REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

IN

TRINITY AND MICHAELMAS TERMS,

IN THE FIFTH AND SIXTH YEARS OF WILL. IV.

BY

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AND

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BARRISTERS AT LAW.

VOL. V.

LONDON:

PRINTED FOR S. SWEET, 1, CHANCERY LANE; A. MAXWELL, 32, AND STEVENS AND SONS, 39, BELL YARD;

Law Booksellers and Publishers:

AND MILLIKEN AND SON, GRAFTON STREET, DUBLIN.

1836.

LONDON:
C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

JUDGES

OF THE

COURT OF KING'S BENCH,

During the period comprised in this volume.

THOMAS Lord DENMAN, C. J.

Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

N.B. WILLIAMS, J., sat in the Bail Court in Trinity Term; and LITTLEDALE, J., in Michaelmas Term.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

How, Clerk, *v.* Kennett and Gough.

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Trustees for the creditors of an insolvent taking an assignment of "all his estate and effects," cannot be sued for *use and occupation* in respect of a tenancy which was in the insolvent, unless they so act as to induce the landlord to believe, and he does in consequence thereof believe, that they mean to become his tenants,—although they have used the premises for the purposes of continuing the trade, and keeping and ultimately selling upon the premises the effects of the insolvent, and not merely for the purpose of ascertaining the value, and endeavouring to dispose of the tenancy.

ASSUMPSIT for the use and occupation of a house and land at Emsworth, Hants, and upon an account stated. Plea: that the defendants did not use or occupy, and that no money was found to be due and in arrear upon an account stated. At the trial before Lord *Denman*, C.J., at the Winchester summer assizes, 1834, the following facts appeared:

1831. The plaintiff demised the premises by parol to *George Hawkins*, from Midsummer, at 30*l.* a year, payable quarterly. *Hawkins* occupied the house, in which he carried on the business of a grocer, and underlet the land.

12 December, 1832. *Hawkins*, by indenture, assigned all his estate and effects to the defendants, in trust for themselves and the other creditors of *Hawkins*. This deed was executed by *Hawkins*, *Kennett*, and *Gough*; but *Gough*, who resided at Portsmouth, left the management of the trust to *Kennett*, who was a tradesman at Emsworth.

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On the same day *Hawkins* quitted Emsworth, leaving his wife and family on the premises. Mrs. *Hawkins* kept open the shop for the defendants (to whom she accounted for the proceeds) until 22d December, when she left Emsworth, and *Kennett* sent his shopman, *George Lover*, to conduct the business.

Lover accordingly remained on the premises from the 22d to the 29th of December, keeping open the shop and selling on behalf of the trustees, and accounting with *Kennett* for the produce of the sales.

On the 29th December, *Lover*, by the order of *Kennett*, closed the shop, but continued to sleep on the premises till the goods, which remained there unsold, were disposed of at an auction held on the premises by one *King*, an auctioneer, on account of the defendants, on the 12th and 13th February, 1833.

19th March, 1833, *Kennett* wrote to the plaintiff as follows:

"Sir,—I beg to say, I am prepared to settle the half-year's rent for *Hawkins*'s house, which the trustees consider themselves accountable for. Please to say if I shall wait on you this morning, or if you wish to go into the house before I deliver you the keys. I am, &c.

George Kennett."

The plaintiff returned the following answer:

"Sir,—To your information this instant to hand, I hasten to reply. I am quite ready to receive rent, but with the keys I can have nothing to do till Midsummer, 1834. I am, &c. *G. A. How*."

In the evening of the same day the plaintiff wrote again as follows:

"Mr. *Kennett*,—In connection with my answer to your note of this morning, I beg leave to inform you, that if the trustees see fit, any time 'twixt this and Saturday, to offer an acceptable proposal, I may thereby be induced to relieve them very considerably with respect to the tenancy

with which they have burthened themselves. Awaiting the acceptance or rejection of this liberal offer,

I remain, &c. *G. A. How.*"

23d March, 1833, *Kennett* wrote to the plaintiff as follows:

"Sir,—Not having an opportunity of consulting my partner trustee on the subject of replying to your proposition, I take upon myself to offer you, for the trustees, half a year's rent, *without prejudice,* in lieu of holding possession such a time as they may be liable.

Waiting your reply this day, I am, &c.

George Kennett."

The plaintiff declined this proposal; and on the 25th March, the quarter-day, *Kennett,* with the privity of *Gough,* paid 15*l.* for the two quarters' rent then due, and tendered the keys; but the plaintiff refused to accept them.

29th January, 1834, *Kennett* was served with the following notice:

"To Messrs. *Kennett* and *Gough.*

"Gentlemen,—It having been intimated to my client, Mr. *How,* that the house lately occupied by Mr. *Hawkins, of which you are now the tenants,* is getting out of repair, I am directed by him to give you notice that he is advised that you are bound to keep it in repair, and that he will be under the necessity of suing you for any damage he may sustain by your neglecting to do so.

I am, &c. *D. Smart.*"

In February, 1833, the plaintiff asked *King,* the auctioneer, whether he could get him a purchaser for the house, but fixed no price. In January, 1834, *King,* having been applied to by some person about the house, asked the plaintiff what the price would be. The plaintiff gave *King* a price, but desired him to keep the matter a secret.

The action was brought in May, 1834, to recover one quarter's rent, due at Lady-day preceding. It was contended, by the defendant's counsel, that the plaintiff must

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be nonsuited, on the ground that the action should have been brought against *Kennett* alone, *Gough* not having taken actual possession; and *Nation* v. *Tozer*(*a*) was cited. The learned judge was, however, of opinion that if *Kennett* was liable, *Gough* had rendered himself liable also. It was then objected that the trust-deed contained no words which would pass *Hawkins*'s interest in the premises. In answer to this objection, *Carter* v. *Warne* (*b*) was cited, in which the interest of an assignee had been held to pass under the same general words. This objection was then abandoned. The case was ultimately left to the jury to say whether they were of opinion that the defendants meant to become tenants to the plaintiff, or if not, whether they so acted as to induce the plaintiff to believe, and whether he did in fact believe, that they meant to become his tenants.

The jury having found a verdict for the defendants, *Coleridge*, Serjt., in the following term, obtained a rule for a new trial, on the ground of misdirection.

Barstow now shewed cause. There was no misdirection. Whether assignees have accepted a lease, is always a question of *fact*. The form in which the question was left to the jury was, to say the least, as favourable to the plaintiff as he was entitled to. There was no *occupation*. The plaintiff relied upon certain equivocal acts, from which it was sought to persuade the jury to find that there had been a substitution of the defendants, as tenants to the plaintiff, in the insolvent's stead. The insolvent had no *estate* in the premises which could be assigned. There was no term: The plaintiff therefore must make out that in point of law there was a *substitution* in the tenancy. The plaintiff must hope to succeed on the *contract* alone, there being no proof of that actual occupation, for which these equivocal acts were relied on. The plaintiff, by speaking of putting up the premises for sale, shewed that they were in his pos-

(*a*) 1 Crompton, Mees. & Rosc. 172, and 4 Tyrwh. 561; *infrà*, 11.

(*b*) Mood. & Malk. 479, and 4 Carr. & Payne, 191.

session. The auctioneer was enjoined to secrecy. It will be said that the secrecy related to the *price* to be paid; but it seems more probable that it related to the plaintiff's taking upon himself the power of disposing of the property.

Even supposing that the interest of the insolvent is to be considered as a *term*, it is always a question of fact whether the assignees have accepted the term or not. But here there was no term. [*Littledale*, J. A tenancy from year to year is a term. *Patteson*, J. If trustees, in the case of an assignment by an insolvent to trustees for the benefit of creditors, have got the legal interest, is there any case to shew that such trustees may elect to keep it or not, as in the case of an assignment in bankruptcy?] It is submitted that the deed would not pass the property, unless there was something to shew that the trustees *accepted* the property. Here, many things are specified; and at the end there are general words large enough, it is true, to carry any *estate* which the insolvent might have in the premises: But can these general words be sufficient to shew that the trustees were bound to accept a burthensome term, without some act on their part denoting an intention to *accept*. In *Carter* v. *Warne* (*a*) it seems to have been assumed that trustees have a power of accepting or rejecting a term, in the same manner as assignees of bankrupts. That case was relied on by Mr. *Manning* at the trial, as being a strong authority to shew a primâ facie liability. Here, the case was left to the jury, upon the whole of the facts, to say whether, from all that had been done, the plaintiff was or was not led by the defendants to believe that they intended to become his tenants. The Chief Justice, with *Carter* v. *Warne* before him, left this case to the jury in a manner very favourable to the plaintiff.

Manning, in support of the rule. In this case the defendants have passed judgment upon themselves. They at first took a correct view of their own liability, and paid

(*a*) Mood. & Malk. 479, and 4 Carr. & Payne, 191, *suprà*, 4.

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the plaintiff one half-year's rent due at Lady-day, 1833, whereas, if the view of the case upon which they now rely is a correct one, they would not have incurred any personal liability, and the estate of the insolvent would have been charged only with the *quarter*'s rent which became due at Christmas, 1822. It is true that *Carter* v. *Warne* was cited at the trial as an authority for the plaintiff, but it was referred to merely for the purpose of shewing that which was then disputed (but which it can hardly be said to require any authority to support,)—that the general words of this assignment "all his estate and effects," were sufficient to pass *Hawkins*'s interest in these premises. But it is submitted that the analogy which, in *Carter* v. *Warne*, was supposed by Lord *Tenterden* to exist between an assignment under a bankruptcy and an assignment to trustees for the benefit of creditors, was an erroneous impression, which on the spur of the moment arose in the mind of that learned judge, when the ground upon which the election given to assignees of a bankrupt stands was not presented to his notice. An assignment to trustees for creditors operates *at common law*, and passes all that the assignor has power to assign, and that falls within the words of assignment used in the conveyance. It is an established principle of law, that upon the execution of a conveyance, the legal interest in the property conveyed is *in* the party to whom the conveyance is made, without his concurrence and even without his knowledge, and it remains in him until *disclaimer* (*a*). Here, there was, and could be, no disclaimer. The deed was accepted and acted upon. The acceptance of the deed was certified in the most solemn form, by their *executing* the deed; after which there can be no disclaimer. Besides this, a conveyance must be disclaimed *in toto* or not at all. There can be no *partial* disclaimer of a deed,—no acceptance of some of the parcels of the conveyance with a rejection of others. Every pound of tea or sugar sold by the defendants, under the assignment, estops them from

(*a*) *Vide* 4 Mann. & Ryl. 189 n.

denying that the *term* is vested in them. The case of an assignment in bankruptcy is totally different from the common law conveyance to trustees in cases of insolvency. The assignment in bankruptcy is not a conveyance moving from the bankrupt, in whom the property was, but it is a legislative transfer of property *for a specific and limited purpose*, and it is therefore properly held to operate only upon such property as is capable of being applied to that purpose, viz. distribution amongst the creditors who shall prove their debts under the commission or fiat. Upon this ground it has been held, that property which the bankrupt holds only *as trustee* does not pass to the creditors; *Carpenter* v. *Marnell*(*a*). For the same reason, that which is *damnosa hæreditas*, and is therefore incapable of working out any satisfaction to the creditors of the bankrupt, does not pass to the assignees; and it is for the assignees, whose duty it is at the time to possess themselves of all the *available* property of the bankrupt for this purpose, to examine whether any particular property is or is not available.

But even supposing the case of an assignment in bankruptcy and a voluntary assignment to trustees to be exactly parallel, the defendants in this case have done acts sufficient to *determine* their election to accept the tenancy. The assignees of a bankrupt may, without determining their election, take all reasonable steps for the purpose of ascertaining the value of the premises, and of endeavouring to dispose of them; but they can go no further. If they employ the demised premises for any collateral purposes; if they use them as a *shop* for retailing the effects of the bankrupt, or as a *warehouse* for keeping other distinct property, and afterwards as an *auction-room* for disposing of that property,—they use and occupy the premises *as tenants*.

Another criterion which has been resorted to for judging whether assignees of a bankrupt have adopted a lease, is to inquire whether the assignees have so acted as to render

(*a*) 3 Bos. & Pull. 40. And see *ante*, vol. i, 705; iii, 47.

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the premises of less value to the landlord; *Carter* v. *Warne* (*a*). The expression, "of less value," is not used with reference to particular injury done to the premises, as by pulling down walls, &c. but to any thing whereby the landlord's beneficial enjoyment of the property is diminished. Here, if as soon as the defendants had ascertained that nothing was to be obtained from a sale or transfer of their interest as assignees in the tenancy, (which they might have known, and probably did know, before Christmas, 1832,) they had restored the possession to the plaintiff, he might have rendered the property available to himself by re-letting immediately to another tenant. This the plaintiff was prevented from doing by the acts of the defendants,—acts done, not for the purpose of ascertaining the value of the property, or in attempting to dispose of it, but in using it for a distinct, substantive, and collateral purpose.

This, however, is not the case of an assignment in bankruptcy, but a common law conveyance. The words of this conveyance being sufficiently large to carry the interest of *Hawkins* in the tenancy, the position of these parties is precisely the same as if this deed had contained an express assignment of the tenancy, and had contained nothing else. That assignment is followed by actual possession taken by the defendants, through their servant *Jones*. [*Patteson*, J. The legal estate having vested in them, they would be clearly liable in an action of *covenant:* The question here is, whether they can be sued for *use and occupation*.] *Carter* v. *Warne* is no authority to shew that assigns at common law have an option as to accepting or rejecting portions of the property assigned to them, as assignees in bankruptcy have. It was a mere sudden impression at nisi prius, by which the Court is no more to be bound than by the opinion thrown out by the noble and learned judge on the trial of *this* cause, which opinion it is the object of this motion to revise. [Lord *Denman*, C. J. The ruling of Lord *Tenterden* was not questioned.] The only party who could

(*a*) *Suprà*, 4, 5.

have questioned the ruling had no interest in doing so, as, notwithstanding the opinion so thrown out, he succeeded in obtaining a verdict.

LITTLEDALE, J.—I am of opinion that this rule ought to be discharged. I entirely agree with Mr. *Manning*, that if the premises are assigned, the assignee may be charged, unless he disclaims. But the question here is, whether an action for *use and occupation* is maintainable; *Naish* v. *Tatlock* (*a*). The plaintiff is bound to shew an *actual* use and occupation. It is true, that if an actual possession is once begun, the liability will continue, although the parties may cease to occupy. I admit that in the present case the premises were assigned to the defendants; but unless the defendants have taken actual possession, this action cannot be supported; though if the plaintiff had declared in debt, that might have done. Here, however, the question for the jury was, whether the plaintiffs *occupied* under the tenancy. That was a question for the jury. If the defendants *took possession* under the assignment, then use and occupation would lie: But it does not follow that because they enter, they do so under the assignment, although they might be liable in debt as assignees of the term. That was for the jury. I see no fault in the manner in which the case was left to the jury; and I find no fault with the finding of the jury. It ought not to be disturbed.

PATTESON, J.—I entirely concur. It is not necessary to determine whether, as Mr. *Manning* contends, it was necessary for the assignees to disclaim in order to get rid of the tenancy. I do not say that he is wrong, but it is not necessary to determine that point; nor is it necessary to decide whether the opinion of Lord *Tenterden*, in *Carter* v. *Warne*, was wrong. I do not say that it may not be so; though I confess it was new to me that *trustees* could

(*a*) 2 H. Bla. 319.

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elect whether they would take property assigned to them. But upon this point I give no opinion. The ground of my decision is, that this is an action for use and occupation. It is clear that such an action will not lie, unless there has been *actual* occupation (*a*). As to what my brother *Littledale* suggests respecting an action of debt,—perhaps an action of debt might lie. I do not, however, say how that would be. The jury have found that there was no occupation; and, upon the evidence, I think they have so found rightly. I see no misdirection. It was left to the jury to say, whether the defendants had held themselves out to the plaintiff as taking possession as tenants, so as to make him believe that they intended to take the premises as tenants, and whether the plaintiff had so understood it and had accepted the defendants as his tenants. That was a proper question to put to them. If the jury had found that the defendants *had* taken possession as tenants, they would have been liable, independently of any legal assignment. If once the occupation had begun, it could not have been afterwards repudiated. It has been suggested that the question put to the jury ought to have been—whether the acts done by the defendants amounted to an acceptance of a tenancy? That is either a question of law, which could not be put to the jury, or if it is meant as a question of fact—whether the parties so *understood* it,—it is the same as the question which was left.

WILLIAMS, J.—I am of the same opinion. The parties never contemplated that the tenancy was to continue. There was abundant evidence to warrant the finding of the jury. It has been said, that as a matter of law the tenancy vested in the defendants, as the legal consequence of the acts which they have been shewn to have done. However that might be in another form of action, this

(*a*) *Vide Burn* v. *Phelps*, 1 Stark. 327; *Baker* v. *Holtzapfell*, 4 N. P. C. 94; *Bull* v. *Sibbs*, 8 T. R. Taunt. 45.

action cannot be maintained without proof of actual occupation. The case was submitted to the jury more favourably for the plaintiff than perhaps he was entitled to.

Patteson, J.—I had forgotten to mention the case of *Nation* v. *Tozer* (*a*), in which even one of two *executors*, who clearly had the legal estate in them, was held not to be liable to an action for *use and occupation*, in the absence of proof of *actual* occupation.

Denman, C. J.—It is a great satisfaction to me to find that upon further examination it is considered that this case was properly left to the jury; otherwise the defendants, by their liberal conduct, would be fixed with a liability which they had no reason to expect. The plaintiff was landlord; the defendants were assignees of his insolvent tenant. They did nothing to shew that they intended to take the tenancy upon themselves. Mistaking the law, they write a letter in which they state their liability up to Lady-day. The plaintiff ought, in his answer, to have set them right, and to have informed them that they were not liable to pay unless they took possession. This is a most unrighteous attempt to take advantage of very praiseworthy conduct on the part of the defendants. Neither party contemplated a continuance of the relation of landlord and tenant. There was no use and occupation, nor was any thing done by the defendants affecting the property in a manner injurious to the landlord's interest.

Rule discharged.

(*a*) 1 Crompton, Mees. & Rosc. 172, and 4 Tyrwh. 561; *S. C.*; *supra*, 4.

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An overseer is not bound to take precautionary measures against the small pox by causing the poor to be vaccinated. And even if the overseer has, by the direction of the vestry, agreed that the poor shall be vaccinated at the expense of the parish, and refuses to fulfil that agreement, the Court will not grant a criminal information against him; although, in consequence of his conduct, the infection of the small-pox has spread and many of the poor have died.

CAMPBELL, A. G. applied for a rule nisi for a criminal information against an overseer, at the instance of the vestry of the parish, the name of which he suppressed, under the following circumstances. The small-pox having broken out in this parish, it was resolved by the vestry, in order to stop the progress of the disorder, that the poor should be vaccinated, and in that resolution the overseer concurred. To carry the resolution into effect, a medical man was employed to vaccinate the poor at the rate of 1*s.* 6*d.* each, with which arrangement also the overseer expressed himself to be perfectly satisfied. The surgeon came to the parish for that purpose, but the overseer refused to allow him to vaccinate any of the poor on the parish account. After this the infection spread, and a large proportion of the poor in the parish had the disorder. The resolution to vaccinate the poor took place when only one boy was ill of the disorder; since then many had died of it, and several others had suffered very severely.

Campbell, A. G., in support of the motion. The duty of an overseer is to relieve the poor, and if the overseer does not furnish them with relief, he is liable to be called on to answer for his neglect of duty. There can be no doubt that it was the imperative duty of the overseer to provide against this malady. It is a disease which, if taken in its natural form, and allowed to spread, is attended with the most dreadful consequences, but which may be guarded against by inoculation or vaccination. The overseer was fully aware of the probable consequences of this dreadful malady. If he had allowed a reasonable sum to vaccinate the poor, these unfortunate circumstances would not have happened. It was a gross breach of his duty. If the poor are neglected in this way, complaints may naturally be expected from them, but they will not complain if they find that those in whose hands the constitution has placed the means of

affording them relief and protection, exercise that power to provide for their wants and necessities.

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Lord DENMAN, C. J.—These circumstances are extremely unfortunate. No doubt the overseer exercised a very unsound discretion. If he had abided by the opinion he had originally formed, and the agreement he had made, these consequences might have been prevented. But, before we can grant a rule nisi for a criminal information against a public officer, we must see plainly and clearly that the *duty* which he is charged with neglecting is by law *cast* upon him. It is true, that by law an overseer must provide *necessaries* and *relief* for the poor, but is he bound to take *precautionary measures* of this kind? It is beyond question that, if he had provided them, the poor would not have been bound to *submit* to any operations of this sort. If the *legal duty* of the overseer had been clear, the unfortunate consequences which have followed the omission of the performance of that duty would have shewn a case of gross neglect, which would have called for the exercise of the power of this Court: But the first step in the case is not made out to my satisfaction, and I am therefore of opinion that the rule must be refused.

LITTLEDALE, J.—The office of overseer is a statutory office, and the duties of an overseer are pointed out by act of parliament. There is no statute which casts on an overseer this duty, and it does not arise out of the nature of his employment. If it did we might interfere. The poor might refuse to run the risk of any operation.

PATTESON, J. and WILLIAMS, J. concurred.

Rule refused.

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In trespass de bonis asportatis in respect of the removal of several articles, a plea justifying the removal, quia damage feasant, enures as a several plea in respect of each article, and the plaintiff may reply severally.

Thus the plaintiff may traverse the justification as to one article, and as to another he may reply excess.

So, if the plea justifies the removal of goods of a similar description enumerated in different counts, if the identity of the goods in the different counts be not alleged, the plaintiff may reply severally in respect of the articles in each count.

TRESPASS. The first count of the declaration (which was entitled 10th December, 1833,) stated that the defendants, on the 23d July, 1833, broke and entered a certain close and mine of the plaintiff, called Wheal Mines, otherwise &c. &c., situate at Perran-Zabuloe, in the county of Cornwall, and broke to pieces, damaged, and destroyed ten windlasses, ten shafts, and one hundred instruments and articles of machinery and tackle used and employed in and about the working of the said mine, and spoiled and destroyed all the shafts, levels, and works in the said mine, and thereby wholly prevented the plaintiff from continuing to work his said mine, and from using and enjoying the same tam amplo modo.

The second count stated, that the defendants damaged and destroyed certain goods and chattels of the plaintiff, to wit, ten other windlasses, and also seized, took, and carried away certain other goods and chattels of the plaintiff, to wit, ten other windlasses, and converted and disposed of the same to their own use.

The third count stated, that the defendants broke and entered four other closes of the plaintiff, situate in the county of Cornwall.

The pleas were entitled 3d February, 1834.

The third plea was in substance as follows: as to the breaking and entering the close in the said first count mentioned, and in which &c.; and as to the breaking and enter-

The insufficiency of one of such *sectional* replications, demurred to for duplicity in putting in issue the whole plea by a traverse absque *tali* causâ, where in respect of matter of title disclosed by the defendants, the plaintiff should have put in issue a portion only of the plea by traversing absque *residuo* causæ, does not affect the validity of the other replications to the same plea.

Where in trespass de bonis asportatis the defendant justifies quia damage feasant, and the plaintiff replies excess, such replication, if filed before Easter term, 1834, (when the rules of H. 4 *W.* 4, came into operation,) should conclude with a prayer of judgment.

In trespass quare clausum fregit, the defendant sets out a possessory title in *A. B.*, giving colour to the plaintiff, and justifies as servant of *A. B.*, and the plaintiff puts the whole plea in issue, by replying de injuriâ suâ propriâ, absque *tali* causâ:—Such replication is bad for duplicity.

ing the four closes in the last count mentioned, and in which &c., and breaking to pieces, damaging, and destroying the windlasses, shafts, instruments, and articles of machinery and tackle in the first count mentioned; and as to breaking, damaging, and destroying the goods and chattels in the second count mentioned, and seizing, taking, carrying away, converting, and disposing of the same, as in that count is mentioned, the defendants say, that the said close in the first count mentioned, and in which &c., and the said four closes in the last count mentioned, and in which &c. now are, and at the several times when &c. respectively were one and the same close, and not other or different closes; that before any of the said times when &c., to wit, on &c. His Royal Highness *George Augustus Frederick, Prince of Wales, Duke of Cornwall,* was seised in his demesne as of fee, in right of his dukedom, of and in the said close in which &c., and being so thereof seised, afterwards and before any of the said times when &c. by his indenture, sealed with his seal, and made between the said duke and one *Edward Smith,* and in due manner inrolled (*a*) of record in the proper office of the Duchy of Cornwall, and now shewn to the Court here, demised the close in which &c., to *Smith,* habendum to *Smith,* his executors, administrators, and assigns, from the 15th August, 1810, for a certain term, whereof divers, to wit, 70 years are still unexpired. The entry of *Smith,* his death, his will, and a bequest therein of the term to his daughter *Mary,* the wife of *Henry Crease,* the appointment of *Mary* as executrix, the proof of the will by *Mary,* and her assent and election to take the bequest, and the entry of *Henry Crease* into the close, were severally stated. The plea then proceeded thus:—and the said *Henry* and *Mary* his wife, being so possessed, the plaintiff claiming title to the said close in which &c., with the appurtenances, under colour of a certain charter of demise, pretended to be made thereof to him by the said duke

(*a*) As to the inrolment of duchy leases, *vide* 3 Mann. & Ryl. 214, 218, in *Rowe* v. *Brenton.*

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for the term of his life, before the making of the said demise to the said *Edward Smith*, whereas nothing of or in the said close in which &c., ever passed by virtue of that charter, afterwards and before any of the said times when &c., and during the continuance of the said term, to wit, at the several times when &c., entered upon the said close in which &c., with the appurtenances, and was thereof possessed; and thereupon the defendants, as servants of the said *Henry* and *Mary*, and by their command, at the said several times when &c., broke and entered the said close in which &c., in and upon the said plaintiff's possession thereof, as being the close of the said *Henry* and *Mary* as aforesaid; and because the said windlasses, shafts, instruments, and articles of machinery and tackle in the said first count mentioned, and the said goods and chattels in the said second count mentioned, before and at the said times when &c. had been wrongfully put and placed, and were at those times remaining and being in and upon the said close in which &c., and incumbering the same, the defendants, as servants of the said *Henry* and *Mary*, and by their command, in order to remove the said incumbrances from and out of the said close in which &c., a little broke to pieces, damaged, and destroyed the said windlasses, shafts, instruments, and articles of machinery and tackle, and took and carried away the same goods and chattels from and out of the said close, to a small and convenient distance, and there left the same for the plaintiff.

Fourth plea, as to breaking to pieces, damaging, and destroying the goods and chattels in the said second count mentioned, and as to seizing, taking, and carrying away the said other goods and chattels in that count respectively mentioned, and converting and disposing of the same as therein mentioned,—that before and at the said several times when &c., the defendant *Richard Jenkins* was lawfully possessed of a certain close and mine situate in the county aforesaid, and because the said goods and chattels in the said second count mentioned were wrongfully in and upon the said

close and mine, encumbering the same, and doing damage there to the defendant *Richard Jenkins*, he the said defendant *Richard Jenkins*, in his own right, and the defendant *Joseph Oakes*, as the servant of the said *Richard Jenkins*, and by his command, at the said time when &c., seized, took, and carried away the said goods and chattels from and out of the close and mine last aforesaid, to a small and convenient distance, to wit, in the county aforesaid, and there left the same for the plaintiff.

The replication was entitled 11th March, 1834; and as to the third plea, the plaintiff, after protesting that the Duke of Cornwall was not seised, proceeded as follows:

"For replication to so much of that plea as relates to the said trespasses in the said first and third counts mentioned, the plaintiff says that the said duke did not demise unto the said *Edward Smith* as in that plea alleged; and this the plaintiff prays may be inquired of by the country.

And the plaintiff for replication to so much of that plea as relates to the trespasses to a certain *part* of the said goods and chattels in the said second count mentioned, to wit, one windlass, two buckets, and ten pieces of timber, says, that the defendants, at the said times when &c., of their own wrong, and without the cause(*a*) by them in that plea alleged, committed the several trespasses to the said part of the said goods and chattels in the said second count mentioned, in manner and form as in that count is alleged; and this the plaintiff prays may be inquired of by the country &c.

And the plaintiff, for replication to so much of that plea as relates to the trespasses to a certain other part of the said goods and chattels in the said second count mentioned, to wit, forty pieces of timber, forty planks of wood, ten

(*a*) As the protestation overrides this part of the replication as well as the preceding part applied to the first and third counts, it seems to be informal and repugnant to traverse the *whole cause* of justification; as such a traverse involves a denial of the seisin of the *Duke of Cornwall*, which seisin the plaintiff, by his protestation, has *for the purposes of this action* admitted. *Vide ante.*

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planks of timber, and one windlass, says, that the defendants, at the said times when &c., with greater force and violence than was necessary for the removing in that plea mentioned, took and carried away the said last-mentioned goods and chattels, and thereby did unnecessary damage to the plaintiff, and wrongfully and unnecessarily broke to pieces, damaged, and destroyed the said last-mentioned goods and chattels; and this the plaintiff is ready to verify &c."

Replication as to 4th plea.—"That as to a certain part of the said goods and chattels in that plea mentioned, to wit, one windlass, two buckets, and ten pieces of timber, the defendants, of their own wrong, and without the cause by them in that plea alleged, committed the several trespasses to the said last-mentioned part of the said goods and chattels in the said second count mentioned, in manner and form as in that count is alleged; and this the plaintiff prays may be inquired of by the country &c. And the plaintiff, for replication to so much of that plea as relates to a certain other part of the said goods in the said second count mentioned, to wit, forty pieces of timber, ten planks of wood, ten planks of timber, and one windlass, says, that the defendants, at the said times when &c., with greater force and violence than was necessary for the removing in that plea mentioned, took and carried away the said last-mentioned goods and chattels, and thereby did unnecessary damage to the plaintiff, and wrongfully and unnecessarily broke to pieces, damaged, and destroyed the said last-mentioned goods and chattels; and this the plaintiff is ready to verify, &c."

Special demurrer.

Special demurrer to the replications to the third and fourth pleas.

The causes of demurrer to the replication to the third plea were as follows:—For that the said replication does not offer any single or material issue on or in respect of any of the matters stated and set forth in the third plea; that the replication is double, and offers to put in issue several

distinct and issuable propositions in this, (to wit,) that the said replication states that the said duke did not demise unto the said *Edward Smith*, as alleged in the third plea; and also as to so much of the said plea as relates to the supposed trespasses to one windlass, two buckets, and ten pieces of timber, the said replication avers that the defendants, of their own wrong and without the cause in that plea alleged, committed the supposed trespasses, and thereby the said replication puts in issue the seisin of the said duke of the said close in which &c., the making of the demise to *Edward Smith*, the making of the will by the said *Edward Smith*, and his death, that the said *Mary* was his executrix, and that she proved the said will, and elected to take the said term as legatee, and that the said *Henry* and *Mary* became possessed of the said close, and that the defendants, as their servants, and by their command, did the acts justified in and by the said third plea; and also that the said replication to so much of the plea as relates to the supposed trespasses to the said forty pieces of timber, forty planks of wood, ten planks of timber, and one windlass, states that the defendants, with greater force and violence than was necessary for the removing in that plea mentioned, took and carried away the said goods and chattels, and thereby did unnecessary damage to the plaintiff, and wrongfully and unnecessarily broke to pieces, damaged and destroyed the said last-mentioned goods and chattels; and also for that the said replication to so much of the said plea as last mentioned, does not conclude with a proper prayer of judgment, and has not any apt or proper conclusion, according to the rules of law and pleading; and also for that the said replication does not tender or take any single issue upon or in respect of any of the matters alleged in the said third plea.

The causes of demurrer stated to the replication to the fourth plea were as follows:—That the said replication is double, and offers to put in issue several distinct and issuable propositions, instead of one single and issuable propo-

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sition only,—in this, to wit, that the said last-mentioned replication avers, as to part of the goods and chattels therein mentioned, that the defendants, of their own wrong, and without the cause in the fourth plea alleged, committed the supposed trespasses to the said last-mentioned goods and chattels; and as to the other part of the said goods and chattels in the fourth plea mentioned, that the defendants, with greater force and violence than was necessary for the removing in the fourth plea mentioned, took and carried away the said goods and chattels, and wrongfully and unnecessarily broke to pieces, damaged and destroyed the same; and also that the same replication puts in issue the fact that the defendant *Joseph* was the servant, and acted by the command of the defendant *Richard*, as stated in the said fourth plea; and also for that the said replication, as to the said last mentioned goods and chattels does not conclude with any proper prayer of judgment, and has not any proper or formal conclusion according to the rules of law and pleading. Joinder in demurrer, (entitled 19th July, 1834.)

First point: Separability of matter of plea, in a replication.

Butt, in support of the demurrer. These replications are a novel attempt to reply double, and also to reply by separate replications to different parts of a plea. The objections to this mode of pleading are particularly pointed out in the special causes of demurrer; and it may be observed at the outset, that the course adopted by the plaintiff is not sanctioned by the precedents or by any decided cases upon pleading. The third plea is to the whole declaration; it identifies the closes in the first and third counts as being one close only, and after deducing title to the close from the Duke of *Cornwall*, avers that the goods in the first count, and also the goods in the second count, were wrongfully incumbering the close, and therefore the defendants, as the servants of the owner of it, removed them. This plea is in the usual and well established form. The replication to this plea professes, in the commencement of it, to be an answer to the whole plea; and it is then divided into

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three parts; one part as to so much of the plea as relates to the trespasses in the first and last counts; the second, as to so much of it as relates to a part of the trespasses in the second count; and the third part, as to so much of the plea as relates to the residue of the trespasses in the second count. Now, taking this as *one* replication to the plea, it is clearly bad, as putting in issue the seisin in fee of the Duke, the lease to *Smith*, the will of *Smith*, the allegation that the goods in the first and second counts were incumbering the close, and also the other allegations in the plea; and, in addition to this, one part of the replication states that the defendants used more force and violence than was necessary for the removal of part of the goods. This replication comes within the second resolution in *Crogate's* case (*a*), which establishes that where an interest in land or common, or rent out of, or way over, land, is claimed, de injuriâ is no plea. To the same effect is *Hooker* v. *Nye* (*b*), where the plea claimed an interest in land, and de injuriâ was held bad on general demurrer. *White* v. *Stubbs* (*c*) is very like the present case. That was an action of trespass for breaking a chamber, and taking away goods: The defendant pleaded to all, except the taking of the goods, not guilty; and as to the taking of the goods, he justified that before the time of the trespass one *N.* was seised in fee of the said dwelling-house, whereof the said chamber was parcel, and being so seised, demised the dwelling-house to one *B.* for a year next after the feast of St. *John* the Baptist (*d*), in the 20th year aforesaid, who afterwards, on the 20th day of June, in the 20th year aforesaid, assigned his interest to the defendant; by virtue of which he entered and was possessed, and being so possessed, afterwards, to wit, on &c. demised the said chamber in which, &c. to the plaintiff; habendum for a quarter of a year then next following; by force of which demise the plaintiff entered and was possessed: and that the term of the said plaintiff of and in the said cham-

Second point: De injuriâ.

(*a*) 8 Co. Rep. 66 b.
(*b*) 1 Crompt., Mees. & Rosc. 258.
(*c*) 2 Saund. 294.
(*d*) 24th June.

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ber, with the appurtenances in which &c. ended on &c., and that the said goods and chattels *justified* to be taken away, after the end of the said term of the said plaintiff, to wit, on &c., were in the said chamber, in which &c., doing damage there; wherefore the defendant afterwards, to wit, on &c. aforesaid, took and carried away the said goods and chattels. The plaintiff replied de injuriâ generally, which was held to be a bad replication. *Selby* v. *Bardons* (*a*), which has been confirmed, may be cited on the other side; but that case is no authority for the plaintiff. It does not come within the rule in the second resolution of *Crogate's* case, and decides that where several matters make *one defence* (in cases not falling within the rule referred to), de injuriâ is a good replication. A great number of authorities are reviewed in the judgment of the Court in *Selby* v. *Bardons;* therefore it is not necessary more particularly to refer to them.

Third point: Excess.

Then, besides the replication of de injuriâ, the plaintiff has replied *excess* to the third plea; and this is contrary to the rules of pleading: *Cheasley* v. *Barnes* (*b*). *Franks* v. *Morris* (*c*), was trespass for an assault and battery on a given day: Plea, son assault: Replication, de injuriâ: New assignment, that more force than was necessary was used in the defence: demurrer for the same causes as in *Cheasley* v. *Barnes;* and after decision in that case the argument for the plaintiff in *Franks* v. *Morris* was abandoned. If the excess in that case could not be new-assigned, it cannot be *replied* in conjunction with another replication, which goes to the whole plea; and in this case, if the plaintiff were to succeed upon either of the issues raised by the other replications, he would be entitled to judgment on the whole plea generally. The replication of excess is pleaded as to a part of the plea which applies to the second count. That count is for trespass to personal property only; and the rule of pleading is well settled, that to a plea justifying such a trespass

(*a*) 3 Barn. & Adol. 2; 1 Crompt. & Mees. 500.

(*b*) 10 East, 73.

(*c*) Ibid. 87.

the plaintiff cannot reply to the justification and also new-assign (*a*). Nothing turns upon the *form* in which the excess is pleaded in this case, because excess is always in effect a new assignment.

The fourth plea is confined to the second count, and the objections to the replication to this plea will be determined by the decision of the Court on those to the third plea.

Fourth point: Omission of prayer of judgment.

But there is also an objection that a part of the replication to each of the pleas which introduces new matter, (i. e. the excess) does not conclude with a prayer of judgment. The demurrer was filed before Easter term, on the first day of which the New Rules (*b*) came into force,—and indeed, under those rules, where a replication is to a part of a plea only, a prayer of judgment is necessary (*c*). By the old rules of pleading, the omission of a prayer of judgment was a ground of special demurrer, though aided by statute in case of general demurrer; 25 *Eliz.*, and 4 & 5 *Ann.* In all the old books of entries, the replication concludes with a prayer of judgment, according to the nature of the action; and in *Chitty*'s and *Stephen*'s Treatises on Pleading (*d*), it is put that a prayer of judgment is necessary, though it is sufficient to pray judgment generally, without pointing to the *appropriate* judgment. In *Bonner* v. *Hall* (*e*), it was held that a replication praying a judgment which the Court cannot give, occasion a *discontinuance*. *Penred* v. *Chambers* (*f*), *Barnes* v. *Gladman* (*g*), *Pitt* v. *Knight* (*h*), *Dowsland* v. *Thompson* (*i*).

Fourth point.

Dampier, contrà. The objection that there is not a proper prayer of judgment is too late. *Freeman* v. *Moyes* (*k*); *Short* v. *Coffin* (*l*). But assuming that the objection may now be taken, no prayer of judgment is

(*a*) 1 Wms. Saund. 299 a.
(*b*) *Ante*, iii. 1.
(*c*) *Vide ante*, iv. 505.
(*d*) 1 Chit. Plead. 680, 5th edit.; Steph. Plead. 399, 400, 3rd edit.
(*e*) 1 Lord Raym. 338.
(*f*) Cro. Eliz. 256.
(*g*) 2 Levinz, 19.
(*h*) 1 Saund. 96 a, 97; Com. Dig. *tit.* Pleader, (F. 5.)
(*i*) 2 W. Bla. 910.
(*k*) *Ante*, iii. 883; 1 Adol. & Ellis, 338.
(*l*) 5 Burr. 2730.

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necessary. The *declaration* prays for damages. The plea denies the action. The replication affirms that the plaintiff should have his action for damages: that is without adding a prayer for judgment. There are several instances where a party has judgment, without any prayer for judgment; for example,—if there is no plea, and judgment is given for the plaintiff;—if an issue of fact on the plea be found for the plaintiff, who has merely added a similiter, he shall have judgment without any prayer. The omission complained of is of unnecessary form, and if the stats. 27 *Eliz.* c. 5, and 4 *Ann.* c. 16, do not apply to it, a special demurrer will not make it a cause of demurrer. Such an omission before those statutes would not have been cause of error, and therefore is not within them. *Dive* v. *Maningham*(*a*), which occurred in the time of *Ed.* VI., shews that an irregular conclusion was not error. In *Pitt* v. *Knight*(*b*), it was objected that no damages were prayed, and it was held that the omission of the praying of damages was cured by the statute of general demurrer, the 27 *Eliz.* c. 5. In 2 Lev. 19, it was held, that, though a like omission was specially demurred to, yet that the plea was not bad. Hence such an omission is not within 27 *Eliz.*, for if it were, a special demurrer would have touched it. "Many forms" of words, were once substance, as giving the Court jurisdiction;—for example, the words "against the peace," "in custody," &c.; or words which tendered a trial, or offered the other side his due advantage, which are now unnecessary, and the omission of which is immaterial. This prayer of judgment is not necessary. The Court may give judgment as the Court has given it in cases where an *improper* judgment has been prayed; *Rex* v. *Taylor*(*c*); *Gardner* v. *Jessop*(*d*). The *judgment* is the act of the Court, with which the *party* has nothing to do. *Bonner* v. *Hall*; *Bowen* v. *Shapcott*(*e*). But if it be neces-

(*a*) Plowd. 66.
(*b*) 1 Saund. 97.
(*c*) 3 Barn. & Cressw. 512.
(*d*) 2 Wils. 42.
(*e*) 1 East, 542.

sary to have a prayer of judgment, the "&c." will be presumed to contain and refer to it; *Sayer* v. *Pocock*(*a*). In *Penred* v. *Chambers*, which was cited on the other side, there was no *verification* or prayer of judgment in the plea.

As to the alleged duplicity of the replication. The pleadings are in effect as if the declaration had been, 1st, for a trespass to real property; and 2dly, for a trespass to personal property. Though a plea may contain a fact on the issue of which the event of the cause may depend, the plaintiff is not in every case obliged to accept such issue. He is only bound to avoid taking two issues on the plea, on *either* of which the whole of the plea turns.

Such a replication is like one at common law, where the defendant has pleaded several pleas to several parts of the count. The replication must answer every plea, else there would be a discontinuance(*b*). Consequently there may be different issues and different, but not conflicting, judgments.

Webber v. *Tivill*(*c*) and *Trueman* v. *Hurst*(*d*), shew that the plaintiff *ought*, in some cases, to divide the replication, and to reply "to so much of the said plea as attempted to answer the first count, &c." [*Littledale*, J. You should call it a replication to the plea so far as it answered the first count.] The effect is the same in whatever form of words it is conceived. In *Swinburne* v. *Ogle*(*e*), a replication dividing the goods mentioned in the declaration and covered by the plea, was held not to be bad, for that in some cases the replication *must* be double. *Solomons* v. *Lyon*(*f*). *Dowsland* v. *Thompson* does not apply. That was a case of a plea containing more than one answer to a declaration. The defendant has a right to unite(*g*) the two trespasses under one justification, and consequently the plaintiff has a right to sever them in his reply, or he will

(*a*) Cowp. 408.
(*b*) Com. Dig. Pleader, (F 4); Dyer, 182.
(*c*) 2 Saund. 121 b.
(*d*) 1 T. R. 40.
(*e*) 1 Lutw. 240.
(*f*) 1 East, 369.
(*g*) But at the risk of a special demurrer for duplicity, if he allege that the trespasses are the *same*, and thereby seeks to oust the plaintiff of the benefit of replying severally.

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Second point.

be deprived of a right, which he would have enjoyed, had he brought two actions, one for the real, the other for the personal trespass.

In this case the plea is distinguished according to the subject. As regards the trespass to the realty: possession is no answer, for the plaintiff has the possession; *Com. Dig. Pleader*, (E. 21). The title pleaded applies to that trespass, and in the replication that title is *specifically* and not generally denied. As regards the personal trespass: Title without possession is no answer: possession without title is enough. Title *and* possession is superfluous. If the defendant so pleads, and the plaintiff replies generally to the possession, and the *title* be traversed generally thereby, it is the defendant's fault for so superfluously pleading his title in answer to a personal trespass; but as the title is surplusage, it seems that such a traverse does *not* put it in issue. That which has been said shews that the defendant sustains no prejudice by the issue on de injuriâ. Suppose the plaintiff had brought two actions, one for a trespass to the realty, the other for the personal trespass. In the former, the defendant must have pleaded his title, and the plaintiff would have replied non dimisit. If, in the latter, the defendant had pleaded possession, the plaintiff might have replied de injuriâ. The defendant cannot, by superfluously adding a title, deprive the plaintiff of that replication. A defendant is not prejudiced by the plaintiff's having so replied, and if the plaintiff cannot so reply, plurality of actions will be the consequence. But it seems that the title, being only inducement, is not traversable; where title is not inducement, possession is not enough. Com. Dig Pleader, (E. 2.). Hence it follows, that where possession is enough, title is only inducement. *Taylor* v. *Eastwood* (*a*), per *Lawrence*, J. The injury to the goods is *collateral* to the title. *Searl* v. *Bunion*(*b*); *Langford* v. *Webber*(*c*). The several cases which

(*a*) 1 East, 218.
(*b*) 2 Mod. 70.
(*c*) 3 Mod. 132.

have been cited to shew that de injuriâ generally cannot be replied, may be distinguished; for *wherever title is necessarily pleaded, it shall not be generally traversed;* this explains much of the ambiguity in the cases. *White* v. *Stubbs* (*a*), *Cooper* v. *Monke* (*b*), *Hooker* v. *Nye* (*c*), were cases of trespass to the realty, to which possession is no plea; *title* was there the *necessary* justification and de injuriâ was consequently a wrong replication. So in all cases of personal trespass "where defendant pleads in destruction of plaintiff's title," *Taylor* v. *Markham* (*d*), and consequently shews his own *necessarily*, that title cannot be *generally* denied. So where, from the nature of the defence, title and not possession must *necessarily* be pleaded in answer to an action for a personal trespass, the replication of de injuriâ is bad: Such were *Crogate's case* (*e*), *Cockerill* v. *Armstrong* (*f*), and those in *Com. Dig.* tit. *Pleader* (F. 21); for the defendant in those cases justified under a right of common. In a plea justifying under a right of common, the defendant must set out his title, 1 *Wms. Saund.* 346, n. (2); but where the title is mere *inducement*, the general replication is allowed. Rast. Ent. 621. Here, as to the second count, the title is unnecessary, and the replication is therefore good.

As to the replication and new assignment in respect of the goods. The goods in the second count are not identified as the chattels in the first count. Where the plaintiff in the declaration *specifies* his goods, and the defendant apparently covers all by his justification, the plaintiff may reply as above. *e. g.* Trespass for ill-using a black and a white horse:—Plea, damage feasant. The replication may say that the trespass to the black horse was ab initio a trespass, and that the trespass to the white horse was excessive; and if it be said, on the authority of *Barnes* v. *Hunt* (*g*), that the plaintiff *need* not so reply, the answer is, First point.

(*a*) 2 Saund. 294.
(*b*) Willes, 52.
(*c*) *Suprà*, 21.
(*d*) Yelv. 157. And see Cro. Jac. 224, S. C.
(*e*) 8 Co. Rep. 67 b.
(*f*) Willes, 99.
(*g*) 11 East, 451.

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that *there* some part of the trespasses was justified; but, in the case supposed, the plaintiff will be prejudiced; for if he goes for the excess only, he loses his damages in respect of the other horse, and if he confines his replication to the original trespass to that other horse, he loses his damages for the excess; for there can be no second action where the plaintiff does not specify his goods in the declaration, and defendant in his plea apparently covers all. The plaintiff may reply as above, or he will be prejudiced,—*e. g.* trespass for ill-using cattle; plea, damage feasant;—replication as to part, a black horse, de injuriâ,—as to other part, a white horse, excess. *Cheasley* v. *Barnes*(*a*), was *one* trespass to the realty; *Franks* v. *Morris*(*b*) was *one* assault. This action is for destroying plaintiff's goods on *one* day, but as a defendant can destroy twenty parcels of goods in as many places and for as many reasons in one day, those cases do not apply. Unity of *day* does not make unity of *trespass*.

First point.

Butt, in reply. The cases cited are not authorities for the mode of pleading adopted by the plaintiff. The replication, though split into parts, must be taken as *one* replication to each of the pleas, and then an objection to any part will be an objection to the whole. The pleas are treated as if they were *divisible*, like the plea of set-off, but that plea is an exception to the rule of pleading, the different parts of such a plea being considered as different counts in the same declaration, *Dowsland* v. *Thompson*(*c*). No hardship is imposed on the plaintiff by confining him to one replication. The defendant by justifying as he has done has laid himself open to an issue upon any part of his plea, and if issue were taken upon any fact, and he were to fail, he would fail on his plea altogether; for example, if the plaintiff had replied (admitting the title) de injuriâ absque residuo causæ, the defendant would have

(*a*) 10 East, 73.
(*b*) 10 East, 81, n. (*a*).
(*c*) 2 W. Bla. 910; 1 Wms. Saund. 27, n.

been bound to prove that *all* the goods were in the close in which, &c. encumbering it, &c., and if he failed in proving this, and it appeared that *part* of the goods were taken elsewhere, the plaintiff would be entitled to a verdict and judgment generally on his replication. But suppose that all the replications to each plea are allowed, and the plaintiff succeeds on one and fail on the others, how is the judgment to be entered according to the rules of law? Had he succeeded on the one part, if it had been pleaded alone, he would be entitled to his judgment on the plea generally, and this goes to shew the reason of the rule against replying double; it shews that it is not necessary for a plaintiff to do so for the purpose of maintaining his action.

The cases cited to shew that a prayer of judgment is *unnecessary* only go to this extent—that if there be an *informal* prayer, the Court will give the right judgment; but if there be no prayer at all, it is a good objection on special demurrer, *Le Bret* v. *Papillon*(*a*).

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court:—

This was an action of trespass. In his first count the plaintiff declared that the defendant broke and entered the close of the plaintiff called Wheal-Mines, &c., in the parish of Perran-zabuloe, in the county of Cornwall, and broke to pieces, damaged, and destroyed the windlasses, shafts, and machinery employed about the mines, and alleged other trespasses, whereby the plaintiff was prevented from working his mines. The second count stated that the defendants damaged and destroyed certain goods and chattels, to wit, windlasses, and seized, took, and carried away other goods and chattels, to wit, other windlasses. The third count averred that the defendants broke and entered four other unnamed closes.

The defendants pleaded several pleas; the third is as to the breaking and entering the close in the first count men-

(*a*) 4 East, 502.

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tioned, and breaking and entering the four closes in the last count mentioned, and breaking to pieces, damaging, and destroying the windlasses, shafts, and machinery in the first count mentioned, and breaking, damaging, and destroying the goods and chattels in the second count mentioned, and seizing, taking, and carrying away the same; and then it avers that the close in the first count, and the four closes in the last count, are the same, but there is no averment of the identity of the *goods*.

It then alleges, that on the 1st August, 1815, the Duke of Cornwall was seised in fee, in right of his duchy, of the close in which, &c. and being so seised, he by indenture inrolled of record on the same day and year aforesaid, demised the close in which, &c. to *Edward Smith* for a term of which seventy years are unexpired; that by virtue of the demise, *Smith* entered and was possessed, and that on the 4th June, 1830, he died, having first made his will, and given the term to his daughter *Mary*, the wife of *Henry Crease*, and made her executrix; that she proved the will, and assented to the bequest, and elected to take the term, and that she and her husband entered, and were possessed of the close; and that the plaintiff, claiming title to the close under a charter of demise pretended to be made by the Duke of Cornwall for the term of his life, before the demise to *Smith*, whereas nothing passed by that charter, entered into the close in which, &c. and was possessed thereof; and therefore the defendants, as the servants of the said *Henry* and *Mary*, broke and entered the close in which, &c. upon the plaintiff's possession, as being the close of the said *Henry* and *Mary*, and because the windlasses, shafts, and machinery in the first count mentioned, and the goods and chattels in the second count mentioned, had been wrongfully put and placed there, and remained on the close in which, &c. encumbering the same, the defendants, as the servants of the said *Henry* and *Mary*, in order to remove the incumbrance out of the close, a little broke to pieces, damaged, and destroyed the windlasses, shafts,

and machinery, and goods and chattels, and removed the same to a convenient distance from the close.

The replication to this plea is as follows. (His lordship here read the replication to the third plea.)

To this replication the defendants have demurred, assigning the following causes of demurrer. (His lordship here read them.)

The third plea is well pleaded to the whole declaration; and according to the usual course of pleading, the plaintiff might by a single replication have presented a sufficient answer to the whole plea. This he has not done, but on the contrary he has divided his replication into three parts. For though he begins by making one entire replication to the whole plea, he afterwards splits and divides it into parts.

The first, as to the trespasses in the first and last counts.

The second, as to part of the trespasses in the second count.

And the third, as to the residue of the trespasses in the second count.

First point.

And the first question is, can he do so? With the view of considering that, we may leave the third count as to the four closes out of the question, these four closes being identified with the close in the first count. The first count charges the breaking and entering the close and destroying machinery, and the second count is for destroying and carrying away goods and chattels. The defendants, by way of answer, say that the Duke of Cornwall was seised in fee, and demised the close to a person under whom the defendants claim, and that because the goods were encumbering the close they removed them.

The plaintiff has alleged several and distinct trespasses in the first and second counts, and the defendants, though they plead one entire plea which covers the whole, do not aver identity between the windlasses and other things in the first count, and the goods and chattels in the second count; and the defendants not having done so, the plaintiff has a right to treat the plea as if there were separate pleas to the

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first count and the second count, and he has, therefore, a right to treat the plea, as far as relates to the first count, as a separate and distinct thing by itself; and having that right, he has, as to the plea to the trespasses in the first count, denied the demise to *Edward Smith;* which is what he might have done if the defendants had pleaded that plea alone to the first count.

