, they paid no checks unless they were signed by three or five directors, and countersigned by the secretary; and it was proved that many such checks had been paid by the bankers.

The bill upon which the action was brought, was drawn by *Clare*, without the knowledge of Messrs. *Foster* and the other new directors, on the 22nd of *October*, 1833, and was addressed to Messrs. *E. M. Roberts*, *James* and *G. H. Foster*, *F. Blakeley*, and others, directors of the South Metropolitan Gas Light and Coke Company, No. 3, *Crosby* Square; and the form of acceptance was, "Accepted for self and directors. *E. M. Roberts*, Chairman."

Clare, the drawer of the bill, was the same person as the defendant *Clare;* and he indorsed the bill to the plaintiffs. *E M. Roberts*, the acceptor, had absconded before the action was brought.

The learned judge told the jury that no question arose on the second issue, as to the consideration given by the plaintiffs for the bill; but that the question for their consideration was, whether the defendants had recognized an authority in *Roberts*, to accept bills for the other directors; or whether they had so conducted themselves as to shew that any such express authority was given. The jury found a verdict for the plaintiffs on the first issue, and for the defendants on the second issue.

Wilde, Serjt., obtained a rule *nisi* for a new trial upon two grounds—first, that by the course of dealing between the parties, there was an implied authority given to any one of the directors to bind the others, by his acceptance; and, secondly, that the verdict was against evidence.

Sir *W. W. Follett*, *Amos*, and *Crowder*, shewed cause for the *Fosters*, *Lyle*, and *Blakeley*.—The first question is, whether it appears that an implied authority was given by the defendants to *Roberts*, to accept the bill. Unless such an authority is shewn, the plaintiffs are not entitled to recover; and the onus of proving this, by clear and undisputed evidence, lies most strictly upon the plaintiffs. First, it is said, that the defendants are shewn to be in partnership with *Roberts*, and that the law implies that an authority is given by one partner to another, to accept bills for the purposes of trade. It is not denied, where a partnership of merchants exists, that the law does imply such a power; but, by the evidence, it clearly appeared that the defendants were not partners, but

members of a joint stock company. The question, therefore, is, whether the members of a joint stock company are responsible as partners, for bills drawn by their chairman; or whether one director is liable for an acceptance given by another director, or by a mere shareholder. For some limited purposes, the members of joint stock companies may be partners; but there is a great difference between this and an ordinary partnership, and no implied authority to draw or accept bills, arises. Joint stock companies are not founded upon mutual confidence, like ordinary partnerships, but they are conducted upon certain terms which are specified in a deed, or act of parliament. Here no deed was given in evidence; but that was the fault of the plaintiffs, upon whom the onus of proof lay, as appears in *Fox* v. *Clifton* (*a*). If there were any special provisions contained in any deed or other document, which empowered the chairman to accept bills, and thereby to make the defendants liable, such power ought to have been proved by the plaintiffs, at the trial. *Dickinson* v. *Valpy* (*b*) is a case very similar to the present: there an action was brought against the defendant, a shareholder in the *Cornwall* and *Devonshire* Mining Company, on a bill of exchange drawn in pursuance of a resolution of the directors; but it was held that the defendant was not liable. The observations of *Littledale*, J., are precisely applicable to the present point. He says, "This bill is drawn by *Richard Wilks* for the *Cornwall* and *Devonshire* Mining Company. It is addressed to the company, and accepted for them by *John Wood*, their secretary. In its form, therefore, it is very unusual. It is not a bill drawn by individuals upon others, but drawn for and accepted by a mining company. When the plaintiff, therefore, took this bill, he had notice on the face of it, that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the persons who drew and accepted this bill, had authority by such acts, to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons; and it was incumbent on the plaintiff to prove, at the trial, that they had such authority. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another, by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to shew that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others, by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company, (which is not a regular trading company,) to bind the rest, by drawing or accepting bills. One of several persons jointly interested in a farm, has no power to bind the others by drawing or accepting bills, because it is not necessary for the purposes of carrying on the farming business that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things, in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn." So here it was incumbent on the plaintiffs to make inquiries before they

(*a*) 6 Bing. 776; 9 Bing. 115. (*b*) 10 Barn. & Cress. 128.

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took the bill, and then they would have ascertained that *Roberts* had no authority to accept it. Whenever a bill is drawn otherwise than in the usual form, parties ought to be on their guard and make inquiries before they take it; as where a bill was accepted by procuration, it was held to be duty of an indorsee to require the production of the authority of the person who assumed to exercise it, *Attwood* v. *Munnings* (*c*). Here there was enough on the face of the bill, to put the plaintiffs on their guard. The general authority of one partner to draw bills, whereby to charge another, is only an implied authority. *Lord Galway* v. *Mathews* (*d*). And if this is to be treated as a case of partnership, then it appears that the bill is drawn only on a portion of the partners, because the shareholders are equally liable with the directors, upon any implied authority which can be raised. In fact, this bill is not drawn upon the company, but upon certain members of it. How then can an authority be implied, enabling the chairman to accept bills drawn in this form? Even when a bill is drawn for partnership purposes, it must be drawn in the name of the partners, by their style and firm, and not in the name of a part of the firm. *Emily* v. *Lye* (*e*), *Denton* v. *Rodie* (*f*), *South Carolina Bank* v. *Case* (*g*), *Ducarey* v. *Gill* (*h*). The verdict is not against evidence, because there was no proof whatever, of any authority being given to *Roberts* to accept bills. The object of this action was to make out a case against the Messrs. *Foster*, and the other persons who joined the company in 1833. But no bills were proved to have been issued after that period, and all payments appeared to have been made in cash. The bankers proved, that they would not have paid a check, unless it was signed by three or five directors, and countersigned by the secretary. If it is contended that the new shareholders adopted the former course of dealing of the company, then the answer is that the plaintiffs did not prove that they had any knowledge of the former dealings. There was nothing to shew that the new directors had allowed *Roberts*, to accept, bills so as to deceive the public, and that question was expressly left to the jury. It was a strong fact to go to the jury, that the plaintiffs received this bill from *Clare*, who was himself one of the directors.

Wilde, Serjt,, and *Kelly*, *contrà*.—There is nothing in *Dickinson* v. *Valpy* (*i*), which may not be admitted for the purposes of this argument. No issue was raised by the five defendants, as to the validity of the indorsement of the bill to the plaintiffs, and therefore it must be considered as having been made upon good consideration. This is the case of an ordinary partnership between the persons who called themselves directors; but there was no evidence, whatever, to shew the formation of a joint stock company. The mere payment of a few deposits did not make a company; and there was no evidence, that any one share was paid up in full. In *Dickinson* v. *Valpy* (*i*), it appeared that a company was regularly established, and, amongst other grounds, the Court also held, that the defendant was not liable, because it was not satisfactorily proved that he was a shareholder. Here it appears, that when this scheme was set on foot, the directors obtained goods upon a long credit, by accepting bills of exchange, drawn upon the directors in different forms. This created a presump-

(*c*) 7 B. & Cress. 283.
(*d*) 10 East. 264.
(*e*) 15 East, 7.
(*f*) 3 Camp. 493.
(*g*) 8 B. & Cress. 427.
(*h*) 1 Moo. & Mal. 450.
(*i*) 10 B. & Cress. 128.

tion of a dealing by bills of exchange. No advertisement appears to have been published, to caution the public against taking any future bills accepted by the directors; this ought to have been done by the new directors who became partners in 1833, if they wished to relieve themselves from a liability to pay any future bills of exchange. There is nothing in the nature of the manufacture of gas, to distinguish it from an ordinary trade which may be carried on by partners. Coal and other articles must be purchased, and tar and coke, as well as gas, is sold. In *Dickinson* v. *Valpy*, reliance was placed upon the absence of proof that any other mining company had been accustomed to issue bills of exchange, but here it was proved that this very company had issued such bills; therefore, upon that point, it is an authority for the plaintiffs. It is said that the plaintiffs ought to have used more caution before they received the bill, but the defendants cannot raise that question under the issues placed on the record; and the doctrine upon this subject is, that it is only in cases of gross negligence and fraud, that the holder of a bill of exchange loses his remedy. *Foster* v. *Pearson* (*k*), *Backhouse* v. *Harrison* (*l*), *Crook* v. *Jadis* (*n*).

Cur. adv. vult.

June 12.

TINDAL, C. J.—This was an action in which the plaintiffs declared, in their first count, upon a bill of exchange for 500*l.* bearing date the 22nd *October*, 1833, drawn by *William Clare*, upon, and accepted by, the defendants, payable to the order of the drawer, and by him indorsed to the plaintiffs. Three of the defendants, *E. M. Roberts*, *Lewis Roberts*, and *William Clare*, pleaded to this count that *William Clare*, did not indorse the bill of exchange to the plaintiffs; and the remaining five defendants, viz., *Baker*, the two *Fosters*, *Lyal*, and *Blakesly*, pleaded that the defendants did not accept. The issue upon the first plea was found for the plaintiffs; the issue upon the second, for the defendants; and the question comes before us on a motion by the plaintiffs for a new trial, upon two grounds; first, that from the situation in which the defendants were placed with respect to each other, there was an implied authority given to any one to bind the others by his acceptance, and next, that the verdict was against evidence. The bill of exchange, when produced in evidence, appeared to be dated 22nd *October*, 1833, to be drawn by *William Clare*, and to be directed to Messrs. *E. M. Roberts*, *James* and *G. H. Foster*, *F. Blakesly*, and others, Directors of the South Metropolitan Gas Light and Coke Company, No. 3, *Crosby Square*, and the form of the acceptance was, "Accepted for self and directors, *E. M. Roberts*, Chairman."

The bill was made papable to the order of the drawer, by whom it was afterwards indorsed to the plaintiffs. Upon the face of the bill, therefore, and without evidence to explain the actual relation of the parties to each other, it did not appear to be a bill of exchange accepted by one of the partners of an ordinary firm, trading in partnership together, but a bill drawn upon the directors of a joint stock company, and accepted by the chairman for himself and the other directors. For the address of a bill to the directors of a metropolitan company, and the frame of acceptance by a chairman of such directors, for himself and other directors can

(*k*) 5 Tyrwh. 255.
(*l*) 5 B. & Ado. 1098.
(*n*) 5 B. & Adol. 909.

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only be referable, unless some explanation is given, to a company of the description well-known in all the courts of law and equity in *Westminster Hall*, as joint-stock companies, and not to ordinary partnerships in trade. It was proved upon the trial of the cause, that *Clare*, the drawer of the bill from whom the plaintiffs derived title, and upon whose indorsement they rely, was the same *William Clare*, who is one of the acceptors, and one of the defendants in his capacity of acceptor; so that the bill is drawn by one of the directors, upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson* v. *Valpy* (*a*), in the authority of which case we entirely concur, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter, or deed, or agreement, under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect. But, upon the trial of this cause, no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given, by deed or otherwise, to any one of the directors to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist. The principal contention, however, on the argument before us on the part of the plaintiffs, has been rested on two grounds; first, that the defendants are, in point of fact the only persons who have any interest in the concern, so that the calling themselves directors on the face of the bill, is matter of description only, which they have thought fit gratuitously to assume, whilst they are in fact, the individual partners in an ordinary trade or business; and, secondly, that even if they are to be considered as directors, the evidence at the trial proved that the defendants had paid various bills accepted in the same form, and that such mode of dealing shews, that they have treated themselves as liable under the present form of acceptance, and is sufficient evidence of a mutual authority to bind each other by accepting bills of exchange. As to the first ground of argument, there was no evidence to shew that the defendants were any other than as described upon the bill, that is, directors of a company properly so called. On the contrary, the evidence given on this subject, so far as it went, tended to establish that a joint stock company really existed; for it was proved that, in *May*, 1830, the sum of one pound per share had been paid into the bankers as a deposit; that the account was opened with the bankers, in the name of the South Metropolitan Gas Light and Coke Company; that the payments by the bankers were made upon the signatures of the directors; and that there was a secretary to the company; all which evidence is applicable only to the existence of an ordinary joint stock company; and if it was intended to rely on an alteration in the nature of the company since that time, such alteration should have been proved by the plaintiffs. As to the second ground of the plaintiffs' argument, the evidence was, that two of the defendants, the

(*a*) 10 B. & C. 128.

Messrs. *Foster*, did not become directors until about the 24th of *April*, 1833; that no bill of exchange had been accepted since that time, but that all payments had been made in cash; and that no bill in which the names of the Messrs. *Foster* were specified, and, indeed, no bill drawn since the time at which they joined in the concern, had been paid with their authority. And as to the payments which they had sanctioned, such payments were all confined to payments of former acceptances, before they became partners, which had been given on account of goods furnished to, or work done for, the company; that is, acceptances to which they were not personally liable, but which they might think themselves under a moral obligation to pay. If, indeed, the Messrs. *Foster* had paid bills of exchange drawn upon *Roberts* and other directors, and accepted by *Roberts* "for self and other directors," after they had acquired a share in the concern, and become directors, it might have afforded evidence of an authority to the chairman to accept the present bill, and, consequently, of their liability under such acceptance; but no such evidence was given. We cannot, therefore, see sufficient reason for sending this cause to a new trial; for we think the jury were justified, upon the evidence which was before them, in coming to the conclusion at which they arrived, on both the points left to them; and it is not suggested that any new evidence could be laid before them upon a second trial, of which the plaintiffs might not have availed themselves on the first. And as to the point which was reserved at the trial for consideration, we are satified that there was no implied authority to *Roberts* to accept this bill, resulting from the situation of the parties in the concern.

Rule discharged.

STOWELL *v.* ROBINSON.

June 10.

ASSUMPSIT. The declaration stated, that, by an agreement between the plaintiff and the defendant, the defendant agreed to sell the lease and good-will of a public-house to the plaintiff, and to deliver possession thereof by the 3rd of *May;* that upon the making of the said agreement the plaintiff paid a deposit of 50*l.*; and the defendant undertook that he then had lawful right and title to assign over the said lease to the plaintiff. *Averment*—That the defendant had not lawful right and title, at the time of making the agreement, to sell and assign over the lease to the plaintiff. Counts for money paid, money had and received, interest, and on an account stated.

Pleas—First; Non-Assumpsit. *Second;* to the first count, that the defendant had lawful right and title, to sell and assign over the lease as in the agreement mentioned. *Third;* to the first count, that neither the plaintiff or defendant

1. A vendor, by an agreement in writing, contracted to sell the lease and good-will of a public-house; and one of the conditions was, that possession should be delivered on the 3d of *May*. *Held*, in an action brought by the vendee to recover back his deposit, that parol evidence of an agreement between the parties, to waive the day which was stipulated, and to substitute another, was inadmissible, as being in contravention of the Statute of Frauds.

2. In an action for non-performance of a contract for the sale of a leasehold house, the declaration alleged that the defendant had not lawful right and title to sell and assign the lease, at the time the contract was made. It was ascertained, after the sale, that the assignments of the lease to the vendor, and to former assignees, had not been registered; and also that the vendor was restrained from assigning without a license from the ground landlord; and that no such license had been obtained at the time the contract was made. *Held*, that neither of these objections impeached the validity of the vendor's title, as the defects were capable of being remedied.

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were ready by the day in the agreement mentioned for completing the purchase; that they thereupon agreed to postpone the performance of it for a reasonable time, and that the plaintiff should accept an assignment of the lease, if the defendant made out a title within such reasonable time; that within such reasonable time the defendant made it appear to the plaintiff that he had such title, but the plaintiff refused to perform the agreement, and prevented its completion.

Issues were raised upon these pleas; and also upon other pleas which are not material.

At the trial, before *Tindal*, C. J., at the *London* sittings, it appeared that, by an instrument in writing bearing date the 19th *April*, 1836, the plaintiff and defendant had entered into the agreement mentioned in the declaration, for the sale of the lease, good-will, and furniture of a public-house belonging to the defendant; the furniture to be valued by two brokers, one to be appointed by each party; and one of the terms of the contract was, that possession of the premises should be given on the 3d of *May*. A deposit of 50*l*. was paid by the plaintiff when the contract was signed. The defendant was assignee of a lease of the house, under Sir *R. Sutton;* and, by a covenant inserted in the original lease, all assignments were required to be made with the consent of the lessor; but on the 30th *April*, when the assignment of the lease to the defendant was shewn to the plaintiff's attorney, it appeared that no such license had been obtained, whereupon the defendant applied to Sir *R. Sutton* to obtain a license. It also appeared that the assignment of the lease to the defendant, and the former assignees, had not been registered at the *Middlesex* Office. On the 3d of *May* the brokers had not completed the valuation of the premises; and the negotiation with the lessor for the license was not concluded, in consequence of the plaintiff's refusal to give a bond which the lessor required; but the parties and their agents met together on the 3rd, 4th, and 5th, of *May*, with a view to complete the transaction. On the 4th of *May*, the defendant had all the assignments duly registered, at the plaintiff's request; and until the 5th of *May* the agent of the plaintiff was endeavouring to procure the license from Sir *R. Sutton*; but, on the following day, the plaintiff having heard that the bond was still insisted upon, he wrote to the defendant, informing him that he considered the contract to be at an end, and demanding a return of the deposit. A few days afterwards, the license might have been obtained from Sir *R. Sutton* without giving any bond.

The learned judge left the jury to say whether the parties had postponed the completion of the agreement for a reasonable time, or only until the 5th of *May;* and the jury found that it had been postponed for a reasonable time, and a verdict was found for the defendant.

Erle obtained a rule nisi to set aside the verdict, and to enter a verdict for the plaintiff, or for a new trial. He contended that the admission of the evidence to shew that the day for completing the purchase had been postponed from the 3rd of *May*, for a reasonable time, was in violation of the Statute of Frauds. *Goss* v. *Lord Nugent* (*a*) was cited. In that case a vendor, by writing, contracted to sell several lots of land, and to make a good title to

(*a*) 5 B. & Adol. 58.

them, and a deposit was paid; the vendor could not make a good title to one of the lots; and it was then verbally agreed between the parties that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted; and in an action brought by the vendor to recover the remainder of the purchase-money, it was held, that oral testimony was not admissible to shew the waiver of the vendee's right to a good title, inasmuch as the effect of such waiver was to substitute a new contract. He also submitted, that the evidence supported the first count in the declaration, which alleged that the defendant had no title to the premises, when he made the agreement.

Wilde, Serjt., and *Chandless*, shewed cause.—It was not a condition precedent that possession of the premises should be given on the day mentioned in the agreement. To make it a condition precedent, the consideration must go to the whole contract. *Lang* v. *Gale* (*b*). Here the day was not material; and it was agreed by both parties that further time should be given, as much for the convenience of the vendee as of the vendor. In *Goss* v. *Lord Nugent* (*c*), the terms which were agreed upon by parol, varied the original contract between the parties, and upon that ground the case is distinguished in the judgment from *Littler* v. *Holland* (*d*), *Thrush* v. *Rooke* (*e*), and *Cuff* v. *Penn* (*f*). The alteration of the day which was made in the present case, does not vary the original contract, but is in performance of it; and the contract remains. And even if this case should be held to be within the principle of *Goss* v. *Lord Nugent* (*c*), the plaintiff is not entitled to recover back the deposit; because, if the old contract was altered, then the deposit remained subject to the conditions of the new one. This is not the case of a total failure of consideration, which entitles the plaintiff to bring an action to recover back his money; but it is a voluntary payment made with a knowledge of all the facts. The plaintiff was acting upon the new contract, because the negotiation was continued after the day originally agreed upon, had passed; therefore the plaintiff would not be entitled to recover back his deposit under the common counts. As to the other point, the plaintiff is not entitled to a verdict on the special count, because it did not appear at the trial that there was any defect in the defendant's title. The license from Sir *R. Sutton* might have been obtained, if the plaintiff had completed the contract; and although the assignments of the lease had not been enrolled, that omission was easily remedied. The evidence proved the defendant's plea, namely, that he had lawful right and title to sell and assign the lease. If the Court should hold, that a vendor's title must be complete at the very moment a contract is made, there would be few contracts of sale, to which such an objection as the present would not be applicable.

Erle and *Jardine*, *contrà*.—First, the plaintiff is entitled to recover upon the special count in the declaration, inasmuch as the defendant had not a lawful title to assign his lease at the time he entered into the contract; nor were the assignments duly registered. It is clear that it is the duty of the vendor, and not of the vendee, to obtain the lessor's consent to the assignment. *Lloyd* v. *Crispe* (*h*), *Mason* v.

(*b*) 1 M. & Sel. 111.
(*c*) 5 B. & Adol. 58.
(*d*) 3 T. R. 591.
(*e*) 1 Esp. N. P. C.
(*f*) 1 M. & Sel. 21.

Corder (*i*). Then, as to the other point, it cannot be said that the day which was fixed for the completion of the contract is immaterial. In *Lang* v. *Gale* (*k*) it was held, that the delivery of the draft of a conveyance was not a condition precedent, with respect to its delivery upon the precise day mentioned in the contract, but that the delivery of the draft was only an intermediate step in the transaction; and in *Berry* v. *Young* (*l*), Lord *Kenyon*, C. J., held, that the seller of an estate ought to be ready to produce his title-deeds at the particular day. *Wilde* v. *Fort* (*ll*) is to the same effect. In Sugden's Vendors and Purchasers (*m*), it is said, "The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord *Kenyon*, and has never been doubted in practice. The contrary rule would lead to endless difficulties." *Lloyd* v. *Collett* (*n*), *Heard* v. *Wadham* (*o*), *Rippingall* v. *Lloyd* (*p*). Thirdly, the defendant cannot shew, that, by a subsequent parol agreement between the parties, another day was substituted. If such evidence were allowed, the provisions of the Statute of Frauds would be rendered nugatory, according to the reasoning in *Boydell* v. *Drummond* (*q*) and *Price* v. *Dyer* (*r*). But *Goss* v. *Lord Nugent* (*s*) is precisely in point; and in that case the decisions on the 17th section of the Statute of Frauds are adverted to. In *Carrington* v. *Roots* (*t*), it was decided, that a contract for the sale of an interest in land without a note in writing, may operate as a license, although it cannot, in any way, be made available as a contract.

Cur. adv. vult.

TINDAL, C. J.—The plaintiff declared in his first count upon a special agreement for the sale, by the defendant to the plaintiff, of the good-will of a public-house, assigning as a breach of the agreement, that the defendant, at the time of the agreement, had no lawful title to assign his lease; and he declared in his second and last counts respectively, for money had and received to his use, and upon an account stated between him and the defendant. The jury found a verdict for the defendant; and a rule was obtained by the plaintiff, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff, on the count for money had and received, or why there should not be a new trial. With respect to the first count, if the matter had rested on that count alone, we should not have thought it a case in which the verdict ought to be disturbed, for we think the breach which has been assigned in that count, and which has been traversed by one of the pleas, was not proved by the evidence given at the trial of the cause. The breach assigned is, that the defendant, at the time of making his agreement, had not lawful right or title to sell or assign over the lease to the plaintiff. But there was no proof of any invalidity or defect in the defendant's right or title to convey at the time of the agreement; the only objection taken was, that he had not, at that time, procured a license from the landlord, to assign the lease to the defendant; and that the assignments, prior to that, to himself, and also

(*i*) 7 Taunt. 9.
(*k*) 1 M. & Sel. 111.
(*l*) Cited in *Farrer* v. *Nightingale*, 2 Esp. N. P. C. 639.
(*ll*) 4 Taunt. 334.
(*m*) Vol. 1, page 420, 9th ed.
(*n*) 4 Bro. C. C. 471.
(*o*) 1 East, 619.
(*p*) 2 Nev. & Man. 410.
(*q*) 11 East, 142.
(*r*) 17 Ves. 356.
(*s*) 5 Barn. & Ado. 58.
(*t*) 2 Mee. & W. 248; S. C. Mur. & Hurl. 14.

his own assignment, had not been then registered. But neither of these objections go to impeach the validity of the defendant's title, at the time of the agreement; for the license to assign cannot, of necessity, be obtained before the agreement is made with the intended purchaser, until which time the name of the intended assignee is not known; and as to the want of registration of some of the previous assignments, and also of that made to the defendant himself, as there was no other subsequent purchaser who had registered the assignment to himself, the objection was capable of being cured at any time before the completion of the purchase; and we think the terms of the agreement pointed only at incurable defects in the title, and not to such imperfections as are capable of being removed, and usually are removed, after the agreement is made, and whilst the title is under investigation. The right of the plaintiff, therefore, to recover a verdict will turn upon the count for money had and received, under which count the plaintiff contends he had a right to recover the sum of 50*l.*, which was advanced by him as a deposit on signing the agreement, upon the ground that the defendant had not completed the conveyance, and given the possession of the premises to the plaintiff, on or before the 3rd of *May*, according to the stipulations of the agreement. The defendant, on the other hand, contends, that the day specified in the agreement was not an essential and material part of the contract, and that both the plaintiff and defendant, in the completion of the contract, acted upon the footing that the precise day was not material; and by their course of dealing after that day with each other, must be taken to have substituted a performance within a reasonable time after the 3rd of *May*, in the place of a performance on that precise day; and the jury were of that opinion upon the point being left for their determination; and the question which was reserved for our consideration, and which has been argued before us, is, whether such a finding is consistent with the rules of law. It may be taken in this case to have been proved at the trial that the parties were neither of them ready to carry the contract into effect, on the 3rd of *May*, not only on account of the objections that were taken to the title, and which were then in a course of being removed, but also because, at that time, the brokers had not completed their valuation; and it may further be taken that both upon the 3rd, 4th, and 5th of *May*, the agent of the plaintiff, the buyer, (who appeared to have taken that part of the business upon himself,) was endeavouring to procure the proper license from the ground landlord for the assignment of the lease; but that, on the 6th, being informed by the landlord's agent that a bond, which had been objected to, would be required to be given by the purchaser, he writes to the defendant on the same day, that he considers the contract at an end, and demands the return of the deposit. Within a few days after this letter, and within what appears to us to be a reasonable time for that purpose, the objections would have been removed. So that the question, as was before stated, is this, can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot. This is an agreement for the sale of land, upon which, by the Statute of Frauds, section 4, no action can be brought, unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorized. Now we cannot get over the difficulty which has been pressed upon us, that, to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a

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subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time, contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing, signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by Lord Chancellor *Hardwicke* in *Partricke* v. *Powlett* (*a*), of Sir *William Grant*, master of the rolls, in *Price* v. *Dyer* (*b*). And we think the reasoning upon which the judgment of the Court of King's Bench proceeds, in *Goss* v. *Lord Nugent* (*c*), goes directly to the point that the evidence now under discussion is inadmissible. Upon the ground, therefore, that the verdict of the jury in favour of the defendant is founded on that evidence, we think there must be a new trial; to which, however, it will be useless to have recourse, unless the defendant can remove the difficulty, by producing evidence in writing as to the enlargement of the time, or unless for the purpose of putting this question upon the record.

Rule absolute (*d*).

(*a*) 2 Atk. 383.
(*b*) 17 Ves. jun. 356.
(*c*) 5 B. & Adol. 58.
(*d*) See *Palmer* v. *Temple*, 1 Har. & Wol. 702; *Harvey* v. *Grabham*, 2 Har. & Wol. 146.

June 9.

PERCEVAL *v.* CONNOR.

A rule *nisi* having been obtained by the defendant, after a verdict for the plaintiff, to set aside a writ of trial upon the ground that the date of the writ of summons was incorrectly stated, the Court suspended the rule to enable the plaintiff to apply for leave to amend the record.

A RULE *nisi* had been obtained to set aside a writ of trial upon the ground of a variance, in the writ of trial, of the date of the writ of summons. The writ of summons was issued on the 22nd of *June*, and in the writ of trial it was stated that "the plaintiff impleaded the defendant on the 6th of *July*." The defendant's attorney attended at the trial, and pointed out the variance, but the cause proceeded, and a verdict was found for the plaintiff.

E. James shewed cause, and contended that the record was conclusive evidence of the time of issuing the writ, and he referred to the form of the writ of trial given in Reg. Hil. T. 4 W. 4, Sch. No. 5.

Thomas, in support of the rule, cited *Whipple* v. *Hanley* (*a*) and *White* v. *Farrer* (*b*).

TINDAL, C. J.—The justice of the case will be satisfied if we suspend this rule for the purpose of enabling the plaintiff to apply to the Court for leave to amend the record on payment of costs.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule suspended accordingly (*c*).

(*a*) 1 Mee. & Wels. 432; S. C., 2 Gale, 56.
(*b*) 2 Mee. & Wels. 88. S. C. nom. *White* v. *Perrers*, Mur. & H. 39.
(*c*) See *Blissett* v. *Tenant*, 1 Arnold, 6.

Doe d. North *v.* Harriet Webber.

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EJECTMENT by a mortgagee. At the trial, before *Williams*, J., at the *Somerset* Summer assizes for 1836, the following appeared to be the facts of the case:—In 1817, one *William Webber*, the husband of the defendant, borrowed 800*l.* from the lessor of the plaintiff, and the ejectment was brought to recover the mortgaged premises, on default of payment. *W. Webber* died in possession of the premises in 1828, and since that time the defendant continued in possession, without paying any interest. The evidence given by the lessor of the plaintiff to prove his title, consisted of an indenture of lease and release dated the 15th and 16th *July*, 1817, whereby the premises sought to be recovered were conveyed to him by way of mortgage. The release purported to be made between the said *W. Webber* of the one part, and the lessor of the plaintiff of the other part, and it recited, that the said *W. Webber*, by a certain grant, by copy of court roll, of 27th of *March*, 1786, and by divers mesne acts, &c., then stood lawfully or equitably seized of certain messuages, tan yard, and premises; to hold for the lives of *J. Hancock*, *P. Hancock*, and *W. Hancock;* and that the said *W. Webber* had applied to the said *R. North* to advance him 800*l.* on a mortgage and security of the said copyhold premises, and the fee simple and inheritance thereof. It was then witnessed that in consideration of 800*l.* the said *W. Webber* did grant, bargain, sell, assign, and set over unto the said *R. North*, his executors, administrators, and assigns, all the said premises, and the copy of court roll, and other deeds to the same belonging; to hold to the said *R. North*, his executors, administrators, and assigns, during the natural lives of the said *J. Hancock*, *P. Hancock*, and *W. Hancock;* subject to the rents, heriots, &c., due in respect of the same. And after reciting certain indentures of lease and release of the 24th and 25th of *March*, 1812, made between the Bishop of *Rochester*, of the first part, *John King*, of the second part, the said *W. Webber*, of the third part, and *Edward Boucher*, of the fourth part, which recited that the said *W. Webber* had contracted with the said Bishop of *Rochester* for the absolute purchase of the inheritance in fee simple, of the hereditaments and premises thereinafter mentioned; it was witnessed, that for the considerations therein mentioned, the said *J. King*, by the direction of the said bishop, testified as thereinafter mentioned, did bargain, sell, alien, and release, and the said bishop did grant, bargain, sell, alien, release, ratify, and confirm, unto the said *W. Webber;* all those messuages, tan-yard, and premises, thereinafter more particularly descirbed, parcel of the manor of the prebend of *Wiveliscombe;* to hold the same unto the said *W. Webber*, his heirs and assigns for ever. And it was further witnessed by the indenture of release of the 16th *July*, 1817, that in considera-

1. In ejectment brought by a mortgagee against the widow of the mortgagor, the lessor of the plaintiff proved an assignment by way of mortgage, of copyhold premises by lease and release, and not by any surrender to the lord. *Held*, that the lessor of the plaintiff had only an equitable interest, and that he could not maintain the action.

2. Where a mortgage of copyhold premises by lease and release recited, that by indentures of lease and release, the mortgagor (a copyholder for lives,) had contracted with the Bishop of *Rochester* for the absolute purchase of the inheritance in fee simple of the copyhold premises, and that the Bishop of R. had granted and released the same (parcel of the manor of the prebend of W.,) to hold the same to the mortgagor, his heirs and assigns for ever; and the mortgage deed then witnessed that the mortgagor granted and released the premises in fee, subject to the usual proviso for redemption. *Held*, that there was no sufficient evidence furnished by the recital that there had been any enfranchisement of the copyhold.

3. Whether the above recital was evidence, by way of estoppel, against the widow in possession of the mortgagor, *quære.*

4. Where, after a verdict for the plaintiff in ejectment, an objection, which had no bearing on the merits of the case, was successfully made to the proof of title given by the plaintiff, the Court refused to enter a nonsuit, but ordered a new trial.

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tion of the said 800*l.* so lent, the said *W. Webber*, did grant, bargain, sell, alien, release, and confirm, unto the said *R. North*, his heirs, and assigns, all those the said messuages, tan yard, and premises; unto the use of the said *R. North*, his heirs and assigns, for ever. And it was further witnessed, that the said *W. Webber*, in pursuance of a power vested in him by the said recited indenture of the 25th of *March*, 1812, did direct, limit, and appoint, unto the said *R. North*, his heirs, executors, and assigns, for ever, all those the aforesaid messuages and premises, thereinbefore granted, subject to the usual proviso for redemption, on payment of 800*l.* in *December* then next, with interest. Covenants from the said *W. Webber*, that he was lawfully seised and lawfully and equitably possessed of the copyhold premises for the lives of the said *J. Hancock*, *P. Hancock*, and *W. Hancock;* that he had power to grant in fee; for peaceable enjoyment free from incumbrances; and for further assurance.

It appeared that the persons for whose lives the premises were held were all living at the time of the trial.

It was contended, on behalf of the defendant, that the lessor of the plaintiff had not proved any legal interest in the premises, inasmuch as a copyhold would not pass by a common law conveyance by lease and release: and that if it was supposed that the Bishop of *Rochester* had enfranchised the premises, then that the recitals of the conveyance of the 24th and 25th *March*, 1812, were not evidence against the defendant, but that the deeds ought to have been produced. It was also contended, that the recitals did not shew that the premises had been enfranchised. A verdict was found for the lessor of the plaintiff, with leave reserved to the defendant to move to enter a nonsuit.

Rogers obtained a rule *nisi* accordingly in *Michaelmas* Term.

Erle shewed cause.—The recitals in the mortgage deed shew that the copyhold had been enfranchised, and every thing is to be presumed in favour of the mortgagee. The defendant, being the widow of the mortgagor, is estopped from disputing the validity of the conveyance to the mortgagee, and the recital of the conveyance of the 24th and 25th *March*, 1812, is evidence against her. The covenant by the mortgagor, that he was seised in fee of the premises without incumbrance, is conclusive as against the defendant. In *Wakeford's* case (*a*), "The Earl of *Bedford*, lord of the manor of B., 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 copyholder doth release to the purchaser. It was holden, by the Court, that by this release the copyhold interest is extinguished and utterly gone." In *Blemmer Hasset* v. *Humberstone* (*b*) it is said, by Lord *Hobart*, "That if a copyholder come into court and says that he is weary of his copyhold, and requests the lord to take it, that is a surrender; for between the lord and the tenant a conveyance shall not need to be according to the custom, for the copyholder hath no other use of the custom but only to convey the land to another." *Lane's* case (*c*).

Rogers and *Bere* in support of the rule. The lessor of the plaintiff was bound to shew himself clothed with the legal title. By the first part of the

(*a*) Leonard, 102.
(*b*) Hutton, 65.
(*c*) 2 Rep. 16 b.

mortgage-deed it appeared that nothing but an equitable interest passed to the lessor of the plaintiff, inasmuch as no surrender of the premises was made, and a conveyance of copyhold premises cannot be made by a lease and release. Then if the legal title passed at all, it must be by reason of an enfranchisement of the copyhold premises, by the conveyance of 24th and 25th *March*, 1812. But the recital of those deeds is not evidence as against the defendant. Co. Lit. 352 b.; Viner's Abr. tit. Estoppel (A. 2.); *Doe* d. *Rogers* v. *Brooks* (*a*). And if it is evidence, then it does not appear that the Bishop of *Rochester* was lord of the manor. It rather seems that the bishop was seized *jure ecclesiæ*, as the premises are described as "parcel of the manor of the prebend of *Wiveliscombe*." If he was seized in right of his prebend only, he could not enfranchise the premises; nor was the mortgagee in a situation to take an enfranchisement during the lives of the *cestui que vies*. *Dancer* v. *Evett* (*e*); *Howard* v. *Bartlet* (*f*). The mortgagor himself would not have been estopped from taking this objection; and even if that were not so, the defendant is not shewn to have paid any interest on the mortgage-money, or in any other manner to have acknowledged the title of the lessor of the plaintiff. *Gaunt* v. *Wainman* (*g*).

Cur. adv. vult.

TINDAL, C. J.—This was an action of ejectment brought by a mortgagee against the widow of the mortgagor, in which it appeared that the mortgagor died in possession of the mortgaged premises in 1828, and the widow continued in possession after the death of her husband up to the time of the ejectment brought. The objection taken at the trial on the part of the defendant, and upon which the learned judge gave leave to the defendant to enter a nonsuit, was this, that the mortgaged premises were copyhold, and that the only title set up by the lessor of the plaintiff was an assignment of the copyhold premises by a common law conveyance of lease and release, and not by any surrender to the lord according to the custom of the manor; and we think it appears from the deed of release produced by the plaintiff at the trial, and which was the only evidence on which he relied, that the premises in question were of copyhold tenure, for they are expressly described in various parts of the deed as being copyhold at the time of the execution of the deed; and as the plaintiff did not produce any surrender, according to the custom of the manor, but relied entirely upon the deeds of lease and release produced by him, we think that, upon his own shewing, he had not any legal interest, but an equitable interest only in the premises, and was, therefore, not in a condition to maintain an ejectment. The plaintiff, in answer to this objection, has contended, that, if it does not appear expressly upon the face of the deed, yet that it does, by necessary inference, that an enfranchisement of this copyhold had taken place by a conveyance, in 1812, of the freehold premises from the then lord of the manor to the mortgagor and his heirs. But upon reference to the deed as recited in the mortgage, and even admitting that such recital is evidence by way of estoppel against the present defendant, the widow, as coming in by claim under her husband, (of which, however, there may be considerable doubt,) still we

(*d*) 3 Ado. and Ellis, 513. S. C., 1 Har. & Wol. 400.
(*e*) 1 Vernon, 392.
(*f*) Hobart, 181.
(*g*) 3 Bing. N. C. 69. S. C., 2 Hodges, 184.

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think there is no sufficient evidence furnished by the deed that there has been any enfranchisement. An enfranchisement is made by a common law conveyance of the fee simple of the particular tenement by the lord of the manor to the copyholder. But upon the recital of this deed it does not distinctly appear that the Bishop of *Rochester*, the releasor of the inheritance, was seised of the fee simple of the manor; and if he had only a limited interest in the manor, he could not enfranchise. Again, it appears from the deed of release that the premises were parcel of the manor of the prebend of *Wiveliscombe*, from which, unexplained, the inference would be, that the lord of the manor was seised in right of his prebend only, in which case he would be prevented by the restraining statutes from parting with the fee, and, consequently, from enfranchising the copyhold, unless power had been given to him by some private act of parliament, of which there was no evidence. We think, therefore, that the plaintiff has, by his own evidence, shewn the infirmity of his own title; and that the mortgagor may take advantage of these objections, which amount, in fact, to this, that the plaintiff is not the legal mortgagee. But as it is probable, that, upon another occasion, the plaintiff may be able to supply these defects, which have no bearing on the merits of the case, and as it would be an useless expense to the parties to direct a nonsuit to be entered, and thereby to compel the mortgagee to commence another ejectment, we think it right, under the circumstances, to direct a rule to be made absolute for a new trial, upon payment of costs of the former trial by the lessor of the plaintiff.

Rule absolute accordingly.

May 22.

MOON *v.* the Guardians of the Poor of the WITNEY Union.

The defendants employed an architect to draw plans for a workhouse, and the architect employed the plaintiff, a surveyor, to calculate the quantities of the materials. The defendants afterwards advertised for tenders to build the workhouse, and they gave notice that copies of the quantities might be obtained, and that the successful competitor would be required to pay for calculating them. The defendants subsequently determined not to build the workhouse. In an action brought by the plaintiff against the defendants for work and labour, it was proved that architects were accustomed to employ a surveyor to calculate the quantities. *Held*, that the action was maintainable, as the architect was the agent of the defendants, and had authority to bind them.

ACTION for work and labour, as a surveyor, with the common counts. *Plea*— the general issue. At the trial, before *Tindal*, C. J., the following facts were in evidence. The defendants employed one *Kempthorne*, an architect, to prepare the plans and specifications of a workhouse which they intended to build. *Kempthorne* prepared the plans, and, after they had been approved by the defendants, he employed the plaintiff, who was a surveyor, to make out the quantities for the use of the builders; and on the 30th of *April*, 1835, the following form of a notice for tenders, was sent by *Kempthorne* to the clerk of the defendants, who caused the same to be printed and circulated:—"*To builders*. The board of guardians of the *Witney* Union, *Oxon*, are desirous of receiving tenders for the erection of the new workhouse at *Witney*. The plans and specifications may be seen at the office of Mr. *Kempthorne* or Mr. *Leake*, clerk to the board. Sealed tenders must be sent to Mr. *Leake* before the 4th of *June*."

On the 14th of *May*, 1835, *Kempthorne* sent the specifications to the clerk, and desired him to shew the builders the following instructions:— "14th *May*, 1835. The builders desirous of contracting for the erection of the *Witney* Workhouse are informed, that the quantities of the works are now

being taken out for their use, and will be ready by the 28th instant. Builders requiring a copy of the same are requested to leave their names, with the sum of 2*l.* 2*s.*, at Mr. *Kempthorne*'s office, or at Mr. *Leake*'s, clerk to the union, *Witney*, before the 26th instant. The successful competitor will have to defray the expense of taking out the quantities, the charge for which will be stated at the foot of the bill of quantities, when delivered. *Sampson Kempthorne.*" Before any tender was accepted, the defendants declined to proceed with the building, and *Kempthorne* having sent in his bill, to the amount of 178*l.*, they refused to pay it, on the ground that the charges were exorbitant. The bill was made out, "for professional charges for the working drawings and specifications of the workhouse, together with the surveyor's bill for making out the quantities of the same, for the use of the builders." *Kempthorne*'s portion of the charges amounted to 113*l.*; and the plaintiff's bill for taking out the quantities, which amounted to 65*l.*, was annexed. After some discussion between *Kempthorne* and the defendants, 80*l.* were paid in liquidation of his account.

The present action was brought by the plaintiff to recover the 65*l.* for taking out the quantities.

Kempthorne was examined on behalf of the plaintiff, and he proved that it was usual in the trade, for architects to employ a surveyor to take out the quantities of an intended building, and that the expense was defrayed by the builder who obtained the contract; and that by means of these quantities, the builders were enabled to send in tenders upon a more certain basis than they could without them. He also said, that, when the quantities were furnished, there was more competition among the builders. Two surveyors confirmed these statements, and said, that sometimes two surveyors were employed to take out the quantities; one by the architect, and the other by the builder.

The jury found a verdict for the plaintiff for 65*l.*

Talfourd, Serjt., in *Hilary* Term, obtained a rule *nisi*, pursuant to leave reserved, to set aside the verdict, and to enter a nonsuit, or for a new trial. He contended, that there was no privity of contract between the plaintiff and the defendants, and that the evidence did not shew an universal usage which entitled the plaintiff to maintain this action; but that the plaintiff's remedy was against *Kempthorne*, who employed him.

Wilde, Serjt., and *Willmore*, shewed cause.—It was proved, at the trial, by the evidence of surveyors and architects, that it was customary for an architect to employ a surveyor, to calculate the quantities, and that it was very much to the advantage of parties who advertised for tenders, that the quantities should be taken out; indeed, that it was absolutely necessary it should be done. If the building had been completed, it was stipulated that the person whose tender was accepted should pay the surveyor; but as the defendants declined to proceed further in the undertaking, they prevented the plaintiff from obtaining payment in this manner. Therefore, there was an implied condition, that if the work did not proceed, the defendants should pay for the quantities. The work was useful to the defendants; and when they employed *Kempthorne* to draw the plans, they gave him an authority, as their agent, to engage a surveyor to make out the quantities. In *Webb* v.

Rhodes (*a*), a lessee was compelled to pay an attorney for preparing an agreement for a lease, which had been prepared by the attorney of the lessor, who died before the lease was executed, although no special retainer was proved. *Grissell* v. *Robinson* (*b*), is an authority to shew that evidence of the custom was properly received.

Talfourd, Serjt., and *Chilton*, in support of the rule.—The plaintiff would have been entitled to bring an action against the successful competitor, if the work had proceeded; but, as it did not proceed, *Kempthorne* was the only person whom the plaintiff could sue. If the defendants are liable at all, it is to *Kempthorne;* but there is no privity whatever between the plaintiff and the defendants. *Rigley* v. *Daykin* (*c*) is very analogous to the present case. There one employed an attorney to raise money on mortgage, and the attorney employed another attorney, who agreed to advance the money on behalf of a client; but the negotiation ultimately failed; and it was held, that the attorney of the intended mortgagee could not sue the mortgagor for the costs, although it was proved to be the practice, for the proposed borrower to pay the expenses which had been incurred. Here the builders who tendered were not compelled to take a copy of the quantities; and it does not appear that the defendants were aware that *Kempthorne* had employed any surveyor to take them out, or that they had authorized him to do so.

TINDAL, C. J.—This question comes round to this, whether there was such a contract existing, as entitled the plaintiff to sue the defendants in an action for work and labour. It is not pretended that the parties were ever introduced to each other; the question is, whether *Kempthorne* had not, by the scope of his authority as an agent, a power to employ a surveyor to make out these quantities. That was the point left to the jury, and they determined it in favour of the plaintiff, after hearing the evidence, and a speech, full of just observations, from the defendant's counsel. They have found affirmatively, that there was an usage for architects to have the quantities made out by surveyors; and the maxim of our own, as well as of the civil law, holds good. *In contractis tacite insunt que sunt moris et consuetidinis.* That being so, it appeared that the quantities were beneficial to the builders, and that, by having them, they were enabled with more confidence to make out the estimate for a building. The consequence of this was, that more competitors were induced to send in tenders; and the tenders would be based upon a calculation which was not likely to mislead the parties. Besides this, there was an intimation given to the defendants, in the communication made to their clerk, on the 14th *May*, 1835, that the quantities were being taken out, and that the successful competitor would be required to pay the expense. When the defendants had this intimation before them, and when they afterwards, and perhaps most laudably, declined to proceed with the intended building, the only inference to be drawn is, that they were themselves to pay a charge which they had authorised their agent to incur. It appears, too, that *Kempthorne*, subsequently sent his account to the defendants, and included the plaintiff's demand in a separate charge; here they had most express notice of the two

(*a*) 3 Bing. N. C. 732; S. C. 3 Hodges, 138.
(*b*) 3 Bing. N. C. 10; S. C. 2 Hodges, 138.
(*c*) 2 Young & J. 83.

matters, but they came to a compromise with the architect, without noticing the other charge, although it would then have been open for them to have said, that they did not recognise the demand made by the plaintiff. It is objected that a contract cannot shift, so as to leave two persons liable at the same time, and I am far from saying that may not be so, in some cases. But this was a conditional contract; the successful competitor was to pay, in the first instance, but there was also a tacit agreement that if the work was not suffered to proceed, so that there was no successful competitor, then that the plaintiff should have a remedy against those persons who had caused him to be put in motion. This rule must, therefore, be discharged.

PARK, J.—The question is—is the plaintiff to be paid for his work, and by whom? The question for the jury was, whether there was sufficient evidence of an implied contract between the plaintiff and the defendants. It seems to me, that *Kempthorne* was authorised to enter into a contract with a surveyor for the purpose of having these quantities calculated. It is also impossible to suppose, that when the defendants compromised with *Kempthorne* for the payment of his bill, they could have imagined that it included the surveyor's charges; and it does not appear that they then made any objection to the plaintiff's demand.

BOSANQUET, J.—I am of opinion that there is no ground for disturbing this verdict. The jury must be taken to have found that all which was done by *Kempthorne*, was done according to the usage and custom of the trade. Here the agent was authorised to make plans of the building, but he did not take out the quantities, and the defendants knew that they were taken out by somebody, because they gave notice that copies might be obtained. If, after the advertisement was published, the defendants declined to proceed with the building, so that there could be no successful competitor, who was to pay the plaintiff but the defendants, who must be taken to have authorised *Kempthorne* to employ him?

COLTMAN, J.—The plaintiff's case is, that if there was a successful competitor, he was to pay for taking out these quantities; but if there was no successful competitor, then that the defendants were to pay for them. The defendants say, that if there was no successful competitor, the plaintiff was not to be paid any thing, but that it was a mere speculative contract on the part of the plaintiff. But there was no evidence to support this supposition; and the general rule is, that a person who does work is to be paid for it by some person. When the nature of an architect's employment is considered, I think there was sufficient evidence to induce the jury to find a verdict for the plaintiff. An architect is not accustomed to take out quantities, or to make advances in money. If the defendants did not intend to pay the plaintiff's demand, they ought to have given a specific notice to that effect, to *Kempthorne*, before his account was settled.

Rule discharged.

May 23.

DOE d. WADE *v.* ROE.

On a motion for judgment against the casual ejector, the affidavit of the service of the declaration and notice ought to state that it was explained to the tenant; it is not sufficient to say it was read over.

FISH moved for judgment against the casual ejector.—The affidavit of the service of the declaration stated, that the declaration and notice were read over to the tenant; but it did not also state that the intent and meaning of the service had been explained.

TINDAL, C. J.—That is not sufficient; a proceeding in ejectment is very unintelligible to common people, and it is not desirable to establish a new form for the affidavit of service (*a*).

BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused (*b*).

(*a*) See Tidd's Forms, Chap. XLVI. (s. 31.)

(*b*) Overruling *Doe* v. *Roe*, 1 Dow. P. C. 428; and see *Doe* d. *Downes* v. *Roe*, 1 Har. & Wol. 671.

June 12.

HUNTER *v.* WHITFIELD.

Where a plaintiff proceeded to outlawry without endeavouring to find the defendant's residence by applying to persons with whom he knew the defendant was acquainted, it was *held*, that this was no ground for reversing the outlawry without costs.

W. H. WATSON obtained a rule *nisi* to reverse the outlawry of the defendant without payment of costs. The plaintiff, who had formerly been the defendant's attorney, sued out a writ of *capias* in *May*, 1836, and in *December*, a *capias utlagatum* was issued. It was stated in the defendant's affidavit, that he had resided in *France* for three years, and that the plaintiff was well acquainted with several persons who could have given information respecting his residence; and that the plaintiff knew that one *Murray* paid an annuity to the defendant. The plaintiff swore in his affidavit that he had not known the defendant's residence during the last three years.

Crowder shewed cause, and contended, that the defendant had not established a case which would induce the Court to set aside the outlawry, except upon the usual terms.

Watson, contrà, submitted that the plaintiff ought to have made inquiries to ascertain the defendant's residence, before he proceeded to outlawry. He cited *Pigou* v. *Drummond* (*a*), where the court set aside proceedings in outlawry, without costs, on the ground that the plaintiff knew that the defendant had an attorney in this country.

TINDAL, C. J.—In that case we thought that there had been an abuse of the process of the court. This does not appear to me to be within that class of cases in which an outlawry is reversed without costs.

(*a*) 1 Bing. New Cases, 354.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute on payment of costs, and putting in bail in the alternative, to pay or render (*b*).

(*b*) See *Adlame* v. *Colebatch*, 2 Salk. 495. Archbold's Practice, 489.

FINLEYSON *v.* MACKENZIE.

May 25 & 27.

In debt on a bill of exchange for 78*l.* 13*s.* 6*d.* the defendant pleaded payment into court of 5*l.* 3*s.* 6*d.* and that he was not indebted to the plaintiff to a greater amount in respect of the cause of action in the declaration mentioned. The plaintiff having taken issue on this plea, *held*, that the plea would have been bad on special demurrer as amounting to *nil debet*, in contravention of the new rules of pleading; but, after a verdict found for defendant, the Court refused to disturb it.

DEBT by the indorsee against the acceptor of a bill of exchange, for 78*l.* 13*s.* 6*d.*, drawn by one *J. Gilles*, and payable three months after date.

Pleas—First, a payment of 5*l.* 3*s.* 6*d.* into Court, and that the defendant was not indebted to the plaintiff to a greater amount than 5*l.* 3*s.* 6*d.* in respect of the causes of action in the declaration mentioned: second, except as to 5*l.* 3*s.* 6*d.*, that the defendant received no consideration or value for accepting the bill, and that the plaintiff retained the bill, in violation of good faith, after obtaining it for the purpose of discount. The plaintiff traversed the first plea, except as to the payment into court, and replied *de injuriâ* to the second plea.

At the trial, before *Vaughan*, J., *Gilles*, the drawer of the bill, proved that the bill was entrusted with him by the defendant, to get it discounted; and that he, *Gilles*, applied to the plaintiff for the purpose of raising the money; but that the plaintiff, instead of discounting the bill, retained it as a security for a debt of 40*l.* due to him from *Gilles*, and advanced only 5*l.* 3*s.* 6*d.* The jury found a verdict for the defendant on both issues.

Wilde, Serjt., obtained a rule *nisi* for a new trial, or to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the first plea afforded no answer to the action, as it amounted to *nil debet*, to all the demand beyond 5*l.* 3*s.* 6*d.* in contravention of the new rules of pleading.

Kelly shewed cause.—As to the first plea. It is true, that, by the new rules, in actions of debt on bills of exchange, the plea of *nil debet* or *nunquam indebitatus*, is not allowed, Reg. Hil. T. 4 Wm. 4, 3, 4. But the form of the plea of payment which is given in the same rules, is applicable to actions of debt on bills of exchange as well as to other actions. It is directed that "when money is paid into court, such payment shall be pleaded *in all cases*, and as near as may be in the following form, *mutatis mutandis*." Reg. Hil. T. 4 Wm. 4, 17. Here the first plea is drawn exactly according to this form, and indeed the defendant was compelled to pursue it. If he had not done so, but had proceeded to set out the other facts specially, then it would have been objected that the form was not observed. Therefore it must be assumed that when payment is pleaded to a bill of exchange, the general issue is to be allowed, as to the remainder of the demand; and the defendant is in the same situation as he was in before these rules, if he paid money into Court as to part of the demand, and pleaded the general issue as to the remainder. These rules have the force of an act of parliament, and it is directed, without except-

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ing bills of exchange, that in all cases, the form of the plea of payment shall be according to the form given in Reg. 17. The second plea was merely added *ex majori cautelâ*. [*Kelly* was about to support the second plea, when he was stopped by the Court.]

Wilde, Serjt., in support of the objection to the first plea.—The first plea admits the drawing and accepting the bill, and also that the plaintiff gave good consideration for it; and yet it is now contended that the defendant is entitled to a verdict, although only 5*l.* 3*s.* 6*d.* was paid, upon a bill for 78*l.* 13*s.* 6*d.* It is obvious, that the defendant ought to have gone on to shew a payment or release of the residue of the bill. If this form of pleading were allowed, then, in all actions on bills of exchange, the defendant may pay one shilling into court, and have the benefit of the general issue, as before the new rules of pleading. The rules 2, 3, & 4, of Hil. T. 4 Wm. 4, shew expressly that a plea of *nil debet* or *nunquam indebitatus* cannot be pleaded in actions on bills of exchange, but it is required that "the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

TINDAL, C. J.—This case may be decided upon the first plea. I am ready to admit that, upon special demurrer, the plea would be bad, as being in direct violation of the new rules of pleading, which take away the plea of the general issue in actions of debt and assumpsit, on bills of exchange. But this application is made after a verdict for the defendant upon an issue which the plaintiff has himself raised. The defendant pleaded, that originally only 5*l.* 3*s.* 6*d.* was due, and the plaintiff chose to go to trial upon that allegation. It resembles the case of *Rawlins* v. *Danvers* (*a*), where the defendant in an action on a bail-bond having pleaded *nil debet*, and the plaintiff did not demur, but took issue upon the plea; Lord *Ellenborough* held, that the defendant was let into any defence which he could prove. I am, therefore, of opinion, that it is too late to object to this plea; and this rule must be discharged.

PARK, J., concurred.

VAUGHAN, J.—I am of the same opinion. I do not think we can treat the first plea as a nullity; but, as the plaintiff has put the allegation in issue, the verdict ought to stand.

COLTMAN, J.—It is not easy to see what the operation of the 17th rule is, in a case of this description, when it is contrasted with the 2nd, 3rd, and 4th rules. It appears to me that the plea is clearly bad in form, but, for the reasons already given, I agree that this rule must be discharged.

Rule discharged (*b*).

(*a*) 5 Esp. N. P. C. 38.
(*b*) See *Bradley* v. *Milnes*, 1 Hodges, 158, and *Rand* v. *Vaughan*, 1 Hodges, 173.

DOE d. BRAME *v.* MAPLE.

May 30
&
June 1.

In ejectment by the assignee of a mortgage against the tenant of the mortgagor, the lessor of the plaintiff proved a deed of assignment which recited a mortgage of certain premises for 900 years as a security for 1500*l.*, and it was witnessed, that in consideration of 1500*l.* paid to the mortgagee, he transferred the mortgaged premises to the lessor of the plaintiff, and the mortgagor, in consideration of 10*s.*, assigned, ratified, and confirmed the same. *Held*, that a stamp of 35*s.* was sufficient, the seisin of the mortgagor having been proved.

EJECTMENT by a mortgagee. At the trial, before *Coltman*, J., at the last *Suffolk* assizes, the following appeared to be the facts of the case:—

The lessor of the plaintiff proved that the corporation of *Ipswich* granted a lease of the premises sought to be recovered, to one *Ellis*, in 1796; and that the defendant came into possession in 1818, and subsequently acknowledged that he was tenant to the corporation. A deed of assignment of mortgage was then proved, bearing date the 11th *October*, 1815, made between one *Barthrop*, of the first part; the corporation of *Ipswich*, of the second part; and one *Pytches*, through whom the lessor of the plaintiff claimed, of the third part; wherein, after reciting that, by indenture of mortgage, dated in 1775, the corporation of *Ipswich* had mortgaged the premises for 900 years as a security for 1500*l.*, and that, by divers mesne assignments, which were also recited, the mortgage term was vested in *Barthrop;* it was witnessed, that, in consideration of 1500*l.* paid to *Barthrop*, he, the said *Barthrop*, by the direction of the corporation, did bargain, sell, assign, transfer, and set over, and in consideration of 10*s.*, the said corporation did grant, bargain, sell, and assign, ratify, and confirm, the said mortgaged premises, unto the said *Pytches;* to hold for the then residue of the said term of 900 years, with a proviso for redemption, on repayment of the said 1500*l.* and interest thereon.

This deed was stamped with a 35*s.* stamp; but it was objected, on behalf of the defendant, that, inasmuch as the recitals were not evidence against him, and as he was not estopped from denying that the corporation were not seised of the premises in 1775, the lessor of the plaintiff was compelled to rely upon the conveyance of the 11th *October*, 1815, as a grant from the corporation; and that it therefore required an *ad valorem* stamp of 6*l.*, as an original mortgage.

Kelly obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, upon the above question as to the sufficiency of the stamp; and also upon the other points, which the Court did not determine.

Palmer shewed cause.—It was sufficient for the lessor of the plaintiff to prove the deed of 1815, and that clearly shewed a good title in the lessor of the plaintiff. *Doe* d. *Rogers* v. *Brooks*(*a*). It is, on the face of it, an assignment of the mortgage, and the words of confirmation by the corporation, do not make it amount to an original mortgage. No further sum was advanced, and the case comes precisely within the words of the Stamp Act, which relate to assignments of mortgages; 55 Geo. 3, c. 184, tit. *Mortgage*. The recital of the mortgage, is *primâ facie* evidence that there was a valid deed of that date which was properly stamped, *Quin* v. *King* (*b*).

Kelly and *O'Malley*, in support of the rule.—If the deed of 1815 is treated as a grant or demise of the premises from the corporation of *Ipswich*, then it requires an *ad valorem* stamp as an original mortgage. If it is not a grant,

(*a*) 3 Ado. & Ellis, 513; S. C. 1 Har. & Wol. 400.

(*b*) 1 M. & Wels. 44; S. C. 1 Gale, 407.

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but a mere confirmation of title, then there was no sufficient evidence of the title of the lessor of the plaintiff, because the recitals in the deed of 1815 are not evidence against the defendant; and there is no proof that the corporation was seised in 1775, when the mortgage was executed. There is no demise from the corporation stated in the declaration; therefore, the lessor of the plaintiff relied entirely upon his title as assignee of the mortgage. In *Doe* d. *Rogers* v. *Brooks* (*c*), the seisin of the mortgagor was proved.

TINDAL, C. J.—This case is capable of a very simple solution. It is an action of ejectment, brought by the assignee of a mortgage, against the tenant of the mortgagor. The lessor of the plaintiff claimed under an assignment of a term of 900 years by way of mortgage, which was originally granted by the corporation of *Ipswich*. The deed of assignment, which was dated in 1815, was in evidence; and the only question is, whether it appears to be properly stamped. On the part of the defendant it is contended, that, if the lessor of the plaintiff availed himself of this deed to shew a grant of the premises from the corporation, it must then be considered as an original mortgage, which requires an *ad valorem* stamp. On the part of the lessor of the plaintiff, it is said to be a mere assignment of the mortgage, which requires only a 35*s*. stamp. Upon looking at the deed, and also at the 55 Geo. 3, c. 184, I am of opinion, that it is properly stamped. When such an objection is taken, I know of no other way of deciding it, than by looking at the operative part of the deed. Now the 55 Geo. 3, c. 184, title *Mortgage*, charges an *ad valorem* duty, "where the mortgage shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." It appears, upon the face of this deed, that it is not a mortgage, for there was no sum of money lent, nor was there any thing previously due from the corporation, to the assignee of the mortgage. The original mortgage from the corporation is recited; and then, in consideration of 1500*l*. paid to *Barthrop*, he transfers the security; and, in consideration of 10*s*., the corporation grant, ratify, and confirm the assignment for the residue of the term of 900 years. This, then, is an assignment of a mortgage. The statute requires a stamp of 1*l*. 15*s*. upon any transfer or assignment of any mortgage, "provided no further sum of money or stock be added to the principal money or stock already secured." The present case comes precisely within this definition; and that puts an end to the question. I find nothing in the act to shew that when an additional security is thrown in, a further stamp would be required; but it is unnecessary precisely to decide that point, or to consider the questions which have been argued as to the doctrine of estoppel.

PARK, J., and VAUGHAN, J., concurred.

COLTMAN, J.—This is a very clear case. The party who makes an objection to the stamp is bound to shew that it is insufficient; and here the defendant cannot do that without referring to the recitals; and *Doe* d. *Rogers* v. *Brooks* (*c*) shews, that, if the recitals are used by one party, they may also be used by the other.

Rule discharged.

(*c*) 3 Ado. & Ellis, 513; S. C. 1 Har. & Wol. 400.

LACEY *v.* WALROND, Administrator of WALROND.

June 5 & 6.

ASSUMPSIT for work and labour performed by the plaintiff, as an undertaker, about the funeral of the deceased, at the request of the defendant, as administrator; and for coaches and horses used in the said funeral. Counts for money paid for the use of the defendant as administrator, and on an account stated with him in that character.

The defendant pleaded payment into court of 53*l.*, and that the plaintiff had not sustained damages to a greater amount in respect of the cause of action in the declaration mentioned.

At the trial, before *Parke*, B., at the last *Gloucester* assizes, the following appeared to be the facts of the case. The action was brought to recover 72*l.*, the charges made by the plaintiff, an undertaker, for conducting the funeral of Mrs. *Walrond*, a lady of fortune, the mother of the defendant. Mrs. *Walrond* died at *Lasborough*, in *Gloucestershire*, on the 29th of *October*, 1833, and Sir *Bethell Codrington*, her brother, who lived near her residence, ordered the plaintiff to make preparations for burying the deceased, in the family vault at *Dodington*, which was situate about ten miles from *Lasborough*. The defendant, who was the only child of the deceased, was in *Paris* when his mother died, but, upon receiving intelligence of her decease, from Sir *B. Codrington*, he came to *London*, and, on the 24th of *November*, he wrote the following letter to Lady *Codrington*:—

"We arrived in *London* on *Tuesday* evening, and I found your kind letter and one from my uncle, enclosing a copy of my poor mother's will. I delayed writing until I could with some certainty say when I could leave *London*. I now hope to get away *Monday* or *Tuesday* next, and I will avail myself of your and my uncle's kind invitation to come to *Dodington*. The next day I will ask you or Sir *Bethell* to be so good as to accompany me to *Lasborough*, to break the seals and commence our sad duty. I am much obliged to you and to him for all you have done, which was certainly the best, and all that could be done. Would you or Sir *Bethell* have the kindness to do what I am told must be done, sooner or later, send some one to the house to take a list of all property whatsoever, in and out of doors, which is not sealed up, with a view to its future valuation."

The letters to which this appeared to be an answer were not produced.—Sir *Bethell Codrington* found a testamentary paper, which had been executed by Mrs. *Walrond*, but no executor was appointed. In a codicil, she expressed a wish to be buried in the nearest church-yard, with as little expense as possible, without hearse or carriage, but to be carried by twelve respectable labourers, who should receive not less than one guinea each.

It appeared, that if the directions of the deceased had been carried into effect, the expense of the funeral would not have exceeded the 53*l.* paid into court.

The defendant did not take out administration until *July*, 1836; and the effects were sworn to be under 4000*l.*

It was contended, on behalf of the defendant, that he was not liable to be sued in this action; inasmuch as it was not shewn that he had given any

1. A relative of a deceased lady ordered the plaintiff, an undertaker, to perform a funeral which was suitable to her rank; and her son, many months before he took out administration to the deceased's effects, wrote a letter to the relative who ordered the funeral, in which he expressed his approbation of all that had been done. In an action against the deceased's son, charging him as administrator, for the expenses of the funeral, it was *held*, that the action was maintainable.

2. A plea of payment into court does not bind the defendant beyond the amount paid into court; and he may dispute the residue of the plaintiff's demand, as if non-assumpsit had been pleaded to it.

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orders to the plaintiff to perform the funeral; and that, at all events, he was not liable beyond the amount paid into court.

The learned judge refused to nonsuit the plaintiff, and told the jury that the defendant would not be liable as administrator, in the absence of any express order, for any thing beyond the expenses of such a funeral as the intestate had directed by her will; and that the question therefore was, whether the defendant had by himself, or by his agent, such agent being authorized at the time, or by subsequent ratification, employed the plaintiff to conduct the funeral upon a larger scale of expense. The jury found a verdict for the plaintiff for 16*l.*

In *Easter* Term, *Maule* obtained a rule *nisi*, to set aside the verdict, and to enter a nonsuit, in pursuance of leave reserved, or for a new trial, upon the ground that the credit had not been originally given to the defendant, and that, at all events, he was not liable to be sued in his character of administrator. He contended that the decision in *Rogers* v. *Price* (*a*) could not be supported.

Talfourd, Serjt., and *Lumley*, shewed cause.—If a relative of a party deceased, orders a funeral which is suitable to his degree, the executor or administrator is bound to pay the undertaker, without any express promise to pay, being proved. *Tugwell* v. *Heyman* (*b*). *Rogers* v. *Price* (*a*). And great inconvenience would result if this doctrine were not supported. Upon a like principle, where a surgeon attended a pauper who had accidentally fractured his leg, it was held that an action of assumpsit would lie against the overseer who had seen the pauper, and did not repudiate the surgeon's attendance. *Lamb* v. *Bunce* (*d*). Nor is there any difference between the liability of executors and administrators. Com. Dig. tit. Administration (C. 1.) The express directions given by the deceased would make no difference, because the funeral, in the present case, was not unsuitable to her station and quality; and the defendant, by not pleading non-assumpsit, cannot now object that the funeral was not conducted according to the directions of the deceased, for, by the plea of payment, the contract which is stated in the declaration is admitted. The plea of payment might have been pleaded to a part of the demand, with non-assumpsit as to the charges for carriages and horses. But, at all events, the direction of the learned judge as to the recognition was correct, and the jury were at liberty to find that the defendant ratified the orders which were given to the plaintiff, for the conduct of the funeral. The letter of the 24th *November*, was receivable in evidence, although the letters to which it was an answer were not produced; and it clearly appeared, by the date and other circumstances, that the defendant must have been informed of the particulars relating to the funeral of the deceased.

Maule, and *R. V. Richards*, in support of the rule.—It is quite evident that credit was not originally given by the plaintiff to the defendant, because, when the funeral was performed, the defendant had not arrived in *England*, nor had he given any directions as to the burial of the deceased. There is a dif-

(*a*) 3 Y. & J. 28.
(*b*) 3 Camp. 298.
(*d*) 4 M. & Sel. 275.

ference between the situation of an executor, and that of an administrator. An executor derives his authority from the will of the deceased; but an administrator derives his authority from the letters of administration, which are granted by the Ecclesiastical Court. Thus it has been held, that the Statute of Limitations does not begin to operate, until from the time that letters of administration are granted. *Murray* v. *East India Company* (*e*). It cannot be maintained, as a general proposition, that an administrator is liable to pay for the burial of the intestate, where no express orders are given. As to the payment of money into court, it merely admits the damage and contract, *pro tanto;* but the plaintiff is bound to prove that a larger sum is due. In the present case, the admission is, that the plaintiff is entitled to receive 53*l.*, on some of the causes of action mentioned in the declaration; but he does not admit his liability to pay the charges for the burial at *Dodington*, contrary to the express directions of the deceased. Nor is the plaintiff entitled to recover on the ground, that the defendant ratified the orders given to the plaintiff, because there was no ratification by him after he became administrator; and if the evidence shewed that the defendant was liable at all, it proved a liability in his personal capacity. Nor did the letter which was produced, satisfactorily shew that the defendant had been informed of the circumstances relating to the burial. The letters which are mentioned as having been received by the defendant, were not produced at the trial, because the defendant could not know that a letter written by him to a third party, would be given in evidence. Therefore, on the ground of surprise, there ought to be a new trial.

TINDAL, C. J.—If this case has been properly left to the jury, no rule can be granted on the ground of surprise, as the verdict recovered is under 20*l.* It appears to me, that there was evidence to go to the jury. This is an action for work and labour, by the plaintiff, as an undertaker; and for hearses and carriages provided for a funeral; and the defendant is charged as administrator of the deceased. The defendant, after paying 53*l.* into court, pleads, "that the plaintiff has not sustained damages to a greater amount than the said sum of 53*l.* in respect of the cause of action in the declaration mentioned, and this he is ready to verify, wherefore he prays judgment, if the plaintiff ought further to maintain his action." I am unable to perceive any difference between the effect of this plea, and that of a payment of money into court, by a rule, according to the old practice, and a plea of non-assumpsit to the residue. Therefore, the defendant is not bound by the admission, beyond the 53*l.* paid into court, and he may dispute any other portion of the plaintiff's demand just as freely as if no money had been paid. The defendant is sued as administrator, and by the course of the pleadings it is admitted, that he was administrator; and the question is, whether, beyond the 53*l.*, the defendant is liable to the plaintiff in that character? It appears to me, that he is liable, and that the letter of the 24th of *November*, which was in evidence, amounts to a ratification of the order which was given for the burial of the deceased. Two objections have been raised by the defendant's counsel: first, that it does not appear that, at the time the defendant wrote the letter, he was aware that the funeral had been performed; and, secondly, that as no letters of administra-

(*e*) 5 B. & Ald. 204.

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tion had been taken out at that time, there could be no ratification of the order, by the defendant, in his character of administrator. Now, what was the fair inference to be drawn, as to the defendant's having notice of the way in which the funeral had been performed? The letter was written more than three weeks after the death of the deceased, and the defendant could then have had no reason to doubt but that the funeral had taken place. It is almost impossible to read it, without supposing, that the letters, to which it refers, must have given an account of the funeral; and the very circumstance and tone of the letter shews that it was written by a person who was likely to assume the character of administrator; otherwise why should he speak of breaking the seals, and making an inventory of the property? But it is said, that, as the administration was not taken out until three years afterwards, the letter cannot have the effect of making the defendant liable. It is laid down, in 2 Rolle's Abr. 554, tit. Trespass per Relation, that an administrator shall have an action of trespass for a trespass done to the goods of the intestate, after his death, and before administration granted to him. And in *Whitehall* v. *Squire*(*f*), it was determined, that if a person consents to the disposition of an intestate's goods, and afterwards takes out administration, he cannot maintain trover for them, because he is bound by his former consent. So in the present case, why should not the defendant be held bound for that which he did before he became administrator(*g*)? If, therefore, this letter does amount to a ratification, and I think it does, and, as the defendant has admitted his liability as administrator, to the amount of 53*l*., it appears to me the verdict may stand. It is unnecessary to say any thing on the case of *Rogers* v. *Price*(*h*), inasmuch as it does not govern the present decision.

PARK, J.—We need not give an opinion upon the case of *Rogers* v. *Price*, although I must say it seems to me to be founded on good sense. The defendant, being sued as administrator, cannot, after having paid money into court, say that he is only liable in another character. It cannot be believed, but that the writer of the letter of the 24th of *November* had been informed of the particulars of his mother's funeral; and if he had not intended, at that time, to become the representative of the deceased, he would not have spoken of breaking the seals; or have requested that an inventory of the effects should be made. It has been contended, that there is a distinction between the situation of an executor and an administrator, and I agree to that. But the case of *Whitehall* v. *Squire*(*f*) is an authority to shew, that an administrator may be bound by relation, and there are other cases to the same effect, collected by Mr. *Williams*, in his excellent Treatise on the Law of Executors. I am perfectly satisfied with the verdict and agree that this rule must be discharged.

VAUGHAN, J.—I am of the same opinion. This is an application to the discretion of the Court, and the law and justice of the case go hand in hand. The first question is, as to the payment of the money into court. I do not

(*f*) 1 Salk. 295. 3 Mod. 276.

(*g*) If an executor *de son tort* takes administration, all acts done by him before, are good by relation. Com. Dig. tit. Administrator, (C. 3.) citing *Kenrick* v. *Burges*, Moore's Rep. 126. See also Com. Dig. tit. Administration, (B. 10.) and *Mitchell* v. *Moorman*, 1 Y. & Jer. 21.

(*h*) 3 Y. & Jer. 28.

subscribe to the argument by which it has been attempted to draw a distinction between the old and new practice on this subject; and it seems to me that the defendant is entitled to dispute his liability beyond the 53*l.* We need not touch the case of *Rogers* v. *Price* (*k*), but the question is, whether the jury have drawn a right conclusion from the facts; and I am clearly of opinion that they have done so.

COLTMAN, J.—It has been contended that this action is altogether misconceived, and that the defendant ought not to have been sued in his character of administrator. If that were a good objection, the defendant ought to have pleaded non-assumpsit to the whole demand. But the question now arises, on the record as it stands, and it appears to me that the defendant has clearly admitted his liability as administrator to some extent. The form of the plea of payment into court has been adverted to, and I was at first inclined to think that it was only an admission as to one count in the declaration: but the rule in pleading is, that every thing which is not denied is admitted. Here there are three counts in the declaration, and the defendant admits something to be due, and that the defendant is liable as administrator. In *Meager* v. *Smith* (*l*) it is said, "With regard to the payment of money into court, there is no doubt but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract; if on a general *indebitatus* count for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some one or more of such contracts." It comes, then, to this question, whether there was a ratification by the defendant of that which had been done; and it appears to me that the jury were warranted in finding a verdict for the plaintiff.

Rule discharged.

(*k*) 3 Y. & Jer. 28.

(*l*) 4 B. & Adol. 680.

JACKSON *v.* JACOB.

June 7.

ASSUMPSIT.—The declaration stated that the defendant agreed to sell fifty Great Western Railway shares, to the plaintiff, at 37*l.* 10*s.* per share, and to deliver them, on a certain day. The plaintiff alleged that he was ready and willing to accept the shares, and that he tendered the price of them to the defendant. *Plea*, that the defendant was not ready and willing to accept the shares, and that he did not tender the price, *modo et formâ;* and issue thereon.

At the trial, before *Patteson*, J., at the last *Liverpool* assizes, the plaintiff called *Batley*, his broker, as a witness, who proved that a contract had been made by him, on the 1st of *December*, 1836, with *Atkinson* and *Townley*, the defendant's brokers, for the purchase of the shares, on the defendant's account. The shares not being delivered in due course, *Batley* wrote to the defendant on the 10th of *January*, informing him that he had purchased the shares for the

In an action for non-delivery of shares, sold by defendant's broker, the defendant pleaded that no tender of the price had been made, and issue was joined thereon. It appeared, that the defendant was informed that a tender of the price had been made to his broker; and the defendant, in reply, without objecting that the broker was not his agent, said he would endeavour to make an arrangement for the delivery of the shares. *Held*, that this was sufficient evidence to prove the tender.

2. Whether a tender to a broker is good, *quære*.

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plaintiff, and requiring him to deliver them, in pursuance of the contract, immediately, Two days afterwards, *Batley* received the following letter from the defendant.:—

"I should have replied to your letter per return, but was unavoidably detained at *Manchester*, and since my arrival here have been engaged with my solicitors respecting a quantity of Westerns, bought by me from a party in *Bristol*, at a low price. With regard to the fifty shares sold to you on my account, by Messrs. *Atkinson* and *Townley*, the reason they have not been delivered, has arisen from the defalcation of the party above alluded to. I do assure you, I am most anxious to fulfil all my engagements, and will do my best to satisfy every one; all I require is a little time to arrange matters, and I think it is not asking too much in requesting, under the circumstances, that such may be granted. At all events the market for Westerns is evidently falling; and if you are compelled to buy them in, I request you will wait a short time, as I think you will get them at lower prices than the present, and any deficiency that may arise I shall endeavour to arrange if time be given."

On the 12th *January*, *Batley* made a tender of the amount of the shares, to *Atkinson* and *Townley*, but they referred him to the defendant, and stated that there had been disputes between them, and they had nothing further to do in the transaction. On the same day, the following letters passed between *Lowndes* and *Robinson*, the plaintiff's attornies, and the defendant:—

"*Jan.* 12.

"Dear Sir,—Since you left, this morning, *W. J. Jackson*, a client of ours, has called upon us relative to a contract he made, through his broker, Mr. *J. Batley*, for the purchase from you of fifty shares in the Great Western Railway at 37*l.* 10*s.* Mr. *Jackson*, this day, made a tender of the price to Mr. *Townley*, who referred him to you, and Mr. *Jackson* has requested us to inquire what arrangements you are prepared to make as to these shares. If, as we presume, you are not ready to deliver the shares, Mr. *Jackson*, although he has sold them, will agree to cancel his contract on reasonable terms, and you had therefore better come across, or authorize Messrs. *Atkinson* and *Townley*, to arrange matters with him. Requesting to hear from you, by return of post, we are, &c. *Lowndes* and *Robinson*."

From the defendant to Messrs. *Lowndes* and *Robinson*.—

"*Manchester Jan.* 13.

"Gentleman,—In reply to your letter of yesterday, I beg to say, I wrote to Mr. *Batley* on the subject previous to my leaving *Liverpool*. It is my intention to be over on *Monday* next, when I shall endeavour to arrange with you respecting the shares."

A verdict was found for the plaintiff for 420*l.*

R. Alexander, in *Easter* Term, obtained a rule *nisi*, to set aside the verdict, and to enter a nonsuit, on the ground that a tender made to a broker was insufficient; and that if the plaintiff relied upon a waiver of the tender, it ought to have been pleaded as a waiver.

Cresswell and *Crompton* shewed cause.—It would have been quite sufficient if the plaintiff had averred in the declaration, that he was ready and willing to

accept the shares, and that part of the plea, which denied that a tender had been made, was superfluous and immaterial. *Rawson* v. *Johnson* (*a*). *Pordage* v. *Cole* (*b*). *Waterhouse* v. *Skinner* (*c*). Therefore no proof of a tender was necessary to support the issue; and, if proof of it were necessary, then a tender made to the defendant's brokers would be good. At all events, the jury might well infer that the defendant was informed that a tender of the money had been made to his brokers, as his agents, and that the letter of the 13th of *January* amounted to a recognition of their authority to receive a tender. That being so, the plaintiff is entitled to retain the verdict.

Wilde, Serjt., *R. Alexander*, and *Wightman*, in support of the rule.—The plaintiff was bound to prove a tender, inasmuch as he had alleged in the declaration that a tender was made. A tender made to a broker is not legal, inasmuch as a broker is *functus officii*, the moment the sale is made. *Blackburn* v. *Scholes* (*d*). When the tender was made, the brokers referred *Batley* to the defendant, saying, that they had nothing to do with the matter; and there are many authorities which shew that a tender made to a person who disclaims an authority to receive it, is insufficient. *Bingham* v. *Allport* (*e*). *Wilmot* v. *Smith* (*f*).

TINDAL, C. J.—This question arises, after a verdict found for the plaintiff, upon an issue raised on a plea, which alleges that the plaintiff was not ready to accept certain shares, and that he had not tendered the price of them to the defendant. It is quite unnecessary to decide whether a tender of the price made to a broker, who has sold shares for his principal, is sufficient. I determine this case upon the ground, that the correspondence shews that a good tender was made. It is quite clear that the defendant had no shares to deliver, and, therefore, the offer of the money was a mere matter of form. I do not urge this as amounting to a dispensation of a tender, but when we find a correspondence which leaves the matter somewhat equivocal, we do no violence to it by holding that it appears that the tender was admitted to have been made. The letter of the 12th of *January* states, that a tender of the money had been made to the defendant's brokers, and the defendant, with a knowledge of this fact, says, in his reply, that he intends to come to *Liverpool*, to endeavour to make an arrangement respecting the shares. This, therefore, is an admission, first, that the contract was made; and, secondly, it is a ratification of the tender. So, by analogy, when the drawer of a bill promises payment to a holder, he thereby admits that the necessary steps have been taken to render him liable. The rule must be discharged.

PARK, J.—I am of the same opinion. It is not necessary to decide whether a tender made to a broker is good. I rely upon the particular circumstances of the case, and it is impossible for any one, with common sense, to read the defendant's letters, without seeing that he knew that the tender had been made to *Townley*, and that *Townley* had refused to receive the money. Yet, on the very next day, the defendant, without repudiating the supposition that *Townley* is his agent, informs the plaintiff's attornies, that he will endeavour to make

(*a*) 1 East, 203.
(*b*) 1 Wm. Saund. 319 b.
(*c*) 2 Bos. & P. 447.
(*d*) 3 Campb. 343.
(*e*) 1 Nev. & M. 398.
(*f*) 3 Car. & P. 454.

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some arrangement respecting the shares. In fact, the defendant altogether acquiesces, and admits that the tender was a good one.

VAUGHAN, J.—The jury were asked, whether there was not evidence of a good tender, and, upon looking at the letter, it is impossible not to see that there was a recognition, by the defendant, of *Townley's* authority to receive a tender. If it were otherwise, the defendant would have disclaimed the agency of *Townley*, but, instead of doing so, he promised to make some arrangement.

COLTMAN, J.—I am of the same opinion. The question is, what the understanding between these parties was? and whether the plaintiff was not entitled to act upon the belief that the broker had authority to receive the tender? The defendant, by his letter, admitted that the agent had such an authority, because he promised to make some arrangement with the plaintiff; and he cannot now turn round and defeat the justice of the case, by saying, that the agent had no such authority.

Rule discharged.

In the Matter of RIDER and another.

June 9.

A bond of submission recited that certain disputes, relating to building a house, had been agreed to be referred to arbitration, and that the arbitrators should determine all claims relating to alleged defects and imperfections in the materials and workmanship, and likewise relating to the accuracy of the claims for extra work and deductions for omissions; and to ascertain what balance, if any, was due to the builder, in respect of such extras and omissions; the costs to abide the event of the award. The arbitrator awarded that 296*l.* should be paid to the builder in full compensation and satisfaction for all the matters in difference. *Held*, that the award was bad, as the two first subjects of dispute were not determined.

A RULE *nisi* had been obtained to set aside an award, upon the ground that the arbitrator had not determined the matters referred to him. It appeared, by the affidavit of Mr. *Fisher*, that Messrs. *Riders*, builders, had entered into a contract with him, to build a house and offices at *Bentworth*, and that disputes having arisen between them respecting the sufficiency of the materials, and the goodness of the workmanship, it was agreed to refer the matter to arbitration.

The bond of arbitration recited, that Messrs. *Rider* had entered into the contract to build the house, and that disputes had arisen respecting alleged defects and imperfections, and that the said *Riders* had made claims for extra works, and deductions in regard to omissions, but of which no detailed accounts had been furnished to *Fisher;* and that it had been agreed between the parties, that, for the purpose of settling, judging, and determining, of all such alleged defects and imperfections, and what, if any thing, was necessary to be done to put the said house and outbuildings in a perfect condition, in conformity with the original drawings and specification, and according to the intent and meaning of the said contract, and for ending all differences and disputes, that it should be referred to certain arbitrators, to whose arbitrament and final determination the parties had severally and respectively agreed to submit all such claims, differences, and disputes between them, and the accuracy of such claims and deductions, and that their award should be final and conclusive both at law and in equity. It was also agreed that the costs incident to the reference should abide the result of the award.

The arbitrators, by their award, directed that *Fisher* should "forthwith well and truly pay unto the said *Riders* the full sum of 296*l.*; and that the same should

be received by them in full satisfaction and compensation of and for all the matters in difference between them, and so referred to them the said arbitrators."

Taddy, Serjt., and *C. Saunders*, shewed cause.—The finding of the arbitrators does in effect determine all the matters in difference between the parties; and if *Fisher* is entitled to deductions on account of any imperfections, it must be taken that the balance was struck after allowing for such imperfections. *Cargey* v. *Aitcheson* (*a*), *Dicas* v. *Jay* (*b*). [*Tindal*, C. J.—The omission to mention defects, if any existed, would affect the question of costs, and probably the greatest expense was incurred in investigating that portion of the case.] If the parties had wished for a specific decision, with a view to costs, an application ought to have been made to the arbitrators. *Dibben* v. *The Marquis of Anglesey* (*c*).

Wilde, Serjt., *contrà*.—The submission gave no power to the arbitrators to set off damages sustained by defects, in liquidation of the general balance. As the award now stands the question of costs remains undetermined.

TINDAL, C. J.—I am of opinion that the submission, which prescribes what the arbitrators are to do, has not been observed. They are required, first, to determine all disputes "relative to alleged defects and imperfections," that is one substantive matter; secondly, "concerning disputes relating to the accuracy of claims for extra work, and deductions for omissions;" and, thirdly, "to ascertain what balance might be due in respect of such extras and omissions." But the balance which has been found by the arbitrators, seems to be confined to the third head of inquiry, and the two first are neglected altogether, so that it is uncertain whether or not they have found a general balance. The rule must, therefore, be made absolute.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute.

(*a*) 3 Dow. & R. 433. (*b*) 10 Bing. 570. (*c*) 5 Bing. 281.

BROGREFFE *v.* HAWKE.

June 12.

A judge has power, under the Rule of *Hilary* Vacation, 1834, to certify that a cause was proper to be tried before him, and not before the judge of an inferior court, where the action is referred, at *nisi prius*, to arbitration.

A RULE *nisi* had been obtained, calling upon the defendant to shew cause why the taxation of costs in this cause should not be reviewed. The action was brought to recover 119*l.*, alleged to be due on a building contract, and the defendant pleaded, first, non-assumpsit; secondly, payment; and, thirdly, a set-off.

After the cause was set down for trial, it was referred to arbitration, on the recommendation of the learned judge, and a nominal verdict was taken for 300*l.*, the damages stated in the declaration. The arbitrator, after examining upwards of twenty witnesses, directed by his award, that a verdict should be entered for the defendant on the second issue, and for the plaintiff on the first and third issues, with 8*l.* 5*s.* 8*d.* damages; and that each party should pay

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his own costs. An application was made to *Tindal*, C. J., in pursuance of the Rule of *Hilary* Vacation, 1834, to certify, on the postea, that the cause was proper to be tried before him, and not before a judge of an inferior court, but no certificate having been given, the costs were taxed on the reduced scale.

Ellis shewed cause, and contended that the Rule of Court did not enable the judge to certify, unless the cause had been actually tried before him; and that, if the parties had intended to reserve a power of granting a certificate, it was necessary to provide for it specially in the order of reference, as in cases where arbitrators are authorized to certify that the costs of a special jury ought to be allowed (*a*).

Wilde, Serjt., *contrà*, insisted that the case was a proper one for the decision of the superior court, and that the intention of the rule was, that the judge should have a power to certify, when a verdict was taken subject to an award; and that the point had been so determined in *Nokes* v. *Fraser* (*b*). He cited *Ivey* v. *Young* (*c*), to shew that the certificate may given at any time.

TINDAL, C. J.—*Nokes* v. *Fraser* (*b*) is certainly in point; and as it seems to me that I had the power to certify, I shall do so. The rule must be made absolute.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute.

(*a*) See *The King* v. *Moate*, 3 B. & Adol. 237.

(*b*) 3 Dow. P. C. 339.

(*c*) 5 Dow. P. C. 450.

June 8 & 9.

BIRD *v.* GAMMON.

1. Where B. had issued execution against the goods of A. his debtor, C. came forward and agreed to pay B. and all the other creditors of A., upon having an assignment of his effects; and, in pursuance of this agreement, A. gave a bill of sale of his effects to C., and B. withdrew his execution. *Held*, that this raised a new contract between B. and C., and that the former might sue the latter, for the amount of the debt originally due from A.

2. Where a debtor wrote a letter to a creditor respecting a debt for which he was liable, stating, that he was very wretched indeed on account of his account not being paid, and that he heard that there was a prospect of an abundant harvest, which must very considerably reduce the account, and that if it did not, the concern must be broken up to meet it at last. *Held*, that this was a sufficient acknowledgment to take the case out of the Statute of Limitations, (9 Geo. 4, c. 14;) also that the construction of the letter was properly left to the jury, and that parol evidence was admissible to shew the amount of the debt.

ASSUMPSIT for work and labour, money had and received, and on an account stated. *Pleas*—non assumpsit; and as to a part of the demand, the Statute of Limitations; and as to another part, payment into court. At the trial, before *Parke*, B., at the last *Worcester* assizes, the following appeared to be the facts of the case:—

The plaintiff sued the defendant to recover certain sums of money amounting to 1000*l.* and upwards, the balance of an account. As to 340*l.* 6*s.* 10*d.* part of the demand, the following evidence was given. In 1829, the plaintiff, who was an attorney, obtained a warrant of attorney, from one *Lloyd* a farmer, for the sum of 340*l.* 6*s.* 10*d.*; and, *Lloyd* being in embarrassed circumstances, the plaintiff signed judgment on the warrant of attorney, and *Lloyd*'s goods

were taken in execution. The defendant, who was brother-in-law to *Lloyd*, then came forward, together with one *Acton*, since deceased, with a view to make some arrangements for the settlement of *Lloyd*'s affairs; the defendant and *Acton* being themselves creditors to a considerable amount. An offer of 10*s*. in the pound was first made to the creditors, which they refused to accept; whereupon the defendant and *Acton*, having examined the state of *Lloyd*'s accounts, at length proposed to pay the debts in full, upon condition that all his effects were conveyed to them. The plaintiff and the other creditors assented to this proposal, and the plaintiff withdrew the execution; and, on the 15th of *May*, 1829, a bill of sale was prepared, which recited that *Lloyd* was in embarrassed circumstances, and that the defendant and *Acton*, as his friends, had come forward to pay his debts, or to secure them to be paid; and that, for the purpose of indemnifying themselves, they had taken the said bill of sale. The consideration for this assignment was stated to be the undertaking of *Acton* and the defendant to pay the debts, which amounted to upwards of 3000*l*. The bill of sale was attested by the plaintiff. An account was also proved, signed by the plaintiff and the defendant and also by *Lloyd*, by which it appeared, that, at this time, 340*l*. 6*s*. 10*d*. was due from *Lloyd* to the plaintiff, and evidence was given to shew that the effects which passed by the bill of sale were sufficient, or nearly sufficient, to pay all the creditors 20*s*. in the pound.

After this arrangement had been made, *Lloyd* remained in the occupation of his farm, as bailiff, and the defendant and *Acton* made payments on account of the debts due to *Lloyd*'s creditors, and incurred other debts, and amongst others a further debt to the plaintiff. Another account was proved, bearing date in *May*, 1832, which contained a statement of the debts then due in respect of *Lloyd's* business; and in that account the plaintiff's claim was set down as 767*l*. 14*s*. 11*d*. which sum included the 340*l*. 6*s*. 10*d*.; this account was cast up by the defendant in his own figures, and *Lloyd*, who was called as a witness, proved that the defendant said that he owed all that money to the plaintiff.

For the purpose of taking the case out of the Statute of Limitations, the following letter, written by the defendant to the plaintiff, on the 4th *August*, 1832, was put in evidence.

"I am in receipt this day only, of your's of the 22d inst. I do wish I could comply with your request; for really I am and have been very wretched indeed on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last. I have this week paid *Lechmere* and Co. very near 500*l*. on account of *Lloyd*, not a farthing of which I ever expect again, having before paid, on the same account, more than the value of the security I hold. It is really a calamity to be so connected. It is impossible any one can be more sensible than I am of your kindness towards *Lloyd*'s family, and my hope is that out of the present harvest you will be paid."

It was objected, on the part of the defendant, first, that the plaintiff was not entitled to recover, inasmuch as a chose in action could not be assigned, and that the Statute of Frauds required an undertaking to pay the debt of another to be in writing; secondly, that, as to the 340*l*. 6*s*. 10*d*., the Statute of Limitations was a bar to the action, and that the letter of the 4th of *August* did not amount to an acknowledgment or promise to pay the debt within 9 Geo. 4, c. 14, and, if it did, then that parol evidence to shew the amount of

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the debt was inadmissable. The learned judge directed the jury as to the first objection, that if they were satisfied that *Lloyd* was discharged, and that the defendant became the plaintiff's debtor, the action was maintainable; as to the other objection, he directed the jury that the letter was sufficient to take the case out of the operation of the Statute of Limitations, and that, if they were also of that opinion, the objection could not be supported. The jury found a verdict for 488*l.* 12*s.* 7*d.*, which included the 340*l.* 6*s.* 10*d.*

Maule, in *Easter* Term, obtained a rule *nisi*, upon the objections taken at the trial, to set aside the verdict, and enter a nonsuit; or for a new trial, or to reduce the damages by the sum of 340*l.* 6*s.* 10*d.*; he also contended, that the effect of the letter of the 4th *August* was a question for the judge, and not for the jury.

Wilde, Serjt., *Ludlow*, Serjt. and *Godson*, shewed cause.—First, this case may be determined without reference to the Statute of Limitations. When the accounts were balanced between the parties, in *May*, 1832, there was evidence that the defendant then acknowledged that he owed the balance, which was stated, to the plaintiff; and this action was commenced before the expiration of six years from that period. Thus, in *Smith* v. *Forty* (*a*), an administratrix sued for a debt due to the intestate; and it appeared that the debt accrued more than six years before the commencement of the action, but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could; and it was held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the Statute of Limitations was no bar. But, if it is necessary to shew an acknowledgment or promise, then the letter sent by the defendant to the plaintiff, contained an acknowledgment of the debt sufficient to warrant the jury in finding a verdict for the plaintiff. The cases upon this point are much stronger than the present. *Dodson* v. *Mackey* (*b*), *Frost* v. *Bengough* (*c*), *Bryan* v. *Horseman* (*d*), *Beale* v. *Nind* (*e*), *Dabbs* v. *Humphrey* (*f*), *Lechmere* v. *Fletcher* (*g*). *Whippy* v. *Hillary* (*h*) is distinguishable from the present case, because there the defendant referred to another person, by whom the defendant was to be paid; and the statute 9 Geo. 4, c. 14, requires the promise to be made by the party "chargeable thereby." But the defendant refers in his letter to a debt which he was himself liable to pay, and the promise is unconditional. It is true that he refers to the proceeds of the harvest, as the fund out of which he hopes to satisfy the demand; but he proceeds to say, that if it does not reduce the account, "the concern must be broken up to meet it at last." *Linsell* v. *Bonsor* (*i*) is also distinguishable, because the defendant acknowledged the debt, but added that he was determined not to pay it. The question on the Statute of Frauds does not arise; for here there was an agreement between the plaintiff, *Lloyd*, and the defendant, that the latter shall become the debtor, and the jury have found

(*a*) 4 Car. & P. 126.
(*b*) 4 Nev. & Man. 327.
(*c*) 8 Moore, 180.
(*d*) 4 East, 599.
(*e*) 4 B. & Ald. 568.
(*f*) 4 M. & Scott, 285.
(*g*) 1 Cr. & M. 623.
(*h*) 3 B. & Adol. 399.
(*i*) 2 Bing. N. C. 241. S. C. 1 Hodges, 305.

that *Lloyd* was released. The case is, therefore, within the principle of *Good* v. *Cheeseman* (*k*).

Talfourd Serjt., and *R. V. Richards, contrà*.—The plaintiff is not entitled to recover by reason of the balance having been struck between the parties in 1832. *Smith* v. *Forty* (*l*) is the only authority in support of that proposition, but if that case should be supported, the provisions of the Statute of Limitations will be altogether nugatory. It is impossible that a bare parol acknowledgment of a debt, can give rise to a new cause of action. The object of the Statute of Limitations was, to prevent parties from proving the existence of a debt by parol evidence. In *Willis* v. *Newham* (*m*), *Garrow*, B., observes, "In the course of the argument, the case of an account current was put, in which the party charges himself, and takes credit for payments made by him; and it was said, shall not this be evidence to take the case out of the Statute of Limitations? I answer, no; because the act says, the defendant shall not be charged except by an acknowledgment in writing signed by him. It must be a writing with the solemnity of a signature, and nothing short of that can bind the party." In *Hyde* v. *Johnson* (*n*) it was decided that an acknowledgment signed by the agent of a debtor was insufficient, because it would lead to the admission of parol evidence to prove the agency. Secondly; the letter does not contain an acknowledgment or promise to pay the debt. In *Kennett* v. *Milbank* (*o*), it is said, "an acknowledgment can operate as evidence of a promise: and if it be accompanied with qualifications which shew it was not meant to operate as a promise, it will not be sufficient to take a debt out of the operation of the Statute of Limitations." The defendant points to the proceeds of the harvest, as the fund which is to furnish the means of payment, but he does not promise to pay the debt, at all events. That case is also an authority to shew that the acknowledgment ought to state the amount of the money due. *Lechmere* v. *Fletcher* (*p*).

TINDAL, C. J.—There are two questions in this case: one on the Statute of Limitations, which is set up as a bar to the whole demand; another, on the Statute of Frauds, which applies to a portion of it. With respect to the Statute of Limitations, the objection is, that the cause of action had accrued more than six years, and the question is, whether there has been any acknowledgment, or promise in writing, within 9 Geo. 4, c. 14, sec. 1. That depends upon the letter of the 4th of *August*, 1832, and that letter appears to me to amount to a promise to pay an existing demand; and, although it points at one particular mode of payment, it does not seem to me to be confined to that mode, but merely contains an expression of the ground of a hope, that the payment would be no longer deferred. After expressing an expectation that the proceeds of the harvest would reduce the account, the writer adds—"if it does not, the concern must be broken up to meet it at last," which seems to imply, that the debt must be paid by a sale of the property which was then in the defendant's hands.

Then it is objected, that the construction of this letter ought not to have been left to the jury; but it is well established by a chain of cases, from *Lloyd*

(*k*) 2 B. & Adol. 328.
(*l*) 4 Car. & P. 126.
(*m*) 3 Young & J. 523.
(*n*) 2 Bing. N. C. 776. S. C. 2 Hodges, 94.
(*o*) 8 Bing. 42.
(*p*) 1 Cr. & M. 623.

v. *Maund* (*a*) to *Frost* v. *Bengough* (*b*), that the proper course was adopted; and, even if this were not so, the objection would be of little force, because the learned judge was of opinion that the letter was sufficient, and in that opinion I entirely agree. The next point is, whether the acknowledgment is imperfect by reason of its omission to state the amount of the debt, and if this were a new question, I should have entertained some doubt, but, after the decision of *Lechmere* v. *Fletcher* (*c*), where the rule is laid down by Mr. Baron *Bayley*, whose accuracy and learning we so well know; I agree that where an acknowledgment is silent as to the amount of the debt, it may be supplied by parol evidence All the objections as to the first branch of the case, are therefore answered.

Then comes the second question, namely, whether the verdict for the 340*l.* 6*s.* 10*d.* ought to be retained. It appears that *Bird* was a creditor of *Lloyd*'s to that amount, and he held a warrant of attorney as a security. In consequence of *Lloyd* becoming embarrassed in his circumstances, judgment was signed upon the warrant of attorney, and execution issued against his effects. This being the state of affairs, *Aston* and the defendant, the latter being the brother-in-law of *Lloyd*, came forward, and made an offer to the creditors, of ten shillings in the pound, which the plaintiff and the other creditors refused to accept. The accounts of *Lloyd* are then examined by the defendant, and it appeared that a large sum was due to the creditors, and, amongst others, they ascertained the amount of the plaintiff's debt. An account is then made out, which is signed by *Lloyd* and the defendant, and is witnessed by the plaintiff, and thus all the parties are cognizant of the transaction. On the 15th of *May*, a bill of sale is executed by *Lloyd*, of all his effects, to *Aston* and the defendant: it is not drawn in the ordinary form, as an assignment to trustees, but they are to hold the effects absolutely, to their own use, and they undertake to pay the creditors. Matters go on upon this arrangement for some years, *Lloyd* remains in possession of the effects, and he overlooks the farm; and, in *May*, 1832, an account is stated, which becomes a most material document, as shewing the footing upon which the parties then stood. The very first item in this account, is 340*l.* 6*s.* 10*d.*, set down with other sums as due to the plaintiff, and the sum total is written by the defendant, and he afterwards is heard to say—"these are the sums we owe to *Bird*." So that here is an admission, by the defendant, that he was the immediate debtor to the plaintiff, made after the plaintiff had relinquished all his claims upon *Lloyd*, and after the defendant had taken possession of all *Lloyd*'s effects upon an agreement to pay his creditors. No objections can be maintained on the effect of the Statute of Frauds, because as between the plaintiff and defendant, this was not a promise to pay the debt of a third person; but it was a new contract, that if the plaintiff would forego the benefit of his execution, the defendant would pay him his debt. Upon this point the case is within the principle of *Read* v. *Nash* (*d*).

But it is said, that the plaintiff could recover against *Lloyd*, and if that were so, it would be a strong argument in favour of the defendant; but I do not see why *Lloyd* could not, by plea or *auditâ querelâ*, shew that, upon good consideration, the plaintiff gave up his remedy as against him, and accepted the

(*a*) 2 T. R. 760.
(*b*) 1 Bing. 266.
(*c*) 1 Cr. & M. 623.
(*d*) 1 Wils. 305.

defendant as his debtor; and although this plea would not properly be accord and satisfaction, the case of *Good* v. *Cheeseman* (*e*), and the authorities which are there cited, shew that such a plea would be a good answer to the action. The rule must, therefore, be discharged.

PARK, J.—I am of the same opinion. The question on the Statute of Limitations has been fully answered by the cases: *Whippy* v. *Hillary*(*f*) is very distinguishable. As to the objection that the amount of the debt is not stated, it is now fully determined that parol evidence may be received. It may be said that *Kennett* v. *Millbank* (*g*) is overruled, although Mr. Baron *Bayley*, in giving judgment in *Lechmere* v. *Fletcher* (*h*), distinguishes that case. As to the other point, it appears, by the evidence, that upon a good consideration, *Lloyd* assigned his effects to the defendant, and that all parties were present and acquiesced in the arrangement. *Good* v. *Cheeseman* (*e*) is decisive upon this part of the case.

VAUGHAN, J.—I am of the same opinion. As to the question arising out of the absence of any mention of the amount of the debt in the defendant's letter, without pretending to reconcile all the cases, I am disposed to act upon the decision in *Lechmere* v. *Fletcher* (*h*). As to the other point, all the facts conspire to shew that the defendant became an original debtor to the plaintiff, and that *Lloyd* was altogether released, and *Good* v. *Cheeseman* (*e*) is quite in point. What a situation would not *Lloyd* have been in, if, after giving up all his effects, he still remained liable to the plaintiff and the other creditors?

COLTMAN, J.—As to the 340*l.* 6*s.* 10*d.* no difficulty arises. If a debtor, creditor, and a third person, agree, upon good consideration, that the third person shall become the debtor, the other is discharged: *Fairlie* v. *Denton* (*k*) points out the exception to the general rule, that choses in action cannot be assigned; and *Good* v. *Cheeseman* (*e*) shews, that a good answer could be set up by plea. In the present case an *auditâ querelâ* would seem to be applicable. In Com. Dig., tit. *Auditâ querelâ*, it is said to lie "for a man in execution, or in danger of it, upon a judgment, statute merchant, staple, or recognizance, when he has matter in fact, or in writing, to avoid such execution, and no other means to take advantage of it." On the other point, it seems to me, that the effect of the letter was properly left to the jury, and that they were warranted in finding that it contained an express promise to pay the debt.

Rule discharged.

(*e*) 2 B. & Ado. 329.
(*f*) 3 B. & Ado. 399.
(*g*) 8 Bing. 37.
(*h*) 1 Cr. & M. 623.
(*k*) 8 B. & Cress. 395.

June 21.

CROFT *v.* MILLER.

The rule of Hilary Vacation, 1834, as to the taxation of costs on the reduced scale does not apply to actions brought for unliquidated damages, where less than 20*l.* is awarded on a writ of inquiry.

MOTION to review the prothonotary's taxation of costs. The plaintiff sued the defendant on a guarantee to pay certain costs incurred in the Court of Chancery. The defendant suffered judgment to go by default, and upon a writ of inquiry the damages were assessed at less than 20*l.*, whereupon the prothonotary taxed the plaintiff's costs upon the reduced scale promulgated by the Court in *Hilary* Vacation, 1834.

Bompas, Serjt., shewed cause.—*Hoppell* v. *Leigh* (*a*) is an express authority to shew that the taxation was correct; and in *Savage* v. *Lipscombe* (*b*), the Court construed the rule liberally, and refused to allow the plaintiff his usual costs where his demand had been reduced below 20*l.* by a cross demand.

Wilde, Serjt., in support of the rule.—An action for unliquidated damages cannot be tried before the sheriff, upon a writ of trial pursuant to 3 & 4 W. 4, c. 42, s. 17: and the rule of *Hilary* Vacation, 1834, was framed with reference to the provisions of that statute. It appears by the form of the heading which is given for bills of costs, that the rule is only applicable to actions for *debts*. That was not commented upon in *Hoppell* v. *Leigh* (*a*).

TINDAL, C. J.—I am disposed to doubt whether *Hoppell* v. *Leigh* (*a*), ought to be supported; but as this is a case of importance we will consult the judges of the other courts before we dispose of this rule.

The Court afterwards made the rule absolute.

Rule absolute.

(*a*) 5 Dow. P. C. 40. S. C. 2 Hodges, 107. (*b*) 5 Dow. P. C. 385.

June 12.

KIRWIN *v.* JONES and others.

In an action of trespass, where the *locus in quo* was of considerable extent and related to a right to moor ships, the plaintiff was required to give particulars of the trespass.

WIGHTMAN had obtained a rule *nisi* requiring the plaintiff to give a more particular statement of the trespasses which were complained of in an action of trespass. The declaration stated that the defendants "broke and entered a close of the plaintiff called *Cross Fetts* and *Marsh*, otherwise called *The Marsh*, otherwise called *The Harbour*, otherwise called *The South Side of the Harbour*, otherwise called *The South Side of the Harbour of Warlington*, and in a certain part of the said close, to wit, a part called the *Glebe Quay*, then moored divers ships, and in and upon the said close, then cast and threw divers chains to certain posts of the plaintiffs, &c."

When the rule was obtained it was stated that the question in dispute, was whether the defendants had a right to moor ships in the *Harbour of Warlington*, but that as the *Marsh*, and the other places mentioned in the declaration were

some miles in extent, it was difficult to draw the pleas of justification so as to cover all the trespasses intended to be justified.

Barstow, shewed cause.—It is not usual to require particulars in actions of trespass, and this case has already been before Mr. J. *Littledale* at chambers who refused to make any order, but referred the matter to this Court.

Wightman, contrà.—Unless the plaintiff will give some more specific statement of that which he complains of, as being a trespass, it is impossible that the defendants can plead a justification to the action. Ships are moored at various places in the harbour, and in some of these places the defendants contend they have a right to moor them.

TINDAL, C. J.—It certainly is not usual to give particulars in actions of trespass, but it is very possible to conceive that they are very necessary in some cases. I think the plaintiff should give a statement of these trespasses to the defendant; he might say that he complained that the ships were moored on such a day, at such a place. If the defendants are not satisfied with the particulars delivered, a further application may then be made to a judge at chambers.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute(*a*).

(*a*) See also *The King* v. *Curwood*, 1 Har. & Wol. 310.

FOSTER *v.* STEELE.

May 27.

Upon a question of sea-worthiness in an action on a policy, the jury found a verdict for the plaintiff, and a new trial was obtained upon the ground, that the verdict was against the evidence. Upon the second trial, the verdict was again found for the plaintiff upon the same evidence. *Held*, per *Tindal*, C. J., and *Park*, J., that no further trial ought to be allowed, the verdict not being perverse. *Vaughan*, J., and *Coltman*, J., *diss.*

ACTION on a policy of insurance from *Sierra Leone* to *London*. The cause had been tried before a special jury in the city of *London*, and the question was whether the ship was sea-worthy when she sailed from *Sierra Leone* on her homeward voyage. It appeared that she had experienced heavy gales of wind after leaving *Sierra Leone*, and sprung a leak before she reached *Madeira:* that some repairs were done at *Madeira;* but soon after she had left that place she experienced a storm, and was abandoned by the crew with nine feet of water in her hold. On the part of the defendant it was shewn that the crew were in a very sickly state when the vessel left *Sierra Leone;* and that it was from being insufficiently manned, and not from stress of weather, that the loss happened. It appeared that the crew were unhealthy before the vessel sailed from *Sierra Leone*.

The jury found a verdict for the plaintiff upon this evidence, and a new trial was subsequently obtained, upon the ground that the verdict was against the evidence.

The cause went down for trial a second time, before *Tindal*, C. J., and another special jury, who, upon precisely similar evidence to that which had been adduced upon the first trial, found a second verdict for the plaintiff.

Wilde, Serjt., obtained a rule *nisi* for a third trial, upon the ground that the verdict was against evidence.

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Taddy, Serjt., and *Channell*, shewed cause, and contended, that sea-worthiness was a question of fact for the jury. The following cases were cited, *Swinnerton* v. *Marquess of Stafford*(*a*), *Hucks* v. *Thornton*(*b*), *Forbes* v. *Wilson*(*c*).

Wilde, Serjt., and *Amos*, in support of the rule, contended that the onus of proving that a ship was sea-worthy, rested upon the assured, and that a vessel must be made sea-worthy with reference to the perils she was likely to encounter; also that the same reasons which induced the Court to grant a new trial in the first instance, remained in full operation. *Annen* v. *Woodman*(*d*), *Douglas* v. *Scougall*(*e*), *Watson* v. *Clark*(*f*), *Levy* v. *Milne*(*g*), *Parker* v. *Potts*(*h*), *Goodwin* v. *Gibbons*(*i*).

TINDAL, C. J.—My mind has fluctuated during the progress of the argument, but unless this second verdict has been most manifestly perverse I feel a difficulty in sending down the case again, because the whole question was a matter of evidence peculiarly for the consideration of a jury. If the verdict should be returned a third, or even a fourth, time in favour of the plaintiff, then upon an application for a new trial the very same argument may be urged again with equal force, and it seems to me that we should be invading the province of the jury, if we made this rule absolute. Precisely the same evidence was given upon the second trial as on the first, and twenty-four merchants of the city of *London*, have, therefore, now decided a question which was peculiarly within their knowledge. If the matter had depended upon my own individual opinion, I do not say that as a juryman, I should have concurred in the verdict, but for the reasons I have already given I am of opinion that this rule ought to be discharged.

PARK, J.—I by no means say that it is not competent for this Court to send a cause to be tried a third, or even a fourth time, but it is only in the case of a perverse verdict that we ought to interfere a second time. This case has been decided twice, upon the same evidence, by two special juries, and the evidence was fully left to them; and although I might have doubted before I concurred in the verdict, I agree that this rule ought to be discharged.

VAUGHAN, J.—I feel a difficulty in saying that this cause ought not to be tried again. No doubt can exist as to the power of the Court to send a cause down for a third trial, and I remember several instances myself when a third trial has been granted after two verdicts the same way. The only question is whether this is a case in which the Court will exercise its authority. It appears that the same evidence was given at both trials; therefore, as the Court thought after the first trial, that the verdict was wrong, the same reasons ought to operate now; and if, as it has been suggested, a third verdict should confirm the others, we must deal with that case when it is brought before us. It seems to me that gross and palpable injustice will happen if this

(*a*) 3 Taunt. 91.
(*b*) Holt, N. P. C. 50.
(*c*) 1 Park. on Ins. 344.
(*d*) 3 Taunt. 299.
(*e*) 4 Dow. 269.
(*f*) 1 Dow. 336.
(*g*) 4 Bing. 195.
(*h*) 3 Dow. 28.
(*i*) 4 Burr. 2108.

rule is not made absolute. What is the meaning of a perverse verdict, unless it mean, a verdict against the justice of the case?

COLTMAN, J.—It is clear that justice has not been done in this case. There does not seem any difference of opinion on the bench, as to what the verdict ought to have been. The power of the Court to send a cause down a third time is admitted. I should always be unwilling to exercise such a power where the decision has turned upon a mere question of fact; nevertheless, I feel strong jealousy with respect to verdicts upon the subject of sea-worthiness, inasmuch as juries are apt to divide amongst many, a loss which would otherwise fall very heavy upon one person. This was not an insurance upon a voyage out and home, and probably the jury have not sufficiently adverted to the state of the ship at the time when the policy attached, and it is upon this ground that I should have been better satisfied if the cause had gone down for a new trial.

Rule discharged.

FOSTER *v.* ALVEZ.

June 12.

The Court refused to open a consolidation rule, where the cause by which the other defendants were bound, had been tried twice upon its merits, and a third trial had been refused, although the verdict for the plaintiff was not altogether satisfactory. *Vaughan*, J., *diss.*

THE defendant was one of the underwriters on the policy of insurance mentioned in the last case, who, with four others, had also been sued by the plaintiff, whereupon he and the other underwriters made the usual application to the Court, and a consolidation rule had been granted.

Wilde, Serjt., upon failing to obtain a new trial in the cause of *Foster* v. *Steele*, obtained a rule *nisi*, calling upon the plaintiff to shew cause why the consolidation rule should not be opened, and why the defendant in this action should not be permitted to proceed to trial. He cited *Cohen* v. *Bulkeley* (*a*).

Taddy, Serjt., shewed cause, and contended that the consolidation rule was never opened, when the cause which had been tried, was decided upon its merits.

Wilde, *contrà*, submitted that the parties who entered into the consolidation rule, originally agreed to be bound by such a verdict as should be satisfactory to the Court; and, that, in the present instance, none of the judges had been satisfied with the decision, whilst two of them had expressed their disapprobation of it.

TINDAL, C. J.—I am unable to see any sufficient distinction between this application, and the application to grant a new trial, which has already been determined. It would lead to great difficulties to make this rule absolute; and if a verdict should be given for the defendant, then all the other defendants would apply to the Court, and the consolidation rule would become altogether useless. This is not like a case where there has been a defect or failure of justice, or where new evidence would be produced; therefore, whatever my private opinion may be, as to the propriety of the verdict, I am not disposed to break into a general rule of so much importance.

(*a*) 5 Taunt.

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PARK, J.—In all my experience, I never heard of a consolidation rule being opened after a second verdict. The question was purely a mercantile one, and it was decided by two special juries of merchants; but I need not say whether I am satisfied or dissatisfied with the verdict. I agree that a distinction may be drawn, if the merits of the case had not been brought before the jury; but after two verdicts upon the merits, and after the Court has refused to grant a new trial, the consolidation rule would be rendered altogether nugatory, if such an application as the present was granted.

VAUGHAN, J.—I regret that I cannot agree with the rest of the Court. I cannot but consider this as an application to the sound discretion of the Court, and though with respect to the other cause it is important *ut sit finis litium*, yet here another person steps forward and urges, that he has only consented to be bound by such a verdict as is satisfactory to the Court. The other verdict is not satisfactory, and, therefore, I would open the consolidation rule.

COLTMAN, J.—This is, in effect, another application to send the former cause to a third trial; and I do not think I shall be open to a charge of inconsistency, if I agree that this rule ought to be discharged, because I always object to do that by an indirect course, which cannot be effected in the regular course.

Rule discharged.

TRINITY TERM, 7TH WM. IV.

IT IS ORDERED that, from and after the last day of this present *Trinity* Term, all the offices (the Secondaries' Office excepted,) be open, in term, from eleven in the forenoon until five in the afternoon, and not in the evening; and that the Secondaries' Office be open, in term, from eleven in the forenoon, until three in the afternoon, and from six o'clock until eight o'clock in the evening: and that, in the vacation, all the offices be open from eleven in the forenoon, until three in the afternoon, except between the 10th day of *August* and the 24th day of *October*, when they are to be open from eleven in the forenoon until two in the afternoon only.

N. C. TINDAL.
J. A. PARK.
J. VAUGHAN.
THOS. COLTMAN.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term, 1837.

IN CHANCERY.

Between MARGARET STODDART DOUGLAS, (wife of JAMES DOUGLAS STODDART DOUGLAS,) by HENRY LEIGH DOUGLAS MORSON, her next friend, Plaintiff. *Nov.*

And

WILLIAM CONGREVE RALPH DUNN, the said JAMES DOUGLAS STODDART DOUGLAS, the Rev. ALEXANDER HOUSTOUN DOUGLAS, ELIZABETH HOUSTOUN, ARETAS AKERS the elder, ARETAS AKERS the younger, and STEPHEN MONCKTON, and JOHN MORRISON, defendants.

A testator devised and bequeathed all his freehold estates together with the use of his household goods, and live and dead stock, used in and about his said estates, unto *Margaret S.* for and during the term of her natural life, for her independent use and benefit, *remainder* to the husband of *Margaret S.* for life, remainder to the use of the heirs of the body of the said *Margaret S.* in tail, remainder to *Alexander H.* for life, with remainders over; and the testator declared that all the aforesaid settlements were intended by him to be in strict settlement with remainder to his own right heirs for ever. *Held*, that *Margaret S.* took an estate in tail general, in the testator's freehold estate.

THE following case was submitted for the opinion of this Court, by an order made by the Right Honourable the Master of the Rolls, bearing date the 4th *August*, 1836.

George Douglas, late of *Chilston* Park, in the county of *Kent*, Esq., was seized, in fee simple, of the manors of *Chilston*, *Bowley*, and *Lenham*, the mansion house and Park called *Chilston* Park, and divers farms and tenements, situated in the county of *Kent*. And the said *George Douglas* was also possessed of a very considerable personable estate; the said *George Douglas*, being so seized and possessed, duly made and published his last will and testament, in writing, bearing date the 12th day of *March*, 1831, whereby, after directing all his just debts to be fully paid, he continued his said will, in the words following, that is to say, "I give and bequeath unto Mrs. *Margaret Stoddart*, wife of *James Douglas Stoddart*, Esq., now residing with me, 50,000*l.*, 3*l.* per cent. consolidated annuities, to be transferred, within six months after my decease,

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to her, or as she shall direct, for her own sole and separate use, independent of her husband. And I give, devise, and bequeath all my manors, messuages, farms, lands, tithes, tenements, and hereditaments, at *Chilston* and elsewhere, in the county of *Kent*, with every of their rights, members, and appurtenances, together with the use of all my household goods, plate, linen, horses, and other cattle, and all my farming and gardening live and dead stock, implements, and utensils, used in about my said estates, unto the said *Margaret Stoddart* for and during the term of her natural life, for her independent use and benefit; and from and after her decease, I give, devise, and bequeath, all and every, my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and premises, with the goods and chattels therein and thereon, as aforesaid, unto and to the use of the said *James Douglas Stoddart*, for his natural life, with remainder to the use of the heirs of the body of the said *Margaret Stoddart* in tail; with remainder to the use of my nephew the Rev. *Alex. Houstoun*, for his natural life, with remainder to the use of the heirs of his body in tail; with remainder to the use of my niece *Elizabeth Houstoun* for her natural life, with remainder to the use of the heirs of her body in tail; with remainder to the use of my cousin *Aretas Akers*, (son of the late *Aretas Akers*, Esq.,) for his natural life, with remainder to the use of the heirs of his body in tail. And I do hereby declare that all the aforesaid limitations of my estate are to be intended by me to be in strict settlement, with remainder to my own right heirs for ever." And after giving a plantation in the island of *Greneda*, with the personal estate thereon, to the said *James Douglas Stoddart*, his heirs, executors, administrators, and assigns, for ever, and another plantation, in the island of *Tobago*, with the personal estate thereon, to *George Stoddart*, (a brother of the said *James Douglas Stoddart*,) his heirs, executors, administrators, and assigns. for ever; and after giving various specific and pecuniary legacies free of legacy duty, the said testator continued his will in the words following, that is to say, "And as to all the rest, residue, and remainder, of my estate and effects, whatsoever and wheresoever, real and personal, I do hereby give, devise, and bequeath the same unto *William Congreve*, *Ralph Dunn*, and *John Morison*, Esquires, their heirs, executors, and administrators, upon trust to convert the same into government securities in their own names, and to pay to the said *Margaret Stoddart*, or to empower her to receive and take the interest and dividends thereof for her natural life, for her sole, separate, and independent use and benefit; and from and after her decease, to pay, assign, and transfer, one moiety or equal half part of all such residue, unto the said Rev. *Alex. Houstoun* for his own absolute use and benefit, and the other or remaining moiety or half part thereof, unto my relation *Aretas Akers*, son of the late *Aretas Akers*, Esq., for his own absolute use and benefit. And the said testator appointed the said *William Congreve*, *Ralph Dunn*, and *John Morison* executors of his said will; the testator departed this life on the 15th day of *May*, 1833, without leaving any child or issue, or any brother or sister, or issue of any brothers, him surviving, but leaving the said *Alexander Houstoun*, now *Alexander Houstoun Douglas*, the son of his only sister, his nephew and heir at law, him surviving; and also leaving the several other persons in his said will named, him surviving.

After the testator's death, the said *James Douglas Stoddart* obtained his majesty's license to assume the surname of *Douglas*.

May 26.

The question for the opinion of the Court was, what interest did the plaintiff take, under the will of the said *George Douglas*, the testator, in the real estates of the testator at *Chilston* and elsewhere, in the county of *Kent*.

Spankie, Serjt., for the plaintiff, *Margaret Stoddart*.—*Margaret Stoddart* took an estate tail in the testator's real estates. The devise to her for life, with remainder to the heirs of her body in tail, would clearly give her that estate, according to all the authorities. *Shelly's case* (*a*), *Legat* v. *Sewell* (*b*), *Goodright* v. *Pullyn* (*c*). *Coulson* v. *Coulson* (*d*), *Hayes* v. *Ford* (*e*), *Robinson* v. *Robinson* (*f*), *Poole* v. *Poole* (*g*), *Doe* v. *Jesson* (*h*), *Sayer* v. *Masterman* (*i*), *Austen* v. *Taylor* (*k*), *Wright* v. *Pearson* (*l*), *King* v. *Burchell* (*m*), *Jones* v. *Morgan* (*n*). Then the subsequent declaration made by the testator, that he intended the limitations, in strict settlement, is not sufficient to induce the Court to put any other construction upon the will. The expression "strict settlement" is a mere conventional term used by conveyancers, but a court of law cannot interpret it. If the words are looked at with a view to ascertain the testator's intention, no certain meaning can be discovered: they may mean a strict settlement in males or females; or the testator may intend, that if the plaintiff had a son, who afterwards died in her lifetime and before the birth of a second son, then that the second son should take the estate before an elder daughter. It is clear that the testator had first given an estate tail to the plaintiff, and that intention must exist until another, which is inconsistent with it, can be clearly seen. *Measure* v. *Gee* (*o*).

Taddy, Serjt., for the defendants, *Aretas Akers* the elder, and *Aretas Akers* the younger.—The plaintiff took only an estate for life. It is evident that this was the leading intention of the testator, because he first gives the plaintiff an estate for life, in express words. And it may be collected from other parts of the will, that the testator did not mean that the first taker should have the power to defeat his intention, by suffering a recovery. Thus he gives the plaintiff the use of certain personal property during her life, and he afterwards limits the estate to the use of the heirs of her body *in tail*, thereby shewing that he intended that the heirs should take as purchasers in succession; otherwise the words "in tail" were unnecessary. And that intention is still more clearly expressed by the declaration that the limitations were intended to be in strict settlement. In *Doe* d. *Wood* v. *Wood* (*p*), the judges use the words "in strict settlement" as an expression which is familiarly known; and it could not have been used with any other intention, than to prevent the estate tail from being destroyed by the tenant for life.

The rule in *Shelly's case* (*a*) is a rule of tenure, and not a rule of construction, and had its origin in considerations of a feudal nature. It merely decided, that the heir should take by descent, and not by purchase. *The Provost of Beverley's case* (*q*). That rule is often confounded with another rule,

(*a*) 1 Rep. 94.
(*b*) 1 Pere Wms. 87.
(*c*) 2 Lord Ray. 1437.
(*d*) 2 Stra. 1125; 2 Atk. 246.
(*e*) 2 W. Black. 698.
(*f*) 1 Burr. 38.
(*g*) 3 Bos. & Pul. 620.
(*h*) 2 Bligh, 1; 5 M. & Sel. 95.
(*i*) Ambler, 344.
(*k*) 1 Eden, 361.
(*l*) 1 Eden, 119.
(*m*) 1 Eden, 424.
(*n*) 1 Bro. C. C. 206.
(*o*) 5 B. & Ald. 910.
(*p*) 1 B. & Ald. 522.
(*q*) 40 E. 3, fol. 9, a b.

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which has respect to the intention of the testator, but which depends upon an entirely different principle. Upon the principle to be collected from the following authorities, it will appear that the rule in *Shelley's case* is not applicable to the present case. *Archer's case* (*s*), *Goodtitle* v. *Herring* (*t*), *Lisle* v. *Grey* (*u*), *Lowe* v. *Davies* (*x*), *Doe* d. *Long* v. *Laming* (*y*).

Atcherley, Serjt., for the defendants, *A. H. Douglas* and *Elizabeth Houstoun*, in addition to the argument of *Taddy*, Serjt.—This is a question of construction; and it is manifest that the testator intended to give the plaintiff an estate for life only. In *Hodgson* v. *Ambrose* (*z*), *Buller*, J., says upon this subject, "If a testator make use of legal phrases or technical words only, the Court are bound to understand them in the legal sense. They have no right nor power to say, that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law. But if a testator use other words, which manifestly indicate what his intention was, and shew to a demonstration that he did not mean what the technical words import, in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will. Lord *Hardwicke* truly said, in *Bagshaw* v. *Spencer*, 'There can be no magic or particular force in certain words more than others; their operation must arise from the sense they carry.' And I say, that sense can only be found by considering the whole will together. There is no rule better established than that the intention of a testator, expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend." *Doe* d. *Long* v. *Laming* (*y*), *Lees* v. *Mosley* (*a*), *Doe* d. *Gallini* v. *Gallini* (*b*). The opinions of the judges were very much divided in *Jesson* v. *Wright* (*c*). In *Doe* d. *Duke of Devonshire* v. *Cavendish* (*d*), Lord *Mansfield* spoke of the import of the words "strict settlement" as being well known. He there says, in reference to the will of Lady *Burlington*, "Suppose she had only said, at the time of making her will, that she meant it to go to the grandchildren, it must have been inquired, whether absolutely, or in strict settlement. If so, her answer must have been—'In strict settlement.' There are two kinds of settlement; one by which the issue of the person to whom the first limitation is made, shall certainly take, by giving the first taker only an estate for life; the other by creating an estate tail in the first instance. But then there is a trick in law, by which, when the issue arrive at twenty-one, the entail may be barred. If this had been represented to Lady *Burlington*, her answer would have been, that she was very sorry for it, as it might be a means of defeating her purpose; but then it would be answered to that again, that there was a trick against that to make a strict settlement. That was meant, but to guard against all events, she said—'I will put the father in my place, and give him authority, if he choose to execute it.' If the words 'in strict settlement' had been used, nobody could have doubted her meaning. Now all the words in the language, except those, are used to

(*s*) 1 Rep. 67.
(*t*) 1 East, 264.
(*u*) 2 Lev. 223.
(*x*) 2 Lord. Ray. 1561.
(*y*) 2 Burr. 1100.
(*z*) Dougl. 341.
(*a*) 1 Young & Collier, 589.
(*b*) 5 B. & Adol. 621.
(*c*) 2 Bligh, 1; 5 M. & Sel. 95.
(*d*) Cited in *Griffith* v. *Harrison*, 4 T. R. 741.

carry this power as far as possible, and to shew that she meant an appointment in strict settlement. Whatever he might do with his own estate, he might do with this; that was her intention, only that the children were the objects. What is the use of powers? It implies a strict settlement, with power to make jointures, leases, and raise portions." The same words are commented upon in *Le Hunte* v. *Hobson* (*f*). *Mandeville's case* (*g*) is very similar to the present (*h*).

Spankie, in reply.—The words "strict settlement" have acquired no fixed meaning; and if the testator intended to limit the estate, according to the construction contended for by the defendants, he has not sufficiently expressed his intention. [*Tindal*, C. J.—You say there are no trustees to preserve contingent remainders?] Yes; and they would have been appointed by the testator, if he had intended so to limit the estate. As to the cases which have been cited, they do not alter the general position, that when a devisee takes an estate for life, with remainder to his heirs in tail, then the heirs take by descent, and not by purchase. It is not contended, that the general rule of law may not bend to the intention of the testator, but then a clear, distinct, and unqualified intention that the rule should not apply, must be manifest.

The following certificate was sent during this term:—

"We have heard this case argued, and we are of opinion that the plaintiff took, under the will of *George Douglas*, the testator, an estate in tail general in the real estates of the said testator at *Chilston* and elsewhere, in the county of *Kent*.

N. C. TINDAL.
J. A. PARK.
J. VAUGHAN.
T. COLTMAN."

(*f*) 5 B. & Cress. 903.
(*g*) Co. Lit. 24 b.
(*h*) But see Har. & Butler's Notes to Lib. 1, Notes 151, 152.

DOE *d.* MINGAY *v.* ROE.

Nov. 3.

J. BAYLEY moved for judgment against the casual ejector. There were four tenants in possession of the demised premises: the affidavit stated, that personal service had been effected on three of the tenants, but, as to the fourth, the service was on the tenant's wife, who was not shewn to be living with her husband, or on the demised premises.

Where there were four tenants in possession, and personal service of the declaration in ejectment had been effected on three of them, but an irregular service on the fourth; judgment against the casual ejector was granted against the three who had been duly served.

TINDAL, C. J.—You may take a rule for judgment against the three who have been formally served; but we cannot grant even a rule *nisi*, as to the other tenant.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute as to three tenants.

Nov. 7.

WRAITH *v.* HARRIS.

The affidavit of the due execution of a warrant of attorney signed by a marksman, should shew that it was read over to him. It is not sufficient to state that it was duly executed.

HODGES moved for leave to enter up judgment on a warrant of attorney, signed by a marksman. The affidavit of the due execution was made by the attesting witness, who stated that the warrant of attorney was duly executed by the defendant, and that the defendant did sign and seal, and as his act and deed deliver it, in the presence of the deponent. It was not stated that the document had been read over to the defendant before it was signed.

TINDAL, C. J.—The affidavit is not sufficient. The attesting witness should state that the document was read to the defendant.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

Nov. 10.

BADEN *v.* FLIGHT.

The plaintiff declared in covenant for two quarter's rent in arrear, and the defendant pleaded *riens en arriere*. Upon demurrer the plea was held bad, and after judgment for the plaintiff, he obtained a judge's order for leave to amend the declaration on payment of costs, by withdrawing the claim of one quarter's rent. The defendant afterwards applied to set aside the order, upon the ground that he ought to be allowed the costs of the demurrer, *held*, that he was not entitled to those costs.

THE plaintiff declared in covenant for two quarters' rent, ending on the 25th *March*, 1836. The defendant pleaded that no quarter's rent, ending on the 25th *March*, 1836, was in arrear; but, upon demurrer, the plea was held to be bad, and judgment was given for the plaintiff (*a*).

The plaintiff afterwards, (*May* 3,) obtained a judge's order to amend the declaration, upon payment of costs, by withdrawing the claim of one quarter's rent; and the costs of the amendment were paid to the defendant, on the 3d of *June*.

On the 6th of *June* the usual order was obtained for time to plead to the amended declaration, and on the 10th of *June* the defendant applied for a rule *nisi*, to set aside the order made on the 3rd of *May*, upon the ground that the costs of the plea and demurrer ought to have been allowed to him, inasmuch as the plaintiff had withdrawn his claim to the quarter's rent to which the plea was applicable.

Wilde, Serjt., shewed cause, and contended that the defendant was not entitled to claim the costs of a demurrer, which had been decided in favour of the plaintiff, but that the plaintiff was entitled to amend his declaration upon the usual terms; and that, at all events, the application to set aside the judge's order came too late after the defendant had acted upon it.

Hoggins, in support of the rule, urged that the whole of the costs ought to have been given to the defendant, as the plaintiff, by withdrawing his claim to the one quarter's rent, admitted that the defendant was justified in resisting the payment of it.

TINDAL, C. J.—I am not sure that the plaintiff ought not to have required the defendant to pay the costs of the demurrer. As the matter stands now, the

(*a*) See *Baden* v. *Flight*, ante, 141.

defendant seems to be benefited, and there is no pretence for making the present application, especially after the defendant has acted upon the judge's order. The rule must be discharged.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

FERGUSON, Assignee of SMITH, a Bankrupt, *v.* NORMAN.

Nov. 11.

Where an arbitrator was empowered to state facts, on his award, for the opinion of the Court, as upon a special verdict, the Court sent the award back to be amended, on the ground that the arbitrator had not found an important fact with sufficien precision.

BARSTOW had obtained a rule *nisi*, calling upon the defendant to shew cause why the arbitrator, to whom this cause had been referred, should not re-consider his award, or make a supplemental award.

The action was brought by the assignee of a bankrupt against the defendant, who was a pawnbroker, and the question was, whether the defendant, in receiving goods in pledge from the bankrupt, had observed the directions of the 39 and 40 Geo. 3, c. 99, sec. 6. That section requires that the pawnbroker shall enter pawns in a book to be kept for that purpose, and shall also deliver to the pawner a written memorandum containing a description of the goods pawned and the sum advanced, and the name and place of abode, and number of the house, if said to be numbered, of the person or persons by whom such goods or chattels are so pawned, pledged, or exchanged, and whether such person is a lodger or housekeeper, as aforesaid, by using the letter L, if a lodger, and the letter H, if a housekeeper; and also the name and place of abode of the owner or owners thereof, according to the information aforesaid. By an order at Nisi Prius, the cause was referred to a barrister, who was empowered to state the facts in his award, for the purpose of obtaining the opinion of this Court, as upon a special verdict. The award was made, and the case came on for argument in *Trinity* Term, but the arbitrator merely stated, in the award, that the duplicates had the word *Pimlico* upon them, but did not state, affirmatively, whether the defendant had observed the directions contained in the Pawnbrokers' Act. The Court thereupon directed that the matter should be referred back to the arbitrator, that he might state whether the defendant had inquired the number of the house in which the pawner lived. The arbitrator made an amended statement, but merely found that the defendant inquired the address of the pawner, without saying whether he had inquired the number of the house in which he lived.

Petersdorf shewed cause on behalf of the defendant, and contended that the plaintiff was bound to prove his case affirmatively, *Williams* v. *East India Company* (*a*); and that the arbitrator had stated enough to shew that the directions of the statute had been complied with.

Barstow was heard in support of the rule.

TINDAL, C. J.—The right course is, that the arbitrator should find this

(*a*) 3 East, 192.

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fact with more precision; the matter must therefore be referred back to him, and he may re-examine the same witnesses, or require other evidence.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

Nov. 22.

TUCKER *v.* NECK.

In an action on an attorney's bill which was not taxable, a verdict was taken for the plaintiff by consent, subject to a taxation of the bill before the fifth day of the next term. The defendant, instead of taxing the bill, applied for a new trial, and caused the taxation to stand over until after the fifth day of the term. *Held*, that the plaintiff was not bound afterwards, to submit his bill to taxation.

ASSUMPSIT on an attorney's bill, which did not contain any taxable item. A verdict was taken, by consent, for 32*l.*, at the sittings after *Trinity* Term, subject to the taxation of the plaintiff's bill, before the fifth day of *Michaelmas* Term then next.

Mansel applied to the Court to compel the plaintiff to proceed with the taxation, and the affidavit disclosed the following facts. The plaintiff and defendant attended to tax the bill, on the first day of *Michaelmas* Term, but an objection was then made by the defendant, that the officer of the Insolvent Debtors' Court ought to tax certain items, and the taxation was not further prosecuted. The defendant, subsequently made an ineffectual application to the Insolvent Court; and also applied to this Court for a new trial, upon the ground that fresh evidence had been discovered, but the application was refused. On the 13th day of the term, the plaintiff proceeded to tax his costs in the action, but refused to allow his bill to be taxed.

Wilde, Serjt., who shewed cause in the first instance, contended that under these circumstances, the defendant had been guilty of negligence, and was not entitled to have the bill taxed.

TINDAL, C. J.—This bill was referred to taxation by consent, and the plaintiff stipulated that the taxation should take place before the fifth day of *Michaelmas* Term. It seems to me that the defendant has altogether passed by an opportunity which was afforded him to tax the bill, and that this application ought not to be granted.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

Nov. 10.

BRASHOUR *v.* RUSSELL.

1. Where the plaintiff delivered a true copy of a capias to the sheriff, in pursuance of stat. 2 W. 4, c. 39, s. 4, but the sheriff's officer made another copy, which stated that the writ was issued in the reign of *William* the Fourth, instead of Queen *Victoria*. *Held*, that this was an irregularity only, within Reg. 10 Mich. T. 3 Wm. 4.

2. The defendant was arrested on the 12th of *October*, and the application for his discharge was made on the 2nd of *November*. *Held*, too late, and that the application ought to have been made within eight days.

WILDE, Serjt., had obtained a rule *nisi*, calling upon the plaintiff to shew cause, why the service of the copy of a writ of *capias*, should not be set aside, and why the defendant should not be discharged out of the custody of the sheriff. The writ was issued on the 7th of *September*, 1837, in

the name of Queen *Victoria;* the defendant was arrested on the 12th *October,* but in the copy of the writ which was served upon him by the sheriff's officer, it was stated that the writ was issued in the reign of *William* the Fourth. No proceedings were taken by the defendant until the first day of this term, when the rule *nisi* was obtained.

W. H. Watson shewed cause, upon an affidavit which stated that the plaintiff had caused a regular copy of the writ to be delivered, with the writ, to the sheriff; and that the incorrect copy was in the hand-writing of the sheriff's officer.—As the writ was regular, the arrest was regular also, and the plaintiff ought not to be prejudiced by a mistake made by the sheriff's officer. By 2 W. 4, c. 39, sec. 4, it is directed that copies of all process shall be delivered by the plaintiff to the sheriff; and that the sheriff shall, after the execution of the process, cause one such copy to be delivered to every person upon whom such process shall be executed. Here the plaintiff delivered a true copy, and the sheriff was bound to deliver that identical copy, when he made the arrest. The duty of the plaintiff's attorney was at end, when he had delivered a regular writ, and a true copy, at the sheriff's office. In *Hodd* v. *Langridge* (*a*), *Coleridge,* J., lays stress on the fact that the plaintiff had not shewn that he delivered a true copy to the sheriff. The defendant's remedy must be against the sheriff. [*Tindal,* C. J.—If the statute has directed a certain mode of proceeding, why is the defendant to remain in custody upon an irregular, and therefore illegal arrest. It makes no difference whether it happens through the default of the sheriff, or of the plaintiff's attorney. Suppose no copy at all had been delivered?] At the moment the arrest was made, it was a good arrest, and the irregularity occurred afterwards. [*Coltman,* J.—If the *detention* is illegal, the party is entitled to his discharge.] At all events, the defect in the copy only amounted to an irregularity within Reg. Mich. T. 3 W. 4, 10, and the process was not void. The defendant was therefore bound to apply to a judge promptly, to set aside the proceedings for irregularity. Reg. Hil. T. 2 W. 4, Reg. 1, s. 33. *Fowell* v. *Petre* (*b*). *Cox* v. *Tullock* (*c*). *Primrose* v. *Baddeley* (*d*). In the present case, twenty-three days had elapsed.

Wilde, Serjt., *contrà.*—The statute which requires that a true copy of the process shall in all cases be delivered, was made for the protection of defendants; and it makes no difference whether the irregularity is occasioned by the sheriff, or by the plaintiff in the suit. In either case the defendant is entitled to his discharge. As to the length of time which has elapsed, it is sufficient for the defendant to say—" I am now, at this moment, in custody under process which is irregular." The omission in this case, is not in contravention of any rule of court, but of a statute; and in all such cases the rule is held more strictly. *Nicol* v. *Boyne* (*e*).

TINDAL, C. J.—It appears to me that this application comes too late; and it is the fault of the defendant that he has not shewn any excuse for neglecting

(*a*) 5 Dow. 721 ; Wil., Wol., & Dav. 379.
(*b*) 5 Dowl. 276; 2 Har. & Wol. 379.
(*c*) 1 Cr. & Mee. 531.
(*d*) 2 Dowl. 350; and see *Esdaile* v. *Davis,* 1 Wil. Wol. & Hodges, 35.
(*e*) 2 Dowl. 761 ; 3 M. & Scott, 812.

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to apply to a judge at chambers. It is a rule which has long been acted upon, that unless some good reason can be shewn for the delay, all applications to discharge a defendant out of the custody of the sheriff, on the ground of irregularity, ought to be made within the ordinary time for putting in bail, that is within eight days. The question turns on this,—whether this defect in the copy of the writ, was an irregularity merely, or whether it rendered the arrest altogether illegal. It seems to me to range itself exactly under the tenth section of Reg. Mich. T. 3 W. 4, which directs that "If the plaintiff or his attorney shall omit to insert in, or indorse on any writ, or copy thereof, any of the matters required by the said act, to be by him inserted therein or indorsed thereon, such writ or copy thereof, shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any judge." It is clear, therefore, that this would only be treated as an irregularity; and, if that be so, the case comes within the other rule as to irregularities, and the application is made too late. I do not think it necessary to go into the other question, but I feel very little doubt upon it, and that the plaintiff must look over to the sheriff, for his remedy.

BOSANQUET, J.—I am of the same opinion. The case seems to fall precisely within the 10th sec. of the rule of Mich. T. 3 W. 4, and it is clear that all irregularities must be taken advantage of within a reasonable time. In mesne process, eight days have been held to be a reasonable time, as I find by a manuscript note in my possession, of a case in the Exchequer, On the other point, I should be sorry to be thought to entertain any doubt that it amounted to an irregularity.

COLTMAN, J., concurred.

Rule discharged (*a*).

(*a*) See *Daly* v. *Mahon*, post. *Exparte Burgess*, 1 Wil. Wol. & Hodges.

Nov. 15.

CHARNOCK *v.* LUMLEY.

The plaintiff sued the defendant for money had and received by the publication of a book on the plaintiff's account. *Held*, that, for the purpose of pleading, the defendant was entitled to inspect an agreement in the plaintiff's possession, which contained the terms upon which the defendant undertook to publish the book.

BARSTOW obtained a rule *nisi*, calling upon the plaintiff to shew cause why the defendant should not have the inspection of an agreement, for the purpose of enabling him to plead to this action. It appeared, by the affidavits, that the defendant had published a book of which the plaintiff was the author, upon certain terms stated in the agreement; only one copy of the agreement was made, and that was in the possession of the plaintiff. The plaintiff commenced an action for money had and received to his use, and informed the defendant that it was brought in respect of the proceeds of the sale of the book. It was also stated that the defendant was unable to plead without being allowed to inspect the agreement. The matter had been before *Park*, J. at chambers, who referred the parties to the Court.

Wilde, Serjt., and *Hindmarch*, shewed cause.—The defendant has pleaded to the action. [*Vaughan*, J.—He was obliged to plead whilst this application was pending, and the defendant swears he cannot proceed with the action without the inspection,] There are cases where one party who holds a single

copy of a deed has been compelled to produce it, but that is on the ground of his being a trustee. That doctrine does not apply here. The Courts have frequently refused to allow the parties in a suit to inspect private documents, as letters and log-books.

Barstow, in support of the rule, cited *Blakey* v. *Porter* (*a*), where it was held, that if one part only of an indenture is executed, the Court will compel the party having the custody of it to produce it for inspection, upon an action being commenced by the other party.

TINDAL, C. J.—The case comes within the spirit of the rule which allows a plaintiff to inspect documents. If an action had been founded upon this agreement, the plaintiff would have had a right to inspect it for the purpose of preparing the declaration. It appears to me, therefore, that this rule ought to be absolute.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute (*b*).

(*a*) 1 Taunt. 386. (*b*) *Smith* v. *Winter*, 1 Horn. & Hurl, 45.

OWEN *v.* KNIGHT.

Nov. 11.

In trover for a deed the defendant pleaded that the plaintiff was not possessed of the deed as of his own property. *Held*, that under this issue, the defendant was entitled to shew that the plaintiff delivered the deed to F. for the purpose of enabling F. to raise money, and that the defendant had lent F. a sum of money on the security of an assignment of it.

TROVER to recover an indenture of lease. The declaration stated that the plaintiff was possessed, as of his own property, of an indenture of lease, made between one *R. Sadler*, of the one part, and one *S. Feary* of the other part, whereby certain premises were granted to *Feary*, for a term of years, which the defendant converted to his own use.

Pleas. First—Not guilty. Secondly—That the plaintiff was not possessed, as of his own property, of the indenture in the declaration mentioned. Thirdly—That *Feary* was the owner of the indenture, and had assigned the premises to the plaintiff by way of mortgage, and that the plaintiff afterwards re-delivered the indenture to *Feary*, for the purpose of raising money, by a deposit of it to enable *Feary*, to pay a bill of exchange drawn by the plaintiff, and accepted by *Feary;* and that *Feary*, with the plaintiff's consent, appeared to be the owner of the indenture, and, on the 23d *May*, 1836, by deed, assigned it to the defendant as a security for the repayment, by *Feary*, of 150*l*. then advanced; that the defendant received the indenture without notice of the claim of the plaintiff, and that the money due on the security of the deposit, remained unpaid, wherefore he refused to deliver the indenture to the plaintiff. Issues were joined on all the pleas.

At the trial, before *Vaughan*, J., at the sittings in *Easter* term, the plaintiff proved a demand of the deed, and a refusal to deliver it up by the defendant; but the defendant having proved the facts alleged in the third plea, a verdict was found for the defendant on the issue raised on that plea, and also on the issue on the second plea.

Talfourd, Serjt., obtained a rule *nisi*, for a new trial, on the ground of misdirection. He contended that the issue on the second plea ought to have been found for the plaintiff.

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Bompas, Serjt., and *Godson*, shewed cause. The plaintiff authorized *Feary* to raise money for his use, upon the security of a deposit of the lease, and after having done so, he cannot recover upon the second issue. To enable a plaintiff to recover in trover, he must shew that he is entitled to the possession of the chattel sought to be recovered, as well that he has a right of property in it; that was expressly decided in *Gordon* v. *Harper* (*a*). In that case, goods leased as furniture with a house, had been wrongfully taken in execution, by the sheriff; and it was held that the landlord could not maintain trover to recover the goods, pending the lease, because he had not the right of possession as well as the right of property. Here the plaintiff had parted with the possession of the lease, and he could not claim to have it restored to him until the money which was borrowed was repaid. *Philips* v. *Robinson* (*b*).