Then as to the plea, as far as relates to the second count, the plaintiff there also may treat the plea as a plea which was pleaded over again to the trespasses in the second count; but here the plaintiff has not only divided the plea applicable to the second count from the plea as to the first count, but he has split this part of the plea into two parts; and as to one part, he replies de injuriâ suâ propriâ, and as to the other, he replies excess. We see no objection in point of law to his doing so, because the goods on which the defendants have trespassed, may, some of them, not have been on the close at all; and such of them as were, they may have treated with more force and violence than was necessary for the removal of them, and if such was the state of things, the plaintiff ought to be permitted to present the facts in his answer to the defendants' plea; and though this mode of pleading may be very uncommon, we see no objection to it in point of law.

Then as we are of opinion that this kind of replication is sufficient, it is next to be considered whether these several replications are correct in point of *form*.

To the first replication there is no objection:—It puts in issue the demise alleged in the plea, and concludes to the country.

As to the replication of de injuriâ suâ propriâ (*a*), we

(*a*) The introductory words "de injuriâ suâ propriâ" are used whether they are followed by a denial of the whole or part only of the matter of defence set up in the plea. In the former case the language of the replication is de injuriâ suâ propriâ, absque *tali* causâ, i. e. the whole cause of defence pleaded; in the latter, the plaintiff, after admitting *part* of the matter pleaded, says, that the defendant committed the trespasses de injuriâ suâ propriâ, absque *residuo* causæ. In ordinary legal language prove the words de injuriâ

have very great difficulty. The general rules as to that are very well understood. If there be several allegations in a plea, there are many cases where a general replication of de injuriâ suâ propriâ is sufficient, but there are others again where it is not. It is quite unnecessary to allude to all the cases cited at the bar; because, with respect to one class of pleas where any *interest* is claimed out of land, there it is clear the general replication is not sufficient. They are mainly illustrative of the rule in *Crogate*'s case (*a*), in which the second resolution is, that where the defendant in his own right, or as servant to another, claims any *interest in the land*, or any common or *rent* going out of the land, or any *way* or *passage* on the land, there de injuriâ suâ propriâ *generally* (*b*) is no plea. And in the present case the defendants justify under persons who claim an interest in the close in question; and if there is nothing more in the case than that, it is quite clear that this general replication could not be supported.

But then it is contended, that if the title be only *inducement*, there the general replication is sufficient. That is certainly so in some cases. In *Taylor* v. *Markham* (*c*), in assault and battery, the defendant pleaded, that at the time when &c. he was seised of the rectory of D. in fee, and that corn was severed from the nine parts, and he came into the ground to carry away the tithes, and in defence thereof, and to hinder the plaintiff from taking them, he stood there to defend them, and the hurt which the plaintiff had was of his own wrong. The plaintiff replied de injuriâ suâ propriâ absque tali causâ, and upon demurrer the plaintiff had judgment, because by his declaration he did not claim any thing in the soil or in the corn, but only damages for the battery, &c. which is collateral. Where the plaintiff makes title in his count and the defendant pleads any matter in destruction of such title, or of the plaintiff's cause of ac-

are used with reference to the *general* denial only.

(*a*) 8 Co. Rep. 66 b.

(*b*) *i. e.* absque *tali* causâ.

(*c*) Yelv. 157.

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tion, then the plaintiff must reply specially, and shall not say absque tali causâ.

The same case is also reported in *Cro. Jac.* 224, and *Brownlow*, 215; and *Hall* v. *Gerrard*(*a*) is to the same effect. This is an action for taking goods.

The case of *Cockerell* v. *Armstrong* (*b*) was an action for seizing and impounding cattle. The defendant pleaded that the bailiffs and burgesses of Scarborough were seised in fee of the place where the cattle were taken; and justified as their servants, taking the cattle damage feasant. There was a general replication de injuriâ suâ propriâ, and held bad, because *title* was put in issue, contrary to the rule in *Crogate*'s case. In *Cockerell* v. *Armstrong* there was an allegation of seisin in fee, and in the present case there is a protestation against the seisin in fee of the king; and then there is a deduction of title ending in possession, but that seems to make no difference in principle(*c*). In *Cockerell* v. *Armstrong* the before-mentioned case of *Taylor* v. *Markham* was urged on the part of the plaintiff, but the Court distinguished between the case of a battery and other cases, and they say that there is a plain difference between the present case and an action of assault and battery, because there, if the party be possessed, even though the plaintiff should have a title to the house or place, it will signify nothing, for his bare possession will justify him even turning the right owner out of the house; whereas here, if the plaintiff has a right to the place where &c. for a right of common &c., it may quite destroy the defendants' plea.

(*a*) Latch, 221.

(*b*) Comyns's Rep. 582; *S. C.* more fully, Willes, 99.

(*c*) In *Cockerell* v. *Armstrong*, the plaintiff sought by his replication to put in issue the whole plea, involving matter of title. In the principal case, the plaintiff, by his protestation, admits the seisin of the *Duke of Cornwall* for the purposes of the present action, and afterwards, disregarding his admission, traverses the *whole* cause or matter of defence, instead of the *residuum* causæ. The replication is, therefore, *repugnant* in itself, unless the admission of seisin be considered so stringent as to reduce the absque *tali* causâ down to an informal absque *residuo* causæ.

The Court there also referred to *Whitnell* v. *Cook* (*a*), but we do not so much rely on that case, nor on *Horne* v. *Lewin*, 1 Ld. Raym. 639, and in several other books, nor on the case of *Jones* v. *Kitchen* (*b*),—as they were cases of replevin, and possibly, in some cases, an *avowry* may be distinguished from a plea in trespass, though in the late case of *Selby* v. *Bardon* (*c*) they were put upon much the same footing.

There are many cases of quare clausum fregit where the same rule has been laid down, but these are plainly distinguishable from trespass for taking away *goods*, and therefore we do not rely on them. The defendants might have pleaded that the persons under whom they claimed were *possessed* of the close, but instead of that they have pleaded *title*, giving colour to the plaintiff, as to the close where the goods were taken. Upon such a plea the plaintiff might have traversed any allegation in the plea forming a step in the title, and which step in that case the defendants would have been bound to prove; and then if they would have been bound to prove any single fact upon a traverse of that fact, they would have to prove the whole of the allegations, if the present replication should be allowed.

We think, therefore, that the general replication is informal and cannot be supported. Then it may be said that if this part of the replication be bad the replication is bad for the whole, according to the case of *Webber* v. *Tivill* (*d*), and the cases in the notes to *The Earl of Manchester* v. *Vale* (*e*); for the beginning of the replication goes to the *whole* of the plea, though it is afterwards split into parts; but on the whole we think that as the replication may be *divided* into parts, each part may be taken as a separate replication, and that therefore the first part of the replication, which is as to the plea as far as it replies to the first and third counts, is good, notwithstanding the defect in that

(*a*) Cro. Eliz. 812.
(*b*) 1 Bos. & Pul. 76.
(*c*) 3 Barn. & Adol. 2.
(*d*) 2 Saund. 127.
(*e*) 1 Saund. 27.

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Plea, "That the defendant did not receive any good or sufficient consideration whatsoever from the plaintiff, for accepting the said bill." Concluding to the country.

Special demurrer, for "That the defendant hath concluded his plea by putting himself upon the country, whereas he ought to have concluded it with a verification, and thereby enabled the plaintiff to take an issue as to whether the defendant did or did not receive any good and sufficient consideration from the plaintiff, for accepting the bill." Joinder in demurrer (*a*).

Though no counsel appeared for the defendant, the Court called upon

Hindmarsh, in support of the demurrer. The usual form of a plea of want of consideration is, "That there was *no* consideration for the acceptance &c." (*b*), but this plea only avers that the defendant did not receive any good or sufficient consideration *from the plaintiff*. Many transactions may form a sufficient consideration for a bill of exchange,

have as yet received the value of no one. Afterwards, I deliver this accepted bill to a broker here (at Orleans) to find a person who will give me the value. To this person I give my order and indorsement, 'value received in cash.' Before my indorsement, the instrument is *not properly a bill of exchange*. It is only by the indorsement which I make in favour of the person who gives me the value, that the *contrat de change* arises, and that it becomes a true bill of exchange."—*Pothier*, Traité du Contrat de Change, No. 10.

In the hands of the drawer such an instrument appears to be rather a *promissory note* than a *bill of exchange*. "Nel vero contratto di cambio si vende il denaro assente." *Casaregi*, Cambista Instruito, cap. 3, s. 51.

And see *Grant* v. *De Costa*, 3 Maule & Selw. 351; *Highmore* v. *Primrose*, 5 M. & S. 65; *Coombs* v. *Ingram*, 4 Dowl. & Ryl. 211; *Clayton* v. *Gosling*, 8 D. & R. 110, 5 Barn. & Cressw. 360.

(*a*) The following points were marked in the margin of the demurrer books.

That the plea does not negative *every* kind of consideration moving *from the plaintiff* to the defendant. Nor does it state the *purpose* for which the bill was given, or explain *why* it was accepted without consideration.

(*b*) As to the sufficiency of such a plea, see *Trinder* v. *Smedley*, *post*, 138; *Easton* v. *Pratchett*, 2 Crompt., M. & R. 542; and 4 Dowl. P. C. 550.

besides a consideration passing between the drawer and acceptor of the bill. For example, the bill may have been accepted by the defendant at the request and for the accommodation of a third person; or it may have been accepted for a bye-gone debt of a third person; and although such a consideration is good, (*Redout* v. *Bristord* (a),) it cannot be said to be negatived by the plea. Although there might be originally no consideration for the acceptance, yet if there was a consideration at any time before the bill became due, that would be sufficient.

As to the second point, that the plea does not state the purpose for which the bill was given, and why it was accepted without consideration as alleged:—This bill is expressed to be for value received, and indeed if it was not so expressed, it imports to be given for value, and the defendant is estopped from denying that it was so given; *Rawson* v. *Walker* (b), *Woodbridge* v. *Spooner* (c), *Hoare* v. *Graham* (d), *Redout* v. *Bristord* (e); and is compelled to plead in confession and avoidance. The want, the failure, or the illegality of the consideration for a bill of exchange, would be a good defence to an action on the bill, but it lies upon the defendant to shew, by his plea, his specific ground of defence.

If a defendant be permitted to state his ground of defence in so general a manner as in this plea, it would seem to be in violation of the old rule against duplicity, and also the new rules of pleading; for "the facts material to the merits of the case would not be brought to the notice of the respective parties more distinctly than heretofore," by means of a notice to prove the consideration.

In *Stoughton* v. *Lord Kilmorey*, in the Exchequer last term, it was held, that a plea similar to this, by the maker of a promissory note, was bad.

(a) 1 Tyrwh. 84.
(b) 1 Stark. N. P. C. 361.
(c) 3 Barn. & Ald. 238.
(d) 3 Campb. 57.
(e) 1 Tyrwh. 84.

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As to the last point, that the plea should have concluded with a verification,

3d. It is a well-established rule in pleading, that when new matter is introduced into a plea, it must conclude with a verification, in order to give to the adverse party an opportunity of answering it. A plea of the want of consideration for a bill of exchange seems to come precisely within this rule; for in a declaration upon a bill of exchange, it is not necessary to aver a consideration, for the law implies it; nor is it so averred in this declaration. The allegation in this plea is therefore *new matter*, and requires a verification. So, in an action to which the statute of limitations is an answer, (which statute it was always necessary to plead,) the declaration is taken primâ facie to be for a cause not barred by the statute, although it is not so stated, the defendant, in a plea of the statute alleges matter in answer to that implication, and therefore the plea must conclude with a verification. So in an action upon a guarantee, it is taken primâ facie to be an agreement in writing, and complying with the requisites of the statute; and a plea of the statute of frauds is always *averred*. So the pleas of ne unques executor, and nil habuit in tenementis must be averred; and even a plea of nul tiel record ought to conclude with a verification; *Sandford* v. *Rogers* (*a*). And it seems that this plea does not come within the rule, which says, that a negative need not be averred; for that rule means, that where a party contradicts or denies the allegation of the opposite party, (*whether that allegation affirm or deny any fact*,) the party so contradicting must conclude to the country. And it is a rule, that if a plea may have an answer to it, it shall not conclude to the country, for the defendant cannot take away the liberty of answering it. *Com. Dig. Plead.* (E. 32.) In this case, instead of simply denying the allegations of the plea, the plaintiff might (as in *Low* v. *Burrows*(*b*),) in his replication have set out the consideration in respect of which the bill was *given*.

(*a*) 2 Wils. 113. (*b*) *Ante*, iv. 366, cited 1 Mood. & Rob. 381.

By the COURT.—There must be judgment for the plaintiff. The plea is without meaning.

Heaton appeared on a subsequent day for the defendant, and admitted that the plea could not be sustained.

Judgment for the plaintiff (*a*).

(*a*) This plea appears to be clearly bad upon *general* demurrer, because the allegation, that at the time of the acceptance there was no consideration from the plaintiff to the defendant, is consistent with the existence of other valid considerations.

The special cause of demurrer seems not to be well founded. A plea which merely negatives some matter which is contained in the declaration ought to conclude to the country. And it is immaterial whether such matter is expressed or is necessarily implied; *Gilbert* v. *Parker*, 2 Salk. 625, and 6 Mod. 158; *Jefferson* v. *Martin*, 2 Wms. Saund. 9, note 14.

Supposing that this had been the case of a plea of general and entire absence of consideration, and that such a plea were good, it would therefore seem that the defendant ought to conclude his plea to the country, as amounting to a traverse of an *implied* allegation of the existence of consideration. *Seal* v. *Crowe*, 3 Lev. 164; *Veale* v. *Warner*, 1 Wms. Saund. 327, n. (1); *post*, 44, (*b*).

And even where *new matter* is introduced, yet if the new matter is such that the plaintiff cannot without a departure, reply to it in any other way than by re-asserting that which is either expressly or impliedly contained in the declaration, the plea ought to conclude to the country.

But supposing in this case that the plea was improperly concluded to the country, and that the defendant ought to have afforded the plaintiff an opportunity of replying specially to the plea, the mode of giving that opportunity would have been by concluding with a prayer of judgment, without expressing a readiness to verify (i. e. to *prove*) a negative. In pleading the statute of limitations in assumpsit, the proper form is, "the defendant did not undertake or promise within six years next before the commencement of this suit, wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him." It is not however unusual, in spite of the rule clearly laid down in Co. Litt. 303, to see the words, "and this he is ready to verify," inserted before the prayer of judgment. This appears to have arisen from not recollecting, that though a verification ought always to be followed by a prayer of judgment, it is not true, e converso, that a prayer of judgment must, or properly can in all cases, be preceded by a verification.

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The KING *v.* The Archdeacon of LITCHFIELD and COVENTRY.

A rule for a a mandamus to the archdeacon to administer the oath of office to a churchwarden, is absolute in the first instance, where there is no rival candidate, and no reason assigned for the refusal to administer the oath.

M. D. HILL applied for a mandamus, to be directed to Archdeacon *Spooner*, commanding him to swear in Mr. *Gutheridge*, who had been elected to the office of churchwarden of the parish of St. Martin, Birmingham.

Gutheridge had been duly elected, and had attended at the proper time and place to be sworn in, when the Archdeacon refused to administer the oath. [Lord *Denman*, C. J. Is there any rival candidate?] It does not appear that there is, nor is it stated that any reason was given for the refusal. If there was a rival candidate, it was the duty of the Archdeacon to swear-in both parties, that the right might be contested elsewhere. [Lord *Denman*, C. J. What was the ground of refusal?] It is not known.

The COURT granted the rule absolute in the first instance.

FARLEY and others, Executors, &c. *v.* JOHN BRIANT and others.

To maintain an action of debt on the 3 (or 3 & 4) *W. & M.* c. 14, against the heir and devisee, it is necessary that a debt should have accrued to the plaintiff in the life-time of the devisor.

DEBT, on the statute 3 (or 3 & 4) *Will. & Mary*, c. 14, by the executors of Sir *Thomas H. Apreece*, Bart., against the heir and surviving devisees of *John Briant*.

The declaration stated, that in the life-time of Sir *Thomas*, by indenture of 19th Sept. 1819, made by Sir *Thomas* of the first part, one *Jenkins* of the second part, and *John Briant* deceased, as surety for *Jenkins*, of the third part, Sir *Thomas*

In debt against the heir and devisee, under 3 (or 3 & 4) *Will. & Mary*, c. 14, if the declaration does not shew that the cause of action accrued in the life-time of the devisor, and the defendant pleads that before the cause of action accrued the devisor died, and the plaintiff demurs, the defendant is entitled to judgment, on the ground that either the declaration is defective in not alleging that the cause of action accrued in the life-time of the devisor, or that if such an allegation is to be implied, the allegation is material, and is well traversed by the plea.

leased to *Jenkins* certain messuages and lands for fourteen years, if Sir *Thomas* should so long live, yielding and paying 590*l.*, to be paid quarterly,—and 50*l.* for every acre of meadow or pasture ground which *Jenkins* should plough up,— and 20*l.* for every acre of arable land which should be sown with any sort of grain more than two years successively, without being summer-tilled or fallowed every third year, in the manner thereinafter mentioned,—and 20*l.* for every acre of meadow or land sown with artificial grass which should be cut for hay oftener than once,—and 20*l.* for every acre of land sown with turnips or cole-seed, which should not be eaten off by sheep or cattle,—and 20*l.* for every acre of land managed contrary to the covenants thereinafter contained. And *Jenkins* and *Briant* for themselves jointly and severally, and for their several and respective heirs, executors, administrators, and assigns, covenanted with Sir *Thomas* that they or one of them, and their heirs, executors, administrators, or assigns, would, from time to time, and at all times thereafter during the term, pay the said rent of 590*l.*, and the additional rents thereby reserved; and *Jenkins* covenanted to pay the taxes. The declaration then set out covenants on the part of *Jenkins* to cultivate the land in a particular manner. Averment, that Sir *Thomas* died on the 27th May, 1833.

Breach, first, that 295*l.* for two quarters' rent was in arrear. Secondly, that *Jenkins* had not cultivated the farm according to the mode of cultivation required by the lease.

Averment, that "after the making of the indenture, and during the continuance of the said term, to wit, on the 1st day of August, 1823, the said *John Briant* died, having, by his will, duly attested to pass real estate, bearing date on a certain day, to wit, the 19th November, 1822, devised certain of his lands and tenements to the defendants *M. B.*, *W. H. B.*, and *C. B.* and to one *W. B.*, since deceased, which lands and tenements the said *John Briant* had power so to dispose of. By force of which devise the defendants *M. B.*, *W. H. B.*, and *C. B.* and the said *W. B.*,

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became and were devisees of the said *John Briant*, of such his lands and tenements. Whereby, &c.(*a*)

Second plea. That Sir *Thomas* in his life-time, and at the time of his death, was not a creditor of the said *John Briant*, having a just debt due and owing to him from the said *John Briant*, at any time during the life-time of the said *John Briant*, upon or by virtue of any bond or other specialty within the meaning of the statute; concluding to the Court.(*b*)

Third plea. That before any part of the said rent in the said first count mentioned accrued due, as in that count mentioned, and in the life-time of Sir *Thomas*, the said *John Briant* died; and concluding to the Court.

Special demurrer, assigning for causes of demurrer to the second plea,

That the plea does not consist of allegation of matter of fact, the existence of which may be tried by a jury on an issue, or the sufficiency of which, as a defence, may be determined by the Court on demurrer.

That the plea has not traversed or denied, or confessed and avoided, any of the causes of action in the declaration mentioned. And that the plea is not a statement of facts but of argument, as to whether or not Sir *Thomas*, in his life-time, and at the time of his death, was a creditor of the said *John Briant*, having a just debt due and owing to him from the said *John Briant*, during the life-time of the said *John Briant*, *within the true intent and meaning of the statute* in such case made and provided; and it may be legally inferred only from the said declaration, that Sir *Thomas* was a creditor of the said *John Briant*, having a just debt due and owing to him the said Sir *Thomas* from

(*a*) There was a second count, which it is not necessary to notice.

(*b*) As this plea could be good only as traversing a fact impliedly alleged in the declaration, it would appear to have properly concluded to the country. *Vide Seal* v. *Crowe*, 3 Levinz, 165; *Veale* v. *Warner*, 1 Wms. Saund. 327, (1); *ante*, 41, n.

the said *John Briant*, during the life-time of the said *John Briant*, by virtue of the said specialties in the said declaration mentioned. And also for that the said plea puts in issue matter of law—as to Sir *Thomas*'s being a creditor within the true intent and meaning of the statute.

The causes of demurrer to the third plea were, that it did not consist of matter of fact, but of argument and legal inference only, as to whether or not the death of *Briant*, before any part of the debt in the first count mentioned accrued due in Sir *Thomas*'s life-time, would be a sufficient answer and defence to the causes of action in the first count. And also for that the said third plea neither confessed and avoided, nor traversed or denied, the causes of action in the first count mentioned. And also for that it put in issue matter of law.

Joinder in demurrer.

This case was argued in last Easter term.

Stephen, Serjt., (with whom was *De Saumarez*,) in support of the demurrer. This action is founded on 3 (or 3 & 4) *Will. & Mary*, c. 14, and the principal question to be determined is, whether the heir and devisees of the covenantor are liable, although the breaches of covenant occurred after the decease of the covenantor. This is a case within the statute, and the death of *Briant* makes no difference. The operation of the act is not confined to cases where the debt is due in the life-time of the covenantor. The wording of the act is very material to the decision of this question. The preamble is, "Whereas it is not reasonable or just that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless, it hath so happened that where several persons *having by bond or other specialty bound* themselves and their heirs, and have afterwards died seised in fee simple of and in manors, &c., have, to the defrauding of such their *creditors*, by their last wills devised the same in such manner as such creditors have lost their said debts." It is

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true the act speaks of *creditors*, but what is meant by that expression, is shewn by the context, which limits the application of the term "creditor" to the creditor of a person *bound by bond or other specialty*. It is not necessary that the relation of *debtor and creditor* should attach in the life-time of both parties. There may be a debitum in præsenti solvendum in futuro. In this case there is a sum due for rent, which *Briant* covenanted absolutely to pay; it *might* become due in his life-time,—it did become due after his death. What was the fraud which the statute was intended to remedy? That of a person having real estate devising his land and not paying his specialty debts. *Briant* is a debtor at the time when the act of parliament is resorted to. [Lord *Denman*, C. J. It seems strange that in *Wilson* v. *Knubley*(*a*) the plaintiff did not declare in *debt* instead of covenant. *Littledale*, J. If the covenant was not broken in the life-time of *Briant*, the executor might pay the simple contract debts.] After breach of the covenant, and notice, the executor could not safely pay the simple contract debts. In *Wilson* v. *Knubley* the action was in covenant, as there was no stipulation for a penalty in that case, and no rent was due. This case gave rise to Sir *Edward Sugden*'s act(*b*), which shews the mischief of rigidly construing acts of parliament. [*Patteson*, J. In *Wilson* v. *Knubley* the objection was entirely technical, and turned upon the form of the action.] In this case that difficulty is avoided, and nothing remains but the question whether this is within the meaning, the justice, and policy of the act of parliament. There is no doubt that this action would lie against the heir, if the devisees had not been joined. In *Viner*'s Abridgment, *title* Heir (A.) it is said, "If a man grant, for him and his heirs, to *B.* for years, an annuity to him after the death of *A.* the grantor, though *A.* himself could never be charged upon this grant, inasmuch as it is to be paid after his death, yet, inasmuch as he binds himself and his heirs, his heir shall be charged if he has as-

(*a*) 7 East, 128. (*b*) 1 *Will.* 4, c. 47.

sets." This case in *Viner* is far stronger than the one under discussion, as the grantor in that case never *could* be liable. The intention of the statute, was to give creditors the same remedies against devisees which they previously had against heirs. *Plasket* v. *Beeby*(*a*), which may perhaps be relied on contrà, does not shew that such was not the object of the framers of the statute. It was held, in that case, that a devisee could not, like an heir, pray the parol to demur during his nonage, because that was a privilege to the heir on account of his being in ward. Wherever a party is bound by a personal covenant, his *executors* may be sued upon it. This shews that a breach of a personal covenant, at any period, constitutes a debt *of the testator*. In *Plumer* v. *Marchant*(*b*) there was a covenant that the covenantor would by his will, or that his executors or administrators would, six months after his death, pay and deliver out of his personal estate 700*l*. unto the defendant and another person, and for the performance of this the covenantor bound himself in a penal sum. The controversy in the case was, whether this was a *debt*, and the Court held it to be such, and that the covenantor's administrator, who was also one of the covenantees, might retain assets to satisfy it. That was a case of much greater difficulty than the present. The Court in fact decided, that the *covenant* constituted a *debt* of the intestate. Here, *Briant* expressly covenants to pay the rent. In *Ex parte Tindal*(*c*), a party covenanted to pay a sum of money within twelve months from the time of his decease:—This was held to be a *debt*. Yet it was a *covenant* to pay on a contingent event. In this case there is no contingency(*d*). In *Westfaling* v. *Westfaling* (*e*), Lord *Hardwicke* put a liberal construction on this act. This Court ought to construe the statute with like liberality.

(*a*) 4 East, 485.

(*b*) 3 Burr. 1380.

(*c*) 1 Moore & Scott, 607; 8 Bingh. 402; 1 Mont. 462; 1 Mont. & Mac. 415; 1 Deac. & Chit. 291.

(*d*) There was uncertainty as to time, but not, strictly speaking, a "contingency."

(*e*) 3 Atk. 460.

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The second and third pleas are also defective in point of *form.*

The second plea states, that Sir *Thomas* was not a creditor of *Briant,* having a debt due to him from *Briant,* at any time during *Briant's* life-time, upon any specialty *within the meaning of the statute.* This is an allegation of a mere matter of law. If the declaration is laid aside, it is a mixed allegation of law and fact; but taking the plea in connection with the declaration, it is an allegation of a mere matter of law. It does not appear from the date of the facts, as stated in the declaration, that the breaches of covenant occurred after the decease of *Briant;* and the day mentioned in the declaration, although stated under a videlicet, is to be taken as the true day; *Bissex* v. *Bissex* (*a*), *Skinner* v. *Andrews* (*b*). The plea should have averred as a fact, that the breaches occurred *after* the death of *Briant.*

The third plea is an indirect denial of what is asserted in the declaration, and should not have concluded to the Court. It neither traverses nor confesses and avoids the matter stated in the declaration.

The plaintiff had also demurred to the 8th and 11th pleas; but the Court desired that the argument on the demurrer to those pleas might be postponed (*c*), as it might be unnecessary to consider them, and called upon the counsel for the defendant to argue upon the general question raised by the pleadings.

R. V. Richards contrà. The question is, whether *Briant* can be considered as a *debtor,* within the meaning of the act of *William & Mary.* There is a great distinction between the liability of the heir and that of the devisee. The former is liable at common law, the latter by the statute. The liability of the latter must depend therefore entirely upon the construction of that statute. From the preamble, it appears that the intention of the

(*a*) 3 Burr. 1729. (*b*) 1 Wms. Saund. 169. (*c*) *Vide post.*

statute was to prevent fraudulent debtors from devising away their land, and to give to creditors the same right as they had previously to the statute of wills. Was then *Briant* a fraudulent debtor? If he never was in such a situation that he could be sued, he was not a *debtor*. There was no debt due until the rent was in arrear. Sir *Thomas* might have died, or have evicted the tenant, and no rent might, therefore, have become due. This covenant is consequently not similar to one for payment of money on a certain day. At what period was *Briant* a debtor? He was only liable on the default of *Jenkins*, and that default did not happen until after his death. But it is said, that the Court will put a liberal construction on the statute. The Court hitherto has construed it strictly. Of this *Plasket* v. *Beeby* is an example. That was an attempt, by a liberal construction of the statute, to place the heir and devisee on the same footing; which the Court refused to sanction. In *Wilson* v. *Knubly* also, a strict construction was put upon the act. That case is likewise an authority to shew, that to bring a devisor within the meaning of the act, there must have been a debt due from him in his life-time. The decision itself probably only amounts to this, that an action of Covenant does not lie against the devisee upon the statute; but if the language of the judges in that case be examined, it will be seen that they were of opinion that the statute did not apply, unless there was a debt due from the devisor in his life-time. *Lawrence* J. says, "In the very preamble it speaks of the practice or contrivance of *debtors* to defraud their *creditors* of their just *debts*, by devising away their lands, &c. in such way and in such manner as such *creditors* have lost their said debts;" and his lordship adds, "All through it speaks of debts, which must mean *existing debts*." As between principal and surety there is no *debt*, until by the default of the principal the surety is damnified; *Welsh* v. *Welsh* (*a*), *Fla-*

(*a*) 4 Maule & Selw. 333.

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nagan v. *Watkins* (*a*), *M'Dougal* v. *Paton* (*b*), *Alsop* v. *Price* (*c*), *Ex parte Adney* (*d*), *Goddard* v. *Varderheyden* (*e*). No *debt*, therefore, existed between *Jenkins* and *Briant* in the life-time of *Briant*, as *Briant* was not damnified during that period; and consequently no debt existed between Sir *Thomas* and *Briant*, as the latter was liable only on the default of *Jenkins*. No authority has been produced to shew, nor does any exist, that this statute applies to *contingent* debts. [*Littledale*, J. Suppose a bond had been given by *Briant* for the payment of this rent, and the performance of the covenants by *Jenkins*, would there not have been a debt before any breach of the covenant. *Coleridge*, J. In that case *Briant* would have *acknowledged* himself to be indebted.] This is a mere covenant, and contains no such acknowledgment. [*Coleridge*, J. The statute was intended to prevent *fraudulent* devises. A devisor knows what his own debts are, but how is he to ascertain *contingent* debts of this description? According to the argument for the plaintiff he is *debtor* to the whole amount of his *liability*.] If devisees in cases of this sort are to be considered liable, when is that liability to cease? Are they to remain for ever liable, even when they have parted with the land devised?

As to the third plea:—[*Littledale*, J. That plea could not possibly have concluded to the country. It contains a new fact quite inconsistent with the declaration.]

Stephen, Serjt., in reply. It is said that there is difficulty in predicating that *Briant* was a *fraudulent debtor*. *Briant* was guilty of fraud, not only in contemplation of law, but also in point of fact. He was aware that he had entered into this engagement, yet by his will he has made no provision for the payment of his debts. [*Coleridge*, J.

(*a*) 3 Barn. & Alders. 186.
(*b*) 8 Taunt. 584.
(*c*) 1 Dougl. 160.
(*d*) Cowp. 460.
(*e*) 3 Wils. 262.

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Is not that assuming that *Briant*'s liability extended beyond his life?(*a*)] Then it is said that there is no existing debt between principal and surety, until the latter is damnified by the default of the former. This may be granted, since it is not contended that *Briant* was a debtor at any period during his life, but that he became a debtor after his death by contemplation of law. All that *Ex parte Tindal* and that series of cases shew is, that *Briant*, in case *Jenkins* had become bankrupt, having up to that time paid the rent and performed the covenants, could not have made oath, under the commission, that *Jenkins* was indebted to him on account of his *contingent* liability. The fallacy of the argument on the other side is, that it assumes, that in order to constitute the relation of debtor and creditor, a debt must be due in the life-time of both debtor and creditor. It has also been assumed, that *Briant* was *surety* for *Jenkins;* in truth both are *principals* (*b*). The objection to the third plea is not that it does not conclude to the country, but that it neither traverses nor confesses and avoids the matter in the declaration.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court as follows:—

This was an action of debt founded on 3 *W. & M.* c. 14, by the executors of Sir *Thomas Apreece* against the heirs and devisees of *John Briant*. It appeared by the declaration, that the defendant (who was described as a surety for the lessee) had joined in the covenants of a lease for years granted by Sir *Thomas Apreece* to one *Jenkins*, determinable on the death of the lessor. A yearly rent of 590*l.* was reserved, and also several penal rents to a large amount, to arise conditionally on the cultivation of the land in particular specified modes. Breaches were assigned in respect of both classes of covenants. Several pleas were pleaded,

(*a*) As against the *personal* estate it would so extend. (*b*) *Ante.*

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but we were only called upon to consider the second and third, and it is only necessary for us now to consider the latter. This plea stated, that before any part of the debt in the declaration mentioned accrued due and in the life-time of Sir *Thomas, Briant* died; concluding with a verification. This plea was specially demurred to; and it was objected that it contained only an indirect and argumentative denial of the facts alleged in the declaration, that it put in issue a matter of law, and was improperly concluded with an averment. But the substantial question between the parties was, whether the case, as it appeared on the record, was within the statute on which the action was brought. Upon this point it was contended for the plaintiff, that although it were to be taken that no breach of covenant had occurred in the life-time of the testator, still, that upon that liberal interpretation of the statute which the Court ought to make, the testator must be considered as having been debtor in his life-time to the covenantee; that the words of the preamble applied not merely to persons owing money in their life-time, but to those who had "bound themselves and their heirs by bonds or other specialties;" and that the relation of debtor and creditor might exist, although no money were actually payable at the time, and although even it might be contingent, whether any would ever become payable. In support of this argument analogies were relied on from the liabilities of executors, and from the bankrupt laws.

The decisions upon the statute are not numerous, and there is none directly applicable to the present case. Neither do they lay down any other rule for construing it than such as we should be bound to follow on general principles; namely, that of ascertaining the mischief intended to be remedied, and advancing the remedy so far as the words of the enacting part will, by a fair interpretation and without any straining, enable us to go.

The mischief described in the preamble is, that by the practice or contrivance of debtors, creditors were defrauded

of their just debts; that it often happened that persons who had bound themselves by bonds or other specialties, by their last wills devised their lands or disposed thereof in such a manner that such creditors had lost their debts. For remedying which, "and for the maintenance of just and upright dealing," the statute first avoids all wills, &c. of such lands as against such creditors; and next, in order to enable "such creditors to recover their said debts," enacts, section 3, that, in the cases before-mentioned, "every such creditor may maintain his action of debt upon his bond or specialty against the heir at law of such obligor and such devisee jointly."

It is at least clear upon these words, that in order to bring a case within the statute, the relation of *creditor* and *debtor* (in whatever sense we understand those words) must exist between the plaintiff and the devisor, in the life-time of both. In the present case, *John Briant* had become liable for the performance of covenants by another man; no payment would be due from him,—he would not be indebted either in ordinary parlance, or in ordinary legal language, until there had been a breach by his principal. No such event happened in his life-time. Some other meaning, therefore, than that which ordinarily attaches to the words creditor and debtor, must be resorted to, in order to support this action; and accordingly it is said that to advance the remedy given by the act, we ought to hold that a man becomes *indebted* the moment he has made himself *contingently liable* for the breach of any covenant; as from that moment it becomes a legal fraud in him so to dispose of his lands by will as to prevent the covenantee from having recourse to them, and as from that moment the land becomes indebted. The latter of these reasons appears to be an argument in a circle, for the land is not indebted or bound to the discharge of the future demand in such a sense as to prevent its alienation by devise, unless the owner was indebted in his life-time within the meaning of the statute. This latter proposition, therefore,

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cannot be proved by the former. With respect to the argument, that a devise under the supposed circumstances is a legal fraud; in order to be satisfied of that, it is not enough that we should think that the remedy would have been more complete if it had been extended by apt words to such a case, but we ought to have almost *irresistible* evidence of the intention of the legislature to control the general power of disposition by devise to this extent, before we shall be warranted in affixing to the language used any other meaning than it would bear in ordinary parlance or common technical acceptation. Upon this point some information may be derived from the case of *Wilson* v. *Knubley* (*a*). This Court there thought it safe to collect that intention of the legislature, to which alone effect would be given, from the language of the enacting part of the statute; they thought, therefore, that it pointed to a distinction between *debts* strictly so called, and *damages* arising from the breach of covenant. *Grose* J., says, that a mere breach of covenant cannot be considered a *debt*. *Lawrence*, J., says, "although it speaks of *debts*, which must mean existing debts," and observes that the damages there sought to be recovered, "never could be considered as a debt due from the testator at the time of his death, within the meaning of the act." *Le Blanc*, J. says, "They only contemplated what were *debts* strictly so called, and did not mean to extend the remedy against devisees, to the recovery of *damages* for breaches of covenants or contracts made by their testators." That case therefore, which determined that an action of Covenant could not be brought upon this statute against the devisee, proceeded as much upon the presumed *intention* as the mere *letter*. In the present case, the damages for the breaches of covenant declared on are liquidated, and therefore in form may be sued for in an action of debt; they are not the less in substance damages; nor in the

(*a*) 7 East, 121.

present case is it to be forgotten that the testator was a *surety*, whose eventual liability was *contingent* only on the future default of his principal. The substance of the testator's contract was to secure to the lessor the performance of the covenants by the lessee.

It was said, however, that wherever a testator is bound by a personal covenant the *executor* may be sued,—and that as he is only answerable for the *debts* of the testator, this implies that the testator's liability on his covenant constitutes a *debt* existing in him in his life-time. In support of this position, *Plumer* v. *Marchant* was cited, in which case it was held, that the trustee of a marriage settlement containing a covenant by *P. M.*, that he should by his last will, or that his executors, &c. should within six months after his death, pay 700*l.* to the trustee on certain trusts, might after *P. M.*'s death, and becoming his administrator, retain the sum of 700*l.*, and give such retainer in evidence under plene administravit to an action of Debt on the intestate's bond. The reason of this decision is clear: If the trustee had not also been administrator, he might have sued the person filling that character on this covenant; it followed therefore, that filling *both* characters himself, he had a right to retain the amount. The *retainer* was an actual *payment* of it, and an administration pro tanto of the assets; but this decides nothing applicable to the present question; the executor is the general representative of the testator, as to his personal contracts, whether the breach accrue in the life-time of the testator, or after his death; whether after breach the sum due be called a *debt*, or the *penalty* of a broken *covenant*, are indifferent matters. In the case cited, the instant *P. M.* had died intestate, the 700*l.* was a liquidated debt due from the representative to the trustee, the payment of which indeed might in ease of the estate be delayed for six months, but which the representative would have been justified in *paying*, and therefore was justified in *retaining* instanter. In the principal case, the liability of the *devisee* is created

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wholly by the *statute*, and is not founded on the same principle, nor can it be carried to the same extent as that of the *executor*.

Another case was cited of *Ex parte Tindal* (*a*), in which it was held, that to covenant that a sum of money should be paid to trustees within twelve months after the decease of the covenantor, on certain contingencies, was to contract a *debt* payable on a contingency, within the meaning of the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 66, for the valuing and proving of contingent liabilities under the bankrupt laws. This also appears to us wholly inapplicable to the present case. Under this section, the issuing of the commission is the analogous point to death under the 3 *Will. & Mary*, cap. 14, and both the letter and spirit of the section point to a liability which, at the date of the commission, not only has not yet become ripe, (so that an action can be maintained on it then,) but to one which rests in uncertainty whether it may ever attach at all. Such a future and contingent liability the legislature has brought within the range of the bankrupt law, and in so doing has called it a *debt*. But for the statute, it is obvious that the covenantor, in the case cited, could not have been considered a debtor to the covenantee; for not only no action of Debt, but no action at all, could ever have been maintained against him. And as regards the parties themselves, the law would remain the same after the statute: Though the statute calls it a *debt*, none of the legal incidents to the relation of creditor and debtor exist as between the parties. The decision therefore of the case cannot be extended to help the present argument for the plaintiff: it is merely the construction of those words taken with their context, and with reference as well to the manifest intention of the section itself as the general policy of the bankrupt law. The plaintiff therefore has failed to satisfy us that we ought to construe the words of this statute in any other than their

(*a*) *Ante.*

ordinary meaning; and we think that the remedy given by it applies only where a *debt*, in that sense, exists between the parties in the life-time of both.

With respect to the pleas, it is enough to say that if the declaration be taken as affirmatively alleging that any part of the debt mentioned in the declaration accrued due in the life-time of *Briant*, the third plea appears to us to traverse that allegation with sufficient directness. On the other hand, if the declaration does not do that, it is substantially defective, and it becomes unnecessary for the defendants to have recourse to *any* plea.

As to the objection that the third plea is improperly concluded with a verification; that, if available at all, ought to have been specially assigned, and having not been so, the plaintiff cannot now avail himself of it. We think therefore there must be judgment for the defendant on the third plea (*a*).

Judgment for the defendant (*b*).

On a day (in Easter term,) subsequent to the hearing of the above argument, but before the delivering of the judg-

(*a*) This plea being pleaded to the whole action, the plaintiff would be wholly barred by this judgment.

(*b*) The *effect* of the judgment seems to be different, according as the declaration is held to be sufficient or not. If the judgment proceed merely on the sufficiency of the plea, then the truth of the plea being admitted by the demurrer, the judgment would estop the plaintiff from alleging, in a new action, that the cause of action arose in the life-time of the devisor. On the other hand, if the judgment proceed merely on the insufficiency of the *declaration* in omitting the averment of the cause of action having accrued in the life-time of the devisor, (that omission not being considered as cured or rendered immaterial by the plea,) the judgment for the defendant would be no bar to a second action. In this view of the case it would be material to consider in what way the judgment should be entered up. If the judgment purport to proceed on the insufficiency of the declaration, when in point of law the declaration is not insufficient, or the defect has been cured by the plea, then the judgment would seem to be reversible by the de-

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ment, *Stephen*, Serjt., proposed to argue demurrers to the eighth and eleventh pleas. He contended that it was necessary for him to argue those demurrers, whatever might be the judgment of the Court upon the principal question between the parties; as in case the plaintiff succeeded in obtaining the judgment of the Court upon the demurrers to the eighth and eleventh pleas, he would be entitled to costs under Reg. 7, H. T. 4 *Will.* 4 (*a*).

Semble, that Reg. 7, H. T. 4 *W.* 4, giving the costs of particular issues to the successful party, does not apply to demurrers.

COLERIDGE, J. referred to a case on this subject, recently decided in the Common Pleas (*b*).

Lord DENMAN, C. J.—We are disposed to think that as this is a case of demurrer, neither party would be entitled to costs.

fendant, as unjustly depriving him of a bar to a future action. If the judgment purport to proceed on the sufficiency of the plea, when the declaration is insufficient, and the defect is not cured by the plea, (*vide* Com. Dig., Pleader, (C. 85, E. 37),) the judgment would seem to be reversible by the plaintiff, as improperly barring his future action.

(*a*) *Ante*, vol. iii. p. 5.

(*b*) Not yet reported.

Ex parte CROFT.

Where between the notice of application by a party for admission as an attorney, and his articles of clerkship, there existed a variance in this,—that in the *notice* the master and clerk were respectively described as having *two* christian names, and in the *articles* as having *one* only,—the Court, upon an affidavit of identity, and that the parties were truly described in the *notice*, allowed the applicant to be admitted, although the affidavit did not state that the parties were *usually known* by their true names.

AN application was made to *Coleridge*, J., at chambers, to issue his fiat that *Croft*, who had duly served five years as an articled clerk, might be admitted an attorney of this Court. It then appeared that there was a variance between the names both of the master and of the clerk in the articles of clerkship and their names in the notice of the intended application for admission. The name of the master was stated in the articles to be *Edwin Smith;* in

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the notice he was called *Edwin* William *Smith*. The name of the clerk was stated in the articles to be *George Croft*: in the notice he was called *George* Anderson *Croft*. *Coleridge*, J., referred the matter to the full Court. In addition to the usual affidavits, *Croft* made an affidavit of the identity of the persons named in the articles and in the notice, and that the true names of the master and the applicant were *Edwin William Smith* and *George Anderson Croft*. This affidavit did not state that the parties were *usually known* by their true names.

Nevile now moved that *Croft* might be admitted. He contended that the variance was immaterial; that no one could be misled by it, since if any person intended to oppose the admission of the applicant, he would look at the notice, in which the true names of the parties appeared, and not at the articles.

Et per CURIAM (*a*)—

Motion granted.

(*a*) Lord *Denman*, C. J., *Patteson*, J. and *Williams*, J.

SMITH *v.* Sir E. B. SANDYS, Bart.

THE facts of this case, and the arguments, are fully stated in the judgment of the Court. The case was argued in

By the practice of K. B. a side-bar rule does not operate to charge a person as in execution, unless he be in custody in the particular suit when the rule is taken out.

Where therefore *A.* was, in 1821, in custody at the suit of *B.*, and *C.* (who had obtained a judgment against *A.* in another suit,) took out a side-bar rule for the Marshal to acknowledge *A.* in custody, and in May, 1835, *A.* was brought up in custody by habeas corpus and charged in execution at the suit of *C.*:—Held, that *A.* had not been properly charged in execution previously to May, 1835, and that he was not *then* properly charged in execution, as it did not appear that *C.* had either revived his judgment by scire facias or taken out execution within a year after he had signed judgment.

Such proceeding by side-bar rule is not only irregular but void and inoperative, and is not set up by waiver or by lapse of time.

In a record of commitment, it is alleged that *B.* was brought up and charged in execution at the suit of *A.* The form of the record is the same whether the party is charged in execution, by side-bar rule, or by habeas corpus. *B.* is not estopped from saying that he was not brought up by habeas corpus.

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this term by *W. H. Watson*, for the plaintiff, and for the defendant, by *Archbold*, who referred to Tidd's Practice, 363, 364, and *Hussey* v. *Wilson* (*a*).

Cur. adv. vult.

Lord DENMAN, C. J., in the course of the term, delivered the judgment of the Court as follows.

It seems in this case, that the defendant being in custody in the year 1821, at the suit of some person, but not being in custody in the action in which this application is made, the plaintiff in this action, in which he had obtained a judgment, took out a side-bar rule for the Marshal to acknowledge the defendant to be in his custody. This acknowledgment was made, and the committitur was entered on the roll, but the defendant was not then brought up by habeas corpus to be charged in execution. By the practice of this Court the proceeding by side-bar rule does not operate to charge a prisoner in execution, unless he be at the time in custody in the particular suit; it was therefore contended, that this side-bar rule, and what was done under it, had no legal operation, and that the defendant, although he has been in custody ever since, (as it was supposed, in this action,) has not been so legally. He applied last term to be discharged, but the motion was refused, because it did not sufficiently appear that he had not been brought up by habeas corpus, nor that he was not in 1821 in custody in this suit. Now those circumstances do appear, but in the meantime, and before the present rule nisi to discharge him was obtained, viz. on 27th May last, he was brought up by habeas corpus and charged in execution in this action, being in custody at the suit of other persons all the time. There is a record of his commitment in this action in 1821, by which it is alleged that he was then brought up and charged in execution in this action.

Three questions arise.

First—Whether the defendant can be heard to aver

(*a*) 5 T. R. 254.

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against this record. Secondly—Whether, if he can, he is prevented by lapse of time. Thirdly—If not, whether he was rightly charged in execution on the 27th of May last.

As to the first: The form of the record appears to be the same, whether a party is charged in execution by side-bar rule, or by writ of habeas corpus. We think, therefore, that the defendant, in explaining the mode by which it was attempted to charge him, is not, strictly speaking, averring against the record, and may be heard. First point: Estoppel.

As to the second: This depends on the point whether the proceeding by side-bar rule was merely *irregular*, or wholly *void and inoperative*. We think that it was wholly *void*, and therefore that there is no waiver, and that the lapse of time does not prejudice the defendant. Second point: Irregularity or nullity.

As to the third: The case must be taken as if nothing had been done on the judgment between 1821 and the 27th May last, when the plaintiff, finding the defendant in custody at the suit of some other person, brought him up by habeas corpus, and charged him in execution. We think that he could not regularly do so without reviving his judgment by scire facias, or shewing that he took out execution within a year from the signing of the judgment. He has not done either, and therefore his proceedings are irregular, and the rule must be made absolute to discharge the defendant out of custody in this action. Third point: Non-revival of judgment.

Rule absolute.

The KING *v.* The Inhabitants ST. GEORGE, EXETER.

Under 43 *Eliz.*, c. 2, the overseers of a parish had authority, with the assent of two justices, to bind apprentice a child of parents legally settled and resident in and chargeable to such parish, although such child be at the time of executing the indenture resident elsewhere, and not a burthen upon the parish.

So, although the binding were to a master resident out of, and unconnected with the parish, the master's consent having been expressed by his execution of the indentures.

BY an order of two justices of the peace for the city and county of the city of Exeter, *Mary Lee* and her five children

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were removed from the parish of St. George, in that city, to the parish of Crediton, in the county of Devon. Upon appeal, the Exeter quarter sessions (*a*) quashed the order, subject to the following case:

The settlement of the paupers depends upon that of *John Lee*, the deceased husband of *Mary Lee*.

John Lee was born in Crediton, of parents legally settled in that parish. When he was about twelve years old, an indenture, dated 15th October, 1811, was executed by the parish officers of Crediton, for the purpose of binding him apprentice to *William Mugford*, who was his uncle, and resided in the parish of St. George, Exeter. At the time of the execution of this indenture his father was at sea, and his mother, having other children living with her in Crediton, was in the receipt of relief from that parish. *John Lee* himself was not residing with her, but had lived for a year or more with his uncle (*Mugford*), in the parish of St. George. The indenture was executed by the churchwardens and overseers of Crediton, at the pay-table of that parish, neither *Mugford* nor *Lee* being present, nor the magistrates who signed the allowance of the indenture. And it does not appear at what time or in what place they signed it, but it bears the signatures of two magistrates of the county of Devon. A counterpart was executed by *Mugford* at his house in Exeter, but *Lee* was not present when he executed it, and was not a party to it, nor to the original indenture. He continued to reside with *Mugford*, serving him in his business of a thatcher, till about a year after he attained the age of twenty-one years.

The question for the opinion of the Court is, whether this was such a binding of *John Lee*, as that the residence and service under it would confer a settlement, he having lived out of the parish of Crediton a full year before the indenture was executed.

(*a*) Mr. Justice *Coleridge* then sitting as Recorder of the city.

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Barstow and *Escott*, in support of the order of sessions. This binding took place before the passing of 56 *Geo.* 3, c. 139, and therefore the question as to the validity of the indenture depends upon 43 *Eliz.* c. 2. The simple point is, whether the mere fact of the poor child being corporally out of the parish at the time of the binding makes the indenture void. By the 6th section, the parish officers are authorized, with the assent of two justices, "to bind any *such children as aforesaid* to be apprentices where they shall see convenient." Upon reference to the *first* section it will be found, that by "such children as aforesaid" are intended "the children of all such whose parents shall not, by the said churchwardens and overseers, or the greater part of them, be thought able to keep or maintain them." There is nothing in the words of this act confining the power of the parish officers to the case of such children only as may happen at the time of the intended binding, to be actually within the limits of the parish, so as to render necessary the ceremony of bringing the poor child into the parish at the time of the binding. In *Rex* v. *St. Nicholas, Nottingham* (*a*), it was held, that if a poor boy be bound apprentice by the parish officers, with the consent of two justices, to a *master residing in a different parish*, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master, by residing there forty days under the indenture. This case, and many observations in the judgments, afford a strong argument against the point principally contended for by the respondents; and at the same time the case is an express decision against them upon two other points, which, from the statements in the case, it appears to be intended to raise, namely, that the parish officers could not bind a poor child apprentice to a master residing out of the parish, and that the indenture required execution by the apprentice.

Crowder and *W. M. Praed*, contrà. The indenture was

(*a*) 2 T. R. 796.

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void on two grounds: first, that *John Lee* was not a poor child whom the parish officers had any authority to bind; and secondly, that *Mugford* was not a person *to whom* they could bind a poor child apprentice.

I. It appears from the first section of 43 *Eliz.* c. 2, taken in connection with sect. 5, that parish officers were authorized to bind as apprentices such children only as they were also empowered to "*set to work.*" By sect. 1, the overseers are empowered to set to work the children of parents unable to maintain them; that is, such children as by reason of the inability of their parents to maintain them, are become *a burthen upon the parish.* If the child of poor parents resided out of the parish of his parents, the overseers of that parish had no power to bring him into the parish by compulsion, in order to set him to work. At the time of the passing of the act of 43 *Eliz.* there was no law of settlements, and the authority of parish officers extended only to such persons as were *in* their parish, and a burthen upon it. A poor child, who at that time resided away from his family in another parish, and became chargeable to it, could not be removed into the parish in which his family resided; therefore in no sense could he have been considered as a poor child of the latter parish, and a burthen upon it. Even to this day, overseers are, in strictness, not bound to relieve persons out of the parish, though settled there, unless in the case of a suspended order of removal,—where the liability arises out of a special enactment. It is true, that under 13 & 14 *Car.* 2, paupers settled in one parish may now be removed into it from another parish in which they may happen to be; but, though on the ground of expediency the practice is commonly otherwise, the overseers of the parish in which the pauper has a settlement is not bound to relieve until an order of removal has been made, and either executed or duly suspended. But, not only must the poor child be within the parish, in order to give the overseers power to set him to work or to bind him apprentice, he must also be the child of parents who are *unable to*

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maintain him. Now, though *John Lee's* mother was, at the time of the binding, in the receipt of relief from the parish of Crediton, yet as he himself was residing with his uncle in another parish, and maintained by him, it cannot properly be said that his parents were unable to maintain him. [*Patteson*, J. If a person maintains his child *by another*,—as in this case, by an uncle,—there is an *ability* to maintain.] In order to support the proposition of the appellants, it is necessary to go the whole of *this* length,—that if a poor person in the receipt of relief in and from a parish in Devonshire, had a child living with a relation in Yorkshire, the overseers of the parish in Devonshire might, under 43 *Eliz.*, have compelled the child to come into their parish and be set to work. *Rex* v. *St. Nicholas, Nottingham*, has been cited as bearing upon this first point, but it does not appear to be an authority against it.

If the Court should be of opinion, for any of the reasons which have been urged, that the overseers had *no authority to bind*, under the circumstances of this case, the result will be, that the indenture must be held *void*, and not *voidable* only, and consequently no settlement will have been acquired by service and residence under it. The cases upon this point are, *Rex* v. *St. Nicholas, Ipswich* (*a*), *Gray* v. *Cookson* (*b*), *Gye* v. *Felton* (*c*), *Rex* v. *Cromford* (*d*), *Rex* v. *Ripon* (*e*), *Rex* v. *Arnesby* (*f*), *Rex* v. *Stoke Damarel* (*g*).

II. Upon this point, the learned counsel admitted that *Rex* v. *St. Nicholas, Nottingham*, was an authority against them, but endeavoured to show that the matter required reconsideration. [*Coleridge*, J. It was my intention, when the case was before me at the Exeter sessions, not to allow this point to be raised by the special case. I thought it not right to re-agitate a question which had been decided many years ago, and which I knew would affect many settlements.

(*a*) Burr. S. C. 91; 2 Str. 1066.
(*b*) 16 East, 13.
(*c*) 4 Taunt. 876.
(*d*) 8 East, 25.
(*e*) 9 East, 295.
(*f*) 3 Barnw. & Alders. 584.
(*g*) 1 Mann. & Ryl. 458; 7 Barnw. & Cressw. 563.

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I certainly intended expressly to refuse to reserve that point. *Patteson*, J. There is no doubt about *Rex* v. *St. Nicholas, Nottingham.* It is a sound and reasonable decision, which has been acted upon, and has never hitherto been questioned.]

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord DENMAN, C. J., who, after stating the facts of the case, proceeded as follows:—One point was made, which however was not intended to be reserved by the sessions, namely, whether, before the stat. 56 *Geo.* 3, c. 139, a child could legally be bound by the parish officers to a master not resident in their parish. We have no doubt on this point: It is expressly decided by *Rex* v. *St. Nicholas, Nottingham,* the authority of which case has never hitherto been questioned.

The point which was intended to be reserved was, whether the parish officers had power under 43 *Eliz.* c. 2, s. 5, to bind out any child not at the time resident in their parish. That section, by the word "*such*," refers to the first section of the same act, and the first section has these words, "the children of all such whose parents shall not, by the churchwardens and overseers or the greater part of them, be thought able to keep or maintain their children." The words are not grammatically correct, but their meaning is obvious. At the time of the passing of the statute of 43 *Eliz.* c. 2, there was no law of settlement, nor could the children of paupers, if at a distance from their parents, be sent home by the parish officers. In that state of the law, the provisions of the 43 *Eliz.* c. 2, s. 5, could not apply to any children not actually resident in the binding parish. But since the law of settlement has been introduced, all the unemancipated children of a pauper are considered as part of his family; and we think that the parish officers of any parish where the pauper is settled and residing, and unable to maintain his children,

may bind out his child, with the assent of two justices and in the proper form, without the formality of having that child, if resident at a distance, brought home to his family. The case of *Rex* v. *Cole-Orton* (*a*), would at first sight seem to lay down the rule, that the statute of *Elizabeth* is to be construed without any reference to any subsequent statutes; but on consideration we do not think that any such rule is there laid down: All that is decided is, that when a child is resident in a parish, and the parents are unable to maintain it, the parish officers may bind out the child, though the parents be not settled in the parish; which is quite consistent with their having power to bind out one of a family legally settled and resident in, and chargeable to their parish, though the individual be at the moment resident elsewhere. As to the consent of the child, it is not requisite in the case of a parish apprenticeship; and no danger need be apprehended that a child may be taken from a friend or relation, against the will of that friend or relation, and against the will of his parents, and bound to a stranger; for the whole matter is under the superintendence of the justices, who cannot be supposed likely to sanction such an arbitrary proceeding.

Under these circumstances we are of opinion that the order of sessions must be confirmed.

Order of Sessions confirmed.

(*a*) 1 Barnw. & Adol. 25.

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REX *v.* MONMOUTHSHIRE CANAL NAVIGATION COMPANY.

By a local act for making a canal, it is enacted that the rates, tolls, and duties, authorized to be taken by the Company of Proprietors, shall not at any time or times hereafter be charged with, or be subject or liable to, the payment of any parochial rates whatsoever, and that the Company "shall *from time to time* be rated to all parochial rates, for and in respect of the *lands and grounds* to be purchased or taken, and the warehouses and other buildings to be erected or set up by the said Company or their successors, in pursuance of this act, in such and the same proportion as, but not at any higher value or improved rent than, *other* lands, grounds, and buildings, lying near or adjacent thereto, *are or shall for the time being be rated*, and as the lands, grounds, warehouses, and other hereditaments, so to be purchased and taken and erected, would have been ratable, in case the same had *continued in their former state*, and not been used for the purpose of the said navigation or undertaking."

Held, first, that the proprietors of the canal were liable to be rated at the *fluctuating* value of the adjacent lands and buildings, and not at the value which the adjacent lands and buildings possessed at the time when the act was passed.

Secondly, that the value of the adjacent lands was to be estimated from *whatever* source it might arise, and that the increase of value arising from the formation of the canal was not to be excluded from the calculation.

UPON appeal, a poor-rate for the borough of Newport, whereby the Company of Proprietors of the Monmouthshire Canal Navigation were rated in the sum of 100*l.*, as the occupiers of part of the canal, and a certain house, tram-road, weighing-machine, and coal-house, lying within the borough, was confirmed, subject to the following case:

By 32 *Geo.* 3, c. cii, the Company were incorporated and empowered, inter alia, to make and keep navigable a canal from "some place near Pontnewynydd, in the county of Monmouth, into the River Usk, at or near Newport," and to purchase lands for the use of the undertaking; and by sections 91 and 95 the Company were empowered to take certain tolls. By section 101 it is enacted, "that the said rates, tolls and duties, by this act granted and authorized to be taken by the said Company of Proprietors as aforesaid, shall not at any time or times hereafter be charged with or be liable to the payment of any parliamentary or parochial rates, taxes, assessments, or impositions whatsoever; and that the said Company shall *from time to time* be rated to all parliamentary and parochial rates, taxes, assessments, and impositions, for and in respect of the *lands* to be purchased or taken, and the *warehouses and other buildings* to be erected by the Company in pursuance of this act, in the same proportion as, but not at any higher

value or improved rent than, other lands, grounds, and buildings, lying near or adjacent thereto, are or shall *for the time being* be rated, and as the lands, warehouses, and other buildings, so to be purchased and taken and erected, would have been ratable in case the same had continued in their *former state*, and not been used for the purposes of the said navigation."

By virtue of this act, the Company purchased lands and made the intended canal,—part of which lies within the borough, and is included in the said rate. It afterwards becoming expedient to extend the canal, the Company were empowered by 37 *Geo.* 3, c. 100, to extend the canal about half a mile, and to purchase land for that purpose. And it was thereby further enacted, that the Company might demand the aforesaid tolls, and that the several clauses and exemptions contained in the 32 *Geo.* 3, c. cii, should extend to the canal thereby authorized to be made(*a*).

(*a*) The words of the clause are as follows:—"And that the said recited act," (32 *Geo.* 3, c. cii.) "and the several clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, therein contained, shall, (so far as the same will apply, and the nature and circumstances of the case will admit, and so far as the same are not repealed, altered, re-enacted, or otherwise provided for, in and by this present act,) extend to the said canal and other works hereby authorized; and shall take effect, operate, and be put in execution, and shall be used and exercised by the said Company of Proprietors, and their agents &c., and shall be applied and enforced in, by, and for and in respect of the making, completing, repairing, preserving, maintaining, and using the said canal and other works hereby authorized, and for supplying the same with water, and for regulating the navigation thereon, and for the punishment of offences relating thereto, and for the purchasing, selling, and conveying of lands, tenements, and hereditaments, and ascertaining the value thereof, and for determining and assessing damages, as well as with respect to all other matters and things whatsoever in any way touching or concerning the said canal and other works hereby authorized to be made, in such and the same manner, in all respects, and as fully and effectually as if the same clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and pro-

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By virtue of the last-mentioned act, the Company extended their canal; and so much of the land taken for the purpose of the extension as lies within the borough, is also included in the rate in question.

By 42 *Geo.* 3, c. cxv, reciting the before-mentioned statutes, and that it was expedient that a railway should be made from Sirhowy Furnaces, in the parish of Bedwellty, to communicate with the canal and the River Usk, at or near Newport, together with certain branches of railway from the last-mentioned railway to other places, after incorporating "The Sirhowy Tram-road Company," the Monmouthshire Canal Company were empowered to purchase lands, and to make a certain portion of the last-mentioned railway; and by section 3 it was provided, that the Sirhowy Tram-road Company and the Monmouthshire Canal Company respectively, might take such tolls and duties for the tonnage of certain commodities conveyed on the said railways or tram-roads, as the Monmouthshire Canal Company were by 32 *Geo.* 3, c. cii, empowered to take for the tonnage and wharfage of the like articles conveyed on the canals and railways thereby authorized to be made. The act then provided that the several clauses of the 32 *Geo.* 2 should extend to this act (*a*).

visions, had been inserted, repeated, and enacted at full length in and by this present act, and as if the canal and other works, hereby authorized to be made and maintained, had been authorized to be made and maintained in and by the said recited act, or been part of the canals and works thereby authorized to be made and maintained."

(*a*) The clause thus proceeded: —"And shall respectively have such and the like powers and remedies for recovering the rates, tolls and duties hereby authorized to be demanded and taken, as are given by the first-mentioned act for recovering the rates, tolls, and duties therein mentioned. And that the first-mentioned act, and the several clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, therein contained, shall, *so far as the same will apply, and the nature and circumstances of the case will admit*, and so far as the same are not repealed, altered, re-enacted, or otherwise provided for in and by this present

By virtue of the last-mentioned act, the Monmouthshire Canal Navigation Company made a portion of the last-mentioned railways, and a part of that portion lies within the borough, and is included in the rate.

Before and at the time of the formation of the canal and railways, the land purchased by the Company for the purposes of the canal and railways, and the land on each side of it, was of very much less value than at the present time. The whole of the land taken for the railways, and a part of

act, extend to the railways and tram-roads, and other works hereby authorized to be made by the said Sirhowy Tram-road Company, and the said Company of the Monmouthshire Canal Navigation respectively, and shall take effect, operate, and be put in execution, and shall be used and exercised by the same Companies respectively, and their respective agents &c., and shall be applied and enforced in, by, and for and in respect of the making, completing, repairing, preserving, maintaining, and using the said railways or tram-roads &c. hereby &c. by them respectively; and for regulating the carriage or conveyance of goods thereon; and for the punishment of offences relating thereto; and for the purchasing, selling, and conveying of lands, &c., and ascertaining the value thereof; and for the determining and assessing of damages, as well as with respect to all other matters and things whatsoever in any wise touching or concerning the said railways or tram-roads &c., hereby &c. by the said Companies respectively, in such and the same manner, in all respects, and as fully and effectually to all intents and purposes as if the same clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, had been inserted, repeated, and enacted at full length, in and by this present act, and been hereby made applicable to the Sirhowy Tram-road Company as well as to the Monmouthshire Canal Navigation Company, and as if the said railways or tram-roads &c., hereby authorized to be made by the said last-mentioned Company, had been authorized to be made by them in and by the first-mentioned act, (*i. e.* 32 *Geo.* 3, c. cii,) or been part of the railways and other works thereby authorized to be made by them, and as if the said railways or tram-roads, and other works hereby authorized to be made by the Sirhowy Tram-road Company, had been part of the railway and other works authorized to be made by the first-mentioned act, and the said Sirhowy Tram-road Company had been therein named and authorized to make the same, instead of the Monmouthshire Canal Navigation Company." See the former part of this clause, *post*, 88, *in notis*.

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the land taken for the purposes of the original canal, were then used for agricultural purposes, and let at the rent usually given for good meadow-land in the neighbourhood of towns. Other part of the land taken for the original canal was, at the time it was so taken, used as wharf-ground to the River Usk; and other part of the same land then formed a part of one of the streets of the borough; but in consequence of the formation of the canal and railways, great alterations have been made in the lands adjacent to the canal, as to the manner of their occupation, and the purposes for which they are used; and by means thereof their present annual value is very much greater than it was at the time of the formation of the canal and railways. An increase in the value of such land has also since arisen from other local causes, independent of the canal. The canal runs for some distance within the borough of Newport, parallel with the Usk, which, before the formation of the canal, was and ever since has been used as a navigable river; and when the canal was formed, there was left between the canal and the river, for the purpose of making wharfs, a convenient space, on which *wharfs* have been constructed, but not by the Canal Company. At these wharfs the coals and other goods conveyed along the canal are landed, and loaded in vessels lying in the river, and goods conveyed in vessels up the river are landed and loaded in boats on the canal. On the opposite side of the canal, dwelling-houses have been erected, and yards and docks formed, extending for a considerable distance along the canal within the borough; none of which belong to the appellants. The wharfs, houses, yards, and docks, are now of great annual value. Some part of the lands adjacent to the canal within the borough still continues to be used for agricultural purposes.

Until the present rate was made, the appellants had been rated at *5l. 5s.* only. By the present rate they are rated for the lands taken by them by virtue of the 32 *Geo.* 3, c. cii, according to the present improved actual value of the lands

and premises adjacent to the canal, and for the lands taken by them under 37 *Geo.* 3, and 42 *Geo.* 3, c. 115, at the improved actual value of the lands so taken, arising from such lands being used for the purposes of the last-mentioned acts.

Upon the hearing of the appeal it was contended by the appellants,

First point: Whether clause of exemption is incorporated in subsequent act.

First, that the provisions contained in the 101st section of the 32 *Geo.* 3, c. cii, were *incorporated* in the 37 *Geo.* 3, c. 100, and 42 *Geo.* 3, c. cxv, or in one of them, so as to exempt the lands taken by them under the last-mentioned acts from being rated according to their actual improved value, arising from the tolls received by the Canal Company.

Second point: Value, how to be estimated.

Secondly, that they were only liable to be rated in proportion to the actual value of the adjacent lands, at the time when the lands held by the appellants were *originally* taken for the purpose of the canal or railways under the act.

Third point: Whether ratable in proportion to the *improved* value of adjoining premises.

Thirdly, that at all events they were only liable to be rated in proportion to such value as the adjacent lands would now possess, supposing the canal and railroads had not been made, and the adjacent lands had continued in their former state, and were now used for the same purposes as at the time when the lands were taken by the appellants; and that any increase of value, arising from or depending upon the existence of the canal or railroads, ought not to be taken into consideration in ascertaining the value of the adjacent lands, for the purpose of fixing the sum at which the appellants ought to be rated.

If the Court shall be of opinion with the appellants, on the first and second or first and third points, made by them as aforesaid, then the rate is to be amended by reducing the sum at which the appellants are now rated, from 100*l.* to 5*l.* 5*s.*

The acts of the 32 *Geo.* 3, c. cii, 37 *Geo.* 3, c. 100, and 42 *Geo.* 3, c. cxv, are to be taken as part of the case.

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Maule and *Talbot* in support of the order of sessions.

First point.

The first question is, whether the 101st section of the 32 *Geo.* 3, (the exempting clause,) is incorporated into the subsequent acts. From the later statutes it is evident that this was a *prosperous* undertaking. An exemption of a party from a common burthen, ought not to be extended by construction. A case upon this very act of parliament, which is not reported (*a*), shews the insufficiency of general words, to incorporate provisions in a preceding act containing unusual powers.

Second point.

The second question for the determination of the Court is, whether the appellants are ratable at the value only of the lands when originally taken. The *respondents* contend, that the *appellants* are to be rated according to the *fluctuating* value of the adjacent land. The statute directs that the Company shall *from time to time* be rated to all parochial rates. The words, "from time to time," must have reference to a future period. Unless these words are struck out, the proposition of the appellant, that the rate is *fixed*, is not maintainable. Then the clause proceeds thus, "in such and the same proportion as, but not at any higher value or improved rent than, other lands and grounds, and buildings, lying near or adjacent thereto, are or *shall for the time being be rated.*" Looking at the collocation of these words, "shall for the time being be rated," it is evident that the legislature intended that the Company should be rated according to a *fluctuating* value. But if, as will be contended on the other side, the value at the time of passing the act is to be the criterion of the ratable amount, how is that provision of the statute to be complied with which directs that buildings *to be erected* by the Company, shall be rated in proportion as other buildings adjacent thereto shall be rated? The buildings might not be erected for years, and yet, according to the construction contended for, they are to be rated in the same pro-

(*a*) See a note of the case at the end of this Report.

portion as other pre-existing buildings were rated at the time that the act passed. It cannot be said that the sites of these future buildings are to be rated by anticipation, according to the then existing value of the adjacent buildings. [Lord *Denman*, C. J. It might mean, that the warehouses to be erected were to be rated as the adjacent warehouses were rated.] It does not appear that there were any adjacent warehouses. There is no reason, on the score of justice, which should require any other construction than that which will subject the Company to be rated as the owners of the adjacent lands are. The object of the clause was evidently two-fold, first, that the *tolls* should not be rated, and secondly, that the inhabitants of the parish should not be deprived of the right of rating the *land*, that is, the fluctuating value of the land, which they previously possessed. The undertaking is exempted from being rated for the tolls, and justice requires that the other object of the statute should be fully carried into effect. The respondents contend that the proprietors of the canal should be rated in the same manner as if they possessed the land covered by the canal, and the canal had been at a distance of 100 yards to the right or left. There are several cases upon acts of parliament, containing provisions similar to the clause under discussion in this statute, in all of which the companies, if ratable at all, have been held to be ratable according to the *fluctuating* value of the adjacent property. *Rex* v. *The Regent's Canal Company* (*a*), *Rex* v. *The Grand Junction Canal Company* (*b*), *Rex* v. *The Inhabitants of St. Mary, Leicester* (*c*), *Rex* v. *The Leeds and Liverpool Canal Company* (*d*). *Rex* v. *Chelmer and Blackwater Navigation Company*. The question in those cases was between a rating according to the value of the adjacent lands, or a rating upon the improved value derived from the tolls: A rating upon the original value has never been suggested till the present case. If the legislature

(*a*) 9 Dowl. & Ryl. 760; 6 Barn. & Cressw. 720.
(*b*) 1 Barn. & Ald. 289.
(*c*) 6 Maule & Selw. 400.
(*d*) 5 East, 325.

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had intended that the Company should be rated by so absurd a standard as the value of the land when *originally* taken, it would have been easy to express such an intention distinctly. From the judgment of *Abbott*, C. J., in *Rex* v. *The Birmingham Canal Company* (*a*), it appears that clauses of this description, which contain an *exemption*, are to be construed strictly. In the *Stourbridge Canal Company* v. *Wheeley* (*b*), it was held, that acts of parliament of this description are to be considered as a *bargain* between the proprietors and the public, and that the rule of construction is, that any *ambiguity* in the terms of the contract must operate *against the proprietors*, and in favour of the public. Suppose the whole of the canal and the adjacent lands should become an unprofitable swamp, it never could be intended that, in such a state of circumstances, this canal Company should continue to pay rates. *Rex* v. *The Calder and Hebble Navigation Company* (*c*), is distinguishable. There, the question was, whether the Company were altogether exempt from parochial rates; here, it is a question of *proportion*.

Third point.

The third point for which the appellants contend is, that the Company are only ratable according to the value which the adjacent lands would now possess, if the canal had not been made. This proposition, which assumes ratability according to the fluctuating value of the adjacent property, involves an insoluble problem; for it is impossible to say what proportion of the increase in value has arisen from the effect of the corn laws, the import and export duties, and other causes, and what proportion arises from the existence of the canal. The appellants seek to apply the words which direct that the *lands purchased* shall be ratable "as if they continued in their former state," to the preceding part of the clause, which speaks of the *adjacent lands*. At all events, the language of the clause is *ambiguous*, and if so, according to the principle of construction already alluded to, the ambiguity must operate against the Company, and in favour of the public.

(*a*) 2 Barn. & Alders. 578.
(*b*) 2 Barn. & Adol. 792.
(*c*) 1 Barn. & Alders. 263.

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Greaves, contrà. The exemption clause is incorporated into the subsequent statutes. The case cited, as having been decided on the 128th section, is very unsatisfactory: Neither the arguments of the counsel nor the reasons of the judges are stated. It is impossible, therefore, to say on what grounds the decision proceeded; but it is clearly distinguishable from this case. [Lord *Denman*, C. J. We do not feel any difficulty on that point.] First point.

The appellants are only liable to be rated at the value which the lands taken by them, and the adjacent lands, possessed at *the time when they were first taken* for the purpose of the appellants. The proper way to arrive at the true construction of the exempting clause is, not to look at the state of facts, which *now* exists, but to contemplate the circumstances and law as they subsisted at the time when the act was passed. Now, what were the circumstances when this act passed? Here was a company entering into a hazardous enterprise of great magnitude, and incurring great expense, and it was impossible to foresee whether the undertaking would be profitable or not. It was reasonable, therefore, that they should take every precaution in their power to free themselves from all burthens likely to diminish the probability of the success of their undertaking. On the other hand, the parishes through which the canal was intended to pass were interested in not being deprived of the rate which the lands to be taken for the canal then paid. What then could be more natural than that the parishes should say to the Company, "Unless you will secure to us the *same* rates which we now receive, we will oppose your undertaking." And what more reasonable than that the Company should answer, "We are willing to pay you, at all times, the rate you now receive; but as you do not choose to incur any risk yourselves, and as you are to have the same rate you now have, even if the undertaking prove unsuccessful, it is but fair that if it prove prosperous, we should reap the benefit of it. If, on the one hand, you are *in no case to be damnified*, on the other hand, you ought *in no case to be benefited*." No agreement can Second point.

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be suggested which could be more reasonable than this; and the more so, because, if the undertaking succeeded, the parishes would reap sufficient benefit from the value of *other* lands being increased by means of the canal. Besides, the statute recites, that the canal will be of great public benefit, and it is but just that those who cause such benefit should be protected to the greatest extent, consistently with the rights of individuals. By leaving the rates at the same amount as when the act passed, the Company will be protected to the greatest extent, without injury to individuals. The principle on which the rate is now framed is, to take the actual value of the adjacent lands, *from whatever source arising*, as the criterion of the rate. Suppose that the actual value of such adjacent lands should, by extraneous circumstances, be so increased, that such value was greater than the value of the canal. According to the principle of the present rate, the Company must be rated according to that value,—which is absurd,—because then this clause of exemption, instead of being beneficial, would impose a greater burthen on the Company than they would be liable to under the 43d *Eliz.* Again, suppose a railway, like the *Manchester* and *Liverpool Railway*, should be made through the same district as the canal, and should run parallel and near to it, and that such railway should so interfere with the traffic on the canal, as that the profits should be less than the expenditure, yet, if the value of the adjacent lands continued the same as it now is, the Company must still, according to the argument on the other side, be rated as they now are, which never could have been the intention of the legislature. [Lord *Denman*, C. J. It is easy to put extreme cases on both sides. Suppose some noxious manufactory were established near the canal, so as entirely to destroy the value of the adjacent lands.] According to the principle which the *appellants* contend for, the parish would lose nothing, because the same rate which was paid before the canal was made, would still be payable. That supposition, therefore, fortifies the argument, for it shews that the principle contended for, will, under all cir-

cumstances, be fair; whereas, according to the principle of the present rate, although the Company's profits were enormous, they would, in such a case, pay *no* rate. Again, the Company are empowered to make reservoirs, feeders, locks, and aqueducts; but the only toll they can take is a mileage toll. Suppose the Company had in any parish a reservoir of 100 acres, and that the adjoining lands were now become very valuable, is it to be contended that the Company are to be rated according to the improved value of such adjacent lands, when they not only receive no benefit from such reservoir, but have sunk a large sum in the purchase of it, and yearly lose the interest of that sum, together with the expenses necessary to keep it in repair? At the time when this act passed, it was generally considered that tolls were ratable per se; and there was a decision, which was supposed to sanction that opinion, in *Rex* v. *Page* (*a*). In the same year this act passed, and probably in consequence of such opinion the first part of the clause in question was introduced. It has been held, that a precisely similar clause exempts a canal from the payment of any rates at all; *Rex* v. *Calder and Hebble Navigation Company* (*b*). If, therefore, the clause had stopped there, no rates would have been payable by the appellants; it is therefore a *repeal* of the 43 *Eliz.* c. 2, s. 1; and the subsequent part of the clause, instead of being an exempting clause, is a clause *affirmatively* imposing rates on the Company, and it is therefore to be construed, like all such clauses, *strictly* as regards the parish, and *favourably* for the Company. This is an answer to the argument on the other side, that any ambiguity must operate against the Company, and in favour of the parish. But then the clause further provides, that the Company shall be rated in the same proportion as other lands adjacent are, or shall for the time being be rated; but it does not stop there, but goes on, "and as the lands, &c., would have been ratable if they had continued in their *former* state." Two things,

(*a*) 4 T. R. 543. (*b*) 1 Barn. & Alders. 963.

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therefore, are given, whereby the rate is to be ascertained—the rate on the *adjacent* lands, *and* that *on the lands taken for the canal.* The present rate, being founded on the actual value of the adjacent lands *only*, is clearly wrong; for it is on one, instead of both the means of ascertaining the rate. Besides, the rate is to be upon the canal lands as if they had continued in their *former* state, the moment, therefore, that they were appropriated for the purposes of the canal, their value was *fixed*, and after that time could never change, except in consequence of the formation of the canal. But it is said, that the words "for the time being" make the rate fluctuate according to the value of the adjacent lands. That is not so. It is clear that the framers of this act knew how to provide for all future time, for in the first sentence of the clause they use the expression "at any time or times hereafter." And in the second, when they speak of the rates, which, of necessity must be at all times after the act, it is "from time to time;" but in the *very same* sentence, when they point out the mode of calculating the rates, it is "for the time being." That variation in the expression, evidently indicates a different purpose in the one instance and in the other. If the words had been "are rated" only, it might have been contended that the Company were liable to no rate for lands which were not actually rated at the time when the act passed. It appears that part of the land taken was a street, and therefore, at that time, not rated at all. It was, therefore, necessary to introduce the words "for the time being," to meet such a case. The words being in the singular number also, can only be applied with propriety to *one* instance, and the proper construction is, that the rate is to be according to the rate on the lands when taken, if there be one at that time, or if there be not, then according to the *first rate* after they are taken. The same rule will be found equally applicable to warehouses, which have been built subsequently to the passing of the act. These arguments do not rest simply on the consideration of this clause, but it will be

found, that there has been one uniform and concurrent opinion among all the Judges who have given opinions on the construction of canal acts, viz. that the company, in each case, is to be rated according to the value of the lands at the time when they were first taken. On reference to the cases it will be found that there is no clause so strongly in favour of the Company as this. There is no clause in any act containing the first sentence or the last. Some effect, therefore, must be given to these additional provisions, which must have been inserted for the benefit of the Canal Company.

As to the third point, it is true that it is not very formally raised, but that arises from the great difficulty there was in settling the case. The appellants contend that it is quite clear that it never was the intention that their lands should be rated according to any increase of value arising *from the canal;* for the rate is to be as if the lands had continued in their *former* state, and had not been used for the purposes of the canal. The present rate, therefore, is wrong, as including a value, which principally, if not entirely, arises from the existence of the canal. And the judgments of Lord *Ellenborough*, *Lawrence*, J., and *Le Blanc*, J. in *Rex* v. *Leeds* (*a*); the judgments of Lord *Ellenborough*, *Bayley*, J., and *Abbott*, J., in *Rex* v. *The Grand Junction Canal Company* (*b*); the judgment of *Bayley*, J. in *Rex* v. *St. Peter the Great, Worcester* (*c*); the case of *Rex* v. *St. Mary, Leicester* (*d*); the judgment of *Bayley*, J. in *Rex* v. *The Regent's Canal Company* (*e*); and the case of *Rex* v. *Chelmer and Blackwater Navigation Company* (*f*) were referred to. Third point.

Lord DENMAN, C. J.—I think that there can be no substantial doubt on the first point. The exemption *is* First point.

(*a*) 5 East, 325.
(*b*) 1 Barn. & Alders. 289.
(*c*) 8 Dowl. & Ryl. 331; *S. C.* 5 Barn. & Cressw. 473.
(*d*) 6 M. & S. 400.
(*e*) 9 Dowl. & Ryl. 760; *S. C.* 6 Barn. & Cressw. 720.
(*f*) 2 Barn. & Adol. 14.

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incorporated in the subsequent acts. This is manifestly distinguishable from the case cited.

Second point.

The next question is as to the construction of the 101st clause, upon which it is contended on the part of the appellants that they are only liable to be rated according to the value of the lands when taken,—that is, that for all time, the Company are only to be rated according to the actual amount, and in proportion to the value of the lands—at the time when they were taken. If that had been the intention of the legislature, it would have been better to have put a certain estimate on the lands. It would have been easy to have said that the land shall hereafter be rated at so much per acre. It would be exceedingly difficult at the present time to determine what was the value of the neighbouring lands at the period when the canal was formed. But it is said that the words are clear and explicit on this subject. If they are so, they are, in my opinion, clear and explicit the other way, because the clause provides that the lands to be taken shall be rated "in such and the same proportion as (but not at any higher value or improved rent than) other lands, grounds, and buildings, lying near or adjacent thereto, *are or shall for the time being* be rated." Two periods are here contemplated during which the lands and buildings shall be rated; not only the time of the passing of the act, but also all future time. The standard of rating being the *fluctuating* value with reference to the adjacent lands, how can it be contended that *these* lands are to be rated according to the value when they were taken? The clause proceeds,—"and as the lands, buildings, &c. so to be purchased and taken and erected, would have been ratable in case the same had continued in their former state, and not been used for the purposes of the said navigation or undertaking." It does not say that they shall only be so rated as if the undertaking had never been carried into effect. It is impossible to give effect to the whole of the words, but it is extremely easy to see what the legislature intended, namely, that the Company should pay the same rates as a similar

description of lands would have paid if those lands had never been taken for the canal. Mr. *Greaves* has with great ingenuity and industry referred to many cases to shew that the time when the lands were taken is the time to look at. But if we attend to the object of those cases, that will appear not to be a fair construction. The Court were not considering the question which we are now considering, but only the question of *ratability*; and though they say that the lands should be liable to be rated only according to their value when taken, that language is to be applied to the liability and not to the rating. The rate is to be according to the value from time to time. The language of the judges is, however, certainly open to the construction contended for.

Third point.

The third point is, that at all events the Canal Company were only liable to be rated in proportion to such value as the adjacent lands would now possess, supposing the canal and railways had not been made, but the adjacent lands had continued in their former state, and were now used for the same purposes as they were at the time when the lands were taken by the Company; and that any increase of value arising from or depending upon the existence of the canal or railways, ought not to be taken into consideration in ascertaining the value of the adjacent lands for the purpose of fixing the sum at which the Canal Company ought to be rated. The words of the clause are not such as these, and do not carry that import with them. The term used in the clause is not "rated," but "ratable," that is, *liable* to be rated. The Company are liable to be rated according to the increase or diminution of value of the adjacent lands. That being so, the question is, whether we are authorized to introduce this condition, that they are only to be rated according to the value of the adjacent lands, such value not arising from the canal. Those are not the words in the act, and there is no reason why they should be inserted. If they were so inserted, the parish and the owners of neighbouring lands would be losers.

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On the first point the appellants are right; on the two latter the sessions have decided quite correctly.

First point.

LITTLEDALE, J.—With regard to the first point I have no doubt whatever. I do not think it necessary to point out what the effective words of the incorporating clauses are; they seem to me complete to all possible purposes to incorporate the clause. Allusion has been made to a case. That was a very difficult case:—A power was given to make cuts communicating with the canal under particular circumstances; the line of the canal was to be extended, and the question was, whether those powers were to be extended to the new canal.

Second point.

The second point is, that the Company were only liable to be rated in proportion to the actual value of the adjacent lands at the time when the lands which they now occupy were originally taken by them; I have not the slightest doubt as to this. The 101st section says, first, that the tolls are to be free from rates; then that the Company shall be rated to all parochial rates in respect of the lands to be taken and the buildings to be erected, in such and the same proportion as (but not at any higher value than) lands and buildings adjacent thereto are rated. If this clause had stopped at these words "are rated," some doubt might have been raised, whether they were not to be rated according to the value when the lands were taken. But I do not think that even in such a case it is clear that would be so. The words "are rated" are however followed by the words "or shall for the time being be rated." That refers not only to present but future time. The rate must go on from time to time. It is now upwards of 40 years since the act passed. I do not see how it is possible to ascertain what the value of the land was when the act passed. I am very clearly of opinion that the true construction is, that you are to take the fluctuating value.

Third point.

With regard to the third question, there is more difficulty. The case states that the value of the property has increased by a variety of means and circumstances. It is

contended by the appellants, that the increased value of the adjacent lands is only to be taken *from other circumstances*, and that the increase of value *from the canal* ought not to be taken into account. There is some doubt from the words, "and as the lands so to be taken and purchased would have been ratable in case the same had continued in their former state." It is said that the meaning of these words is, that the improved value of the lands, supposing that the canal had not been made, is to be taken. That appears to me not to be their meaning. The increased value of the lands is, in my opinion, to be taken—from whatever cause it arises. At the time of passing this act some doubt existed as to whether tolls were ratable per se. The act clearly intended to exempt tolls at all events, and the framers of the act may have thought that though they had exempted the tolls, yet if they had said nothing as to the lands, a doubt might have arisen as to whether those lands, as increased by the value of the tolls, might not be ratable; or whether, if a toll-house were erected on the land, the rate might not be increased on account of the value of the tolls received. The meaning of the latter part of the act is, that the land shall be ratable *as mere land*. The Company have taken so many acres of land, and are to be exempt altogether from the payment of rates on the tolls; but the lands they possess are to be rated at the value of the adjacent lands. There is, however, great doubt (arising from the inaccurate wording of the clause,) as to how the value of the adjacent land is to be estimated. Is the value of the adjacent lands to be taken *without* the addition made by means of the canal, or *with* the addition? How are the adjacent lands now increased in value? From two causes; by means of the canal, and by means of other circumstances. The meaning of the clause, I think, is, that the value, as it is *altogether*, is to be taken. I do not see how it is possible to ascertain how much the value has increased from one, and how much from the other cause. The proper mode of rating the

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canal is upon the supposition, that instead of the canal being made where it is, it was 100 yards off, and the present value of the land 100 yards off is to be taken as the value of the land upon which the canal is situated.

First point.

PATTESON, J.—On the first point I am with the appellants. The precise ground on which the case cited was decided is not known. There is this distinction between that and the present case, that there the question arose on the 128th section, and the Court thought that the incorporating clause in the act of 42 *Geo.* 3, did not extend to *that* clause. I do not see exactly the reason for the decision, but it is enough to say that the two cases are not alike.

Second and third points.

With regard to the other points, I cannot make sense altogether of the clause, though, upon the whole, it is more nearly intelligible than those clauses generally are. The intention and object of the act was, that the Company should not be rated in respect of the tolls. The discussion in all the cases cited by Mr. *Greaves* was, whether the premises were to be rated, taking into consideration the value of the tolls. Mr. *Greaves* has argued upon the difference in the forms of expression used in different parts of this clause; first, there is "at any time or times hereafter," then "from time to time," and presently for the "time being." But what can this last expression by possibility mean, as it is here used, but the same as "from time to time?" The enactment is, that the lands, warehouses, and other buildings *to be* erected, (not *now* erected,) are to be rated as other lands, grounds, warehouses, and buildings, *are or shall for the time being* be rated. If the clause had stopped there, no doubt could have existed but that the Company were to be rated in the same way as if the lands and warehouses were in the hands of any private person; but it goes on to say, "and as the lands and grounds, warehouses and buildings, would have been ratable if they had continued in their former state." That is impossible, because the

warehouses to be erected cannot be rated in the same way as if they had continued in their former state, for they had no former state, and had not been used before. They are ratable in the same manner as other land, that is to say, as if they were not in the hands of the Company. That is the real meaning of the act.

To the third question the answer has been given,—that the thing is impossible. No person can possibly tell what is the value of the lands without including the value arising from the canal. The legislature cannot have intended what was impossible. Third point.

WILLIAMS, J.—Upon the question of incorporation I am entirely of the same opinion. No doubt whatever can be entertained. All the words that can be introduced are to be found in the clause in question. First point.

Nor is there more doubt on the second point. Mr. *Greaves* very properly brought under the consideration of the Court the several cases that have been decided, for the purpose of inducing us to suppose that the period to be looked at, is the period of the formation of the canal or of the taking of the lands. Those cases depended upon the language of each act. This particular one must depend on, and be regulated by, the language in the particular statute itself. Upon that, it is impossible to suppose that the time of making the canal is the point of time to which we are to look to ascertain the amount of assessment. The property is to be rated from time to time according to the fluctuating value of the adjacent lands. Second point.

With regard to the third point, almost all the observations as to the second apply, with this, that it introduces another subject more intractable and more impossible, namely, the extinction of the canal by supposition—a state of things I do not know how we are to deal with. Third point.

The result is, that as to the second and third points we are against the appellants, and therefore the rate is to remain confirmed.

Rate confirmed.

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The Sirhowy Tram-road Company *v.* J. Jones and others.
W. Homfray *v.* Jones.

Effect of clause in railway acts for incorporating the provisions of another act.

In pursuance of an order of the Lord Chancellor made in these causes, on 9th March, 1822, a case was made for the opinion of the Court, stating as follows:

In 32 *George* 3, an act passed for making and maintaining a canal from or from near Pontnewynydd into the river Usk, at or near Newport, and a certain collateral canal from the same, all in the county of Monmouth; and for making and maintaining railways or stone-roads from such canals to several iron-works and mines in the counties of Monmouth and Brecknock.

In 37 *George* 3, an act passed for extending the Monmouthshire Canal Navigation, and for explaining and amending the above act.

In 42 *George* 3, an act passed for making and maintaining certain railways to communicate with the Monmouthshire Canal Navigation, and for enabling the Company of Proprietors of that navigation to raise a further sum of money to complete their undertaking, and for explaining and amending the above acts.

Copies of the said three acts of parliament, which are declared to be public acts, accompany this case, with leave to either side to refer to any part thereof (*a*).

(*a*) 32 *Geo.* 3, c. 102. Some of the provisions (material to be here considered) of this act will be found set out above in the case of *Rex* v. *The Monmouthshire Canal Company*.

Sect. 128 provided "that if the owner of any estate, &c. &c. *situate within eight miles from any part of the said canals or railways*, should deem it expedient that any railways should be made through the lands of any other person, for the purpose of conveying his iron, coal, &c. to or from the said canal or railways, and if the said Company should refuse to make any such railway, in that case the owner, at his own costs, might make any such railway, and that such railway should be public for the conveyance of any minerals, &c. on payment to the person, at whose expense such railway was made, such tolls as for the time being should be payable to the said Company."

42 *Geo.* 3, c. 115. By sect. 1 of this act, certain persons were incorporated by the name of the Sirhowy Tram-road Company, and were empowered to make a railway or tram-road from Sirhowy furnaces or iron-works, in the parish of Bedwelty, Monmouthshire, along by Tredegar iron-works, then erecting in the same parish, down to a certain point called *Nine-mile Point*; and for this purpose to have, use, exercise, and enjoy such and the like ways, passages, powers, and authorities, upon, in, and over the lands through which such railway or tram-road should be made, in as full, ample, and beneficial a manner to all intents and purposes, as the Monmouthshire Canal Navigation Company were authorized and empowered to have, use, &c. under and by virtue of 32 *Geo.* 3, c. 102, with respect to the canals, railways, and other works thereby authorized to be made. Sect. 2 authorized and empowered the Monmouthshire Canal

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The tram-road authorized to be made by the last of these acts was completed some years since according to the directions of the said act, and is commonly termed the Sirhowy Tram-road. The Sirhowy Tram-road nowhere communicates, or forms a junction, with the canals or tram-roads made under the powers of the act of 32 *Geo.* 3.

John Jones, esq. was, at the time of making the application and request hereinafter mentioned, and still is the owner of certain lands called Tir Lewis David, containing unopened coal mines. These are situate within much less than eight miles of part of that proportion of the Sirhowy Tram-road which is below the nine-mile point mentioned in the act 42 *Geo.* 3, and therefore within much less than eight miles from that point;

Navigation Company to make and maintain a railway or tram-road from the point called the *Nine-mile Point*, down to, (with the exception of one mile of the road passing through Tredegar Park, which was to be made by Sir *C. M.* the owner, at his own expense on certain terms) and so as to communicate with, the Monmouthshire Canal Navigation and the river Usk at or near Newport, and also certain other branch railways. Section 3 enacts "that the said Sirhowy Tram-road Company, and the Monmouthshire Canal Navigation Company, and their respective agents, &c. and all bodies politic, &c. and all other persons whomsoever, shall have and be seised and possessed of, and are hereby respectively invested with such and the like estates, authorities, powers, abilities, interests, privileges, and advantages, and shall be, and are hereby made subject and liable to, such and the like rules, conditions, directions, regulations, limitations, restrictions, payments, penalties, forfeitures, punishments, and benefit of appeal, with respect to the said railways or tramroads, and other works hereby authorized to be made and maintained by the said Sirhowy Tram-road Company, and by the Monmouthshire Canal Navigation Company respectively as aforesaid, and to the purchase and sale of lands and other hereditaments, and the conveyance of lands &c. to the said Companies respectively, for the purposes aforesaid, and to all other matters and things in anywise relating thereto, as are mentioned, given, granted, prescribed, established, and inflicted, in and by the said first-mentioned act, (i. e. 32 *G.* 3, c. 102,) with respect to the said canals, railways, and other works thereby authorized to be made and carried on, to all intents and purposes whatsoever, as far as the same respectively are or shall be applicable, and not repealed, altered, re-enacted, or otherwise provided for, in and by this present act; and that the said Sirhowy Tram-road Company, and the Monmouthshire Canal Navigation Company respectively, shall and may demand, take, and receive such and the like rates, tolls, and duties, for the tonnage of iron, coals, limestone, and other commodities carried and conveyed on the said railways or tramroads hereby authorized to be made by them respectively, as the Monmouthshire Canal Navigation Company are by the said first-mentioned act authorized and empowered to demand, take, and receive, for the tonnage and wharfage of the like articles, carried and conveyed on the said canals and railways thereby authorized to be made, save and except as hereinafter is otherwise provided and directed." The remainder of the clause is set out above, p. 70, in notis.

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and they are also situate within much less than eight miles of every part of that proportion of the Sirhowy Tram-road which is above the nine-mile point. The part of that proportion of the Sirhowy Tram-road above the nine-mile point, nearest to the lands of *John Jones*, is not more than half a mile distant from the said lands, and the distances between the lands of *John Jones* and the Sirhowy Tram-road, in several other parts of that proportion of the said tram-road which is above the nine-mile point, are not more than two miles, two miles and a half, and three miles. The same lands of the said *John Jones* are within eight miles of the main canal made by virtue and in pursuance of the first section of 32 *Geo.* 3. The said *John Jones* deeming it expedient that a railway or waggon-road should be made from his lands, for the purpose of conveying the coals in his lands to a part of the Sirhowy Tram-road, which is immediately below the nine-mile point, over, through, and along the lands of several other persons, owners of land situate between his lands and the said nine-mile point, and who refused to consent to the making of the said railway or waggon-road; and being advised *that the provisions of the* 128*th section of the said act of the* 32 *Geo.* 3, *were to be considered as incorporated into the act of the* 42 *Geo.* 3, *so as to authorise the making of such railway or waggon-road from his lands to any part of the said Sirhowy-Tram-road, within eight miles of his lands*, made an application and request in writing to the Company of Proprietors of the Monmouthshire Canal Navigation to make such railway or waggon-road, at a general meeting or assembly, held as is mentioned in and directed by the 76th section of the said act of 32 *Geo.* 3, such application and request specifying all matters required by the said section to be specified in such applications and requests.

The said Company of Proprietors refused, for the space of three calendar months after such application and request had been made, to make any such railways or waggon-roads.

The said *John Jones* made no application or request of any kind or in any manner to the Sirhowy Tram-road Company to make such railway or waggon-road.

The length of the railway or waggon-road so proposed to be made by the said *John Jones* is more than four but less in the whole than five miles. Its proposed junction with the Sirhowy Tram-road is below the nine-mile point, and in that proportion of the Sirhowy Tram-road which was made by the Company of Proprietors of the Monmouthshire Canal Navigation. The said railway or waggon-road would not pass over, through, or along, or damage or interfere with any house or building, or any ground which was the site of any house or building, or any garden, orchard, yard, park, paddock, planted walk, avenue, lawn, or pleasure ground (*a*). No railway or waggon-road could be made from the lands of *John Jones* to join that part of the Sirhowy Tram-road which is the nearest to the said lands, and which, as is above stated, is not more than

(*a*) Which, except in certain cases specified in the schedule, was prohibited by sect. 4 of 42 *Geo.* 3, c. 115.

half a mile distant therefrom, for the purpose of conveying coals from the said mines to such part, but at an expense which would prevent the working of the said mines at a profit; but a railway or waggon-road might be made from *John Jones's* lands to several or some parts of that proportion of the Sirhowy Tram-road which is above the nine-mile point without any such expense as would prevent the working of the mines in his lands at a fair and reasonable profit, although the same would not be wrought to so large a profit as they would yield if the proposed longer railway or waggon-road were made. A railway or waggon-road, if so made as is last mentioned, to certain parts of that proportion of the Sirhowy Tram-road which is above the nine-mile point, would pass through the lands of several owners of land against their consent, but would not pass through the lands of several other owners of lands against whose consent a railway or waggon-road from the lands of the said *John Jones* to a point of junction below the nine-mile point must pass.

If a railway or waggon-road is made from the lands of Mr. *Jones* to a point of junction below the nine-mile point, the Sirhowy Tram-road Company would not be entitled to any tolls for coals carried from Mr. *Jones's* mines along part of the Sirhowy Tram-road. If a railway or waggon-road is made from the lands of Mr. *Jones* to a point of junction with the Sirhowy Tram-road, above the nine-mile point, the Sirhowy Tram-road Company would be entitled to some tolls for coals carried from Mr. *Jones's* mines along part of the Sirhowy Tram-road.

The questions for the opinion of the Court are, whether the provisions of the 128th section of 32 *Geo.* 3, are, by the force and effect of any clause, enactment, or words in 42 *Geo.* 3, to be considered as so incorporated into and made part of the provisions of the 42 *Geo.* 3, as that the whole or any and what part or parts of the Sirhowy Tram-road is or are to be taken and considered as a railway to which the said provisions are applicable, so as to authorize the making of such railways or waggon-roads to the said Sirhowy Tram-road, or such part or parts thereof, from any lands within eight miles thereof, as are authorized to be made by the said 128th section, to any of the railways mentioned in the act of the 32 *Geo.* 3, from any lands situate within eight miles of such last-mentioned railways? And if the judges of this Court shall be of opinion in the affirmative, then, first, whether, if any railway is intended to be made to the Sirhowy Tram-road under the effect of the said provision so understood to be incorporated, and to be made against the consent of the owners of the land through which it is proposed the same should pass, by an owner of lands, an application or request of the nature mentioned in the said 128th section, ought or ought not to be previously made both to the Monmouthshire Canal Company and the Sirhowy Tram-road Company, or to either and which of them,—whether it is proposed that an intended railway shall join the Sirhowy Tram-road above the nine-mile point, or below the nine-mile point?—and if such application or request ought to be made to them jointly, in what manner the same is to be made, there being no general assembly of both Companies; and in what manner an application

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or request ought to be made to the said Sirhowy Tram-road Company, if a request or application to that Company is necessary? Secondly, whether, according to the true interpretation of the said acts, the Monmouthshire Canal Company, upon request and application made to them only according to the 128th section aforesaid, or, upon their refusal, the said *John Jones*, would by law be entitled to make a railway or waggon-road from the said lands of the said *John Jones* without the consent of the owners of the land through which the same must pass, to a point of junction with the Sirhowy tram-road, below the nine-mile point, which is distant more than four miles from *John Jones*'s lands, or to any point of junction above the nine-mile point more distant than three miles from the said lands of the said *John Jones*, taking it as a fact that the mines of the said *John Jones* could be wrought at a fair and reasonable profit to the said *John Jones*, if the coals were carried from such mines to a point of junction with the said tram-road, not more than two miles from his lands, though the same could not be wrought to so large a profit as if the coals were carried to a point of junction below the nine-mile point, or to a point of junction above the nine-mile point, but more distant from the said lands than three miles; and taking it also as a fact that a railway or waggon-road made to join the Sirhowy Tram-road below the nine-mile point, or to join it above the nine-mile point, but when the junction was more than three miles from the lands of the said *John Jones*, would be made with a more expedient degree and variation of descent than a railway or waggon-road would be made with a point of junction not more than two miles from the said lands; such difference of descent, nevertheless, not preventing a fair and reasonable profit arising from working of the coal mines?

Judges' Certificate.

"This case has been argued before us by counsel, and we are of opinion the provisions of the 128th section of the 32 *Geo.* 3, are *not*, by force and effect of any clause, enactment, or words in the act of the 42 *Geo.* 3, to be considered as so incorporated into and made part of the provisions of the act of the 42 *Geo.* 3, as that the whole or any parts of the Sirhowy Tram-road is to be considered a railway to which the said provisions are applicable, so as to authorize making of such railways or waggon-roads to the said Sirhowy Tram-road, or any part thereof, from any lands within eight miles thereof, as are authorized to be made by the said 128th section to any of the railways mentioned in the said act of the 32 *Geo.* 3, from any lands situate within eight miles of such last-mentioned railways:—*unless the lands from which such railways are to be made to the Sirhowy Tram-road are within eight miles from some part of the canals, or of the railways, particularly described in the* 32 *Geo.* 3, *so as to warrant making a railway therefrom under the* 32 *Geo.* 3.

J. BAYLEY,
G. S. HOLROYD,
W. D. BEST."

The Lord Chancellor Eldon subsequently made the following observations, which were handed with the certificate to Mr. J. *Bayley*, who made the reply thereto which is subjoined.

Lord Chancellor's Remarks.

"This matter has come again before me, Mr. *Puller* and Mr. *Campbell* attending with the Chancery counsel. On neither side are they able to state what is meant by the words in italics. If they except any railways to be made to the Sirhowy Tram-road out of the negative answer contained previously in the certificate, then as to such railways, the other questions in the case stated, which have not been answered, should receive an answer from the judges, but are not noticed in the certificate at all."

"If the words in italics do not import that some railways are such as do not fall within the preceding negative answer, what is the exact meaning of those words?"

Mr. Justice Bayley's Answer.

"My dear Lord,—The judges before whom the case of the Sirhowy tram-road was argued, were of opinion that the Sirhowy Tram-road was not, under 42 *Geo.* 3, made a new terminus, so as to warrant railways upon all lands within eight miles thereof; and that the 42 *Geo.* 3, gave no right to make a railway to the Sirhowy Tram-road upon lands which before that act were not liable to that burthen. But as there might be lands within eight miles of the termini specified in 32 *Geo.* 3, (viz. the canals and the railways specially described in that act,) and railways over those lands to those termini might touch upon or fall in with the Sirhowy Tram-road, the qualification at the end of our certificate was intended to intimate that such railways as, independently of 42 *Geo.* 3, could have been made under 32 *Geo.* 3, might still be made. I have the honour to be, &c. J. Bayley.

"17th April, 1823.

"Should this explanation be insufficient I will readily attend your lordship when and where you may appoint, and so will either of my brethren."

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By a local act for paving &c. the town of Stafford, certain commissioners were authorized to make rates for the purposes of the act, and if any person thought himself aggrieved by the rate, an appeal was given to the commissioners, and from their determination to the sessions; and it was enacted, that in case any person rated should neglect to pay his rate for seven days after demand, it should be *lawful* for any justice, upon proof on oath of such demand and non-payment, by warrant to authorize the collector to levy the rate by distress and sale of the goods of the person rated; and in case there should be no distress, to commit the party to gaol:—Held, that the clause was not obligatory on the justice to issue a warrant, *without a previous summons.*

Semble, that in all cases in which magistrates are authorized, upon application, to issue a distress warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons;—unless by act of parliament it be specially directed that the warrant shall be issued immediately.

BY a local act of 11 *Geo.* 4, sess. 1830, for paving the streets &c. within the borough of Stafford, the mayor, aldermen, and capital burgesses, of the borough, and all owners, tenants, or occupiers, of any hereditaments within the borough, of the yearly value of 25*l.*, were appointed commissioners for putting the several powers of the act into execution; and for that purpose were empowered to make rates and to appoint assessors and collectors of the rates. The assessors were to ascertain the yearly value of the premises to be rated, and the several sums which ought to be charged upon the tenants, occupiers, or landlords. The commissioners were empowered to remit or reduce the rates, either on account of poverty, or on the ground that the tenants or owners of the premises received no or only a partial benefit by reason of the act. It was also provided, that if any person thought himself aggrieved by any rate, he might apply to the commissioners, after the demanding of the rate, and the commissioners were empowered to give such relief as to them should seem reasonable; and if any person thought himself aggrieved by their determination, he might appeal to the quarter sessions; and it was enacted, that in case any person who should be rated or assessed, or subject or liable to the payment of any rate to be made as aforesaid, should refuse or neglect to pay his proportion of any of the said rates, to any collector or collectors to be appointed as aforesaid, for the space of seven days next after personal demand thereof made, or demand thereof in writing left at the usual or last place of abode of such person, it should be *lawful* for any justice or jus-

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tices of the peace of the said borough, upon proof made upon oath of such demand and non-payment, (which oath any such justice or justices were thereby *empowered and required* to administer,) by warrant under the hand and seal or hands and seals of such justice or justices, (which he and they were thereby *empowered* to grant,) to authorize and direct the said collector or collectors to levy such rate or moneys so in arrear, together with the costs and charges attending the same, to be ascertained by such justice or justices, by distress and sale of the goods and chattels of the person so refusing or neglecting to pay as aforesaid, rendering the overplus (if any) upon demand, to the owner; and in default of distress, such justice or justices were authorized to commit such person to gaol, for any period not exceeding three months, or until payment of such sum as should have been found due and in arrear upon any such assessment, together with all costs &c., to be ascertained by the said justice or justices. It was also enacted, that all *fines, penalties, and forfeitures,* imposed by the act, (the manner of levying and recovering whereof was not particularly directed,) should be recovered by distress and sale of the goods of the offender, by warrant of any justice of the borough, upon the confession of the party, or upon the information of any credible witness upon oath; and in case there were no goods, the offender was to be committed to gaol. It was further provided, that in all cases in which by the act any *penalty or forfeiture* was imposed, and made recoverable by information before a justice of the peace, it should be lawful for any justice of the peace to *summon* the party complained against, and on such summons to determine the matter of such complaint, although no information in writing should have been exhibited. It was further enacted, that when any distress should be made for any sum of money to be levied by virtue of the act, the distress itself should not be deemed unlawful, nor the parties making the same be deemed trespassers, "on account of any defect or want of form in the *summons,* conviction,

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warrant of distress, or other proceeding relating thereto."