Talfourd, Serjt., and *R. V. Richards, contrà*.—The plaintiff had an assignment of the premises made to him by *Feary*, and, therefore, he was the legal owner of the original lease, at the time the action was brought. The property in title-deeds does not pass, unless the premises to which they refer are also conveyed away. The cases which are cited, were decided before the New Rules of Pleading. The effect of the allegation is, that the plaintiff was the owner of the indenture, not that he was entitled to the possession of it. *Bailey* v. *Fermor* (*c*) is an authority for the plaintiff.

TINDAL, C. J.—It becomes unnecessary to give any opinion upon the effect of the plea of "Not guilty," as the whole case turns upon the second issue. This is an action of trover to recover an indenture of lease, and, as is usual, the plaintiff states, in the declaration, that he was lawfully possessed of the indenture, as of his own property. The defendant joins issue upon this precise allegation, and the question, therefore, is, whether the facts which were proved, are such as to entitle the plaintiff or the defendant to the verdict. It is clear that the action of trover lies only where the plaintiff has the right to the possession of the chattel sought to be recovered, as well as the right of property. That was decided in the case of *Gordon* v. *Harper* (*a*), which has long been acquiesced in as law. The facts in the present case were, that the plaintiff was entitled to the indenture of lease, as of his own property, and that *Feary*, with his assent, delivered it to the defendant, as a security for an advance of money, which the defendant made, to pay off a bill upon which the plaintiff and *Feary* were both liable. The plaintiff was, therefore, entitled to the property in this deed, but not to the possession of it until the money advanced by the defendant had been repaid. Until that time the defendant was entitled to the right of possession. Therefore, the verdict was right, and this rule must be discharged.

VAUGHAN, J.—I am of the same opinion. The question is, what did the second plea put in issue? A party must have the right of possession, as well as the right of property, or he cannot maintain trover. Here it was proved that the defendant had advanced money with the privity and consent of the plaintiff, upon the security of the deed. It has been said, that the defendant may have waived his lien: it is true that if he had set up a title inconsistent

(*a*) 7 T. R. 9. (*b*) 4 Bing. 106. (*c*) 9 Price, 262.

with his lien, he could not fall back upon it; but if he says nothing about it, when a demand is made, he may rely upon it afterwards. That appears by the cases of *White* v. *Gainer* (*f*) and *Boardman* v. *Sill* (*g*).

BOSANQUET, J.—The declaration alleges that the plaintiff was possessed of the indenture of lease, as of his own property, and if this had not been traversed it would have been admitted; but it is put in issue, and the evidence shewed that at the time the demand was made, the plaintiff was not entitled to the possession of the indenture.

COLTMAN, J., concurred.

Rule discharged.

(*e*) 2 Bing. 28. (*f*) 1 Campb. 410 n.

LUMLEY and others, Executors of ROBERT LUMLEY, deceased, *v.* MUSGRAVE.

Nov. 3.

In an action on a bill of exchange by the indorsee against the acceptor, with a count for interest and in an account stated, the defendant pleaded that a second bill was drawn and accepted in full satisfaction and discharge of the first bill, and that the second bill was duly paid. It was in evidence that the first bill remained in the hands of the indorsee, and that the acceptor had acknowledged that interest was due in respect of it, whereupon the jury returned a verdict for the amount of the interest, notwithstanding the defendant proved that the second bill had been paid. *Held*, that the verdict ought to stand.

ASSUMPSIT on a bill of exchange for 508*l.*, dated 29th *October*, 1835, drawn by one *Joseph Hudson*, payable to his order, four months after date, and accepted by the defendant, and afterwards indorsed by *Hudson* to *Robert Lumley*, deceased. The declaration also contained counts for interest of money lent in the lifetime of *Robert Lumley;* and for money due on an account stated with him.

The defendant pleaded, to the first count, that, after the cause of action in the first count of the declaration mentioned had accrued to the said *R. Lumley*, deceased, and before the commencement of the suit, on the 14th *June*, 1836, the said *R. Lumley*, deceased, made and drew, produced and shewed, to the defendant, a certain paper writing, stamped with a bill of exchange stamp of the value of 12*s.* 6*d.*, and purporting to be a bill of exchange, addressed to the defendant, whereby the defendant was requested to pay to the order of such person as should thereafter sign and place his name thereto as the drawer thereof, the sum of 508*l.*, three months after the date thereof, for value received. And it was then agreed, by and between the said *R. Lumley*, deceased, and the defendant, that the defendant should write and sign his name on the said paper writing, so purporting, as aforesaid, to be a bill of exchange, as the acceptor thereof, and should deliver the same, so signed with the defendant's name as aforesaid, to the said *R. Lumley*, deceased, and that the said *R. Lumley*, deceased, should forbear to sue the defendant in respect of the said cause of action, in the first count of the declaration mentioned, until the expiration of the time, in and by the last-mentioned paper writing, so purporting, as aforesaid, to be a bill of exchange, and the custom and usage of merchants in that behalf limited, and appointed, for the payment of the money therein mentioned; and also that if, at any time after the expiration of the said last-mentioned period of time, and before any action commenced for the cause of action, in the said first count of the declaration mentioned, the defendant should pay and satisfy to the holder thereof the amount of the money mentioned in the said

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paper writing, so purporting to be a bill of exchange, and satisfy and discharge all causes of action, and should also pay and satisfy and discharge the costs and charges of any action or actions which might or should arise or be brought on the said paper writing, so purporting as aforesaid, to any person or persons to whom such cause of action should or might accrue, that such payment, satisfaction, and discharge *should be accepted in full satisfaction and discharge of the said cause of action, in the said first count of the declaration mentioned.* That in pursuance of the said agreement, the defendant then wrote and signed his name on the said paper writing, so purporting as aforesaid, in this plea mentioned, as the acceptor thereof, and then delivered the same, so signed with his, the defendant's, name, to the said *R. Lumley*, deceased; and afterwards, on the day and year last aforesaid, the said *J. Hudson*, in the first count of the declaration mentioned, subscribed his name to the said paper writing, so purporting as aforesaid, as the drawer thereof, and then signed his name on the back thereof as an indorser thereof, to the said *R. Lumley*, deceased, who then indorsed the same to certain persons, bearing the style, firm, and description of *Jordeson* and *Webb*, who held, kept, and retained the same from thenceforth till the delivery thereof to the defendant, as hereinafter mentioned. The plea then averred, that the amount of this bill was paid after it became due, and after an action had been commenced by the holders; and that no actions, save and except the last-mentioned action, were ever commenced for any cause arising out of or in respect of the said bill of exchange, whereby, and by reason of the premises in this plea mentioned, the said cause of action in the first count of the declaration mentioned, became extinguished, discharged, and satisfied. There was also a plea of payment to the first count.

As to the second and third counts of the declaration, the defendant pleaded non-assumpsit, and issues were joined thereon.

The plaintiff traversed the agreement set forth in the special plea to the first count, upon which issue was also joined.

At the trial, before *Tindal*, C. J., at the last *London* sittings, it appeared that the bill of exchange mentioned in the declaration, was not paid when it became due, and that the defendant requested further time to pay it. Time was given, and nothing was done until the 14th *June*, 1836, when, in pursuance of an agreement between the parties, another bill for the same amount was drawn and accepted in the manner stated in the plea. The former bill remained in the hands of *Lumley*, the indorsee, who told the defendant that the interest on that bill was unpaid. The defendant assented to this, and promised that the interest should be paid. To shew that the transaction amounted to a mere renewal of the first bill, the defendant put in evidence a letter from *Lumley* to *Hudson*, in which the former stated that this was the last time *Musgraves*'s bill would be renewed. The bill of the 14th *June* was proved to have been paid by the defendant, when it arrived at maturity; but the interest on the first bill was not paid, whereupon the present action was brought to recover it. The learned judge left it to the jury to say, first, whether the agreement set out in the plea was proved; secondly, whether the defendant promised to pay interest on the first bill, from the day it became due, until the time when the second bill was paid. The jury found a verdict for 13*l.* 15*s.* 6*d.* being the amount of the interest for the above period.

Platt moved for a new trial, on the ground of misdirection.—This action is

not brought on a special agreement to pay interest: but upon the bill of exchange, which was paid before the action was brought. The question is, whether any right of action continued on that bill? The interest is merely accessory to the principal money, and it would be an anomaly if the interest might be recovered when the principal sum could not. In *Hollis* v. *Palmer* (*a*) it was held, that where a promissory note was brought within the Statute of Limitations, the plaintiff was not entitled to allege in the declaration, that the defendant had paid interest upon the note, within six years. So, in *Dillon* v. *Rimmer* (*b*), where the defendant was indebted to the plaintiff on a bill which was dishonoured, and gave another bill at a longer date, and also a warrant of attorney to confess judgment in case the second bill should not be paid when due, and agreed to pay the expenses of executing the warrant of attorney: and the second bill was duly honoured, but those expenses were not paid, and the first bill was retained by the plaintiffs, it was held that they could not sue the defendant on such original bill. It may even be admitted that the defendant agreed to pay the interest, but that could not revive the bill which was paid. In *Van Sandau* v. *Crosbie* (*c*), the certificate of a bankrupt was held to be a bar, not only to the original debt, but also to an action for consequential damages arising from the non-payment of it; and *Holroyd*, J., said—" I am of opinion that when the remedy at law is taken away for the non-payment of the money, it is also taken away as to any consequential damage arising from such non-payment." [*Tindal*, C. J.—Here there was no evidence that there had been payment in satisfaction of the original bill. The evidence was the other way,] Then *Soward* v. *Palmer* (*d*) cannot be law: there the defendant being indebted to the plaintiff, gave him a promissory note for 45*l*., which was dishonoured; the latter afterwards agreed to accept 5*s*. in the pound, to be secured by the acceptance of a bill for 11*l*. 5*s*, by the defendant's brother, which was accordingly given, but the original note remained in the plaintiff's possession, and was to revive if the acceptance were not honoured. The bill was not paid the day it became due, but, on the following morning, the defendant tendered 12*l*. to the plaintiff, including the amount and expenses thereon, which the latter refused to accept, and brought an action on the original note; and it was held that he was not entitled to recover. [*Tindal*, C. J.—In that case there was a new consideration, as the plaintiff had taken a third person's security.] Here the payment of the second bill was equivalent to a payment of the first. *Kendrick* v. *Lomax* (*e*) *Ex-parte Barclay* (*f*).

TINDAL, C. J.—It appears to me that the finding of the jury was justified by the facts which were proved at the trial. As to the objection made to the direction of the jury, I left them to say whether the agreement set out in the plea was proved by the evidence. The first bill was due in *March*, and after it became due nothing was done for some time, except that the defendant requested further time to pay it. At length, on the 14th of *June*, a second bill was drawn, for the same amount, and it was then stated that a certain sum was due for interest upon the first bill; and it appeared that the first bill was left in the hands of *Lumley*. This was sufficient to entitle the jury to say that the new bill was not given in satisfaction of the former one; and it

(*a*) 2 Bing. N. C. 713; 2 Hodges, 55.
(*b*) 7 B. Moore, 427; 1 Bing. 100.
(*c*) 3 B. & Ald. 13.
(*d*) 2 B. Moore, 274.
(*e*) 2 Cr. & J. 405.
(*f*) 7 Vesey, 596.

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clearly appeared that a promise had been made to pay interest upon it. The jury were directed to say, whether the first plea was proved; and we do not contravene any rule of law, by directing that this verdict should stand.

VAUGHAN, J.—This is moved for misdirection, but it appears to me to be rather a question of evidence. It appeared that interest was due on the first bill, and the plea was not made out by the facts.

BOSANQUET, J.—The question is, whether the second bill was given in full satisfaction of the first? It appears to me, that it was not given in full satisfaction of the damages which had accrued to the plaintiff, and therefore the verdict was right,

COLTMAN, J., concurred.

Rule refused (*g*).

(*g*) *Lumley* v. *Hudson* :—

THIS was an action against the drawer of the above bill, who pleaded similar pleas to those which are already stated. At the trial, before *Vaughan*, J., the plaintiff proved that the drawer had also promised to discharge the interest which was due upon the first bill, at the time the agreement to give the second bill was made; and the defendant having failed to prove the special plea, a verdict was found for the amount of the interest. A rule *nisi*, was afterwards obtained to set aside the verdict.

Kelly and *C. Saunders* shewed cause, and relied upon the above decison in *Lumley* v. *Musgrave*.

Platt and *W. H. Watson*, in support of the rule, cited the cases already mentioned, and *Dickson* v. *Parkes*, (1 Esp. 110): and also contended, that there was a distinction between the two cases, inasmuch as the drawer was only liable to the indorsee on default of the acceptor, whereas, the acceptor, being primarily liable for the principal money, might be under an implied liability to pay the interest also.

The Court repeated the observations already reported and discharged the rule upon the same grounds.

Rule discharged.

Nov. 18.

HOCKEN *v.* GRENFELL.

The defendant put a construction on an award, which induced the plaintiff to move to set it aside. The Court decided that the defendant's construction was not correct, and the rule was therefore discharged as the objection did not then arise. *Held*, that the prothonotary was correct in taxing the costs of the rule for the defendant, according to the usual practice.

WILDE, Serjt., obtained a rule *nisi*, on behalf of the plaintiff, to review the prothonotary's taxation of costs.

The plaintiff enjoyed the limited use of a stream of water, under the provisions of an award; and there having been an alleged interruption of his right, by the defendant, an action was commenced, which was afterwards referred to arbitration, upon the condition that the arbitrator should not award any thing which was inconsistent with the plaintiff's rights under the first award.

An award was made, by which a limited use of the water was given to the defendant. A construction was put, by the defendant, upon some ambiguous language used in the award, which, as the plaintiff contended, made the award inconsistent with the first award, and also made it bad for not being final; and he applied to the Court to set it aside upon those grounds. The two awards and certain affidavits were turned into a special case, and, after argument, the Court determined that the defendant's construction of the award was incorrect. According to this construction of the award, the plaintiff's objections could not be supported, and the rule was discharged without any mention of costs. Upon the taxation, the prothonotary taxed the costs for the defendant.

Crowder shewed cause.—The defendant was compelled to appear in consequence of the plaintiff's rule, and, as it was discharged, the defendant was entitled to his costs, according to the invariable practice.

Wilde, Serjt., in support of the rule.—This is not a case within the ordinary rule. If the construction which the defendant put upon the award had been correct, then the objections made to the award would have been fatal, and the plaintiff's rule must have been made absolute. In that case he would have been entitled to costs. But the Court determined that the construction was wrong, and then the plaintiff forbore to press his objections, because that was virtually a decision in his favour. The argument on the other side, failed altogether. *M'Andrew* v. *Adam* (*a*).

TINDAL, C. J.—If we made this rule absolute, we should introduce an exception which would lead to difficulty in other cases. I admit that the defendant was contending for a construction which was untenable, and if the plaintiff had waited until some act had been done, which would have entitled him to apply for an attachment against the defendant, for not observing the award, the costs might have been recovered; but the plaintiff having moved to set aside the award, and the Court having held that it was a good award, the costs must follow the ordinary course.

VAUGHAN, J.—The prothonotary has taxed the costs properly.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

(*a*) 1 Scott, 99; 1 Bing. N. C. 270; 3 Dow. 120.

BULNOIS *v.* M'KENZIE.

Nov. 25.

SIR F. POLLOCK obtained a rule calling upon the plaintiff to shew cause why two orders, made at chambers, should not be rescinded; and why the defendant should not be at liberty to rely upon certain objections originally stated in a notice delivered to the plaintiff, in pursuance of stat. 5 & 6 W 4, c. 83, sec. 5 (*a*).

(*a*) Sect. 5 enacts "That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objection on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively, at such trial, unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served on such defendant or plaintiff, or such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms, as to such judge shall seem fit.

1. In an action for the infringement of a patent, the Court will not compel a defendant to give the names and addresses of persons whom, in a notice of objection given under 5 & 6 W. 4, c. 83, sec. 5, he alleges to have used the invention before the patent was granted.

2. But where a judge had made two orders requiring the name and address of a person who had used the invention, and the defendant complied with the orders, the Court refused to rescind them.

3. The Court may order a further and better notice of objections, under their general jurisdiction, as well as under the statute.

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This was an action brought for the infringement of a patent granted to one *Poole*, for an improved cabriolet, and by him assigned to the plaintiff. The defendant pleaded several special pleas, and in pursuance of the 5 & 6 W. 4, c. 83, sec. 5, delivered with them a notice of the objections which he meant to rely upon at the trial. The notice contained a mere recapitulation of the objections raised by the pleas, namely: 1. That the invention was not new; 2. that *Poole* was not the first inventor; 3. that *Poole* was not in possession of the invention at the time the patent was granted; 4. that the invention had been used by other persons at the time the patent was granted; 5. that the alleged improvements were not new as to the public use thereof; and, 6. that the specification was imperfect in not shewing the application of the alleged improvements.

On the 14th *June*, the plaintiff applied to *Park*, J., at chambers, for further and better particulars of the objections, and after counsel had been heard, on both sides, the learned judge made the order as prayed. The defendant, thereupon, amended the fourth objection, by stating that the invention had been used by one *James Hargrave Mann*, in *England*, and by divers other persons in other parts of the kingdom. The fifth was stated to be that the specification did not describe the nature of the invention; that every matter or principle stated in it was already known to the public, and open to public use, and that it contained no new combination; and the 6th, that vehicles with two wheels, drawn by one horse and entered behind, were in public use before the patent was granted, and that the specification did not set out with any certainty what the invention was.

On the 22d of *June*, the plaintiff applied to *Vaughan*, J., at chambers, by summons, for another order, requiring the defendant to furnish the names, description, and place of abode of the persons mentioned in the fourth objection, or that he might otherwise be precluded from calling witnesses in support of that objection; and also further and better objections in lieu of the fifth and sixth. The learned judge, after hearing counsel, made an order accordingly, and, in obedience to it, the defendant specified in detail the parts of the alleged invention which were not new: and instead of the fourth, fifth, and sixth objections, substituted a minute detail of defects in the specification, and also gave a statement of the address and description of *James Hargrave Mann*.

The present rule was obtained upon the ground that, under the provisions of the statute, the defendant delivered the objections at his own peril: and that the judges had no jurisdiction, either at common law or by the statute, to compel the defendant to give a minute and detailed statement of the objections which he intended to rely upon.

Wilde, Serjt., and *Hoggins*, shewed cause.—The proviso in the 5th section of the statute points expressly to a discretion being entrusted to the Court, to compel the delivery of a full notice of the objections which are intended to be raised at the trial. But, apart from the statute, the Court or a judge, have authority to interfere, by virtue of their general jurisdiction in regulating proceedings. The practice of requiring the parties in a cause to give full and accurate particulars of their demands, is not founded upon any statute; but it it depends upon a rule of convenience which has been long established. So the power to compel the parties to grant an inspection of documents, has long

been exercised with the greatest benefit to suitors. In *Blakey* v. *Porter* (*a*), where one part only of an indenture was executed, the Court compelled the party having the custody of it, to produce it for inspection, upon an action being commenced against him. Every argument used on the other side, would apply to the powers exercised by the Court in requiring defendants to give particulars of an intended set-off. The statute 2 Geo. 2, c. 22, sec. 13, which gives the right of set-off, merely requires that notice shall be given of the debt, and upon what account it became due; but it is every day's practice to compel a defendant to give particulars of the set-off. Here the notice of objections, was a mere echo of the contents of the pleas, and it is evident, by a reference to the new statute, that the information to be given in the notice should be something more than was given in the plea. At all events the judge's discretion at chambers cannot be interfered with, after it has been exercised.

Sir F. Pollock, and *R. V. Richards*, *contrà*.—The situation of a defendant is very different from that of a plaintiff. The former is altogether precluded from making his defence, if he is compelled to disclose his evidence to his opponent, who will then be enabled to shape his case accordingly. But the courts have always refused to compel a party in a cause to shew his evidence to the other side; and, whenever documents have been produced, it has been upon the ground that the party in whose possession they are, is holding them as a trustee. This is the first time that such an order has been made since the passing of the statute; and it is a very important question whether the Court can compel a defendant to comply with it. The defendant may go to trial at his own risk, and if the judge at Nisi Prius does not think that a sufficient notice has been given, he will reject the evidence, and the defendant may then tender a bill of exceptions. In *Crofts* v. *Peach* (*b*), which was an action for the infringement of a patent, this Court refused to compel the plaintiff to produce a specimen of the patent articles, to enable the defendant to prepare his defence to the action.

TINDAL, C. J.—This is an application to set aside two orders made at chambers; one has been complied with, and there is, therefore, no occasion for rescinding it; the other requires the defendant to give the address and description of *James Hargrave Mann*, and the other persons mentioned in the fourth objection. To a certain extent that order has also been complied with, for *Mann's* address has been given, and it is unnecessary to rescind that part of it; the only question is, whether it should be rescinded as to the names and addresses of the other persons. I think this Court has a right to model these proceedings under its general jurisdiction; and looking at the words of the statute 5 & 6 W. 4, c. 83, sec. 5, it seems to me to fall exactly within the same construction as the statutes of set-off. At the same time, there is a doubt whether, under the words "notice of objection," we ought to require the defendant to furnish the names and descriptions of those persons who are alleged to have used the invention. The order must, therefore, be rescinded so far as relates to the supplying the names and descriptions of those other persons, and

(*a*) 1 Taunt. 386, and see *Charnock* v. *Lumley*, ante, 244. (*b*) 2 Hodges, 110.

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the judge at Nisi Prius will reject or admit evidence as to those persons, according to his discretion.

VAUGHAN, J.—It is true that this order is new in specie, but, looking at the recent act of parliament, it seems to me that it was intended that the defendant should give the plaintiff more specific information than the plea afforded to him. I therefore think the present notice is insufficient, as the plaintiff must now be taken by surprise, if the defendant resorts to evidence of the use of the invention by any persons except *Mann*.

BOSANQUET, J.—I entertain no doubt as to the power of the judges to order the particulars of these objections to be given. The practice as to notices of set-off is very analogous. There the defendant is required, not to disclose the evidence by which his case is to be supported, but to give a reasonable account of the nature of the transaction which he intends to prove. So here the defendant is not to lay open the proof by which he intends to support his case, and I think the order goes too far in requiring the names and descriptions of the other persons who are alleged to have used the invention. *Andrews* v. *Bond* (*b*) is in point.

COLTMAN, J.—This point ought to be decided in the same way as questions which arise under the statutes of set-off. The jurisdiction to make these orders undoubtedly exists, and the object of the legislature would be defeated, if the judges had not power to require a full statement of the grounds of objection, but so far as this order requires such very minute particulars, it appears to me that it may be modified.

Rule absolute accordingly.

(*b*) 8 Price, 213.

VAUGHAN *v.* WILSON.

Nov. 23.

On the 6th of *June*, a judge's order was made by consent, which authorized plaintiff to sign final judgment immediately. On the 8th of *June* the defendant died, before the plaintiff had entered up his judgment. *Held*, that this was not a case in which the plaintiff was entitled to have judgment entered, *nunc pro tunc*, under Reg. 3. Hil. T. 4 W. 4.

WILDE, Serjt., obtained a rule *nisi*, to discharge an order made by *Vaughan*, J., on the 22nd of *June*, which authorized the plaintiff to enter up judgment, *nunc pro tunc*, as of the 6th of *June*.

Upon showing cause, the affidavits disclosed the following facts:—The plaintiff sued the defendant on a bill of exchange, and the defendant pleaded to the action, and issue was joined, and the cause was ready to be tried at the next sittings. On the 15th of *May*, a meeting of the defendant's creditors was held, and the plaintiff and one *Smith*, another creditor, who had also an action pending, agreed to suspend further proceedings in their actions, until a report of the state of the defendant's affairs could be made. It then appeared to be the general wish of the creditors, that an equal division of the effects should be made; but *Smith*, in breach of his agreement, afterwards proceeded with his action; whereupon, on the 6th of *June*, the defendant's attorney consented that a judge's order should be made, by which the defendant was allowed to withdraw his plea, and liberty was given to the plaintiff to sign judgment immediately, with a stay of execution until the 13th of *June*. In

consequence of *Smith*'s proceedings, a fiat in bankruptcy was also issued against the defendant on the 6th of *June;* but on the 8th of *June*, before anything had been done in the bankruptcy, and before the plea was withdrawn, or the plaintiff had signed judgment, the defendant died.

Talfourd, Serjt., shewed cause.—The judge was well justified in making this order, because the plaintiff was in a situation to have gone to trial before the defendant died, and only forbore to do so, for the purpose of enabling the defendant to come to some arrangement with his creditors. It is clear that there was no defence to the action, and after the defendant's attorney had consented to withdraw the plea, the plaintiff was in the same situation as if he had signed judgment. If the trial had taken place and the defendant had died before trial, but after the commencement of the sittings, the verdict would have stood. *Jacobs* v. *Miniconi* (*a*). In *Miller* v. *Spurrs* (*b*) judgment was entered *nunc pro tunc*, where a cause had been referred to arbitration, but more than two months had elapsed since the verdict was taken. In *Green* v. *Cobden* (*c*) the Court allowed a judgment to be entered, when a delay of more than four terms had elapsed, whilst the judgment of the Court was pending.

Wilde, Serjt., in support of the rule.—The rights of the defendant's executors will be affected, if this proceeding is allowed, because a judgment debt will take precedence in the administration of the assets. The plaintiff was at liberty to sign judgment between the 6th and 8th of *June*, and the plea might have been withdrawn by retraxit, if such a step were necessary. But after the plaintiff has himself been the cause of the delay, the Court will not interfere; and the Rule of Court, Hil. T. 4 W. 4, Reg. 3, which provides that judgments shall not have relation back, becomes imperative. In all the cases where judgments have been entered *nunc pro tunc*, the delay has arisen from the act of the Court. *Bates* v. *Lockwood* (*d*). In *Lambirth* v. *Barrington* (*e*), where the defendant, on an issue tried under the Interpleader Act, died after verdict for the plaintiff, but before the judgment was signed, the Court refused to order the Rules of Court to be entered *nunc pro tunc*. And in *Lawrence* v. *Hodgson*(*f*), an application like the present was refused, upon the express ground, that the delay was the act of the party and not of the Court. *Copley* v. *Day* (*g*) is to the same effect.

TINDAL, C. J.—This case must be decided with reference to the power which the Court has to order judgments to be entered *nunc pro tunc*. The general rule was, that judgments could not be entered up after the death of the party, between verdict and judgment; but, by the stat. 17 Car. 2, c. 8, judgment may be entered within two terms after the verdict. There are also cases where the Courts have allowed judgment to be entered *nunc pro tunc*, where more than two terms have elapsed; but these are all cases where the delay has arisen by the act of the Court, and not by the act of the party. Thus in *Lawrence* v. *Hodgson* (*f*) such an application was refused on that precise ground. Here the agreement was, that the plea should be withdrawn,

(*a*) 7 T. Rep. 31.
(*b*) 2 M. & Scott, 730.
(*c*) Not then reported. 4 Scott, 486.
(*d*) 1 T. Rep. 637.
(*e*) 2 Bing N. C. 149; 1 Hodges, 205.
(*f*) 1 Y. & J. 368.
(*g*) 4 Taunt. 702.

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and that the plaintiff should be at liberty to sign judgment; but he did not do so on the 6th or the 7th of *June*, and on the 8th, the defendant died. It is to be observed, that the administration of the effects of the deceased will be altered, if this application is granted; it also appears to me that the plaintiff has been guilty of laches which were by no means justifiable. For these reasons, I think, we ought not to order the judgment to be entered *nunc pro tunc*.

VAUGHAN, J.—I am disposed to concur. By the Rule of Court of Hil. T. 4 W. 4, all judgments must now be entered of the day and year when they are signed; but it is competent for the Court to order a judgment to be entered *nunc pro tunc*, by which I understand that we may exercise a sound discretion upon the subject. I was at first impressed in favour of the application, upon looking at the intention of the parties, and no doubt the plaintiff was upon vantage ground, and intended to avail himself of his proceedings, but he afterwards consented to come in with the rest of the creditors. The plaintiff had the opportunity of entering the judgment, but the law favours those who are vigilant; and as the Courts have interfered only where the delay has happened by the act of the Court, I agree that this rule must be made absolute.

BOSANQUET, J.—I am of opinion that this case does not fall within the proviso contained in Rule 3 of *Hilary* Term, 4 W. 4. The agreement made between the parties, before the defendant's death, was, that the plea should be withdrawn, and that the plaintiff should be at liberty to sign judgment on the 6th of *June*. On that day the judgment might have been entered up, and it was the plaintiff's own neglect that he did not do so. Without that agreement the plaintiff would have had no power to sign judgment, and he has omitted to take advantage of it. Now the rule is that judgments shall be entered of the day when they are signed, "and shall not have relation to any other day." Then by the proviso it is competent for the Court or a judge, to order a judgment to be entered *nunc pro tunc*. That applies to cases where the delay does not occur by the act of the parties, but by the act of the Court.

COLTMAN, J.—There are circumstances in this case which would induce me to give the plaintiff relief, inasmuch as he delayed to enter the judgment for a laudable reason; but considering that the death of the defendant has intervened, and that a total alteration of circumstances has occurred, without saying that the Court has no power to interfere, I think it would not be proper to allow the judgment to be entered *nunc pro tunc*.

Rule absolute.

The Earl of HARRINGTON and others *v.* the Bishop of LITCHFIELD and COVENTRY and others.

Nov. 17.

QUARE IMPEDIT.—The declaration stated, that from time immemorial there had been a certain ancient church, with cure of souls, situate in the township of *Boulton*, which was a perpetual curacy, augmented by Queen *Anne*'s bounty; and that the majority of the proprietors of estates for the time being, situate within the said township, from time whereof the memory of man was not to the contrary, had nominated and presented, and had been used and accustomed to nominate and present, and of right ought to have nominated and presented, and still of right ought to nominate and present, a fit and proper person, being in holy orders, that is to say in the holy orders of priesthood, to be the perpetual curate of the said church, whenever at any time the same had or should become vacant by the death of the then incumbent thereof or otherwise, and to present the said person so nominated to the bishop of the said diocese for the time being in which the same church was situate, to wit, to the Bishop of *Litchfield* and *Coventry*, for the purpose of his being admitted and licensed by the said bishop to the perpetual curacy of the said church. The declaration then alleged a vacancy in the curacy, by the promotion of the Rev. *G. H. Woodhouse*, the late incumbent, to the living of *Finningley*, and proceeded, "and thereupon, afterwards, to wit, on &c., the then majority of the proprietors of estates for the time being, situate within the said township, that is to say the now plaintiffs, who then respectively were, and still are, proprietors of such estates, did nominate *William Cantrell*, clerk, then and continually afterwards, and hitherto being a fit and proper person for that purpose, and in holy orders, that is to say the holy orders of priesthood, to be the perpetual curate of the said church of *Boulton*, in the place and room of the said *G. H. Woodhouse*, as under and by virtue of the statute in such case made and provided, it was lawful for them to do, and did then present the said *William Cantrell* to the defendant *Samuel*, he then being Bishop of *Litchfield* and *Coventry*, and by whom the said *William Cantrell* ought to have been admitted and licensed to the perpetual curacy of the said church, &c."

The Bishop of *Litchfield* and *Coventry* and the Rev. *Edward Poole* pleaded separately, but those pleas were not material to the present question. The other defendants pleaded—

That before and at the time when it was in the declaration alleged that the plaintiffs were the majority of the proprietors of estates for the time being, situate within the said township, and from thence hitherto, they the defendants were and still are the majority of the proprietors of estates for the time being, situate within the said township, and then were and still are respectively proprietors of such estates. And that, after the said *G. H. Woodhouse* was so admitted, instituted, and inducted into the church of *Finningley*, to wit, on, &c., they the defendants then being the majority of the proprietors of estates for the time being, situate within the said township, and then respectively being the proprietors of such estates, did duly nominate the said *E. Poole*, clerk, to be the perpetual curate of the said church of *Boulton*, and did then, still being such majority as aforesaid, present the said *E. Poole* to the defendant *Samuel*, he

In *quare impedit*, the plaintiffs alleged, that they being the majority of proprietors of estates for the time being of the township of B., of right nominated and presented a clerk to be the perpetual curate of the church of B. The defendants pleaded that they being the majority of the proprietors of estates for the time being of the said township, nominated another clerk to the curacy, *without this*, that the plaintiffs were the majority of the proprietors of estates at the time of the said nomination, *modo et forma*. Replication, that defendants then being such majority of the proprietors of the said estates, did not duly nominate the clerk *modo et forma*. *Held*, that the replication was bad, as it traversed matter alleged in the inducement of the plea, instead of joining issue upon the plea.

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then being Bishop of *Litchfield* and *Coventry*, and by whom the said *E. Poole* ought to have been admitted and licensed to the perpetual curacy of the said church of *Boulton*, wherefore they, the defendants, did hinder and prevent the plaintiffs, as in the declaration mentioned, and as the plaintiffs had above thereof complained, against the defendants: *without this* that the plaintiffs were, at the time of the said nomination of the said *W. Cantrell*, the majority of the proprietors of estates for the time being, situate within the said township, in manner and form as in the declaration was alleged. Conclusion to the country.

There were other pleas which it is not necessary to mention.

Replication—That they the said defendants, then being such majority as in the plea mentioned, did not duly nominate the said *E. Poole* to be perpetual curate of the said church of *Boulton*, in manner and form as the defendants have above in their plea in that behalf alleged. Conclusion to the country.

Demurrer—assigning for cause that the plaintiffs had, in the replication, improperly traversed matter alleged in the inducement of the plea, instead of joining issue. Joinder in demurrer.

Wightman, in support of the demurrer.—A traverse upon a traverse is not allowed when a material traverse is tendered. Here the traverse which is tendered is material, because it denies the plaintiff's title, and therefore they were bound to support their title, as it is expressly decided in *Lady Chichesley* v. *Thompson* (*a*), and which was an action of *quare impedit*. There it is said—"but when the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse." And the same principle is to be found in many authorities. *The King* v. *the Bishop of Worcester* (*b*). *Digby* v. *Fitzherbert* (*c*). *Thrale* v. *the Bishop of London* (*d*). *Thorn* v. *Shering* (*e*). Com. Dig. tit. Pleader (G. 17.) In the *Cross Keys Bridge Company* v. *Rawlings* (*f*), where in an action for carelessly navigating a ship, the defendants pleaded as inducement, that the plaintiffs had narrowed the channel of a river which made the passage of vessels dangerous, and then traversed the allegation of carelessness, it was held that the defendants were not confined to give evidence to prove that the plaintiffs had narrowed the river, but that they might also show that they had not been guilty of carelessness. Here the material matter in issue is, whether the plaintiffs have a right to present to the curacy; but instead of proving their own title, they turn round and attack the title of the defendants. The plaintiffs are bound to prove that they were the majority of the proprietors of estates in the township.

Cowling, *contrà*.—It appears that the church is not full; the defendants are therefore actors, and must shew a good title in themselves, in order that they may have a writ to the bishop, if the judgment of the Court should be in their favour. Com. Dig. tit. Pleader (3 I. 9,) (3 I. 12). 3 Black. Com. 250. The best form of pleading is that which raises the whole merits of the case,

(*a*) Cro. Car. 105.
(*b*) Vaughan, 58.
(*c*) Hobart. 106.
(*d*) 1 H. Black. 376.
(*e*) Cro. Car. 586.
(*f*) 3 Bing. N. C. 71; 2 Hodges, 147.

and the question is raised whether the plaintiffs or the defendants have the right to present. The traverse taken by the defendants under the *absque hoc* is immaterial, and the plaintiffs were not bound to demur, but may raise a material issue upon the inducement. It was sufficient if the plaintiffs were the majority of a majority of the proprietors, present at the meeting, when the nomination was made, and then their clerk would be duly presented. In like manner the act of a majority at a meeting of any constituent part of a corporation, has been held to be binding upon the whole body. *Quare impedit* is in the nature of trespass, and if this suit was commenced by too few persons, there ought to have been a plea in abatement. Vin. Abr. tit. Presentation (N. c.) Com. Dig. tit. Abatement (E 9,) (E 10.) If this had been an action of trespass, the defendants must have pleaded in abatement, 2 Wms. Saund. 102 (14.) *Gilbert* v. *Parker* (*g*). The plaintiffs do not allege in the declaration that *they* compose a majority, but merely that *Cantrell* was elected by a majority of the proprietors. In *Lady Chichesley* v. *Thompson* (*h*) the church was full, and no writ to the bishop was required, therefore the defendants were not bound to shew title in themselves. In *Cross Keys Bridge Company* v. *Rawlings* (*i*) it is said, that a traverse after a traverse may be allowed. Com. Dig. tit. Pleader, (G. 17. 18. 19. 20.)

Wightman in reply.—The plaintiffs would be bound to prove that they were the majority of the proprietors, or they could not recover in this action; there cannot be a doubt upon that point. Nor was it necessary for the defendants to make out any title in themselves; it would be quite sufficient if they destroyed the plaintiff's title. In *Danvers* v. *the Bishop of Worcester* (*k*) it appears, that if the defendant have a judgment upon demurrer to the declaration, he shall have a writ to the bishop without making any title.

Judgment for the defendants was about to be delivered, when *Cowling* prayed leave to amend on the usual terms.

Rule accordingly.

(*g*) 2 Salk. 630.
(*h*) Cro. Car. 105.
(*i*) 3 Bing. N. C. 76. 2 Hodges, 147.
(*k*) Dyer, 246.

DELEGAL *v.* HIGHLEY.

Nov. 22.

After judgment for the plaintiff on a demurrer to one of several pleas of justification in an action for a libel, the Court will not allow him to withdraw a replication of *de injuria* to other pleas, which are open to the same objections, and substitute a demurrer.

2. Where there were three counts in libel, and Not guilty had been pleaded to the whole declaration, and issues in fact had also been raised, upon pleas to the first and last counts, and judgment had been given for the plaintiff, on a demurrer to a special plea to the second count, the Court allowed the plaintiff to withdraw the first and third counts from the record, on payment of costs.

ACTION on the case, brought against the defendant for maliciously charging the plaintiff with a fraud, and for causing a libel respecting the charge to be inserted in a newspaper. The first count of the declaration charged the malicious prosecution, and the second and third were founded upon the libel. The defendant pleaded—1. Not guilty to the whole declaration. 2. To the 1st count, a justification of the charge; 4th, 5th, and 6th, to the 2nd count, a justification of the libel; and similar pleas to the third count. The plaintiff

demurred to the second plea, and also to the fourth, fifth, and sixth pleas. To the pleas to the third count, he replied *de injuriâ.*

The Court held, upon the argument of the demurrer, that the second plea was bad in form as well as in substance, and that the fourth, fifth, and sixth pleas were also bad (*a*).

It appeared that the pleas to the third count were liable to the same objections as the pleas to the second count.

Wilde, Serjt., obtained a rule *nisi*, calling upon the defendant to shew cause why the plaintiff should not be at liberty to strike out the first count in the declaration, and withdraw the replication of *de injuriâ*, to the pleas to the third count, and substitute a demurrer.

Talfourd, Serjt., and *E. V. Williams*, shewed cause.—This application is not a matter of right, but it is made to the discretion of the Court, and in this case the plaintiff is not entitled to any favour. If the object of the action is to protect the character of the plaintiff, the issues which are raised on the record are well adapted to meet that purpose. But it is manifest that the plaintiff is desirous of avoiding the real merits of the case. [*Tindal*, C. J.—The latter part of the rule is that which I doubt about, but I do not see how you can prevent the plaintiff from striking out one of the counts in the declaration. He might enter a *nolle prosequi*.] This must be treated as an entire rule. *Strother* v. *Randerson* (*b*) and *De Rutzen* v. *Lloyd* (*c*) are authorities against this application. A record cannot be altered, when the alteration will prejudice the opposite party.

Wilde, Serjt., *contrà*.—If the defendant should obtain a verdict on the issues raised on the third plea, the plaintiff would still be entitled to judgment *non obstante;* and, therefore, the Court will not compel the plaintiff to go to trial, when a demurrer will decide the question at a much less expense. From the judgment which has been already given, it is manifest that the pleas to the third count cannot be supported, and that the fault will not be cured by the verdict. The cases which have been cited, are not applicable to the present question.

TINDAL, C. J.—I feel a difficulty in saying that after the plaintiff has replied *de injuriâ*, he may be allowed to alter the course of the trial at Nisi Prius, by withdrawing the replication and substituting a demurrer. In the present case, the plaintiff may set himself right, because he may enter a *nolle prosequi* as to either of the counts. I think, therefore, that this rule must be discharged, the plaintiff being at liberty to withdraw the first and last counts in the declaration, on payment of costs. The costs of this rule to be costs in the cause.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

(*a*) See Delegal v. Highley, ante, 158.
(*b*) 5 Dow. 280.
(*c*) 5 Ado. & Ellis, 456.

DALY *v.* MAHON.

Nov. 3.

Where no application was made to discharge a defendant out of the custody of the sheriff on the ground of a defect in the affidavit to hold to bail, until 21 days after the arrest, *held*, to be too late, and that the extreme age and infirmity of the defendant was no sufficient excuse for the delay.

HURLSTONE moved to discharge the defendant out of the custody of the sheriff, upon the ground that the affidavit to hold to bail was defective. He made several objections to the affidavit; but it appeared that the defendant was arrested on the 25th of *July*, and that no application to discharge him out of custody, was made to a judge at chambers until the 15th of *August*. For the purpose of accounting for the delay, an affidavit was produced, by which it appeared that the defendant was very aged, and suffering from severe indisposition; *Primrose* v. *Baddeley* (*a*) was cited to shew that if the delay was accounted for, the lapse of time was no objection, and *Rock* v. *Johnson* (*b*) where it is said, that the rule is not so strict, when objections are made by persons in custody.

TINDAL, C. J.—Objections to the affidavit to hold to bail, ought to be made within a reasonable time, which has been held to be within the ordinary time for putting in bail. In *Fowell* v. *Petre* (*c*) a prisoner was held to be too late after nineteen days had elapsed. I do not think any sufficient excuse has been offered, because the application did not require any personal exertion to be made by the defendant himself.

Rule refused (*d*).

(*a*) 2 Dow. 350; 2 Cr. & M. 168.
(*b*) 4 Dow. 405.
(*c*) 5 Dow. 276; 2 Har. & Wol. 373.
(*d*) See Brashour v. Russell, ante, 212. Exparte Burgess, 1 Wil. Wol. & Hodges.

OLDROYD *v.* J. CRAMPTON, JOHN CRAMPTON, and H. WILKINSON.

Nov. 6.

1. In an action by trustees under 3 Geo. 4, c. 126, s. 57, against the renter of turnpike tolls and his sureties, for rent in arrear, the declaration should shew that the agreement, under which the tolls were let, was in writing, and signed by the trustees, or their clerk, or treasurer.

2. But it need not set out all the preliminary steps which are required to render a meeting valid for the letting of the tolls; it is sufficient to state that at a public meeting of the trustees, duly held by virtue of the statutes in that case made and provided, the tolls were duly put up and let by auction, by virtue of the powers, and in the manner directed by the statutes.

THE declaration stated that *Thomas Oldroyd*, clerk to the trustees of the *Dewsbury* and *Leeds* turnpike road, acting under and by virtue of an act of parliament made and passed in the fifty-sixth year of the reign of his late majesty king *George* the Third, intitled, &c., complained, &c.

For that whereas, heretofore, to wit, on the 30th day of *July*, 1835, at a public meeting of the trustees of the said turnpike road, duly held by virtue and authority of the statutes in that case made and provided, at *Dewsbury* in the county of *York*, the tolls of the several gates, chains, and sidebars, erected upon the said turnpike road, were duly put up and let to farm by auction, by virtue of the powers, and in the manner directed by the statutes in that case

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made and provided, and the said *Joshua Crampton* did then and there become and was the last and highest bidder for the said tolls, and was thereupon duly declared the farmer or renter thereof, at the yearly rent or sum of 1630*l.* for three years from the 8th day of *September* then next, and the said *Joshua Crampton* did then and there produce and tender the said *John Crampton* and *Henry Wilkinson* to the said trustees as his sureties for the payment of the said rent; and thereupon, in consideration of the premises, afterwards, to wit, on the same day and year aforesaid, by a certain agreement then and there made by and between the said trustees, (in pursuance of the power and authority given to and vested in them, the said trustees, by the said statutes or some or one of them, and of all other powers and authorities enabling them in that behalf,) and the said defendants, the said trustees, did consent, contract, and agree with the said *Joshua Crampton* to let to him, and the said *Joshua Crampton* did agree to take of and from the said trustees, the said tolls, and all and every the said gates, chains, and sidebars, for the term of three years from the said 8th day of *September*, then next, at the yearly rent of 1630*l.*, payable by twelve equal monthly payments in each year, on the eighth day of each successive month, the first payment thereof to be made on the said 8th day of *September*, then next ensuing; and also under and subject to certain other conditions and stipulations and agreements therein contained. And the said *Joshua Crampton* as farmer or renter of the said tolls, and the said *John Crampton* and *Henry Wilkinson* as his sureties, did thereby jointly and severally promise, undertake, and agree to and with the said trustees, that he, the said *Joshua Crampton*, his executors, or administrators, should and would well and truly pay, or cause to be paid, the said yearly rent or sum of 1630*l.*, at the times in the proportions and in manner thereinbefore limited and appointed for that purpose, and perform, fulfil, and keep, all and singular the conditions, restrictions, and agreements therein contained, and which, on the part of the highest or last bidder, farmer, or renter of the said tolls, were or ought to be performed; and the said plaintiffs say that afterwards, to wit, on the said 8th day of *September*, 1835, aforesaid, the said *Joshua Crampton* entered into and upon, and took possession of, all and singular the toll-houses of and belonging to the said trustees, and then being upon and adjoining the said turnpike road with the appurtenances; and by virtue of the said agreement then and there became and was interested in and entitled to and possessed of the said tolls, and all and every the said gates, chains, and sidebars, belonging to the said turnpike road.

Breach—That after the making of the said agreement, and during the said term of three years thereby granted, to wit, on the 8th day of *September*, in the year of our Lord, 1836, a large sum of money, to wit, the sum of 271*l.* 13*s.* 4*d.* of the rent aforesaid, for two monthly payments thereof ending on the day and year last aforesaid, became and was due, and still is in arrear and unpaid by the said *Joshua Crampton*, as farmer or renter of the said tolls, to the said trustees, contrary to the tenor and effect, true intent, and meaning, of the said agreement, so made as aforesaid, of all which several premises the said defendants afterwards, to wit, on the day and year last aforesaid, had notice and were requested to pay the said sum of money so in arrear as aforesaid; yet the said defendants had not paid the same, to the damage of the said trustees of 500*l.*; and therefore the said plaintiff, as such clerk to the said

trustees as aforesaid, and by force of the statute in such case made and provided brought his suit.

Demurrer, and the following causes of demurrer were shewn.—That it was not stated in the declaration whether the said trustees caused such notice to be given of the time and place of holding the said meeting, whereat it was alleged the said tolls were put up and let to farm, as was required by the statute, to render the said meeting a legal and valid meeting, for the purpose of letting to farm the said tolls. And also for that the several allegations that the said meeting was duly held, and that the said tolls were duly put up and let to farm by auction, were too general; and that the plaintiff ought to have set forth such facts as would enable the Court to judge whether the said meeting was duly held, and the said tolls duly put up and let, and whether the several directions given by the said statute, touching the holding of meetings for the purpose of letting tolls, and the putting up and letting such tolls, were observed and complied with; upon which facts, some certain and definite issue or issues might be taken to be tried by the country. And also for that it was not stated that the said agreement was signed by the trustees letting the said tolls, or any two or more of them, or by their clerk or treasurer, and by the said defendant *Joshua Crampton* as the lessee and farmer thereof, and the said other defendants as his sureties; or that the said agreement was by deed or under the seals of the said trustees or any of them.

C. D. Bevan, in support of the demurrer.—The trustees profess to have acted in pursuance of the 55th section of the Turnpike Act, 3 Geo. 4, c. 126. That section requires that the tolls should be let at a public meeting at which certain directions shall be observed (*a*). Now when a special authority is delegated to particular persons, it ought to be shewn that the authority has been strictly pursued. In this case the act is imperative and not directory, and the distinction between directory and positive statutes is pointed out in *Pearse* v.

(*a*) Sect. 55 directs, "That it shall and may be lawful for the trustees or commissioners of every turnpike road, at a public meeting, to let to farm the tolls of the several gates erected upon their respective turnpike roads in the manner hereinafter mentioned, although no express power shall have been given by any act or acts for that purpose, and that whenever any tolls shall hereafter be let to farm by virtue of the powers given by this or any other act or acts of parliament, the following directions shall be observed; that is to say, the trustees or commissioners shall cause notice to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the best bidder on his producing sufficient sureties for payment of the money monthly or otherwise, (as in such notice shall be specified,) and that they will be put up at the sum which they were let for, or produced in the preceeding year, clear of the salary of the collector; and to prevent fraud or any undue preference to the letting thereof, the trustees or commissioners are hereby required to provide a glass with so much sand in it as will run from one end of it to the other in one minute, which glass, at the time of letting such tolls, shall be set upon a table; and immediately after every bidding the glass shall be turned, and as soon as the sand is run out it shall be turned again, and so for three times unless some other bidding intervenes; and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls, and shall forthwith enter into a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit."

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Morrice (*b*) and *The King* v. *the Mayor of Norwich* (*c*). In *Tully* v. *Sparkes* (*d*), it was held to be necessary to shew that there was a petition, and who the petitioners were, and that they were creditors to the amount of the sums required by the Bankrupt Act, 5 Geo. 1, c. 24; and that an allegation that the commission was issued in due form of law was not sufficient. So here it is not enough to state that the tolls were let at a meeting "duly held by virtue and authority of the statutes." [*Tindal*, C. J.—This is a case where the defendants have taken all the benefit of the contract. Many of the directions in the statute are extremely minute. Is it necessary, for instance, to state in the declaration that the glass held so much sand as would have run through in one minute? It seems to me that the general allegation is sufficient.] Then there is another objection, namely that the declaration states that the tolls were duly put up and let to farm, and that an agreement was made by the trustees, in pursuance of the power vested in them by the statute. Now at common law the demise would require to be made under seal; but as no deed is pleaded, the plaintiffs ought to have shewn by what authority the agreement was made. [*Tindal*, C. J.—The statute is a public one, and we are bound to take notice of its provisions. I am not aware of any instance where a party who has had the benefit of a contract could take such an objection.] In *Pearse* v. *Morrice* (*b*), the party for whom the defendant was surety, had taken a benefit under the contract, and it was held that the defendant might take advantage of a similar defect. [*Tindal*, C. J.—There every lease which was not made in pursuance of a local statute was declared to be "null and void to all intents and purposes whatsoever." Here the statute is only directory.] The plaintiff alleges that an agreement was made in pursuance of the statute; but he ought to have shewn how the agreement was made; and cannot be permitted to state the result of the steps which were taken, to comply with the statute. *Lloyd* v. *Wood* (*f*). In general, an allegation that an act has been duly or lawfully performed is not sufficient. *The Abbott of Strata Marcella's case* (*g*). *Everard* v. *Paterson* (*h*). *Hodsdon* v. *Harridge* (*i*). The turnpike acts have always received a very strict construction. *Bell* v. *Nixon* (*k*). And at all events the declaration ought to have alleged that the agreement was signed by two of the trustees, or their clerk or treasurer. By the 57th section of the statute, it is provided that all agreements entered into for the letting of the tolls, signed by the trustees or commissioners or any two or more of them only, their clerk or treasurer, and the lessee or farmer and his sureties, shall be good, valid, and effectual, to all intents and purposes whatsoever, notwithstanding the same may not be by deed or under seal, any act to the contrary thereof notwithstanding. Here it is not even alleged that the agreement was in writing.

Addison, contrà.—The fallacy in the argument used for the defendants is, that an agreement would be binding upon them, although it might not have been made in pursuance of the 57th section of the statute. If a farmer of tithes has received the benefit of his contract, he will be liable to be sued, although there was no demise of the tithes under seal. [*Tindal*, C. J.—This

(*b*) 2 Ado. & Ellis, 84.
(*c*) 2 B. & Ado. 310.
(*d*) 2 Lord Ray. 1546.
(*f*) 5 Ado. & Ellis, 228.
(*g*) 9 Rep. 25.
(*h*) 2 Marsh. 304.
(*i*) 2 Wms. Saund. 61 h.
(*k*) 7 Bingh. 393.

is an action against sureties.] The cases which have been cited are distinguishable from the present. *Pearse* v. *Morrice* (*l*), has been distinguished during the argument. Although a lease by husband and wife is required to be by deed "still, however, if the lessee or any other plead a demise by husband and wife, it is not necessary to plead it to be by deed." 2 Wms. Saund. 180 a. *Wiscot's case* (*m*).

TINDAL, C. J.—The second point, that the declaration does not allege that the agreement was in writing and signed by the trustees or their clerk, is very strong against you, and you will do well to amend.

Addison assented.

Rule accordingly.

(*l*) 2 Ado. & Ellis, 84. (*m*) 2 Rep. 61 b.

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Nov. 10.

TROVER to recover a gun the property of the plaintiff. *Pleas*—1st, Not Guilty; 2ndly, that the gun was not the property of the plaintiff; and, 3rdly, that on the 24th of *November*, 1830, one *William Jones Burdett* was lord of the manor of *High Littleton* and also lord of the manor of *Stowey*, in the county of *Somerset;* and being lord of the said manors the said *W. J. Burdett*, before the commission of the supposed grievance, to wit, on, &c., according to the form of the statute, &c., by writing under his hand and seal, did nominate and authorize and appoint one *William Crossman*, therein described as servant of the defendant, to be gamekeeper, of, in, and to, his, the said *W. J. Burdett's*, said manors, and each of them, with full power, license, and authority, within and upon the said manors. or either of them, to kill any hare, pheasant, partridge, or any other game, whatsoever, for the use and benefit of him the said defendant, and also to take and seize all such guns, bows, greyhounds, setting dogs, lurchers, or other dogs, to kill hares or conies, ferrets, hamels, lowbels, hays, or other nets, harepipes, snares, or other engines, for the taking or killing of conies, hares, pheasants, partridges, or other game, as within the precincts of his said manors or either of them, should be used by any person or persons who by law should be prohibited to keep or use the same; which said authority, deputation, and appointment, at the time of the committing of the supposed grievance, was and still is in force and effect, and the same was afterwards, and before the committing of the supposed grievance, to wit, on the 9th of *December*, 1830, duly entered and registered, with and by the clerk of the peace for the county of *Somerset*, according to the form of the statute in that case made and provided. That at the time of the using of the said gun, in the declaration mentioned, by one *George Keel*, as hereinafter in this plea mentioned, and also at the time of the seizing, taking, and carrying away the same, as is hereafter also mentioned, the said *G. Keel* had not any game-certificate authorizing him to kill game, and was by law prohibited from killing game, for want of such certificate; that *W. Crossman*, so being authorized and deputed, and *G. Keel* being so unauthorized and

1. A deputation to kill game, granted before the 1 & 2 Wm. 4, c. 32, does not continue in force so as to entitle a gamekeeper in an action for an act done by him after that statute was passed, to have a notice of action, and to give all matters in evidence under the general issue.

2. The 1 & 2 W. 4. c. 32, s. 1, repeals all former game acts, "except as to any matters done by any persons, under the authority of the said acts before the 31st Oct., 1831, with respect to which every privilege and protection given by any of the said acts shall continue in force as if this act had not been made." *Held*, that the granting of a deputation was not a *matter done* within the meaning of this exception.

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prohibited as aforesaid, because the said *G. Keel* before and at the said time when, &c., within the precincts and limits of the manor of *Stowey*, did use the said gun in the declaration mentioned, for the killing of game within the precinct and limits of the said manor, he, the said *W. Crossman*, being gamekeeper and deputed and authorized as aforesaid, at the same time when, &c., did, by virtue thereof, within the precinct and limits of the manor of *Stowey*, take and seize from the said *G. Keel*, the gun so used by the said *G. Keel* for the killing of game within the precincts and limits of that manor; and did then carry and deliver the same to the defendant, to be by him held and kept, for the use and benefit of the said *W. J. Burdett*, as being such lord of that manor, as it was lawful for him to do, for the cause aforesaid; and that the defendant had from thence, hitherto, as the servant and by the command of the said *W. J. Burdett* in that behalf, kept and detained the said gun, for the use of the said *W. J. Burdett*, as it was lawful for him to do for the cause aforesaid; which were the said supposed grievances and conversion in the declaration mentioned. Conclusion with a verification.

The plaintiff joined issue on the first and second pleas; and after protesting that the authority, deputation, and appointment, at the time of committing the grievances, was not in force or effect, replied *de injuriâ* to the third plea.

At the trial, before *Williams*, J., at the last spring assizes for *Somersetshire*, the following appeared to be the facts of the case. The plaintiff proved that a gun belonging to him, was taken away from one *George Keel*, an uncertificated sportsman, by *Crossman*, the defendant's servant, in *November*, 1832. When the seizure was made, *Keel* was within the supposed manor of *Stowey*, with the gun in his pocket, loaded, and under circumstances which might have warranted *Crossman* in supposing that his intention was to kill game. The defendant refused to give up the gun to the plaintiff, contending that his servant had a right to seize it.

On behalf of the defendant it was proved that Mr. *Burdett* had demised his estate at *Stowey* to the defendant; and on the 24th *November*, 1830, had granted a deputation to *Crossman* as gamekeeper, which was enrolled with the clerk of the peace in the same month. For the purpose of shewing that *Stowey* was a manor, some evidence of the exercise of manorial rights, by Mr. *Burdett* was given, as that he had enclosed waste lands, and erected a pound. On behalf of the defendant it was objected that he ought to have received a notice of action, in pursuance of 1 & 2 Wm. 4, c. 32, sec. 47 (*a*). The plaintiff contended that the defendant was not within the protection of that statute; and that *Stowey* was not a manor, or a reputed manor. The learned judge reserved the point arising on the construction of the statute; and the jury found, 1st, that the gun belonged to the plaintiff; 2ndly, that *Keel* was not using it for the destruction of game; and, 3rdly, that *Stowey* was not a manor. Verdict for the plaintiff.

(*a*) The 47th section enacts, "That all actions and prosecutions to be commenced against any persons for any thing done in pursuance of the act, shall be commenced within six months, and notice in writing of such action and of the cause thereof shall be given to the defendant one calendar month at least before the commencement of the action, and the defendant may plead the general issue and give this act and the special matter in evidence."

Erle, in *Easter* Term obtained a rule *nisi*, to enter a nonsuit, upon the point reserved at the trial.

Bompas, Serjt., and *Butt*, shewed cause.—The statute which was in force when the gun was seized by the defendant, was the 1 & 2 Wm. 4, c. 32. It is true that by the 47th section, the defendant would have been entitled to notice of action if he had been a regularly appointed gamekeeper, but there are several grounds upon which it may be contended, that he is not within the protection of that statute.

1st point.—The statute came into operation on the 31st *October*, 1831, and, consequently, after the granting of the deputation in 1830. By the 14th section of the 1 & 2 W. 4, c. 32, a lord of a manor or reputed manor, may appoint and depute any person to be a gamekeeper; and the 16th section provides that no appointment or deputation shall be valid, unless and until, it shall be registered with the clerk of the peace for the county. The defendant ought, therefore, to have obtained a new deputation, and to have registered it with the clerk of the peace, in pursuance of these enactments. The former deputation was no longer in force, because, by the first section of the new statute, all the former statutes, (except as therein excepted,) were repealed. Nor can it be contended that the present case, falls within either of the exceptions (*b*). It was contended, at the trial, that the granting of the deputation in 1830, was a *matter done* within the words of this exception, but that construction cannot be adopted. Sections 5, 13, and 41, may be referred to, to shew that a new deputation was contemplated by the legislature, and that the old one was no longer in force. *Surtees* v. *Ellison* (*c*). *R.* v. *M'Kenzie* (*d*).

2nd point.—Another objection is, that even if *Crossman* had a valid deputation, the defendant is not entitled to the protection which a gamekeeper would have, by force of the 47th section of the statute. The deputation was granted to *Crossman*, and although it recited that he was at that time the servant of the defendant, that would not authorize the latter to keep the gun. Nor was it shewn that he was servant to the defendant at the time of the seizure of the gun, but the defendant has acted in the transaction as an entire stranger. *Hopkins* v. *Crowe* (*e*). *Irving* v. *Wilson* (*f*). Nor is this case within the principle to be found in *Greenway* v. *Hurd* (*g*), and *Waterhouse* v. *Keen* (*h*).

3rd point.—The next objection is that there was no proof at the trial that *Stowey* was a manor or reputed manor, and the verdict of the jury negatived that it was either the one or the other; therefore there was no right in Mr. *Burdett* to appoint a gamekeeper. The acts of ownership which were relied upon, were quite consistent with the fact that the owner was a freeholder. They did not even prove that *Stowey* was a reputed manor; but as in the plea it is called a manor, it was incumbent on the defendant to shew the existence of a manor. The older game-acts do not give the right to appoint gamekeepers to the lords of reputed manors. In *The Earl of Aylesbury* v. *Pattison* (*i*), it was held that the word manor did not include a hundred, or wapentake.

Erle contrà.—It is said that although *Crossman* may be within the protec-

(*b*) See this part of the statute in the judgment.
(*c*) 9 B. & Cress. 750.
(*d*) Russ. & Ryan, Cro. C. 429.
(*e*) 4 Ad. & Ellis, 774.
(*f*) 4 T. R. 485.
(*g*) 4 T. R. 553.
(*h*) 4 B. & Cress. 200.
(*i*) 1 Doug. 28.

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tion of the new statute, the defendant is not. But throughout the whole transaction, the two persons have been treated as acting together; and in the deputation *Crossman* is described as the servant of the defendant; and it was in evidence that the defendant was the lessee of the manor. Even if he were not strictly within the meaning of the new statute, yet, as he acted *bona fide* under a notion that he was justified in keeping the gun, he is entitled to set up the statute as a justification. *Beechey* v. *Sides* (*k*). *Cook* v. *Leonard* (*l*).

The existence of the manor is admitted on the pleadings. The plaintiff having protested that the deputation was not in force, at the time of committing of the grievances, thereby admitted the existence of the manor, and that question was not in issue, and the verdict of the jury as to that point, has no operation. And it was not necessary to prove it a manor for all purposes, because there may be a *quondam* manor in existence, when it has ceased to be a legal manor for defect of freehold tenants. *Soane* v. *Ireland* (*m*).

Nor is it necessary that the defendant should rely altogether upon the third plea; because if the defendant is within the protection of the statute, he is entitled to give all matters in issue, under the provisions of the 47th section. Then the question is, whether the deputation was in force when the gun was seized. It is clear that there was a good and valid deputation in force before the passing of the 1 & 2 W. 4, c. 32. By the first section all former statutes are repealed with certain exceptions, one of which is, "except as to any matter done by any persons under the authority of any of the said acts, before or upon the 31st day of *October*, 1831." Now the granting of the deputation in 1830, was a matter done, under the authority of the repealed statute; and, therefore, the defendant comes within the provisions of the exception. It could not have been intended that a new deputation should be taken out; if that were so, two deputations would have been required in all cases during the year 1831; one which would be in operation until *October*, and another for the remaining months in the year.

TINDAL, C. J.—This rule must be discharged. The defendant justifies the right to seize the plaintiff's gun, under the statute 1 & 2 W. 4, c. 32. By sec. 13 it is enacted, that it shall be lawful for the lord of any manor, or reputed manor, by writing under hand and seal, "to appoint one or more person or persons as a gamekeeper or gamekeepers, to preserve or kill the game, within the limits of such manor or reputed manor, for the use of such lord or steward thereof, and to authorize such gamekeeper or gamekeepers, within the said limits, to seize and take, for the use of such lord or steward, all dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used within the said limits, by any person not authorized to kill game for want of a game-certificate." The question is, whether the defendant has brought himself within the privileges granted by this statute, so as to entitle him to give matters in evidence, under the general issue, and to have notice of action? It is clear that, under the special plea, the defendant is out of court, and he must, therefore, rely upon the general issue; and it becomes one and the same proposition, whether he can avail himself of the general issue, and also require notice of action. It is clear that, under the 22 and 23 Car. 2, c. 25, he would not be entitled to either of these privileges, and he must,

(*k*) 9 B. & Cress. 806.
(*l*) 6 B. & Cress. 351.
(*m*) 10 East, 259.

therefore, bring himself within the provisions of the new statute. Now it appears to me that the defendant was not a gamekeeper, appointed or deputed under the provisions of the new statute. The words of the sixteenth section are extremely strong and significant. It is enacted, that no appointment or deputation of any person as gamekeeper, by virtue of that act, shall be valid, unless and until it shall be registered with the clerk of the peace. It was expressly found, at the trial, that the deputation was given under the old act; and that it was registered in *November*, 1830, which was before the new act came into operation. It cannot, therefore, be said, that the defendant was a gamekeeper, appointed or deputed by virtue of the new act. Then it is said that there are words used in the first section, which do virtually continue the deputations under the old act; but the defendant is bound to go further, and to shew that he is entitled to all the benefits conferred by the new act; let us therefore see, if the words are sufficient to support this view of the case. By the new act, all the former statutes are repealed, with certain exceptions; they are three in number: first, "except so far as any of the said acts may repeal the whole or any part of any other acts;" secondly, "and except as to any offences which may have been committed against any of the said acts, before or upon the said 31st day, and as to any penalties which may have been incurred thereunder, before or upon the said 31st day, which offences shall be dealt with and punished, and the penalties recovered, as if this act had not been made." Then comes the third exception, upon which the defendant relies, "and except as to any matters done by any person under the authority of any of the said acts, before or upon the said 31st day, with respect to whom every privilege and protection given by any of the said acts, shall continue in force, as if this act had not been made." These words import that the privileges and protection given by the former statutes, shall continue until the 31st of *October*, 1831, and it is contended that this includes the deputation. But it is to be observed that the persons of whom the legislature is speaking, are gamekeepers, acting under a deputation, and that limits the clause, and it cannot be extended to lords of the manor, who grant the deputation. It appears, therefore, to me, that as the defendant has not brought himself within the exception, he is not entitled, on that ground, to enter a nonsuit, and this rule must be discharged.

VAUGHAN, J.—No reasonable doubt can be entertained about this case. The plaintiff proved all that was necessary to support an action of trover. The question is whether, under the provisions of the 1 & 2 W. 4, c. 32, the old deputation was continued, as if it had been a new one. It has been contended that if this is not so, great inconvenience would follow, but if the words are plain, that argument ought not to prevail. The first section contains three exceptions, but I cannot consider that the construction contended for is in any manner applicable. In every view of the case the verdict is right.

BOSANQUET, J.—The first point which the defendant is bound to maintain is, that there was a valid deputation, and it must have been a deputation which was valid, prior to the 1 & 2 W. 4, c. 32. Previous to that time, certain rights are conferred on lords of manors, and by the special plea, the deputation is stated to have been given by the lord of the manor of *Stowey*, and upon that question an issue was raised. But it appears, by the finding of the

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jury, that there was no manor in existence, and, if that be so, there was no valid deputation which could be continued. It might be unnecessary, therefore, to inquire whether the deputation was continued; but, for the reasons which have been given by my lord chief justice, which I do not think it necessary to repeat, I am of opinion that the deputation was not continued by the new act. By the exception in the new act, for matters done prior to the 31st of *October*, 1831, the same privilege and protection is given; but I think the word "matters" means things done which would make the party liable to penalties or other proceedings; and in such cases they have the same privilege and protection as they had before. Then it is said, that if the deputation is continued by the 1 & 2 W. 4, c. 32, then that an act done subsequently, would be entitled to protection; but even if that were so, the privilege and protection would only be the same as it was previously, and that did not include the privilege of pleading the general issue, and of receiving a notice of action.

COLTMAN, J.—I see no ground for disturbing this verdict. The third plea is out of the question, by the finding of the jury; but it is open for the defendant to ask for a nonsuit, on the ground that he was entitled to give the whole defence in evidence, under the general issue, and that no notice of action was given by the plaintiff: that depends upon the effect which is to be given to the exceptions in the first section of the 1 & 2 W. 4, c. 32. All former acts are repealed, with certain exceptions, and it is material to consider for what purposes the exceptions are introduced. The exceptions are, first, of former repeals; secondly, of offences committed before the 31st of *October*, which would otherwise have remained unpunished; and, thirdly, of matters done under the authority of former acts. The latter provision seems to have been inserted for the protection of persons who might otherwise have been liable to actions; such an exception might have been unnecessary for this purpose, but I see no reason for extending it beyond that. Upon the principle, therefore, that the new act repeals all former acts, and that the defendant is not brought within the exception, I agree that this rule must be discharged.

Rule discharged.

Nov. 15.

MORLEY, administrator of JOHN CUMBERLEGE deceased *v.* INGLIS and others.

In an action of assumpsit for money lent, the defendants pleaded, as a set-off, that by a memorandum in writing the plaintiff guaranteed to pay the defendant 1600*l*., money lent, and any further sums which they might advance to J. C.; and that, at the time of the suit, the plaintiff was indebted to the defendants on the said guarantee, the said sum of 1600*l*., and a further sum of 3000*l*., afterwards lent to J. C. *Held*, that this was not a debt which could be set-off against the plaintiff's demand, within 2 Geo. 2, c. 22, sec. 13.

ASSUMPSIT.—The declaration stated that the defendants on, &c., were indebted to *John Cumberlege* in his lifetime in 10,000*l*. for money received by the defendants for the use of the said *John Cumberlege;* and in 10,000*l*. for money found to be due from the defendants to the said *John Cumberlege*, on an account then stated between them.

Breach—Non-payment to the said *John Cumberlege*, or to the plaintiff, as his administrator, since his decease. A similar count for money due to the plaintiff as administrator.

Plea—The defendants say that heretofore, and in the lifetime of the said *John Cumberlege* deceased, to wit, on the 29th day of *September*, A.D., 1831, in consideration that the defendants, at the request of the said *John Cumberlege*, since deceased, had agreed to lend and advance to *John Cumberlege* the younger, the son of the said *John Cumberlege* deceased, the sum of 1600*l.*, and would, with the assent of the said *John Cumberlege*, hold the said sum at the disposal, and place the same to the credit, in account of the said *John Cumberlege* deceased; and also in consideration that the said defendants, at the request of the said *John Cumberlege* deceased, would advance to or for or on the account of the said *John Cumberlege* the younger, such further sums as he might require of the defendant in that behalf, the said *John Cumberlege* deceased, by a certain memorandum in writing, then signed by him, guaranteed and agreed with the defendants to be answerable to them for the repayment of the said sum of 1600*l.*; and also any further sums which might then, to wit, on the day and year last aforesaid, or thereafter be owing to them from the said *John Cumberlege* the younger. And the defendants aver that they, confiding in the said promise and undertaking of the said *John Cumberlege* deceased, did afterwards, to wit, on the day and year last aforesaid, with the assent of the said *John Cumberlege* the younger, hold the said sum of 1600*l.* agreed to be lent, and which was then lent to him, by the defendants, on the terms aforesaid, at the disposal of, and place the same to the credit in account of the said *John Cumberlege* deceased, and did accordingly then apply and advance and pay the same upon the terms aforesaid; and relying on the said guarantee, did afterwards, in the lifetime of the said *John Cumberlege* deceased, to wit, on the 1st day of *October*, 1831, advance and pay to and for and on the account of the said *John Cumberlege* the younger, divers other monies, to wit to the amount of 3000*l.*; and although the times for the repayment of the said sums of 1600*l.* and 3000*l.* to the defendants elapsed before the commencement of this suit, and although the said *John Cumberlege* the younger was afterwards, to wit, on, &c., requested by the defendants to pay them the said sums of 1600*l.* and 3000*l.*, yet he hath not paid the same, or any part thereof, to the defendants or either of them; of all which premises the said *John Cumberlege* deceased, afterwards, to wit, on, &c., had notice, and was then requested by the defendants to pay them the said sums of 1600*l.* and 3000*l.*; yet the said *John Cumberlege* deceased, in his lifetime did not pay, nor hath the plaintiff, as administrator as aforesaid, since the death of the said *John Cumberlege* deceased, paid the said sums of 1600*l.* and 3000*l.*, or either of them, or any part thereof, to the defendants, or either of them, and the same still remains due, in arrear, and unpaid; and the plaintiff, as administrator as aforesaid, before and at the time of the commencement of this suit was, and still is, indebted to the defendants in the said sums of 1600*l.* and 3000*l.*, upon and by virtue of the said guarantee; which said several sums of money in this plea mentioned, so due to the defendant, exceed the damages sustained by the plaintiff, as administrator as aforesaid, by reason of the non-performance by the defendants, of the said several promises in the said first and second counts mentioned, and out of which said sums of money so due to defendants, they, the defendants, are ready and willing, and hereby offer to set off and allow to the plaintiff, as ad-

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ministrator as aforesaid, the full amount of the said damages, according to the form of the statute in such case made and provided.

Demurrer—And as to so much of the said second plea as relates to the above guarantee, and the monies therein alleged to be due to the defendants, upon and by virtue of the said guarantee, the plaintiff saith that it is not sufficient in law, and shews the following causes of demurrer:—that money claimed to be due upon such a guarantee is not the subject-matter of set-off, and that the averment at the conclusion of the said part of the said second plea, that the plaintiff, as administrator, was and is indebted to the defendant by virtue of the said guarantee, if meant to be a conclusion of law upon the facts previously stated, is not a true or correct legal conclusion; or if meant as a distinct allegation of a matter of fact, is not sufficiently certain, and does not show, as it ought to do, how and in what manner the plaintiff became so indebted; whether upon an account stated, or by contract, or otherwise; and also for that the said plea is in other respects uncertain, informal, and insufficient.

Joinder in demurrer.

Martin, in support of the demurrer.—The question is, whether a liability on a guarantee is the subject of a set-off. It would not be so at common law, that is quite clear; therefore the defendant must rely upon the statute 2 Geo. 2, c. 22, which gives the right of set-off. Sec. 13 of that stat. enacts, that where there are *mutual debts* between the plaintiff and defendant, one *debt* may be set against the other; but a liability on a guarantee is not a debt within the meaning of this statute. The debts must be mutual. Now in 1 Rolle's Abr. page 594, pl. 2, it is said, that if the plaintiff declares that the defendant was indebted to him in 20*l.*, for goods sold to a third person, at the request of the defendant, and for which the defendant promised to pay, that is not a good consideration, because no action of debt would lie, but only an action on the case upon the promise. The same rule is laid down in other authorities, 1 Wms. Saund. 211, b. *Butcher* v. *Andrews* (*a*). *Marriott* v. *Lister* (*b*). *Mines* v. *Sculthorpe* (*c*). And, down to the present time, the rule is well established, that upon a liability on a guarantee, an action of debt is not maintainable. Nor can any precedent be found, of a plea of set-off, arising on a guarantee, in any of the books on pleading. There are several authorities directly in point. In *Crawford* v. *Stirling* (*d*) the amount of a guarantee, given by the plaintiff, on account of one *Kirkpatrick*, was made the subject of a set-off, and it appeared that the plaintiff and defendant had settled an account, in which it was agreed that a certain sum should be taken as the amount of the guarantee; but Lord *Ellenborough*, C. J., said "that there was no foundation for the set-off claimed, as the sum claimed was unliquidated damages: that a guarantee was a contract of indemnity: it was to make good the default of another party, for whom the guarantee was given: that it was not an absolute debt by the plaintiff to the defendant, but an engagement for the deficiency of *Kirkpatrick* only: it could, therefore, only be known to what extent the plaintiff was liable, when it was ascertained how much was paid by *Kirkpatrick*'s estate; this was, therefore, uncertain and unliquidated till that fact was known. With respect to the settlement of accounts, in which a certain sum had been put on

(*a*) 1 Salk. 23.
(*b*) 2 Wils. 141.
(*c*) 2 Campb. 214.
(*d*) 4 Esp. 206.

one side of the account, on account of the guarantee, that was only stated as the amount of the guarantee and the palpable amount in the account, but it was still liable to be altered by the dividend made by *Kirkpatrick*, in diminution of the debt due by him to the defendant. To make the sum admissible as a set-off, the sum must be settled in monies numbered." That case is in all respects like the present, and the reasoning of Lord *Ellenborough* is unanswerable. *Howlett* v. *Strickland* (*e*). Comyn's Dig. tit. Debt. *Weigall* v. *Waters* (*f*). *Colson* v. *Welsh* (*g*). *Hutchinson* v. *Reid* (*h*). *Hardcastle* v. *Netherwood* (*i*). *Cooper* v. *Robinson* (*k*). *Grant* v. *Royal Exchange Company* (*l*). It may be said, on the other side, that in *Cope* v. *Joseph* (*m*) and *Collins* v. *Wallis* (*n*), defendants have been held to bail for money due upon contracts of indemnity; but in all cases where the arrest is not founded upon a debt, a special order is obtained from a judge. Before arrests were allowed for debt, defendants might have been arrested for injuries accompanied with violence, as in the case of forcible entries. 3 Black. Comm. 281.

Sir *W. W. Follett, contrà.*—The set-off relates to two different species of sums: one a sum of 1600*l.*, which the defendants agreed to advance to *Cumberlege* the younger, and which was to be placed to credit in the intestate's account: the other a sum of 3000*l.* advanced to *Cumberlege* the younger, on the guarantee of the intestate. The words of the 13th sec. of 2 Geo. 2, c. 22, must be taken in their usual and ordinary sense, and whenever a sum certain, is due from the defendant to the plaintiff, it is a debt within the meaning of the statute. It may be conceded that whenever the claim is for unliquidated damages which must be assessed by a jury, it is not the subject of a set-off; and, therefore, it has been properly held that damages arising from a breach of covenant in a lease, cannot be set off in an action of covenant for rent, because the set-off sounds in damages. This observation disposes of *Weigall* v. *Waters* (*o*) and that class of cases which has been referred to on the other side. It is said that an action of debt will not lie upon a guarantee, and it is thence inferred that it cannot be made the subject of a set-off: but that is not the true criterion, for there are many cases where debt would not lie, and nevertheless the demand could be set off. Com. Dig. tit. Debt, (A. 8.) where it is said—"If one promises A. to pay him 10*s.* per week, if he will serve his aunt, debt does not lie, for the service was not to himself, and so there wants a *quid pro quo*." Many other similar illustrations are to be found in Comyns. So debt will not lie by an indorsee against the acceptor of a bill of exchange, *Clowes* v. *Williams* (*p*); and yet such a debt is by every day's practice made the subject of a set-off. Debt will lie by the drawer against the acceptor of a bill of exchange, *Priddy* v. *Henbrey* (*q*), and that is in like manner the subject of a set-off. The question is, what is the meaning of the word "*debt?*" It means a sum certain, which is owing by one party to the other; and the cases only go to shew, that whenever the intervention of a jury to assess damages is required, the claim cannot be set off. It has been held, under the Bankrupt Acts, 5 Geo. 2, c. 30, sec. 28, and 6 Geo. 4. c 16, sec. 50, that to entitle a defendant, to his right of set-off, it is sufficient if the demand is of

(*e*) Cowp. 56.
(*f*) 6 T. R. 488.
(*g*) 1 Esp. 379.
(*h*) 3 Camp. 329.
(*i*) 5 B. & Ald. 93.
(*k*) 2 Chit. 161.
(*l*) 5 M. & Sel. 439.
(*m*) 9 Price, 155.
(*n*) 11 Moore, 248.
(*o*) 6 T. R. 488.
(*p*) 3 Bing. N. C. 868; ante, 176.
(*q*) 1 B. & Cress. 674.

such a nature as would end in a debt. *Cornforth* v. *Rivatt* (*r*). *Rose* v. *Sims*(*s*). *Rose* v. *Hart* (*t*). *Hawkins* v. *Whitten* (*u*). *Dickson* v. *Cass* (*x*). The question is not, therefore, whether an action of debt could be maintained upon this guarantee, but whether it is a debt which may be set off. The dictum of *Ashhurst*, J., in *Howlett* v. *Strickland* (*y*), that debts to be set off must be such as an *indebitatus assumpsit* will lie for, is clearly incorrect, otherwise no specialty debt could be pleaded by way of set-off. In *Thorpe* v. *Thorpe* (*z*), where A. remitted a bill of exchange to B., to be paid to a third person on A.'s account, and B. did not pay over the proceeds, upon which A. brought an action of assumpsit for money had and received, it was held that a set-off was admissible; although it was admitted that if the plaintiff had chosen to bring an action on the case, for the breach of duty, there could have been no set-off. The same principle is applicable here, the defendant may abandon any right which he may have to recover damages, and set off the actual amount of the money advanced on the guarantee. The principal authority on the other side is *Crawford* v. *Stirling* (*a*), but the reasoning of Lord *Ellenborough* is not satisfactory. By the law of this country a party who receives a guarantee is not required to take any steps against the principal debtor; but Lord *Ellenborough*'s observations are rather applicable to the state of the law in other countries, where it is first necessary to exhaust the property of the principal debtor. Nor does it appear, in the report of that case, whether the time for payment by the principal debtor had expired; it would rather seem that it had not. In the present case the defendants were not bound to take any proceedings against *Cumberlege* the younger, and therefore, the amount of the debt being ascertained and defined, there can be no good reason for holding that it cannot be set off. Whenever damages are liquidated, they may be set off. *Fletcher* v. *Dyche* (*b*) and *Lowe* v. *Peers* (*c*). In *Cope* v. *Joseph* (*d*) it was held that a defendant may be held to bail upon a guarantee, on the ground that an action of debt would lie. The same principle is to be found in *Collins* v. *Wallis* (*e*).

Martin, in reply.—The cases which have been last referred to, do not affect the present question, because it is the usual practice to allow defendants to be held to bail, in actions of trover and other similar cases. It is a strong fact that no authority can be produced, where a liability on a guarantee has been allowed to be set off. The reason is, that the damages are uncertain, and the intervention of a jury is requisite to determine the amount of the liability. The question of damages is entirely with the jury; they may give less than the amount which is claimed, if the circumstances of the case warrant them in doing so. For instance, if the principal debtor were a perfectly responsible man, the jury may take that into account. [*Tindal*, C. J.—I know of no case where money is to be paid on a day certain, that, upon an action being brought against the surety, the Court have inquired into the solvency of the principal debtor.] Many of the cases which have been referred to, arise on debts due on bonds and other specialties, but here the damages arise on a simple con-

(*r*) 2 M. & Sel. 510.
(*s*) 1 B. & Ado. 521.
(*t*) 8 Taunt. 499.
(*u*) 10 B. & Cress. 217.
(*x*) 1 B. & Ado. 343.
(*y*) Cowp. 56.
(*z*) 3 B. & Ado. 580.
(*a*) 4 Esp. 206.
(*b*) 2 T. R. 32.
(*c*) 4 Burr. 2225.
(*d*) 9 Price, 155.
(*e*) 11 Moore, 248.

tract, and they are unliquidated. *Crawford* v. *Stirling* (*f*) and *Hardcastle* v. *Netherwood* (*g*) are decisive authorities to shew that this plea cannot be supported. The cases arising on the Bankrupt Acts are distinguishable, because the words "mutual credits" and "debts and demands" are there to be found. It is true that, in some cases, the amount of bills of exchange has been allowed to be set off, although no action of debt would lie, and it is not easy to find the origin of this practice. But the cases are very different, because a liability on a bill of exchange is not a contract of indemnity, like a guarantee.

TINDAL, C. J.—It appears to me, that this plea of set-off cannot be supported. The question depends upon a statutory law. The 2 Geo. 2, c. 22, sec. 13, enacts—"That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require." I shall not undertake to say that the word "debt" must be construed in the strict sense, which was necessary for the maintenance of the old action of debt, nor shall I go through the bead-roll of cases which has been cited upon that point. If the demand sought to be set off, sounds in damages, the proper mode of deciding the question is to ascertain whether the damages have been, or may be, liquidated or ascertained with precision, at the time of pleading. The present case falls within neither of these alternatives. The intestate had given the defendants a guarantee for the repayment of 1,600*l.*, and any further sums which might thereafter be owing to them from *J. Cumberlege* the younger. Now there being no time fixed for the payment of the money due on this guarantee, the law would imply that it was payable on demand; and accordingly the declaration contains an averment that a demand of 1,600*l.* and 3,000*l.* was made, and the plea then proceeds to state that "the same still remained due, in arrear, and unpaid, and the plaintiff as administrator as aforesaid, before and at the time of the commencement of this suit, was still indebted to the defendants in the said sums of 1,600*l.* and 3,000*l.* upon and by virtue of the said guarantee." But that is not a legal deduction. The guarantee was given for the payment of an uncertain sum of money at a certain time, and the intestate would not only be answerable for the sum lent, but also for any damages which would be immediately consequential upon the breach of the undertaking; one species of such damages would be the interest on the sum due, and others may be suggested. It is clear, and it seems to have been admitted during the argument, that *indebitatus assumpsit* could not have been maintained on this guarantee against the intestate. Suppose the parties were reversed, and that the defendants were suing the plaintiff on the guarantee, could it be contended that the plaintiff might set off the debt which he now seeks to recover? All the cases, and particularly *Crawford* v. *Stirling* (*f*), which I am unable to say is not rightly decided, clearly shew that he could not. What, then, is to prevent the defendants from suing on the guarantee in one action, and at the same time setting off the demand as an answer to another action? Is that to depend upon their treating it as a demand for unliquidated damages in the one case, and calling it a debt in

(*f*) 4 Esp. 206. (*g*) 5 B. & Ald. 93.

the other? It, therefore, does not appear to me in this case that the damages are liquidated or ascertained. *Thorpe* v. *Thorpe* (*f*) is a case where the plaintiff waived his right to any damages, and sued upon the contract, and it was held that he had a right to make his election. *Fletcher* v. *Dyche* (*g*) was a case where the damages were clearly liquidated and ascertained. *Cope* v. *Joseph* (*h*) and *Collins* v. *Wallis* (*i*) did not depend upon any question of set-off, but merely upon the discretion of the Court to allow parties to be held to bail, and those cases are not of sufficient weight to counteract the principle upon which we are now proceeding. Seeing, therefore, that *Crawford* v. *Stirling* (*k*) has remained so long undisturbed, I am not disposed to interrupt its repose now; and think that our judgment ought to be for the plaintiff.

VAUGHAN, J.—It was admitted, during the argument, that if this is a demand for unliquidated damages, it could not be set off against the plaintiff's debt; but it has been contended that the defendants may elect to receive the principal sum due from the original debtor, and waive all damages. It seems to me, however, that a guarantee is a contract peculiarly sounding in damages, and in the absence of all authority in support of this plea, I agree that our judgment must be for the plaintiff.

BOSANQUET, J.—I am also of opinion that the demands in the declaration and the plea are not mutual debts within the statute 2 Geo. 2, c. 22, sec. 13, It is clear that the intestate's undertaking to pay the money advanced to *J. Cumberlege* the younger, must have been in writing, and no liability would have accrued, until default was made in payment by the original debtor. It was not, therefore, *debitum in præsenti solvendum in futuro*. It being, therefore, a mere collateral engagement to pay the debt of another, it could only be made the subject of a suit for unliquidated damages. No precedent has been referred to, to shew that such a plea has been allowed, and there is a very direct authority, *Crawford* v. *Stirling* (*k*), in which Lord *Ellenborough* held that such a demand was not the subject of a set-off.

COLTMAN, J.—I have always understood that such a demand as the present could not be made the subject of a set-off; and I look upon *Crawford* v. *Stirling* (*k*) as shewing what the impression of the profession was, at the time it was decided, and there have been no subsequent decisions contrary to it.

Judgment for the plaintiff.

(*f*) 3 B. & Ado. 580.
(*g*) 2 T. R 32.
(*h*) 9 Price, 155.
(*i*) 11 Moore, 248.
(*k*) 4 Esp. 206.

CROOME *v.* GUISE.

Nov. 25.

TROVER for the conversion of a horse. The defendant pleaded that the plaintiff was not possessed of the said horse as of his own property, on which plea issue was joined.

By consent of the parties and by the order of a judge, the following case was submitted for the opinion of the Court:—

The manor of *Painswick*, in the county of *Gloucester*, is an ancient manor, the lords of which have, from time immemorial, enjoyed the right of taking certain fines and heriots from the tenants of the manor, according to the custom of the manor, as thereinafter set forth, and the customary and copyhold messuages and hereditaments, parcel of the said manor, have been from time immemorial, used and accustomed to be granted and demised by copy of court roll of the said manor, for estates of inheritance in fee simple, by the words sibi and suis, at the will of the lord, according to the custom of the manor.

In the 28th year of the reign of Queen *Elizabeth*, some difficulties having arisen between the then lord of the said manor and his tenants, touching the customs of the manor, those customs were declared and explained in and by a decree in a certain chancery suit, a copy of which decree was to be taken as part of this case. The customs set out in this decree were afterwards ratified and confirmed by an act of parliament, passed for that purpose in the 21st *James* 1, which statute is also to be taken as part of this case.

The 6th, 7th, 13th, 16th, and 17th of these customs, are to the following effect:—

6. "The tenants by their custome tyme out of minde used, may geve and sell their customary lands att their will and pleasure, making a surrender of the same either in the open court to the hands of the steward for the tyme being, or else out of court into the hands of the reeve of that yere, or his deputie, in the psence of two customarie tenants of the same mannor, and the same surrender must be psented att the next court, or else the surrender to be void, and upon every surrender so made and psented in court, the lord is to have an herriott if the land be heriottable, that is to saye, for every yard and halfe yard of land which the tenants hold, to geve or paye the best quicke cattle, and in default of such cattle the best household stuffe or goods of what kinde soever."

7. "That upon every discent of anie customary lands of inheritance, the lord is to have one year's rent for his fine and herriott in manner aforesaid if the land be herriottable."

13. By this custom tenants were allowed to demise their lands without a license from the lord.

16. "By the custome every yarde or halfe yard of land holden by coppie after the custome and manner, is heriottable, and the heriot to be paid att the death of the tenante that dyeth seized thereof or upon the surrender of his possession when the reversion was surrendered before."

17. "If any customary tenante shall lett or sell his yarde or halfe yarde of landes which is heriottable, and att his decease the lord not answered the best

By a custom in the manor of P. upon every descent, the lord was to have for an heriot, the best quick cattle of the tenant, and in default of such cattle, the best household stuff or goods. By another custom, if any customary tenant should let his land, "and at his death the lord has not been answered the best beast for his heriot which did commonly manure the premises for one year before his decease," then the lord was to be paid 40*s*. instead of a heriot. *Held*, that where a customary tenant had let his land and afterwards died, the lord could not seize the best beast for his heriot, but that he was bound to take the 40*s*. in lieu thereof.

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beast for his heriott, which did commonly manure the said pmises by the space of one yeare next before his decease, or the full value thereof, that then such pson to whom the same yarde or halfe yarde by the custome ought to come, shall pay to the lord or his officers, within six weeks next after the death of such tenant, three pounds for every yarde lande, and forty shillings for every halfe yard, insteade of an herriott, and in case defaulte be made thereof, then it shall be lawfull for the lord, by his officers, to take one whole yeare's proffitts of such yarde or halfe yard, to his owne use and behoofe instead of the said herriott."

In *February*, 1804, the plaintiff purchased the said manor of *Painswick* and became and still is the lord of the said manor and seised in his demesne as of fee thereof. On the 21st of *July*, 1823, Sir *Berkeley William Guise*, Bart., was admitted tenant to a half yard land, heriotable, parcel of the customary tenements of the said manor, called the *Quarr*, within the said manor, and held at the yearly rent of 1*l.* 7*s.* 4*d.*, and a heriot, according to the custom of the manor, on descent and alienation when it should happen; and the said Sir *B. W. Guise*, continued until the time of his decease seised of the said tenement in his demesne as of fee, at the will of the lord, according to the custom of the manor. Sir *B. W. Guise*, afterwards, in 1830, demised the last mentioned tenements, from year to year, to *John Bailey*, to hold as such tenant thereof, under the said Sir *B. W. Guise*, and *J. Bailey* became tenant, and his tenancy under the said Sir *B. W. Guise* continued until the decease of the latter, who died 23rd of *July*, 1834, having by his will appointed the defendant his executor. The copyhold tenement descended to the heir at law of Sir *B. W. Guise*. Upon the death of Sir *B. W. Guise*, the plaintiff claimed the best quick beast of the said Sir *B. W. Guise* at the time of his death, as a heriot due on the descent of the said copyhold tenement, and in prosecution of such claim, and within the space of ten days after the death of Sir *B. W. Guise*, the plaintiff seized a certain horse of the value of 50*l.*, being the horse in the declaration mentioned, being the best quick beast of Sir *B. W. Guise*, such horse not having commonly manured the said premises by the space of one year next before his decease; whereupon the defendant, claiming the said horse as part of the personal estate of the said Sir *B. W. Guise*, deceased, retook the said horse from the plaintiff, and converted the same to his own use. The defendant, after seizure of the said horse by the plaintiff, and within six weeks next after the death of Sir *B. W. Guise*, tendered to the plaintiff the sum of 2*l.* for the said half yard of land, instead of an heriot, but the plaintiff refused to accept the same.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action? If the Court should be of opinion that the plaintiff was so entitled, judgment was to be entered for the plaintiff by confession for 50*l.* damages; but if the Court should be of opinion that the plaintiff was not entitled to recover, judgment of *nolle prosequi* was to be entered for the defendant.

R. V. Richards, for the plaintiff.—The lord of the manor is entitled to recover this horse under the general law; and by virtue of the sixth and seventh customs of the manor. When a heriot is due, the property in the beast is in the lord immediately on the death of the tenant: and the lord cannot take any chattel but one which which belongs to the tenant. 1 Scriv. on Copyholds,

440, 2nd ed. *Parton* v. *Mason*(*a*). By the sixth custom the heriot is described as being the best quicke cattle, and in default of such cattle, the best household stuff or goods of the tenant, Then the seventh custom is, that upon every descent, the lord is to have one year's rent for his fine, and heriot in manner aforesaid, if the land be heriotable. Here the lord has exercised his right by making the seizure, and it is incumbent on the defendant to shew why that right cannot be exercised. It will be said that the seventeenth custom prevents the lord from demanding the best beast, and that the tenant was entitled to pay the sum of two pounds for the half yard of land; but that custom would only come into operation where the lord "is not answered the best beast for his heriot, which did commonly manure the premises." There was, therefore, an option reserved to the lord, and the seventeenth custom was not intended to deprive the lord of his heriot according to the seventh custom; but must be construed as giving him a cumulative remedy, in cases where the customary tenant had let his land, as he was allowed to do by the thirteenth custom. But the personal estate of the tenant, is not in any manner exonerated from the primary liability to satisfy the lord of his heriot.

Stephen, Serjt., *contrà*.—The defendant having tendered to the plaintiff the sum of two pounds, within six weeks from the death of the tenant, in respect of the land which had been demised, the plaintiff was not entitled to claim the horse as an heriot. The seventeenth custom is precisely applicable to this case. Nor was the plaintiff entitled to seize this beast, because it had not commonly manured the premises demised, for one year before the tenant's decease. The case of *Parton* v. *Mason*(*a*) merely shews that a custom to take the goods of a stranger as a heriot, is not good. In *Garland* v. *Jekyll*(*c*) heriots are said to be a species of tribute, which the tenant offered to the lord, when he prayed the lord to confer on him the interest which had been determined by the decease of his former tenant.

The custom set out in the seventeenth section was intended as a commutation for the heriot: for half a yard of land consists of about ten acres, and two pounds was about the value of a good beast at the time the award was made. The lord was entitled to seize the best beast which manured the ground, and if there was no such beast to seize, the lord was to be entitled to the payment of two pounds. If there is any doubt as to the compensation which the lord is entitled to receive, then as customs are construed strictly, the judgment of the Court ought to be in favour of the defendant. Year Book, 5 Hen. 7, 41. In *Arthur* v. *Bokenham*(*d*), it is said upon this subject, "All customs which are against the common law of *England* ought to be taken strictly, nay very strictly, even stricter than any act of parliament that alters the common law. It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that makes the law in such cases, and not the reason of the thing; for it cannot be said that a custom is founded on reason, though an unreasonable custom is void, for no reason, even the highest, whatsoever, would make a custom a law; so it is no particular reason that makes any custom, law, but the usage and practice itself, without regard had to any reason of such usage, and therefore you cannot enlarge

(*a*) Dyer, 199 b.
(*c*) 2 Bing. 293.
(*d*) 11 Mod. 160.

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such custom by any parity of reason, since reason has no part in the making of such custom."

Nor will equity interfere in favour of heriots. 2 Eq. Ca. Abr. 279. It appears that there is no novelty in a custom which gives the lord the sum of forty shillings in lieu of a heriot. Viner's Abr. tit. Heriot, G. 12. *Hangon* v. *Carve* (*e*). Or in requiring that the beast should be levant and couchant upon the land. Fitz. Abr. tit. Hariott, 6. *Parton* v. *Mason* (*f*). The case of underletting was expressly provided for by the seventeeth section, and the lord is bound by that provision. As the custom there set forth, comes subsequently to the sixth custom, it ought to prevail. Thus in *Paget* v. *Foley* (*g*), where two affimative enactments were inconsistent, it was held that the provisions of the latter, *pro tanto*, repealed the former. Hardress, 344.

R. V. Richards, in reply.—The lord has not seized under the provisions of the seventeenth section, but under the custom set out in the sixth and seventh sections. Therefore the argument, that the beast had not been manuring the premises, is not applicable. It is not necessary for the plaintiff to shew what the meaning of the seventeenth section is, because it does not apply to the present case. As to the origin of heriots, the better opinion is that they were originally tributes made to the lord, of the best horse and armour of the deceased tenant, in order that they might continue to be used for the purposes of national defence. There is no privity between the lord, and the occupier of the land, and the lord could not seize the beast of a stranger: 2 Wms. Saund. 168 a., therefore the heriot must in all cases be paid by the tenant. It is said that the lord ought to seize a beast which has manured the land for one year, but cattle do not stay on any premises during the whole of a year. In *Parkin* v. *Radcliffe* (*g*), it was decided that a plea which set out a custom that the homage should assess a compensation in lieu of a heriot could not be maintained.

Cur. adv. vult.

TINDAL, C. J.—The question raised by this special case is, whether the plaintiff, as lord of the manor of *Painswick*, was justified in seizing the horse which is the subject-matter of this action, as a customary heriot due upon the death of the late Sir *Berkeley William Guise*, a customary tenant of the said manor? And the answer to this question appears to us to depend not so much upon any discussion of the general law relating to heriots, as upon the proper construction to be put upon the customs of this particular manor. The customs are set forth in the decree of the Court of Chancery, which forms part of this case, and which were afterwards confirmed by a private act of parliament, passed in the 21st year of King James I.