Two rates were made under this act, on the 6th August, 1833, and 25th August, 1834, respectively. An information upon oath in writing was made by *Jones*, one of the collectors, that *J. W.*, an occupier of a house and premises in the borough, was duly assessed by those two rates, towards the necessary expenses and purposes of the act, in the sum of 6*l.* 17*s.* 6*d.*, and that such sum had been lawfully demanded of *J. W.*, who had neglected to pay the same for the space of seven days next after such demand being made. The information in conclusion prayed that a distress warrant might be forthwith issued, to levy the said sum upon the goods and chattels of the said *J. W.* The justices refused to issue a distress warrant, without *previously issuing a summons* to the party of whom complaint was made.

Upon an affidavit of these facts, a rule nisi was obtained for a mandamus to the justices to issue their warrant for levying, upon the goods and chattels of *J. W.*, the sum of 6*l.* 17*s.* 6*d.*

Whateley now shewed cause. The question for the consideration of the Court is, whether the justices are to be *compelled* to issue a distress warrant for the enforcement of the payment of these rates, without previously *summoning* the parties to appear and state what they may have to urge why their goods should not be distrained. The clause upon which reliance is placed, is that which enacts that in case the rate shall be unpaid for seven days after demand, it shall be *lawful* for any justice, *by warrant*, to authorize the collector to levy the rate. Although no mention is here made of a summons, yet the justices are not therefore bound to grant their warrant at once, without summoning the party. By a subsequent clause in the act, it is enacted, that where any distress is made, the distress shall not be deemed unlawful "on account of any defect or want

of form in the *summons*, conviction, warrant of distress, or other proceeding relating thereunto." This shews that the legislature presumed that a summons would be issued previously to the making of a distress. Lord *Kenyon*, in *Rex* v. *Benn* (*a*), says, "It is an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard;" whereas if a distress warrant were to issue without a *previous summons*, the party would have no opportunity of shewing cause why the execution should not issue against him. There are several cases in which it has been held, that for justices to proceed against a party without summoning him, is a *misdemeanor*, for which they are liable to a criminal information; *Rex* v. *Venables* (*b*), *Rex* v. *Constable* (*c*), *Rex* v. *Broderip* (*d*), *Rex* v. *Commins* (*e*); and it is well established that this Court will not, by mandamus, compel magistrates to do that which will expose them to an action; *Rex* v. *Justices of Bucks* (*f*), *Rex* v. *Justices of Bucks* (*g*).

R. V. Richards, who was to have supported the rule, was absent.

Lord DENMAN, C. J.—These magistrates have, in my opinion, done that which is perfectly correct. Supposing them to have the *power* to issue a warrant in the first instance, they have done right in thus limiting its exercise. If the party against whose goods the distress warrant is prayed, be summoned, he may shew that he has paid his proportion of the rate to one of the collectors who has not accounted for it.

LITTLEDALE, J.—We ought not to issue a mandamus

(*a*) 6 T. R. 198.
(*b*) 2 Lord Raym. 1407; *S. C.* 1 Str. 630.
(*c*) 7 Dowl. & Ryl. 663.
(*d*) 7 Dowl. & Ryl. 861; *S. C.* 5 Barn. & Cressw. 239.
(*e*) 8 Dowl. & Ryl. 344.
(*f*) 2 Dowl. & Ryl. 689; *S. C.* 1 Barn. & Cressw. 485.
(*g*) *Ante*, iii. 69.

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to *compel* magistrates to issue a distress warrant, without having previously issued a summons.

PATTESON, J.—I am of the same opinion. The only question is, whether the clause which empowers the magistrates to issue a distress warrant, in case of non-payment of the rate, is *obligatory*. The language of the clause is, that "*it shall be lawful*" for the justices to issue a warrant of distress. There may be cases in which a summons would only be notice to the party summoned to get out of the way, and the magistrates may, in order to meet such a case, have a *power* to issue a distress warrant in the first instance, but they are not to be compelled to do so by mandamus.

WILLIAMS, J.—The magistrates have exercised a proper discretion, and this rule ought therefore to be discharged.

R. V. Richards was subsequently heard in support of the rule. By the act, certain commissioners are empowered from time to time to make rates, and are authorized to relieve parties who either receive none, or only a partial benefit from the act, or who are unable, from poverty, to pay the rate. The magistrates have no discretion to exercise as to issuing warrants, when applied for by the proper parties. Their duty, under the clause which has been referred to, is entirely ministerial. But another clause has been referred to as shewing that the legislature contemplated that a summons would be issued. That, however, is explained by a reference to the clause respecting the mode of proceeding in all cases in which any *penalty or forfeiture* is imposed, in which it is provided that the justices may *summon* the defendant, although there is no information in writing. Where the magistrates have no discretion, they ought not to issue a summons. It would be a mere notice to the party complained of to get out of the way. [Lord *Denman*, C. J. The words of the act are, that "it shall be

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lawful" for the justices to issue a distress warrant.] This case bears no resemblance to those in which the magistrates have a power to hear and determine the matter in dispute. [*Patteson*, J. How does this differ from the case of a *poor-rate*, which the justices have no power to modify? The 4th section of the 43 *Eliz.* c. 2, is analogous to the clause in this act, and it has been held, that before the magistrates issue a distress warrant for a poor-rate, they should summon the party.] Here, the commissioners are the persons to redress all grievances. [*Patteson*, J. In the case of a poor-rate, the appeal is to the quarter sessions.] The magistrates have a discretion in the case of a poor-rate. [*Patteson*, J. Not by the words of the act.] The justices in this case have no power to relieve. For what purpose, therefore, is the summons to be issued? [*Patteson*, J. The party may shew that the rate has not been demanded, or that he has paid it and that it has not been accounted for.] At all events the Court will discharge the rule without costs, as the question was doubtful.

Lord DENMAN, C. J.—Not the slightest doubt has been raised in my mind by the argument which has just been urged. The argument with respect to the occurrence of the word "summons" in that clause which provides that no distress shall be unlawful for any defects of form, has certainly been answered, but it is impossible to distinguish this act from the 43 *Eliz.* c. 2. By that act the rates are to be made by the churchwardens and overseers, and when made, the magistrates are to enforce the payment *by warrant*. The same language is held in this act. The magistrates should issue a summons, not by way of exercising any authority over the rate, but, admitting the rate to be valid, to call on the party to shew cause why his proportion of it is unpaid. The appeal against a poor-rate is to the sessions; that against *this* rate is to the commissioners. Why are we not to suppose that the legislature, who passed this local act almost in the same form as the 43 *Eliz.*,

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intended that the mode of proceeding under both should be the same? Supposing that the magistrates had the *power* to issue the warrant in the manner prayed, yet they were perfectly justified in refusing to issue it without having summoned the party. The magistrates have, in my opinion, done themselves honour by limiting their jurisdiction. It is a matter of course that magistrates have their costs. If these persons had been less impatient, they might have had no difficulty.

LITTLEDALE, J.—I continue of the same opinion, except as to the argument upon the occurrence of the word "summons" in the clause providing against defects of form. I cannot distinguish this act from the 43 *Eliz.* c. 2. It is reasonable that the magistrates should call the party before them, to ascertain whether there has been any refusal to pay. That is not saying that the magistrates are to exercise any discretion as to the rate.

PATTESON, J.—It is plain that the magistrates have only power to enforce the payment of *the rate;* but the words of the act are not compulsory on them to issue a warrant upon the information of the collector. They have, in my opinion, exercised the power entrusted to them most properly and discreetly.

WILLIAMS, J.—My mind remains in the same state. I do not entertain any doubt on the question. Neither the language of the particular clause, nor general duty, obliges the magistrates to issue a warrant in the first instance. The simple expression in the act is, that "*it shall be lawful*" for the justices to issue a warrant of distress. The analogy between this and a poor-rate is perfect and complete. *Rex* v. *Benn* shews that it is an answer to an application for a mandamus to justices, to command them to grant warrants of distress for non-payment of poor-rates,

that no previous summons had been issued. The magistrates in this case have, in my opinion, acted *legally and wisely*.

Rule discharged with costs.

The KING *v.* THEOPHILUS JEYES, Esq.

WADDINGTON obtained a rule, calling upon *Jeyes*, town clerk and town treasurer of the town of Northampton, to shew cause why a writ of mandamus should not issue, directed to him, commanding him to pay to Mr. *Becke*, the attorney of one *J. G.*, the sums of 49*l.* 6*s.* and 53*l.* 12*s.*, for the loss of time and expenses of witnesses attending the prosecution of an indictment for riot, tried at the last assizes for the said town, and for the charges and expenses attending the said trial, pursuant to the several orders of Court, made at the said assizes, for that purpose. From the affidavits, these facts appeared:—

J. G. having made complaint to the magistrates of the town of Northampton, that certain persons had committed a riot and assault within the town, he was bound over to prosecute at the *town quarter sessions*. Instead, however, of prosecuting at the sessions, he preferred an indictment for a riot at the county *assizes*, which indictment being found, the defendants were tried thereupon before *Park*, J., and convicted. The learned judge at first refused to make any order for the payment of the costs of the prosecution, on the supposition that such order could not be made, except when the prosecutor had entered into recognizances to appear and prosecute at the assizes, but subsequently the two orders above-mentioned were made under the direction of the judge; one of the orders being for the expenses of the witnesses who had been called and examined upon *circuit* subpœnas, obtained from the clerk of assize by *prosecutor*

The Court will not issue a mandamus to the *treasurer* of a town or county, commanding him to obey an order made by a judge of assize, for payment by him of the costs &c. of the prosecutor of and witnesess in an indictment for a misdemeanor, under 7 *Geo.* 4, c. 64, s. 23.

A party was bound over to prosecute at the sessions, in a case within 7 *Geo.* 4, c. 64, s. 23, but prosecuted at the assizes. Witnesses were called on subpœnas from the clerk of assize:— Held, that the *witnesses* were entitled to an order for their costs under that statute.

Dubitatur whether the was so entitled.

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the prosecutor, and the other order being for the expenses of the prosecutor. These orders being shewn to Mr. *Jeyes*, he refused to pay the sums mentioned in them (*a*).

N. R. Clarke (with whom was *Miller*) now shewed cause. A mandamus will not lie in this case. In *Rex* v. *Bristow* (*b*) it was held, that the Court would not grant a mandamus to a *ministerial officer*, such as the *treasurer of*

(*a*) Section 23 of 7 *Geo.* 4, c. 64, after reciting that for want of power in the Court to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred, by the expense, from prosecuting persons guilty of misdemeanor, who thereby escape the punishment of their crimes,—enacts, for remedy thereof, that when any prosecutor, or other person, shall appear before any Court on *recognizance* or *subpœna*, to prosecute or give evidence against any person indicted of &c. (certain misdemeanors therein specified,) every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time; in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony: and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have bonâ fide attended the Court, *in obedience to any such recognizance*, to order payment of the expenses of such person, together with a compensation for his trouble and loss of time, in the same manner as in case of felony; provided that in cases of misdemeanors, the power of ordering the payment of expenses and compensation shall not extend to the *attendance before the examining magistrate*.

Section 24 enacts, that every order for payment to any prosecutor &c., shall be forthwith made out and delivered by the proper officer of the Court, unto such prosecutor &c., and, except in cases hereinafter provided, shall be made upon the *treasurer* of the county, riding, or division, in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby *authorized and required*, upon sight of every such order, *forthwith to pay* to the person therein named the money in such order mentioned, and shall be allowed the same in his accounts.

Section 25 provides, that where the misdemeanor is committed in a town &c. which does not contribute to the county rate, but has a rate in the nature of a county rate, or any other fund applicable to similar purposes, the sum directed to be paid by virtue of that act shall be paid out of such rate or fund, by the treasurer or other officer having the collection or disbursement of the same.

(*b*) 6 T. R. 168.

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a county, to obey an order of the Court of Quarter Sessions, but that the proper remedy, in case of his refusal to obey such order, was by indictment; and Lord *Kenyon*, in delivering his judgment, uses this language, "It has been often said by Lord *Mansfield*, that a mandamus was a very beneficial writ, and that the best method of preserving it was to be sparing in the use of it."—"This Court have no difficulty, upon a proper case laid before them, in granting a mandamus to *justices* to *make an order*, when they refuse to do their duty; but it would be *descending too low* to grant a mandamus to inferior officers to *obey that order:* we might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him, as to grant this application to the treasurer to obey the order in question." This case is followed by *Rex* v. *The Treasurer of Surrey* (*a*), which was an application for a mandamus to the treasurer of the county of Surrey, commanding him to pay the expenses of a witness in a case of felony, pursuant to an order from the borough of Southwark sessions, under 58 *Geo.* 3, c. 70. The Court there said that they could not interfere by *mandamus;* that the most proper remedy was by indictment at common law; and they referred to *Rex* v. *Johnson* (*b*) as a case in point. The Court will not *go so low* as to send a mandamus in this case. An indictment will lie, and is the proper remedy.

It is questionable also whether these orders, or at least that which directs the payment of the *prosecutor*'s expenses &c. is warranted by 7 *Geo.* 4, c. 64, s. 23. The prosecutor did not appear at the assizes on *recognizance*, but went there as a *volunteer*. [*Littledale*, J. In *Rex* v. *Richards* (*c*) it was held, that the statute did not apply where an indictment, preferred at a Court of Quarter Sessions, had been removed into K. B. by certiorari, and tried at the assizes.]

Campbell, A. G. and *Waddington*, contrà. It is not

(*a*) 1 Chitty's Rep. 650.
(*b*) 4 M. & S. 515.
(*c*) 2 Mann. & Ryl. 405; 8 Barn. & Cressw. 420.

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denied on the other side, that this is a case in which the Court have *power* to issue a mandamus, and it is hoped that they will consider the case to be one in which it is right to *exercise* that power. Here is a refusal by a public officer to perform a duty cast upon him *by act of parliament.* Section 24 of the statute under which these orders were made, expressly authorizes and requires the county treasurer, upon sight of any such order, *forthwith to pay* to the person therein named, the money therein mentioned. Mr. *Jeyes* refuses to obey the order of the judge in this case, and there ought to be some process by which the party, for whose benefit the order was made, may enforce the *speedy* performance of that which is directed to be done. An *indictment* is no remedy for this party, although it may be a good mode of *punishing* the officer refusing to obey the order. All that the applicant wants is the payment of the money, which he cannot procure by means of an indictment. The Courts have said, that where the subject is without any other effectual remedy, he shall have a mandamus. In *Rex* v. *The Severn and Wye Railway Company* (*a*), a railway, which was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, had been afterwards taken up by the company; and it was held that a mandamus ought to issue to compel the company to reinstate and lay down again the railway. It was objected in that case, that the company were liable to an *indictment*, and that therefore a *mandamus* was not the proper remedy; in answer to which, *Abbott*, C. J. says, "If an indictment had been a remedy *equally convenient, beneficial and effectual* as a mandamus, I should have been of opinion that we ought not to grant the mandamus; but I think it is perfectly clear that an indictment is not such a remedy, for a corporation cannot be compelled

(*a*) 2 Barn. & Ald. 646.

by indictment to *reinstate the road.* The Court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine and refuse to reinstate the road, and at all events a considerable delay may take place. The remedy is therefore *not so effectual* as that by mandamus. I am therefore of opinion, that the circumstance of the corporation being liable to an indictment is no objection to the granting of a mandamus." The other judges proceeded upon the same principle. This case is of a later date than *Rex* v. *Bristow,* and is a very strong authority in support of the present application. The test is, whether a mandamus or an indictment be the more *effectual* remedy. In that case there was *less* reason for deeming the indictment not so effectual a remedy, for, as *Abbott,* C. J. observed, a *fine* might there have been imposed in case of conviction. There was a case of *Rex* v. *Lord Boston* (*a*), in which the Court granted a mandamus under circumstances very similar to those now before the Court. The only authority contrà is *Rex* v. *Bristow* (*b*), and that was in fact decided upon a different point. The justness of the observation of Lord *Mansfield,* referred to by Lord *Kenyon* in that case, and upon which he appears to found the rest of his remarks, may well be doubted. That a mandamus is a *very beneficial* writ, would appear to be a strong ground for *issuing it freely,* rather than a reason for being "*sparing in the use of it.*" Lord *Kenyon* also, when he says that it would be *descending too low* to grant a mandamus in the case before him, appears to consider it analogous to the case of a *constable* refusing to execute a warrant directed to him. The case of the constable bears no analogy to *this* case, whatever resemblance may be supposed to exist between it and the case of a county treasurer refusing to obey the order of the *Court of Quarter Sessions.* This is an order by a judge of assize, and an order which by statutory enactment the treasurer is directed forthwith to

(*a*) MS. (*b*) *Suprà,* 103.

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obey. Besides, that case was decided at a period when it was the common opinion that a mandamus could not be granted in any case where there was a remedy by indictment. This opinion was first broken into by Lord *Ellenborough*, many years afterwards, in *Rex* v. *The Commissioners of Dean Inclosure* (*a*). In shewing cause against a rule nisi for a mandamus in that case, one objection was, that another remedy was open to the party by indictment for disobedience to the order of sessions; to which it was answered, that an indictment was not such a remedy as the case demanded, for that *indictment is only a proceeding in panam for the past, and not a remedy for the future.* Lord *Ellenborough* says, "Upon the objection of there being another remedy in this case, I cannot help thinking that what has been observed by the counsel in support of the rule is extremely material, and that an indictment would not afford that *convenient* mode of remedy which might be attained by mandamus." This *dictum* was followed by the decision of the Court in the case already cited of *Rex* v. *Severn and Wye Railway Company*. A mandamus in this case would beyond doubt be a complete and speedy remedy, whereas an indictment would be a remedy worse than the disease, inasmuch as it would entail upon the party fresh costs, without enforcing the payment of those already incurred.

There can be no doubt, and indeed it is hardly disputed, that the order for the payment of the costs of the *witnesses* is good; and it is submitted that, laying aside the fact of the prosecutor's having been bound over to prosecute at the *sessions*, it is sufficient to warrant the judge to make the order as to *his* costs, that the witnesses were called upon circuit subpœnas.

Lord DENMAN, C. J.—With respect to the validity of one of these orders I have some doubt; with respect to the

(*a*) 2 M. & S. 80.

other, which directs the payment of the costs of the witnesses, I have none.

There is considerable doubt whether, when an inferior officer refuses to do his duty, he being amenable to other persons, this Court will under any circumstances interfere by mandamus. It is not desirable to multiply applications of this sort, as would be the case if we were to make this rule absolute. In *Rex* v. *Bristow* (*a*), the Court said that they would not descend so *low* as to grant a mandamus to an inferior officer to obey an order of justices. Here is another remedy, by indictment. The indictment, though an *imperfect* remedy, must be considered as *some* remedy. The treasurer will, after one conviction, obey the order. It is true that in *Rex* v. *The Commissioners of Deau Inclosure*, and *Rex* v. *Severn and Wye Railway Company* (*b*), strong observations are made by Lord *Ellenborough* and *Abbott*, C. Js.; but those cases are different, and do not govern that which is now before us. The case of *Rex* v. *The Treasurer of the County of Surrey* (*c*) is really directly in point; for the statute of 7 *Geo.* 4, c. 65, is founded upon 58 *Geo.* 3, c. 70: the language in the two statutes is the same, and the same direct duty is cast on the county treasurer by either statute. I am of opinion that we ought not to proceed by mandamus. This party is the officer of other persons, and we must not interfere with their authority over him. We must not assume that an indictment would be no remedy. In one respect it would be a *better* remedy than a mandamus, for it would have the effect indirectly of producing obedience, and also of *punishing* the party in case of wilful disobedience.

LITTLEDALE, J.—In *Rex* v. *Bristow*, it is laid down distinctly that a mandamus will not lie to an inferior officer. I should feel much inclined to act on this rule; but here a difficulty occurs owing to the act of parliament pointing out the treasurer as a distinct officer,—which, I think, makes this

(*a*) *Suprà*, 108. (*b*) *Suprà*, 104. (*c*) *Suprà*, 106.

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case not to be exactly within the rule. But in *Rex* v. *The Treasurer of Surrey*, the Court refused a mandamus under precisely the same circumstances. The treasurer is only the servant of the justices, and to such, a mandamus ought not to issue. In Lord *Boston's* case the application was against *principals*.

Then with regard to the merits: I think that the *witnesses* are clearly entitled to their costs, but as to the *prosecutor's* right I have much doubt. The inclination of my mind is strongly that he is *not* entitled. Here, the prosecutor was bound over to the sessions, and prosecuted at the assizes. The act intends only to give the prosecutor his costs, when he has *previously been before magistrates who have thought it a case proper to be referred to the Court*. That cannot be said to have been the case here (*a*).

PATTESON, J.—I entirely agree that we ought not to grant this mandamus. In *Rex* v. *Bristow* the Court thought it necessary to decide on the broad ground that the party was a ministerial officer. This was followed up by *Rex* v. *Treasurer of Surrey*, which is a direct authority. It is said that an indictment would be no remedy in this case; that is not so; there may be a *fine;* and, in truth, the indictment is a quicker, and therefore probably a better remedy. In *Rex* v. *Severn and Wye Railway Company*, there was something *to be done* by the parties to whom the mandamus was sent,—not a mere payment of money.

WILLIAMS, J.—I entirely concur. It is said that a mandamus is a more speedy and complete remedy:—The party might make a return and cause great delay. But the rule laid down in *Rex* v. *Bristow* has long been the prevalent doctrine. I observe that even in *Rex* v. *Severn and Wye Railway Company*, which is relied upon as somewhat relaxing the rule, Lord *Tenterden* entertained considerable doubts during the discussion. That case is quite distinguishable.

Rule discharged.

(*a*) See section 23, *ante*, p. 102.

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EDMUND POLLEXFEN BASTARD, Esq. *v.* WILLIAM TRUTCH.

ARCHBOLD had obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Marshal of the Marshalsea, as to this action, upon an affidavit stating as follows:

In January 1834, the defendant was arrested in Devonshire at the suit of one *Slack*, upon a writ of ca. sa., directed to the sheriff of Devon, and was lodged in the prison of the said sheriff. Being indebted to the plaintiff in 225*l.* 5*s.*, the defendant, in April, gave a cognovit for the amount, upon which judgment was entered up in Trinity term, 1834. On 3d June, a writ of ca. sa., in this action, issued out of this Court, upon which writ the defendant was detained in the same prison. In October, the defendant obtained a writ of habeas corpus cum causâ, under which he was removed from the prison of Devonshire, and was committed to the custody of the Marshal of this Court. In the return to the writ of habeas corpus, the writ of ca. sa. in this case (which was dated 30th May, 1834,) was set out, and was as follows: "*William* IV. &c. to *Our Coroners* of the county of Devon, greeting. We command you that you take *William Trutch* if he shall be found in your county, and that you safely keep him, so that you may have his body before Us at Westminster immediately after execution hereof, to satisfy *E. P. Bastard*, Esq. for 225*l.* 5*s.*, which in Our Court before Us at Westminster, were awarded to the said *E. P. B.*, Esq., for his damages which he sustained as well by reason of not performing certain promises &c. made by &c. to &c., as for his costs &c., whereof the said *W. T.* is convicted, as appears to Us of record. And have you then there this writ, &c." The return then set out a certificate, that

A writ of ca. sa., sued out against a defendant, by a plaintiff who is in fact sheriff of the county into which the process issues, should be directed to the coroners; but the fact of the plaintiff's being sheriff, need not appear on the face of the writ.

Semble, that upon the record of the proceedings, the ground of so directing the writ should be surmised.

But where a prisoner is charged in execution under such writ, it is no objection that the proceedings have not been entered of record.

A party being detained for debt in the gaol of the county of D., a writ of ca. sa. at the suit of the sheriff of D., issues, directed to the coroners of D., and is lodged with the gaoler of the county gaol of D. These matters being returned to a writ of habeas corpus cum causâ, together with a certificate, signed "*A. B.* one of the coroners of D.", that the copy of the writ of ca. sa. set out in the return was a true copy:—Held, that it must be taken, that the writ came to the gaoler through the coroners in proper course.

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this was a true copy of the writ of ca. sa. so lodged as aforesaid, and upon which the defendant was detained, signed thus, "*Joseph Gribble*, one of the coroners of the county of Devon." No further proceedings had taken place at the instance of the said plaintiff against the defendant, since such lodging of the writ of ca. sa. The affidavit further stated, that the deponent having been advised that a surmise ought to appear on the writ of ca. sa., shewing the cause of its being directed to the coroners, and that the same should also appear on the record of the proceedings in the action, he had searched for the roll and had found that none had been carried in.

The affidavit in answer stated that the plaintiff was sheriff of Devon for 1834; that the defendant being in his custody, under two writs of ca. sa. at the suit of *D. D.* and *Slark*, escaped from his custody against his will on 11th March, and was not retaken till 18th April; that in consequence of the escape, the plaintiff as sheriff was obliged to pay 182*l.* 6*s.* to *D. D.*; that he thereupon commenced proceedings against the defendant for the 182*l.* 6*s.* and expenses attending the escape and retaking; that the defendant subsequently gave the cognovit for 225*l.* 5*s.*, upon which the judgment was entered up, and a writ of ca. sa. directed to the coroners of Devon, (the plaintiff still being *sheriff* of that county,) issued, and was on 3d June lodged with the keeper of the prison of Devonshire; that upon this the defendant was, detained until removed under the writ of habeas corpus; and that the roll had been carried in to the proper officer, on a day subsequent to the granting of the rule nisi.

Crowder now shewed cause. The writ was properly directed to the *coroners*, the sheriff being a party to the action. [*Archbold.* It is not intended to deny that the writ was properly *directed* under the peculiar circumstances of the case. The objection is, that the ground of deviating from the ordinary course *does not appear* on the *writ*, nor

on the *record.*] In *Pariente* v. *Castle* (*a*), the Court refused to discharge a prisoner out of custody, on the ground that there was no judgment docketed against him and entered upon the rolls of the Court; and a late rule of Court (H. 2 *W.* 4, s. 95,) says, that "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record." The objection, therefore, that the ground of directing the writ to the coroner does not appear on the roll falls to the ground; and there appears to be no reason why it should appear on the face of the ca. sa., that the sheriff is a party, and that *therefore* the writ is directed to the coroners.

Campbell, A. G., and *Archbold*, contrà. The question is, whether upon this return, sufficient cause for detaining the prisoner appears. All that appears is, that he is detained upon a writ directed to the *coroners* of Devon; but as the special matter, which alone authorizes a direction of the ca. sa. to the coroners, instead of to the ordinary officer of the Court, does not appear upon the face of the writ, the return is as bad as if it had stated that the defendant was detained upon a writ directed to *A. B.* or *C. D.* In *Done* v. *Smethier* (*b*), a writ of covenant was directed to the *coroners* with this clause at the end of the writ: "Quia prædictus Joh. Done miles, est vicecomes comitatûs Cestriæ, fiat executio brevis prædict., per Coronator., ita quod vicecomes non se intromittat." It being objected that the writ ought to have been directed to the sheriff, and was abatable for being directed to the coroners, the Court said, that when the sheriff is plaintiff or defendant, it was right to take out a writ directed to the coroners "upon surmise thereof in Chancery, at the time of suing the writ." In *Rex* v. *Watrington* (*c*), it was held, that the coroners are not the proper officers of the Court, except when the sheriff is absolutely improper. In that case one of the sheriffs of Chester was

(*a*) 2 Bos. & Pul. 169.
(*b*) Cro. Car. 15.
(*c*) 1 Salk. 152; *S. C.* 4 Mod. 65.

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a defendant, and the process was awarded to the other, upon a suggestion of the fact being entered on the roll: So in *Rich* v. *Player* (*a*), and *Letsom* v. *Bickley* (*b*).

The delivery of the writ to the keeper of the county gaol is not a charging in execution, except in the ordinary case of a ca. sa. directed to the sheriff. The county gaol being the gaol of the sheriff only and not of the coroners, the writ might as well have been lodged with the keeper of the gaol of any other county. The coroners should have directed a warrant to the sheriff to receive him. Here, it does not appear that the writ ever came to the hands of the coroners until after the issuing of the habeas corpus, when one of them certified that the copy returned was a true copy of the ca. sa. [*Littledale*, J. The defendant was not in the custody of the coroners before; therefore the lodging of the writ with the gaoler does not seem to operate in the ordinary way. It seems to me at present, that there should be a warrant directed to the gaoler.]

LITTLEDALE, J. (*c*)—This writ is directed to the coroners without any surmise that the sheriff is a party, and I think it not necessary that any such should appear on the writ; and with regard to the proceedings, all might now be entered on the roll upon a cross rule. It is not necessary, however, to enter the proceedings on the roll, in order to charge the defendant in execution, the late rule of H. 2 *W.* 4, having so ordered. But then it is contended that the defendant was never lawfully charged in execution. In ordinary cases, where it is intended to charge a prisoner in execution, the course is to lodge the writ at the sheriff's office; but the reason of that practice does not apply here, the writ being directed to the coroner and not to the sheriff. It is objected that there is no proof that the writ ever reached the coroners: I think that we must intend that it

(*a*) 2 Show. 262, 286.
(*b*) 5 M. & S. 145.
(*c*) Lord *Denman*, C. J. had left the Court on public business.

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reached him as directed, and that he did his duty in lodging it with the gaoler. It appears by the affidavit that the writ was lodged with the gaoler, and that it was indorsed (*a*) "*John Gribble*, one of the coroners of the county of Devon." This is, I think, sufficient. I do not think it was necessary that the coroner should make out a *warrant* to the gaoler: He might go *personally* and lodge the writ.

PATTESON, J.—There is not the least irregularity in the proceedings. I take it for granted that some suggestion is entered on the proceedings. But the rule of Court says, "that in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record." Then the writ being directed to the coroners, who have no gaol, they must take it to the *sheriff's* gaol.

As to the objection, that it does not appear that the writ ever *reached* the coroners, we must assume that all has been done rightly.

Rule discharged.

(*a*) *Sed quære.*

HISCOCKS *v.* KEMP.

A Rule nisi had been obtained to set aside the execution and to discharge the defendant out of the custody of the Marshal. On the affidavits these facts appeared:—

On the 5th June, 1824, a warrant of attorney was executed by the defendant to the plaintiff and one *T. P.*, since deceased, by the defeazance of which it was stated that it was given to secure the payment of 420*l.*, together (with costs of judgment, if signed,) on the 5th December,

If a plaintiff has judgment with a stay of execution, by agreement, for any period, he may, at any time within a year and a day after the expiration of such period, take out execution without a scire facias to revive the judgment.

The defeazance to a warrant of attorney, dated 5th June, 1824, stated that it was given to secure the payment of 420*l.* (with costs of judgment, if signed,) on the 5th December, 1826: and that it was agreed that the plaintiff should enter up judgment thereon at his pleasure, and issue execution, &c: Held, that the plaintiff was restrained by this defeazance from suing out execution before the 5th December, 1826.

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1826, and that it was agreed that *T. P.* and the plaintiff, or the survivor, should be at liberty to enter up judgment thereon at their or his pleasure, and issue execution, &c.

On 27th May, 1825, judgment was signed.

On 5th February, 1827, the defendant was taken in execution by a writ of ca. sa., and he has since remained in custody.

No scire facias had been issued to revive the judgment, and the roll had been carried in.

This case was argued in Easter term last. The arguments and the authorities cited will be found in the judgment of the Court.

Campbell, A. G., and *Helps*, shewed cause; and Sir *W. W. Follett* argued in support of the rule.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court as follows:

This was a motion to set aside the execution upon a judgment signed under a warrant of attorney; and the only question was, whether, under the circumstances, it was necessary to revive the judgment by scire facias, prior to the issuing of the execution. The warrant of attorney was dated the 5th June, 1824. The defeazance was upon the payment of 420*l.*, (with the costs of judgment, if signed,) on the 5th December, 1826: The plaintiff was to be at liberty to enter up judgment at his pleasure; and in case of default in payment as aforesaid, to issue execution, and levy for the said sum and so much thereof as should remain unpaid. The judgment was in fact signed on the 27th May, 1825, and the execution issued in February, 1827.

Argument for the plaintiff.

For the plaintiff it was contended, that wherever the execution is suspended beyond the year and day after signing the judgment, by the agreement of the parties, the delay so occasioned will not compel the plaintiff to

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revive the judgment; and that the facts of this case bring it within that exception to the general rule. The defendant denied that any such agreement appears on the case, and further, that if it did, it would not waive a necessity imposed expressly by statute: The authorities on which such a practice was founded were asserted not to warrant it, when duly examined; and in particular it was contended that the case of *Withers* v. *Harris* (*a*) was a decision directly in point, and the other way. We have looked into the facts and the authorities, and are of opinion that on neither ground is there any reason for disturbing the execution.

Argument for the defendant.

Upon reading the warrant of attorney and the defeazance, it appears that although judgment might be signed at the pleasure of the plaintiffs at any time after the date of the 5th June, 1824, yet that they were restrained from issuing execution before the 5th December, 1826. It was therefore in the contemplation of the parties that the judgment might remain more than a year without execution; and that it might do so was a *restraint* imposed upon the plaintiffs' right by the defendants. It cannot therefore be denied that the delay of the execution in this case was by *agreement* with the defendant, at least,—if not a *term* imposed by him upon the plaintiffs.

Construction of defeazance to warrant of attorney.

With respect to the practice, it has long been clearly understood in the profession, that "*if the plaintiff has judgment with a cesset executio, or stay of execution for a year, he may, after the year, take out his execution without a scire facias* (*b*), because the delay is by consent of parties and in favour of the defendants." This is the language of Mr. Serjt. *Williams*, in the notes on *Underhill* v. *Devereux* (*c*); and we should be very unwilling to disturb, except on the clearest grounds, a practice now well recognized, on which all persons have acted for a long series of years, and which is in itself neither unreasonable nor inconvenient.

Course of practice.

(*a*) 7 Mod. 64.

(*b*) *i. e.* the year and day do not begin to run until the expiration of the period during which the execution is stayed.

(*c*) 2 Wms. Saund. 72 c.

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The objections made were threefold:—first, *that it was contrary to the express provisions of the statute of Westminster* 2,—13 *Edw.* 1. This appears to us to be a mistake. The scire facias in personal actions was given by that statute rather in *aid* of plaintiffs than in *restraint* of them. At the common law, a presumption arose from a plaintiff's delay beyond a year, that his judgment either had been satisfied or from some supervening cause ought not to be allowed to have its effect in execution after such delay: therefore he was not allowed to issue execution, as a matter of course, but was driven to bring a new action on the judgment. The scire facias, which had been in use at the common law for the purpose of executing judgments in *real* actions, after a year and day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as equally affording protection to the defendant, if he had any reason to shew why the execution should not issue. It is not then a *contravention* of the statute to hold that a scire facias, given in lieu of the action on the judgment, is not necessary where such action would not have lain; and what arguments could a defendant have used to induce the setting aside an execution, on the ground of delay and the legal presumption consequent thereon, when such delay was shewn to have originated, and the presumption therefore to fall to the ground, by his own act.

First objection to the practice.

Second objection.

The second objection was, *that the case of Withers* v. *Harris*, 7 *Mod.* 64, *was an authority directly opposed to the practice.* The facts of that case are reported in that book thus: "Judgment was given in *ejectment* upon terms that there should not be execution until such a time, which was a year and a half after. The sole question was, whether this judgment could be executed without a scire facias;" and the report concludes—"The execution was set aside as irregular, and restitution granted." There are seven other reports of this case referred to in the margin;—one in the same volume, three in *Salkeld*, two in *Holt*, and one in *Lord*

Raymond. In no one of these is the fact stated that the execution was *stayed on terms*, nor in the report cited at the bar is it mentioned in the argument or judgment. The point in discussion was, whether a scire facias, either at common law or by the statute, was necessary for the purpose of suing an *habere facias possessionem* in ejectment. It was admitted that a scire facias was necessary in the principal case, so far as regarded the damages to be levied by fieri facias; whereas that point would have been equally debatable if the question had been, what was the effect of the execution having been stayed on terms. The circumstances under which the delay of execution had taken place were not even attended to, unless Lord *Holt* was speaking of them when he said, "The party has *delayed himself* by not suing execution in time,"—language scarcely applicable to the case of a judgment *given upon terms*, which terms would have been wrongfully broken if the execution had been sued out earlier. It should be observed, too, that Lord *Holt*, in the same judgment, speaks of it as clear law, that if a plaintiff be delayed beyond the year by writ of error, he may have execution after the year;—an undoubted position, which in truth stands upon the same principle, though another and a wholly unsatisfactory reason is assigned for it in some of the older authorities.

The case, therefore, of *Withers* v. *Harris* cannot, when it comes to be examined, be considered an authority to shew that the present execution is irregular; but it may be conceded that other dicta, and even decisions, may be found in the older books, which cannot easily be reconciled with the present practice. Some such may be seen in *Roll. Abr.* "Execution, Scire Facias, (N.) (O.)," and even in the commentary of Lord *Coke* on the statute (*a*). It is by no means to be wondered at that such instances should be found in the progress of the Courts to the establishment of the present rule; but they will not be found, on examina-

(*a*) 2 Inst. 471.

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tion, so satisfactory or consistent as to form a ground for the Court's restraining its steps at this day.

Third objection.

The last objection was, that *the practice rested on no sufficient authority*. The truth is, as it often happens in points of practice, that the written authority for it is not so much to be found in any one or more express decisions, as to be collected from the analogies of other decided points within the same principle, and from the undisputed dicta of counsel or judges scattered through the books. Thus, as early as the reign of *Edw.* 3, we find it stated that "if judgment be given on a writ of annuity, the plaintiff shall have execution within the year after every day of payment by fi. fa. or elegit, though it be many years after the judgment" (*a*). The same rule prevailed very early, where the delay was by a writ of error. At first it was denied that a stay of execution, by injunction out of Chancery, should have the same effect; *Booth* v. *Booth* (*b*); but in *Michell* v. *Cue et ux.* (*c*) good sense determined, that being within the same reason, the same rule ought to prevail; and a rule to set aside an execution, stayed by injunction and by obtaining time for payment, was discharged *with costs*. In *Dillon* v. *Browne* (*d*), where the suggestion was that it had been agreed between the parties, at the execution of the warrant of attorney, that no execution should be taken out till a year after, the Court neither denied the legality nor validity of such agreement, but reflected only "upon a gentleman at the bar, who was said to be advised with in the transaction, because the agreement was not by deed." And in *Booth* v. *Booth*, before cited, when the counsel for the plaintiff argued that if the *cesset executio* were for a year after the judgment, yet the plaintiff within the next year might take out execution without a scire facias, the reporter adds, "*Quod fuit concessum.*"

We cite these as specimens of what may be found in the

(*a*) 2 Inst. 471.
(*b*) 6 Mod. 288.
(*c*) 2 Burr. 660.
(*d*) 6 Mod. 14.

books on this subject; but we pronounce our judgment that the execution ought not to be disturbed, on the principle that it has issued in accordance with a *practice* of the Courts long considered as established, not inequitable or inconvenient in itself, or at variance with any legal principle, statute, or decided authority.

Rule discharged.

The KING *v.* MATTHEW WILSON and JOHN NICHOLAS COULTHURST, Esqrs. Justices for the West Riding of Yorkshire.

A party who, for the settlement of disputes between the incumbent and his parishioners, and for the benefit of all parties, takes a lease of the tithes from the incumbent, rendering a certain rent, the amount of which, and no more, he receives from the tithe-payers of the parish, is liable to be rated to the relief of the poor in respect of those tithes, *semble*.

DUNDAS, in last Michaelmas term, obtained a rule nisi for a mandamus to *M. Wilson* and *J. N. Coulthurst*, esqrs., justices &c., commanding them to make and issue their warrant for levying upon the goods and chattels of *James Hammerton*, esq. 18*s*. 4*d*., assessed upon him in a rate made for the relief of the poor for the township of Hellifield, in respect of the tithes of that township. In the affidavits for and against the motion, the following facts were stated:—

Disputes having arisen, and actions being pending between the vicar of the parish of Long Preston (in which parish Hellifield is situated) and the inhabitants of the four townships within that parish, respecting the right of the vicar to certain tithes, it was finally agreed between them, that one principal proprietor of each township should,

The want of certainty in the specification of some of the property included in a poor-rate, is no ground for refusing a mandamus to justices to issue warrants of distress for levying the amount of a particular assessment. The defect is ground of *appeal* only.

It is no ground of discharging a rule nisi for a mandamus to justices to enforce a poor-rate which the party rated has refused to pay, and for which the justices have refused to issue a warrant of distress, that since the granting of the rule a third party has tendered the amount of the assessment to the overseer.

But it is an answer to such an application, that at the meeting of justices when the warrant was demanded, the overseer came under a promise to prove that the occupation of the party rated was beneficial, and failed to do so, whereupon the justices decided against the rate,—although it was not necessary, in point of law, that the occupation should have been beneficial.

The overseer ought to have gone again, and, after saying that the occupation need not be beneficial, have demanded a warrant.

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as trustee for the benefit of all parties, take a lease from the vicar of the tithes within his township, rendering a certain rent. Leases were accordingly prepared and executed in June, 1825, and in one of them, (which related to the tithes of Hellifield,) in which a rent of 30*l.* 6*s.* 1*d.* was reserved, the name of Mr. *Hammerton*, who was a principal proprietor in the township, was inserted as the lessee. Mr. *Hammerton* at first refused to accept the lease, but was afterwards prevailed upon to do so for the general good of the inhabitants of Hellifield. The expenses of the lease were paid to Mr. *Hammerton* by the tithe-payers of Hellifield. He took the lease without any intention of making any profit, and never did make a profit; but, with the assistance of some of the inhabitants, arranged the mode in which the amount of the rent should be apportioned amongst the proprietors and occupiers of land within the township. No more than the amount then agreed upon had ever been demanded or received of the several tithe-payers. Similar leases were executed in two of the other townships, in neither of which have the lessees ever been rated to the relief of the poor in respect of the tithes so leased to them. In April, 1834, a rate of 10*d.* in the 1*l.*, for the relief of the poor of the township of Hellifield, was allowed by Messrs. *Wilson* and *Coulthurst*, in which rate Mr. *Hammerton* was assessed thus:

Occupiers' Names.	*Owners' Names.*	*Value.*	*Rate.*
Jas. Hammerton, Esq.	For property in his own occupation,	£. s. d. 85 16 7	£. s. d. 3 11 6¼
Do.	Rev. Hy. Kempson, for tithes of Hellifield	22 0 0	0 18 4

Mr. *Hammerton* refused to pay the rate for the tithes, and he also refused to pay a part of the sum of 3*l.* 11*s.* 6¼*d.*, on the ground that a part of the property so assessed as "property in his own occupation" was plantation, and not ratable. *Wilkinson*, the overseer, obtained a summons from the said two magistrates, for Mr. *Hammerton* to appear before them

and shew cause why he refused to pay the rate. At the time of applying for this summons, *Wilkinson* expressly engaged to bring evidence to shew that Mr. *Hammerton* received *benefit* from his occupation of the tithes under the lease. Upon the parties appearing before the same justices, *Wilkinson* gave no proof that Mr. *H.'s* occupation was beneficial, and Mr. *H.* asserted that such was not the case, and that he never intended to or would receive any pecuniary benefit from the lease, although he believed that it would be in his power to do so. The magistrates, therefore, decided that Mr. *H.* was not liable to pay the rate in respect of the tithes, because he derived no benefit or profit from them, observing on the fact of *Wilkinson's* having failed in performing his promise of bringing evidence to the contrary. The overseer then demanded a distress-warrant for the rate of 18*s.* 4*d.* for the tithes, which warrant the magistrates refused to grant. The overseer had deducted 17*s.* 8½*d.* from the rate, in respect of the plantation, and had received the remainder, with the exception of the 18*s.* 4*d.* for the tithes, from Mr. *Hammerton.* On a former occasion *Wilkinson* had appealed against an order for the allowance of the accounts of the then churchwardens and overseers of Hellifield, upon the ground (amongst others) that they had neglected to obtain from Mr. *Hammerton* an assessment made upon him in respect of the tithes of that township. The court of quarter sessions, (at which Mr. *Wilson* presided as chairman,) after hearing evidence, both for and against the appeal, being satisfied that Mr. *Hammerton* derived no *beneficial interest* from those tithes as lessee, confirmed the order.

Subsequently to the obtaining the rule nisi, certain persons, deputed by the majority of the inhabitants of Hellifield, had offered to pay to *Wilkinson* the sum claimed from Mr. *Hammerton* in respect of the tithes, but he refused to receive the same.

Sir *W. W. Follett* and *Milner* shewed cause. The rate

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is on the face of it bad, for not shewing distinctly in respect of what property Mr. *Hammerton* was rated. The overseers are bound to give to the parties rated reasonable information of the nature of the property in respect of which they are rated. In this very case, the overseer had mixed up property not liable to be rated with property ratable, and afterwards deducted it of his own authority. *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*a*). The rate being bad, the magistrates cannot, of course, be compelled to enforce the payment of the amount of the assessments.

First point: Property rated not *described* in rate.

Second point: Lessee of tithes, without benefit, not ratable.

The principal question is, whether Mr. *Hammerton* was liable to be rated in respect of the *tithes*. He took those tithes as a mere trustee for the benefit of the inhabitants of the township, and lets them out again at an apportioned rent, he himself receiving no benefit from them. Mr. *Hammerton* cannot be said to be in the *occupation* of the tithes, and therefore he is not ratable in respect of them. [*Patteson*, J. Who then is ratable? The vicar is not so, because he has made a lease of the tithes.] Mr. *Hammerton*, at all events, is not ratable, for he has no beneficial interest and no occupation. If any body is ratable, the parties to whom the tithes are underleased, though there is no regular underletting, are so. Mr. *Hammerton* would probably bring an action against the justices if they issued a warrant.

Third point: That quarter sessions had held lessee not ratable.

This same question had already been before the quarter sessions, after an appeal against the allowance of the accounts of churchwardens and overseers of the township, and that Court decided that Mr. *Hammerton* was not ratable for these tithes. The overseer ought not afterwards to call upon two of the same justices, in direct opposition to the adjudication of the sessions, to issue their warrant.

Fourth point: Amount of assessment tendered by others.

Two of the inhabitants actually tendered the amount of the rate to the overseer, who refused to receive it. He ought to have accepted it. *Rex* v. *Cozens* and another (*b*),

(*a*) 4 Dowl. & Ryl. 253; 2 Barnw. & Cresw. 718.

(*b*) 2 Douglas, 426.

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[Lord *Denman*, C. J. He cannot require a warrant of distress, if he can obtain payment of the rate from any body.]

The litigant parties were Mr. *Wilkinson* and Mr. *Hammerton*. The former went before the justices upon an undertaking that he would prove that Mr. *Hammerton* took a *beneficial* interest under the lease, but failed to give any evidence to that effect. He should, at least, have gone again to the justices, and have said that it was immaterial whether the occupation of Mr. *H.* was beneficial or not, and then have applied for a warrant. Fifth point:

Sir *F. Pollock* and *J. L. Adolphus* contrà. The offer to pay the rate was not until after the granting of the rule nisi, and was probably made in consequence of it. [Lord *Denman*, C. J. If the overseer was put to the necessity of moving for the rule, the subsequent offer to pay is no reason for discharging it.] The offer by other persons than Mr. *Hammerton* would leave the question unsettled for the future. It was a mere attempt to get rid of the rule, without giving the applicant the advantage sought. Fourth point.

The sessions never decided that Mr. *Hammerton* was not ratable. Their decision only went to this,—that the liability was not *so clear* that the overseers were bound to make good the amount in which Mr. *H.* was rated, notwithstanding that it had not been collected. Third point.

Then with regard to the form of the rate. The tithes are sufficiently described; and it is too much to say, that because *some* property contained in the rate is improperly described, therefore the *whole* rate is *void*,—for to that extent the objection goes. *Rex* v. *The Undertakers of the Aire and Calder Navigation* does not bear out the proposition for which it was cited. It only decides that it is good ground of *appeal* against a poor rate, that it does not appear upon the face of it, in respect of what property the assessment is made upon each individual charged. There are probably few rates which are not open to objections such as these; and if it were held that a rate was *void* by reason of such an informality, the Court would be much First point.

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troubled with applications of this sort. [Lord *Denman*, C.J. There is no doubt that it is a very good ground of *appeal* that some property is badly described; but it is too much to say that the whole rate is therefore void. *Patteson*, J. In *Cortis* v. *The Kent Waterworks Company* (*a*), it was held, that the want of sufficient certainty in the specification of property rated, cannot be made a ground of objection to an action for rates, but that the objection can *only be made by way of appeal*,—for which *Hutchins* v. *Chambers* (*b*) was cited.]

Second point. The tithes are ratable in the hands of *some* party or other. The vicar is not liable, for he has let them. Who then is liable? Certainly the occupier, that is, Mr. *Hammerton*. [*Patteson*, J. Mr. *Hammerton* is certainly the occupier (*c*). Lord *Denman*, C. J. I believe we have no difficulty upon that point.]

Fifth point. The last objection which has been urged raises a question of *bona fides*, which the Court will not probably think it right to try upon affidavits. Besides, there is a fallacy in identifying the person who undertook to give this evidence, and the rated inhabitants at large.

Lord DENMAN, C. J.—All the parties seem to have thought that a *beneficial* occupation was necessary. As the parties met with a distinct understanding that the overseers would prove that Mr. *Hammerton* occupied beneficially, I think the magistrates were justified, upon their failing to do so, in refusing to grant the warrant. The overseers should have gone again to the magistrates, and have stated that they claimed to have a warrant, notwithstanding that the occupation was not shewn to be beneficial.

LITTLEDALE, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule discharged without costs.

(*a*) 7 Barnw. & Cressw. 314.
(*b*) 1 Burr. 580.
(*c*) *Vide Underhill* v. *Ellicombe*, M'Cleland & Younge, 450.

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The KING v. SIVITER.

A charter, granted by Queen *Eliz.* and confirmed by *Charles* 1, exempting the tenants of certain ancient demesne lands from the payment of road money (*chimagium*), does not operate to exempt them from the performance of *statute duty* on the highways, pursuant to 13 *Geo.* 3, c. 78, 34 *Geo.* 3, c. 64, 44 *Geo.* 3, c. 54, and 54 *Geo.* 3, c. 109.

UPON an appeal against a conviction of *Samuel Siviter* for neglecting to perform statute duty on the highways in the parish of Kingswinford, pursuant to the 13 *Geo.* 3, 34 *Geo.* 3, 44 *Geo.* 3, and 54 *Geo.* 3, the court of quarter sessions affirmed the conviction, subject to the opinion of this Court upon a case, which stated in substance as follows:—The appellant claimed to be exempt from the performance of statute duty on the highways, on the ground that he was occupier of ancient demesne lands in Kingswinford, and that, by charter, the tenants of demesne lands in that parish were exempted from the payment of all highway rates. The charter was granted by Queen *Elizabeth*, in the ninth year of her reign, and was confirmed by *Charles* 1, in the fifth year of his reign. The material words in the charter of *Charles* were, as translated, thus: "We do authorize and command you that you suffer all and singular the men and tenants of the parishes of Kingswinford and Clent, and every of them, to be quit of all payments of toll, slate-money, highway-rate, bridge-money, pitching-money, walking-money, standing-money, and from the expenses of knights." The word in the original, which has been translated as "*highway rate*," was "*chimagium*."

Corbett, who appeared to argue in support of the order of sessions, was stopped by the Court.

Godson contrà, contended that the performance of the statute duty was within the meaning of the exemption of the charter, and read the opinion of a learned gentleman to that effect.

Corbett referred the Court to the case of *Brett* v. *Whitchob* (*a*).

(*a*) 3 Mod. 96.

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Lord DENMAN, C. J.—If a statute enacts that certain persons shall either perform certain specified duties, or, in lieu thereof, pay certain penalties, I do not see how such persons can be excused from the performance of those duties, or from the payment of those penalties, because they were exempted, before the act passed, from the performance of the duties.

LITTLEDALE, J., PATTESON, J., and WILLIAMS, J., concurred.

Order of Sessions confirmed.

The KING *v.* The JUSTICES of MIDDLESEX.

The Court will not grant a mandamus to justices of Middlesex, commanding them to issue distress-warrants for levying paving rates made in any district within the metropolis, but will leave the commissioners, (or other persons having the control of the pavements of the district,) to their remedy by action under 57 *Geo.* 3, c. xxix, s. 38.

The 57 *Geo.* 3, c. xxix. s. 38, applies as well to those districts within the metropolis, the paving commissioners of which have already, by a local act, a *limited* power of bringing actions for the recovery of rates, as to other districts.

A Rule had been obtained, calling upon certain magistrates of Middlesex to shew cause why a mandamus should not issue to them, commanding them to issue a warrant of distress upon the goods of *A. B.* for a certain sum which had been assessed upon him in and by a rate made for defraying the expenses of paving, &c. the parish of St. Martin-in-the-Fields, Westminster. Upon the affidavits it appeared that a rate had been made by certain persons acting as commissioners for paving, &c., but the legality of whose election was disputed by a large body of the inhabitants of the parish; that several hundreds of persons had refused to pay the amount in which they were assessed; and that upon application to the justices for distress-warrants they refused to grant them, saying, that they entertained doubts as to the legality of the rate, and thought that if they issued the warrants, actions of trespass would be brought against them. The circumstances connected with the election of the commissioners were also stated upon the affidavits.