Such of the customs of the manor as claim our particular attention, are the customs contained in the 6th, 7th, 16th, and 17th articles of the indenture set forth in the decree. It appears, by articles 6 and 7, that a heriot is due by custom to the lord, upon every surrender and every descent of all customary tenements of the manor, that are heriotable, and that such heriot is "the best quick cattle; and in default of such cattle, the best household stuffe or goods of what kinde soever of the late tenant." And it appears further, from arti-

(*e*) 1 Sider. 437.
(*f*) Dyer 199 b.
(*g*) 2 Bing. N. C. 679; 2 Hodges. 237.
(*h*) 1 Bos. & Pul. 282.

cle 16, that all half-yard lands within the manor, holden by copy, of which description is the tenement in question, are heriotable.

So far, therefore, as depends on these two customs, the case is free from all doubt. If no other custom had been set forth iu the decree, the right of the lord of the manor to seize the horse, as the best quick cattle of the late customary tenant, upon his death, would have been inevitable, and the plaintiff, the lord of the manor, would have been entitled to judgment in this action.

But the difficulty arises from the custom set out in the seventeenth article, by which it is provided "that if any customary tenant shall let or set his half-yard land which is heriotable, and at his decease the lord not answered the best beast for his heriot, which did commonly manure the said premises by the space of one year before his decease, or the full value thereof, then such person to whom the same yard or half yard, by the custom ought to come, shall pay to the lord or his officers, within six weeks next after the death of such tenant, 3*l.* for every yard land, and 40*s.* for every half yard, instead of an heriot; and in case of default the lord may enter and take one year's profits." Now, on the part of the lord it is contended, that notwithstanding the case may fall within the seventeenth custom, by reason of the half yard land, being let or set at the time of the tenant's death, the lord has still the right to the best beast of the tenant, under the sixth and seventh customs; that the seventeenth custom only applies where the lord "has not been answered the best beast;" that is, has not seized the best beast, under the general customs, and that the seventeenth custom gives him a cumulative remedy against the new tenant or the land itself, in case the old tenant died without being possessed of a beast, or the lord was unable to seize it. On the other hand, the tenant insists that the seventeenth custom applies to and governs the case of a half yard land which is let and set at the time of the tenant's death, and that the lord in such case can only take the heriot given by that custom, or the substitute thereof, provided by the same custom, and cannot resort to the heriot given him by the general custom. And we think we do less violence to the language of the customs, by holding the interpretation contended for on the part of the tenant to be the right construction; namely, that where the half yard is let or set, the lord cannot seize the best beast, or best household stuff or goods of the late tenant, but must have recourse to the heriot or the substitute thereof, described and provided for by the seventeenth custom.

In the first place it is difficult to hold the seventeenth custom, as giving a cumulative remedy to the sixth, when it provides for and relates to only one of the cases governed by the general custom. For whilst the general custom gives the lord a heriot both upon surrender and descent, the seventeenth custom applies itself to the case of descent only. Again, whilst the general custom gives as a heriot, the best quick cattle, and, in default of such cattle, the best household stuff or goods, the seventeenth custom is altogether silent as to the alternative, and gives only the best beast; and as to the argument on the part of the plaintiff that by the very terms of the seventeenth custom it is conditional only, namely, the lord not answered the best beast for his heriot, we agree that if the condition had stopped here, the conclusion contended for by the lord, would have been irresistible; but it continues thus, the lord not answered the best beast for his heriot, which did commonly manure the said premises by the space of one year next before his deccase, or the full value

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thereof; so that the custom is so far from letting in the ordinary heriot due upon a descent, that it gives a heriot substantially different in kind and description in every case falling within it; the one giving the best quick cattle or best household stuff or goods of the customary tenant, the other giving the best beast which ordinarily manured the land for the year next before the tenant's death (whosoever it might be) or the value thereof. We think, therefore, we can give force to the two customs, in no other manner, than by holding the one to apply to the case where the customary tenant dies in occupation of his heriotable tenement, and the other to the case of the death of the tenant of a half yard of land, which is let or set at the time of his death.

In the course of the argument, many difficulties have been put by the plaintiff's counsel, as to the possibility of enforcing the seventeenth custom; such as the legality of a custom to seize the best beast of the occupier or of a stranger; the difficulty of applying the custom, if the premises have been manured only part of a year, and the like, but it is to be observed that the custom provides an election which is free from all difficulty; viz., the value of the beast, and as the payment is to be made by the tenant, the election is with him. And still further in case the payment of this heriot altogether fails, the custom provides a resource which is altogether free from exception; viz., the payment of 40*s*. instead of an heriot, and in default thereof, one whole year's profit of the land.

It is to be observed that by this construction the lord gains in many cases an immediate advantage, for he has the certainty of a heriot, or of a substitute for a heriot, which at the time was probably thought an equivalent in value, in every case of the death of a tenant of a half yard land, which is let and set; and again the customary tenant is bound to make good the payment in lieu of the heriot. Whereas under the general custom, he has only the best quick cattle or best household stuff of the customary tenant, which may be worth less, or the tenant may die without possessing any. It appears, therefore, a more just as well as sound construction, not to throw into the lord's scale the benefit of both customs; and we are the more inclined to this construction because, upon the general principles, the custom of heriots is not a custom to be extended in favour of the lord, and in this particular case the confirming of the custom, was the result of a bargain or agreement between the lord and the tenants, in which, according to the language of the arbitrators to whom the differences were referred, "the tenants have given for buying their peace, a very ample and liberal satisfaction to their landlord, not inferior in our opinions to the true worth of any benefits they shall or may receive by this order."

We therefore think, for the reasons above given, a *nolle prosequi* must be entered.

Judgment for defendant.

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CASE for an excessive distress. At the trial, before *Tindal*, C. J., at the *London* sittings after *Easter* Term, it was proved, that the defendant, as trustee for a charity, let a dwelling house and premises in St. *James*'s Street to the plaintiff, at the yearly rent of 250*l.*, payable quarterly, by an agreement in writing bearing date the 29th of *August*, 1835. The agreement contained the following clauses:—"And the said *Thomas Dallman* doth hereby promise and agree, to spend out of his own proper monies, within one year from the date hereof, 200*l.*, at the least, in erecting and building a kitchen to the said messuage with necessary fittings; and also in altering the large room one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation; such erection and alterations or repairs to be inspected and approved of by the said *William King*, and to be done in a substantial manner; and it is agreed that the said *Thomas Dallman* shall be allowed 200*l.* towards such erection and alteration or repairs, and shall be at liberty to retain the same, out of the first year's rent of the premises. And the said *T. Dallman* doth hereby further promise and agree to pay to the said *W. King*, or to the trustees for the time being of the said charity, the said yearly rent of 250*l.* at the times and in manner aforesaid." The plaintiff having entered upon the premises, caused sundry repairs and alterations to be made at the cost of 200*l.* and upwards, within one year from the date of the agreement; but the defendant did not approve of some portions of the work, and when the first year's rent became due, he allowed the plaintiff 115*l.* 17*s.* on account of the repairs, and distrained for the balance of the year's rent, after giving the plaintiff credit for 50*l.*, which he had offered to pay.

It was contended on behalf of the defendant, that his approval of the alterations, was a condition precedent to the plaintiff's right to deduct the 200*l.* out of the first year's rent. The learned judge refused to nonsuit the plaintiff, and left it to the jury to say, whether the work had been done in a proper and substantial manner, and to the amount stated in the agreement. The jury found a verdict for the plaintiff.

Talfourd, Serjt., in pursuance of leave reserved, obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit upon the objection made at the trial. He cited *Morgan* v. *Birnie* (*a*).

Wilde, Serjt., and *J. Bayley* shewed cause.—The opinion of the learned judge at the trial, was correct. In all questions as to conditions precedent, the situation of the parties in the particular case, must be considered. In the present instance the stipulation does not go to the whole of the consideration.

(*a*) 9 Bing. 672.

An agreement for the lease of a house contained the following clauses, "and the said T. D., [the lessee,] doth hereby agree to spend, within one year from the date hereof, 200*l.*, at the least, in erecting a kitchen to the said messuage, and also in altering the large room into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alteration or repairs, to be inspected and approved of by the said W. K., [the lessor,] and to be done in a substantial manner; and it is agreed that the said T. D. shall be allowed 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." The lessee laid out more than 200*l.* but the lessor did not approve of all the work, and distrained for the balance of the first year's rent. *Held*, in an action brought by the lessee for an excessive distress, that the approval of the lessor was not a condition precedent, and that after the jury had found that 200*l.* was expended by the plaintiff, in substantial repairs, he was entitled to recover in the action.

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The jury have found that 200*l.* and upwards, was laid out in making substantial repairs, and the defendant was not justified in withholding his approval, *Morgan* v. *Birnie* (*b*) is not an authority to shew that this was a condition precedent. Here there is nothing said about a certificate being required from the defendant, and as between him and the plaintiff, no act was necessary to be done. The agreement merely provided that the alterations or repairs should be inspected and approved of by the defendant, and be done in a substantial manner. The argument on the other side must go to the extent of shewing that no part of the money expended ought to have been allowed; but the defendant, by giving credit for a portion of the repairs, has admitted that he cannot treat the promise as a condition precedent. In *Hotham* v. *The East India Company* (*c*) it is said upon the subject of conditions precedent, "That there are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits, therefore, of the question must depend on the nature of the contract and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record which have happened in consequence of this contract."

In *Boone* v. *Eyre* (*d*) Lord *Mansfield*, C. J., lays down the distinction as clear, 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 they go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. That case was supported in *Fothergill* v. *Walton* (*e*), *Ritchie* v. *Atkinson* (*f*), and *Stavers* v. *Curling* (*g*). *Miller* v. *Burn* and *George* v. *Jackson* from the MS. of Mr. Justice *Bayley*, were also cited (*h*).

(*b*) 9 Bing. 672.
(*c*) 1 T. R. 645.
(*d*) 1 H. Black. 273 n.
(*e*) 8 Taunt. 576.
(*f*) 10 East, 295.
(*g*) 3 Scott, 740; 2 Hodges, 237.
(*h*) The reporter has been favoured with a sight of the notes of the above cases, made by this distinguished judge; as the cases are not reported, a copy is subjoined.

"Plaintiff let defendant an hotel, upon certain conditions, one of which was that plaintiff should, within two months, build a taproom; and the defendant covenanted, that, at the end of the term, he would take, at a valuation, the tap to be built by plaintiff as aforesaid. At the end of the term defendant would not pay for the tap, and action *inde*. The declaration averred that plaintiff built the tap, but it did not allege that he built it within two months, and, after judgment by default, error on that objection; but the Court thought it clear that the building within the two months was not a condition precedent, as it did not go to the whole, and the counsel for the plaintiff in error, did not press to argue it. Judgment affirmed. *Miller* v. *Burn*, *Michaelmas*, 1813, K. B."

"*If a ship owner charters her, and covenants that when the lading, ordered on board by the charterer, shall be received, the ship shall proceed, it is not a condition precedent that the ship shall be fully laden, though the owner is to have so much per ton freight.*

If there is not a full loading, the owner's remedy is by a cross action.

Defendant chartered his ship to the transport board, and covenanted that the master should obey their orders, and that when the lading they should order on board should be received, and he should have signed bills of lading for them, he should proceed; they put goods on board him and ordered him to proceed, but he did not, and covenant *inde* against defendant. *Plea*—That by the charter-party the commissioners were to pay 3*l.* 18*s.* 0*d.* per ton, for the goods delivered, and that the goods received did not amount to a full lading, and the master waited till he could procure a full lading. *Demurrer*, and on argument the Court were clear the plea was bad: it was not a condition precedent that the com-

Talfourd, Serjt., *contrà*.—The stipulations contained in this agreement are not separate and independent, but when the whole of it is read, it will appear that the approval of the defendant was a condition precedent. *Morgan* v. *Birnie* (*a*) is precisely in point. There, in a building contract, it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises; and the defendant agreed to pay certain proportions of the contract price, upon receiving a certificate in writing signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction; and it was held that the obtaining the surveyor's certificate was a condition precedent to the plaintiff's right to sue upon the contract. The same objection might have been made there, as in this case, viz., that the stipulation did not go to the whole of the consideration.

TINDAL, C. J.—The first question is, whether the defendant's approval of the repairs to be done by the plaintiff, was a condition precedent. Now in point of form it appears to me, upon looking at the agreement, that it is not a condition precedent. It cannot be, unless the words which precede the latter part of the agreement make it so in point of law. The words are, that *Dallman* shall spend 200*l*. at the least "in erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alterations or repairs, to be inspected and approved of by the said *William King*, and to be done in a substantial manner. And it is agreed that the said *Thomas Dallman* shall be allowed the sum of 200*l*. towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." Now the latter clause, beginning with the words "and it is agreed," is a separate and distinct clause from the former; and unless the word "*such*" is supposed to have so much force as to refer not only to the extent of the repairs, but also to the lessor's approval of them, it is not a condition precedent. We ought to be the less ready to give such a construction to the agreement, inasmuch as the subject-matter does not go to the whole consideration, for if all the repairs had been done, except the minutest fraction of them, the argument for the lessor would be as strong as it is now. But let us assume for a moment that it was a condition precedent. Two things were provided for. First, that the erection and repairs should be inspected and approved of by the lessor; and, secondly, they were to be done in a substantial manner. Now I cannot help thinking that the gist of this part of the agreement was, that the work should be done in a substantial manner, and that the lessor should be afforded an opportunity of ascertaining that it was in reality

missioners should furnish a full lading, because it did not go to the whole, and if the commissioners did not furnish as much as they were bound, the remedy was by cross-action. Judgment for plaintiff. *George* v. *Jackson*, *Michaelmas*, 1813."

(*a*) 9 Bing. 672.

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done according to the agreement; because otherwise the lessor might wilfully refuse to approve of the work, and then it would be a condition which would go to the destruction of the thing granted, and, being repugnant to the whole agreement, might consequently be held void on that ground.

But let us go a step further, and see whether the jury have not found that there was a virtual performance of the agreement. The jury found that 200*l.* had been laid out in doing substantial repairs; that is, according to the intent of the parties who made the agreement. The case is distinguishable from *Morgan* v. *Birnie* (*a*); there the great object of the party was that he should not be liable to pay for the work, unless it was first approved by an architect, whose certificate was required, before any demand of the price of the work could be made.

That agreement cannot be read except as containing a condition precedent. Here it is doubtful whether there is any such condition; and if there is, then the jury have found that the agreement has been substantially performed. This rule must therefore be discharged.

VAUGHAN, J.—Whether an agreement contains a condition precedent or not must depend upon the instrument itself. In modern times the doctrine relating to conditions precedent, has been considerably relaxed, and there are cases where the Courts have rather preferred to treat such clauses as independent agreements. Looking at the intention of these parties I cannot put the construction on the word *such* which the defendant requires. The agreement is that *Dallman* shall spend within one year 200*l.* In doing what? "In erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room, one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation." Now it is clear what the parties intended. The lessor would not allow 200*l.*, if it was expended in mere decorations, but he required that it should be laid out in repairs of the description specified, which would make the house fit for habitation. The latter sentence, which stipulates for the lessor's approval of the repairs, is quite distinct, and admits of this construction, and does not amount to a condition precedent. The argument, on behalf of the defendant, amounts to this, that if he capriciously and childishly refused to approve of the repairs, the plaintiff would be without any remedy, and the defendant's simple negative would defeat the justice of the case. It, therefore, appears to me, that this is not a condition precedent; and even if it were, the jury have found that it has been substantially complied with. As far as the defendant's acts appear, he has not treated it as a condition precedent, because he has given the plaintiff credit for 115*l.* on account of the repairs.

BOSANQUET, J.—This case depends upon the construction which is to be given to the agreement; the Court cannot take into its consideration that the defendant was not contracting for his own benefit. The plaintiff entered on the premises as tenant to the defendant, and agreed to lay out 200*l.* in the

(*a*) 9 Bing. 672.

manner which was specifically mentioned, or in such repairs as might be necessary to make the premises fit for habitation. The jury have found that this part of the contract has been performed by the plaintiff. The agreement goes on to say "such erections and alterations or repairs to be inspected and approved of by the said *William King*, and to be done in a substantial manner." If this sentence had commenced thus—"And it is further agreed that such alterations shall be inspected," &c., it would hardly have been contended that it amounted to a condition precedent; and I have great difficulty in saying that there is any substantial difference between the two forms of expression. Then we come to the clause—"that the said *Thomas Dallman* shall be allowed the sum of 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." This is, in its form, a distinct agreement that the lessee shall be allowed 200*l.*; and the description of the repairs for which the allowance is to be made is given. It is contended that the word "such," embraces not only the description of the repairs, but also the provision that they must have been approved of by the lessor; but that construction would make the condition precedent, repugnant to the principal object of the agreement, and would therefore make it void. *Morgan* v. *Birnie* (*c*) has been relied upon, but that case is clearly distinguishable: here there is no condition precedent, and there is nothing to prevent the plaintiff from deducting the amount of the money which the jury have found that he has expended.

COLTMAN, J.—The first question is, whether this is a condition precedent? If we should hold that it is not, no inconvenience will happen to the defendant; because, if the plaintiff has not expended the money in repairs, he will not be entitled to retain it out of the rent. On the other hand, if we say that the agreements are dependent, the inconvenience to the plaintiff may be very great; inasmuch as if he had expended only 199*l.* in repairs, he would not be entitled to make any deduction from the rent, and he would be without any other remedy. It appears to me that there is nothing so stringent in this agreement as to oblige us to treat it as a condition precedent. *Morgan* v. *Birnie* (*c*) is quite distinguishable. It is said that the defendant may capriciously withhold his approval of the repairs, and so deprive the plaintiff of his right to retain the money, and I do not say that a party may not enter into such a contract; but before the Court would put such a construction upon this agreement, they would see that the words used are so strong that they cannot be understood in any other way. Here the jury have found that the repairs were substantially done, and I agree that this rule ought to be discharged.

Rule discharged.

(*c*) 9 Bing. 672.

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PLANCHE *v.* BRAHAM.

The plaintiff wrote the English words for the representation of *Weber's* opera of *Oberon* and the defendant afterwards caused other words to be adapted to the same music, and produced the opera at his theatre; but in the course of the representation, the performers introduced several of the plaintiff's songs instead of the new version. In an action brought by the plaintiff against the defendant to recover the penalty given by the 3 & 4 W. 4, c. 15, sec. 2, the jury found a verdict for the plaintiff; and, upon a motion for a new trial,—*Held*, first that the question as to what was a representation of a dramatic production, in contravention of the statute, is a question for the jury; and, secondly, that the facts which were proved at the trial warranted the verdict.

DEBT on the stat. 3 & 4 W. 4, c. 15, sec. 2 (*a*), for representing certain portions of a dramatic piece, of which the plaintiff was the author. The first count of the declaration stated that theretofore, and within the space of ten years next before the passing of a certain act of parliament made and passed in the reign of his Majesty *William* 4, being An Act to amend the Laws relating to Dramatic Literary Property, to wit, on the 1st *January*, 1836, the plaintiff did compose, print, and publish a certain dramatic piece called *Oberon*, and from the time of the passing of the said act, hitherto had been the proprietor thereof, and during all that time had had the sole liberty of representing, or causing to be represented, the said dramatic piece at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of *Great Britain* and *Ireland*, in the Isles of *Man*, *Guernsey*, and *Jersey*, or in any part of the British dominions; nevertheless the plaintiff said that, after the making and passing of the said act of parliament, and within twelve calendar months next before the commencement of this suit, and also whilst the plaintiff was such proprietor of the said dramatic piece, and had such sole liberty of representing, or causing to be represented, the same as aforesaid, and during the continuance of the same liberty, to wit, on the 26th *December*, 1836, he the defendant did, without the consent in writing of the plaintiff, cause certain parts, to wit, certain verses, songs, and duets, and portions of songs and duets, of the said dramatic piece to be represented at a certain place of dramatic entertainment, to wit, at the *St. James's* Theatre, situate, &c., in that part of the United Kingdom called *England*, contrary to the form of the statute and the intent thereof, and the right of the plaintiff as such author and proprietor as aforesaid; whereby, and by force of the said statute, the defendant became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid for and in respect of such representation, an amount not less than 40*s.*, or the amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages; and the plaintiff said that the amount of the injury sustained by the plaintiff from the said representation of the said piece amounted to a large sum of money, to

(*a*) Stat. 3 & 4 W. 4, c. 15, s. 2, enacts, "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.* or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases, in that part of the said United Kingdom or of the British dominions in which the offence shall be committed; and in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority or otherwise mentioning the same."

wit, the sum of 100*l.*, the same being the greatest damages recoverable by the plaintiff according to the form of the statute, in respect of the representation of the said dramatic piece by the defendant as aforesaid, whereof the defendant then had notice, whereby, and by force of the aforesaid statute, an action had accrued to the plaintiff to demand from the defendant the said sum of 100*l.*, parcel of the sum above mentioned.

Second count—That after the making and passing of the said act of parliament, and within twelve calendar months next before the commencement of the suit, and whilst the plaintiff, having so composed, printed, and published the said dramatic piece within the space of ten years next before the passing of the said act, as in the first count mentioned, was the proprietor thereof, and had the sole liberty of representing, or causing to be represented, the said dramatic piece at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of *Great Britain* and *Ireland*, in the Isles of *Man*, *Guernsey*, and *Jersey*, or in any part of the British dominions, as in that count also mentioned, and during the continuance of the same liberty, he, the defendant, on twelve several occasions, to wit, on each of the days following, that is to say, on, &c., did, without the consent in writing of the plaintiff, cause certain parts, to wit, certain verses, songs, duets, and portions of songs and duets of the said dramatic piece to be represented at the said place of dramatic entertainment, to wit, at the *St. James's* Theatre, situate as aforesaid, in, &c., in that part of the United Kingdom called *England*, contrary to the form of the said statute and the intent thereof, and the right of the plaintiff as such author and proprietor as aforesaid; whereby and by force of the said statute, the defendant became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid, for and in respect of each of the representations in this count mentioned, an amount not less than 40*s.*, or the amount of the benefit or advantage arising from each of such representations, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages; and the plaintiff said that the sum of 40*s.* is the greatest damages recoverable by the plaintiff according to the form of the said statute in respect of each of the said representations of the said dramatic piece by the defendant, as in this count mentioned, whereof the defendant then had notice, whereby and by force of the said statute, an action had accrued to the plaintiff to demand from the defendant the sum of 40*s.*, in respect of each of the said representations of the said dramatic piece as aforesaid, together amounting to the sum of 24*l.* residue of the said sum above demanded. Yet the defendant had not paid the said sum above demanded, or any part thereof, to the damage, &c.

At the trial before *Tindal*, C. J., at the *London* Sittings after *Trinity* Term, it appeared that the plaintiff had written the English words for *Weber's* opera of *Oberon*, which was performed at *Covent Garden* Theatre in 1836, and that the defendant then performed the principal character of *Sir Huon*.

The defendant afterwards produced the same opera at his own theatre in *St. James's* Street, under the name of *The Enchanted Horn*, with English words adapted to the music, and the defendant again performed the same character as at *Covent Garden* Theatre. It was proved that the defendant and other performers sung the words written by the plaintiff, in three songs and concerted pieces, and that the whole of the piece appeared to be a paraphrase of

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the plaintiff's opera. Witnesses were also called to prove that, in their judgment, the representation of *The Enchanted Horn* caused an injury to the plaintiff's copyright. The learned judge said he was of opinion that the evidence was sufficient to shew that there had been an infraction of the statute, and he left the jury to say whether the defendant had represented any part of the plaintiff's opera. A verdict was found for the plaintiff, damages 40*s*.

Wilde, Serjt. moved for a new trial.—The question is, whether the evidence which was given, proved that there had been a representation of the plaintiff's production, or of any part thereof, within the meaning of the statute. A part of a production, does not mean any small number of lines or a single paragraph, but a substantial portion of the whole piece. The evidence shewed that only very small and unimportant portions of the plaintiff's production, had been used at the defendant's theatre. The construction of the statute ought to be based upon broad and general principles. It is evident in this particular case, that the words which were sung were merely accessory to the music, and the music was the common property of both parties.

TINDAL, C. J.—It appears to me that this is a question which must in all cases be left to the jury. The new statute directs that if any person shall represent any production, or any part thereof, without the consent of the author, he shall be liable, for every such representation, to the payment of not less than 40*s*., or to the full amount of the benefit arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages. It is impossible to lay down a general rule as to what is or what is not a representation of part of a dramatic production, but in all cases it must be left to the jury to determine the fact; that has been done in the present case, and I was also of opinion that there had been a representation of a part of the plaintiff's opera. The statute does not merely give the plaintiff damages, but it operates as a prohibition, and renders a defendant liable to the payment of 40*s*., although no damage may be found to have been sustained. Besides, as the jury have given a verdict of 40*s*., we should infringe the usual rule which has been established, if we directed a new trial upon the ground that the verdict is against the evidence.

VAUGHAN, J.—It is impossible to lay down any general rule as to what is a representation of a part of a dramatic piece: it may be often a very nice question, and must in all cases be left to the jury. The jury having found a verdict in this case for 40*s*. I agree that it ought not to be disturbed.

BOSANQUET, J.—The legislature has forbidden the representation of any part of a dramatic piece without the author's consent, and it appears to me that there has been an infraction of the statute in the present instance.

COLTMAN, J.—I am of the same opinion. This case has been left to the jury, and we ought not to interfere.

Rule refused.

VINE *v.* SAUNDERS and ELIZABETH his Wife.

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Trespass for assault and false imprisonment, will lie against husband and wife jointly.

TRESPASS.—The declaration stated that the defendants heretofore, to wit, on, &c., with force and arms, &c., assaulted the plaintiff and then caused the plaintiff to be arrested and taken into custody upon a false charge of felony, then made by the defendant, against the plaintiff, and then forcibly compelled the plaintiff to get out of the bed in which the plaintiff then was lying, and then indecently and indelicately forced and compelled the plaintiff to go from and out of a certain bedroom, parcel of a certain dwelling-house, situate and being in the county of *Hertford*, in certain night clothes, in which the plaintiff was then dressed, in the presence of divers, to wit two men, down the stairs of the said dwelling-house, into another room, parcel of the said dwelling-house, and then indecently and indelicately kept and detained the plaintiff in custody in the last mentioned room, in the presence of the said men, in the said night clothes, without decent apparel, for a long space of time, to wit, twenty minutes then next following; and also then, during the night-time, forced and compelled the plaintiff to go from and out of the said dwelling-house, into and along divers public highways, in the county aforesaid, to a certain other dwelling-house, in the county aforesaid, and there imprisoned the plaintiff, and kept and detained her in prison, without any reasonable or probable cause whatsoever, in the said last-mentioned dwelling-house, for a long space of time, to wit, for six hours then next following, and during the night-time; contrary to the laws and customs of this realm, and against the will of the plaintiff, whereby the plaintiff was, during that time, deprived of her necessary sleep and rest, and suffered great alarm and inconvenience, and distress of mind, and was also thereby then greatly exposed and injured in her credit and circumstances, and other wrongs, to the plaintiff then did, against the peace of our lord the king, to plaintiff's damage, &c.

General demurrer and joinder.

Petersdorff, in support of the demurrer.—This action ought to have been brought against the husband alone. The earliest authorities to be found upon this subject are in Yelverton's Reports, *Drury* v. *Dennis* (*a*); *Draper* v. *Fulkes* (*b*); *Anonymous* (*c*). But those cases do not decide the question now before the Court, and in principle they are distinguishable. In *Rogers and Wife* v. *Goddard* (*d*) it was held that husband and wife ought not to join in trespass for an assault upon the wife. It is true that in *White* v. *Eldridge* (*e*) it was held that trespass would lie against husband and wife, but that was upon motion in arrest of judgment, after verdict. So in *Keyworth* v. *Hill* (*f*) a declaration in trover against husband and wife stated that the defendants converted the property to their own use, and it was held sufficient after verdict. The authorities collected in Com. Dig. tit. Baron and Feme, Y, are somewhat

(*a*) Yelv. 106; 1 Brownl. 209; 1 Sid. 376.
(*b*) Yelv. 165.
(*c*) Yelv. 166.
(*d*) 2 Show. 255.
(*e*) Lord Ray. 443.
(*f*) 3 B. & Ald. 685.

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contradictory. If the husband died before judgment, and after verdict, then the wife would be liable to pay damages for the wrong committed by her husband, which is a strong and sufficient reason why this declaration ought not to be supported. There are many cases which decide that a joint action of trespass, cannot be maintained by husband and wife for a trespass done to them individually. *Newton* v. *Hatter*(*g*), *Dugwell* v. *Marshall* (*h*), *Hockett* v. *Stiddolph* (*i*), *Rogers* v. *Goddard* (*k*), and the rule is recognised in *Milner* v. *Milnes* (*l*). The principle upon which all the authorities are decided is this, that the wife has no interest in the husband's person.

J. Addison, contrà.—Many of the cases which have been cited are not applicable to the present question, because they related to actions of trover. In *Watson* v. *Thorpe* (*m*), in battery against husband and wife, the husband justified that the plaintiff assaulted his wife; the wife, by herself, pleaded *de son assault demesne;* and the plaintiff replied *de injuriâ*. Both issues were found for the plaintiff, and damages entirely given; and it was alleged, in arrest of judgment, that the trial was ill, for the wife, by herself, could not plead, and the damages being entirely assessed, all was ill. "The Court was of that opinion, and awarded that they should replead." Now this is a direct authority in favour of the plaintiff, because no objection was made that trespass was not sustainable against the husband and wife; nor would the Court have awarded a repleader. In *Berry* v. *Nevys* (*n*) it was admitted, that a joint battery or imprisonment might be charged against husband and wife, In *Keyworth v. Hill* (*o*), which has been cited on the other side, *Bayley*, J., says—"It is quite clear that, in trespass, the husband and wife might be jointly sued; the reason of which is, that the action is founded on the wrongful act of the defendants." In Com. Dig. tit. Pleader (2 A 2) it is said—"Yet trespass against husband and wife, for taking goods is good, though the conversion is said to be to their own use; for the conversion is not the gist of the action as in trover." *Smalley* v. *Kerfoot* (*p*) was an action of trespass, against husband and wife, for entering the plaintiff's house and taking his goods; and, after judgment by default, and a writ of inquiry executed, it was moved, in arrest of judgment, that the declaration was ill, because it alleged the conversion to be to the use of the wife, but the Court overruled the objection; as this motion was made after a judgment by default, it was the same as if the same objection had been made on demurrer.

Petersdorff, in reply.—It appears by the report of *Smalley* v. *Kerfoot*, in Strange (*q*), that the objection was made after a verdict for the plaintiff. No direct authority has been produced in support of this declaration.

TINDAL, C. J.—I think this action is maintainable. No direct authority has been cited to shew that it is not; and, as far as the cases go, they lead one's mind to the opposite conclusion. The first authority is *Watson* v.

(*g*) Lord Ray. 1209.
(*h*) 2 Lev. 20.
(*i*) 2 Mod. 66.
(*k*) 2 Show. 255.
(*l*) 3 T. R. 627.
(*m*) Cro. Jac. 239.
(*n*) Cro. Jac. 661.
(*o*) 3 B. & Ald. 687.
(*p*) Andrews, 242.
(*q*) Strange, 1093.

Thorpe. There an objection being made in an action of trespass against husband and wife, that the wife had pleaded by herself, the objection was allowed; but the Court would not have awarded a repleader, if they had not been satisfied that the action was maintainable. The second case is *Berry v. Nevys* (*q*), where it is admitted at once, without argument, that husband and wife may be charged with a joint battery or imprisonment. Then comes *Smalley v. Kerfoot* (*r*), which was an action of trespass, brought against husband and wife, for entering the plaintiff's house, seizing his goods, and converting them to their own use. According to the report in Strange, it is put as if the motion in arrest of judgment, was made after verdict. The resolution of the Court is delivered by the Chief Justice, who says—" that this being trespass, it was well enough; for the conversion here is not the gist of the action, as it is in trover, this action being maintainable for entering the house, and taking the goods; and we must take it the damages were given only for that." This is a direct and distinct authority upon the point; and although it is said, in Strange, that this was after verdict, I cannot agree that the effect of the decision is altered, because another reporter, who states the case more in detail, says that it was after a judgment by default and damages assessed on a writ of inquiry. There is also the very high authority of Mr. Justice *Bayley*, in *Keyworth* v. *Hill* (*s*), and the passage in Com. Dig. tit. Pleader, 2 A 2, which has been referred to. I am, therefore, of opinion that the plaintiff is entitled to our judgment.

VAUGHAN, J.—It is incumbent on the defendants to produce a direct authority in support of this objection, but none has been shewn. *Keyworth* v. *Hill* (*s*) satisfies my mind that this action may be maintained. Mr. Justice *Bayley*, who had been a pleader, and who was not likely to give expression to a rash opinion, says in the most unequivocal manner, that in trespass the husband and wife may be jointly sued. The present is a much stronger case than an action for taking goods. *Watson* v. *Thorpe* (*t*) is also an authority in favour of the plaintiff.

BOSANQUET, J.—I am also of opinion that this demurrer must be overruled. No authority has been cited to shew that this action cannot be maintained. On the contrary there are some strong cases in favour of the plaintiff. In *Watson* v. *Thorpe* (*t*) a repleader would not have been awarded if the Court had considered that the action was not maintainable. In *Berry* v. *Nevys* (*q*) it seems to have been admitted that husband and wife may be charged with a joint battery or imprisonment. Then come the two reports of the case of *Smalley* v. *Kerfoot* (*r*), and it is impossible to read the report in Andrews, without being satisfied that Andrews is correct, in stating that the question arose after a judgment by default and a writ of inquiry executed. In *Keyworth* v. *Hill* (*s*) it was held, that trover might be maintained against husband and wife when the conversion might have been the act of the wife. It is admitted that for an assault the husband and wife are both criminally responsible. There does not seem to me to be much weight in the argument, that the wife

(*q*) Cro. Jac. 661.
(*r*) Andrews, 242; 2 Strange, 1093.
(*s*) 3 B. & Ald. 687.
(*t*) Cro. Jac. 239.

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might be answerable for all the damages, if the husband died after verdict, but it is unnecessary to say more upon that part of the case.

COLTMAN, J.—The argument advanced for the defendants rests upon the position that the wife ought not to be made responsible for the whole of the damages, but it is not necessary to go into that question. How far do the authorities go? The cases relating to actions brought by husband and wife are foreign to the present question, and no authority has been cited to shew that they may not be made joint defendants. On the contrary, *Watson* v. *Thorpe* (*a*), *Berry* v. *Neyys* (*b*), and *Smalley* v. *Kerfoot* (*c*) are express authorities the other way.

Judgment for plaintiff.

(*a*) Cro. Jac, 239.
(*b*) Cro. Jac. 661.
(*c*) Andrews, 242: 2 Strange, 1093.

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STROTHER *v.* HUTCHINSON and another.

1. A bill of exceptions will lie from a judgment in the county court.
2. And it will lie where the plaintiff was nonsuited, after he had appeared and refused to submit to a nonsuit.
3. A *venire de novo* cannot be awarded to a county court.

FALSE judgment from the county court of *Yorkshire*. The declaration was in debt for work and labour, as a surgeon, performed by the plaintiff upon one *Humphrey* at the request of the defendants. *Plea—Nil debent*, and issue thereon.

The proceedings at the trial were stated on the record, which was returned by the sheriff, and it was stated that the jury were ready to give their verdict, and the record proceeded as follows:—"Upon which the said *W. J. Strother*, being solemnly called, does not further prosecute his said writ against *J. Hutchinson* and *J. Langstaff*. Therefore it is considered that the said *W. J. Strother* take nothing by the said writ, but that he and his said pledges to prosecute, be in mercy, &c., and that the said *J. Hutchinson* and *J. Langstaff* do go thereof without day, &c.; it is also considered by the Court here, that the said *J. Hutchinson* and *J. Langstaff* do recover against the said *W. J. Strother* 33*l.* 13*s.* 0*d.*, for their costs, &c., and that the said *J. Hutchinson* and *J. Langstaff* have execution thereof, &c.; at which court, to wit, at the eleventh county court of H. P., sheriff of the county, aforesaid, comes the said *W. J. Strother*, by his attorney, and then and there excepts to the nonsuit above mentioned, and then and there tenders and proposes his bill of exceptions, to which the said H. P., the said sheriff, at the request of the said attorney, and with the concurrence of the counsel of the said *J. Hutchinson* and *J. Langstaff*, put his seal, pursuant to the statute, in such case made and provided."

It appeared, by the bill of exceptions, that the action was brought by the plaintiff against the defendants, as overseers, for the time being, of the township of *Hutton*, for attendances upon a pauper in the time of preceding overseers, and that the defendants denied their liability on the ground that they were not overseers at the time of the attendances; but that the plaintiff contended that they were liable in consequence of their being overseers at the time the action was commenced, it proceeded as follows: "nevertheless the said sheriff and suitors did then declare, that the said *W. J. Strother* had brought his action against the wrong parties, and could not, in point of law, maintain the same

against the said *J. Hutchinson* and *J. Langstaff*, and though the said *W. J. Strother* did then and there, by his said attorney, insist upon the cause being left to the jury, and did offer to abide their determination, and did appear on his being called, and did refuse to consent to a nonsuit; yet the said sheriff conceiving that there was no matter of fact to be left to the said jury, and not being required, on the part of the said *W. J. Strother*, to submit to them whether the said *J. Hutchinson* and *J. Langstaff* were the overseers of the towship of *Hutton*, at the time his alleged cause of action accrued, did then and there, with the consent of the said suitors, order the said *W. J. Strother* to be called, and did then and there declare that the said *W. J. Strother* was nonsuited, and the jury thereupon did not give a verdict; whereupon the said *W. J. Strother*, by his said attorney, did then and there except to the opinion of the said sheriff, and did insist on the said *W. J. Strother*'s right to maintain his aforesaid action against the said *J. Hutchinson* and *J. Langstaff*, as overseers as aforesaid for the alleged cause of action, and also on the illegality of nonsuiting him, the said *W. J. Strother*, without his consent and contrary to his wish; and inasmuch as the said several matters so produced and given in evidence on the part of the said *J. Hutchinson* and *J. Langstaff*, and insisted on as aforesaid, do not appear by the entry of judgment of nonsuit as aforesaid, the said *W. J. Strother* did then and there propose his aforesaid exception to the opinion of the said sheriff, and requested the said sheriff and suitors to put their seals to his bill of exceptions, containing the said several matters so produced, and examined in evidence as aforesaid, according to the form of the statute in such case made and provided.

The error assigned was that the plaintiff ought not to have been nonsuited.

Archbold.—The sheriff had no authority to nonsuit the plaintiff against his consent, and it cannot be done even where there is an insuperable objection to the plaintiff's right to recover. *Minchin* v. *Clement*(*a*). By the statute of *Westminster* 2(*b*), "When one that is impleaded before any of the justices doth alledge an exception, praying that the justices will allow it; which, if they will not allow, if he that alledged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and, if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal; and, if the justice cannot deny his seal, they shall proceed to judgment, according to the same exception, as it ought to be allowed or disallowed." And, according to Lord *Coke*'s commentary this statute is applicable to the county court, although if the express words of the statute were relied upon, it would appear that a bill of exceptions would only lie in the Common Pleas(*c*). But the statute has always been construed according to the construction which appears in Lord *Coke*'s note. And there is more reason for giving such a remedy in causes tried in inferior courts, because as is observed by Lord *Coke* "the judges are more likely to erre." It is clear that a writ of error will lie upon a

(*a*) 1 B. & Ald. 252. (*b*) 2 Inst. West. 2. cap. 31, 426. (*c*) 2 Inst. 427 (2).

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nonsuit. *Newell* v. *Pidgeon* (*d*). *Box* v. *Bennett* (*e*). And there is no difference between a writ of error and a bill of exceptions.

W. H. Watson, for the defendants.—When a plaintiff is nonsuited, he must be supposed to be absent from the court, and he cannot therefore be present to tender a bill of exceptions. A county court is not a court of record; and no instance is to be found in the books, where a bill of exceptions has been allowed in a court not of record. This is a very strong fact to shew that the argument used on the other side cannot be supported. A county court is not within the statute, as the "*justices*" are required to affix their seals, and it is said that the "*record*" shall be returned before the king; whereas there are no justices, nor is there any record in the county court. A writ of error will not lie upon a nonsuit; and in Buller's Nisi Prius (*f*) it is said, "A bill of exceptions is only to be made use of upon a writ of error, and therefore where a writ of error will not lie, there can be no bill of exceptions." In *Rex* v. *Preston on the Hill* (*g*), it was expressly decided that no bill of exceptions will lie to the court of quarter sessions (*h*). The plaintiff may, perhaps, have a remedy by mandamus against the sheriff, and then the facts willl appear by affidavit, but here the return shews that the plaintiff was not in court, and he was not therefore in a condition to tender a bill of exceptions.

Archbold, in reply.—The cases which have decided that no bill of exceptions lies at the quarter sessions, are distinguishable from the present. The justices at quarter sessions are to judge of the fact, as well as of the law, and the whole proceeding is contrary to the course of the common law. Here the writ of false judgment recites the proceedings which took place at the trial, and it is in substance similar to a writ of error. If a bill of exceptions will not lie in the county court, the plaintiff is altogether without a remedy; and the statute of *Westminster* has always received a liberal construction.

TINDAL, C. J.—This case has been sent before us by a writ of false judgment, after a bill of exceptions tendered in the county court; and several objections have been taken as to the legality of the proceedings. First, it is urged, for the defendants, that no bill of exceptions will lie from a county court. Undoubtedly, if we look at the statute of *Westminster* 2, it appears to refer only to proceedings before the justices of the superior court; but if we look also at the commentary of Lord *Coke*, which remains uncontradicted to the present day, and has, in part, been acted upon, we there find that the statute ought to receive a more extended construction. He says, "Albeit the letter of this branch seemeth to extend to the justices of the Court of Common Pleas only, by reason of these words, Et si forte ad querimoniam de facto justic venire fac' dominus rex recordum coram eo', (which is by writ of error into the King's Bench,) yet that is put but for an example, and this act extendeth not only to all other courts of record, (for upon judgments given in them a writ of error lieth in the King's Bench,) but to the county court, the hundred, and court baron, for therein the judges were more likely to erre; and, albeit of judgments given in them, a writ of

(*d*) 1 Stra. 235.
(*e*) 1 H. Black. 432.
(*f*) 5th ed. 316.
(*g*) Rep. Temp. Hardwicke, 231. See also 1 Burr. S. Cases, 77.
(*h*) 1 Stark. on Evid. 467.

error lyeth not, but a writ of false judgment in the Court of Common Pleas, yet the case being in the same, or greater mischief, the purview of this statute, doth extend to those inferior courts (*h*)." Now I say that, looking at the letter only of the statute, it would appear that no bill of exceptions would lie in the Court of Queen's Bench or the Exchequer, yet by every day's practice we know that it lies in both these courts; and as we find these instances in the same sentence, I see no reason why we should not give the same degree of credit to Lord *Coke*'s opinion, that the statute is applicable to the county court and other inferior courts. It is to be observed that these are not mere loose expressions thrown out at random by the learned commentator, but his mind was evidently at work upon the subject before him, for he not only states that the statute is applicable to inferior courts, but he states the reason of it, and even anticipates the objection that a writ of error does not lie in those courts.

When, therefore, I find the authority of so great a man, not only uncontradicted, but his opinion adopted in the digests and books of authority, I think we are bound to hold it to be law now, and no one can doubt that this is a case within the mischief of the act.

But, in the course of the argument, it has also been objected that this was only a judgment of nonsuit, and that no writ of error lies upon a nonsuit, but the cases which have been cited are quite in point to shew that it does; and if a writ of error lies, so will a writ of false judgment.

Then it is said, that the improper direction of a nonsuit, is not a subject-matter for which a bill of exceptions will lie, but it seems to me, to fall quite within the reach of those cases where it has been held to apply. A bill of exceptions is not confined to errors in the reception or rejection of evidence; but it also applies to any direction given by the judge, which is incident to the course of the suit, as in allowing or refusing a challenge to a juror. So if he refuses a demurrer to evidence, when he ought to receive it. *Coot* v. *Bishop of St. David's* (*i*), or if he refuses to receive a party, who prays to be received as vouchee. These and other points, which are important in the conduct of a cause, independently of the direction to the jury, are all the subject of a bill of exceptions, and it also appears to me to apply where the judge directs the plaintiff to be nonsuited, although he appears and refuses to submit to it. The only other point made for the defendants is, that as the nonsuit appears on the record, it cannot now be objected that the plaintiff appeared, and that he ought not to have been nonsuited; but that is setting up a defence, which is prohibited by the maxim, *Non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. This judgment of nonsuit must therefore be reversed.

VAUGHAN, J.—I agree that this judgment must be reversed. The opinion of Lord *Coke* is stated in the clearest terms, as he expressly mentions the county court, the hundred court, and court baron.

BOSANQUET, J.—The first question is, whether a bill of exceptions lies in the county court. Upon this point, Lord *Coke* does not state his opinion loosely or carelessly, but he gives his reasons, and observes, that the words which are used in the statute, are put by way of example. This was sometimes the case in ancient statutes, and after this exposition of the statute of

(*h*) 2 Inst. 427 (n.) (*i*) Cro. Car, 249.

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Westminster 2, I cannot doubt, that a bill of exceptions will lie in the county court. Then it is said, that it does not lie after a judgment of nonsuit; the consequence of this would be, that a judge may say, I am satisfied that the plaintiff has no right of action, and therefore, I order that the plaintiff be nonsuited. If the plaintiff chooses to appear, is he to be without any remedy? It appears to me, that as a bill of exceptions lies for the misconduct of a judge, in the conduct of a cause, it lies for this species of misconduct. As to the other objection, it seems to me, that the defendants are setting up as a defence, the very matter which is the subject of the objection.

COLTMAN, J.—I am of the same opinion. Lord *Coke*, and other writers since his day, say that a bill of exceptions will not lie from the county court, and although Mr. Justice *Buller* says, that it will only lie where a writ of error lies, he refers to the court of quarter sessions, which, as Mr. *Archbold* argued, is not a court according to the course of the common law.

As to the objection, that it does not lie upon a nonsuit, if that were so, a party would be altogether without remedy. It is also said, that the plaintiff cannot aver any thing which is contrary to the record: but that is answered by the maxim referred to by my lord. It appears, by the cases of *Trevor* v. *Wall* (*k*), and *Bishop* v. *Kaye* (*l*), that we cannot award a *venire de novo;* therefore the judgment must be reversed.

Judgment reversed.

(*k*) 1 T. R. 151. (*l*) 3 B. & Ald. 610.

Nov. 25.

STAPLES and another *v.* HOLDSWORTH.

In an action by two plaintiffs, a defence that one of them became bankrupt after action brought and before plea, cannot be pleaded, after the defendant has obtained an order for time to plead, upon the terms of pleading issuably.

MOTION for leave to plead the bankruptcy of one of the plaintiffs. The declaration was delivered in *Trinity* Term, 1827; and in *May*, 1827, the defendant obtained an order for a month's time to plead, upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial. The cause stood over until 1837, when a term's notice was given, and a demand of plea was made. Further time to plead was afterwards granted upon the same terms as before. The defendant pleaded non-assumpsit, and afterwards applied to *Bosanquet*, J., at chambers, for leave to plead the bankruptcy of one of the plaintiffs, which application was refused, on the ground that it was not an issuable plea. The alleged bankruptcy occurred in *June*, 1834. It appeared, that the assignees of the bankrupt had disclaimed interfering.

R. V. Richards shewed cause.—This is not an issuable plea; it is not a plea to the merits. A plea of non-joinder of a defendant, would clearly not be issuable, *Barker* v. *Skinner* (*a*); and the same rule applies to the present case. The effect of allowing the plea would be merely to compel the plaintiff to bring a new action. The defendant is in no danger of paying the wrong per-

(*a*) Chitty, Jun., Precedents of Pleas, 11.

son, as he probably might be, if there was but one plaintiff who had become a bankrupt (*b*). It has been decided, that a plea of alien enemy is not issuable. *Simeon* v. *Thompson* (*c*). Here it is evident, that the object of the defendant is to compel the plaintiff to commence a new action, and if another action should be commenced, to plead the Statute of Limitations.

Wilde, Serjt., and *Greenwood*, shewed cause.—The question is, whether a party who is under terms to plead issuably, thereby gives up a substantial defence which he may have to the action. By 6 Geo. 4, c. 16, s. 63, it is enacted, that all debts due to a bankrupt shall be assigned to the assignees, and that the bankrupt shall not have any power to recover the same. In *Foster* v. *Snow* (*d*), an issuable plea is said to be, "pleading such an issue, as the defendant could go to trial upon." *Sautell* v. *Gillard* (*e*) is to the same effect. It has been held, that a plea of alien enemy is not issuable, but that is on the ground of its being a dilatory plea; so a false plea is not issuable. *Serle* v. *Bradshaw* (*f*). In *Newham* v. *Dowding* (*g*), a special demurrer was allowed. Here the defendant does not attempt to delay the plaintiff, but he pleads a good defence, upon which issue may be taken. *Kinnear* v. *Tarrant* (*h*), *Biggs* v. *Cox* (*i*). If the assignees are honest in determining not to interfere, it is clear that there can be no good cause of action, because if there was, they would be bound to proceed for the benefit of the creditors. The defendant may be desirous of examining the bankrupt as a witness, or to give declarations made by the assignees in evidence, which he will be precluded from doing, if the plea is not allowed. The Statute of Limitations is not necessarily an unconscientious plea, and the defendant ought not to be prevented from pleading it. *Rucker* v. *Hannay* (*k*), *Maddocks* v. *Holmes* (*l*).