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Campbell, A. G. and *Platt*, in shewing cause, denied the validity of the rate, and contended further, that, assuming the rate to be good, a mandamus would not lie, as both by a local act of 23 *Geo.* 3, c. 90 (*a*), and the act of 57 *Geo.* 3, c. xxix. (*b*), (*Michael Angelo Taylor's* act,) power is given to

(*a*) Intituled "An Act for better paving, cleansing, and lighting the Parish of St. Martin-in-the-Fields, within the Liberty of Westminster, and certain Places adjoining thereto; and for removing and preventing Nuisances and Annoyances therein." By this act a power to pave, &c. the parish, is given to the vestry and a committee of the inhabitants; the committee, and, in case of default, the vestry, are authorized to make rates; which rates the collectors are, in case of refusal to pay them, authorized to collect and levy, by warrant under the hands and seals of two justices of Middlesex, and by distress and sale; and, by section 33, the commissioners are authorized, if they think fit, *where no sufficient distress can be made*, to direct and cause an action to be brought in any of his majesty's Courts of record at Westminster, for the recovery of any of the said rates; and upon proof of the demand made, and refusal or neglect of payment of the rate for the recovery whereof such action shall be brought, the commissioners shall be entitled to a verdict.

(*b*) Intituled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein." By section 38, the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the jurisdiction of that act, are authorized at any time thereafter (if they shall think it expedient), in the name of their treasurer, clerk, or collector, to bring or cause to be brought any action of debt, on the case, or other action, in any of his majesty's Courts of record at Westminster, or to proceed in any Court of Requests, or other Court whatever (for the recovery of debts above or under five pounds), within the jurisdiction of which the messuages or hereditaments in respect whereof such rate shall be made, or wherein the person or persons, or either of them, against whom such action or other proceedings may be brought, shall reside,—against executors, assignees, sheriffs, &c., or any other person or persons liable to pay money by virtue of any rate for the expenses of paving, &c. the streets, &c. in any such district, by virtue of any local act, or by virtue of this act, for the recovery of the money due from any such person or persons dying or becoming bankrupt, or whose effects may be taken in execution or otherwise, or from any other person or persons liable to pay the same: and that in any such action or other proceedings it shall be sufficient for the plaintiff or complainant to declare or allege, that the person or persons against whom such action, &c.

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the commissioners to bring *actions* at law for the recovery of those rates.

Sir *W. W. Follett* and *Channell* contrà, contended that the rate was good, and that no *action* was maintainable for these rates, or, if maintainable, that it was not an efficient remedy; that under the local act an action was given only where *no sufficient distress could be found*, which was not shewn to be the case here; and that the more general act could not be considered as applying to districts where, by a local act, a restricted power of bringing actions had already been given.

Lord DENMAN, C. J.—It seems to me that this rule ought to be discharged, on this strict and simple ground, that there is another, and, I think, a preferable and more speedy remedy. The 38th section of *Michael Angelo Taylor's* act (57 *Geo.* 3, c. xxix.) seems to be framed expressly with a view to prevent this circuitous proceeding by way of mandamus; in which the party seeking to enforce the rate first comes here to apply for the mandamus; which being granted and issued, distress-warrants are made out by the justices; then the distress takes place; and finally an action is brought against the magistrates, in which the very same questions may be raised and decided as in an action

may be brought, is indebted to him in such sum as shall appear to be due by or on account of any such rate; and that it shall only be necessary for such plaintiff, &c. to produce any such rate, and to prove that the person or persons against whom such action, &c. shall be brought, or who shall be deceased, or have become bankrupt, or whose effects have been taken in execution or otherwise, was or were the person or persons mentioned in such rate, or liable to the payment thereof by virtue of any local act, or of this act, to entitle such plaintiff, &c. to recover the whole sum for the recovery whereof such action &c. shall be brought; and that if such plaintiff &c. shall recover the whole or any part of the sum claimed, he shall have full costs; and that in any such action no essoign, protection, or wager of law, nor more than one imparlance shall be allowed.

brought at once against the party on whom the rate is made. On this short ground alone, I think that this rule must be discharged.

LITTLEDALE, J.—I entirely concur. It is suggested that the mandamus would be preferable, because then all the money might be raised *at once*. Certainly, there might be four or five hundred distress-warrants issued *at once*, but then there might be as many actions brought against the magistrates. The question may be as well tried by an action against the party rated. It is true that the action will not lie on the local act, because that act gives the action only when *no sufficient distress* can be found:—But there is no such limitation in 57 *Geo.* 3, c. xxix; and upon that statute the action may be brought. I give no opinion upon the other questions.

PATTESON, J.—I entirely agree that the rule ought to be discharged. The 38th section of 57 *Geo.* 3, c. xxix., enables the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the metropolis, to bring actions in any of the superior Courts at Westminster, or to institute proceedings in any Court of Requests in certain cases, for the recovery of any sum of money due from a person liable to pay the same, for or in respect of any rate made for the repair of the pavement, &c. of the streets in such district. This act was passed subsequently to 23 *Geo.* 3; and I think that the argument that this provision does not apply to a case where a limited power of bringing actions was previously possessed, is wrong. I think that it operates to *enlarge* the power.

WILLIAMS, J.—I entirely concur. It has long been a rule that this Court will not grant a mandamus to magistrates, commanding them to do a thing which may involve them in an action, especially where another remedy is open

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to the party applying. I agree that the 38th section of 57 *Geo.* 3, authorizes the bringing of an action in all cases, without restriction. In that action all proper questions are open to the parties. We ought not, if we can avoid it, to put *magistrates* in the place of the parties to try the action.

On the other points it is unnecessary, and perhaps would be improper, to give any opinion.

Rule discharged.

The KING *v.* WM. ROBERTS, Esq.

By charter, *Edw.* 1, granted to the burgesses of C., that the constable of His castle of C. for the time being, should be mayor of that borough, "sworn as well to the King as to the burgesses, who, (an oath for preserving the King's rights being first taken,) should swear to the burgesses, that he would preserve the liberties of the burgesses,

THIS was an information in the nature of a quo warranto, which,—after alleging that the borough of Carnarvon is an ancient borough, the burgesses of which are a body corporate and politic, by the name of "The Burgesses of the Borough of Carnarvon," and that there ought to be a mayor of the borough,—stated that the defendant had, without any legal warrant, royal charter, or right whatsoever, usurped the office, liberties, &c. of mayor of such borough.

The defendant pleaded that the office of mayor of Carnarvon existed from time immemorial (*a*), and that *Edw.* 1, by letters-patent, granted that the town of Carnarvon should be a free borough, and that the constable of His castle of Carnarvon, for the time being, should be the mayor of that borough, "*sworn as well to the said King as to the said*

(*a*) *i. e.* before the conquest and annexation of Wales, which took place within legal memory.

granted by the said King, and faithfully do those things which to the office of mayoralty belong, in the said borough." By letters patent, His present Majesty granted the office of constable of the castle of C.:—Held, that until oath taken, according to the charter, the title of the grantee is incomplete.

The grantee of an office, for which an oath is a necessary qualification, but which may be executed by deputy, cannot appoint a deputy until he has been sworn.

A party is appointed during pleasure, by letters-patent of King *Geo.* 3, to an office which cannot be executed until oath taken. He takes the oath, and by operation of 57 *Geo.* 3, c. 45, and 6 *Ann.* c. 7, s. 8, is continued in office until six months after the death of *Geo.* 4, and by the operation of 1 *Will.* 4, c. 6, until six months after the passing of that act. Before the expiration of the last-mentioned period, he is by letters-patent again appointed to the office. He cannot, after this second appointment, execute the office until oath be again taken.

burgesses, who (oath for preserving the said King's rights being first taken) should swear to the same burgesses upon the Gospels of God, that he would preserve the liberties of the same burgesses, granted by the said King, and faithfully do those things which to the office of mayoralty belong in the said borough." The plea then avers that the most noble *Henry William* Marquess of *Anglesea* (then Earl of *Uxbridge*) was, in the year 1812, appointed to the said office of constable, to have, hold, and exercise the said office during His Majesty's pleasure, by himself or his *sufficient deputy*, and was *duly sworn* into the said office, and was by virtue of that office mayor of the said borough. It then states the demise of King *George* the Third, and that the marquess, under 57 *Geo.* 3, c. 45 (*a*), held the same office during the pleasure of King *George* the Fourth, till His demise in June, 1830; and also, by virtue of the statute in such case made and provided, (6 *Ann.* c. 7, s. 8 (*b*),) for six months after, during the pleasure of His present Majesty. Then the defendant avers, that before the expiration of six months from the passing of the act of 1 *Will.* 4, c. 6 (*c*), His present

(*a*) Which enacted, "that every person who, upon the death or demise of His then present Majesty, should hold any office, civil or military, under the crown, during pleasure, should, under and by virtue of that act, and without any new or other patent, commission, warrant, or authority, continue and be entitled in all respects, notwithstanding the death or demise of His Majesty, to hold and enjoy the same, during the pleasure of the successor of the King."

(*b*) Which provided "that no office, place, or employment, civil or military, should become void by reason of the death or demise of any king or queen of this realm, but that the persons in such office, &c. should continue in their respective offices, &c. for six months next after such death or demise, unless sooner removed by the king or queen next in succession."

(*c*) Which received the royal assent 23d Dec. 1830, and enacted "that every commission, appointment, patent, or grant, of any office or employment, civil or military, which at the time of the demise of His late Majesty King *Geo.* 4, was in force and effect, and which had not been made void or determined by His present Majesty, at any time before the passing of that act, should remain in full force for six months next after the passing of that act, unless the same should be in the mean time superseded."

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Majesty, by letters-patent, being graciously pleased to renew the said appointment and continue the said marquess in the said office, did give and grant unto him the same, to be enjoyed and exercised as before. The plea then alleges, that after the said grant the said marquess was duly sworn into the said office, and hath ever since enjoyed the same. The defendant then states his own appointment by the said marquess, as deputy mayor, by deed of 21 July, 1829, when he took the proper oaths and exercised the office; and also, that after the last-mentioned letters-patent, the said marquess duly appointed him to be his deputy in the office of mayor;—but this deputation was not said to be by deed, nor was it stated that the defendant had taken any oath of office subsequently to this last appointment.

The fourth replication to this plea alleged that the marquess was *not sworn* into his office of constable, after the grant of the same, *by the present King*.

Demurrer to this replication, and joinder.

The points marked for argument were as follows:

1. That the defendant had not any right to exercise the office of deputy mayor, or to act as mayor, without being sworn into office, after the said grant, by *William* IV., of the office of constable to the Marquess of *Anglesea* (*a*).

2. That the marquess had no right to exercise the office of mayor under that grant, without being sworn.

3. That the marquess had no right to appoint a *deputy mayor* (*b*).

(*a*) In the arguments upon this point, *Jenkins* v. *De la Grange*, 1 Lev. 206; *Rex* v. *Clapham*, 1 Ventris, 111, were cited.

(*b*) Upon this point the following authorities were cited: Com. Dig. Officer, (B. 1); Bacon's Abr. Officer, (L); Viner's Abr. Officer, (I); *Rex* v. *The Mayor of St. Alban's*, 12 East, 559; *Rex* v. *The Mayor of Gravesend*, 4 Dowl. & Ryl. 117, 2 Barn. & Cressw. 602. Dictum of Lord *Coke* in *Phelps* v. *Winchcomb*, 3 Bulst. 77.

The practice in the corporations, generally, of North and South Wales, and of the Palace Court, was also referred to.

4. And that if he had such right, he had no right to appoint a deputy, except *by deed* (*a*).

This case was argued in Hilary term last. The Court having given judgment on the second point only, the arguments on the other points are omitted.

J. Jervis, for the defendant. In construing this charter, it should not be forgotten that this is a *military* corporation, differing in many respects from ordinary corporations.

It is not necessary that the marquess should have taken the oath, in order to constitute him mayor of Carnarvon. The oath is not an oath of *qualification*, but of *sanction*. It is the oath of qualification only which it is necessary to take, before the office is exercised at all:—The oath of sanction is for the security of the parties over whom the officer presides, but is not in the nature of a condition precedent to the complete possession of the office. That this is an oath of sanction is manifest, upon a comparison with other oaths of sanction. Such are the coronation oath,—the oath taken by aldermen who become justices by having served the office of mayor,—the oath taken by churchwardens and by tithingmen. *Rex* v. *Corfe Mullen* (*b*), *Anonymous* case (*c*). But assuming that it was necessary that Lord *Anglesea* should take the oath before he could exercise the office, the taking of the oath by him upon his *first* appointment is sufficient. Lord *Anglesea* was appointed in 1812, and then took the prescribed oaths. 29th January, 1820, King *George* the Third died: but by virtue of 57 *Geo.* 3, c. 45, the marquess, without any fresh appointment, held the office during the

(*a*) In the arguments upon this point, the following authorities were cited: Viner's Abr. Officer, (l.) pl. 1 & 3; *Clecott* v. *Dennys*, Cro. Eliz. 67; *Kennycote* v. *Bogen*, 2 Bulstr. 250; *Owen* v. *Saunder*, 1 Lord Raym. 158; *Rex* v. *Harris*, 1 Barn. & Adol. 936; *Rex* v. *Lenthall*, 3 Mod. 143; Lord *Shrewsbury's* case, 9 Co. Rep. 42; 3 *Geo.* 1, c. 15; *Midhurst* v. *Waite*, 3 Burr. 1259.

(*b*) 1 Barn. & Adol. 211.

(*c*) 1 Vent. 267.

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pleasure of *George* IV. *George* IV. died on 26th June, 1830, but the marquess's tenure of the office was, by virtue of 6 *Ann.* c. 7, continued for six months longer. By 1 *Will.* 4, c. 6, which passed before the expiration of the six months, the marquess was continued in the office for a further period of six months. On the 10th January, 1831, at which period the marquess continued (by virtue of 1 *Will.* 4, c. 6,) to hold the office, His present Majesty, by letters-patent, again granted to him the office. This second grant was a renewal and continuance of the former: It operated as a *confirmation* of the first grant, and not as a *new* grant. On the death of *George* IV. the office would, it must be admitted, have ceased to exist, had it not been for the statutes of 6 *Ann.* and 1 *Will.* 4. Those statutes, however, disturbed the operation of the general rule, that offices of this description determine on the death of the king. If the second grant was a *confirmation* of the first, another taking of the oath was unnecessary.

Sir *W. Follett*, contrà. The fact of this being a military corporation cannot affect the question. Lord *Anglesea* has not taken the oath required by the charter: he is not, therefore, constable of Carnarvon, and consequently cannot appoint a deputy. It is quite clear that if it is at all necessary to take the oath, that should have been done upon the appointment by *William* IV. The office of constable expired upon the death of the late king; *Com. Dig.* tit. Officer, (K. 10.) The marquess was appointed in the reign of *George* III., and upon his death, or six months afterwards, the office would have expired but for the act of 57 *Geo.* 3, which was passed in order to obviate the expense of taking out new patents upon the accession of the prince-regent to the throne. The statute of *William* IV. merely extends the privilege first conferred by 6 *Anne,* of continuing in the office for a definite period after the demise of the crown. There is no foundation whatever for saying that the grant by

William IV. operated as a confirmation of the first grant, and not as a new grant. It might as well be contended, that if a lessee held an estate for a term to expire at the end of six months, and a new lease were granted to him before the expiration of that period, such second lease would operate as a *confirmation* of the first. Then was the taking of the oath a condition precedent to the having possession of the office? The words of the charter are clear, and expressly require the oath to be taken. In an ordinary case no one can claim to exercise the office of mayor, without having previously taken the oath of office, although the swearing in need not be immediately upon the election; *Rex* v. *Pindar* (*a*), *Rex* v. *Courtenay* (*b*), *Rex* v. *Ellis* (*c*), *Rex* v. *Swyer* (*d*). The words of the charter are obligatory, (*Rex* v. *The Steward &c. of Havering Atte Bower*,) and although a party when appointed has an *inchoate* right to the office, yet that right is not *complete* until the oath is taken. The demurrer admits that the oath has not been taken by the marquess: He was not therefore in complete possession of the office, and had consequently no right to appoint a deputy; *Rex* v. *Jordan* (*e*). Cases have been cited which shew that some offices may be exercised by parties who have not taken the oath of office, but those were not *corporate* offices.

J. Jervis, in reply. The taking of the oath is not a *qualification* for the office: it is not a *condition precedent* under this charter. *Rex* v. *Pindar*, cited contrà from 8 *Mod.* 235, is also reported in 1 *Stra.* 582, and 2 Lord *Raymond*, 1447 (*f*). It does not appear what were the terms of the charter in that case; but it may be assumed that the charter required, in the usual way, that the oath should be taken *simul et semel*. *Rex* v. *Courtenay*, and *Rex* v.

(*a*) 8 Mod. 235.
(*b*) 9 East, 246.
(*c*) Ibid. 252, n.
(*d*) 10 Barn. & Cressw. 486.
(*e*) 9 East, 263, cited.
(*f*) In *Rex* v. *Reeks*.

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Ellis (*a*), do not decide this question. *Rex* v. *Ellis*, in which the necessity of taking the oath may be considered to have been *assumed*, arose upon a charter which required that the oath should be taken by the new mayor before the old one, and under which, the taking of the oath by the new mayor was therefore a necessary condition precedent to the substitution of the new mayor for the old. In *Rex* v. *Swyer* (*b*), the charter expressly required, that before the mayor was admitted to execute the office, or in any way to intermeddle with the same, he should take the oath. But even supposing it were admitted that the proposition that a mayor must take an oath of office before he is qualified to execute the office, is generally correct, *this* case would not come within the rule. *This* is expressly a military corporation, and in many respects unlike ordinary civil corporations. In ordinary cases, a party may be elected mayor without his *consent*, and a mandamus may go to compel him to be sworn in: Here, it is otherwise. In ordinary cases, the office of mayor is a *yearly* office: Here, the office depends on the will of the crown. In ordinary cases, the mayor must be sworn in *simul et semel*, and before the old mayor, who remains in office until the new one is sworn in: Here, there can be no old mayor, for the mere fact of appointing a new mayor puts an end to any former appointment. In ordinary cases, the *burgesses* appoint the mayor: Here, that power of appointment is in the *king* alone. The mayor is also *constable*, and as constable he is not required, either by charter or by common practice, to take any oath. No mandamus would lie to compel the taking of this oath, whence it appears that it is only an oath of sanction.

The argument that the two statutes, 6 *Anne* and 1 *Will.* 4, had the effect of making the grant of His present Majesty operate as a confirmation, and not as a re-grant, has not been satisfactorily answered.

Cur. adv. vult.

(*a*) *Suprà*, 135. (*b*) Ibid.

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In this term, Lord DENMAN, C. J., delivered the judgment of the Court. His Lordship having stated the pleadings, nearly as above, proceeded as follows:—Several other points were raised on the pleadings; some relating to the peculiar nature of the office of constable of the castle of Carnarvon, and the constitution of Welsh boroughs,—and some arising as to the general practice of swearing in, as a qualification or sanction for particular offices, as well as the general privilege of appointing a deputy. But we are not called upon to enter into these inquiries, as we find in the replication above said to have been demurred to, a defect in the noble marquess's title, at the period of his last appointing the defendant deputy mayor of Carnarvon, which appears to us to invalidate the defendant's title.

The charter of King *Edward* 1, in the clause referred to, has clearly made it necessary that the constable of the borough should take the oath of office before he can be a good mayor of the borough, and of course before he can appoint a deputy; and the marquess was duly sworn, in the first instance, before he appointed the defendant. By 57 *Geo.* 3, (the object of which was to give to the appointments of the prince-regent the same duration as if he had made them when king,) the office was continued during pleasure during the life of King *George* 4. But on his death the office was continued by the statute of *Anne* for six months only; just before the expiration of which period the act of the 1st of His present Majesty passed. It enacts, that all and every commission, appointment, patent, and grant, of any office or employment, civil or military, which at the time of the death of His late Majesty was in force and effect, and not superseded, determined, or made void by the present King, should continue and remain in full force and virtue for six calendar months next after the passing of that act, unless in the meantime determined. This act continued the marquess in his former office for six months, at the pleasure of the crown; and if, while in the enjoyment of such office, he had duly appointed the defendant deputy mayor, that appointment would have been good for the same term.

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But the grant of the office of constable, in January, 1831, was not the *continuance* of this former office: it was manifestly a new appointment, extending to the lives of His Majesty and the marquess, if His Majesty should so please. This new appointment required, by the words of the charter, a new swearing in, to complete the title; and as the demurrer admits that no swearing in had taken place after the new grant and before the appointment of the deputy, that appointment is invalid.

The same fact is replied in the fourth replication to each of the defendant's pleas, and all of these replications are demurred to; one essential part of the defendant's title is therefore wanting, and our judgment must be for the Crown.

Judgment for the Crown.

TRINDER *v.* SMEDLEY.

A plea to a declaration on a promissory note, in an action by indorsee against indorser, that the indorsee "had *no consideration*," or that he indorsed "*without consideration*", is bad on special demurrer.

ASSUMPSIT. The declaration stated that one *Taylor* drew a promissory note, and thereby promised to pay to the defendant or order, 13*l.* 9*s.* 11*d.* six weeks after date, and delivered the note to the defendant; that the defendant indorsed the same to one *Bingham*, and that *Bingham* indorsed the same to the plaintiff; and that *Taylor* did not pay the note, although the same was presented to him on the day when it became due; of which the defendant then had notice. Plea: "that the defendant *never had any consideration* for his indorsing the said promissory note," and that *Bingham* "indorsed it to the plaintiff *without any consideration*," and that "the plaintiff had always held it *without any consideration*." Replication: that the defendant "*had consideration* for his indorsing the said promissory note," and that *Bingham* "indorsed it to the plaintiff *with consideration*." Demurrer to the replication, assigning as special causes of demurrer, that the *particulars* of the supposed consideration for the indorsement by the defendant, are not therein set forth; and that it is improperly stated therein,

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that *Bingham* made his said indorsement *with* and not *for* consideration; and that the particulars of the supposed consideration for the indorsement are not, although he was a party thereto, set forth. Joinder in demurrer.

Mansel, in support of the demurrer. It is not necessary that all the particulars of the consideration should be set out; but it should have been stated in the replication, that there was a *valuable* consideration. [Lord *Denman*, C. J. The *plea* states that there was no consideration; and the *replication* answers that there *was* consideration. One is as good as the other, I should think.] The plea is much like that in *Bramah v. Baker* (*a*). [Lord *Denman*, C. J. What is the meaning of the words "without any consideration"? Does the law give them any meaning? Ordinarily, to say that a man did a thing "without consideration," means that he did it without *reflection*. The defendant may have had value, and yet have indorsed the bill without consideration. A plea of this sort is no plea at all. *Patteson*, J. We have said over and over again, that a general plea of no consideration is no plea at all.]

Per CURIAM— Judgment for the plaintiff.

(*a*) 1 Hodges, 66; *S. C.* per nomen *Bramah* v. *Roberts and others*, 1 New Cases, 469.

The KING *v.* The Justices of SUFFOLK.

ROBERT HEWES was indicted, at the Easter quarter sessions for the county of Suffolk, in 1835, for maliciously poisoning some horses belonging to his master. At the

Upon the trial of an indictment at the quarter sessions, that Court is the sole judge of the propriety of the entry of the verdict. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact. The only course open to the prisoner is to apply to the crown for a pardon.

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trial it appeared that the prisoner had administered to the horses a root cut into pieces, called *bank-break* which caused a slow inflammation, of which they died. The defence set up by the prisoner was, that this drug was of a stimulating nature, and was frequently administered to horses to improve their coats, and that he had given the root to the horses for this purpose, and had not acted from a malicious motive. At the conclusion of the case, the prisoner's counsel contended that the prisoner was entitled to an acquittal, as there was no proof that the act was done maliciously, and he cited a passage from 3d *Institute* (*a*.) The chairman summed up the evidence, and the jury returned a verdict of "guilty by mischance." This verdict was entered by the clerk of the peace, in the minute book of the proceedings of the sessions. The counsel for the prisoner submitted that this finding of the jury was a good special verdict, and that the prisoner was upon that finding entitled to an acquittal. The chairman however told the jury that he could not receive this verdict, and that they must find in terms either that the prisoner was guilty or not guilty. The jury again retired, and after a short time returned and found the prisoner guilty, but recommended him to mercy. The chairman asked them upon what grounds they recommended the prisoner to mercy, and they said "Because we think it was not done with any malicious intention, but to better the condition of the horses." The chairman then directed the clerk of the peace to enter a verdict of guilty, which was done, and the prisoner sentenced.

In Easter term, *Byles* obtained a rule, calling upon the justices and clerk of the peace, to shew cause why a mandamus should not issue, commanding them to cancel the alteration made by the said clerk of the peace in the minute of the verdict, or to alter the minutes of the verdict so given, according to the fact.

(*a*) If it be done by mischance or negligence, it is no felony, 3 Inst. 67.

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Biggs Andrews, and *Sydney Taylor*, were about to shew cause, when they were stopped by the Court.

LITTLEDALE, J.—Was any authority shewn to the Court when this rule was obtained? In *Rex* v. *Carlile* (*a*), the record was brought into this Court by writ of error.

Byles, in support of the rule. If the record be brought here by writ of error, this Court cannot compel the amendment. But this Court has the power to correct the practice of an inferior Court, where it tends to injustice. This Court will interfere by mandamus, where an inferior Court, in a matter of practice, whether preliminary, or subsequent to a judicial investigation, violates the law. This power follows from the constitution of this Court. If the Court of Quarter Sessions neglect to enter continuances, this Court will compel them to do so, where the justice of the case requires it. In *Rex* v. *The Justices of the W. R. of Yorkshire* (*b*), the sessions having refused to hear an appeal, this Court granted a mandamus, commanding them to enter continuances and hear the appeal. In that case it was contended that the justices were the proper judges of matters of practice arising at their sessions, and that their decision, unless manifestly wrong, ought not to be interfered with. Lord *Denman*, C. J. says, "I have always understood that this Court will interfere to see that no illegal practice prevails at the Court of Quarter Sessions." The verdict was properly entered, in the first instance, by the clerk of the peace. That is the only mode by which a verdict can be recorded at the time of delivery, as appears from what fell from Lord *Tenterden*, in *Rex* v. *Carlile;* and the Court of Quarter Sessions had no right to direct the alteration of the minute. [*Patteson*, J. You do not furnish us with any instance of the Court interfering after the record has been made up.] There are several cases in which this Court has, on error, refused to amend; *Salter* v.

(*a*) 2 Barn. & Adol. 971. (*b*) *Ante*, ii. 390, 396.

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Slade (*a*), *France* v. *Parry* (*b*), *Mellish* v. *Richardson* (*c*). A *writ of error* is the proper remedy, where the error is judicial and on record; a *mandamus*, where the error is, as in this case, in a proceeding ministerial or extra-judicial; *Com. Dig.* Mandamus, (A.) If this mandamus is refused, the trial by jury in Courts of Quarter Sessions may almost be dispensed with. If the Court entertain a doubt, the mandamus ought to be issued. [*Patteson*, J. If a man is improperly convicted before a Court of oyer and terminer, the practice is to apply to the judge. If we were to assume a jurisdiction in this case, it would extend to every Court in the kingdom. We might even interfere in a trial at bar, before the Court of Common Pleas. In *Rex* v. *Bowman* (*d*), the mandamus was to *make up* the record.] In *Rex* v. *The Justices of Wiltshire* (*e*), Lord *Ellenborough* said, "The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal, but we have also a kind of *visitatorial* jurisdiction over them, in the exercise of such discretionary power. In the case of an appeal respecting the settlement of a pauper, the Court of Quarter Sessions give judgment for the appellants, but refuse to award the costs of maintenance; a mandamus lies to compel the Court to amend their judgment, by giving to the appellants the costs of maintenance" (*f*). The rule must be the same in criminal cases. Suppose the jury to return a verdict of "not guilty," and the chairman to direct a verdict of "guilty" to be entered,—surely this Court would interfere. Here, there was a mistake in practice, subsequent to the judicial proceeding. A jury may, in criminal as well as in civil cases, insist on giving a special verdict, and it was formerly their safer course, for if they gave a false verdict, they were liable to attaint (*g*); *Dow-*

(*a*) *Ante*, iii. 717.

(*b*) 1 Adol. & Ellis, 615.

(*c*) 9 Bingh. 125; 6 Bligh, 70; 2 Moore & Scott, 191.

(*d*) Reported as *Rex* v. *Justices of Middlesex*, *ante*, iii. 110.

(*e*) 10 East, 404.

(*f*) *St. Mary's, Nottingham*, v. *Kirklington*, 2 Bott. 756.

(*g*) But not if the indicted were found guilty, as then he would have been convicted by 24; 1 Roll. Abr. 280; nor upon a verdict on an appeal of felony, F. N. B. 107, (L.)

man's case (*a*); 2 *Hale's Pleas of the Crown*, 302; 4 *Bla. Com.* 360. The finding of the jury in this case was a good special verdict. The verdict amounts to an acquittal, for the word "guilty" may be rejected as a conclusion of law repugnant to the premises; *Bacon's Abr.* Verdict, E., *Foster* v. *Jackson* (*b*), *Priddle* v. *Napper* (*c*); indeed it is not necessary to reject the word "guilty," for that may mean guilty of the trespass.

LITTLEDALE, J. (*d*).—I am of opinion that we have no power to issue this mandamus. The rule is for a mandamus to cancel the alteration made by the clerk of the peace, or to alter the minute of the verdict according to the fact. It may be admitted that this Court has a species of superintending jurisdiction over inferior Courts, but we must see that this jurisdiction has before been exercised in the manner now proposed. It is urged that we interfere with the Court of Quarter Sessions, and oblige them by mandamus, in certain cases, to enter continuances and hear an appeal. In those cases this Court merely puts the Court of Quarter Sessions *in motion*, and obliges them *to decide*. In *Rex* v. *Bowman* (*e*), this Court merely directed the Court of Quarter Sessions to *make up* the record; and *that* was done after some difficulty. We have no authority to interfere with the practice of other Courts *in this way*. At the assizes, disputes sometimes arise as to the mode of entering the verdict. If we interfere in this case, we may as well interfere with the proceedings at the assizes (*f*), or with the proceedings of any other Court in the kingdom. Whether the verdict is entered properly or improperly, is matter for the consideration of the Court in which the trial takes place.

(*a*) 9 Co. Rep. 12 b.
(*b*) Hob. 53.
(*c*) 11 Co. Rep. 9.
(*d*) Lord *Denman*, C. J. had left the Court to sit as Speaker of the House of Lords.
(*e*) *Vide ante*, 142, (*d*).
(*f*) As the judge of assize acts under the authority of the Court out of which the record issues, the Courts above do exercise control over verdicts found at nisi prius; *secus* as to verdicts found before justices of oyer and terminer or of gaol-delivery, who derive their authority solely from the crown.

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The finding of the jury might perhaps amount to something to be returned, but as no instance has been given of an exercise of jurisdiction in a similar case, this rule should, in my opinion, be discharged.

PATTESON, J.—If there had been any *authority* for this course of proceeding, we should have been desirous to proceed to ascertain whether justice has been done in this case. But as no authority has been adduced, we ought not, in my opinion, to interfere. The cases cited, in which this Court has by mandamus compelled the Court of Quarter Sessions to enter continuances and hear an appeal, do not resemble this case. The Court, by *ordering continuances* to be entered, is only supplying *a defect*, and the mandamus in such cases commands the Court of Quarter Sessions *to hear* an appeal. It is necessary that there should be continuances entered, to give the Court of Quarter Sessions *jurisdiction*, and for that purpose they are directed to be entered. So, if it were necessary, as in *Rex* v. *Bowman*, that a record should be *made up*, this Court would interfere by mandamus, as it did in that case. But I have always understood that this Court would send a mandamus in *general* terms, and would not require the inferior Court to do a *specific act* in a *particular* mode. It would be wrong to issue a mandamus merely for the sake of a return. If the jury really did mean that the prisoner should be acquitted, the proper course is to apply to the secretary of state.

WILLIAMS, J.—I see no reason why we should interfere by mandamus. Where the Court of Quarter Sessions altogether decline to hear a matter which is within their jurisdiction, this Court has the power to issue a mandamus to compel them to do so. But we do not direct a mandamus to do a specific act. If parochial officers refuse to make a rate, this Court will, if necessary, compel them to make one, but we do not command them to make an equal rate (*a*). Were we to interfere in this case, we should

(*a*) 1 Nol. P. L. 62.

be doing that for which no precedent can be adduced. I cannot distinguish this from any other point in practice.

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Rule discharged.

Ex parte W. H. CARMICHAEL SMYTH.

MR. *SMYTH* moved for a rule nisi for a writ of prohibition to the Judicial Committee (*a*) of the Privy Council, under the following circumstances:—A suit was commenced in the Consistory Court of London, in 1831, against Mr. *Smyth*, by his wife. The judge decided against Mrs. *Smyth* upon a part of the case, and refused to order Mr. *Smyth* to appear absolutely. Mrs. *Smyth* appealed to the judge of the Arches Court, who decreed that she had not appealed to his Court in due time and place; and thence again to the Court of Delegates, who decided against the appeal, and remitted the cause back. The cause being returned, according to the ordinary process, to the Consistory Court, the judge of that Court decreed that the suit should proceed as if there had been no appeal. On 11th February, 1833, Mrs. *Smyth* appeared and tendered additional articles to the libel which had been previously brought in by her, and prayed leave to correct the 9th and 10th articles of such libel in a certain respect, and further prayed the judge "to assign to hear on admission of the said libel so altered, and of the additional articles, the by-day." The judge refused to receive the additional articles, and rejected the said prayers. Mrs. *Smyth* thereupon appealed from this decision to the Arches Court of Canterbury. On 9th May the judge of the Arches Court decided in favour of the appeal, reversed the decree appealed from, retained the principal cause, decreed a monition to the judge of the Consistory Court to transmit the original

The temporal Courts cannot entertain a question, whether, in a particular cause admitted to be of ecclesiastical cognizance, the *practice* of the Ecclesiastical Court has been regular.

The temporal Courts can prohibit any particular proceeding in an ecclesiastical suit, only where such proceeding is contrary to the general law of the land, or manifestly out of the jurisdiction of the Court.

(*a*) *Vide post*, 147 (*a*).

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libel, and gave the appellant leave to correct, in the manner proposed, the 9th and 10th articles of the libel when transmitted, and to bring in the additional articles which she had tendered. Mr. *Smyth* appealed against this decision to His Majesty in Council, by whom it was referred to the Judicial Committee of the Privy Council. Before the appeal came on to be heard, Mr. *Smyth* prayed the lords of the council to reverse the decree appealed from, to retain the pretended principal cause, and therein to dismiss him, the appellant, from all further observance of justice in the premises. Mrs. *Smyth* then prayed their lordships to affirm the decree appealed from, to retain the principal cause, and therein to assign to hear immediately upon the admission of the libel and additional articles, and that a monition should issue against the judge of the Consistory Court to transmit the original libel, and also a monition to the judge of the Arches Court, to transmit the additional articles. Their lordships, on 12th February, 1835, reported to His Majesty that the decree appealed from ought to be reversed, the principal cause retained, and that therein Mr. *Smyth* should appear absolutely; that they should assign to hear, on admission of the original libel and additional articles, and should decree a monition to the judge and registrar of the Consistory Court to transmit the original libel, and a monition against the judge and registrar of the Arches Court, to transmit the additional articles to the Committee or their surrogate. And their lordships ordered, that in case His Majesty should confirm their report, Mr. *Smyth* should appear absolutely before their lordships' surrogate, at the Common Hall at Doctors' Commons, at ten o'clock on the day following such confirmation. Mr. *Smyth* objected to his being assigned to *appear absolutely*, but the report was, on 23d February, 1835, confirmed by His Majesty in council.

Mr. *Smyth*, in support of his motion. The Judicial Committee had cognizance of the cause generally, but they

have decided upon a matter which was coram non judice, de facto, and also de jure. They had *no right* to require an absolute appearance. The question, whether the parties should be directed to appear absolutely, was not the subject of appeal, nor was such direction prayed for on occasion of either of the appeals. The Judicial Committee had no jurisdiction except over the subject-matter of the appeal. [*Patteson*, J. The subject-matter is properly a matter cognizable in the Spiritual Court. I do not see how we can interfere, unless they intermeddle beyond their jurisdiction, in temporal matters. *Littledale*, J. The king appears by the act (*a*) to be the person to act. We cannot issue a prohibition to the king.] The Judicial Committee are, by the act, substituted for the Court of Delegates. [*Coleridge*, J. By the act, the power of enforcing the judgments of the committee is given to the king himself in person.] Under the old law, the appeal from the Court of Arches was to the king in Chancery, who *delegated* the matter to persons who were thereby created a Court of Delegates. The Judicial Committee of the Privy Council and the Court of Delegates, stand on a similar footing; and prohibitions have issued to the Court of Delegates. [*Patteson*, J. The Judicial Committee are only to make a

(*a*) 3 & 4 *W.* 4, c. 41, s. 3, which enacts "that all appeals and complaints in the nature of appeals, whatever, which either by virtue of this act, or of any law, statute, or custom, may be brought before His Majesty, or His Majesty in council, from or in respect of the determination, sentence, rule, or order, of any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall, from and after the passing of this act, be referred by His Majesty to the said Judicial Committee of his Privy Council; and that such appeals, causes, and matters, shall be heard by the said Judicial Committee, and *a report or recommendation thereon shall be made* to His Majesty in council for *his decision* thereon, as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of his Privy Council, or a committee thereof, (the nature of such report or recommendation being always stated in open court)."

The appeal to *His Majesty in Council* was substituted for that to the Court of Delegates, by 2 & 3 *W.* 4, c. 92.

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report or *recommendation* to His Majesty in Council for *his decision.* The act expressly draws a distinction.] 3 *Bla. Com.* p. 112, 113; 24 *H.* 8, c. 12; *Wood's Institute,* book iv. c. 1, were referred to.

Lord DENMAN, C. J.—We will look at the affidavits, and consider of this matter.

In the course of the term Lord DENMAN, C. J., delivered the judgment of the Court. After stating the facts disclosed by the affidavits, his lordship proceeded thus:—The ground of appeal by Mrs. *Smyth* was the refusal of the judge of the Consistory Court to grant leave to correct her original libel in certain respects, and "to admit additional articles to her libel, and to assign to hear on admission of the said libel so altered, and of the additional articles, the by-day." The Court of Arches decided in favour of Mrs. *Smyth.* The Judicial Committee, on appeal, have reversed that decision, but have gone on further to retain the principal cause, and to direct Mr. *Smyth* to appear absolutely.

This last part of their decree forms the ground of the present application. It is admitted that the suit is solely of ecclesiastical cognizance, and no matter has arisen in the progress of the suit which interferes with that cognizance; but it is alleged that the Judicial Committee have exceeded their jurisdiction in decreeing Mr. *Smyth* to appear absolutely, the question of such appearance not being in any way the subject of appeal. It appears that this question had been the subject of a former appeal to the Court of Delegates, when it was decided in favour of Mr. *Smyth,* on the ground that such appeal was not brought in due time.

In the present appeal, the prayer of *both* parties is, that the principal cause should be retained. The Judicial Committee have retained it, and have decreed Mr. *Smyth* to appear absolutely.

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Whether they are right in so decreeing, or not, is a question of *practice*, not of *jurisdiction*. The temporal Courts cannot take notice of the *practice* of the Ecclesiastical Courts, or entertain a question whether, in any particular cause, admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal Courts can interfere, by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court. The proceeding here complained of comes within neither of those heads, and therefore we are of opinion that the rule prayed for ought not to be granted.

Rule refused.

Henry Pringle Bruyeres, Esq. *v.* John Halcomb, Esq.

The Court will not allow judgment to be entered up (under 9 *Geo.* 4, c. 22,) on a certificate of the Speaker of the House of Commons, for the costs of opposing an election-petition, when it appears upon affidavit, that the certificate was founded upon the report of a select committee for trying the merits of the petition, which was not duly appointed according to the provisions of that act.

Where a party, who has presented a petition to the House of Commons, complaining of an undue return, does not appear at the time appointed for taking the petition into consideration, or within an hour afterwards, a committee for the trial of the merits of the petition cannot be elected; but the petition should be discharged.

Quære, as to the *mode* in which the Speaker's certificate for costs, under 9 *Geo.* 4, c. 22, should refer to the report of the examiners appointed to tax those costs.

DEBT, for the costs and expenses of opposing a petition to the House of Commons, complaining of the return of Sir *John Rae Reed*, bart., as member for the town and port of Dover, and of the conduct of the plaintiff as returning officer.

In Michaelmas term 1831, a rule was obtained by *D. Pollock*, calling upon the defendant to shew cause why the plaintiff should not be at liberty to enter up judgment upon the certificate of the Speaker, pursuant to 9 *Geo.* 4, c. 22, s. 63. That section is as follows:—"That it shall and may be lawful for the party or parties entitled

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to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof so certified as above, from any one or more of the persons, respectively, who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned; and in case of non-payment thereof, to recover the same by action of debt in any of His Majesty's Courts of record at Westminster; in which action it shall be sufficient for the plaintiff or plaintiffs to declare, that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses ascertained in manner aforesaid shall amount, by virtue of this act; and the certificate of such amount, so signed as aforesaid by the Speaker, shall have the force and effect of a warrant to confess judgment; and the Court in which such action shall be commenced shall upon motion, and upon production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action, to that amount." Upon the affidavits, the following facts appeared:—Mr. *Halcomb* was a candidate, at the general election in July and August, 1830, to represent the town of Dover in parliament; but Sir *John Rae Reed*, bart., the other candidate, was returned as the member elected, by the plaintiff, who was the mayor and returning officer. In November 1830, Mr. *Halcomb* presented a petition to the House of Commons complaining of an undue election and return of Sir *John Rae Reed*, and also complaining of the conduct of the plaintiff as returning officer. This petition was ordered to be taken into consideration on the 8th of March, at three o'clock p. m. The petitioner did not, however, attend on that day, nor did any counsel or agent attend on his behalf; but the House of Commons nevertheless proceeded to ballot for, and appointed a select committee. On the following day the committee met to try

the merits of the petition, when Mr. *Halcomb*'s solicitor, without any directions from him, stated to the committee, that Mr. *Halcomb* was absent from London, having left in his hands a second petition to the House of Commons for leave to withdraw the former petition, as required by the statute; but that he had understood that the latter petition could not be received. He, however, offered it to the committee in explanation of Mr. *Halcomb*'s absence, and further stated, that he had no instructions to prosecute the first petition, and declined to take any part in it before the committee. The counsel for the *sitting member* then referred to the 9 *Geo.* 4, c. 22, s. 3, and suggested that their proceedings were illegal, for that the petition ought to have been discharged in consequence of the non-appearance of the petitioner at the House on the preceding day. But the counsel for the *returning officer* stated, that he had been put to considerable expense, and therefore prayed that the petition of the defendant might be considered frivolous and vexatious. The committee shortly afterwards determined and reported that Sir *John Rae Reed* was duly elected, and that Mr. *Halcomb*'s petition appeared to them to be frivolous and vexatious. Soon after the decision of the committee, the costs and expenses of the plaintiff were taxed, and the Speaker granted to the plaintiff a certificate, which was as follows:—"Whereas *A. B.* and *C. D.* were duly appointed and directed by me, according to the act passed in the 9th year of the reign, &c. (entitled &c.), to examine and tax the costs and expenses of *Henry Pringle Bruyeres*, returning officer at the last election of &c., incurred by him in opposing the petition of *John Halcomb*, esq. complaining of an undue election and return of Sir *John Rae Reed*, bart., have reported to me the amount thereof. Now I do hereby certify, that the said costs and expenses allowed in the report, amount to the sum of 341*l.* 3*s.* 9*d.* and that the said *John Halcomb* is liable to the payment of the said costs and expenses. Given under my hand the 22d April 1831."

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Sir *William Follett*, in Easter term last, shewed cause. The power of this Court cannot be put in motion, unless the provisions which authorize the entering up of judgment upon the Speaker's certificate, have been complied with.

There are two species of objection to this certificate, the one in substance, the other in matter of form.

First point: Committee illegally appointed.

I. The committee, upon whose report the present certificate is based, was illegally appointed. The petitioner not attending the House at the time appointed, this petition should have been *discharged*. The authority of this Court depends entirely on 9 *Geo.* 4, c. 22, which was passed to consolidate and amend the laws relating to the trial of controverted elections; and in order to shew the illegality of the proceedings of the House of Commons, it is necessary to examine many of the provisions of that statute. Section 2 enacts, "that whenever a petition complaining of an undue return of any member to serve in parliament, shall be presented to the House of Commons within such time as shall be from time to time limited by the House, a *day and hour* shall be appointed by the House for taking the same into consideration, and notice thereof in writing shall be forthwith given by the Speaker to all parties so petitioning, and to the sitting members, and, where the conduct of the returning officer is complained of, to the returning officer, accompanied with an order to the parties to attend the House *at the time appointed*, by themselves, their counsel, or agent." By sections 17 & 18, the mode of balloting for the committee is regulated; and a list of 33 members, chosen by ballot, is to be reduced to eleven, by each party's alternately striking off one of the 33, until so reduced. By section 33, if there are more than two parties before the House on distinct interests, each of the parties is successively to strike off the name of a member, in succession, from the 33 chosen by ballot, until the number is reduced to eleven. It is manifest from this section, that the legislature was exceedingly anxious that all parties should be *present* when the list was reduced. The

petitioner in this case did not appear, and he knows not how the list was reduced. By section 34, if within one hour after the time appointed for taking any petition into consideration, the *sitting member* or the *party opposing* the petition shall not appear, his place is to be supplied, in reducing the list, by the clerks appointed to attend the committee. It is probable that the clerk of the committee, erroneously thinking this section applicable to the case of the *petitioner* not appearing, proceeded to reduce the list. By section 40, the committee are to try the merits of the return and election, and are to report their decision to the House, and at the same time they are to report to the House whether the opposition appeared to them to be frivolous and vexatious. Section 57 enacts, "that whenever any committee appointed to consider the merits of any petition, shall report to the House with respect to any such petition, that the same appeared to them to be frivolous and vexatious, the parties who shall have appeared before the committee in opposition to the petition, shall be entitled to recover from the petitioner the costs and expenses which such parties shall have incurred in opposing the same, such costs and expenses to be ascertained in the manner hereinafter directed." By section 60, the mode of ascertaining the costs is pointed out: Upon application within three months *after the determination of the merits* of the petition, the Speaker is to name two persons to tax the costs, and those persons are required to examine the same and *to report the amount thereof, together with the name of the party liable to pay the same, to the Speaker,* who shall, upon application, deliver to the parties a certificate, signed by himself, assessing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same; *and such certificate, signed by the Speaker, shall be conclusive evidence of the amount of all demands* in all cases and for all purposes whatsoever. The certificate is only declared to be conclusive as to the *amount,* and cannot be considered as conclusive of any

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other matter. The 63d section is the one on which this proceeding is founded. By that section it is provided, that it shall be lawful, &c. (a). By the third section, "The House may alter the day and hour so appointed for taking any such petition into consideration, and appoint some subsequent day and hour for the same, as occasion shall require, giving to the respective parties the like notice of such alteration, accompanied with an order to attend on such subsequent day and hour as aforesaid; and if, within one hour after the time fixed in the manner hereinafter directed for calling in the respective parties, their counsel, or agents, for the purpose of proceeding to the appointment of a select committee, the *petitioner or petitioners, or some one or more of them, who shall have signed any such petition, shall not appear* by himself or themselves, or by his or their counsel or agents, *the order for taking such petition into consideration shall thereupon be discharged*, and such petition shall not be any further proceeded upon." As Mr. *Halcomb* did not attend to appoint a committee, it is manifest that the proper course for the House to have pursued was to *discharge* the order for taking the petition into consideration, and not to proceed to appoint the committee, as they have done. But the committee having met, and made a report, the parties have thought fit to proceed upon a clause in the act which is not applicable. The question then is reduced to this, whether, conceding that the House of Commons have acted contrary to law, the Speaker's warrant is to be considered as conclusive and binding upon this Court. If so, there is no relief for the defendant. It was said, upon moving for the rule in this case, that this Court has no right to interfere with the proceedings of the House of Commons, and that this Court has no jurisdiction to inquire whether that House has acted legally or illegally. It is true that this Court will not set itself up to inquire generally into the legality of the proceedings of the House of Commons; but when it is asked to issue its pro-

(a) *Suprà*, 149, 150.

cess, as in this case, upon the certificate of the Speaker, this Court will inquire whether the certificate was given under the circumstances on which alone the act *authorizes* it to be given. When it is said that *the certificate* shall have the force of a warrant of attorney, that is to be understood of a certificate signed *in accordance with the provisions of the statute.* It was suggested from the bench, upon a former occasion, that the *production* of the certificate was sufficient. All the reported cases, however, shew that the Court will inquire into the *regularity* of the certificate: *Strachey* v. *Turley* (*a*), *Magrane* v. *White* (*b*), *Ex parte Williams* (*c*). [*Coleridge*, J. In that case the Court were of opinion that the committee had done wrong.] *Gurney* v. *Gordon* and another, in error (*d*).

II. The second objection is, that the certificate is informal, as it does not appear upon the face of it that the examiners had found that Mr. *Halcomb* was liable. [Lord *Denman*, C. J. Are we not to infer that the Speaker has done his duty?] The contrary appears. It was the duty of the examiners to determine who was the party liable, and to report it to the Speaker. Such report should have been recited correctly in the Speaker's certificate, and the liability of Mr. *Halcomb* should also have been certified as consequent upon that report. Another informality is, that the certificate omits to state that application was made to the Speaker within three months after the determination of the merits of the petition.

Second point: Certificate informal.

David Pollock, contrà. It is sufficient for the plaintiff to *produce* the Speaker's certificate, and it is to be *assumed* that every necessary preliminary step has been taken. The 63d section declares that the certificate of the Speaker shall have the force and effect of a warrant to confess

First point:

(*a*) 7 East, 507; *S. C.* 11 East, 194.

(*b*) 2 Mann. & Ryl. 440; 8 Barn. & Cresw. 413.

(*c*) 8 Price, 3.

(*d*) 9 Bingh. 37; 2 Moore & Scott, 187; 2 Crompt. & Jerv. 614; 3 Tyrwh. 616.

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judgment, and that the Court in which the action shall be commenced shall, upon motion, and on the *production* of the certificate, enter up judgment in favour of the plaintiff, as if the defendant had signed a warrant to confess judgment. It is contended that these words give this Court jurisdiction to inquire into the merits of the case and the legality of the proceedings of the House of Commons. This Court will not make any such inquiry. In every case in which the Courts have refused to enforce the certificate, they have proceeded on the ground of a defect apparent on the face of the certificate. In *Strachey* v. *Turley* the informality was apparent on the face of the certificate. So in *Magrane* v. *White*. *Ex parte Williams*, which was a case decided by the Court of Exchequer, was a proceeding on the *recognizance*. There is therefore a material distinction between that case and this.

But, supposing that this Court will take cognizance of what passed when the committee were ballotted for, still, if they were *de facto* appointed, it is sufficient; since the 30th section declares that the eleven members, from and after the time of their being sworn, shall be deemed and taken to be a select committee to try and determine the merits of the return or election appointed by the House to be by them taken into consideration.

Second point: With respect to the alleged *informality*, it has been assumed, in the argument on the other side, that the examiners have not made a report, to the Speaker, of the liability of the defendant. It should, on the contrary, be assumed that this *was* done before the Speaker made his certificate. It would indeed be a violent conclusion to infer that the report of the examiners as to liability was not made, and that the Speaker has improperly granted a certificate.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of this term delivered the judgment of the Court as follows:—

This was an action of debt, founded on the 63d section of 9 *Geo.* 4, c. 22, to consolidate and amend the laws relating to the trial of controverted elections or returns of members to serve in parliament. (His Lordship then read the 63d section(*a*).) The Speaker's certificate was produced, finding a certain amount of costs, and that the defendant was liable to pay them to the plaintiff. Some objections were made to the form of it, which we need not consider, as our judgment proceeds upon other grounds; and we assume, for the purpose of this argument, that the certificate was correct in its form, within the 60th section, which farther enacts that the Speaker's certificate shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever.

The enactment by which the certificate is made available for rendering a party liable to costs, is the 57th section, providing, that, whenever any committee appointed to consider the merits of any petition complaining of an undue election shall report to the House that the same petition appeared to them to be frivolous and vexatious, the party opposing such petition shall recover, from any party who signed it, the full costs of opposing it,—to be ascertained in manner thereinafter directed.

For the amount of costs thus ascertained, the plaintiff obtained a rule to shew cause why judgment should not be entered up; against which, cause was shewn upon affidavits, from which it plainly appeared that the committee itself was not legally formed within the statute; for the third section expressly enacts, that if within one hour after the time fixed, in the manner thereinafter mentioned, for calling in to the House the respective parties, their counsel, or agents, for the purpose of proceeding to the appointment of a select committee, the petitioner or petitioners, or some or one of them who shall have signed the petition, shall not appear by himself or themselves, or by his or their counsel or agents, the order for taking such petition into consideration shall thereupon be *discharged*, and such petition shall

(*a*) *Suprà*, 149, 150.

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not be further proceeded upon. Now the affidavits clearly shew that no petitioner did appear, either in person or by deputy, within one hour of the time specified, or indeed at any time. The statute therefore expressly required that the order should be discharged, and the petition no farther proceeded upon.

The same affidavits, however, state, that the Committee was *in fact* appointed; but it could not be reduced from 33 to 11, as the act requires, in the manner directed by the 30th section, for that assumes the presence of some person acting for a petitioner, who is to strike off names alternately with other parties. The Committee, however, were sworn, met, appointed a day for trying the merits, and on that day voted the defendant's petition frivolous and vexatious, in his absence, and without the presence of any person authorized by him. It was objected at the bar, that none of the Courts in Westminster Hall are at liberty to inquire into the legality of proceedings by the House of Commons, nor can do so, consistently with the respect due to the privileges of that body. It is unnecessary to enter upon that general question in the present case, for in this instance, at least, we are bound to institute the inquiry, as our assistance is prayed to give effect to the Speaker's certificate, and we should be unwarranted in issuing our process to that end, unless we saw that his certificate was founded on a proceeding legal by act of parliament, and in compliance with those general principles of justice which are binding on all jurisdictions. The certificate by itself possesses no authority to issue process; recourse must be had to the act for that purpose, and, obviously, that can only be in cases where the act applies. If this were otherwise, the Speaker's certificate that *A.* owed *B.* a sum of money, without more, would authorize, nay, *compel* the Court to issue execution against *B.*, to seize his goods and throw him into prison.

But the Speaker's certificate here produced plainly refers to the 60th section of the statute, for it recites a report of examiners appointed under its provisions, and by them

empowered to tax the costs of prosecuting or opposing any petition presented under the provisions of that act. But their costs become due by the 57th section, already cited, the words of which, it is true, apply to any committee to try the merits, but which must, we think, be confined to committees *duly* appointed under the act, and possessing the powers it confers. The House of Commons does not, by virtue of the act, lose its power to appoint an unsworn committee to try the merits of an election, by the examination of witnesses not upon oath. Many cases may be supposed in which this ought to be done; but though the decision of such a committee should be, that a petition was frivolous and vexatious, it is clear that the liability to pay costs would not ensue, nor, if they should be awarded, could payment be enforced in a court of law.

The 30th section has been supposed to give validity to any committee *de facto* appointed, and to supersede all inquiry into the process actually pursued in appointing it. The words are, "the said eleven members shall be sworn at the table, well and truly to try the matter of the petition referred to them, and a true judgment to give according to the evidence, and shall be deemed and taken to be a select committee, legally appointed to try and determine the merits of the return or election appointed by the House to be by them taken into consideration, from and after the time of any such select committee having been sworn at the table." And these words may possibly have been introduced with the intention of dispensing with the proof of the facts, which must concur to give a committee jurisdiction, though they are not very well selected for the purpose. But they do not exclude proof that the preliminary facts never did take place, nor prevent the consequence that the jurisdiction never was created. The proof in the present instance is, that the committee was appointed in a state of things in which the statute required that it should *not* be appointed. It therefore had no power over the petitioner; and the report, that his petition was frivolous and vexatious, it had no right, under the statute, to make. The Speaker could not

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lawfully put the examiners in motion to tax the costs: Their report was an unauthorized statement of an immaterial fact, and the Speaker's certificate of its being made, could give it no authority.

The party in this case is not without a remedy for his costs, under the 5th section, if he brings himself within the third section, on the recognizances thereby required.

It follows, in our opinion, from the previous examination of the statute, that as the Speaker's certificate, to which the act assigns the effect of a warrant of attorney to confess judgment, must be one founded on the report of a committee appointed in conformity with the act, and as this committee has not been so appointed, the rule for entering judgment in this case must be discharged.

Rule discharged.

The KING *v.* The Justices of the Town and County of the Town of NOTTINGHAM.

All business relating to the assessment, application, and management of the county rate, must be transacted by the justices in *open Court*; but no rate-payer or person not being a member of the Court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices in respect of such assessment, &c.

Therefore, a rate-payer present at an adjourned sessions held for the purpose of allowing the accounts, &c. to be charged upon the county rate, is not entitled to inspection of such accounts, &c., previously to their allowance.

Although it appear that such accounts, &c. were inspected, examined, and the amounts adjusted at a *private* meeting of justices held previously to such adjourned sessions, and that at such sessions the accounts, &c. were allowed, upon the *total* amounts thereof, and the names of the parties to whom due, being openly *read* in Court.

Semble, that a rate-payer is entitled to inspection of such accounts, &c. upon application on a day *subsequent* to the allowance.

A Rule had been obtained, calling upon the above justices to shew cause why a mandamus should not issue commanding them to permit *C. D'A. Shelton* to inspect and examine, and to have copies or extracts of, the several bills, accounts, vouchers, and papers, exhibited to and allowed and passed by them at the general quarter sessions of the peace, holden by adjournment, in and for the said town and county on 30th April last, and the amounts whereof were then and there by them directed to be paid out of the county-rate of and for the said town and county. The affidavits of Mr. *Shelton* (an attorney), upon which

this rule was obtained, stated, that he was ratable in the parish of St. Mary, Nottingham; that on 9th April a general quarter sessions for Nottingham was held, and adjourned to 30th April; that public notice was given that on that day the business appertaining to the assessment, application, and management of the county-rate would commence; that at such adjourned sessions, several bills or accounts of charges and disbursements for business and matters done and performed, and intended to be directed to be paid out of the sums to be received by the overseers of the respective parishes in Nottingham, as and for the rate to be assessed upon the inhabitants of the respective parishes, called the county-rate of Nottingham, were produced by the clerk of the peace and treasurer of the county of the town, and that it was then publicly stated by him that the several bills and accounts had been previously examined, audited, and allowed at a *private* meeting held by the magistrates for that purpose; that such private meeting was held on the Friday preceding April 9th, and that such bills were then and there examined, &c.; that the deponent, at such adjourned sessions, required to be permitted to look at and inspect the items of such bills, &c., at the same time stating that he claimed a right to look at and inspect the same, with a view to obtain and give information as to the propriety of the same being allowed and paid out of the county-rate; but that the Court publicly stated and decided that they would not allow or permit of any inspection of or interference with any of the said accounts, by any person or persons present, other than the Court, or some or one of the members thereof; that the *amount* of such bills, and the names of the persons to whom they were owing, were publicly read, and many of them allowed without any particular inspection of the items taking place on that occasion; that it had been and still continued to be the constant usage of the magistrates of Nottingham, to hold *private* meetings a short time before every general quarter sessions, for the purpose of examining

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and inspecting at such meetings the items of the several bills, &c. to be charged upon and disbursed out of the county-rate; and that at such meetings the said bills were examined and inspected, and the respective total amounts adjusted and finally settled; that deponent's attention had for many years been called to the disbursements and payments made out of the county-rate, and that if he were permitted to examine and inspect, and have copies and extracts of the several bills, &c., produced at the said adjourned sessions, and allowed and directed to be paid out of the county-rate, he should be able satisfactorily to make it appear, that many sums of money, to a large amount, have been illegally and improperly charged upon the county-rate.

Campbell, A. G. and *Amos*, now shewed cause. This application is grounded on a misapprehension of the act of 4 & 5 *W.* 4, c. 48. That act is declaratory, and does not, in the slightest degree, alter the jurisdiction or the power of the justices. Before the passing of this act, bills were to be allowed *by the justices;* and by this act it is enacted, that all business relating to the assessment and application of the county-rate shall be transacted in open court. It does not follow from this enactment, that every stranger or even every rate-payer, is to have a right to inspect the bills and accounts, and enter into a discussion as to the propriety of allowing them. Such discussion was the object which the party had in view when he required the inspection of the bills, &c. Mr. *Shelton* did not apply for an inspection of the orders *after* the allowance.

G. T. White contrà. Before the passing of this statute it was held, in *Rex* v. *Justices of Leicester* (*a*), that a mandamus lies to the justices and the clerk of the peace of a borough, to permit the attorney for and on behalf of persons contributing to the county-rate, "to inspect and take

(*a*) 7 Dowl. & Ryl. 370.

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copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto." The application in that case was very similar to the present, Afterwards, the act of 4 & 5 *W.* 4, c. 48, passed. That act, after reciting that doubts had arisen whether it was requisite that the business relating to the assessment, application, and management of the county-rate, should be transacted by the justices publicly and in open court, at their general or quarter sessions, or any adjournment thereof, and that *a practice had in many counties prevailed of transacting such business in private, which had been found inexpedient,*—for the removal of such doubts, and the prevention of such practice for the future,—declared and enacted, that, thereafter, all business pertaining to the assessment, application, or management of the county-rate, or to any matter in respect whereof the county-rate is chargeable, which the justices are authorized and directed to do and transact at the general or quarter sessions, or at any adjournment thereof, *shall be done and transacted publicly and in open court,* at such general or quarter sessions, or adjournment thereof, *and not otherwise.* Here, the business was in fact transacted at the *private* meeting, in accordance with the former practice of these justices, though the *formal* allowance took place in open court. The object of this act will be defeated if such an evasion of its provisions be allowed. That object was, it is submitted, that all rate-payers should be permitted to inspect the accounts of the expenditure, and to discuss each item, if they thought proper, in court. It is not, however, necessary to go this length for the purposes of the present application.

Lord DENMAN, C. J.—It appears to me that this rule must be discharged. The party wishes to inspect and examine, and to have copies or extracts of the several bills and accounts allowed by the justices, and the amounts

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whereof were ordered by them to be paid out of the county-rate. It does not appear that he might not have had all that he asks. Perhaps, if he had applied after the allowance, he might have been permitted to have such inspection, &c. At the time, however, when the application was made, the Court were right in refusing to grant that which was demanded. Supposing, therefore, that *Rex* v. *The Justices of Leicestershire* be good law, I still think that this rule cannot be made absolute.

LITTLEDALE, J.—The application should have been made after the business was completed,—as upon some subsequent day.

PATTESON, J.—If we make this rule absolute, we should make all the rate-payers of the county auditors, as well as the justices. The act only means that what the justices do shall be done by them in public.

WILLIAMS, J.—I am of the same opinion. It was not intended that the rate-payers should have a right to interfere. That would be destroying the jurisdiction of the justices. This application goes too far, and is premature.

Rule discharged.

REX *v.* JOHN WILSON.

A conviction for a forcible detainer, under 8 *H.* 6, c. 9, must shew an *unlawful entry* as well as a forcible detainer.

CONVICTION by two justices of the peace, for a forcible detainer. The return to a certiorari issued to the justices set out the conviction, (which see *ante*, iv. p. 753,

And therefore a conviction for a forcible detainer, which states an information and complaint of an unlawful ejection and forcible detainer, but in which the justices profess to convict solely upon their own view of the forcible detainer, is bad.

Justices cannot convict of a forcible detainer upon their *own view* of the detainer, without evidence that the entry was unlawful.

upon a former application in this case ;) and also an inquisition by twelve good and lawful men before the same justices and another, who say that the said *J. W.*, into the said messuage whereof *B.* and *S.* were lawfully and peaceably seised in fee, unlawfully did enter, and the said *B.* and *S.*, of and from the said messuage aforesaid, unlawfully ejected, expelled, and removed, and the said messuage from the said *B.* and *S.* unlawfully with strong hand and armed power did hold and from them detain. On the inquisition was indorsed a memorandum of restitution made by the same three justices, to *Bates* and *Stiles*.

M. D. Hill now moved to quash the conviction. He contended that the conviction was bad, by reason of the absence of any adjudication by the magistrates, that the entry of the defendant had been unlawful as well as the detainer forcible; and he relied upon *Rex* v. *Oakley* (*a*).

Sir *W. W. Follett*, in support of the conviction, referred to the statutes 5 *Ric.* 2, c. 8, 15 *Ric.* 2, c. 2, and 8 *Hen.* 6, c. 9; and contended that the magistrates were empowered to convict *upon their own view* of a forcible *detainer*, without any evidence of the character of the *entry*. He contended that the decision on the general point in *Rex* v. *Oakley* did not apply, as in this case the information states an unlawful entry, and that the observation of *Patteson*, J. in that case, by which he supposed that learned judge to have sanctioned the precedent in *Rex* v. *Elwell* (*b*), was in favour of the present conviction, which closely followed that precedent. [*Patteson*, J. I did not mean to say that the precedent in Lord *Raymond* is good. Magistrates cannot, upon their own view of the detainer, know any of the circumstances of the entry.] It is sufficient, to bring a party within the act, that the magistrates see him detaining

(*a*) *Ante*, i. 58; 4 Barnw. & Adol. 307.

(*b*) 2 Ld. Raym. 1514; 3 Ld. Raym. 360.

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the land by force, for the statute says nothing of an unlawful *entry*. [*Patteson*, J. Then the act is one for the benefit of trespassers. It is impossible to say that I am not to detain my property by force, against a person attempting to take it from me.] The paramount object of the statute was to prevent breaches of the peace. [Lord *Denman*, C. J. It appears to be a violent outrage of common sense to say that the magistrates are to act upon the mere view of a forcible detainer.] *Regina* v. *Layton* (*a*), *Hawkins P. C.*, Book 1, c. 28.

Lord DENMAN, C. J.—That case of *Regina* v. *Layton* is very singular. The Court took time to consider of their decision, as it would seem by the report, but their ultimate determination is not stated.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

Lord DENMAN, C. J., who, after reading the conviction, inquisition, and indorsement thereon, proceeded as follows:—

This conviction has been questioned before us on the ground that no *unlawful entry* is averred even in the information, or proved by evidence, or adjudged by the justices; and we are of opinion that the conviction is bad for these reasons, perhaps for some others also.

The justices have proceeded on the statute 8 *Hen.* 6, following up two statutes of *Ric.* 2, the object of which, according to *Hawkins*, is to prevent breaches of the peace by parties forcibly asserting their own rights. The earliest statute merely prohibits the offence of *forcible entry*, on pain of imprisonment; the second gives summary power to the justices; the third extends the remedy to cases where

(*a*) 1 Salk. 156, 353, 540.

the entry may have been *peaceable*, but is followed up by a *forcible detainer*.

In the case of *Rex* v. *Oakley* (*a*), we had to consider of a conviction precisely similar to the present, except that it neither averred an unlawful entry nor an unlawful expulsion,—the present conviction alleging the latter only: We all agreed (*Parke*, J. indeed not without some hesitation) that though by the third statute above mentioned, the original entry need not be *forcible*, it must have been *unlawful*, to give the magistrates jurisdiction. We see no reason now for entertaining a different opinion, for otherwise the manifest consequence would be, that a party seised in fee, and unlawfully dispossessed, who should afterwards peaceably recover his possession and maintain it by force, might be ejected, fined, and imprisoned by two justices; but the statute will not be found to invest them with such a power. The 5 *Ric.* 2, is in these terms:—"The king defendeth that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law; and in such case not with strong hand, &c.; and if any man from henceforth do to the contrary, and be thereof lawfully convict, he shall be punished, &c." The 15 *Ric.* 2, requires that the former statute be carried into effect; and further, that at all times when such forcible entry shall be made, and complaint thereof come to the justices of the peace, they shall go to the place and commit the offender to prison. The statute of *Hen.* 6 gives the like remedy in the case there described. The foundation of the proceeding, then, is not the *complaint*, but the *fact*,—a fact which, we think, should be proved to the satisfaction of those who are to exercise the power, and should appear on the face of the conviction.

In what I am reported to have said in *Rex* v. *Oakley*, it appears that I thought that the justices had there adjudged the keeping out to be *unlawful*, and that I held the adjudication bad for want of specifying the facts from which its unlawfulness was inferred. Speaking for myself, I think

(*a*) *Suprà*, 165 (*a*).

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that holding correct, though not necessary for deciding that case or the present. For, in the conviction before us, the party interested is said to have complained (not even upon oath) that he was expelled, but the justices heard no evidence, and came to no other decision on the fact than this,—that finding and seeing the defendant unlawfully with strong hand and armed force *holding possession*, it is considered that *J. W.* of the *detaining* aforesaid with strong hand, by our own proper view is convicted; he is then sentenced to fine and imprisonment.

Now it is plain that the *view* of the justices, though it might embrace a *forcible* detainer, could give them no information as to its *unlawfulness*. The fact, of which they are eye-witnesses, is in its own nature indifferent, as the rightful owner in peaceable possession may be seen defending his possession by force, and would be justified in so doing. If the possession so defended were an unlawful possession, that should be proved to the justices and adjudged by them.

A substantial doubt of the goodness of the conviction, arises here from its not shewing that the party was summoned or had the opportunity of defending himself against the ex parte charge. *Hawkins* lays it down that this is necessary with reference to another provision of 8 *Hen.* 6: "As the justice is bound to stay the award of restitution, upon the defendant's tendering a traverse of the force, so it hath also been said that he ought not to make such an award in any case in the defendant's absence, without calling him to *answer* for himself; for it is implied by natural justice in the constitution of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself." For this he quotes *Savill*, 68, where *Wray*, C. J., speaking of his own practice under 8 *Hen.* 6, said that he never useth to grant restitution without hearing the party indicted. *Hawkins* cites also *Aleyn*, 78, where *Roll.* C. J. agreed that one may be indicted for not taking the oath of headborough when duly appointed; but then he ought to be *warned* to appear before a justice of the

peace, there to take his oath: and for want of that, and for another objection, the indictment was quashed.

My brother *Parke* observed in *Rex* v. *Oakley*, that when a complaint is made, the party has the opportunity of traversing the facts, and must be taken to admit them if he omit to do so. But in the present case, if not in every similar case, the party had no such opportunity, not having been present when the complaint was made. He could not then traverse the complaint, nor could he confront the witnesses, for none were examined, nor was he summoned. Every thing is done behind his back till he is found and seen detaining the possession, whereupon he is arrested and imprisoned. When the inquisition is thereupon found, that may indeed be traversed by the party; and, according to C. J. *Wray*, he must be summoned before the award of restitution. The disadvantage under which he will dispute the facts, if already thrown into prison, need not be dwelt upon; and there seems no stronger reason for summoning him in the last stage to defend his *property* than in the first, when he may be deprived of his *liberty* and *fined*. This objection, however, is not among the points set down for argument, nor one of those on which the judgment of the Court is founded.

The precedents and authorities were supposed to sanction the present conviction, but they are very scanty; and, indeed, *Layton*'s case may almost be said to stand alone.

That was a conviction by the Lord Mayor, for a forcible detainer after a forcible entry of the Fleet Prison; by which *Layton* was fined 100*l*., and imprisoned quousque. One objection was, that it did not negative three years' peaceable possession; but this was held unnecessary, because that is matter of defence given by a proviso.

The Court also said, that "the conviction was traversable because the party is to be imprisoned;" but this is no authority for asserting that a complaint alone is sufficient to warrant a conviction; and if it were, it would only prove the conviction bad for want of summoning the party to

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answer such complaint. With regard to the particular point raised herein, on which we decided *Rex* v. *Oakley* (*a*), viz. the want of averring that the defendant's entry was either forcible or illegal, no judgment was given. Sir *James Montagu* took exception that the complaint was of a forcible entry and detainer, but here is no forcible entry at all; and a man's house is his castle, which it is lawful for him to defend with force. *Cur. adv. vult.* Thus far the report. Mr. *Dealtry* has found the warrant for *Layton*'s committal to Newgate, bearing date March 27, 1705. The objection we are now considering certainly appears upon the face of it, and must have been overruled by the great authority of *Holt*, if this Court ultimately committed *Layton* by virtue of it. This fact, however, is not certain nor very probable; for the commitment just referred to is undoubtedly imperfect, being for an indefinite period, and no fine being imposed. But we have been furnished from the same quarter with a second commitment dated a week later, and executed in all probability when the defects of the first were discovered. In this the Lord Mayor says he has fined the parties 100*l.* each, but the offence of which, on his own view, he convicts them, is that of *riot* and forcible detainer. This is manifestly the conviction reported by *Salkeld* (*b*), on which the Court took time to consider. But the records of this Court further shew, that *Layton* and the others were ordered to find bail to answer to an indictment preferred against them at the Old Bailey sessions on the 18th April, 1705, for a riot and assault in the Fleet. It does not appear that they found bail; and in Easter term of the same year they were committed to the Marshal. As we find no further record of these proceedings they probably were not pressed to a legal decision; and it remains at least doubtful whether the imprisonment was upon the summary conviction or for want of bail. *Layton* had been warden of the Fleet, and for-

(*a*) *Ante*, vol. i. 58; *S. C.* 4 Barn. & Adol. 307; *ante*, 165.

(*b*) 1 Salk. 353.

feited the office in 1699, by a judgment which was affirmed in parliament in 1704. He had the office again granted to him in January, 1707. Taken altogether, these circumstances wear the appearance of a compromise.

In *Rex* v. *Elwell* (*a*), a conviction very like the present was brought before the Court and quashed. The objection was, that imprisonment was awarded till fine paid, and that no fine was set.

The form of that conviction is copied into *Burn's Justice* from the third volume of Lord *Raymond*, and was contrasted by my brother *Patteson*, in *Rex* v. *Oakley*, with that which was there held bad on another ground. It was thence inferred that he approved of the form in *Rex* v. *Elwell* in every other particular, but surely no mode of arguing can be less just. One fatal objection is sufficient in each of these cases, and in deciding *Rex* v. *Elwell*, it was not necessary to enter into that now before us.

The fact appears to be, that summary convictions on these statutes were at all times of rare occurrence, and that parties were in the habit of proceeding to obtain restitution by the safer course of *indictment*. But far greater precision was required in the form of this indictment than is found in this summary conviction. See *Fitzwilliam's* case (*b*), and many other cases collected in *Vin. Abr. tit.* "Forcible Entry" (*c*), and in 1 *Hawk. Pl. Cr.* p. 495.

Upon the whole we think the conviction bad for these reasons, and it follows that the inquisition founded upon it must also be quashed.

Conviction and inquisition quashed.

(*a*) 2 Ld. Raym. 1514. Jac. 19.
(*b*) Cro. Eliz. 915, and Cro. (*c*) 13 Vin. Abr. 379, &c.

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The Court will not permit the plaintiff to enter an appearance for a defendant after a distringas has issued, upon an affidavit which states that diligent inquiry was made to find the defendant, and that the deponent was unable to find either the defendant or his place of abode, or any of his goods or chattels.

The affidavit should specify the places at which, and the persons of whom, inquiry was made.

HARRISON, for the plaintiff, applied to enter an appearance for the defendant, upon an affidavit made by a sheriff's officer and by a clerk to the plaintiff's attorney. The sheriff's officer stated, that on the 15th of May last he received a warrant on, and copy of, a writ of distringas against the defendant at the suit of the plaintiff, which was made returnable on the 1st June instant, whereby the sheriff was commanded to distrain upon the goods and chattels of the defendant for the sum of 40*s.*, in order to compel him to appear; and that in consequence thereof he went to the dwelling-house of the defendant, situate No. 7, Park Crescent, Regent's Park, in the county of Middlesex, for the purpose of executing the writ, when he was informed by a man-servant on the premises there, that the defendant and his family had recently left the house, and that there were no effects or property belonging to the defendant on the premises, and that he made diligent inquiry to find him to serve him with a copy of the writ of distringas, but was unable either to find him or discover the abode of the defendant, or any goods or chattels belonging to him upon which he could distrain in pursuance of the writ; which writ was returned by the sheriff "no goods, and not found," and that the attorney's clerk stated that he believed, from the information he had obtained, that the defendant had absconded and was secreting himself, to avoid all proceedings at law against him by his creditors; and the deponent further said, that no appearance had been entered for the defendant at the suit of the plaintiff.

LITTLEDALE, J.—The affidavit merely states that the sheriff's officer made diligent inquiry, without giving one instance of the person of whom inquiry was made. It should at least have appeared that an inquiry was made either of the butcher or baker, or at the twopenny post-office.

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PATTESON, J.—I have repeatedly at chambers refused applications of this description founded upon similar affidavits.

By the COURT.

Rule refused.

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ASSUMPSIT. The first count of the declaration (entitled 6th November, 1834,) stated, that by a certain *agreement or instrument in writing*, made on the 14th May, 1832, the defendants jointly and severally promised to pay to the plaintiff or her order 50*l.*, in the proportions and on the several days and times thereunder mentioned, (being for value received by sundry household goods, &c. duly sold,) by way of instalments, in manner and form following; that is to say, the sum of 5*l.* on the 11th October then next, and a like sum of 5*l.* on the 6th April, 1833, (and so on as to the eight other instalments of 5*l.* each.) But, nevertheless, it was by the said *agreement or instrument* declared, that it was thereby considered and fully intended, by the receiver as well as the givers of that *note of hand*, that all installed payments thereupon whatsoever, from and immediately after the decease of the plaintiff, should cease and become null and void, to all intents and purposes, against the executors, &c. of the plaintiff, as by the said *agreement or instrument*, reference being thereunto had, will appear. The declaration then stated a promise by the defendants to perform and fulfil the said agreement or instrument, and a plea that the defendant did not make the said supposed *promissory note* in the declaration mentioned, is bad on special demurrer.

An instrument, whereby *A.* promises to pay *B.* a sum of money by instalments, but which is to become void upon the death of *B.*, is not a promissory note, but an agreement to pay upon a contingency.

A plaintiff declared on such an instrument, describing it as an *agreement or instrument in writing*, whereby the plaintiff promised to pay, &c. The agreement, which was set out, appeared to be called on the face of it a "note of hand." A

Whether a plea, directly and expressly denying the facts alleged in one count of the declaration, and wholly inapplicable to the other causes of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be considered as a plea to that count only, or as an informal answer to the whole declaration, *quære.*

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breach by non-payment of two 5*l.* instalments, due on 6th April and 11th October, 1834. The declaration also contained a count on an account stated.

Plea: "And the defendants, by *F. Jeyes*, their attorney, say that they did not make the said supposed *promissory note*, in the said first count mentioned, in manner and form as the plaintiff hath in the said first count alleged; and of this they put themselves upon the country." "And as to the last count of the said declaration, the defendants say that they did not promise as in that count alleged; and of this," &c.

The plaintiff demurred, and stated as special causes of demurrer, first, that the first plea is not expressed to be pleaded as to the first count of the declaration only, and must therefore be deemed and taken to be pleaded to the whole declaration; whereas it could be at most an answer only as to the first count, and not to the last count: secondly, that the defendants have by that plea alleged that they did not make the said supposed *promissory note;* whereas the plaintiff has declared, not upon any *promissory note*, but upon the *agreement or instrument in writing* therein set out, and which agreement or instrument in writing is not, nor can it operate as, or be deemed or taken to be, a promissory note. Joinder in demurrer.

Wightman, in support of the demurrer. This plea is clearly bad on special demurrer, for both the reasons assigned. 1. It professes to answer the whole declaration, yet it is, in fact, an answer to one count only. 2. It is quite clear that the instrument mentioned in the first count of the declaration is not a *promissory note;* for it is to become void upon the death of the plaintiff:—It is payable on a *contingency*. *Carlos* v. *Fancourt* (*a*), *Goss* v. *Nelson* (*b*), *Leeds* v. *Lancashire* (*c*), *Williamson* v. *Bennett* (*d*),

(*a*) 5 T. R. 482.
(*b*) 1 Burrow, 227.
(*c*) 2 Campb. 205.
(*d*) Ibid. 417.

Bayley on Bills, 2d edit. p. 8, *Clarke* v. *Percival* (*a*), *Bolton* v. *Dugdale* (*b*).

Miller, contrà. The first plea clearly refers only to the first count of the declaration, and there is a distinct answer to the second count. The Court will look at the whole plea together, and not at the commencement only, and they will find that this plea *professes* to answer the first count only; and they will look at the rest of the record, and will see that there is a distinct answer to the other count. The plaintiff could not possibly mistake this plea, and read it as tendering an answer to the whole declaration. First point.

The second objection is also untenable. The plea does not tender an issue on the nature of the instrument, but is in effect merely a denial that the *instrument*, whatever its nature, was made by the defendants. The term "promissory note" is not here used in its strict technical sense, but in the more general sense in which it is used in common parlance. The plaintiff declares upon an instrument which, upon the face of it, is described as a "*note of hand*"—a term which is synonimous with "promissory note." He ought not, after this, to be allowed to take this technical objection. It is sufficient that the plea intimates to the plaintiff what it is that the defendants deny having made. It would have been a very different thing if the instrument had been declared on as a promissory note. Second point.

Wightman, in reply. It is not enough for the defendant to plead so that it is obvious to the plaintiff's understanding what it is that he means. This plea might be good on *general*, but not on *special* demurrer. The plaintiff has correctly described this instrument in the declaration; and the defendant, if he intended to traverse the making of it, ought to have described it in the same way. Second point.

The plea does not commence as a plea to one count First point.

(*a*) 2 Barn. & Adol. 660. (*b*) *Ante*, i. 412; 4 Barn. & Adol. 619.

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only. Rule 9 of H. T. 4 *Will.* 4 (*a*), says, that in a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, and that all pleas pleaded without such formal part as aforesaid, *shall be taken, unless otherwise expressed, as pleaded in bar of the whole action.* [*Patteson*, J. It has been decided upon that rule, that the statement of actionem non is dispensed with in a plea which is pleaded to the whole of *one* of several counts (*b*). I do not think your argument depends upon that rule. I can conceive a traverse to a fact in one count to be an answer to the whole of the declaration. If that may be so, then this plea would appear to be an answer to the whole declaration; whereas, upon looking at the declaration, it appears to be an answer to part only.] If this had been the only plea, it would have been an answer to part only; and yet the plaintiff could not have signed judgment, because the plea professes to be an answer to the whole declaration: he could only demur. This is a sufficient ground for holding the plea bad. The point upon the new rules may be abandoned (*c*).

Lord DENMAN, C. J.—I am of opinion that the plaintiff is entitled to our judgment. The first plea professes to be to the *whole* action. The defendant cannot aid his first plea by a reference to the second.

LITTLEDALE, J.—I give no opinion upon the first objection,—that the plea professes to answer the whole declaration. I am clear upon the *second* objection. The de-

(*a*) *Ante*, vol. iii. 5; *suprà*, 36.

(*b*) *Vide Bird* v. *Higginson*, *ante*, vol. iv. 505. But see ibid. 508 (*a*).

(*c*) The rule merely excuses the actionem non in some cases where the omission would formerly have been bad on special demurrer. It does not *create* the necessity in cases not within the exception, but which were not within the rule,—as where (as in this case) the general issue is pleaded to part of the declaration.

fendants had no right to plead that they did not make the *said supposed promissory note* in the said first count mentioned. In the declaration, the instrument is described as an "agreement or instrument in writing." It is true that when the instrument is set out, it is said that the defendants thereby *promised to pay*, &c., but then it is a promise on a contingency. The money is not payable, at all events; therefore it is an *agreement*, and not a promissory note. As for the parties themselves calling it a "note of hand,"—it is true that in common parlance that means "promissory note," but not strictly so; for "promissory note" has a technical meaning under the statute of *Anne* (*a*). The defendant has attempted to put in issue that which is not material.

PATTESON, J.—I am quite of the same opinion upon the construction of the instrument. It might have happened that not one single instalment might ever have become due. The plaintiff might have died between the day of making the bill and that appointed for the payment of the first instalment. It is quite clear that it is not a promissory note. Then, is it so called in the declaration? It is not. In one part of the declaration, where the plaintiff is setting out the instrument, he is obliged to call it a *note of hand*. The parties have so called it; but that does not make it to be such. The plaintiff has studiously avoided calling the instrument a promissory note. The issue then is tendered upon no fact in the declaration. With regard to the first ground, I would be understood as *not* saying that it is not a good objection on special demurrer.

WILLIAMS, J.—I am of the same opinion. The instrument is properly described throughout the declaration. The instrument itself appears to begin with "I promise to pay," and to be called by the parties to it a "note of hand,"

(*a*) 3 & 4 *Anne*, cap. 9.

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The plaintiff was obliged to set it out truly, and does not, by so doing, *adopt* the description of "note of hand." The defendant does not designate the instrument by the name given to it in the declaration, nor according to its legal effect; therefore the plea is no answer to the declaration.

Judgment for the plaintiff.

The KING v. STRETCH and others.

An attachment for a contempt in disobeying a subpœna to attend as a witness at the trial of an indictment, should be moved for in the term next ensuing the trial.

Therefore, where an indictment was tried on 11th December, and a rule nisi for an attachment against a party for such disobedience was moved for and obtained in *Easter* term, the Court discharged the rule, on the ground that the application had been too long delayed.

WHITE, in Easter term, in this year, obtained a rule, calling upon *Charles Auriol* to shew cause why an attachment should not issue against him, for his contempt in not attending to give evidence against *Stretch* and others at the general quarter sessions of the peace, holden for the county of Middlesex, on the 11th December last, upon an indictment for certain misdemeanors, pursuant to a writ of subpœna served upon him for that purpose. The affidavits upon which this rule was obtained, were sworn respectively on the 23d and the 28th April last. Affidavits, in answer, stated that an application of a similar nature had been made against other witnesses subpœnaed upon the same indictment, in Hilary term, and refused.

W. Clarkson now shewed cause, and contended that the application should have been made in Hilary term, as in the case of *In re Jacobs* (*a*), and that the rule not having been applied for until Easter term, the Court would not now make it absolute.

White, contrà, contended, that the application was made sufficiently early.

(*a*) Harrison & Wollaston, 123.

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Two other questions were also discussed by the learned counsel on both sides.

Lord DENMAN, C. J.—It is not necessary to enter into the other points which have been discussed. It seems to me to be quite a sufficient ground for discharging this rule, that too long time was suffered to elapse before the rule was moved for, and that an application has been made against other parties, without the absence of this party being referred to. Applications of this sort should be made promptly.

LITTLEDALE, J.—It appears to me that this rule should have been moved for in Hilary term, the more especially as applications were made against the other parties in that term. The delay is quite a sufficient ground for refusing to make this rule absolute.

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

WILLIAMS, J.—A party applying for an attachment for a contempt, as in this case, should be very prompt. This application came too late.

Rule discharged without costs.

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HARRISON *v.* DOUGLAS.

Policies effected in a Mutual Insurance Club, contain this memorandum: —"All ships are to be inspected and approved by a committee of the club before admission. All ships hereby insured to be well found, &c. and otherwise in a seaworthy state, as to the committee or their inspector shall from time to time seem meet. *All chain cables to be properly tested.* All ships to be subject to survey by the committee or their surveyor, at such times as the committee shall think proper, and subscribers neglecting to get such repairs done to their ships as shall from time to time be ordered by the committee or their inspector, after notice, to be uninsured until the same shall be done:"—Held, in an action on such a policy for a total loss, that the clause respecting chain cables is merely *directory* to the committee, and does not create a condition precedent, imposing on the assured the necessity of proving that his chain cable had been properly tested.

By payment of money into Court, upon a count on a policy, the defendant is estopped from shewing (*a*) that the vessel is unseaworthy, or that the action is brought too soon.

THIS case was argued by *Cresswell* and *W. H. Watson* for the plaintiff, and Sir *J. Scarlett*, *Holt*, *Alexander* and *Tomlinson*, for the defendant, in Trinity term, 1834, when the Court took time to consider of their judgment. The points raised and decided will, it is believed, be understood from the following judgment, delivered in this term, by

Lord DENMAN, C. J.—This was an action on a policy of insurance on the plaintiff's ship, tried before my brother *Bolland*, at Durham, in the summer assizes of 1833.

The policy was not a *common* marine policy, but it was one on which the plaintiff, the defendant, and a great many other persons, were mutual insurers on their respective ships, for the period of one year. This policy contained several rules and stipulations, which do not exist in the *common* marine policies. In the body of the policy there is the following clause:—

"And we the subscribers hereunto do hereby elect, nominate, and appoint Messrs. *John Bell*, (and six others,) to be a committee and general referees between and amongst all and every of us the said subscribers, in all and every matter and thing relating to our respective assurances hereby made; and any three of the committee or referees for the time being, are hereby authorized to adjust, settle, and determine all controversies and disputes, and all accounts, demands, and transactions whatsoever, by and between all or any of us the said subscribers to this policy, touching

(*a*) It would be otherwise if the objection appeared *upon the record*, as if a declaration were entitled of a day in July, upon a bill of exchange which would become due in August.

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and concerning all and every or any of the insurances hereby made, or other matter or thing relating to or concerning the same, or this policy, and the determination or determinations from time to time to be made and signed by any three of the committee or referees for the time being, according to the terms of this policy, and the warranties, rules, terms and conditions, hereto subjoined, (which are deemed a component part of this policy,) shall be, and is and are hereby agreed and declared to be final and conclusive to the several subscribers hereunto respectively, and their respective heirs, executors, administrators, and assigns, who are hereby declared to be bound thereby. And it is mutually agreed, that in case any of the said committee or referees shall die or become incapacitated, or refuse or decline to act, before the expiration of the said twelve calendar months, then and in such case, and so often as the same shall happen, it shall be lawful to and for the surviving or continuing committee, by writing under their hands, to choose and appoint any other or others of us to supply the vacancy or vacancies to be occasioned as aforesaid; and after such said appointment, the person or persons so to be chosen shall be vested with the same powers and authorities, in every respect, as are hereby given to or vested in the committee or general referees herein above named; and all acts or orders to be made or signed by such of us as shall or may be chosen and appointed in manner aforesaid, shall have the same force and effect as if the same had been made by the said committee or general referees herein above named."

At the foot of the policy there was a heading of "Exceptions, warranties, rules, terms, conditions, and agreements, referred to and subjoined;" and amongst them,

"1. All ships to be inspected and approved of by a majority of the committee before admission; and no ship registered at any other port than Sunderland, shall be admitted for a larger sum than the interest of the owner resident at the port of Sunderland. All ships hereby insured to be well found and fitted out with all necessary tackle

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and materials, and otherwise in a seaworthy state, as to the committee or their inspector shall from time to time seem proper. Vessels not exceeding twelve keels in burthen, to have 180 fathoms of rope cable, or 160 fathoms of chain; and if above that burthen, 200 fathoms of rope cable, or 180 fathoms of chain; *and all chain cables to be properly tested*, and the windlasses of such ships as shall have chain cables to be properly secured. All ships to be subject to survey by two or more of the committee and the surveyor, in the autumn of the present year, and at such other times as the committee shall think proper; and subscribers neglecting to get such repairs done to, and stores and materials for their respective ships, as shall from time to time be ordered by the committee or their inspector, after notice for that purpose from the secretary, to be uninsured until the same shall be got or done, although such subscribers, in the interim, to be liable to other losses."

"25. A proportion not exceeding 1*l.* 5*s.* per cent. of the total and partial losses, (except salvages, as hereinafter named,) shall be called for upon the subscribers liable to the same at every forty days, and for which receipts shall be prepared by the secretary and given to the several sufferers to receive their proportion of the same; and salvages for money paid for getting any ship off a strand, or for assisting any ship in distress, shall be paid ten days after settled by the committee, if the same shall amount to 100*l.* And where two or more averages or losses shall be put together in one receipt (for greater ease in collecting the same of subscribers,) and any subscriber having to pay the same shall fail, or of whom payment cannot be obtained, in such case the several sufferers, whose averages or losses shall have been so put together, shall pay back to the holder of such receipt their several proportions or sums which shall have been included in any such receipt, provided such receipt shall be returned to the secretary within ten days after the same shall become due, but if kept longer by the holder, he is to take the risk of the whole amount of such receipt

upon himself. Any subscriber not paying to the secretary, on demand, his proportion of any receipt to be returned as aforesaid, to be uninsured until the same be paid, although he shall in the interim be liable to other losses."

The first count of the declaration contains allegations adapted to the particular stipulations of the policy, and amongst others that the vessel was provided with such cables as the rules in the policy require. It states a total loss by the perils of the sea; that the plaintiff revoked the power and authority of the committee; and that the proportion of the loss which the defendant was liable to pay amounted to 4*l.* 13*s.* 9*d.*

The second count is more general; it does not contain any allegation that the plaintiff revoked the power and authority of the committee,—and it claims a nominal sum of 20*l.*, as the proportion of the loss which the defendant was liable to pay.

The third count was for money had and received, and on an account stated.

The defendant pleaded the general issue, and paid 1*l.* 10*s.* into Court on the last two counts.

On the 1st April, 1833, the plaintiff's ship went on shore and was stranded, near Sunderland, and she was got off on the 20th.

Notice of abandonment was given before the 20th, and which was declined, and on the 25th a second notice of abandonment was given.

The committee met to investigate the loss, and on the 21st of June a notice was served on the plaintiff, of a meeting of the committee to make their award. The committee met on the 22d. The plaintiff attended, and said he was not then prepared to go into his case, in consequence of the absence of his attorney, who had his papers. The chairman asked him if he wished to have it adjourned; he said yes, and it was adjourned to the 27th; the plaintiff made no objection to this.

On the 25th, the plaintiff sent a notice withdrawing from

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the arbitration. On the 27th, the committee met, examined the surveyor, and made their award, and by that award they determined that the plaintiff was not entitled to abandon the ship and to recover for a total loss, and they accordingly dissented from such abandonment, and they determined that the damage amounted to a partial loss, and they awarded and determined that the underwriters should forthwith contribute and pay to the plaintiff the sum of 85*l.* 8*s.* 7*d.*, being the amount of their proportion, as ascertained by the 17th rule.

The defendant's proportion under the award would be 1*l.* 4*s.* 3*d.*, and that sum was more than covered by the money paid into Court on the last two counts, which was 1*l.* 10*s.*

The jury found that the loss was total, and that the sum which the defendant was liable to pay was 4*l.* 13*s.* 9*d.*

On the trial it appeared, that according to the course of proceeding under the 25th rule, in consequence of prior losses in the club, which had been drawn for, the losses which happened on the 1st of April, 1833, (which was the day the plaintiff's ship was stranded,) would be drawn for at the earliest at forty days after the 22d of July, and would have become payable to the assured on the 31st of August, and the club would not have been in funds earlier than that day to pay the present loss.

The defendant, on the trial, submitted that the plaintiff should be nonsuited on two grounds.

1st. That the chain cable of the ship was not properly tested, according to the first rule; and,

2d. That the action was brought too soon (*a*), under the 25th rule, as the club would not be in funds to pay the loss till the 31st of August; and the judge gave leave to the defendant to move the Court on both these grounds.

On the first of these points, we are of opinion that the chain cable not being properly tested, is not, taken by itself, without more, a condition precedent. It is true that in that

(*a*) This action was commenced by writ of summons, issued 10 June, 1833.

part of the 1st rule which immediately precedes the testing the chain cable, there is nothing said about the committee or their inspector, but both at the beginning of the rule and also in the latter part of the rule, the committee are mentioned; and on the whole of the rule, we are of opinion that what is said about the chain cable is only a *direction* to the committee as to what they were to point their attention to. But suppose it were otherwise, it is in the nature of a want of seaworthiness, and the opinion of the jury should have been taken upon it. Independently of that, however, we think, that by payment of money into Court, the objection, if it ever existed, is cured; for that admits the plaintiff to be entitled to recover *something*, which he could not be if the vessel were not seaworthy (*a*).

As to the second ground of nonsuit, there is no doubt that the action is brought too soon, and it would be a cause of nonsuit if it were not for the payment of money into Court.

That admits, to some extent at least, that the plaintiff was entitled to recover. It does not appear from the evidence, whether, supposing the loss to be total, the whole of the money which the plaintiff would be entitled to receive became due on the 31st of August, or whether the sum was divisible, to be paid at different times; if the whole was to be paid at once, as one entire sum, in which no distinction could be made between one part and the rest, then as the payment of money into Court admitted part to be due, it would constitute an admission of the whole; but not so if it was to be paid by instalments. It lay upon the defendant to have this distinctly ascertained, because the admitting of part unexplained would operate as an admission of the whole. We think, therefore, that there is no ground for a nonsuit on either of the points reserved.

The rule was only granted on these two grounds, and therefore we are of opinion that it should be discharged.

Rule discharged.

(*a*) Every marine insurance contains a warranty of seaworthiness, either express, as in the first count, or implied, as in the second.

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POUNDS v. PENFOLD and MARY his Wife.

Practice with respect to short notice of trial under the new rules.

CASE for slanderous words spoken by the defendant *Mary*. The defendants were served with a writ of summons in September, 1834, and entered an appearance in the same month.

30th January, 1835, the declaration was delivered.

On the following day a plea was demanded.

7th February, an order was made by consent, that the defendant should have five days time to plead "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, for the next assizes."

12th February, another order was obtained (not by consent) for a week's further time to plead, upon the same terms.

19th February, at half-past seven o'clock, p. m., the general issue and three pleas of justification were left by the defendant's agent, at the office of the plaintiff's agent in London.

27th February, at half-past seven, p. m., the replication was delivered, forming part of the issue, upon which issue, notice of trial for the next assizes to be holden at Winchester was indorsed. The defendants' agent, on this occasion, objected that the delivery of the replication with the notice of trial was too late, and he gave notice to the plaintiff's agent that he should treat the notice of trial as a nullity. No witness was subpœnaed on the part of the defendants.

3d March, being the commission day at Winchester, *Patteson*, J. sat at nisi prius; and this cause, which had been duly entered, was called on and tried as an undefended cause, and the plaintiff had a verdict for 50*l*. damages. Upon affidavits stating these facts, and that the defendants and their attorney verily believed that the defendants had a good defence upon the merits, *F. Kelly*, in Easter term, obtained a rule to set aside the verdict, and for a new trial.

Affidavits in answer stated, that the pleas were not sent

from London until 20th February, and did not arrive in the country until the 21st; that some time was necessarily spent in inquiring whether the facts stated by way of justification were correct, before replying; so that the replication could not be delivered earlier than the time when it was delivered, and that on the *morning* of the 27th February, the defendant's agent was informed that the issue would be delivered on that evening with notice of trial, if possible, before post time, but that at all events he might write into the country by that night's post, to inform his client that the issue and notice of trial would be delivered on that evening.

Dampier now shewed cause. By Reg. Gen. H. T. 2 *W.* 4, I. 58, it is ordered, that "the expression 'short notice of trial' shall, in country causes, be taken to mean *four* days." By Reg. Gen. H. T. 2 *W.* 4, VIII., "in all cases in which any particular number of days is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, &c., in which case the time shall be reckoned exclusively of that day also." By Reg. Gen. H. T. 2 *W.* 4, I. 50, it is ordered, that "service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour." Under all these rules it is submitted, that notice of trial given at half-past seven in the evening of the 27th February, for trial at the assizes which commenced on 3d March, was given sufficiently early. In *Lawson* v. *Robinson* (*a*), "short notice of trial" under the rule of H. T. 2 *W.* 4, I. 58, was held to mean four days *peremptorily*.

As the defendant had time to plead given him twice, and as it was through his laches, in not pleading more speedily, that the plaintiff was prevented from giving a longer notice of trial, the Court will not, it is hoped, allow him now to

(*a*) 1 Crompt. & Mees. 499.

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have a new trial. The plaintiff's delay in replying is accounted for in the affidavits.

F. Kelly, contrà. The laches (if any) was on the part of the plaintiff. In the first place, he did not declare until several months after the defendant had entered his appearance; and afterwards he delayed his replication until the latest possible moment consistently with the giving of four days notice of trial. The defendant's pleas were of a difficult nature, and required the full time that was allowed by the two orders. The plaintiff's replication was the simple one of de injuriâ, and might have been delivered earlier than half-past seven (which is after post time) on the 27th February. The terms of the order for time to plead are "taking short notice of trial, *if necessary*, for the next assizes." Short notice of trial was *not* necessary in this case, as the replication might have been delivered earlier. Ordinarily, the defendant is entitled to twenty-four hours to add the similiter; but upon moving for this rule, the Court said that the plaintiff was entitled to make up and deliver the issue and give notice of trial *at any time* before the assizes.

Lord DENMAN, C. J.—We think that this rule ought to be made absolute (*a*). Upon the whole, the trial does not appear to us satisfactory, though we think that neither party was to blame.

Rule absolute (*b*).

(*a*) As nothing was said about costs, each party would pay his own costs of the first trial, under Reg. H. 2 *Will.* 4, I. 64. And see Hullock, 391; *Newberry* v. *Colvin*, 2 Dowl. P. C. 415.

(*b*) At the summer assizes, 1835, the plaintiff obtained a verdict—damages 40*l.*

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TAYLOR and another, Assignees of WALSH, *v.* WILKINSON and another.

The liability of bail upon a recognizance given in an action commenced by original writ, was neither *destroyed* nor *extended* by inserting in the declaration new causes of action not included in the writ, and increasing the general claim of damages, and also increasing the amount claimed in the several causes of action stated in the writ.

SCIRE FACIAS against the defendants, as bail in an action of assumpsit by original writ against *George Barnard Gregory*, for 1200*l.* money lent, and the like sum for money paid, money had and received, and upon an account stated. The declaration at first contained four counts in conformity to the writ, and the damages were laid at 1200*l.* The recognizance of bail was in the usual form, "in the sum of 2000*l.*, to be levied &c., in case *Gregory* should happen to be convicted in a plea in a certain action theretofore commenced against him at the suit of the plaintiffs." Afterwards, upon application to amend the declaration, Mr. J. *Bayley* made the following order:—"Upon hearing the attorneys or agents on both sides, I do order that on payment of costs the plaintiffs be at liberty to amend the declaration in this cause." In pursuance of this order two new counts were added, viz. one for work and labour, and another for interest, and the demand in each of the original counts was increased from 1200*l.* to 3000*l.*, and also the damages in the declaration were laid at 3000*l.* instead of 1200*l.* The counts then stood thus:—1. For money lent, 3000*l.*: 2. For money paid, 3000*l.*: 3. For money had and received, 3000*l.*: 4. (new) For work and labour, 500*l.*: 5. (new) For interest, 1000*l.*: 6. Upon an account stated, 3000*l.* Damages laid at 3000*l.*

To this declaration so amended, *Gregory* pleaded the general issue and the statute of limitations. The plaintiffs entered a nolle prosequi on the sixth count, and a verdict was found for the plaintiffs on the first and third counts for one shilling; on the second for 1001*l.* 11*s.* 2*d.*; on the fourth for 77*l.* 5*s.*; and on the fifth for 1026*l.*,—making together 2104*l.* 17*s.* 2*d.*, and 40*s.* costs. Judgment was entered up for the said sum of 2104*l.* 17*s.* 2*d.*, and also for 211*l.* 12*s.* 10*d.* for costs of increase.

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The declaration in sci. fa., after stating the above matters, averred, that although the sum of one shilling, recovered on the first and third counts of the declaration, was recovered in the plea in the recognizance mentioned, and for the non-performance of the said promises and undertakings in the said recognizance first above mentioned, and the sum of 1001*l.* 11*s.* 2*d.*, recovered in the second count of the declaration, was also recovered in the plea in the recognizance mentioned, and for the non-performance of the promise and undertaking in the said recognizance secondly above mentioned; yet *Gregory* had not paid or satisfied the plaintiffs the sum of one shilling and 1001*l.* 11*s.* 2*d.*, or the said costs and charges, or rendered himself: Whereby the recognizance became forfeited: Wherefore the plaintiffs had prayed execution against the defendants according to the force and effect of their recognizance.

Pleas: first, that no judgment was given in the suit in the condition of the recognizance mentioned.

2. That *Gregory* never was convicted in the action in the recognizance mentioned.

4. That the action in the recognizance mentioned was commenced by original, (referred to as set out in a third plea), and that in declaring in the said action the plaintiffs were bound by law to set forth and allege in the declaration the same identical causes of action as those set forth in the original writ upon which the action was commenced, and could not, in and by their declaration, set forth or allege causes of action in substance and effect at variance with and different from the causes of action set forth or alleged in the original writ; yet that the recovery was had and obtained on an amended declaration not containing the identical causes of action, but containing others in substance and effect at variance with and differing therefrom.

6. That a *fine* is payable to the king on original writs, and that the fine which was paid is less than would have been payable if the original writ had contained the same

causes of action and the same amount of damages as are contained in the amended declaration.

7. That *Bayley*, J. did not, with the *consent* of the *defendants*, (the bail,) make any order for amending the declaration.

8. That the supposed order of *Bayley*, J. has not been made a rule of Court.

9. That on the trial of the original action, the plaintiffs, for the purpose of proving that the causes of action accrued within six years, produced a copy of the continuance roll in that action, (the roll was here set out) and no other evidence, and that there was a verdict on the second issue in the original action, subject to a case. (The special case was then set out (*a*).) Averment: that pending the special case, and without the consent of the defendants, a rule nisi was granted and afterwards made absolute for amending the continuance roll, by adding a continuance from the first return day of Trinity term to the last return day of the same term; that the amendment was made in pursuance of the rule; that afterwards, by a certain other rule of Court, it was ordered that judgment should be entered for the plaintiffs; and that judgment was entered accordingly. The plea then averred, that the recovery was not had upon the facts stated in the special case, but upon other facts not found by the jury at the trial.

10. That the plaintiffs ought not to have execution against the defendants for the costs of the original action, for that one entire sum of 40*s.* was recovered for costs, and one entire sum of 211*l.* 12*s.* 10*d.* was adjudged for costs of increase upon the whole of the counts of the *amended* declaration.

Replications: To the first and second pleas, traversing the allegations in those pleas.

To the fourth plea, that the causes of action in the amended declaration in the original action, in respect of

(*a*) See *Taylor* v. *Gregory*, 2 Barnw. & Adol. 257.

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which one shilling was recovered, are the same identical causes of action as those set forth in the original writ, so far as relates to the promises first and thirdly mentioned therein; and that the cause of action in respect of which 1001*l.* 11*s.* 2*d.* was recovered, is the same as that set forth in the original writ, so far as relates to the promise secondly mentioned therein.

To the sixth plea, that the damages laid in the original writ, and on which the fine was paid, included the said sums of one shilling and 1001*l.* 11*s.* 2*d.*

To the 7th, 8th, 9th, and 10th pleas, general demurrers.

The defendants demurred to the replication to the 1st, 2d, 4th, and 6th pleas, and joined in demurrer to the 7th, 8th, 9th, and 10th pleas.