Cur. adv. vult.

TINDAL, C. J.—This was a motion for leave to plead the bankruptcy of one of the plaintiffs, which took place after the commencement of the action, in addition to the plea of non-assumpsit. It was made by way of appeal from the decision of a judge at chambers, who had refused to allow the two pleas. The defendant had had time given to him to plead on the usual terms, one of which was, that he should plead issuably, and the question debated on the motion before us was, whether the proposed plea was an issuable plea within the meaning of a judge's order: and we are of opinion that it is not. The meaning of the term "pleading issuably," as stated by Lord *Kenyon*, in *Simeon* v. *Thompson*, 8 T. R. 71, is not merely pleading a plea on which issue may be taken, but such a plea as goes to the merits; and the substantial merits of the action, in this case, are, whether the defendant ever entered into the alleged contract, and whether he has broken it; but the effect of the proposed plea, if allowed

(*b*) But see *Wettenhall* v. *Graham*, 4 Bing. N. C. 714; 1 Arnold, 286.
(*c*) 8 T. R. 71.
(*d*) 2 Burr. 781
(*e*) 5 Dow. & R. 620.
(*f*) 2 Cr. & M. 148.
(*g*) 1 Chitt. 711.
(*h*) 15 East, 622.
(*i*) 4 B. & C. 920.
(*k*) 3 T. R. 124.
(*l*) 1 B. & P. 228.

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will be merely to turn the plaintiffs round, in order that the same question may be litigated in another action.

Now it is obvious, that the substantial merits of the controversy between these parties, may be tried as well in the present action as in one to be brought by the solvent plaintiff and the assignees of the bankrupt, against the present defendant. And it appears to us that no injury can result to the defendant from his being compelled to try the question of his liability in the present form of action; for, if the plaintiffs should recover judgment against him, and receive satisfaction, the present defendant can never be compelled to pay the money over again. Or if we put the case the other way, and suppose the defendant to succeed in the present action, and obtain a judgment on a plea which goes to the merits, we are of opinion, that in that case also the judgment would be a bar to any subsequent action which should be brought by the solvent plaintiff, in conjunction with the assigness of the bankrupt.

It was argued that the defendant may have a good defence against an action to which the assignees are parties, though such defence might not be available against the present plaintiffs, and that it is unjust to deprive him of any advantage which the proposed plea would give him. It appears to us, however, that the possibility of a good defence being made to the action, if brought by the assignees, does not render the plea an issuable plea on the merits. That must depend, not on any extrinsic circumstances, but on the nature of the defence raised by the plea itself. If there are any circumstances *dehors* the plea, which would render it fit that it should be pleaded, they may, in the particular case, furnish grounds for an application to be released from the terms of the judge's order, but they cannot make the plea itself an issuable plea. Another argument pressed upon us has been, that the defendant may wish to examine the bankrupt, or to give in evidence declarations made by the assignees; but we think the same answer applies to this as to the preceding objection.

A further ground on which the propriety of allowing the two pleas to be pleaded becomes very questionable, is, that the one is a plea in bar generally, and the other a plea to the further maintenance of the action; but as a decision on that ground would probably lead only to a further application to the Court in a different form, we have thought it best to decide the question upon the point which has been argued before us; and we cannot but observe, that in the particular case before us, there is the less reason to doubt that the plea is dilatory, as the assignees are stated to have disclaimed interfering.

We therefore think that this rule must be discharged.

Rule discharged.

BECKHAM *v.* KNIGHT and others.

Nov. 1.

After joinder in demurrer, the plaintiff became bankrupt, and afterwards obtained his certificate. The defendants applied for security for costs, but it being shewn that the assignees did not intend to interfere with the action, and that it was continued for the benefit of the bankrupt, the Court refused the application.

THE plaintiff sued the defendants for the breach of an agreement, whereby they undertook to employ him at a salary for a term of years. The defendants demurred to the declaration, and, after joinder in demurrer, the plaintiff became a bankrupt.

E. V. Williams, on a former day, obtained a rule *nisi*, calling upon the plaintiff to shew cause why he should not give security for costs.

It appeared, by affidavit, that the plaintiff had obtained his certificate; that the action was continued by the attorney for the sole benefit of the bankrupt; and that the assignees did not intend to interfere. The bankrupt attributed his bankruptcy to the non-performance, by the defendants, of the agreement which was the subject of the action.

Stammers shewed cause.—The assignees have declined to interfere with the action, and the plaintiff is therefore at liberty to proceed in the usual course. *Morgan* v. *Evans* (*a*), is an express authority. In that case the Court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of J. S., who was alone beneficially interested in the result.

So in *Townsend* v. *Snow* (*b*), the Court refused to set aside the proceedings, or to require an insolvent to give security for costs in an action where the assignees had refused to sue.

In *M'Cullock* v. *Robinson* (*c*), it was decided, that a bankrupt, who desired to dispute the commission of bankruptcy, ought not to be required to give security for costs, although he was gone abroad. In the present case the plaintiff attributes his bankruptcy to the non-performance of the agreement by the defendants; and it is against the equity of the case to assent to the present application. *Wilkinshaw* v. *Marshall* (*d*). In *Manley* v. *Mayne* (*e*), the action was carried on for the benefit of the bankrupt's assignees.

E. V. Williams, in support of the rule.—The defendants would have been entitled to allege the bankruptcy of the plaintiff in bar of the action, if they had not pleaded; *Kinnear* v. *Tarrant* (*f*). *Biggs* v. *Cox* (*g*). But as the effect of that would be to compel the assignees to commence a new action, it has been the practice to allow the bankrupt to proceed with the action upon giving security for costs. The principle, upon which such security is required, is, that it is a matter of right, that those who are to benefit by the proceedings, should be liable for the costs. *Mason* v. *Polhill* (*h*). In the present case, the action is in fact, proceeding for the benefit of the assignees, because it is founded on a chose of action which belonged to the bank-

(*a*) 7 Moore 344.
(*b*) 1 Marsh. 477; 6 Taunt. 123.
(*c*) 2 New. R. 352.
(*d*) 4 Tyrw. 993.
(*e*) 3 Man. & R. 381.
(*f*) 15 East, 622.
(*g*) 4 B. & C. 920.
(*h*) 1 Cr. & M. 620.

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rupt before his bankruptcy. *Webb* v. *Ward* (*i*). The rule is the same as to insolvents. Where the plaintiff was discharged under the Insolvent Act after issue was joined, the Court stayed the proceedings until the assignee or some creditor should give security for costs. *Heaford* v. *Knight* (*k*).

TINDAL, C. J.—This case stands on its own peculiar grounds, and will form no rule for any other case not within the same circumstances. The action was brought and issue was joined before the bankruptcy; and, after the bankrupt obtained his certificate, the present application was made. If the matter had rested here, the motion would probably have been successful, but it appears that the assignees do not intend to interfere, but on the contrary, that the action is carried on for the benefit of the bankrupt. The case, therefore, falls within the principle laid down in *Townshend* v. *Snow* (*l*), where an application similar to the present was unsuccessfully made, and C. J. *Gibbs* said, referring to *Webb* v. *Ward*, "In that case the assignees were suing for their own interest in the name of the bankrupt; the present action, on the contrary, was brought because the assignees refused to sue at all."

VAUGHAN, J.—This is an application to the discretion of the Court, and the possibility that the action may enure for the benefit of the assignees is not a sufficient reason for granting the application.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.
Costs to be costs in the cause.

(*i*) 7 T. R. 296. (*k*) 2 B. & C. 579. (*l*) 1 Marsh. 477.

Nov. 10.

STONE and others *v.* PHILLIPS and others.

Four actions between distinct parties, and all differences, were referred to arbitration; but the arbitrator did not notice or dispose of a fifth action which was pending, although it was a matter in difference, and was brought before the arbitrator; *Held*, that the award was altogether bad, notwithstanding the arbitrator had directed that mutual releases should be given by the parties.

MOTION to set aside an award. At the last *Oxford* assizes, by an order of Nisi Prius, four causes were referred to the arbitration of a barrister viz., *John Stone* v. *William Phillips*, *John Stone* v. *George Phillips and three others*, *Doe* d. *R. Stone* v. *Elizabeth Stone and others*, *Richard Stone* v. *Robert Stone*. By the terms of the order, the arbitrator was directed to settle the above-mentioned causes and all matters in difference, at law and in equity, between the parties, with leave to all other parties interested to come in within a month; the costs of the several causes to abide the event of the award, and the other costs to be in the discretion of the arbitrator.

The arbitrator, by his award, directed how the issues which had been raised in the four actions should be entered, and set out what interests in certain houses and fields, were taken by the various persons who claimed title to them, and which were the subject of the actions. He also awarded, that all the parties in the actions should execute releases of all actions, claims, and demands, touching any matter which was the subject of any of the actions referred, or any claim or dispute concerning any title to any of the premises.

Cooper obtained a rule *nisi* to set aside the award, upon the grounds, amongst others, that it was not final, and that it did not determine the claims

of *Richard Stone*, one of the parties. It appeared, by affidavit, that there was another action, not mentioned in the order of reference, between *Richard Stone* and *Robert Stone*, relating to part of the premises in dispute, and which action, in consequence of some mistake in the proceedings, was not ripe for trial at the assizes; but notice was given to the arbitrator of the claim of the said *Richard Stone*, and that the action was still pending, and was considered part of the matters in difference between the said *Richard Stone* and *Robert Stone*.

Keating shewed cause.—In substance, the objection to this award is, that it is not final. As to the two first causes which were referred, the affidavit does not shew that any thing remains undetermined between the parties to those causes, and as there is an award of mutual releases, the award is at all events good as far as those parties are concerned. When an award is good on an independent question which is submitted to the arbitrator, it will not be vitiated by other parts which are faulty. *Manser* v. *Heaver* (*a*). *Thorp* v. *Cole* (*b*). Nothing can be more independent than two causes upon which an express adjudication is made. [*Tindal*, C. J.—You are bound to shew that a severance of the causes may be safely made. Here the causes all seem to refer to the same property.] Every intendment ought to be made to support the award, and the affidavits, on the other side, ought to shew that the award cannot be supported, as to the causes which are settled. In *Birks* v. *Trippet* (*c*), where the arbitrator had awarded general releases, it is said that the arbitrator was not bound to allow a debt, although the claim was notified to him. So, in *Wharton* v. *King* (*d*), it is laid down that where an arbitrator has awarded mutual and general releases, he must be deemed to have adjudged and finally decided upon the matters referred to him. In the present case, as the arbitrator has finally disposed of one matter, and then awarded general releases as to all matters, it is final and conclusive. The release is applicable to any state of circumstances which can be suggested.

Cooper, contrà—This award is not final. As far as the interests of *Richard Stone* are concerned, it is expressly shewn that an action in which he claimed a portion of the premises has not been disposed of. It clearly appears that notice was given to the arbitrator of the existence of that action, and he ought to have disposed of it. In the matter of *Robson* (*e*), on a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money, (without saying on what account,) to the party against whom the above claim had been made, with costs; and it being proved that they left that claim out of consideration in making their award, as a matter not in dispute, it was held that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *Mitchell* v. *Staveley* (*f*). The consideration upon which the arbitration was agreed to was, that all matters in dispute between the parties should be referred. In

(*a*) 2 B. & Ado. 295.
(*b*) 2 Cr. M. & R. 367; 1 Gale, 443.
(*c*) 1 Saund. 32 a.
(*d*) 2 B. & Ado. 528.
(*e*) 1 B. & Ado. 723.
(*f*) 16 East, 58.

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some cases an award may be good as to part of the matter referred, but this case is not within that rule, but is like the case of *Turner* v. *Turner*(*g*), where an award was held to be bad, because some of the parties were left at liberty to prosecute their claims.

TINDAL, C. J.—I should have been glad, if I could have supported this award; but it appears to me, that one of the matters in difference has not been decided. At first, I thought the matter not disposed of, might have been severed, as in *Manser* v. *Heaver*(*h*), but upon looking at that case, it does not seem to me to be applicable. There the arbitrator, after making a good award as to the matters referred, proceeded to add something for the purpose of enforcing the performance of certain works, and the Court merely determined that the latter part might be rejected as surplusage. In that case the unsound parts were cut out of the award, but that cannot be done in the case before us. Four actions were referred to the arbitrator, and also all matters in difference between the parties. One of the matters in difference was an action of ejectment which was pending between two of the parties, and as to that no award has been made. This is somewhat similar to the case of *Auriol* v. *Smith*(*i*). *Addison* v. *Gray*(*k*) is also an authority to shew that, in some cases, an award may be good as to part although bad as to another part.

BOSANQUET, J.—I am reluctantly compelled to say that I am of the same opinion.

COLTMAN, J.—There are some cases where an award may be good in part, but that is where the subject matter is severable. *Doe* d. *Williams* v. *Richardson*(*l*) was a case of that description. *Aitcheson* v. *Cargey*(*m*), also shews that if an arbitrator exceeds his authority, in certain cases the excess may be treated as surplusage.

Rule absolute.

(*g*) 3 Russ. 494.
(*h*) 2 B. & Ado. 295.
(*i*) 1 Turn. & Russ. 128.
(*k*) 2 Wils. 293.
(*l*) 8 Taunt. 697.
(*m*) 13 Price, 639.

Nov. 4.

Exparte DAVIES.

The Court will amend a writ of *habeas corpus* which was erroneously tested in the reign of *Victoria* instead of 7 Wm. 4.

TALFOURD, Serjt., applied for leave to amend a writ of *habeas corpus*, which had been sued out during the last vacation, bearing date the last day of *Trinity* Term, and tested 1st *Victoria*, instead of 7 Wm. 4. The sheriff returned the writ, and it was doubtful whether the mistake would not vitiate the proceedings if not corrected. *Morris* v. *Herbert*(*a*). *Wakeling* v. *Watson* (*b*).

TINDAL, C. J.—We take judicial notice that her majesty had not ascended the throne at the time the writ bears date. The amendment may be made.

Rule granted.

( ) 1 Price, 245.
(*b*) 1 Cr. & J. 467.

CORBIN *v.* HEYWORTH.

Nov. 16.

In a motion for judgment as in case of a nonsuit for not proceeding to trial, the affidavit is sufficient if it states that notice of trial was given, without stating that the cause was at issue.

A RULE *nisi*, had been obtained for judgment, as in case of a nonsuit, for not proceeding to trial, upon an affidavit which stated that notice of trial had been given.

F. V. Lee shewed cause, and objected that it did not sufficiently appear that the cause was at issue, and that it ought to have been expressly shewn that it was at issue. He cited *Smith* v. *Parslow*(*a*).

Keating contended that, as notice of trial was given, it did appear that the cause was at issue; in the case cited, there was no statement of that fact.

TINDAL, C. J.—I think the affidavit is sufficient.

Rule discharged on a peremptory undertaking.

(*a*) 2 Cr. & J. 217; 1 Dow. 308.

SMITH, administratrix of SMITH *v.* the FESTENIOG Railway Company.

Nov. 7.

An action of covenant, in which the pleas had raised several issues upon one breach of covenant, was referred to arbitration, and the arbitrator instead of stating the sum for which the verdict should be entered, awarded separate damages on each issue, *Held*, that the award was good.

COVENANT for breach of a contract made between the testator and the defendants. The contract stipulated that, upon the completion of seven-eighth parts of a railway, the testator should receive a certain sum of money. *Breach*—That seven-eighth parts of the work had been completed, but that the defendants refused to pay the sum mentioned in the contract. Other breaches were assigned which are not material. *Pleas*—1st, that seven-eighth-parts of the railway were not completed. 2nd, that the defendants paid the testator the sum which they agreed to pay for seven-eighth parts of the railway.

By the consent of the parties it was ordered, at Nisi Prius, that the jury find a verdict for 5000*l*., subject to be reduced or vacated, and instead thereof a verdict for defendant, or a non-suit entered, according to an award to be made by a barrister; and it was also ordered, that the costs of the cause and reference, so far as regarded the cause, should abide the event and determination of the award so far as regarded the cause, and that the residue of the costs of the reference should be in the discretion of the arbitrator.

The arbitrator, by his award, directed that, on the first issue, a verdict for the plaintiff should be entered with one shilling damages; and, on the second issue, with 13*s*. 4*d*. damages. He also directed how the verdict should be entered on the other issues.

Cowling, on the part of the defendants, moved to set aside the award on the

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ground that it was uncertain, and did not follow the submission. The arbitrator ought to have awarded a certain sum in satisfaction of the breach of the covenant, and not separate sums upon the issues which were raised upon the breach. The verdict would then be entered for the sum so awarded. He cited *Mortin* v. *Burge*(*a*).

TINDAL, C. J.—Why may not the verdict be entered for 14*s*. 4*d*.? The arbitrator has chosen to direct a small sum to be entered on each issue, but I cannot think the award is bad upon that ground. It would be straining the law to get rid of the justice of the case, if we acceded to the argument.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

(*a*) 4 A. & E. 973.

Nov. 24.

DOWNTON *v.* STYLES.

In applying for an attachment against an attorney, it is sufficient since 7 W. 4, and 1 Vict. c, 56, s. 4, to describe him as an attorney at law, without shewing him to be on the rolls of the court to which the application is made.

A RULE *nisi* had been obtained for an attachment against the defendant's attorney, for non-performance of an order of this Court.

R. V. Richards shewed cause, and objected that it did not appear by the affidavit upon which the rule was obtained, that the party was an attorney of the court. It merely stated that he was "an attorney at law."

Best, who appeared in support of the rule, relied upon the stat. 7 W. 4. and 1 Vict. c. 56, sec. 4, which enacts that an attorney may practise in all the courts of law, although he may not have been admitted an attorney thereof, "provided always that any solicitor practising in any court of law or equity shall be subject to the jurisdiction of such court, as fully and completely, to all intents and purposes whatever, as if he had been duly admitted an attorney or solicitor of such court (*a*)."

TINDAL, C. J.—That puts an end to the objection.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged on the merits.

(*a*) See *Prior* v. *Smith*, 1 W. W. & Hodges, 65.

GOULD and others *v.* OLIVER.

Nov. 25.

Where, by the custom of loading timber, between *London* and *Quebec*, the owners of vessels placed part of the timber on the deck, and on the voyage the timber on the deck was thrown overboard in a storm, to preserve the ship, *Held*, that the owner of the ship, was liable to the owner of the timber, to contribute in a general average.

DEMURRER to a plea in assumpsit. The second count of the declaration stated, that the plaintiffs, before and at the time of the happening of the damages and losses thereinafter mentioned, were the owners and proprietors of certain merchandize and chattels, to wit, twenty-six pieces of timber then being in and on board a certain ship or vessel of the defendant, and laden and placed on the deck thereof, to be carried and conveyed therein, on freight payable to the defendant in that behalf, for a certain voyage, whereon the said ship was then proceeding, to wit, from *Quebec* to *London;* that before and at the time of the loading of the said pieces of timber, in and on board the said ship, there had been and was a certain ancient and laudable custom used and approved of, touching and concerning the loading of timber in and on board ships or vessels trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* aforesaid to *London* aforesaid, that is to say, that the owners of such ships or vessels have had, and have been used and accustomed to have, and of right have had and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing on the deck of such ships, a reasonable part of such timber as they from time to time respectively are employed to bring from *Quebec* aforesaid to *London* aforesaid; that the said ship, in this count mentioned, at the time of the happening of the damages and losses in this count mentioned, was a ship or vessel trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* aforesaid, to *London* aforesaid; and the said twenty-six pieces of timber so laden and placed on the deck of the said ship, then was a reasonable part, in that behalf, of the timber which the defendant was then employed to carry in that voyage, by the said ship, from *Quebec* aforesaid, to *London* aforesaid; and the said twenty-six pieces of timber were laden by the defendant, on the deck of the said ship, in pursuance of and according to the said custom; that whilst the said ship was sailing on her said voyage with the said last mentioned chattels and merchandize on board, to wit, on &c. by storms, winds, and tempestuous weather, in order to preserve the said ship, it then became expedient and necessary to throw and cast overboard the said chattels and merchandize, being the property of the plaintiffs, of great value, to wit, &c., and the same were then accordingly cast and thrown overboard, and became and were wholly lost to the plaintiffs, and the said ship was, by means of the premises, then saved and preserved, and afterwards to wit, on &c., arrived safely, to wit, at *London* aforesaid, of all which premises the defendant afterwards had notice, and then, in consideration of the last mentioned premises, promised the plaintiffs to pay them so much money, as the defendant, as owner of the said last mentioned ship, and interested in the said freight, was liable to contribute to the said losses and damages, in a general average on request; that the defendant, as such owner of the said ship, and so interested in the said freight, was liable to pay and contribute to the said losses and damages, in a general average, a large sum of money, to wit, the sum of 20*l.*, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice.

Plea to the second count,—that though true it was, that before and at the

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time of the loading of the said pieces of timber, in and on board the said ship, there had been, and was the said custom in the second count mentioned, there had not been, and was not any custom, that any contribution and general average should be paid upon the loss and damage of timber, so laden and placed, as in the second count mentioned, and cast and thrown overboard, as in that count also mentioned. Conclusion with a verification.

Special demurrer to the plea, assigning for causes, that it was admitted by the plea that such custom existed, and the matter sought to be put in issue by the plea was a conclusion of law, necessarily resulting from such custom; and that no apt, sufficient, or material traverse of fact could be taken upon the matter alleged in the plea.

Wilde, Serjt. in support of the demurrer.—It is said in *Price* v. *Noble* (*a*), "that the law of average and contribution, had existed for ages before the practice of insurance was known." According to the *Rhodian* law, it was enacted, that all the property on board, should contribute to a loss by jettison. Park on Insurance, 202, 7th ed. [*Park*, J.—Schomberg's Observations on the *Rhodian* Law, is a very excellent book.] The question in the present case, is whether there is anything to repel the general rule, that the owner of the goods shall have contribution. In *Simonds* v. *White* (*b*), it is said by Lord *Tenderden*, C. J., "The principle of general average, namely, that all whose property has been saved, by the sacrifice of the property of another, shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much on the terms of any particular instrument, as upon a general rule of maritime law." It is true, that where goods are stowed upon the deck, they are said to be excluded from the benefit of a general average; French Ordinance, Liv. 3 Tit. 8, du jet, art. 13; *Ross* v. *Thwaite*, Park on Insurance, 26; Abbott on Shipping, 355, 5th ed. But that is put on the ground, that goods so stowed, obstruct the management of the ship, and an exception is made of cases, where usage may have sanctioned the practice. The rule does not apply when the goods are placed on the deck of the vessel by custom. In *Da Costa* v. *Edmunds* (*c*), the Court held, that, as against underwriters, the owners of carboys of vitriol, which were thrown overboard from the deck, were entitled to contribution, and Lord *Ellenborough* put it on the ground that there was an usage to carry vitriol on the deck. In the present case it is stated in the declaration, that the goods were stowed on the deck according to a custom.

There does not seem to be any express authority upon the question now before the Court, in any of the *English* reports. In the ordinance of *Lewis* XIV. (*d*), sec. 33, art. 13, it is said, "There shall no contribution be demanded for payment of such effects as were upon the deck, if they be thrown overboard or damnified by the ejector, *allowing the owner his recourse against the master*. However, if they are preserved, they shall contribute." And by art. 12, "Effects for which there is no bill of lading shall not be paid, though thrown overboard." In the present case, the owner of the vessel has not been guilty of any neglect or misconduct; and it is upon the ground of carelessness upon his part, that the owners of the other goods have not been compelled to con-

(*a*) 4 Taunt. 123.
(*b*) 2 B. & C. 811.
(*c*) 4 Camp. 142; 2 Chitty, 227.
(*d*) Vide this ordinance, in "The Laws of the Sea, ancient and modern, 252."

tribute. Accordingly, in Weskett on Insurance (*e*), the rule is thus stated: "Goods stowed upon deck or hanging without board, either with or without the consent of the freighter, or the ship's boat lashed to the side, if, after the lading be completed, and the ship is under way, they are not taken within board, are not entitled to any amends or contribution, though cut away or cast overboard for the general safety, yet shall they be obliged to contribute in case any average has been the means of saving them."—Ordin. of Koningsb. "All goods that lay upon the deck of a ship, if they are thrown overboard or damaged, are not to be paid for; but when they are preserved, they must nevertheless contribute towards the other goods that were flung over, reserving, however, to the owner of them his demand upon the captain."—Ordin. of Hamb.

The Code Napoleon (*f*) adopts the same principle. In the *French* Ordinance, liv. 2, tit. 1, art. 12, p. 397, it is said, that if there be a known usage to load goods upon the deck, as upon a coasting voyage, the goods below shall be liable to contribution.

Stephens, Serjt., *contrà*.—The declaration does not sufficiently allege the existence of a custom; a custom ought to be shewn to have existed from time immemorial. Co. Lit. 110 b.; Bro, Abr. tit. Custom. Nor is the custom alleged in the declaration with sufficient certainty. *Birkley* v. *Presgrave* (*g*).

The principal question, however, is, whether goods, placed upon the deck of a vessel, and thrown overboard in a storm, come within the general rule as to contribution. There are many authorities to shew that they do not. Ordinances of *Lewis* XIV, art. 12, 13. Pardessus Cours de Droit Commercial (*h*). Emérigon, cap. 12, sec. 42. In Phillips on Insurance (*i*), it is said, "where a shipper agrees that his goods shall be carried on deck he thereby gives up his right to claim contribution if they are thrown overboard." The cases of *Dodge* v. *Bartol* (*k*), and *Barber* v. *Brace* (*l*), are there cited, and the rule is thus laid down by Mr. Phillips, "It results from these two cases, that goods may be carried on deck, even without the consent of the owner, where the usage of the trade is such, and thrown overboard for the general benefit, without giving the owner of them any claim either against the master, for stowing them in this manner, or against the other shippers for contribution" (*m*).

The only case which has been referred to on the other side, relates to a coasting voyage made by small vessels. But in long voyages such a rule ought not to apply, because the ground upon which goods on deck cannot have contribution is in consequence of the great peril in which those goods are placed, by reason of being so carried. Common peril is the principle upon which general average is given, but goods upon deck, are in greater peril, than goods which are stowed below. In *Da Costa* v. *Edwards*, the claim

(*e*) Tit. Deck.
(*f*) Code de Commerce, Liv. II. Tit. 12, 421.
(*g*) 1 East, 220.
(*h*) Part IV, Tit. 4, cap. 3, sec. 725.
(*i*) 2 Phillips on Insurance, 230, Boston.
(*k*) 5 Greenleaf, 286; Reports in the State of Maine.
(*l*) 3 Conn. Reports, 9.
(*m*) But in a previous part of this work, Mr. Phillips says, "But the right to demand contribution may depend upon the particular situation of the thing sacrificed. If goods carried on deck are thrown over, it is held in general, that no contribution can be claimed. The reason given by Valin is, that goods so carried embarrass the navigation of the ship. But he thinks that this doctrine ought to be controlled by the usage

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turned upon the construction of the policy of insurance, and not upon the general law. In the present case, the plaintiffs may have an action on the case against the master for damages; but the question now is, whether he is entitled to contribution against the owner of the vessel.

Wilde, Serjt. in reply.—The *Rhodian* law, which was adopted by the *Romans*, and is to be found in the digest of their laws, is the foundation of the maritime law of *England*. By art. 9 of those laws, "Of lightening ships in a tempest," it is said, that "a just computation shall be made of the ship and every thing in it (*n*)." And arts. 32, 35, 38 and 43, shew that this rule applies to all cases, except where the master is guilty of some misconduct. The laws of *Oberon*, which were instituted by *Richard*, I. adopt the same general rule, art. 8, 9, 32 (*o*): and they are adopted by *Valin* and *Emerigon*. It appears, that the only thing which was required, was that the goods should be properly laden. If they were, then all the goods were liable to contribute for an average. If they were not, then a remedy was given against the captain. Decked vessels were unknown in ancient times, and certainly not till many centuries after the *Rhodian* laws were framed. There is, therefore, no reason, why goods on the deck, should not be entitled to contribution, in cases where the captain has not been guilty of misconduct in placing them there. As it is the usage to carry timber upon the deck, the captain would not be liable to any action at the suit of the plaintiffs. The owner of the goods would, therefore, be without any remedy, except by contribution. The defendant cannot protect himself by saying, that his servant had improperly loaded the deck.

In *Dodge* v. *Bartol* (*p*), it appeared, that the goods which were on the deck, were taken at half freight; and the facts in that case, and *Barber* v. *Brace*, do not warrant the principle, which is extracted by Mr. *Phillips* the *American* writer on the law of insurance.

Cur. adv. vult.

TINDAL, C. J.—The question upon this record, arises upon the second count of the declaration, in which the plaintiffs declare for contribution against the defendant, the ship-owner, in respect of certain timber of the plaintiffs, which was laden on the deck of the defendants' vessel, to be carried on a voyage from *Quebec* to *London* for freight, to be paid to the defendant; and the plaintiffs state in this count, a certain ancient and laudable custom, touching the loading of timber on board ships, engaged in the said voyage, by which custom, the ship-owners have the liberty and privilege of loading on the decks of their ships or vessels, a reasonable part of the timber which they are employed to carry on such voyage; and the count then alleges, that the timber in question was a reasonable part of the timber which the defendant was employed to carry upon that voyage, "and was laden on the deck of the ship, in pursuance

of the trade; and accordingly that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft which usually carry a part of their cargoes on deck. Upon the principle of this exception, if it is the usage of the trade to carry a part of the cargo on deck, a jettison of it ought to be a subject of general contribution. It is accordingly the practice in respect to whaling voyages to adjust upon the principles of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold." Vol. 1, 332.

(*n*) Laws of the Sea, ancient and modern, 91.

(*o*) Laws of the Sea, ancient and modern, pages, 132, 135, 162.

(*p*) 5 Greenleaf's Reports, 286.

of and according to such custom." The defendant pleads to this count, that there is not any custom, that any contribution and general average, should be paid on the loss or damage of timber placed on deck, and cast overboard, to which plea the plaintiff demurs.

It has been urged, in argument, by the defendant, that the custom stated in the second count has been pleaded without sufficient certainty or formality; but as this objection does not arise upon a special demurrer to the declaration itself, we think no objection in point of form can now be taken, and that the allegation, in substance and effect, amounts to a statement of an usage and practice of loading ships generally observed upon the voyage in which the vessel was engaged, and consequently that it must have been known to both the contracting parties, the ship-owner, and the owner of the timber, who must be taken to have entered into this contract with reference to it.

The question, therefore, before us is not whether, generally, the owner of goods laden on deck, which are thrown overboard for the preservation of the ship and the rest of the cargo, is entitled to contribution against the owners of the ship and of the residue of the cargo, but whether, in the special and particular case where the ship-owner has laden the goods on deck, under a privilege reserved to him by the general usage and practice of the voyage, the owner of the goods may claim contribution from such ship-owner; and upon the best consideration we can give to this question, referring, at the same time, to the foreign authorities and to the few decisions which have taken place in our own courts, we think the plaintiff entitled in this case to contribution against the ship-owner.

The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard for the preservation of the ship and cargo, shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception by the foreign writers, "that goods laden on the deck and cast into the sea shall not receive contribution, saving to the owner of the goods, his recourse against the master and ship-owner." Consel del Mare, c. 183; Ordinance, liv. 3, tit. 8, art. 13; Emeregon, ch. 12, s. 42; Code de Commerce, art. 421. Now where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are, indeed, express on that point; Valin, tit. Du Capitaine, art. 12; Consel del Mare, c. 183. And the general rule of the *English* law, that no one can maintain an action for a wrong where he has consented or contributed to the act which has occasioned his loss, leads to the same conclusion.

Unless, therefore, the owner of the timber in this case has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss, in consequence of his timber having been thrown overboard for the benefit of all—an inference directly at variance with the general rule above laid down, and indeed contrary to the authority of the foreign writers; for Valin lays it down, that the rule of article 13 does not apply in respect of boats and other small vessels going from port to port, "where the usage is to load merchandize on the deck;" the latter words of which text-writer give the reason for throwing such a case out of the exception, into the general rule for contribution, at least so far as the ship is concerned. As to the authorities in the *English* courts, there is no one

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which states directly that goods laden on deck shall in no case, be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter; and the rule generally established seems to have been, that, for goods so laden, the underwriters are not responsible. *Ross* v. *Thwaites*, Park Ins. 26; *Backhouse* v. *Ripley*, ib. But in the case of *Da Costa* v. *Edmunds*, 4 Camp. 142, it was left to the jury to say whether there was a usage to carry on deck goods of the description of those thrown overboard, and the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties, but it appears to fall within the same principle of decision.

We think, therefore, the judgment on the second count must be for the plaintiffs.

Judgment for the plaintiffs.

Nov. 25. This being the last day of the term, *Addison*, from one of the back benches, reminded the Lord Chief Justice that, in the Court of Queen's Bench, on the last day of the term, the motions in the back benches had precedence, and now that this was an open court, he claimed the same privilege on behalf of himself and those who sat near him.

TINDAL, C. J.—In the Court of Queen's Bench that practice depends upon a very ancient custom, but this court has been so recently opened that no such usage can exist.

END OF MICHAELMAS TERM.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME,

CONTAINING

THE DECISIONS OF THE COURT OF COMMON PLEAS,

FROM

HILARY TERM, 7 W. IV. 1836, TO MICHAELMAS TERM, 1 VICT. 1837, INCLUSIVE.

ACCORD AND SATISFACTION.—See PLEADING, 18.

ACKNOWLEDGMENT.

See ATTORNEY, 4.

An acknowledgment by a married woman was duly taken, but through inadvertence the parties did not send the certificate and affidavit to be filed, until two years afterwards, when the Court allowed them to be filed. *Ex parte Stevens*, 13.

ACTION.

1. A witness living at Camberwell was subpœnaed by the plaintiff to attend a trial at Guildhall, and the witness stated that he had been previously subpœnaed by the defendant, who had paid him a guinea as conduct-money, and the plaintiff then paid him but one shilling with his subpœna. An action was afterwards brought against the witness to recover costs incurred in consequence of his neglect to attend the trial; and the plaintiff alleged in the declaration that he had paid a reasonable sum with the subpœna. *Held*, that this averment was sufficiently proved, by shewing the payment of the one shilling. *Betterby* v. *M'Leod*, 44.

2. If, when a cause is called on, a material witness is absent, the attorney is justified in withdrawing the record, and he is not bound to allow the trial to proceed, to take the chance of the arrival of the witness. *Id.*

3. An action on the case was brought against the defendant for negligently and carelessly allowing a new rick of hay to ignite, whereby certain cottages belonging to the plaintiff were burnt. At the trial, the judge, in summing up, told the jury, that it was not sufficient for the defendant to shew that he had acted *bonâ fide*, and had done every thing he had thought best to prevent an accident, but that he must prove that he acted as a prudent, not as a rash man would have done under similar circumstances, and that if they were satisfied the defendant had been guilty of gross negligence, the plaintiff was entitled to a verdict. *Held*, that this direction was correct, and a verdict which had been found for the plaintiff, was ordered to stand. *Vaughan* v. *Menlove*, 51.

ADMINISTRATION BOND.—See PRACTICE, 12.

ADMINISTRATOR.—See EXECUTORS.

AFFIDAVIT.

See EJECTMENT, 4, 5. PRACTICE, 19.

1. An affidavit of debt stated that the defendant was indebted to plaintiff, for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant. *Held*, that the latter allegation had reference to the whole of the items, and that the affidavit was not defective. *Lucas* v. *Goodwin*, 32.

2. An affidavit to hold to bail for money due from the defendant on the balance of an account stated, is sufficient, without stating that the account was stated *and settled*. *Tyler* v. *Campbell*, 79.

AGREEMENT.

See ATTORNEY, 3. CONTRACT. COVENANT, 2, 3. VENDOR AND VENDEE, 1.

An agreement for the lease of a house contained the following clauses: "and the

said T. D., [the lessee,] doth hereby agree to spend, within one year from the date thereof, 200*l.*, at the least, in erecting a kitchen to the said messuage, and also in altering the large room into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alterations or repairs, to be inspected and approved of by the said W. K., [the lessor,] and to be done in a substantial manner; and it is agreed that the said T. D. shall be allowed 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." The lessee laid out more than 200*l*, but the lessor did not approve of all the work, and distrained for the balance of the first year's rent. *Held*, in an action brought by the lessee for an excessive distress, that the approval of the lessor was not a condition precedent, and that after the jury had found that 200*l.* was expended by the plaintiff in substantial repairs, he was entitled to recover in the action. *Dallman* v. *King*, 283.

ARBITRATION.

See Costs, 2. Inclosure Act. Pleading, 25.

1. An action of covenant, in which the pleas had raised several issues upon one breach of covenant, was referred to arbitration, and the arbitrator, instead of stating the sum for which the verdict should be entered, awarded separate damages on each issue. *Held*, that the award was good. *Smith* v. *Festeniog Railway Company*, 305.

2. Where an arbitrator was empowered to state facts, on his award, for the opinion of the Court as upon a special verdict, the Court sent the award back to be amended, on the ground that the arbitrator had not found an important fact with sufficient precision. *Ferguson* v. *Norman*, 241.

3 Four actions between distinct parties, and all differences, were referred to arbitration; but the arbitrator did not notice or dispose of a fifth action which was pending; and, although it was a matter in difference and was brought before the arbitrator. *Held*, that the award was altogether bad, although the arbitrator had directed that mutual releases should be given by the parties. *Stone* v. *Phillips*, 302.

4. A judge has power, under the Rule of Hilary Vacation, 1834, to certify that a cause was proper to be tried before him, and not before the judge of an inferior court, where the action is referred at nisi prius to arbitration. *Brogreffe* v *Hawke*, 223.

5. A bond of submission recited that certain disputes, relating to building a house, had been agreed to be referred to arbitration, and that the arbitrators should determine all claims relating to alleged defects and imperfections in the materials and workmanship, and likewise relating to the accuracy of the claims for extra work and deductions for omissions; and to ascertain what balance, if any, was due to the builder, in respect of such extras and omissions: the costs to abide the event of the award. The arbitrator awarded that 296*l.* should be paid to the builder in full compensation and satisfaction for all the matters in difference. *Held*, that the award was bad, as the first two subjects of dispute were not determined. *In the matter of Rider and another*, 222.

ARREST.

See Affidavit, 1, 2. Insolvent. Practice, 2.

1. Where no application was made to discharge a defendant out of the custody of the sheriff on the ground of a defect in the affidavit to hold to bail, until twenty-one days after the arrest, *held*, to be too late, and that the extreme age and infirmity of the defendant was no sufficient excuse for the delay. *Daly* v. *Mahon*, 261.

2. The defendant was arrested on the 12th of October, and the application for his discharge was made on the 2nd of November. *Held*, too late, and that the application ought to have been made within eight days. *Id.*

ATTORNEY.

See Action, 2. Costs, 7. Slander.

1. In an action on an attorney's bill which was not taxable, a verdict was taken for the plaintiff by consent, subject to a taxation of the bill before the fifth day of the next term. The defendant, instead of taxing the bill, applied for a new trial, and caused the taxation to stand over until after the fifth day of the term. *Held*, that the plaintiff was not bound afterwards, to submit his bill to taxation. *Tucker* v. *Neck*, 242.

2. In applying for an attachment against an attorney, it is sufficient, since 7 W. 4, and 1 Vict. 4, c. 56, s. 4, to describe him as attorney at law, without shewing him to be on the rolls of the court in which the application is made. *Downton* v. *Styles*, 306.

3. A tenant for life, entered into an agreement to let an estate to the defendant; and the agreement, which was executed by the parties, at the office of the plaintiff, who was the intended lessor's attorney, stipulated that a lease and counterpart should be prepared by the attorney, at the expense of the defendant. The tenant for life died, after the lease was prepared, but before it was executed. *Held*, that the defendant was liable to pay the attorney half the costs of drawing the agreement, and the costs of an ab-

stract of title, lease, and counterpart. *Webb* v. *Rhodes*, 138.

4. Charges in an attorney's bill for drawing and enrolling the certificate of an acknowledgment, made by a married woman, and for fees paid on enrolment, under the Fines and Recoveries' Act, (3 & 4 W. 4, c. 74,) do not render the bill taxable within 2 Geo. 2, c. 23. *Ex parte Bransom*, 132.

5. A charge by an attorney for searching for an old judgment, and advising his client as to the propriety of reviving it, is not a taxable item under 2 Geo. 2, c. 23. *Ex parte Rice*, 130.

6. Where an attorney who had money belonging to his client, to invest on mortgage, examined the title of one who desired to borrow money on mortgage; it was held, that the relation of attorney and client existed, and that the communication was privileged, although no money was lent, and the attorney made no charge for examining the title. *Doe* d. *Thomas* v. *Watkins*, 25.

AVERAGE.—See INSURANCE.

AWARD.—See ARBITRATION.

BAIL.

See AFFIDAVIT, 1, 2.

1. The Rule Trin. 1 Will. 4, s. 5, which requires that bail shall not be changed without the leave of a judge, applies to cases where the other bail justify, in consequence of the rejection of the first bail. *Vestris's bail*, 129.

2. Where a defendant pleaded an issuable plea, after the plaintiff had taken an assignment of the bail-bond, and the bail gave notice that the plaintiff was at liberty to proceed with the trial of the cause; and the bail was afterwards perfected in time to try at the second sittings in the term, provided the defendant accepted short notice of trial; *held*, that the bail-bond ought not to stand as a security, under R. H. T. 2 Will. 4, V. *Clark* v. *Vestris*, 133.

3. In an action against the acceptor of a bill of exchange, it is no objection to bail that he is the drawer of the bill. *Beesley's bail*, 15.

BANKRUPT.

See COSTS, 1.

1. A. and B., who were traders in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings, and to sell them at 25 per cent. under prime cost. The shopman called on the defendants and offered the goods for sale, without disclosing the names of his employers, but stating that the owners were in want of money. The defendant called at the lodgings and made several large purchases, paying the shopman for each parcel in cash, and deducting the discount. A fiat in bankruptcy issued, and the assignees brought trover to recover these goods. The jury found that the bankrupts intended to defraud their creditors, and that the defendants had not made such inquiries as honest and prudent men would have done. *Held*, that the assignees of the bankrupts were entitled to recover back the goods sold both before and after the commission of the act of bankruptcy, and that the case was within the 82nd sect. 6 Geo. 4, c. 16. *Devas* v. *Venables*, 9.

2. A., as principal, and B., as surety, became jointly and severally bound to the plaintiffs; and the condition of the bond was, that A. should pay the first year's interest of the money lent, on the 1st March, 1833; and the third year's interest, with the principal sum, on the 1st March, 1835. A. did not pay the first year's interest until the 30th of March, 1833. B., the surety, became bankrupt in June, 1833, and obtained his certificate in August, 1833. A. not having paid the principal sum in March, 1835, B. was sued on the bond, and he pleaded his certificate in bar:—*Held*, that the bond was forfeited before the bankruptcy, and that the subsequent payment of the interest did not waive the default: that the debt was therefore provable against the estate of B., and that his certificate was a bar to the action. *The Skinner's Company* v. *Jones*, 18.

BILL OF EXCEPTIONS.

1. A bill of exceptions will lie from a judgment in the county court. *Strother* v. *Hutchinson*, 294.

2. And it will lie where the plaintiff was nonsuited, after he had appeared and refused to submit to a nonsuit. *Id.*

3. A *venire de novo* cannot be awarded to a county court. *Id.*

BILL OF EXCHANGE.

See BAIL, 3. PLEADING, 8, 9, 10, 11, 12, 13. PRACTICE, 4. PUBLIC COMPANY.

1. In an action on a bill of exchange by the indorsee against the acceptor, with a count for interest and on an account stated, the defendant pleaded that a second bill was drawn and accepted in full satisfaction and discharge of the first bill, and that the second bill was duly paid. It was in evidence that the first bill remained in the hands of the indorsee, and that the acceptor had acknowledged that interest was due in respect of it, whereupon the jury returned a

verdict for the amount of the interest, notwithstanding the defendant proved that the second bill had been paid. *Held*, that the verdict ought to stand. *Lumley* v. *Musgrave*, 247.

2. Where the witness met the drawer of a bill at the theatre, the evening that it became due, and asked him whether he had heard of the dishonour of the bill, and he replied that he had, and intended to call and pay it, it was held that the defendant could not object that he had no notice of the dishonour of the bill. *Norris* v. *Salomonson*, 14.

3. In an action on a bill of exchange by indorsee against indorser, the defendant pleaded that he did not have notice of the presentment of the bill to the acceptor, and of the non-payment thereof; and issue thereon. *Held*, that proof of the delivery of the following letter from the plaintiff to the defendant, was insufficient to sustain this issue. "The promissory note for 200*l.* drawn by H. S., dated the 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith." *Boulton* v. *Welch*, 77.

BOND.—See BANKRUPT, 2. PRACTICE, 12.

CHARTER-PARTY.

See PLEADING, 5.

A ship was chartered to proceed to Rio Nunez, and take on board a full and complete cargo of lawful merchandize, freight to be paid upon certain enumerated articles, according to the terms mentioned in the charter-party, "all or either at the option of the charterer," the charterer to have the liberty of filling up the vessel at St. Mary's. The charterer put on board about one-seventh of a cargo of the goods enumerated at Rio Nunez, and about the same quantity at St. Mary's, and at the latter place the cargo was completed with eighty-four loads of teak wood, which was not an enumerated article, at 4*l.* per ton. It appeared that the charterer paid for the whole freight 593*l*, but that a cargo consisting of average quantities of all the enumerated articles, would have produced 668*l.*, whilst a cargo of palm oil, one of the enumerated articles, would only have produced 452*l*. *Held*, that the plaintiffs were entitled to recover freight to the amount of 668*l.*; and that the charterer did not fill up a full and complete cargo of lawful merchandize. *Capper and others* v. *Forster*, 177.

CONDITION PRECEDENT.—See AGREEMENT.

CONSIDERATION.—See CONTRACT. PLEADING, 6, 13, 18.

CONTRACT.

See AGREEMENT, 1. EXECUTORS, 4 BANKRUPT, 1. CHARTER PARTY. COVENANT, 2, 3. PLEADING, 6, 7. 18. PRINCIPAL AND AGENT, 1, 2. TENDER, 1. VENDOR AND VENDEE, 1, 2. WAGERS, 1, 2.

Where B. had issued execution against the goods of A., his debtor, C. came forward, and agreed to pay B. and all the other creditors of A., upon having an assignment of his effects; and, in pursuance of this agreement, A. gave a bill of sale of his effects to C., and B. withdrew his execution. *Held*, that this raised a new contract between B. and C., and that the former might sue the latter for the amount of the debt originally due from A. *Bird* v. *Gammon*, 224.

COPYHOLD.—See HERIOT. MORTGAGE, 1, 2, 3.

COSTS.

See ATTORNEY, 1. 4, 5. OUTLAWRY. PRACTICE, 20.

1. After joinder in demurrer the plaintiff became bankrupt, and afterwards obtained his certificate. The defendants applied for security for costs, but it being shewn that the assignees did not intend to interfere with the action, and that it was continued for the benefit of the bankrupt, the Court refused the application. *Beckham* v. *Knight*, 301.

2. The defendant put a construction on an award, which induced the plaintiff to move to set it aside. The Court decided that the defendant's construction was not correct, and the rule was therefore discharged, as the objection did not then arise. *Held*, that the prothonotary was correct in taxing the costs of the rule for the defendant, according to the usual practice. *Hocken* v. *Grenfell*, 251.

3. The rule of Hilary Vacation, 1834, as to the taxation of costs on the reduced scale, does not apply to actions brought for unliquidated damages, where less than 20*l.* is awarded on a writ of inquiry. *Croft* v. *Miller*, 230.

4. In trespass for breaking a close, the defendant pleaded, 1st, not guilty; 2nd, that all the king's subjects had a right of way over the *locus in quo*, to carry goods and water; and 3rdly, a similar right limited to the inhabitants of M—. The jury found for the plaintiff on the first and second issues, and for the defendant on the third

issue, so far as it related to the carrying of water only. *Held*, that this verdict was substantially in favour of the defendant, and that he was entitled to the general costs of the cause, including the costs of those witnesses who proved the defendant's claim as to the carriage of water, but disproved it as to the carriage of goods. *Knight* v. *Woore*, 1.

5. The costs given to a plaintiff in ejectment against a mortgagor, after payment of the mortgage money, under 7 Geo. 2, c. 20, are taxed costs as between party and party. *Doe* d. *Capps* v. *Capps*, 136.

6. A defendant in custody for twelve months for the nominal damages in ejectment, and for costs beyond twenty pounds, is entitled to his discharge under 48 Geo. 3, c. 123. *Doe* d. *Daffey* v. *Sinclair*, 145.

7. Interlocutory costs payable to a plaintiff may be set off, under H. T. 2 Will. 4, c. 93, against the costs of a judgment of non-pros in fendant's attorney's lien. *Holliday* v. *Lawes*, 130.

8. After a writ of summons was issued, but before it was served, the defendant paid the plaintiff the debt, but afterwards refused to pay the costs of the writ; whereupon the plaintiff's attorney delivered a declaration, and proceeded with the action. The Court ordered the proceedings to be stayed on payment of the costs of the writ, but refused to make the defendant pay the costs of the declaration. *Willie* v. *Phillips*, 82.

9 The plaintiff declared in covenant for two quarters' rent in arrear, and the defendant pleaded *riens en arriere*. Upon demurrer the plea was held bad, and after judgment for the plaintiff, he obtained a judge's order for leave to amend the declaration on payment of costs, by withdrawing the claim of one quarter's rent. The defendant afterwards applied to set aside the order, upon the ground that he ought to be allowed the costs of the demurrer; *held*, that he was not entitled to those costs. *Baden* v. *Flight*, 240.

COUNTY COURT.—See Bill of Exceptions, 1, 2, 3. False Judgment.

COVENANT.

See Pleading, 18, 19.

1. Where a canal company, empowered by act of parliament to raise money at interest, upon the credit of the undertaking and the rates or duties thereof, and the company, by a deed-poll under their common seal, assigned their property in the undertaking, and the rates and duties thereof, until a sum of money should be paid with interest, to be paid half-yearly, on certain days which were specified; *held*, that an action of covenant could not be maintained against the company to recover an arrear of interest due under a deed-poll. *Pontet* v. *Basingstoke Canal Company*, 46.

2. Demise of a mill, together with the use of the stream of water running or flowing in the stream, excepting such part of the said stream as should be sufficient for the supply of such persons as the lessors had then already contracted, or should at any time thereafter contract, to supply with water. "Provided nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof, twelve hours at least in each and every day of the said term." *Held*, that this did not amount to an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill, as the water was flowing at the time of the demise. *Blatchford* v. *The Mayor, &c., of Plymouth*, 86.

3. The lessors covenanted that the lessee should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement; the lessee alleged as a breach, that the defendants drew and took, and caused and procured to be drawn and taken, from the stream, divers quantities of water, and interrupted the lessee in the use of the mill; the evidence was, that the water was taken away by persons who claimed a right under contracts made by the lessors before they granted the lease of the mill and stream. *Held*, that the breach was improperly assigned. *Id.*

CUSTOM.—See Insurance. Heriot.

DEVISE.—See Will.

DISTRINGAS.—See Practice, 1.

DOCK DUES.—See East India Company.

DRAMATIC PERFORMANCES.

The plaintiff wrote the English words for the representation of Weber's opera of Oberon; and the defendant afterwards caused other words to be adapted to the same music, and produced the opera at his theatre; but, in the course of representation, the performers introduced several of the plaintiff's songs instead of the new version. In an action brought hy the plaintiff against the defendant to recover the penalty given by the 3 & 4 W. 4, c. 15, s. 2, the jury found a verdict for the plaintiff; and, upon a motion for a new trial, *held*, first, that the question as to what was a representa-

tion of a dramatic production in contravention of the statute, is a question for the jury; and, secondly, that the facts which were proved at the trial warranted the verdict. *Planché* v. *Braham*, 283.

EAST INDIA COMPANY.

The East India Dock Act provides for a return of dock duties to such of the East India Company's ships as have completed "their regular number of voyages." *Held*, that this refers to the last voyage, being more than six, which is made by any ship. *East India Company* v. *Baker*, 171.

EJECTMENT.

See Costs, 5, 6. Evidence, 2. Mortgage, 1, 2.

1. Where there were four tenants in possession, and personal service of the declaration in ejectment had been effected on three of them, but an irregular service on the fourth; judgment against the casual ejector was granted against the three who had been duly served. *Doe* d. *Mingay* v. *Roe*, 239.

2. Where a declaration in ejectment directed the tenant to appear in Michaelmas Term, but judgment against the casual ejector was not moved until Hilary Term, the rule for such judgment is nisi only. *Doe* d. *Thring* v. *Roe*, 13.

3. Where the date of a declaration in ejectment was wrongly stated, but the notice at the foot was correct, the Court granted a rule for judgment against the casual ejector. *Doe* d. *Phipps* v. *Roe*, 33.

4. In moving for judgment against the casual ejector, it appeared that the tenants in possession of the premises expressed their knowledge of the intent and meaning of the declaration in ejectment which was served upon them. *Held*, that it was unnecessary to shew that the declaration and notice were read over and explained. *Doe* d. *Stone* v. *Roe*, 14.

5. On a motion for judgment against the casual ejector, the affidavit of the service of the declaration and notice ought to state that it was explained to the tenant; it was not sufficient to say it was read over. *Doe* d. *Wade* v. *Roe*, 210.

ESTOPPEL.—See Mortgage, 3.

EVIDENCE.

See Action, 1, 2. Attorney, 6. Limitation, Statutes of, 2. Pleading, 3. 8. 21.

1. In an action for money had and received, brought by a ship-owner against his captain, the plaintiff offered evidence of the payment of a bill of exchange drawn by the defendant in a foreign port, in favour of a broker, on account "of disbursements for the ship." There was evidence that the ship had undergone some repairs in the port. *Held*, that proof of the payment of the bill was inadmissible in this form of action, in the absence of evidence that the money had ever come to the defendant's hands. *Scott* v. *Miller*, 169.

2. In ejectment, the lessor of the plaintiff claimed as heir-at-law of one Bath, though a younger son. The defendant, who claimed an interest in the premises, set up as a defence, that the true heir of Bath was the grandson of his eldest son, and that he was then living; and to prove this, the grandson was called by the defendant as a witness. *Held*, that he was a competent witness. *Doe* d. *Bath* v. *Clarke*, 48.

3. On an action by a horse-dealer for the recovery of the price of a horse, which had been bequeathed to the defendant, and which he had sold after the death of the testator, *held*, that under 3 & 4 W. 4, c. 42, s. 26, the executor and residuary legatee was a competent witness to prove that the horse had never been sold by the plaintiff, but was merely sent upon trial to the testator. *Bowman* v. *Willis*, 137.

4. Where the defendant was charged with a fraudulent design to induce the plaintiff to build some houses upon the credit of his son, evidence was given that the defendant had represented that he and his son were entitled to receive some money from America, and that the Stamford Mercury contained an advertisement, which required them to go to a certain place to receive the legacy. *Held*, that a copy of the Stamford Mercury of a date which corresponded with the time when the representations were made, and which contained such an advertisement, was receivable in evidence. *Lucas* v. *Godwin*, 114.

5. Under the Interrogatories' Act, (1 Will. 4, c. 22,) the Court gave the parties a mutual power to cross-examine witnesses in Paris and Boulogne, *viva voce*, and directed that the cross-examinations should be taken down in writing, and return with the commission. *Pole* v. *Rogers*, 83.

6. Upon an issue whether an administratrix had assets at the commencement of the suit, the plaintiff proved that the intestate, twelve months before his death, had purchased certain furniture, which was seen, after his decease, in a house where he lived with the defendant, his sister. The defendant proved, that he was merely a lodger in the house. *Held*, that there was *primâ facie* evidence of the possession of assets. *Eritton* v. *Jones*, 82.

EXECUTORS AND ADMINISTRATORS.

See EVIDENCE, 6. PRACTICE, 12.

1. An administrator appointed *pendente lite*, is entitled to call upon the late attorney of the deceased to deliver up deeds and papers belonging to the deceased, which are in his possession. *Exparte Du Faur*, 135.

2. The attorney of one who had a claim on a deceased person's estate, wrote a letter to the executrix, in which he stated that the creditor did not claim the debt from her as executrix, but that he claimed it from her individually, she having paid the interest from time to time. The executrix afterwards died insolvent, and it was held that this letter did not release her from her liability as executrix. *Richards* v. *Browne*, 27.

3. A testator bequeathed certain goods to his executrix for life, with remainder to B. absolutely. The executrix used the goods during her life; and, after her death, her executor permitted B. to receive them. The executor of the executrix was afterwards sued for a debt due from the testator who had bequeathed the goods, which the executrix had neglected to discharge. *Held*, that she had not been guilty of a *devastavit* in her life-time, and that her executor ought to have discharged the debt by selling the goods. *Id.*

4. A relative of a deceased lady ordered the plaintiff, an undertaker, to perform a funeral which was suitable to her rank; and her son, many months before he took out administration to the deceased's effects, wrote a letter to the relative who ordered the funeral, in which he expressed his approbation of all that had been done. In an action against the deceased's son, charging him, as administrator, for the expenses of the funeral, it was held, that the action was maintainable. *Lacey* v. *Walrond*, 215.

FALSE JUDGMENT.

Upon a writ of false judgment from a county court, the sheriff returned a mere transcript of the proceedings which had taken place in the court below, so that it did not appear whether it had jurisdiction to try the cause, whereupon the Court remanded the transcript to be amended. *Overton* v. *Swettenham*, 142.

FRAUD.—See BANKRUPT, 1.

FRAUDS, STATUTE OF.—See VENDOR AND VENDEE, 1.

FREIGHT.—See CHARTER PARTY.

GAME.

1. A deputation to kill game, granted before the 1 & 2 W. 4, c. 32, does not continue in force so as to entitle a gamekeeper in an action for an act done by him after that act was passed, to have a notice of action, and to give all matters in evidence under the general issue. *Bush* v. *Green*, 265.

2. The 1 & 2 W. 4, c. 32, s. 1, repeals all former game acts, "except as to any matters done by any persons, under the authority of the said acts, before the 31st Oct., 1831, with respect to which every privilege and protection given by any of the said acts shall continue in force as if this act had not been made. *Held*, that the granting of a deputation was not a matter done within the meaning of this exception. *Id.*

GAMING.—See WAGERS, 1, 2.

GUARANTEE.—See SET-OFF.

HABEAS CORPUS.—See PRACTICE, 3.

HERIOT.

By a custom in the manor of P. upon every descent, the lord was to have for an heriot the best quick cattle of the tenant, and in default of such cattle, the best household stuff or goods. By another custom, if any customary tenant should let his land, "and at his death the lord has not been answered the best beast for his heriot which did commonly manure the premises for one year before his decease," then the lord was to be paid 40*s*. instead of a heriot. *Held*, that where a customary tenant had let his land and afterwards died, the lord could not seize the best beast for his heriot, but that he was bound to take the 40*s*. in lieu thereof. *Croome* v. *Guise*, 277.

HUSBAND AND WIFE.—See PLEADING, 20.

INCLOSURE ACT.

By an inclosure act, commissioners were empowered to divide and allot certain open and common fields among the proprietors thereof; and it was declared, that the several fields so to be allotted, should be in lieu of and in full satisfaction and compensation of all rights and interests whatsoever, of the persons to whom the allotment was made; and it was declared, that it should be lawful for the commissioners to allot and award any new allotments and old in-

closures, in exchange for any other new allotments or old inclosures within the same parish, or any adjoining parish; so that such exchanges should be set forth in the award, and that they should be made with the consent of the respective proprietors of the land, to be testified in writing under their hands. A power was reserved to parties aggrieved, to appeal to the quarter sessions. The commissioners, by their award, made in 1793, allotted to Sir H. Mildmay, in respect of an estate in the parish, two closes of land, late Mr. Parson's land. They also allotted to the said Mr. Parsons, in respect of his freehold estate, two old inclosures, late Sir H. Mildmay's, called South Stearts; also one allotment of arable land, called Shortlands, late a common field; and the commissioners did thereby consent to, approve of, and confirm the several exchanges made between the said Sir H. Mildmay, and the said Mr. Parsons. It did not appear, that any consent in writing was entered into between the parties; but Parsons entered into possession of the two closes, called South Stearts and Shortlands, and after his death, the trustees under his will contracted, in 1813, to sell the same. *Held*, that the vendors could not, under the award and the act of parliament, make a good title to the purchaser. *Cox* v. *King*, 119.

INSOLVENT.

By the General Insolvent Act, 7 Geo. 4, c. 57, s. 34, it is enacted, that no creditor shall, after the commencement of the imprisonment of a prisoner, "avail himself of any execution issued or to be issued." *Held*, that where an actual imprisonment within the walls of a prison follows upon an arrest for debt, as one continuous act, within the usual time allowed and required by law, then the arrest must be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by law, takes place before the actual commitment to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, then not the arrest, but the actual coming within the walls of a prison, is the commencement of such imprisonment. *Yapp, Assignee of Parkington, an insolvent*, v. *Harrington*, 165.

INSURANCE.

Where, by the custom of loading timber, between London and Quebec, the owner of vessels placed part of the timber on the deck, and, on the voyage, the timber on the deck was thrown overboard in a storm to preserve the ship; *held*, that the owner of the ship was liable to the owner of the umber, to contribute in a general average. *Gould* v. *Oliver*, 307.

INTEREST.—See Bill of Exchange, 1.

INTERROGATORIES.—See Evidence, 5.

INTRUSION.

1. A writ of intrusion may be maintained for an intrusion made after the determination of an estate *pur autre vie*. *Piercy* v. *Gardner*, 103.

2. A devisee is entitled to sue by a writ of intrusion. *Id.*

3. The limitation for suing out a writ of intrusion is fifty years, under stat. 32 Hen. 8, c. 2.

JOINT STOCK COMPANY.—See Public Company. Covenant, 1.

LANDLORD AND TENANT.

See Agreement. Attorney, 3. Covenant, 2. Pleading, 18, 19, 25.

1. A notice to quit was given by an agent who had from time to time received the rent of the estate, and paid the money into a bank to the credit of the landlord, but had always acted upon instructions received from the landlord's immediate agent:—*Held*, that, without some further proof of authority, the notice was insufficient. *Doe* d. *Rhodes* v. *Robinson*, 84.

2. In assumpsit, the declaration stated that the defendants had become and were tenants to the plaintiffs, of a brewery, and in consideration thereof, they undertook to repair the same. *Breach*,—that the defendants suffered and permitted the premises to be ruinous and prostrated. A verdict was taken for the plaintiffs, subject to a special case, which stated the following facts:—In 1769, a lease of the premises in question, was made to one Uppon, by a tenant for life, for a term which expired in 1830; and that lease contained a covenant from the lessee to repair the premises. Samuel Sanders became the assignee of the lease, and, in 1795, he made an underlease at an improved rent, and Samuel Sanders, during his life-time and the defendants, after his death, paid the rents reserved in the lease of 1769, until 1827; and received the improved rent, payable under the lease of 1795, until 1830. The plaintiffs, were assignees of the reversion, and in 1830, the premises were in a very dilapidated state; but it was then ascertained, that the lease of 1769 was void, because the tenant for life had exceeded his power of leasing. *Held*, first, that as all the parties had treated the lease as being valid, the defendants were bound by the terms of it, and that they were liable to pay such an amount of damages, as would be sufficient to put the premises in re-

pair, at the expiration of the term; and that the declaration disclosed a sufficient consideration to support the promise; also, that the defendants were liable to pay the rent reserved in the lease of 1769, until its expiration, but that they were not liable for rent or dilapidations after 1830. *Beale* v. *Saunders*, 147.

3. The defendants, entered into the following agreement:—"That they should become tenants of Botolph Wharf, at 375*l.* a quarter, the tenancy to commence on the 14th of June, they paying a quarter's rent on that day; that they should give security to pay one quarter's rent in advance, as long as they should continue tenants;" and in a bond, given as a security for the rent, it was recited, "That the defendants had become tenants of Botolph Wharf, at the rent of 375*l.* a quarter, and had paid the first quarter's rent, and had agreed to pay the said sum of 375*l.*, on or before the first day of every quarter, during which they should hold the premises." *Held*, that this was a quarterly tenancy. *Wilkinson* v. *Hall*, 56.

6. Whether a quarterly tenant, who wilfully holds over, after his tenancy is expired, is liable to pay double value to his landlord, under 4 Geo. 2, c. 28.—*Quære*. *Id.*

LEASE.—See ATTORNEY, 3. COVENANT, 2, 3. LANDLORD AND TENANT, 2. 3. MORTGAGE, 4.

LIBEL.—See PLEADING, 14, 15, 16, 17. PRACTICE, 5, 6.

LIEN.—See COSTS, 7.

LIMITATION, STATUTES OF.

See INTRUSION, 3.

1. The limitation affecting an action to recover a rent-charge, granted by will, is twenty years from the death of the testator, under the 3 & 4 Will. 4, c. 27, s. 2. *James* v. *Salter*, 70.

2. Where a debtor wrote a letter to a creditor, respecting a debt for which he was liable, stating that he was very wretched indeed, on account of the account not being paid, and that he heard, that there was a prospect of an abundant harvest, which must very considerably reduce the account, and that if it did not, the concern must be broken up to meet it at last; *held*, that this was a sufficient acknowledgment to take the case out of the Statute of Limitations, (9 Geo. 4, c. 14;) also, that the construction of the letter was properly left to the jury, and that parol evidence was admissable to shew the amount of the debt. *Bird* v. *Gammon*, 224.

3. Where there is a life interest outstanding in an estate tail, the heir of the grantor who claims on failure of the estate tail, has twenty years from the death of the tenant for life to bring an action of *formedon in reverter*. *Dumsday* v. *Hughes*, 33.

MORTGAGE.

See COSTS, 5. STAMP.

1. In ejectment, brought by a mortgagee, against the widow of the mortgagor, the lessor of the plaintiff proved an assignment, by way of mortgage, of copyhold premises, by lease and release, and not by any surrender to the lord. *Held*, that the lessor of the plaintiff had only an equitable interest, and that he could not maintain the action. *Doe* d. *North* v. *Harriet Webber*, 203.

2. Where a mortgage of copyhold premises, by lease and release, recited that, by indentures of lease and release, the mortgagor, (a copyholder for lives,) had contracted with the Bishop of Rochester, for the absolute purchase of the inheritance, in fee simple of the copyhold premises, and that the Rishop of R. had granted and released the same, (parcel of the manor of the prebend of W.,) to hold the same to the mortgagor, his heirs, and assigns for ever; and the mortgage deed then witnessed, that the mortgagor granted and released the premises in fee, subject to the usual proviso for redemption. *Held*, that there was no sufficient evidence, furnished by the recital, that there had been any enfranchisement of the copyhold. *Id.*

3. Whether the above recital was evidence, by way of estoppel, against the widow in possession of the mortgagor, *quære*. *Id.*

4. An estate was mortgaged in fee, subject to the usual proviso for redemption, on payment of the principal and interest, on the 5th June, 1834. It was further provided, that the mortgagor should not be entitled to call in the principal money, before December, 1840, if the interest was in the meantime regularly paid; and the mortgage deed contained a covenant, that the mortgagor should hold, occupy, and enjoy the estate, until default should be made in payment of the principal or interest, contrary to the beforementioned provisos. *Held*, that this amounted to a lease of the premises, by the mortgagee to the mortgagor, until December, 1840. *Wilkinson* v. *Hall*, 56.

NEW TRIAL.

1. Upon a question of sea-worthiness in an action on a policy, the jury found a verdict for the plaintiff, and a new trial was obtained, upon the ground that the verdict was against the evidence. Upon the second trial, the verdict was again found for the plaintiff upon the same evi-

dence. *Held*, per *Tindal*, C. J., and *Park*, J., that no further trial ought to be allowed, the verdict not being perverse. *Vaughan*, J., and *Coltman*, J., diss. *Foster* v. *Steele*, 231.

2. The Court refused to open a consolidation rule, where the cause by which the other defendants were bound had been tried twice upon its merits, and a third trial had been refused, although the verdict for the plaintiff was not altogether satisfactory. *Vaughan*, J., diss. *Foster* v. *Alvez*, 233.

NOTICE OF ACTION.—See GAME, 1.

NOTICE OF DISHONOR.—See BILL OF EXCHANGE, 2, 3.

NOTICE TO QUIT.—See LANDLORD AND TENANT, 1, 2.

OUTLAWRY.

Where a plaintiff proceeded to outlawry without endeavouring to find the defendant's residence by applying to persons with whom he knew the defendant was acquainted, it was held, that this was no ground for reversing the outlawry without costs. *Hunter* v. *Whitfield*, 210.

OYER.—See PRACTICE, 12.

PATENT.—See PRACTICE, 9, 10.

PLEADING.

See PRACTICE, 5, 6. 13, 14, 15. 17. 20.

1. The first count of a declaration set out a contract that the defendants, together with the auctioneer employed, would be responsible for the proceeds of the sale of certain books; the second count, that the defendants alone would be responsible. *Held*, that these counts did not shew a distinct subject matter of complaint, within Reg. 5, Hil. T. 4 W. 4. *Cholmondeley* v. *Payne*, 80.

2. In trover against a wharfinger, the Court allowed the following pleas: first, not guilty; secondly, that the goods were not the plaintiff's goods; and, thirdly, that they had been deposited with the defendant by a third party, as a security for money advanced. *Jaulerey* v. *Britton*, 93.

3. In debt under a plea of nunquam indebitatus, payment must be pleaded, although the plaintiff has given credit for the sum paid, in the bill of particulars. *Ernest* v. *Brown*, 79.

4. To a declaration in assumpsit for money paid to the defendant's use, &c., the defendant pleaded that the money was paid on account of a certain contract made between the plaintiff and defendant, relating to the purchase of foreign securities, whereon it was agreed that the defendant should repay the plaintiffs all advances made by him on account of the said securities, and should also, upon receiving reasonable notice, pay certain deposits, in case the securities should be depreciated; and that if the defendant neglected to pay such deposits, then the plaintiff should be at liberty to sell the securities, and that the defendant should reimburse the plaintiff any losses occasioned by such re-sale. The plea then averred, that in contravention of this agreement the plaintiff had sold the securities without giving any notice to the defendant to pay advances on deposits. *Held*, upon special demurrer, that the plea was bad as amounting to non assumpsit. *Morgan* v. *Pebrer*, 3.

5. Declaration in assumpsit. On a charter-party in the first count, the breaches assigned were, 1. The omission to supply a cargo. 2. The non-payment of a large sum, to wit, 200*l*., due for freight. In the second and third counts (indebitatus assumpsit) the plaintiff claimed 200*l*. for freight and 200*l*. on an account stated. The defendant pleaded, as to 476*l*. 14*s*. 7*d*. parcel of the sums of money in the declaration mentioned, payment and acceptance of that amount before action brought. *Held*, that the plea was bad for not shewing specifically to what part of the plaintiff's demands it was pleaded. *Lorymer* v. *Vizeu*, 38.

6. A contract was made for the sale of a cargo of good merchantable Gallipoli oil, consisting of 240 casks, containing 901 salms and nine pignatelles, at 54*l*. per imperial ton of 7 and 1-5th salms. An action being brought against the defendant for not performing the contract, he pleaded that the said casks containing the oil were not properly seasoned or proper casks for containing good merchantable Gallipoli oil, but were badly seasoned, and unfit and improper casks for such purpose. *Held*, upon demurrer, that the plea was no answer to the action, because it took issue upon that which was not of the essence of the contract, and because the objection went only to a part of the consideration. *Gower* v. *Von Dadelzen*, 94.

7. Where a contract stipulated that the plaintiff should be paid for building six cottages, "on the 1st January, 1837, on condition of the work being done in a substantial and workmanlike manner, and to be completed by the 10th of October;" *held*, that after the work was done, and the day of payment had expired, the plaintiff was entitled to recover in indebitatus assumpsit, without declaring specially. *Lucas* v. *Godwin*, 114.

8. In an action on a bill of exchange by indorsee against the acceptor, the defendant pleaded that

the bill was accepted for the accommodation of the drawers, who had indorsed it without consideration; and that certain unlawful wagers and contracts were made between the indorsee and the plaintiff, relating to the then future price of Spanish Cortes bonds, and thereupon it was unlawfully agreed between the plaintiff and the indorsee, that there should not be any actual or *bonâ fide* transfer of the said stock, but that in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said stock, at certain times, to wit, &c., that the said indorsee should pay the plaintiff the difference which might then be between the said respective prices; but that if the price should be more than the said specified price, then the plaintiff should pay the indorsee such difference or excess. The plea then averred, that the bill of exchange was given to the plaintiff as security for the balance which might become due under and by virtue of the said illegal wagers. *Held*, that variance at the trial in the proof of the price of the stock, was immaterial. *Robson* v. *Fallowes*, 41.

9. Debt does not lie by the indorsee of a bill of exchange against the acceptor. *Clowes* v. *Williams*, 176.

10. In debt on a bill of exchange for 78*l.* 13*s.* 6*d.*, the defendant pleaded payment into court of 5*l.* 3*s.* 6*d.*, and that he was not indebted to the plaintiff to a greater amount in respect of the cause of action in the declaration mentioned. The plaintiff having taken issue on this plea; *held*, that the plea would have been bad on special demurrer, as amounting to *nil debet*, in contravention of the new rules of pleading; but, after a verdict found for defendant, the Court refused to disturb it. *Finleyson* v. *Mackenzie*, 211.

11. In an action against the acceptor of a bill of exchange, payable to the drawer or his order, the declaration alleged that the drawer indorsed the bill to one S., and that S. delivered it to the plaintiff. *Held*, upon demurrer, that no title to the bill was shewn to be in the plaintiff. *Cunliffe and others* v. *Whitehead*, 182.

12. In assumpsit by the indorsee against the drawer of a bill, if the declaration does not allege a promise to pay, it is bad on special demurrer. *Henry* v. *Barbidge*, 16.

13. The declaration stated that H. R. was desirous of obtaining certain deeds deposited with W. B., and that H. R. applied to the plaintiff to accept certian bills for his accommodation, to enable him to endorse the said bills to W. B as a payment for his interest in the deeds, and H. R. offered to procure the defendants to undertake to deliver the said deeds to the plaintiff on the payment of the bills so accepted; that the bills were accordingly drawn, and H. R. requested the defendants to undertake to deliver the deeds to plaintiff; of all which the defendants had notice; and that thereupon, in consideration of the plaintiff accepting the bills, the defendant undertook and promised the plaintiff to deliver the deeds to him when the bills should be paid. Averment, that the bills were accepted and duly paid, but that the defendants had not delivered the deeds to the plaintiff in pursuance of their undertaking. *Held*, upon demurrer, that a sufficient consideration appeared to support the defendants' promise. *Tipper* v. *Bicknell*, 98.

14. In an action for causing a malicious charge of fraud to be made against the plaintiff before a magistrate, the defendant pleaded that he had caused the charge to be made upon and with a reasonable and probable cause; and the plea then proceeded to state what the reasonable and probable cause was, and certain facts and circumstances were stated; upon special demurrer the plea was held bad, on the ground that it was not expressly stated that the defendant had a knowledge of the facts and circumstances at the time when the charge was made. *Delegal* v. *Highley*, 158.

15. It is an established principle, upon which the privilege of publishing a report of any judicial proceeding is admitted to rest, that such report mast be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings; and a remark made by the clerk to the magistrate, forms no part of the proceedings which may be published. *Id.*

16. In an action for publishing a libel, which stated that the defendant had been charged with a fraud before a magistrate, the only justifications which the law admits are, first, that the charge itself was a true charge; or, secondly, that the publication contained a true, full, and faithful account of the proceedings of a court of justice; and if such proceedings are published, the terms of the accusation should be stated, not merely the result of it, because if the terms in which it was preferred were stated, it might carry with it its own refutation or explanation. *Id.*

17. In an action for libelling the plaintiffs in their business of selling a medicine called Morison's pills, by publishing that the defendants had crushed the self-styled hygeist system of wholesale poisoning, and that several of the scamps and rascals had been convicted of manslaughter; the defendants pleaded in justification that the pills were composed of aloes and gamboge, of a dangerous and poisonous nature, and that by impudent advertisements the plaintiffs had pretended that the pills would cure all diseases if taken in sufficient quantities; and that two of the hygeists had been convicted of manslaughter for administering the pills. *Held*, that the plea was sufficient, although it did not particularly justify the use of the words scamps and rascals; also, that it was no objection [illegible]

one of the patients who had died, had taken a less quantity of pills than the hygeist had ordered; and that it was not necessary for the defendants to shew that they had entirely crushed the system. *Morison* v. *Harmer*, 108.

18. In an action for a breach of covenant in not delivering up a messuage in repair at the expiration of the term, the defendant pleaded, that after the covenant was broken, an agreement was entered into, between the plaintiff and defendant, that in consideration that the defendant had become tenant from year to year, and had promised to repair the premises before the 12th of April, he, the plaintiff, would give time for the reparation, without bringing an action in the meantime, yet that the plaintiff wrongfully commenced the suit before the 12th of April. *Held*, that this plea was bad—first, because it was a plea of an accord executory only, and not executed; secondly, that there was no good consideration laid for the defendant's promise to repair, or for the plaintiff's promise to forbear to sue for the breach of covenant. *Bayley* v. *Homan*, 184.

19. A declaration in covenant on a lease, alleged, that, after the making of the indenture, to wit, on the 25th March, 1836, 66*l.* 5*s.*, for two quarters of a year's rent, ending on the day and year last aforesaid, was due and in arrear, contrary to the indenture. Plea, that no quarter's rent, ending on the said 25th March, was due or in arrear, *modo et formâ*. *Held*, upon demurrer, that the plea was bad. *Baden* v. *Flight*, 141.

20. Trespass for assault and false imprisonment will lie against husband and wife jointly. *Vine* v. *Saunders*, 291.

21. In trover for a deed, the defendant pleaded that the plaintiff was not possessed of the deed as of his own property. *Held*, that under this issue, the defendant was entitled to shew that the plaintiff delivered the deed to F. for the purpose of enabling F. to raise money, and that the defendant had lent F. a sum of money on the security of an assignment of it. *Owen* v. *Knight*, 245.

22. In *quare impedit*, the plaintiffs alleged, that they being the majority of proprietors of estates for the time being of the township of B., of right nominated and presented a clerk to be the perpetual curate of the church of B. The defendants pleaded that they being the majority of the proprietors of estates for the time being of the said township, nominated another clerk to the curacy, *without this*, that the plaintiffs were the majority of the proprietors of the estates at the time of the said nomination, *modo et forma*. Replication, that defendants then being such majority of the proprietors of the said estates, did not duly nominate the clerk *modo et forma*. *Held*, that the replication was bad, as it traversed matter alleged in the inducement of the plea instead of joining issue upon the plea. *Earl of Harrington* v. *Bishop of Litchfield and Coventry*, 257.

23. In an action by trustees under 3 Geo. 4, c. 126, s. 57, against the renter of turnpike tolls and his sureties, for rent in arrear, the declaration should shew that the agreement, under which the tolls were let, was in writing, and signed by the trustees, or their clerk, or treasurer. *Oldroyd* v. *Crampton*, 261.

24. But it need not set out all the preliminary steps which are required to render a meeting valid for the letting of the tolls; it is sufficient to state that at a public meeting of the trustees, duly held by virtue of the statutes in that case made and provided, the tolls were duly put up and let by auction, by virtue of the powers, and in the manner directed by the statutes. *Id.*

25. In replevin, the defendant avowed for rent in arrear, and the plaintiff pleaded in bar that, by the demise in the avowry mentioned, the avowant demised and transferred the premises to the plaintiff for all the residue of the avowant's estate, term, and interest in the same, and that the avowant had not, at the time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant rejoined, that, by an award made in an arbitration between the plaintiff and defendant, a power for distraining upon the premises for rent was given to the defendant. *Held*, first, that the plea alleged, with sufficient certainty, that the avowant, at the making of the demise, did not reserve any reversion in himself; secondly, that the rejoinder was insufficient, because it did not appear that the arbitrator had any authority to give the defendant the power of distraining. *Pascoe* v. *Pascoe*, 188.

PRACTICE.

See ACKNOWLEDGMENT. AFFIDAVIT. ARREST. ATTORNEY. BAIL. COSTS. EJECTMENT. NEW TRIAL. REGULÆ GENERALES. WARRANT OF ATTORNEY. WRIT OF TRIAL.

I. PROCEEDINGS TO APPEARANCE.

1. A distringas which issues more than four months after the date of the writ of summons, is irregular. *Abbots* v. *Kelly*, 32.

2. Where the plaintiff delivered a true copy of a capias to the sheriff, in pursuance of stat. 2 W. 4, c. 39, s. 4, but the sheriff's officer made another copy, which stated that the writ was issued in the reign of William the Fourth, instead of Queen Victoria. *Held*, that this was an irregularity only, within Reg. 10 Mich. T. 3 W. 4. *Brashour* v. *Russell*, 242.

II. AMENDMENT.

3. The Court will amend a writ of habeas

corpus which was erroneously tested in the reign of Victoria, instead of 7 Wm. 4. *Exparte Davies*, 304.

4. In an action on a bill of exchange, the declaration described the plaintiff as "Henry H. Lindsay." A rule was obtained by the defendant requiring the plaintiff to amend, by inserting his full names; but the cause of the omission being satisfactorily shewn, the rule was discharged. *Lindsay* v. *Wells*, 97.

5. After judgment for the plaintiff on a demurrer to one of several pleas of justification in an action for a libel, the Court will not allow him to withdraw a replication of *de injuria* to other pleas, which are open to the same objections, and substitute a demurrer. *Delegal* v. *Highley*, 259.

6. Where there were three counts in libel, and not guilty had been pleaded to the whole declaration, and issues in fact had also been raised, upon pleas to the first and last counts, and judgment had been given for the plaintiff, on a demurrer to a special plea to the second count, the Court allowed the plaintiff to withdraw the first and third counts from the record, on payment of costs. *Id.*

III. Particulars of Demand.

7. In an action of trespass, where the *locus in quo* was of considerable extent, and related to a right to moor ships, the plaintiff was required to give particulars of the trespass. *Kirwin* v. *Jones*, 230.

8. The plaintiff sued the defendant for money had and received by the publication of a book on the plaintiff's account. *Held*, that, for the purpose of pleading, the defendant was entitled to inspect an agreement in the plaintiff's possession, which contained the terms upon which the defendant undertook to publish the book. *Charnock* v. *Lumley*, 244.

9. In an action for the infringement of a patent, the Court will not compel a defendant to give the names and addresses of persons whom, in a notice of objection given under 5 & 6 W. 4, c. 83, sec. 5, he alleges to have used the invention before the patent was granted. *Bulnois* v. *M'Kenzie*, 251.

10. But where a judge had made two orders requiring the name and address of a person who had used the invention, and the defendant complied with the orders, the Court refused to rescind them. *Id.*

11. The Court may order a further and better notice of objections, under their general jurisdiction, as well as under the statute. *Id.*

IV. Other Proceedings before Verdict.

12. A creditor sued a surety for the breach of an administration bond, given in pursuance of 22 & 23 Car. 2, without obtaining an assignment of the bond from the archbishop, or his permission to use his name; and the Prerogative Court having refused to allow the bond to be taken to the defendant, who had craved oyer, this Court discharged a rule to set aside a judge's order, which had been obtained to stay further proceedings in the action, until the bond was brought to the defendant. *The Archbishop of Canterbury* v. *Tubb*, 101.

13. In an action by two plaintiffs, a plea that one of them became bankrupt after action brought, and before plea, cannot be pleaded, after the defendant has obtained an order for time to plead, upon the terms of pleading issuably. *Staples* v. *Holdsworth*, 298.

14. When further time to plead was given by the plaintiff's attorney, upon being served with a paper which purported to be a judge's summons for time to plead. *Held*, that the attorney was justified in signing judgment for want of a plea after he had discovered that no judge's summons had been issued. *Lowne* v. *Loader*, 55.

15 A plea of payment into court does not bind the defendant beyond the amount paid into court; and he may dispute the residue of the plaintiff's demand, as if non-assumpsit had been pleaded to it. *Lacey* v. *Walrond*, 215.

16. A writ of summons had been served in debt, and afterwards a declaration in assumpsit. The defendant did not apply to set aside the proceedings for irregularity, but the plaintiff having signed judgment in debt, for want of a plea, the Court set it aside, upon the ground that the defendant might have expected to receive notice of a writ of inquiry. *Cons* v. *Kirk*, 145.

17. The tenant having demanded a *rien in formedon* after a general imparlance, the demandant sued out a writ of grand cape. *Held*, that this was irregular, and that the demandant ought to have counter-pleaded or demurred. *Tolson* v. *Watson*, 113.

18. After the defendant had moved for the costs of the day against the plaintiff for not proceeding to trial, and three terms having again elapsed without any notice of trial, the defendant gave plaintiff's attorney notice that he intended to apply for judgment as in case of a nonsuit; the attorney said that he should not oppose the motion. Under these circumstances the Court granted a rule absolute for judgment as in case of a nonsuit. *Phillip* v. *Arden*, 13.

19. In a motion for judgment as in case of a nonsuit for not proceeding to trial, the affidavit is sufficient if it state that notice of trial was given, without stating that the cause was at issue. *Corbin* v. *Heyworth*, 305.

V. Proceedings after Verdict.

20. The party who virtually succeeds in an action is entitled to the custody of the postea; therefore, where, in trespass, a verdict, with one

shilling damages, was found for the plaintiff on not guilty, and on an issue as to the property in the close; and a verdict for the defendant on an issue as to a right of way over the close, it was held, that the postea ought to have been delivered to the defendant. *Staley* v. *Long*, 144.

21. On the 6th of June, a judge's order was made by consent, which authorized plaintiff to sign final judgment immediately. On the 8th of June the defendant died, before the plaintiff had entered up his judgment. *Held*, that this was not a case in which the defendant was entitled to have judgment entered *nunc pro tunc*, under Reg. 3 Hil. T. 4 W. 4. *Vaughan* v. *Wilson*, 254.

PRINCIPAL AND AGENT.

See TENDER, 1, 2.

1. The plaintiff, who was a stock-broker, sold for the defendant four Guatemala bonds, and and paid him £298, the price for which they were sold. The vendee discovered, after two days, that the bonds were not stamped so as to make them saleable at the Stock Exchange, and he thereupon returned them to the plaintiff, who repaid the purchase-money without conferring with the defendant. The plaintiff did not disclose the defendant's name when he sold the bonds; and it appeared that stock-brokers were treated as principals, and were liable to be expelled from the Exchange if they failed in performing their contracts. *Held*, that the plaintiff was authorized to rescind the contract, and that an action for money had and received was sustainable by the plaintiff to recover back the £298, without declaring, upon an implied warranty by the defendant, that the bonds were saleable. *Young* v. *Cole*, 126.

2. The defendants employed an architect to draw plans for a workhouse, and the architect employed the plaintiff, a surveyor, to calculate the quantities of the materials. The defendants afterwards advertised for tenders to build the workhouse; and they gave notice, that copies of the quantities might be obtained, and that the successful competitor would be required to pay for calculating them. The defendants subsequently determined not to build the workhouse. In an action brought by the plaintiff against the defendants for work and labour, it was proved, that architects were accustomed to employ a surveyor to calculate the quantities. *Held*, that the action was maintainable, as the architect was the agent of the defendants, and had authority to bind them. *Moon* v. *the Guardians of the Witney Union*, 206.

PROMISSORY NOTE.—See BILL OF EXCHANGE.

PUBLIC COMPANY.

See COVENANT, 1. EAST INDIA COMPANY.

Where it appeared, that the directors of the company, had given bills of exchange, accepted by one or more directors, before the defendants became directors; but, since that period, no such bills had been accepted; and the jury found, upon these and other facts, that there was no *express* authority given by the new directors to draw or accept bills, the Court refused to grant a new trial. *Bramah and another* v. *Roberts and others*, 191.

QUARE IMPEDIT.—See PEALDING, 22.

REAL ACTION.

See INTRUSION, 1, 2, 3. LIMITATION, STATUTES OF, 3. PRACTICE, 17.

A count in a writ of right must shew, upon the face of it that the ancestor of the demandant had seisin of the tenements within sixty years from the teste of the writ. *Dumsday* v. *Hughes*, 33.

REGULÆ GENERALES.

UPON WHICH DECISIONS ARE REPORTED.

Trin. T. 1 W. 4. (Bills of Exchange. Bail.)

Henry v. *Burbidge*, 16.
Vestris's Bail, 129.

Hil. T. 2 W. 4. (Practice.)

Knight v. *Woore*, 1.
Holliday v. *Lawes*, 130.
Clarke v. *Vestris*, 133.

Mich. T. 3 W. 4. (Indorsement on Writ.)

Brashour v. *Russell*, 242.

Hil. T. 4 W. 4. (Pleadings and Practice.)

Cholmondeley v. *Payne*, 80.
Perceval v. *Connor*, 202.
Finleyson v. *Mackenzie*, 211.
Vaughan v. *Wilson*, 254.

Trin. T. 7 W. 4.

Hours of Business at the Offices, 234.

REPLEVIN.—See PLEADING, 25.

SET-OFF.

In an action of assumpsit for money lent, the defendants pleaded, as a set-off, that by a memorandum in writing the plaintiff guaranteed to pay the defendant 1600*l.* money lent, and any further sums which they might advance to J. C.;

and that, at the time of the suit, the plaintiff was indebted to the defendants, on the said guarantee, the said sum of 1600*l.*, and a further sum of 3000*l.* afterwards lent to J. C. *Held*, that this was not a debt which could be set-off against the plaintiff's demands, within 2 Geo. 2, c. 22, s. 13. *Morley* v. *Inglis*, 270.

SHERIFF.—See BILL OF EXCEPTIONS, 1, 2, 3. FALSE JUDGMENT. INSOLVENT. PRACTICE, 2. WRIT OF TRIAL, 1, 2, 3.

SLANDER.

In an action for slander, by an attorney, the declaration stated, that the defendant published of and concerning the plaintiff, and of and concerning him, in the way of his profession, these words, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" it was in evidence, that the plaintiff was accustomed to bet at horse-races, and the jury found that the words were not spoken of him as an attorney, but that the slander had a tendency to injure him morally and professionally. A verdict was found for the plaintiff, and a rule nisi having been obtained to enter a nonsuit, the Court held, that the defendant was not entitled to a nonsuit, but they arrested the judgment. *D'Oyley* v. *Roberts*, 154.

STAMP.

In ejectment by the assignee of a mortgagee against the tenant of the mortgagor, the lessor of the plaintiff proved a deed of assignment, which recited a mortgage of certain premises for 900 years as a security for 1500*l.*; and it was witnessed, that, in consideration of 1500*l.* paid to the mortgagee, he transferred the mortgaged premises to the lessor of the plaintiff, and the mortgagor, in consideration of 10*s.*, assigned, ratified, and confirmed the same. *Held*, that a stamp of 35*s.* was sufficient, the seisin of the mortgagor having been proved. *Doe* d. *Brame* v. *Maple*, 213.

STATUTES

UPON WHICH DECISIONS ARE REPORTED.

West. 2, c. 31. (Bill of Exceptions.)

Strother v. *Hutchinson*, 294.

32 Hen. 8, c. 2. (Real Action.)

Dumsday v. *Hughes*, 33.
Piercy v. *Gardner*, 103.

22 & 23 Car. 2, c. 10. (Administration.)

Archbishop of Canterbury v. *Tubb*, 101.

2 Geo. 2, c. 22. (Set-off.)

Morley v. *Inglis*, 270.

——— c. 23. (Attorneys.)

Exparte Rice, 130.
Exparte Branson, 132.

4 Geo. 2, c. 28. (Landlord and Tenant.)

Wilkinson v. *Hall*, 56.

7 Geo. 2, c. 20. (Mortgage.)

Doe d. *Capps* v. *Capps*, 136.

14 Geo. 3, c. 48. (Wagers.)

Morgan v. *Pebrer*, 3.

18 Geo. 3, c. lxxv. (Private Act. Canal.)

Pontet v. *Basingstoke Canal Company*, 46.

33 Geo. 3, c. xvi. (Private Act. Canal.)

Pontet v. *Basingstoke Canal Company*, 46.

43 Geo. 3, c. cxxvi. (Private Act. East India Dock.)

East India Dock Campany v. *Baker*, 171.

48 Geo. 3, c. 123. (Prisoner.)

Doe d. *Daffey* v. *Sinclair*, 145.

55 Geo. 3, c. 184. (Stamp.)

Doe d. *Brame* v. *Maple*, 213.

3 Geo. 4, c. 126. (Turnpikes.)

Oldroyd v. *Crampton*, 261.

6 Geo. 4, c. 16. (Bankrupt.)

Devas v. *Venables*, 9.
Skinners' Company v. *Jones*, 18.

——— c. 94. (Factor's Act.)

Jaulerey v. *Britton*, 93.

7 Geo. 4, c. 57. (Insolvent Act.)

Yapp v. *Harrington*, 165.

9 Geo. 4, c. 14. (Limitations.)

Bird v. *Gammon*, 224.

1 Will. 4, c. 22. (Interrogatories.)

Pole v. *Rogers*, 83.

1 & 2 Will. 4, c. 32. (Game.)

Bush v. *Green*, 265.

2 Will. 4, c. 39. (Writ of Summons.)

Abbots v. *Kelly*, 32.
Brashour v. *Russell*, 242.

3 & 4 Will. 4, c. 15. (Dramatic Copyright.)

Planché v. *Braham*, 288.

3 & 4 Will. 4, c. 27. (Limitations.)

James v. *Salter*, 70.

——— c. 42. (Law Amendment.)

Lindsay v. *Wells*, 97.
Bowman v. *Willis*, 137.

——— c. 74, s. 85. (Acknowledgment.)

Ex parte Stevens, 13.
Ex parte Branson, 132.

5 & 6 Will. 4, c. 83. (Patent.)

Bulnois v. *M'Kenzie*, 251.

7 Will. 4 & 1 Vict. (Attorney)

Downton v. *Styles*, 306.

STOCK-BROKER.—See PRINCIPAL AND AGENT, 1. WAGERS, 1, 2.

TENDER.

1. In an action for non-delivery of shares sold by defendant's broker, the defendant pleaded that no tender of the price had been made; and issue was joined thereon. It appeared that the defendant was informed that a tender of the price had been made to his broker; and the defendant, in reply, without objecting that the broker was not his agent, said he would endeavour to make an arrangement for the delivery of the shares. *Held*, that this was sufficient evidence to prove the tender. *Jackson* v. *Jacob*, 219.

2. Whether a tender to a broker is good, *quære*. *Id.*

TRESPASS.—See Costs, 4. PLEADING, 20. PRACTICE, 7.

TRIAL.—See ACTION, 1, 2.

TROVER.

See PLEADING. 2. 21.

Where a box was given to an innkeeper to be kept until it was called for, and when inquiry was made for it, the innkeeper's wife said, she supposed some of the carriers had taken it away by mistake. *Held*, that this was no evidence of a conversion, and that trover could not be maintained. *Williams* v. *Gessey*, 131.

TURNPIKE.—See PLEADING, 23, 24.

VARIANCE.—See PLEADING, 8, 17.

VENDOR AND VENDEE.

See AGREEMENT.

1. A vendor, by an agreement in writing, contracted to sell the lease and good-will of a public-house; and one of the conditions was, that possession should be delivered on the 3d of May. *Held*, in an action brought by the vendee, to recover back his deposit, that parol evidence of an agreement between the parties, to waive the day which was stipulated, and to substitute another, was inadmissible, as being in contravention of the Statute of Frauds. *Stowell* v. *Robinson*, 197.

2. In an action for non-performance of a contract for the sale of a leasehold house, the declaration alleged that the defendant had not lawful right and title to sell and assign the lease at the time the contract was made. It was ascertained, after the sale, that the assignments of the lease to the vendor, and to former assignees, had not been registered; and also that the vendor was restrained from assigning without a license from the ground landlord; and that no such license had been obtained at the time the contract was made. *Held*, that neither of these objections impeached the validity of the vendor's title, as the defects were capable of being remedied. *Id.*

VERDICT.—See Costs, 4. PRACTICE, 20.

WAGERS.

1. A wager relating to the value of foreign funds is not illegal at common law, and therefore an action was held to be maintainable to recover differences paid by the plaintiff on the depreciation of Spanish stock. *Morgan* v. *Pebrer*, 3.

2. The stat. 14 Geo. 3, c, 48, is only applicable to gambling transactions arising on policies of insurance. *Id.*

WARRANT OF ATTORNEY.

The affidavit of the due execution of a warrant of attorney signed by a marksman, should shew that it was read over to him. It is not sufficient to state that it was duly executed. *Wraith* v. *Harris*, 240.

WARRANTY.—See PRINCIPAL AND AGENT, 2.

WILL.

See EXECUTORS, 4. LIMITATION, STATUTES OF, 2.

A testator devised and bequeathed all his freehold estates, together with the use of his household goods, and live and dead stock, used in and about his said estates, unto Margaret S. for and during the term of her natural life, for her independent use and benefit, *remainder* to the husband of Margaret S. for life, remainder to the use of the heirs of the body of the said Margaret S. in tail, remainder to Alexander H. for life, with remainders over; and the testator declared that all the aforesaid settlements were intended by him to be in strict settlement with remainder to his own right heirs for ever. *Held*, that Margaret S. took an estate in tail general, in the testator's freehold estate. *Douglas* v. *Congreve and others*, 235.

WITNESS.—See ACTION, 1, 2. ATTORNEY, 6.

WRIT OF TRIAL.

1. The Court refused to grant a new trial, in the Sheriff's Court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was unnecessary. *Semble*, that the Court will not require an under-sheriff to make an affidavit of circumstances which occurred at the trial. *Power* v. *Horton*, 14.

2. A rule nisi having been obtained by the defendant, after a verdict for the plaintiff, to set aside a writ of trial, upon the ground that the date of the writ of summons was incorrectly stated, the Court suspended the rule to enable the plaintiff to apply for leave to amend the record. *Perceval* v. *Connor*, 202.

3. Where it appeared, by the return of the sheriff to a writ of trial, that it was executed a day after the return-day, an application was made by the unsuccessful party who had appeared at the trial, to set the writ aside; but the Court intimated that, in such a case, they would amend the return, if necessary. *Sherman* v. *Tinsley*, 32.

END OF THE VOLUME.

DAVIDSON, Printer, Serle's Place, Carey Street, London.