The plaintiff joined in demurrer to the 1st, 2d, 4th, and 6th replications.

Sir *W. W. Follett* for the plaintiff. The seventh plea is no answer to the declaration. The judge had full authority to allow the amendment, without the consent of the bail. Even if the declaration had been amended in pursuance of an order which the judge was not warranted in making, the bail would be liable upon the old counts to the extent of their original undertaking. It is not contended, that if a plaintiff adds counts to a declaration, the bail are responsible for the damages or debt recovered on the *additional* counts. In this case the damages have been assessed separately on each count; and all that the plaintiff seeks to recover from the bail is the amount of the damages assessed on the counts which were originally contained in the declaration, and which damages do not exceed the amount originally claimed in those counts. If the bail are prejudiced in any way by the amendment, they may apply to the Court for relief.

The objection to the eighth plea,—that the order of *Bayley*, J. has not been made a rule of Court, cannot

prevail. That is an *irregularity* which cannot be taken advantage of in an action against the bail.

The ninth plea in effect says, that the Court ought not to have allowed the amendment of the roll by adding the continuance. It is therefore an attempt to impeach the decision in *Taylor* v. *Gregory* (*a*), which is unreversed, and is supported by *Beardmore* v. *Rattenbury* (*b*).

The tenth plea, which states that one entire sum was awarded for costs, is informal; for even assuming that the bail are not liable to those costs, the plea should not have been pleaded to the *whole* declaration, but only to so much of the demand as relates to the costs.

The demurrer to the replications to the 1st and 2d pleas is altogether groundless.

The demurrer to the replication to the 4th plea raises one of the questions which were decided in *Taylor* v. *Gregory* (*c*). That was an application that an exoneretur might be entered on this bail-bond, on the ground of the variance between the amended declaration and the original writ. If the defendants mean to say, as a matter of fact, that the plaintiff did not recover *on the original causes of action*, that is a question to be determined by a jury:—if, on the other hand, they say that because the plaintiffs amended the declaration the action cannot in point of law be the *same*, then the question resolves itself into that which was decided in *Taylor* v. *Gregory*. The defendants cannot take advantage of any variance between the original writ and the declaration. It is true that where the action is commenced by original, and there is a variance between the original writ and the declaration, the Court will discharge the defendant on entering a common appearance; but the Court will not, for this reason, set aside the proceedings (*d*); *Mayfield* v. *Davison* (*e*), *Green* v. *Elgie* (*f*). No advantage

(*a*) 2 Barn. & Adol. 257.
(*b*) 1 Dowl. & Ryl. 27; 5 Barn. & Alders. 452. And see *Wynne* v. *Middleton*, 2 Stra. 1227.
(*c*) 2 Barn. & Adol. 264.
(*d*) Tidd's Prac. 9th ed. 451.
(*e*) 10 Barn. & Cressw. 223.
(*f*) 3 Barn. & Adol. 437.

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can however, *after verdict*, be taken, even by the original defendant, of any variance between the original writ and the declaration. That is provided against by 18 *Eliz.* c. 14, 21 *Jac.* 1, c. 13, and 5 *Geo.* 1, c. 13. There is no reason why the *bail* should be in a better situation in this respect than their principal. In a note to 1 *Wms. Saund.* (*a*), after stating succinctly the various authorities on the subject, it is added, "From hence it seems to follow, that no advantage whatever can now be had, either of a defective original, or of a variance between it and the declaration." The distinction on this subject is this:—If the plaintiff declares for a cause of action *wholly different* from that mentioned in the original, the bail are discharged; but if he merely adds *other* causes of action in the declaration to those mentioned in the original, the bail are not discharged, but are liable to the extent of the causes of action stated in the original; 2 *Wms. Saund.* 71 d, n., *Wheelwright* v. *Jutting* (*b*), *Jacob* v. *Bowes* (*c*), *Green* v. *Elgie* (*d*). There is a rule of Court, which is mentioned in *Jacob* v. *Bowes*, which orders that where the plaintiff recovers a *greater sum* than is expressed in the process on which he declares, the bail shall be liable for the sum sworn to and indorsed on the process, *or for any lesser sum* (*e*) which the plaintiff shall recover. The bail in this case are therefore liable to pay the sums of one shilling and 1001*l.* 11*s.* 2*d.*, which are recovered in respect of causes of action stated in both writ and declaration, and to the costs,—but are not liable to the sums of 77*l.* 5*s.* and 1026*l.*, which were recovered in respect of causes of action not stated in the original writ.

Campbell, A. G., for the defendant. The first and second pleas are in substance, that the plaintiff had no judgment against *Gregory* in the action in which the re-

(*a*) Note to p. 318.
(*b*) 7 Taunt. 304; 1 B. Moore, 51.
(*c*) 6 East, 313; 2 Smith, 402.
(*d*) 3 Barn. & Adol. 437.
(*e*) *Sic.*

cognizance was entered into. Either the declaration is bad on the face of it, or there is no judgment which will support a declaration framed like the present. The plaintiff says by his sci. fa. that he is entitled to judgment for 2000*l.* If the condition of the recognizance is broken, the whole penalty is forfeited. There is a great difference in the recognizance where the action is commenced by bill and where it is commenced by original; for where the action is commenced by bill, there is no description of the action on the face of the recognizance; but where it is commenced by original, there is a very minute description (*a*). The condition of the recognizance is, that in case *Gregory* be convicted in a plea in a certain action theretofore commenced at the suit of the plaintiffs against *Gregory*, and which action was *then* depending, to wit, in a plea &c.,—and then the writ, which contained four counts, claiming 1200*l.* each, and in which the damages are laid at 1200*l.*, is set out; —and if *Gregory* should not pay to the plaintiffs "*all such* damages, costs, and charges, as should be adjudged to the plaintiffs in the plea aforesaid," or render himself,—the defendants, (the bail,) will pay the plaintiffs 2000*l.* The extent of the liability of the defendants is 1200*l.* The bail might have had good ground for declining to become bail for the defendant, even to the same limited amount, if they had known that their principal would be sued upon *all* the causes of action which are contained in the *amended declaration*:—they might have supposed that the defendant would have discharged the debt claimed in the *writ*, if found to be due, but have doubted his ability to pay the amount claimed in the amended declaration. Suppose the cause of action had been for money lent, 20*l.*, and that afterwards the claim had been increased to 1000*l.*, would the bail have continued liable on their recognizance? Here, not only are the damages increased, but new causes of action are inserted. It is argued that the liability of the bail may be limited to the causes of action stated in the

(*a*) See Tidd's Practical Forms, 6th ed. 108.

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original writ. Even were that so, the *costs*, which may be indefinitely increased by the addition of new counts, cannot be severed. But if the bail are liable at all, they are liable for the *whole* sum recovered and the *entire costs*. There is a variance between the original and the declaration, and of this the bail may avail themselves. Any substantial variance between the writ and the declaration is fatal. *Berkenhead* v. *Nuthall* (*a*), *Edwards* v. *Watkin* (*b*), *Norton* v. *Palmer* (*c*), *Greenfield* v. *Dennis* (*d*). *Berkenhead* v. *Nuthall* shews that if the *sum* is greater in the declaration than in the writ, the variance is fatal; and *Norton* v. *Palmer* shews that the addition of another *cause of action* is likewise fatal: and of such a variance the bail can take advantage; *Yates* v. *Plaxton* (*e*). In that case a scire facias issued against the bail, upon a judgment in the county *of the city* of York. The defendant pleaded that the original writ was in the county of York, and that there was no original in the county of the city of York. The plaintiff replied that a capias issued on the original writ, in *B.*, directed to the Sheriff of York. The defendant rejoined that there was no judgment, against the principal, had in the county of York, but confessed that there was a recovery in the county of *the city* of York, and traversed that in such a case the bail were chargeable. The plaintiff demurred specially to the rejoinder, because the defendants traversed matters in law. The Court gave judgment for the defendant. [*Littledale*, J. Suppose the order for amendment, instead of being in general terms, had ordered those specific counts to be added, which were subsequently inserted in the declaration,—it would then have appeared that the action was the same as that in which the original writ issued. Would the bail in that case have been liable?] It is submitted that they would not. In *Comyn's Digest*, title "Condition," various cases are stated, which shew that, on principle, the bail would not be liable.

(*a*) Cro. Eliz. 198.
(*b*) Ibid. 185.
(*c*) Ibid. 829.
(*d*) Ibid. 722.
(*e*) Levinz's Entries, 170.

The 4th plea states that the causes of action in the declaration in *Taylor* v. *Gregory* are not the same as those mentioned in the original writ. If they are not, the defendants are entitled to judgment.

As to the 6th plea,—the fine upon the issuing of original writs is part of the royal revenue; and if the proper fine was not paid, there was no authority for issuing the writ.

The 7th plea states that the bail did not *consent* to the order for the amendment of the declaration. The amendment of the declaration is substantially the same as an alteration in the recognizance; and if this Court would not permit the recognizance to be altered without the consent of bail, neither ought they to permit the declaration to be amended without their consent.

The 8th plea is, that the order for the amendment was not made a rule of Court. A judge's order is not of any authority until it is made a rule of Court. In certain cases *single* judges have authority, by statute, to make orders, but this is not one of those cases.

As to the 9th plea. In the case which has been referred to upon this point, no opinion was given by the Court as to whether the liability of the bail would be affected by the amendment of the roll.

It may be admitted that the 10th plea is irregular. The plea ought to shew that the recognizance entered into has not been broken. The defendant cannot divide the liability, as is attempted in this plea. This being a bad plea, reflects great light upon the general matter.

Sir *W. W. Follett*, in reply. The general question now under discussion has been solemnly decided by this Court after two arguments. It is idle to say that this is not the same suit as that in which the recognizance was entered into. When an amendment is made, it has relation back. Suppose this were an action for penalties on the statutes against usury, and new counts had been added for further penalties, not claimed in the writ,—could the defendant say

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that the action was no longer the same, and, upon that, ground an objection that the action was not commenced in due time? Clearly not. The former case of *Taylor* v. *Gregory* was decided on the authority of *Beardmore* v. *Rattenbury*; and no case has been cited which can overturn that decision. *Berkenhead* v. *Nuthall* was decided in the 22d year of Queen *Elizabeth*, and the judgment in that case was reversed, because the statute of 18 *Elizabeth* had cured the want of an original writ, but did not cure a variance between the original writ and the declaration. The same observation applies to *Edwards* v. *Watkins*, and *Norton* v. *Palmer*. From *Johns* v. *Staynar* (*a*), it appears that where an original issues into a different county from that in which the venue is laid in the declaration, it is the same as if *no* original had issued. This explains the case from *Levinz's Entries* (*b*). Variances between the writ and the declaration have been more lately cured by 5 *Geo.* 4, c. 13. The case has been argued as if the question were, whether or not it would be a hardship upon the bail to hold them liable in this action; but that is not the question. It is, whether the recognizance has been forfeited. The bail may, in case of hardship, apply to the equitable jurisdiction of the Court. In *Gray* v. *Harvey* (*c*) the defendant was arrested on a debt alleged to be due for goods sold and delivered, and money lent and advanced: The declaration contained no count for goods sold and delivered. The bail applied to have an exoneretur entered on the bail-piece, but this was refused by *Littledale*, J.

As to the 4th plea. Whether the causes of action are identical, is a question of fact for the jury; *Lord Bagot* v. *Williams* (*d*), *Seddon* v. *Tutop* (*e*). The replication is, that the causes of action in the writ and declaration are identi-

(*a*) Cro. Car. 272, 281.

(*b*) *Yates* v. *Flaxton*, *ante*, 196, (*e*).

(*c*) 1 Dowling's P. C. 114.

(*d*) 5 Dowl. & Ryl. 87; *S. C.* 3 Barn. & Cressw. 235.

(*e*) 6 T. R. 607; 1 Esp. N. P. C. 401. And see *Power* v. *Butcher*, 5 Mann. & Ryl. 327, 10 Barn. & Cressw. 329.

cal. This therefore raises the same question as the issue on the 1st plea.

As to the 6th plea. It is immaterial to the present case whether the proper fine on the original writ has been paid or not. [*Littledale*, J. That is a question for the filacer or the attorney-general.]

As to the 7th and 8th pleas. The bail cannot object to any irregularity in the action against their principal. The taking of a cognovit does not discharge the bail; neither will the making of any amendment in the declaration. The judge had jurisdiction to order the amendment. [*Patteson*, J. The judges at chambers have had full power of making orders for the amendment of declarations from all time. It is true that before a party can be brought into *contempt* for disobedience to a judge's order, it must be made a rule of Court.] It is the universal practice.

As to the 9th plea. It seems to be admitted that the effect of this plea is to controvert the previous judgment of the Court.

The 10th plea is bad, but not for the cause assigned.

Cur. adv. vult.

Lord DENMAN, C.J., in the course of this term delivered the judgment of the Court. After stating the substance of the allegations in the scire facias, nearly in the language of this report, his lordship thus proceeded:—

To this declaration in sci. fa., the defendants pleaded various pleas, stating their defence in various ways, but all (*a*) in effect amounting to this,—that by the changes made by virtue of the above-mentioned order of the learned judge, the suit was no longer that in which the recognizance of bail was entered into, and that they were thereby discharged. It is not necessary to allude more particularly to the form of those pleas, because, as has been observed

(*a*) The *ninth* plea appears to touch a distinct question.

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already, the declaration in sci. fa. states all the facts whereon those pleas rest, and is therefore (as was contended) upon the face of it bad in law, if the defence be available. The question arising out of the objections presented to our notice in different shapes, is resolved into the single point already shortly adverted to,—whether the recovery against the defendant in the original action, was *in the same suit* as that wherein the defendants entered into the recognizance. To enforce these objections, it has been contended that the liability of the bail has been *increased*, by enlarging the plaintiffs' means of recovering damages against their principal, and also their means of increasing the amount of costs. It is observable, however, that admitting the justice of the observations which have been pressed upon us, they are not precisely directed to and fall short of the propositions to be established by the defendants,—that the suit had, by the alterations already noticed, changed its character, and no longer remained *the same;* and in our opinion they do *not* establish that proposition. The suit, as regards the *parties* engaged in it, and the *manner of commencing it*, remained unchanged and the same. The alteration in the declaration, by the order alluded to, is, we think, strictly within the control ordinarily exercised by the Court over the proceedings of the parties, upon terms imposed in each case: it is an amendment, at the *discretion* of the Court, of the part of the proceedings which is supposed to require it, but it does not destroy the *identity* of the suit.

In support of the objection to the plaintiffs' recovering, we have been referred to several cases. Upon considering them, however, they do not seem to bear upon the point before us. At the time when they were decided (previous to the several statutes referred to in the argument, and particularly 5 *Geo.* 1, c. 13,) a departure from the original writ in the declaration was a fatal objection. That, however, was by no means founded upon the supposition that there was any change of suit, but the contrary; the suit remaining *the same*, the error was entirely in *departure*. In *Berken-*

head v. *Nuthall* (*a*), upon error, the variance was between the amount of debt claimed in the writ and in the declaration; a larger sum having been claimed in the latter; and *therefore* the judgment was reversed. In *Edwards* v. *Watkin* (*b*), in trespass, the error was in the excess in the declaration beyond the writ—clau*sa* fregit, instead of clau*sum*. *Norton* v. *Palmer* (*c*) was also decided on the excess of the declaration beyond the writ. The cases cited, are therefore clearly distinguishable from the present, and proceed upon a principle wholly independent of the present objection,—which is, that the variance from the original writ makes the suit *other* and *different*.

But we have been further pressed with the consideration that the *costs* are entire, and that because the declaration has been enlarged, and the costs thereby increased, and therefore the responsibility of the bail increased, they are thereby discharged. But upon this point also we are of opinion against the defendants (*d*). We think that the costs of increase form no integral part of the suit. They are awarded *by the Court* in consequence of the damages recovered by the plaintiffs, and form the subject of a distinct and separate adjudication. If therefore the bail have been in this respect aggrieved, the Court, upon application, may relieve them, but they are not, for the reason suggested, discharged from the *whole*. Therefore we are of opinion that judgment must be for the plaintiffs.

The former consideration of this case (*e*) has not been adverted to, though our present decision seems to be in conformity to the view then taken by the Court.

Judgment for the plaintiff.

(*a*) Cro. Eliz. 198.
(*b*) Ibid. 185.
(*c*) Ibid. 829.
(*d*) And see *Peterkin* v. *Sampson*, 4 Dougl. 17; *Wheelwright* v. *Simons*, 5 Maule & Selw. 511.
(*e*) Vide *Taylor* v. *Gregory*, 2 Barn. & Adol. 257.

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MANN *v.* LANG and others, Executors of PENMAN, deceased.

Upon an issue of plene administravit vel non, the stamp on the probate of the testator's will is admissible in evidence.

But it is not even primâ facie evidence of assets come to the hands of the executor.

Held, per *Patteson*, J. and *Coleridge*, J., that the lapse of a long period of years would not make it such evidence.

Secus, per Lord *Denman*, C. J.

ASSUMPSIT on promises by *Penman* in his lifetime. Plea: plene administravit præter 200*l.* Replication: assets ultrà,—with a prayer of judgment for the 200*l.*

At the trial before *Coleridge*, J. at the Middlesex sittings in this term, it appeared that the action was brought for 498*l.* for goods sold &c., and that the executors had administered to the amount of 214*l.* To prove assets ultrà, the plaintiff offered in evidence the stamp on the probate of the will, which was a 22*l.* stamp. This evidence was objected to, but received. Other slight evidence of assets having been given, the case was left to the jury, who found for the plaintiff, damages 172*l.* *J. Henderson* having obtained a rule nisi for a new trial, on the ground that the probate stamp had been improperly received in evidence,

Platt now shewed cause. Any *act* or *word* proceeding from the defendants, tending to shew the receipt of assets, may be used in evidence against them. In such character, the stamp on the probate constituted primâ facie evidence of assets to such an amount as rendered that stamp necessary. The stamp on this probate was for 22*l.*, which is the duty required when the effects are "of the value of 800*l.*, and under the value of 1000*l.*" (*a*): It was therefore primâ facie evidence of assets to the amount of 800*l.* at the least. This was expressly decided in *Curtis* v. *Hunt and others* (*b*). [*Littledale*, J. It may be impossible to meet that evidence. The admission of such evidence might make it necessary to go into the whole of the testator's affairs in order to find out what is the balance. A man may die leaving property worth 100,000*l.* and yet his estate be insolvent. In such case an inquiry would be entailed upon the Court by the reception of this evidence,

(*a*) 55 *G.* 3, c. 184, Sched. Part iii. (*b*) 1 Carr. & Payne, 180.

which could, perhaps, be satisfactorily prosecuted only before a Master in Chancery.] The proctor might be called to state generally on what ground he advised that the amount of duty should be paid. If the estate proves of less value than it was supposed to be of at the time of taking out the probate, the executor may obtain from the Stamp-office a remission of part of the duty. The fact of the defendants' not having done so, in this case, is a confirmation of the correctness of their original estimate. In *Curtis* v. *Hunt and others* (*a*), *Abbott*, C. J. expressly laid it down, that the duty paid upon the probate was primâ facie evidence of assets to the amount of the lowest sum to which the stamp duty was adapted. [*Littledale*, J. That is only a nisi prius decision, which I do not much respect. If you bring similar nisi prius decisions of four different judges, they may be entitled to great weight. Frequently, nisi prius decisions are brought forward when it is merely the setting of the opinion of one judge against that of another.] The same point has been solemnly determined in a case in banc (*b*). These decisions have been acted upon; and in *Starkie on Evidence*, and other books, it is treated as an established principle, that the stamp on probate is primâ facie evidence that the executor has received assets to the amount covered by the stamp. [*Patteson*, J. When a man takes out the probate of a will by which he is appointed executor, he gets a stamp equal to the amount which he *expects* to receive. He may not receive a single farthing for six months,—perhaps he may *never* receive any thing; yet you would say that this is evidence of the *actual receipt* of assets equal to the amount so expected to be received. It seems to be very good sense to say that this should not be evidence.] In *Moses* v. *Crafter* (*c*), it was objected, that the stamp was not sufficient to cover, in addition to other assets, a debt due

(*a*) *Suprà*, 202.

(*b*) In *Foster* v. *Blakelock*, 8 Dowl. & Ryl. 48; 5 Barn. & Cressw. 328; *post*, 205.

(*c*) 4 Carr. & Payne, 524.

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from persons who had become bankrupts, and another debt which had been paid to the executors by instalments. Lord *Tenterden*, however, held "that desperate and doubtful debts need not be included; and that the executor has a right to exercise his judgment fairly and *bonâ fide*, whether a debt is doubtful or bad." An insolvent estate cannot be liable to probate duty.

F. Kelly and *J. Henderson*, contrà. The question is, whether the stamp on the probate can be said to be evidence—not of the amount of *outstanding debts*—but of *assets* actually come into the hands of the defendants at the time of commencing the action. [Lord *Denman*, C. J. The difficulty which occurs to me on your side of the argument is this:—may not the amount of the probate duty be taken as evidence of a *declaration* by the defendant as to one side of the account? I have some doubt whether it may not be so taken. I do not say that, supposing the evidence admissible for that purpose, it would be sufficient evidence even to go to the jury; but my difficulty is, whether it can be altogether excluded? *Patteson*, J. Suppose the executor had made a *declaration*, that he *expected* so much to come to his hands,—could that declaration be excluded? I much doubt whether it could be *absolutely excluded*.] It ought not to be regarded as a mere question of *admissibility*. Almost any thing that was ever said by the executor relative to the estate might be *admissible*, but would not so invariably be evidence of any assets actually *come* to hand. It is important that the question should be settled, as it deeply affects the interests of mercantile men. A great part of the estate may consist of outstanding debts: probate must be taken out with a stamp proportioned to the whole amount, because in suing for any debt, the sufficiency of the stamp may be questioned. If the stamp be received as primâ facie evidence, the burthen of proving a very difficult negative will be thrown upon the executor, for he will be put upon proof of the *non-receipt*

of the debts. The amount of the stamp is nothing more than a measure of the *anticipations* of the executor, and cannot properly be regarded as evidence of assets *come* to his hands. In *Stearn* v. *Mills* (*a*), the Court appears to have considered that the *Inventory* exhibited in the Ecclesiastical Court, is not evidence of assets; and *Littledale*, J. and *Parke*, J. expressed a dissent from the doctrine laid down in *Foster* v. *Blakelock* (*b*), that the probate stamp is primâ facie evidence of assets. It would be highly dangerous to lay it down as a rule, that unless an executor can prove the non-receipt of assets, he shall be bound by evidence which is perfectly consistent with his not having any assets whatever in his hands.

Lord DENMAN, C. J.—The question in this case is, whether the probate stamp was properly admitted in evidence—whether it was receivable with other evidence tending to shew assets. Upon *principle* alone I think it ought to be received, subject, of course, to such remarks as the judge may think proper to make. It is not objected in this case, that the learned judge misdirected the jury as to the effect of the evidence when received.

This question has arisen in several cases, and there has been a diversity of opinion upon the Bench. In *Curtis* v. *Hunt* (*c*), Lord *Tenterden* decided, that the probate stamp was primâ facie evidence of assets to the amount of the smallest sum to which that stamp was adapted. In that case, however, there had been 28 years entire acquiescence by the parties interested; and I think it would be very unreasonable not to consider such evidence as strong proof of assets. I think Lord *Tenterden* perfectly right in receiving the evidence, and even in treating it as sufficient to call for an answer. The next case, *Foster* v. *Blakelock* (*d*), was an action by a sheriff's officer against an executor, for

(*a*) *Ante*, i. 436; 4 Barnw. & Adol. 657.
(*b*) *Suprà*, 203, (*b*).
(*c*) 1 Carr. & Payne, 180.
(*d*) 8 Dowl. & Ryl. 48; 5 Barnw. & Cressw. 328.

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fees for executing writs for the testator, and the probate stamp was admitted as primâ facie evidence of assets to the amount covered by the stamp (*a*). The Court refused to grant a rule for a new trial; Lord *Tenterden* saying, that the probate stamp was presumptive evidence, which, in the absence of any answer, was sufficient. *Bayley*, J., enters only into another disputed point, and *Holroyd*, J. is merely stated to have concurred. *Stearn* v. *Mills* (*b*) was Debt against executors, to which the defendant, *Mills*, pleaded *plene administravit*, and the other defendant, Mrs. *Wright*, suffered judgment by default. Upon the trial of the issue raised by the plea, it was shewn by the plaintiff that at the time of proving the testator's will, an *inventory* of stock, &c. on his farm, was exhibited by Mrs. *Wright* in the presence of *Mills*; but it was admitted, that no part of the testator's effects had ever actually come to the hands of *Mills*. The question was, whether this was evidence to charge *Mills* with the *receipt of assets*; and it was held to be no evidence to shew that any of the testator's effects had come to his hands. The question as to the probate duty did not properly arise.

It is impossible to draw any line as to the time within which this evidence ought to be considered as having become sufficient primâ facie evidence of assets, and when not. A long course of time, during which there has been an acquiescence in the correctness of the original estimate, may render it very reasonable to treat the stamp as presumptive evidence. I think that the stamp must be admissible for some purposes, as, to shew that the *credit side* of the testator's accounts amounted to a sum requiring such a stamp. My brother *Coleridge* properly admitted this evidence.

LITTLEDALE, J.—An executor is only liable to the amount of *assets received*, and the question is, how is that amount to be proved? I cannot say that the probate stamp is not *ad-*

(*a*) Rather to the amount of the smallest sum requiring such a stamp.

(*b*) *Ante*, i. 436; 4 Barnw. & Adol. 657.

missible in evidence upon this question. It is an act or declaration, made by the executor, as to what he *expects* the assets will amount to at the time of taking out the probate, which, by act of parliament, must be done within a certain limited time. It is as if the executor, when taking out the probate, had been heard to say, "I expect that if all the debts, &c. of the testator should turn out to be of the value at which I now estimate them, the assets will amount to so much; but I cannot say how much the testator may have owed, and therefore I cannot say whether there will ultimately be any assets (*a*). If all be realized, as I expect, the estate will be worth so much. For any thing I *know*, the debts due from the testator may exceed the estate; but, nevertheless I must, in obedience to the act of parliament, pay duty proportioned to what I now believe to be the full value of the effects, without making any deduction for debts." If too much probate duty has been paid, the excess will be remitted. I cannot say that this is not *admissible* in evidence, but, at the same time, I cannot say that it is even primâ facie *evidence of assets* in the executor's hands. In *Curtis* v. *Hunt*, Lord *Tenterden* considered it to be so; but that was after an acquiescence of 28 years; and in *Foster* v. *Blakeloch*, Lord *Tenterden* again held the probate stamp to be primâ facie evidence, to which the other judges must be taken to have assented. In *Stearn* v. *Mills* my brother *Parke* and I are reported to have expressed a dissent from the doctrine laid down in *Foster* v. *Blakelock*. I do *not* think that the probate stamp is primâ facie evidence of assets.

PATTESON, J.—In order to prove that the defendants

(*a*) The amount of assets, both with reference to the amount of probate stamp required and to the evidence, to charge the defendant primâ facie in disproof of a plea of plene administravit, seem to depend upon the realization or non-realization of credits, rather than upon the ultimate value of those credits, as contrasted with the debts, or as likely to form part of a residuary estate.

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had not fully administered the assets which *had come to hand*, it is not sufficient to shew that there were assets *of the estate*. I confess, with all possible respect for the opinion of Lord *Tenterden*, and no one can feel a greater respect for the opinion of that very learned judge than I do, that I cannot assent to the doctrine, that (even after any length of time,) the probate stamp can be primâ facie evidence of assets come to the executor's hands. Still I cannot say that it is not at all *receivable in evidence*. As a declaration, it is *admissible;* but it is not, in my opinion, sufficient primâ facie evidence by itself. The distinction between assets *come to the executor's hands*, and assets *expected*, is clear. When they are *expected* to come to hand, the plaintiff may have judgment of assets *quando acciderint*. I cannot conceive how a declaration, by the executor, of what he *expects*, can be evidence of what *has come* to his hands. My opinion is, that the decisions in *Curtis* v. *Hunt*, and *Foster* v. *Blakelock*, are wrong; and that my brothers *Littledale* and *Parke* were right in *Stearn* v. *Mills;* yet I cannot say that the probate stamp is not *any* evidence.

WILLIAMS, J.—The question is, whether the probate stamp was *admissible*. The *weight* to be given to it is a distinct independent question for the judge and the jury. I cannot say that a statement by the executor of what he *expected* would be the value of the estate, was not *admissible*.

Rule discharged.

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DOE *d.* CHANDLER and another *v.* FORD.

EJECTMENT for lands at Alton, Hants. At the trial before Lord *Denman*, C. J., at the Winchester summer assizes, 1834, a deed, whereby an annuity of 20*l.* was granted by *Ford* to *Whitehead* and *Wood*, and the land in question,—of which *Ford* was seised in fee,—demised to *Chandler* for a term, upon trust to pay the annuity, was offered in evidence. It was objected on the part of the defendant, that the deed, which was not inrolled according to the provisions of the Annuity Act, 53 *Geo.* 3, c. 141, was on that account void; and it was held by the learned judge, after argument, that it lay on the plaintiff to prove that the deed came within the exception created by sect. 10 of the statute, which enacts that the act shall not extend to (inter alia) "any annuity or rent-charge, secured upon freehold &c. land of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession, or the fee-simple whereof in possession the grantor is enabled to charge at the time of the grant." Upon this the plaintiff proved the deed, which being read, was found to contain the following amongst other covenants:—"That now and at the time of the sealing and delivering these presents, the said hereditaments and premises hereby demised, or intended so to be, are of more than sufficient annual value to answer and pay the said annuity or clear yearly sum of 20*l.* hereby granted, over and above all repairs, charges, and incumbrances whatsoever, payable out of or affecting the same." A witness, called on the part of the plaintiff, stated, that at the time of negociating the sale of the annuity, the defendant had, by positive statements to that effect, induced the agent of the intended grantee to believe that the premises were of the clear yearly value of, *and*

The necessity of inrolling a memorial of an annuity charged upon land of which the grantor is seised in fee, is not dispensed with by a *covenant* from the grantor, that the land is of greater annual value than the annuity, coupled with *representations* to the same effect made to the grantee, and by him bonâ fide received and acted upon.

In ejectment by the grantee, it is therefore competent to the grantor to falsify the covenant and representation, and shew that the land is of less annual value.

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were actually let for, 24*l.*, and gave a reference to a person residing in London, who confirmed the statement; and that it was in consequence of such his representations alone, that no surveyor was sent down to inspect the premises, and that the deed was not inrolled. For the defendant, evidence was offered for the purpose of shewing that the premises were not, at the time of granting the annuity, of the yearly value of 20*l.* This evidence was objected to by the plaintiff, as being in contravention of the defendant's express covenant, and an attempt to take advantage of his own wrong. Lord *Denman*, C. J. referred to a case then pending before this Court (*a*), and admitted the evidence, but took a note of the objection. The evidence went to shew that the premises had never been worth more than 15*l.* per annum; and the question of value being left to the jury, with directions to find for the defendant, if they were of opinion that the premises were not, at the time of granting the annuity, of the annual value of 20*l.* above all charges, a verdict was returned for the defendant.

In pursuance of leave granted, *Coleridge*, Serjt., in the following term, moved for a rule to set aside the verdict, and enter a verdict for the plaintiff, which was granted.

Erle now shewed cause. The Annuity Act requires that a memorial of every annuity deed shall be inrolled, unless in certain excepted cases, one of which is, where the annuity is secured upon land of equal or greater value than the annuity, above all charges; otherwise the deed to be *null and void to all intents and purposes.* This enactment would be liable to constant infringement, if a grantee of an annuity were estopped by such a covenant as that relied on here, from proving as a fact that the lands were of less annual value than the annuity. In *Saunders* v. *Wright* (*b*), an application was made to set aside, for want of a memorial, a warrant of attorney, given as a collateral security for

(*a*) Probably *Bowman* v. *Rostrow*, *ante*, iv. 552.
(*b*) 1 Taunt. 369.

an annuity secured on freehold houses, which, at the time of negociating the sale of the annuity, the grantor represented to be of greater annual value than the annuity. It was contended that the grantor ought not to be allowed to take advantage of his deception. The Court, however, directed an issue to try whether the premises were, at the time of granting the annuity, of equal or greater annual value than the annuity. In *Sheppard's Touchstone*, 63, several cases of *usury* are given, from which it appears that however strongly a party may covenant that there is not usury, he may nevertheless by plea bring forward the real state of the facts to shew usury. In *Buller's N. P.* 173, it is said, "Where the consideration on which the bond is given is illegal, the defendant may take advantage of it by pleading, as simony, usury, compounding of felony, &c. and this notwithstanding there be a different and legal consideration recited in the bond." In *Hill* v. *Manchester and Salford Waterworks Company* (*a*), it was held that "an obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, *unless* he can make it appear by the plea that the real transaction was *fraudulent or unlawful.*" The principle that a party is not estopped, by a recital in his deed, from bringing forward facts which shew that the deed is illegal, is strongly asserted by the Court, and especially by *Le Blanc*, J. in *Paxton* v. *Popham* (*b*).

Here he was stopped by the Court.

Manning, contrà. The case of *Hill* v. *Manchester and Salford Waterworks*, cited on the other side, is conclusive against the defendant. That case shews that the defendant is estopped by the allegation in his covenant, unless it were entered into *with the view* of covering a fraud, or of effecting an unlawful purpose. Here, fraud, except that practised by the defendant, is out of the question. Then was the covenant entered into with a view of effecting an *un-*

(*a*) 2 Barn. & Adol. 544. (*b*) 9 East, 408.

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lawful purpose? Here there was nothing unlawful in the granting of the annuity, or in the covenant stating the value of the property. If the lessor of the plaintiff, knowing, or having reason to believe, that the property was of less annual value than the amount of the annuity, had, for the purpose of avoiding the trouble of inrolment, chosen to substitute the covenant for a memorial, it must be admitted that the purpose would have been unlawful, as the object would have been to evade the provisions of a statute. But the jury did not infer, nor was there any ground for inferring, that the lessor of the plaintiff doubted the correctness of the representations as to value made to him by the defendant. He had no motive for omitting the memorial, the expense of which would have fallen exclusively upon the defendant, while it would have relieved the lessor of the plaintiff from all question as to value.

If this had been an action of *covenant* instead of ejectment, and the defendant had pleaded want of a memorial and insufficiency of value, in bar of the action, the plaintiff might have replied the estoppel, and thereby have ousted the defendant of the answer by which he now seeks to defraud the lessor of the plaintiff of the security which he has solemnly pledged to him; *Outram* v. *Morewood* (*a*). If, in such action of covenant, the plaintiff, instead of replying the estoppel, had taken issue upon the alleged insufficiency of value, he would thereby have waived the estoppel, and must have rested his success upon the actual value of the property; *Vooght* v. *Winch* (*b*); *Hooper* v. *Hooper* (*c*). But in *eject-*

(*a*) 3 East, 346.

(*b*) 2 Barn. & Alders. 662. In *Vooght* v. *Winch* the defendant had had the opportunity of pleading the estoppel, and instead of doing so had pleaded the general issue only, thereby setting the matter *at large;* and though the language which *Abbott*, J. is reported to have used is *general*, and would therefore, *in terms*, apply to a case where the parties had had no opportunity of pleading or replying the estoppel, it seems reasonable to construe it with reference to the case then before the Court, rather than in a more extended sense, in which it would have been at least extra-judicial. And see 2 Mann. & Ryl. 581, n.

(*c*) M'Cleland & Younge, 509.

ment, or in any other action where the plaintiff has no opportunity of *replying* the estoppel, he may insist upon the matter of estoppel as *conclusive evidence* before the jury. *Bird* v. *Randall* (*a*); *Duchess of Kingston*'s case (*b*); *Hitchen* v. *Campbell* (*c*). The defendant, therefore, was not at liberty, and ought not to have been permitted to give evidence to contradict his covenant and falsify his own solemn statement under seal. *Bowman* v. *Taylor* (*d*); *Bowman* v. *Rostrow* (*e*). The learned judge entertained considerable doubt at the trial as to the admissibility of the evidence, and he only received it de bene esse, subject to the opinion of the Court. It might have been *prudent* to inrol a memorial of the annuity, but the omission to do so,—the absence of this abundant caution,—is no evidence of fraud, or of any attempt to evade the provisions of the statute. By sanctioning the defence which has been set up, the Court would allow the defendant to take advantage of a gross fraud, without any principle of law, which requires them to come to a decision so repugnant to the merits and honesty of the case.

LITTLEDALE, J.—I must own that it seems to me that the defendant was at liberty to give evidence of the inferiority of value. It is not necessary on this occasion to say whether the covenant could be pleaded as an estoppel. If it were allowed to conclude the party, the provisions of the act might in that way be evaded. Mr. *Manning* says that the plaintiff had no motive to evade the provisions of the act. I do not say that he had; though, perhaps, he may have intended to save the defendant unnecessary expense. The plaintiff should have inquired into the value of the premises. If he had done so, he would have obtained the

(*a*) 3 Burr. 1345, 1 W. Bla. 373, 387.

(*b*) 11 State Trials, 261; 20 Howell's St. Tr. 355.

(*c*) 2 W. Bla. 827; *S. C. Kitchen* v. *Campbell*, 3 Wils. 304. And see *Thorp* v. *Fry*, Bull. N. P. 87; *Decosta* v. *Atkins*, ibid.; *Rex* v. *St. Pancras*, Peake, N. P. C. 219; *Strutt* v. *Bovingdon*, 5 Esp. N. P. C. 57; *Stafford* v. *Clark*, 2 Bingh. 377; *S. C.* 9 B. Moore, 724; *Hancock* v. *Welsch*, 1 Stark. N. P. C. 347; *ante*, iii. 273.

(*d*) *Ante*, iv. 264.

(*e*) Ibid, 552.

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same result as was established before the jury at the trial. The learned judge was, I think, right in allowing this evidence to be gone into.

PATTESON, J.—It is not necessary to say whether this could be pleaded as an estoppel. The question depends upon the Annuity Act, which says that every annuity deed, of which a memorial is not duly inrolled, shall be void, except in certain cases specified in the 10th section. A party who attempts to enforce an annuity deed where there is no memorial, must therefore bring himself within the proviso in the 10th section. That section excepts annuities secured upon freehold land of greater annual value, above all charges, than the annuity. In order to prove that he came within that section, the plaintiff merely puts in the deed itself, in which it is stated that such is the fact. If we were to hold that sufficient, any thing that the parties put in might be allowed to dispense with the express provisions of the statute. Mr. *Manning* says, that the grantee could have no motive for evading the provisions of the act. I do not know that in this case there was any motive: but I can conceive that the grantee may have a motive—as the saving expense to the grantor or the prevention of publicity. The doctrine of estoppel cannot therefore, as it seems to me, apply. I do not suppose that it would be contended that if the defendant had moved to set aside the securities, under the provisions in the Annuity Act, enabling the Court to order the securities to be cancelled, (assuming that the want of a memorial would be a ground for setting aside the securities,) the deed would have been an estoppel (*a*): Why more so in ejectment?

WILLIAMS, J.—I am of the same opinion. In *Hill* v. *Manchester and Salford Waterworks*, all the judges, in the

(*a*) As to the grounds upon which the Court is authorized to cancel or vacate the securities, see the fourth section of the first Annuity Act, (17 *Geo.* 3, c. 26,) and the sixth section of *Sugden*'s Annuity Act (53 *Geo.* 3, c. 141.)

course of Mr. *Coltman*'s argument, and afterwards in the judgment, proceeded on the ground that the pleas were not a sufficient defence. *Littledale*, J. begins his judgment thus: "These pleas might have been an answer to the plaintiff's action, if they had shewn that the bonds were given in consideration of some act which was immoral or *contrary* to act of parliament." Upon the present occasion evidence was admitted, notwithstanding the covenant, for the purpose of shewing that the land was of inferior value than the annuity, and I think that the evidence was admissible for that purpose.

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Lord DENMAN, C. J.—I think I should not have reserved the point, had it not been that the admission of the evidence gave effect to the fraud of the party who tendered it. I have considerable doubt whether the covenant can estop at all; but I think that, at all events, evidence was admissible here to shew that the case was not within the exception in the 10th section.

Rule discharged.

The KING *v.* The Inhabitants of ST. MARY, LEICESTER.

A primâ facie case of settlement by evidence of the place of birth of the pauper, may be answered by proof of the maiden settlement of his mother, without shewing that his father had no settlement.

UPON an appeal against an order of justices for the removal of *John Cuthbert*, his wife and family, from Swepstone, Leicestershire, to Saint Mary, in the borough of Leicester, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The respondents proved that *Cuthbert* was born in the appellant parish. This was met by the appellants proving that *Cuthbert*'s mother, before her marriage, acquired a settlement by hiring and service in St. Martin's, Leicester. The sessions confirmed the order, on the ground that no evidence had been offered to shew that the *father* of *Cuthbert* had *no* settlement (*a*).

(*a*) It would, perhaps, be difficult to say by what evidence this negative proposition could have been established.

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Humfrey and *Burnaby*, in support of the order of sessions. In *Rex* v. *St. Matthew, Bethnal Green* (*a*), the rule is clearly laid down that children are to follow the settlement of their father, if it can be known; and that if it can be known, then recourse cannot be had to the mother's settlement. In this case the appellants did not *attempt* to trace the settlement of the father. If it be sufficient, in a case like this, to shew the place of settlement of the mother, it will also be sufficient to shew the place of settlement of the maternal grandmother, or any other more remote ancestor on the mother's side. The confusion would be great, and it would open a wide door for fraud. The respondents can never be in a situation to contest a place of settlement of every remote ancestor of the pauper, and it would not be difficult for the appellants to suppress the evidence of the settlement of the father. In *Rex* v. *Harberton* (*b*), an order for the removal of a wife and daughter, was held to be supported, primâ facie, by shewing that the parish to which the removal was made was the place of the wife's maiden settlement. But in that case the attention of the Court was not called to *Rex* v. *St. Matthew, Bethnal Green*. [Lord *Denman*, C. J. What was there said, was without any discussion.] The *facts* of the two cases are also in some measure distinguishable. In *Rex* v. *St. Mary, Beverley* (*c*), upon the trial of an appeal against an order by which a wife had been removed to her maiden settlement, the respondents proved that the wife's maiden settlement was in the appellant parish, but it appeared upon the cross-examination of one of the respondents' witnesses that the husband was born in some part of Ipswich. The Court held, that it was incumbent on the respondents to shew that the pauper was settled in the parish to which the removal was made, and that they had disproved that by shewing that the *husband* had a birth-settlement in another parish.

(*a*) Burr. S. C. 485.
(*b*) 13 East, 311.
(*c*) 1 Barn. & Adol. 201.

J. Hildyard and *White*, contrà. It was incumbent on the respondents to remove *Cuthbert* to the place of his settlement. Either his father had a settlement or he had not. If he had no settlement, then the mother's place of settlement was that of the child. If he had a place of settlement, then the respondents have removed to the wrong parish. The maxim, de non apparentibus et de non existentibus eadem est ratio, applies. The presumption of law is, that the father had no place of settlement, as none was shewn. The settlement by birth, on which the respondents relied, depends on this very maxim of law. It was incumbent on the respondents, before removal, to inquire first, whether *Cuthbert*'s father had a settlement, and if he had none, then to ascertain the mother's settlement. They make neither of these inquiries, but rely on a settlement by birth, which assumes that a search has in vain been made for the settlement of both parents. In this view of the case, the whole of the authorities are reconcileable. In *Rex* v. *St. Mary, Beverley*, it was determined, that the burthen of proof was on the respondents, who had removed the pauper, and that was the principle of the decision. In *Rex* v. *Woodford* (*a*), it was held that the birth of the pauper is sufficient primâ facie evidence of the settlement to call for an answer from the other side. In this case, that primâ facie case *was* answered. In *Rex* v. *Harberton* it was said, that there could be no doubt that the evidence offered, of the wife's maiden settlement, was primâ facie sufficient, but that it lay on the appellants to rebut it. Here the primâ facie case made out by the respondents *has* been rebutted. In *Rex* v. *Wakefield* (*b*), it was said by *Le Blanc*, J., that "the place of birth is the *weakest* evidence of settlement." Proof of such settlement is therefore rebutted by shewing the settlement of the mother.

Lord DENMAN, C. J.—My first impression was, that according to the rule laid down in *Rex* v. *St. Matthew, Beth-*

(*a*) 2 Bott, P. L. 13. (*b*) 5 East, 338.

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nal Green, it was incumbent on the appellants, who are to rebut the primâ facie case made out by the respondents, to prove the father's place of settlement, and if, after diligent search, that could not be found, that then only they might resort to the settlement of the mother. But the respondents rely altogether on the birth-place of the pauper. Undoubtedly, if neither the father nor mother have gained a settlement, proof of the place of birth is sufficient. It is, however, a mere primâ facie case, which admits of the answer, that *either* the father or the mother was settled elsewhere. In this case it was shewn that the mother was settled in a parish other than that to which the removal was made. The sessions have, therefore, done wrong in affirming the order.

LITTLEDALE, J.—The pauper was born in wedlock. No account was given by the respondents of the place of settlement of either of his parents. Therefore, proof of where the pauper was born was primâ facie evidence of the place of settlement. This was relied on by the respondents. It was competent then for the appellants to rebut this primâ facie case, by proving that the mother had, before her marriage, acquired a settlement elsewhere. That might, undoubtedly, have been displaced by proof of the place of settlement of the father; but proof of the father's settlement, is only one mode of answering the primâ facie case arising from proof of the place of birth. The case, therefore, stands thus: The respondents have made out a primâ facie case by proving *Cuthbert*'s place of birth, and the appellants have rebutted that case by proving the mother's place of settlement.

PATTESON, J.—What is called a birth-settlement is the weakest species of settlement; and if one better is shewn, it is destroyed. A child is settled in the place where it is born only when no other settlement can be ascertained. The appellants prove that the mother had a place of settlement, and that destroys the settlement by birth.

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WILLIAMS, J.—I concur in that view of the case. It is quite clear, in the words of *Le Blanc*, J., that "the place of birth is the weakest evidence of settlement." Evidence of the place of birth was given by the respondents. What is the next proof? Evidence of the settlement of the mother:—And this is an answer to the respondents' case, on the assumption made by the respondents themselves,—that the father had no settlement,—by relying on the place of birth, which would not be the place of settlement, unless the father had no settlement.

Order of Sessions quashed.

The KING v. The Trustees of ST. PANCRAS New Church.

The trustees appointed and acting under a local act of parliament for building a church, which authorizes them to levy rates upon the inhabitants of the parish,

BY 56 *Geo.* 3, c. xxxix. "for building a new church and a parochial chapel in the parish of St. Pancras, in the county of Middlesex, and for other purposes relating thereto," certain persons were appointed trustees for carrying the act into execution.

Sect. 16 enacts, that fair and regular entries shall be made in books to be provided for that purpose, of all the acts,

and directs that the accounts shall be audited and allowed by the quarter sessions, are, nevertheless, compellable, under sect. 34 of the General Vestry Act (1 & 2 *Will.* 4, c. 60), to produce and explain their accounts before the auditors of the parish accounts, appointed under, and in consequence of the adoption of, the last-mentioned act.

Semble, that all Boards, &c. having power to levy rates on the inhabitants of a parish which adopts the General Vestry Act, are compellable to produce and explain their accounts before the auditors.

Auditors of parish-accounts, appointed under that act, can hold meetings only in the board-room of the vestry.

A mandamus to appear, and produce and explain accounts to auditors, cannot direct the parties to appear, &c. "at such time and place as the auditors may appoint and give notice thereof," where by statute the parties are only required to appear at a meeting directed to be held at a certain place.

When, upon a motion to quash the return to a mandamus for insufficiency, and to issue a peremptory mandamus, the matter is set down in the Crown paper for argument, the counsel for the Crown is entitled to begin, although the counsel for the defendants propose to urge objections to the mandamus itself.

The Court has power to mould the *rule* for a mandamus, but cannot re-mould the *writ* after it has issued, and award a peremptory mandamus in a more limited form than the original mandamus.

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orders, regulations, and proceedings of the trustees relative to the execution of the act.

Sect. 19 empowers the trustees, by order in writing, to direct their treasurer, from time to time, to pay such sums of money out of the several moneys raised by virtue of that act, to such persons and in such manner as they shall think necessary.

Sect. 67 authorizes the trustees, as they may think necessary, by writing under their hands, to make rates on the occupiers of lands, tenements and hereditaments within the parish, not exceeding two pence in the pound in any one year, until a certain rate, called the sinking fund rate, shall cease, nor four pence in any succeeding year; all which rates are vested in the trustees, to be by them applied for the purposes of the act, and are to continue until payment of the building of the new church shall be made, and so long as any of the moneys to be borrowed and raised by sale of annuities and otherwise, shall remain due.

Sect. 77 enacts, that an account shall be kept by the trustees, of the rates to be made in pursuance of the act, and that the trustees shall cause all receipts, payments, debts, credits, and minutes of contracts, and all other their proceedings, to be entered into a book or books to be kept for that purpose; and that all books and accounts of the trustees, shall at all seasonable times be open to the inspection and perusal of any person liable to pay rates by virtue of the act; and that once, at least, in every year during the execution of this act, the trustees shall make a true statement or account of all sums of money by them received and expended; and such statement or account, when so made, together with the vouchers relating thereto, shall be by them laid before the justices of Middlesex assembled in quarter sessions, to be by them examined and allowed; and the balance of such account shall by such justices be stated in the book of accounts, to be kept in the office of the clerk to the trustees; and that no charge or item in such accounts shall be binding on the parties concerned or valid in law, unless the same shall have been duly allowed by such justices.

By another local act, 1 & 2 *Geo.* 4, c. xxiv., the powers of the trustees are considerably extended, and they are authorized, by writing under their hands, to make rates not exceeding four pence in the pound.

The General Vestry Act (1 & 2 *Will.* 4, cap. 60,) was adopted (*a*) by the parish of St. Pancras.

By sect. 27 of that act it is declared, that nothing therein shall be construed to repeal or alter any local act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision of divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than was by that act expressly enacted regarding the election of vestrymen and auditors of accounts.

By sect. 33 it is enacted, that in any and every parish adopting this act, the parishioners duly qualified to vote for vestrymen shall, in the manner therein directed, elect five rate-payers to be auditors of accounts.

Sect. 34 enacts, that the auditors of accounts shall meet twice at least in each year *at the board-room of the Vestry*, and (a majority of the auditors being present) shall proceed to audit the accounts of the Vestry for the preceding half-year, in presence of the vestry-clerk, and requires the Vestry, by their clerk, to produce and lay before the auditors, at every such meeting, a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money which may have come to the hands of the Vestry or of their treasurer, and also of all moneys paid, laid out, or expended by them, or by any churchwardens, overseers, surveyors, or other persons by them employed, and responsible to the Vestry, since the last period up to which the accounts of the Vestry were audited; and directs that *in all parishes in which other boards shall have control over any part of the parochial expenditure, the auditors shall have the same power of examining the accounts and officers thereof* as of examining the accounts and officers of the Vestry, and

(*a*) Under the power of adoption given by s. 1.

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shall audit the accounts of the Boards in the same manner as they audit the accounts of the Vestries.

Sect. 35 enacts, that the auditors shall have power to summon and call before them by writing, &c. any parish-officer or other person or persons concerned in the said accounts, and to require of them to attend the auditors *at any meeting or adjourned meeting*, and to bring with them all books of account, writings, papers, and documents required, which may concern the said accounts, and to give such information as to the particulars of such accounts as they shall be able to give; and any parish officer or other person refusing so to attend, or otherwise wilfully obstructing the purposes of such inquiry, shall be deemed guilty of a misdemeanor.

Sect. 36 enacts, that the accounts, when audited and approved by the auditors, shall be signed by them in the presence of the clerk of the Vestry, who shall also affix his signature to the same, and that it shall be lawful for the auditors to subjoin such remarks thereto as to them shall seem meet.

Sect. 37 enacts, that the accounts, when so audited and signed, shall remain at the office of the clerk of the Vestry, and shall, after such audit, be open and accessible for the examination, at all seasonable times, of any person rated to the relief of the poor of the said parish, and of any creditor on the rates thereof: Provided always, that nothing in the act contained relative to the appointment and duty of auditors, shall debar the parishioners from any remedy before possessed.

A rule nisi was obtained for a mandamus to the trustees acting under the two local acts, commanding them to attend a meeting of the auditors of accounts of the parish, and bring with them and produce at such meeting the book or books containing an account of all moneys received and of all moneys paid---between Lady-day and Midsummer-day, 1833.

Sir *James Scarlett* and *Platt*, in Hilary term, 1834,

shewed cause, and contended that the provisions of the General Vestry Act, respecting the auditing of parish accounts, could not apply to the accounts of the trustees, as the legislature had already provided a mode of auditing those accounts, viz. before the quarter sessions.

Campbell, S. G., and *F. Kelly*, contrà, contended that the General Vestry Act was applicable to the case of these trustees;—that the provisions of the statutes were not inconsistent, for that the previous production of the accounts before the auditors, would enable them to point out to the quarter sessions any objections which they might have to the allowing of the accounts. Sections 34, 35, 36, and 37, of the General Vestry Act, were relied on, and it was contended that the trustees were a board having control over the parochial expenditure, since they raised money upon the parish, and expended it for the benefit of the inhabitants. *Rex* v. *The Inhabitants of East Teignmouth* (*a*).

Cur. adv. vult.

Lord DENMAN, C. J., in the course of the same term, delivered the judgment of the Court as follows:—

In this case the question was, whether accounts kept by the trustees under an act for building a chapel and making a burial ground, were to be produced under the General Vestry Act; that is, whether the trustees were *bound* to produce them. My brother *Parke* granted that rule, after a great deal of hesitation. The question has since been fully argued on both sides, and we have considered it under all its circumstances; and although we think that the act is not well worded, we are of opinion that these *are* accounts of a description which the parish have a right to see. These trustees are a Board constituted by the act, and the moneys to be raised for the purposes mentioned in the act are levied by rates upon the parishioners; and although the trustees have the direction of the expenditure, yet the Ves-

(*a*) 1 Barn. & Adol. 244.

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try, under the *general* act applicable to them, have a right to *inspect* those accounts. We therefore think that *some* means must be discovered for auditing these accounts both before the Sessions and before the Vestry. The rule must therefore be made absolute. I should add, that my brother *Parke*, although he thought at first that it should be otherwise, agrees with the rest of the Court in coming to this conclusion.

Rule absolute.

A mandamus issued to the trustees and their clerk or clerks, which—after reciting information that the auditors of the accounts of St. Pancras, appointed and acting under 1 & 2 *Will.* 4, c. 60, on or about the 11th November then last past, in exercise of the powers given to them by the act, did, by a writing for that purpose, duly sign, summon and require the clerks to the trustees *to come before and attend at a meeting of the auditors of accounts of the said parish, at a certain time and place in the said writing specified*, and to bring with them and produce at such meeting the book or books containing the accounts of all moneys received and paid between Lady-day and Michaelmas-day, 1833, by or on account of the trustees acting under, &c., and then and there to give such information as to the particulars of such accounts as they should be able to give; and that thereupon the said clerks ought to have attended &c., but neglected and refused &c., and still neglect and refuse to attend at any meeting of the said auditors for the purpose aforesaid; in contempt, &c.—commanded the said trustees, acting under and by virtue of &c., and their clerk or clerks, or such of them as should be thereto required, to attend with and produce to the auditors of accounts of the said parish, acting under &c., the book or books containing the account or accounts of all moneys received and of all moneys paid between Lady-day and Michaelmas-day, 1833, by or on account of the said trustees, under and by virtue of &c., *at such time and place or at such times and places as a majority of the said auditors might appoint and give notice*

thereof to the clerks of the said trustees, and then and there give such information as to the particulars of such accounts as the trustees and the said clerk or clerks might be able to give, according to the directions of the said act (the Vestry Act),—or shew cause to the contrary thereof.

A return (the particulars of which it is not necessary to state) having been made to this mandamus, and a rule nisi to quash the return and to issue a peremptory mandamus, having been obtained, the case was set down in the crown paper for argument.

Platt, for the defendants, contended that he had a right to begin, as he had an objection to the mandamus, which he proposed to urge.

The COURT determined that the counsel for the crown was entitled to begin.

Campbell, A. G., for the crown. The question for the consideration of the Court is, whether, by the late Vestry Act, the auditors are entitled to inspect all accounts of parochial expenditure, although, by a local statute, another mode of finally auditing those accounts is provided. After the judgment of the Court, given when the rule for this mandamus was made absolute, it cannot be contended that this mandamus does not lie. The return states no new matter, and contains no answer to the writ.

Platt, for the defendants. The writ of mandamus is void; first, because it does not appear that the parish of St. Pancras has ever adopted the Vestry Act (*a*); and, secondly, because it does not command the trustees to attend at the place prescribed by the act (*b*). The place pointed out by the act is the *board-room* of the Vestry.

(*a*) 1 & 2 *Will.* 4, c. 60.

(*b*) Several other objections were taken, but the argument respecting them has been omitted, as they were not noticed in the judgment of the Court.

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The mandamus requires the trustees to attend "at such time and place as the auditors, or a majority of them, may appoint." By sect. 34 of the Vestry Act (*a*), the auditors of accounts are required to meet twice, at least, in each year, at the board-room of the Vestry, and to proceed to audit the accounts for the preceding half-year; and in all parishes in which other Boards have control over any part of the parochial expenditure, the auditors are to have the same power of examining the accounts and officers of such Boards as of examining the accounts and officers of the Vestry, and are to audit the accounts of the Boards in the same manner as they audit the accounts of the Vestry. Sect. 35 empowers the auditors to summon before them any person concerned in the accounts, *at any meeting or adjourned meeting*. The auditors have therefore only power to summon parties to a meeting or adjourned meeting. It does not appear by this mandamus that the defendants were ever summoned to appear at any meeting at the board-room; and by the mandatory part they are required to appear at such *time* and *place* as the auditors may appoint. [*Patteson*, J. The mandamus recites that the trustees were summoned to attend a *meeting* of the auditors of accounts at a certain time and place, specified in a written summons.] From any thing that *appears* on the face of the mandamus, the written summons may have required the trustees to appear at Highgate or at some distant part of the country. The power of the auditors is given by this act; and the trustees cannot be compelled by mandamus to do an act not positively required by the statute.

Campbell, A. G., in reply. [Lord *Denman*, C. J. We are all satisfied there is nothing in the first objection.] The second objection which has been made, divides itself into two parts; first, that it is not recited in the mandamus that the defendants had been summoned to attend at the board-room of the Vestry; and, secondly, that the manda-

(*a*) 1 & 2 *Will.* 4, c. 60.

tory part of the writ is wrong, in not requiring the trustees to attend at a meeting *at the board-room*. The provision of the 34th section, which requires the auditors to meet at the board-room, is only *directory*. That section does not say that the acts of the auditors shall be *null and void* if they do not meet at the board-room, nor does it impose any *penalty* upon them in case they do not follow the directions given. Besides, no house is described. The board-room of the Vestry is the room in which, *for the time being*, the Board of the Vestry assemble. It is not intended as a designation of a *distinct building* appropriated to Vestry meetings. The Vestry Act may be adopted by every parish in England:—Could it be contended that the act cannot be carried into effect in any parish unless it contain a particular building, which is called "the Board-room of the Vestry"? Then the 35th section makes no mention of board-room. It merely gives the auditors power to summon persons concerned in the accounts to attend them at any meeting or adjourned meeting. The mandatory part of the writ requires the trustees to appear at such time and place as the auditors may appoint, and give such information as to the particulars of the accounts as the trustees and their clerk may be able to give, *according to the directions of the act*. Therefore the attendance of the trustees is only required at such time and place as is in conformity with the provisions of the act. Few writs of mandamus could be considered valid if they are to be criticised so minutely. [Lord *Denman*, C. J. When you require the trustees to attend at such time and place as you *think proper* to appoint, do you not go further than the act authorizes you?] The trustees are only required to attend at such time and places as are authorized by the act. [*Patteson*, J. Nothing is said in the mandamus limiting the command to appear at such time and place as are authorized by the statute.] [Lord *Denman*, C. J., here read the mandatory words of the mandamus. It is carrying these words, "*according to*

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the directions of the said act," a great way back, to say that they have the effect of making "times and places" mean times and places prescribed by the act.] Assuming that the writ is faulty in this respect, yet the whole is not therefore a nullity. [Lord *Denman*, C. J. The very act which this mandamus requires to be done is not within the powers given by the statute. In *Rex* v. *Leicester* (*a*) Lord *Tenterden* said he would *mould* the *rule*, but this mandamus must go *in its terms* or not at all.] The mandamus may be made peremptory as to that which is lawful.

Lord DENMAN, C. J.—This is a very important matter in *principle*, but it seems to me to be quite clear that we cannot make peremptory a mandamus which requires parties to do that which by the law of the land they clearly are not liable to do. By the writ we require them to do a particular act. What is it? To obey the order of the auditors, if they shall call upon them to attend at *any place* and at *any time* which they may appoint. The auditors have no such power. They have only power to require the attendance of the trustees *at the board-room* of the Vestry. The mandamus has issued in such terms, that it is impossible for us, consistently with our duty, to give effect to it. This may be a very considerable inconvenience to the parties, but still we cannot call upon persons to obey a power which they are not bound to obey. I think, therefore, that this mandamus must be quashed.

LITTLEDALE, J.—The act requires the auditors to meet at the board-room of the Vestry. It was contended by the Attorney-General that that was merely *directory*, and that although the board-room of the Vestry might be pointed out by the act as a convenient place, yet the auditors were not restricted to that locality. The provision, in my opi-

(*a*) 7 Dowl. & Ryl. 373; 4 Barn. & Cressw. 395.

nion, is not merely *directory*, and for this reason, that the vestry is the place where by law all parish business ought to be transacted. Where was the vestry? It was in the place designated by law, namely, the board-room, and there the accounts must be audited, unless by the act authority is given to audit them somewhere else. The board-room of the Vestry is the vestry itself; and as the parish accounts ought to be audited at a place which the law has appointed for parish meetings, this provision cannot be considered as *directory*.

This mandamus requires the trustees to meet at such time and place, &c.—(His lordship here read the remaining words of the mandamus.) Even supposing that these words, "according to the directions of the said act," are to be considered as overriding the whole of the command respecting the auditing of the accounts, and as indicating that in auditing the accounts the parties should proceed according to the provisions of the statute, still you can only make the command good by presuming that the auditors will act upon it, according to the directions of the statute. If the statute has given a particular place where the thing is to be done, you cannot, *according to the statute*, say they are to attend *at such time and place as the auditors may appoint*.

It seems to me that these words, "at such time and place," &c. override the whole, and if the mandamus is bad as to that part, it is bad as to the whole, because it is *there* that the trustees are to bring their accounts and give the information. This mandamus must therefore be quashed.

PATTESON, J.—I am entirely of the same opinion upon the second objection, though really at first sight it may seem to be a small objection, and one which in this case would be of very little importance; yet I am afraid of the *principle*, because although it is only in one thing, yet that thing clearly exceeds the power in the act; and if we say that we will nevertheless award a peremptory mandamus, we are

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in fact moulding the writ of mandamus, which we have no right to do. We may mould the *rule* for a mandamus, but not the *writ* itself.

WILLIAMS, J. concurred.

Mandamus quashed.

BONE *v.* DAWE and others.

A plaintiff who obtains a verdict in an action of assault and battery, is intitled to full costs, if a battery be admitted on the record,— although the judge certify (under 43 *Eliz.* c. 6,) that the damages recovered do not amount to 40*s.*, and does not certify (under 22 & 23 *Car.* 2, c. 9, s. 136,) that an assault and battery were sufficiently proved.

As where to trespass for an assault and battery and false imprisonment, the defendant pleads a *justification*, and the plaintiff replies *excess*, upon which issue is tendered and taken.

TRESPASS. The declaration alleged that the defendants assaulted and beat, and wrongfully imprisoned the plaintiff, and tore his clothes. Pleas: First, Not Guilty. Secondly: Son assault demesne. Replication to the second plea, that the defendants, of their own wrong, detained the plaintiff a greater length of time, and in a more violent manner, than was necessary. The rejoinder traversed the excess. At the trial, before *Gurney*, B., at the Cornwall spring assizes, 1835, the jury found a verdict for the plaintiff, with 1*s.* damages. The learned judge certified, under 43 *Eliz.* c. 6, that the damages did not amount to 40*s.* In the following term, *Crowder* obtained a rule calling on the defendants to shew cause why the master should not tax the plaintiff his full costs, notwithstanding the certificate.

Erle and *W. C. Rowe* now shewed cause. The plaintiff is not entitled to his full costs. Assuming that this was an action for a battery, and therefore not within the statute of the 43 *Eliz.* c. 6, s. 2 (*a*), and that the judge had no power to certify, by force of that statute, to deprive the plaintiff of his costs, yet as there is no certificate under the 22 & 23 *Car.* 2, c. 9, s. 136, which deprives a plaintiff of costs "in

(*a*) Which is expressly limited to personal actions "not being for any title or interest of land, nor concerning the freehold or inheritance of any lands, *nor for any battery.*"

all actions of trespass, assault and battery, and other personal actions wherein the judge, at the trial of the cause, *shall not find and certify* under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the declaration, was chiefly in question," where the damages found are under 40*s*., the plaintiff, by force of the latter statute, is deprived of his full costs. [*Patteson*, J. Here is no traverse of the plea of *son assault demesne* in this case.] There is not; but there is a new assignment of excess, both in length of time, and degree of violence. It is true that several cases on this subject tend to lead to the inference, that where there is a special plea to the battery, the plaintiff is entitled to full costs; but that doctrine has been considerably limited, and the cases are distinguishable from the present. *Wiffin* v. *Kincard* (*a*) was an action for assault and battery, and false imprisonment; a verdict was found for the plaintiff, and the judge certified under 43 *Eliz*. c. 6, that the damages amounted to 1*s*. only. It was contended on the part of the defendants, that the evidence proved a battery, and that if that was proved, the judge could not certify. The Court agreed, that whether the evidence amounted to proof of battery or not, it would not prevent the judge from certifying under 43 *Eliz*.; and that the plaintiff was not intitled to full costs for the assault and battery, unless the judge certified under 22 & 23 *Car*. 2, c. 9. [*Patteson*, J. There is a special plea in this case which *admits* the battery, and is equivalent to a certificate under the statute of *Charles*.] In *Stead* v. *Gamble* (*b*), there was a special plea on the record, yet a certificate was held to be necessary, in order to give the plaintiff full costs. [*Patteson*, J. In *Stead* v. *Gamble*, which was trespass quare clausum fregit, the general issue, and a special plea justifying a part of the trespass, were pleaded. The issue on the special plea was found for the *defendant*. The Court held, that they could not look at the facts stated in that plea to

(*a*) 2 New Rep. 471. (*b*) 7 East, 329.

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ascertain whether the plaintiff's freehold could come in question, and that as the freehold might have come in question under the general issue, a certificate was necessary to give the plaintiff full costs]. This is an analogous case. Here, the justification is admitted, and there is no special plea as to the excess. It is therefore the same as if not guilty had been pleaded. This is distinguishable from *Smith* v. *Edge* (*a*). There, the general issue was pleaded with a plea justifying the whole of the assault and battery. [*Littledale*, J. referred to *Mears* v. *Greenaway* (*b*), and *Lockwood* v. *Stannard* (*c*)]. *Wiffin* v. *Kincard* is confirmed in *Briggs* v. *Bowgin* (*d*).

But this case is within the statute of *Elizabeth*, since all that the parties went to try was the *excess*. Then is the power of certifying taken away by the statute of *Charles* 2? No case has decided, that where there is a justification, it ousts the judge of the power to certify under the statute of *Elizabeth*. On the contrary, in *Broadbent* v. *Woodhead* (*e*) it was held, that the judge may certify under the statute of *Elizabeth*, though there be pleas of justification. The statute of *Charles* was framed, as appears from the preamble, in *aid* of the statute of *Elizabeth*. It does not, consequently, abrogate the power given to the judge by the statute of *Elizabeth*. *Littlewood* v. *Wilkinson* (*f*), and *Pyeburn* v. *Gibson* (*g*), shew that the object of the statute of *Elizabeth* was to confine suits of a trifling nature to inferior courts. Applying that test to this case, it is manifest that this is such a case as ought not to have been tried in a superior court; and the case is consequently within the provisions of the statute of *Elizabeth*.

Crowder, who was to have argued in support of the rule, was stopped by the Court.

(*a*) 6 T. R. 562.
(*b*) 1 H. Bla. 291.
(*c*) 5 T. R. 482.
(*d*) 2 Bingh. 333; 9 B. Moore, 628.
(*e*) 2 Tidd's Practice, 953, 9th ed.
(*f*) 9 Price, 314.
(*g*) 8 B. Moore, 450.

Lord DENMAN, C. J.—It is quite clear that the learned judge had no power to certify under the statute of *Elizabeth*. It is impossible not to see that this is an action for *battery*. It is within the *exception* in that statute, and not within the general rule.

LITTLEDALE, J.—All cases of battery are exempted from the operation of the statute of *Elizabeth*. The only question is, whether this is within the statute of *Charles*. By that statute the plaintiff is not to have his full costs, unless the judge certify that a battery has been proved. In this case there is no *certificate*, but by the special plea the battery is *admitted*. Excess is replied. Still the battery is admitted; and many cases shew, that where a battery is admitted on the record, there is no necessity for a certificate under the statute of *Charles*. The plaintiff is, therefore, in this case, intitled to his costs.

PATTESON, J.—I do not mean to go into an examination of all the cases on the subject, on the present occasion, although I think they are not inconsistent. *Wiffin* v. *Kincard* is distinguishable. In that case there were two causes of action. Here there is one charge of an assault and battery, and there is a replication of excess. The issue is, whether or not the battery was excessive. The battery is therefore admitted. This admission does away with the necessity of a certificate under the statute of *Charles*, and the case clearly not being within the statute of *Elizabeth*, the plaintiff is intitled to his full costs.

WILLIAMS, J.—The only doubt I have entertained was, whether a certificate under the statute of *Charles* was not required to give the plaintiff his costs. That want is supplied by the admission on the record of a battery.

Rule absolute.

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A *custom* for the inhabitant landholders of a parish to dig or take from closes adjoining the sea-shore, sand which had been from time to time drifted from the shore, and carried by the wind from the shore into and deposited upon such closes, is bad: First, because the sand when deposited becomes a part of the soil of the closes, and therefore the custom is for taking a *profit in alieno solo*. Secondly, for *uncertainty*, it being impossible to distinguish between the original soil of the closes, and the sand from all time drifted upon it.

Quære, whether such a right might be claimed by *prescription*(*b*).

TRESPASS for breaking and entering the plaintiff's close, in the parish of Perranzabuloe (*a*), in the county of Cornwall, and with feet, in walking, treading down the grass and herbage there growing, and with horses and carts crushing the grass &c. of the plaintiff, there growing, and tearing up the earth and soil of the said close, and with the said horses and carts passing and repassing, in, upon, and over the said close; and also then and there with shovels &c., raising and digging divers large quantities of sand from and out of the said close, and the said sand so raised and dug, then and there taking and carrying away and converting to his own use.

Tenth plea: that the close in which &c., is contiguous and next adjoining to the sea, and that the said sand was and is sand which had been and was from time to time drifted and carried by the violence of the wind from and off the sea shore aforesaid, and into and upon the close in which &c., and there deposited and left; and that within the parish of St. Erme, in the same county aforesaid, there is, and from time immemorial has been, *an ancient and laudable custom* for the inhabitants of that parish, occupying messuages and lands there, *to enter upon the close in which &c., every year, at all seasonable times of the year, and at their free will and pleasure to collect, get, take, and carry away, from and out of the said close, reasonable quantities of all such sand as had been and was so drifted &c., for the purpose of manuring the lands so in the occupation of such inhabitants*, doing no unnecessary damage thereby; and that the trespasses complained of were committed in the exercise of the alleged customary right. The replication to this plea traversed the custom.

(*a*) Called also Perran-Sands, (Perran-in-sabulo.)

(*b*) The second objection seems to be equally fatal to the prescription as to the custom.

An issue joined upon this traverse was found for the defendant, at the trial before *Williams*, B., at the Cornwall spring assizes, 1834. It having been objected at the trial, that the plea was bad in law, the point was reserved, and *Follett*, in the ensuing term, obtained a rule to shew cause why judgment should not be entered for the plaintiff, with 1*s*. damages, *non obstante veredicto*; or why the verdict should not be set aside, and a verdict entered for the plaintiff with 1*s*. damages (*a*).

Crowder and *Butt* shewed cause. The objection which was taken to this plea is, that the right claimed in it is a right to take a profit in alieno solo, and that such right cannot be by *custom*. It cannot be denied that where an interest or profit-a-prender is claimed in another man's soil, it must be alleged by way of *prescription*, and not by *custom*; *Gateward's* case (*b*), *Grimstead* v. *Marlowe* (*c*): but there may be a custom for a *right of way* over another man's soil, or to *turn a plough*, to *play at cricket*, or to *dance* upon another man's soil. So a custom to *dry nets* on the lands of another, or to dig the lands of others in order *to make bulwarks* in time of danger, is good. These and many other instances may be found collected in *Vin. Abr.* tit. Custom and Customs (passim). The only thing which a man may not have, by custom, in the soil of another, is a profit-a-prender. The Court will not extend this rule beyond its strict limits. A principal reason given for that rule is, that a *customary* right cannot be released; *Grimstead* v. *Marlowe* (*d*), 1 *Wms. Saunders*, 341, n. (*e*); a reason which will apply with equal force to the other cases which have been mentioned. Then, is the right claimed by this plea precisely within this strict technical rule? It

(*a*) For the defendant, a rule to shew cause why there should not be a new trial, in case the Court should make this rule absolute, was obtained. *Vide post.*

(*b*) 6 Co. Rep. 59 b.
(*c*) 4 T. R. 717.
(*d*) 4 T. R. 719.
(*e*) Note to *Mellor* v. *Spateman*.

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is submitted that it is *not*. The right claimed is not to *take* any thing out of the *soil* of another, but to take a *chattel* which is distinct from the *soil*. It appears by the plea, that the *sand* in question is sand *drifted* from the sea-shore, which adjoins the locus in quo, and deposited there by accident. [*Littledale*, J. The sand is no part of the *sea-shore*. It seems to me impossible that such a custom as your plea claims, can exist. It is impossible to ascertain what sand is drifted from the *sea-shore*, and what is a part of the plaintiff's soil.] There is no difficulty, in point of fact, in distinguishing between the sea sand and the common soil. This sand is a fine impalpable sand, peculiar to the coasts of Devon and Cornwall, which is sometimes drifted inland from the shore (between high and low water marks) in large quantities. It is serviceable as manure, and by act of parliament, as well as by custom, may be taken for manure by the inhabitants of the neighbouring country. It is not stated in the declaration, that the defendant took sand which was a *portion of the plaintiff's soil*, and by the plea it is expressly alleged that the sand was drifted from the sea-shore upon the locus in quo. The custom here claimed much resembles a custom to *take water* in the close of another, which is a good custom. In *Selby* v. *Robinson* (*a*), a custom for *poor and indigent landholders* living in A., to *cut and carry away rotten boughs and branches* in a chase in A., though held bad on the ground that the description of *persons entitled* was too vague, was assumed to be good in other respects. In *Rowe* v. *Brenton* (*b*), a custom that any tinner may bound and inclose land that now is or anciently was waste, or that was anciently bounded, was held good. Now whether the land be waste or ancient inclosed lands, can make no difference with reference to the question now under consideration, for in either case the soil is the soil of another. In *Stile* v. *Butts* (*c*), a cus-

(*a*) 2 T. R. 758.

(*b*) 3 Mann. & Ryl. 213, 214, and more fully, 497, (*a*); *S. C.* 7 Barn. & Cressw. 737.

(*c*) Cro. Eliz. 434.

tom was stated for every tenant and inhabitant in Brookbanck, to dig, haul, and carry away clay, in Brookbanck Green, for his necessary use. No objection was made to this custom. In *Oxenden* v. *Palmer* (*a*), Lord *Tenterden*, C. J., treated as valid, a custom for all persons residing within a parish to take *shingle* from the sea-beach, for the purpose of repairing the highways of the parish. A custom to take sea-weed on the shore for manure, and to follow it upon the adjoining land, is good. The custom in this case is very similar. The defendant had a right to take this sand on the coast, and might follow it as a *chattel* on the adjoining land. Indeed little more is claimed by this plea than a *right of way* to the place where the *chattel* lies.

Sir *W. Follett* contrà. It has been, without proper foundation, assumed throughout the argument for the defendant, that he had a customary right to take the sand on the sea-shore. Under the *act of parliament* alluded to he has that right, but not by *custom*. The whole soil in this part of the county is composed of sand, supposed to have been at some time drifted from the sea-shore, and of the same description as that now found between high and low water marks. [Lord *Denman*, C. J. This does not appear upon the plea.] The custom is bad for *uncertainty* in the subject of it. It cannot be possible to distinguish with certainty between the soil of the close and the sand of the sea-shore drifted upon the close. But in reality the sand is not merely *intermingled* with or undistinguishable from the soil of the close, but is the soil itself, and therefore the custom alleged is a custom for taking a *profit in alieno solo*, which is admitted to be bad in law. In *Viner's Abr.* the distinction between *custom* and *prescription* is frequently overlooked, and many of the claims stated to be good by *custom*, can be so only by *prescription*.

(*a*) 2 Barn. & Adol. 236.

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Lord DENMAN, C. J. (stopping Sir *W. Follett.*)—It is perfectly clear that this is not a good custom. The sand is a part of the soil, and inseparable from it. There is no conceivable process by which the *sand* and the *soil* can be distinguished. But even supposing there were any such process, some *limit* to the claim should appear. It cannot be right to take away sand drifted *from all time.*

LITTLEDALE, J.—It is a decisive objection to this custom, that it is quite uncertain what you are to take. We know that in many parts of the kingdom, the lands adjoining the sea-shore have the same kind of soil as the shore itself; and it often occurs that the adjoining land, for a considerable distance, has never been inclosed at all, and it is utterly impossible to distinguish the sand from the soil. But, independently of that, I think that if the sand is blown over a hedge into a field, it becomes a *part* of the *soil.* The soil of a field is often composed, in a great measure, of matter brought there artificially. The defendant claims a right to take this very sand,—which he denies to be a part of the soil of the *plaintiff*'s close,—for the express purpose of using it as manure, and thus making it a part of the soil of his *own* land.

PATTESON, J.—I am of the same opinion. I do not think it necessary to enter into the discussion upon the distinction between *custom* and *prescription.* It is clear law that there cannot be a *custom* to take a *profit* in alieno solo. It is clear that the right claimed here is to *take a profit,* for it is to take sand for manure. Then is it *in alieno solo?* I think that the sand is clearly a part of the soil. Sand or mud lodged in a close becomes a part of the close. It may be easy, where there is a *mound* of sand, to distinguish between the drifted sand and the original soil, but here the claim is to take *all.* But independently of this consideration, I think that the custom is bad, for the reason that

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when the sand was blown up or lodged upon the close, it became a part of the close.

WILLIAMS, J.—At the trial I thought the custom bad. It is uncertain, perfectly so. It is an absurd and indefinite custom. There is no means of distinguishing between the drifted sand and the original soil. I do not see how, in point of *fact*, any more than *in law*, there can be any criterion for distinguishing them.

Rule absolute.

In re FENTON, Gent., one, &c.

CAMPBELL, A. G., applied, on the behalf of the Receiver General of the Stamp Duties, for a rule, calling upon *Fenton*, an attorney of this Court, to shew cause why he should not pay over the sum of 49*l.* 9*s.* 5*d.*, with costs, to the Receiver General of Stamp Duties.

The Court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the *client* to whom the money is due.

No rule will be granted at the instance of a third party.

Some time since, a Mrs. *Nicholson* died, leaving Colonel *Soder* her executor and residuary legatee. Colonel *Soder* employed *Fenton* to prove the will and to pay the legacy duty, and subsequently died intestate, and without effects. Amongst his papers was found an account, in *Fenton's* handwriting, in which he debited himself with a sum of money received on account of Mrs. *Nicholson's* estate, and took credit for 49*l.* 9*s.* 5*d.*, the amount of legacy duty, as *paid* by him at the stamp office, but which sum had not, in fact, been paid.

Campbell, A. G., in support of his application, urged, that the mode of proceeding which he proposed, was a much more lenient proceeding towards *Fenton* than filing an information.

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Lord DENMAN, C. J.—This is not a case in which we ought to grant a rule, since it is not an application on the part of a client against his attorney, but an application at the instance of a third party.

LITTLEDALE, J.—The rule applied for ought not, in my opinion, to be granted. The Court have been in the habit of exercising a summary jurisdiction over attorneys where they have misconducted themselves in that character, and an application is made by the client to pay over money to him. In this case the application is to pay money over to a third party.

PATTESON, J., and WILLIAMS, J., concurred.

Rule refused.

MASON *v.* LEE.

To intitle a plaintiff to a distringas upon a writ of summons not personally served, it is not sufficient to shew that unsuccessful attempts were made to serve the defendant at his residence on three occasions, and that on the *second* a copy of the writ was left, and referred to on the third.

The copy of the writ must be left on the third visit.

SHEE moved for a distringas upon a writ of summons, which had not been served personally. A clerk to the plaintiff's attorney had called three times at the defendant's residence, but had been unable to see him. On the occasion of the *second* visit, a copy of the writ was left with the defendant's servant, and at the third visit the copy left on the preceding occasion was referred to, and the object of the visits explained.

Cur. adv. vult.

On the following day, Lord DENMAN, C. J., said—We have considered of this matter, and we think that there ought not to be any rule. The copy should be left at the *third* visit.

Rule refused.

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In the matter of PARSONS.

The Court will not admit an attorney on the last day of the term, upon a notice of application posted on the third day of that term.

So, although sufficient notice had been posted during the whole of a preceding term.

ON the 15th of June, in this term, *Byles* moved that Mr. *Parsons* might, on the last day of this term, be admitted an attorney of this Court. It appeared upon his affidavit, that Mr. *Parsons* had duly served articles with an attorney; that the usual notice of application for admission had been posted upon the *third* day of this term, and that a similar notice had been posted up during the whole of Trinity term, 1834, but that no application had been made in pursuance of such notice. Mr. *Parsons* further swore, that he believed that no one had any objection to him, or intended to oppose his application for admission, and that as an advantageous opening for practice existed, it would be very detrimental to his interests if, by the refusal of this application, he should be thrown over to the last day of next Michaelmas term. *Byles* referred the Court to a case in which, as he had been informed by Mr. *Steer*, a party had been admitted whose notice had been posted on the *second* day of the term. [*Patteson*, J. Next term we shall have a similar application where the notice has been posted on the *fourth* day; after that it will be the *fifth* day, then the *sixth*,—and all will be cases of *hardship*.]

Lord DENMAN, C. J.—Perhaps we have gone too far already. We certainly must go no further.

Rule refused.

The KING *v.* The Inhabitants of the Parish of MABE, CORNWALL.

The proviso in 37 *Geo.* 3, c. 111, exempting from the stamp duties thereby imposed, every indenture of apprenticeship "where *a sum or value not exceeding* 10*l.* shall be given or contracted with or in relation to the apprentice," does not extend to an indenture where *no* consideration passes.

UPON appeal against an order of two justices of the borough of Penryn, for the removal of *Nicholas Halvosso*,

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his wife and children, from Penryn to Mabe, the Court of Quarter Sessions for Cornwall made an order, which stated as follows:

It appeared to this Court, that by indenture duly executed, bearing date 16th October, 1799, and since lost, *Nicholas Halvosso*, then being about fifteen years of age, was stated to be bound apprentice, with the consent of his surviving parent, to *Thomas Bolitho*, of the parish of St. Gluvias, tanner, until he should attain the age of twenty-one; that no sum of money or value was given or contracted for with or in relation to the said apprentice; that the said indenture was stamped with the several stamps impressed on indentures of that class by the several statutes prior to 37 *Geo.* 3, c. 111, amounting to 10*s.*; but this Court considering it liable, under that act, to an additional stamp duty of 10*s.*, held that it ought not to be received in evidence. And upon hearing what could be alleged and proved on either side, it is ordered and adjudged by this Court, that the said order be, and the same is hereby, on the merits, confirmed, subject to the opinion of the Court of King's Bench (*a*).

This order of sessions was brought up by certiorari, and a rule nisi to quash it was granted.

Bere now argued in support of the order of sessions. The simple question in this case is, whether the indenture was liable to the additional duty of 10*s.*, imposed by sect. 1 of 37 *Geo.* 3, c. 111, (which was in force at the time of executing this indenture,) or whether it is within the *exception* created by sect. 3. Sect. 1 imposes the additional duty, generally, upon every deed which should be made after 1st August, 1797. Sect. 3 provides, "that nothing in that act contained shall be construed to extend to (inter

(*a*) *Patteson*, J., upon the case being read, observed, that no settlement of the pauper in the respondent parish was stated. Upon this it was agreed by the counsel, that the case should be considered as amended in this respect.

alia) any indenture of apprenticeship *where a sum or value, not exceeding* 10*l.*, *shall be given or contracted* with or in relation to the apprentice." Here, *no* sum or value whatever was given or contracted: Consequently this indenture is not within the exception. It will be urged, contrà, that the spirit and intention of the act was to exempt all indentures where there should be *no* consideration, as well as those where there should be a consideration under 10*l.*; but the words of the statute will not, without distortion, bear this construction; and the judges of this Court have lately said, that they will rather adhere to the plain meaning of the words of a statute, than put a forced construction upon them, for the purpose of giving effect to the *supposed* spirit and intention. The legislature appears to have subsequently *discovered*, that by the words of this act they had imposed a higher duty where there was a total absence of consideration, than where there was a small consideration; for in the subsequent acts, (48 *Geo.* 3, c. 149, and 55 *Geo.* 3, c. 184,) it is expressly provided, that in cases where there is *no* consideration, the same duty only shall be paid as in the cases where the consideration is of the lowest specified amount. In *Wood* v. *Norton* (*a*), this Court thought themselves bound to put a *strict* construction upon the Stamp Act of 55 *Geo.* 3, and to require a stamp in a case clearly not within the *spirit and intention* of the act. There, a mortgage and a bond were given to secure the same sum of money, and were executed at the same time, but did not bear the *same date*. It was held, that the bond was not,—within the meaning of 55 *Geo.* 3, c. 184, sched. part 1,—a bond "given as a security for the payment of any sum of money, in part secured by a mortgage or other instrument, *bearing even date with such bond*."

Crowder, contrà. Upon a *reasonable* construction of the language of this proviso, it is submitted that it is clear that the deed is within the exemption. The fair meaning is, that

(*a*) 4 Mann. & Ryl. 673; 9 Barn. & Cressw. 885.

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the additional duty shall not be imposed in any case where there shall not be a consideration exceeding 10*l.*,—which will include this case. Such a technical and unfair construction as is now sought to be put upon the proviso, cannot have been contemplated by the legislature; and on the other hand, there can be no doubt that the legislature meant to use the words in the same sense as if they had said, "where *no sum exceeding* 10*l.*" &c. This is a clause exempting from a burthen, and therefore the Court must carry the intention into effect, if they possibly can do so. In many acts of parliament the word "or" has been construed to mean "and,"(*a*)—et vice versâ,—in order to give effect to the spirit and intention of the act. *Wood* v. *Norton* affords no criterion by which the present case can be decided.

Lord DENMAN, C. J.—This is an evident *mistake* in the act, but we have no power to correct a mistake of the legislature. According to the only construction which we can put on this proviso, it operates to exempt only money contracts, (or contracts for other valuable consideration,) of a certain limited amount.

The other judges concurring,

Order of Sessions confirmed.

(*a*) SEU, pro *et*, conjunctivâ, occurrit passim, in verbo *Ducange*.

WENHAM *v.* DOWNES.

Where a judgment irregularly signed by the plaintiff is set aside with costs, it is competent to a judge to stay the proceedings until such costs are paid.

And it is no ground for rescinding such order, that the defendant has since issued an attachment for such costs.

But *semble*, that if the plaintiff were actually taken upon such attachment, the Court would relieve him from the stay of proceedings.

RICHARDS moved to discharge an order of *Williams*, J., giving the defendant time to rejoin until three days after the plaintiff should have purged himself of his

contempt in non-payment of certain costs. The plaintiff had irregularly signed judgment in this action, and the judgment so signed was set aside with costs. These costs not being duly paid, the above order of *Williams*, J., was made. Subsequently an attachment had issued against the plaintiff for his contempt, but had not been executed.

Richards argued. The party has a sufficient remedy in the attachment. [*Littledale*, J. The learned judge had probably some good reason for ordering that the action should not be proceeded in until these costs were paid. The effect of the order is to *stay the proceedings* until the costs are paid.] There does not appear to be any case in which it has been held that the mere non-payment of the costs, where a judgment has been set aside with costs, is a ground for staying the proceedings. [*Littledale*, J. The judge certainly had a *right* to make the order, and probably had good *reason* for doing so.] The attachment has issued *since* the making of the order. When the order was applied for, there was good reason for making it, because then it appeared merely that the judgment had been set aside with costs, which costs were unpaid. An *attachment* is the ordinary, and it is a sufficient, mode of proceeding. As the matter stands now, the defendant has a cumulative remedy for these costs;—the attachment, under which the plaintiff is *liable* to be taken,—and also the stay of proceedings. [*Littledale*, J. If the plaintiff is *taken*, and is in custody under the attachment, then you may apply to have this order discharged. At present I do not think that you have laid sufficient ground.]

By the COURT.—No sufficient reason for discharging this order has been shewn to us. If any steps are taken to enforce the remedy by attachment, then the plaintiff may apply. At present the defendant has not received any of the fruits of his attachment.

Rule refused.

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The KING *v.* The LEEDS and SELBY RAILWAY COMPANY.

By a local act, a company are empowered to take lands,—with an exception of *mines*,—for a railway, paying the value of the lands and making compensation for damage sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement or assessed by a jury:—Mines to be worked by the owner, *so that no damage be thereby done* to the railway,—and in case of damage the owner to repair it at his own expense, or the Company to repair in case of neglect or refusal, and recover the expenses from the owner. The owner of land taken by the Company, and for which compensation is paid, cannot, upon afterwards discovering that a mine, to which he is entitled, cannot be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment.

A Rule was obtained, calling upon the Leeds and Selby Railway Company to shew cause why a mandamus should not issue, commanding them to issue their warrant to the Sheriff of Yorkshire, requiring him to impanel, &c. a jury to assess the amount of compensation to be paid to Sir *Charles Ibbetson*, bart., for damages incurred in the execution of the act of 11 *Geo.* 4, c. lix.

By that act (sect. 3) the Company were empowered to take lands for the purpose of making a railway from Leeds to the river Ouse, in the parish of Selby, in the West Riding, making satisfaction in the manner thereinafter directed.

By sect. 30 it was provided that nothing in that act contained should extend to give the Company any *mines* or any *coals*, &c. under any land purchased by them under the provisions of the act, but that all such mines, coals, &c. should be deemed to be excepted out of the purchase of such lands, and might be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said Company, as if the act had not passed, *so that no damage or obstruction were thereby done or should occur to or in such railway or works.* The section then provided, that in case of such damage or obstruction being done or occurring, it should be repaired or removed by and at the expense of the owner or lessee of such mines, coals, &c., and that if the same should not be forthwith done, the Company might repair or remove such damage or ob-

struction, and recover the expenses from the owner of lessee.

Sect. 31 enacted, that the owners or occupiers of lands through which the railway or other works were intended to be made, might accept compensation for the value of such lands or their interests therein, and also compensation for damages sustained by reason of the execution of any of the works by that act authorized, and also by reason of the dividing of such lands, and also for and on account of any damage, loss, or inconvenience which might be sustained by such parties by reason of the execution of any of the powers of that act,—in such gross sums as should be agreed upon between such owners and the Company; and that in case of disagreement as to the amount of such purchase-money, satisfaction, or compensation, the same respectively, or any of them, concerning which the owners and Company should not agree, should be ascertained and settled by a jury.

Sect. 32 authorized and required the Company, in case of disagreement, from time to time to issue their warrant to the sheriff for the impanelling &c. of a jury,—who were to assess the sum or sums of money to be paid for the purchase of such lands, and also a separate sum for satisfaction or compensation, either for the damages which before that time should have been done or sustained in the execution of that act, or for subsequent temporary, perpetual, or recurring damage, the cause or occasion of which should have been in part only obviated, removed or repaired by the Company, or which could not or would not be further obviated, &c. by them.

Sect. 40 enacted, that the Company should not be obliged, nor should a jury be allowed, to take notice of any complaint for any loss or injury *sustained, or supposed or discovered to be sustained,* in consequence of the execution of any of the powers of the act, unless notice in writing, stating the particulars of such loss or injury, and the amount of compensation claimed in respect thereof, should have

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been given within six months after the time of such supposed loss or injury having been sustained, or the doing or committing thereof should have ceased.

The line of the intended railway passed through lands of Sir *Charles Ibbetson;* and land necessary for the purposes of the railway was purchased of him at the price of 900*l.* A seam of coal under this land, which ran across the line of the railway, had been worked up to that line, when it appeared that the mine could not be worked under the railway without endangering the railway, unless arches were constructed under it, at an expense exceeding the probable value of the coal. Within six months from the discovery of this fact, notice of a claim for compensation was given by Sir *Charles Ibbetson* to the Company.

Cresswell shewed cause. Sir *Charles Ibbetson* is not entitled to compensation for the risk of letting in or injuring the railway by the working of his mines. The 30th section provides that the original owner of the lands shall, notwithstanding the purchase of them by the Company, be deemed to be the owner of the mines beneath, and shall be at liberty to work them, provided he does no injury to the railway, &c.; such injury, if done, to be repaired *at his expense.* The object of the present motion is to make the Company indemnify the owner of the mines against the risk of having to repair the railway under the provisions of this clause. This section contemplates that the original owner of the land, who is to have the benefit of the mines under the railway, shall bear the whole burthen of repairing the railway or works which may chance to sustain injury by reason of the working of the mines. The applicant relies upon the 31st clause, but he cannot be said to have sustained any damage, loss, or inconvenience by reason of the execution of any of the powers of the act; and even were that otherwise, upon the terms of that section taken alone, the express provision of the 30th clause is a clear answer to the present application.

Sir *F. Pollock* and *Milner*, contrà. The applicant requires compensation for injury *sustained*, not (as it has been treated) an indemnity against a *risk*. The provisions of the 30th section, excepting the mines out of the purchase by the Company, is *in ease* of the Company,—in order to prevent their being called upon to give speculative compensation in respect of minerals which might not exist. Taking the 30th and 31st sections together, it is submitted that the meaning is this,—that the Company shall pay for the land and give compensation in the first instance for any damages which may *then* be capable of being ascertained, but not *speculative* compensation for supposed mines underneath the land; and that whenever, at any subsequent period, it shall palpably appear that the owner sustains injury in respect of mines, &c. underneath, by reason of the railway, compensation shall be made by the Company. As soon as the owner is stopped in the working of his mines, so that he cannot proceed without injury to the railway, *then* he sustains damage, loss, or inconvenience, by reason of the execution of the powers of the act. Sect. 40 shews clearly that the legislature did not contemplate that all the compensation to which a party could be entitled should be assessed *at once*. When this land was purchased, it was impossible to know whether the railway would cause any impediment to the working of the mines, and it would have been a *hardship on the Company* to have compelled them to make compensation for the merely *possible* injury. [*Patteson*, J. What effect do you give to the latter part of the 30th section? According to your argument, if the owners of the soil work their mines so as to injure the railway, they must repair the damage done, and then compel the Company to give them compensation.] The different sections may be reconciled. The provision in the 30th section is introduced for the purpose of preventing the owner of the sub-soil from recklessly working his mine in such a way as to injure the railway, and thereby to affect the interests of the *public*, who use it. It does not follow from this pro-

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vision that the owner is not to have compensation for the loss and inconvenience which he sustains by reason of his being *prevented* from working his mine. It would be a mere play upon words to say that the original owner of the soil shall have the coals, and be entitled to work the mines as if the act had not passed, when by reason of the existence of the railroad he cannot have them except at an expense more than equal to their value.

Lord DENMAN, C. J.—I do not think that the party can have this compensation. I see nothing in the act which gives a right to *future* compensation in respect of a damage, loss, or inconvenience, not anticipated at the time when the original compensation is paid.

LITTLEDALE, J.—This claim ought to have been brought forward at the time of the original assessment of or agreement for compensation. It is true that if this had been done, the party might have had the compensation, and never, after all, have sustained the injury; but this cannot be helped. The *whole* compensation must be assessed in the first instance.

PATTESON, J.—The effect of this enactment may be very injurious; but it is contrary to the plain and obvious meaning of the 30th section that the party shall now have compensation for the loss sustained by not being able to work his mine. The plain meaning of that section is, that if the party cannot work his mine without injury to the railroad, he must abstain from working it.

Rule discharged (*a*).

(*a*) *Vide Rudder* v. *Price*, 1 H. Bla. 547; Com. Dig. *tit.* Action (F).

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ASSUMPSIT to recover the deposit and a moiety of the auction duty on a sale of certain leasehold premises by auction, and also damages for the expenses of investigating the title, and endeavouring to procure the completion of the purchase. The first count of the declaration stated, that the defendants caused to be put up for sale by auction certain premises, represented by them to consist of a leasehold public-house called "*The Aberdeen Arms*," held for a term of which twenty-three years were unexpired, at the low rent of 55*l.*, and comprising (inter alia) *a small yard and wash-house*, and subject to the following, amongst other conditions:—That the highest bidder should be the purchaser; that the auction duty should be paid in equal moieties by the vendor and purchaser; that the purchaser should immediately pay into the hands of the auctioneer a deposit of 20*l.* per cent. on the purchase-money, and a moiety of the auction duty, and sign an agreement for payment of the residue on or before 25th June, 1832, at which time the purchase was to be completed; that within one week from the day of the sale, the vendors should, at their own expense, deliver to the purchaser an abstract of the title; and that, upon payment of the remainder of the purchase-money at the time specified, the vendors should execute, or cause to be executed, an assignment of the lease to the purchaser. Averment: that the plaintiff became

Upon a sale of lands by auction, a written contract indorsed on the conditions of sale, is signed by the purchaser only: letters are subsequently written by the vendor to the purchaser's attorney, distinctly referring to the contract, and insisting upon the completion of the purchase. This contract and the letters, together, constitute a sufficient note or memorandum within the statute of frauds, to enable the vendee to sue the vendor for the expenses of investigating the title, upon such title being found to be defective.

And where, upon such contract, it does not appear upon the face of it, or by reference, *of whom* the property is purchased, letters, written by persons in the character of vendors, may be connected with the contract for the purpose of supplying this defect.

Premises are sold by auction upon this condition (amongst others): "If any *mistake* be made in the description of the property, or any other *error* whatever shall appear in the particulars of the estate, such mistake or error shall not annul or vitiate the sale, but a compensation or equivalent shall be settled by two referees, or their umpire, and the decision of the referees or umpire (as the case may be), shall be final." The particulars of sale described the premises as a leasehold public-house, comprising (inter alia) a small yard and wash-house, held for a term of years, at the rent of 55*l.* It appeared that the yard and wash-house, which were *essential* to the occupation of the premises, were not included in the lease, but were held from year to year, at an additional rent.—Held, that the misdescription was not the subject of compensation within the condition,—and that the sale was *void* by reason of such misdescription.

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the purchaser of the premises so represented for 94*l.* 10*s.*, and paid 18*l.* 18*s.* as a deposit, and 2*l.* 7*s.* 8*d.*, being the moiety of the auction duty. Then followed a statement of mutual promises by the plaintiff and defendants, to perform all things by them respectively to be performed respecting the said public-house and premises, and that the plaintiff was ready to perform his promise, and to pay the remainder of the purchase-money. Breach:—in non-delivery of an abstract of the title.

The second count stated as a breach that the defendants had not, at the time of making these promises, a leasehold public-house held for a term, of which twenty-three years were unexpired, at the low rent of 55*l.*, and comprising (inter alia) *a small yard and wash-house*; nor had the defendants the said premises at the rent of 55*l.*, but the same was at the rent of 65*l.*

The third count stated as a breach that the defendants had not, at the time of making the contract, authority to sell the public-house and premises, nor were the defendants possessed of the term of and in the same absolutely and without condition, nor were they possessed of the said term of twenty-three years in the several premises, or any like term therein, at the rent of 55*l.*

The declaration also contained the common money counts.

Plea: non assumpsit.

At the trial, before *Patteson*, J., at the Middlesex sittings after Easter term, 1834, the following facts appeared:

The defendants caused to be put up for sale by auction certain premises, described in the printed particulars and conditions of sale, as stated in the declaration, and subject to the conditions therein mentioned, and also to the two which follow:—Eighth condition: That if the purchaser shall neglect or refuse to comply with the preceding conditions, his deposit shall be forfeited to the vendor, who shall be at liberty to re-sell; any deficiency and expenses to be paid by the purchaser. Ninth condition: If any *mistake* be made in the *description* of the property, or any

other *error* whatever shall appear in the particulars of the estate, such mistake or error shall not annul or vitiate the sale, but a compensation or equivalent shall be settled by two referees or their umpire; and the decision of the referees or their umpire (as the case may be) shall be final.

The plaintiff was the highest bidder, and became the purchaser at 94*l.* 10*s.*, and paid to *Ricards*, the auctioneer, 2*l.* 7*s.* 3*d.*, being the moiety of the auction duty, and also a deposit of 18*l.* 18*s.*

On the back of the particulars and conditions of sale was written the following memorandum:

"I hereby acknowledge myself the purchaser of the property described in the annexed particular, at the price of 94*l.* 10*s.*, and I hereby undertake and agree to perform my part of the conditions therein specified; in furtherance of which, I have this day paid 18*l.* 18*s.*, being the amount of the deposit, as also the sum of 2*l.* 7*s.* 3*d.*, being my moiety of the government duty. As witness my hand, this 11th day of June, 1832. *Isaac Dobell.*

"Witness, *E. M. Sheppard.*"

The names of the defendants, who were attorneys in partnership, did not appear, except at the foot of the particulars of sale, where they were named merely as persons from whom further particulars might be obtained.

The defendants delivered to *Wimburn* and Co., the plaintiff's attorneys, an abstract of title, from which it appeared that the public-house, *without the yard and wash-house*, was held at the rent of 55*l.*, for a term of which twenty-three years were unexpired, and of which the defendants were the assigns.

20th June, 1832, *Wimburn* and Co. wrote to the defendants as follows:—"We are instructed to inform you, that Mr. *Dobell*, in consequence of your not having shewn a good title to the premises offered for sale on the 11th instant, as described in the particulars, declines taking to the property; and we have to request that you will direct Mr. *Ricards* to return the deposit and duty received by him of Mr. *Dobell*, and that you will remit to us the

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expenses incurred in this matter, or make some arrangement for the payment thereof."

2d July, 1832, the defendant *Hutchinson*, who had previously had some conversation with *Wimburn* and Co. on the subject, wrote to them as follows: "I beg to acquaint you that we are advised by counsel that the reasonable and just *compensation* to which Mr. *Dobell* is intitled, on our securing him a lease of the yard and wash-house adjoining the Aberdeen Arms, is an abatement of one-eighth of the purchase-money (94*l.* 10*s.*) bid by him for the premises—say 11*l.* 16*s.* If he is willing to accede to this, the business may be completed without further delay. If not, we beg to be understood as now calling upon Mr. *Dobell* to appoint a referee, to meet one on our part, and settle the compensation or abatement to which he is intitled. If he declines this, we presume you will accept Chancery process against him, at our suit."

11th July, 1832, *Wimburn* and Co. received the following note: "Messrs. *Hutchinson* and *Holdsworth* have to request to be favoured with a decisive answer on the part of Mr. *Dobell*, in the course of this week, or they must presume he refuses to complete his *purchase*, and proceed accordingly."

20th Sept. 1832, *Wimburn* and Co. wrote to defendants as follows: "Without prejudice to our client's rights, (if the offer now made should not be accepted,) we propose that the contract be rescinded, and that you return to us, for Mr. *Dobell*, the amount of the deposit and auction duty, 21*l.* 5*s.* 3*d.*"

On the same day the defendants replied: "On considering the terms proposed by you, of rescinding *this contract*, we cannot accede thereto, inasmuch as we are advised that we have full power to compel the fulfilment of it, subject to the abatement of about one-seventh of the premium, viz. 13*l.* 10*s.*, in respect of the larger rent to which the premises appear to be liable, than was stated in the particulars of sale, viz. 63*l.* instead of 55*l.* Whereas, if we were to release your client on the terms proposed, of returning his deposit, we find that we should lose a quarter's

rent, 16*l.* 2*s.* 6*d.*, and outgoings in respect of the house, and charge of man keeping possession, 18*l.* 4*s.* Unless, therefore, Mr. *Dobell* consents to give up the deposit, we shall forthwith, after shewing our title to the premises contracted to be sold, call on him to nominate a referee to ascertain the amount of the allowance to be made to him in respect of the increased rent; and in default of his doing so, within a reasonable time, we shall, according to the conditions of sale, treat the deposit as forfeited, and proceed to a re-sale of the premises, On the other hand, if the defendant consents to give up the deposit, we will release him."

The signatures to the receipt of the above, and some others letters not material to be stated, were admitted.

The yard and wash-house were held, with the public-house, of the same landlord, under a yearly tenancy, and at the rent of 10*l.*, and were *essential* to the occupation of the house.

25th Sept. 1832, *Wimburn* and Co. received, and immediately returned, an abstract of a lease of the yard and wash-house, at a rent of 8*l.*, and for a term to expire at the same time as the term in the public-house. This deed was not executed until after the 25th June, 1832, the day named in the conditions for completion of the title.

The action was commenced in October, 1832.

It was objected by the defendants, that there was no written contract binding upon them within the statute of frauds,—and that the defect of title was not such as could warrant a refusal to complete the purchase, but was the subject of *compensation*, within the terms of the ninth condition. Under the direction of the learned judge, who, however, reserved the points made, the jury found a verdict for the plaintiff—damages 52*l.* 5*s.* 11*d.* *F. Kelly*, in the following term, obtained a rule nisi for a nonsuit, or to reduce the damages.

R. V. Richards (in Easter term, 1835,) shewed cause.

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The contract signed by the plaintiff and the letters of the defendant, taken in connection, make a valid contract binding on both parties. It is not necessary, in order to satisfy the statute of frauds, that the signature of a party should be upon the contract itself. If there be a contract containing the necessary particulars, and that contract be distinctly referred to and adopted in a letter written and signed by the party, the requisitions of the statute are satisfied. Here is a long correspondence, in which the defendants sufficiently refer to the contract, and throughout the whole of which they are insisting upon their supposed rights *under the contract*. They cannot, after this, come forward and deny that there is any valid contract. *Jackson* v. *Lowe* (*a*), *Saunderson* v. *Jackson* (*b*), *Allen* v. *Bennet* (*c*).

First point: Statute of frauds.

Second point: Compensation clause.

At the trial it was established, beyond dispute, that the yard and wash-house were *essential* to the occupation of the public-house; and therefore this is not such a case as is contemplated and provided for by the ninth condition of sale. Where a portion of that which is contracted to be sold, is *essential to the enjoyment of the remainder*, the want of title in the vendor, as to that portion, makes the whole contract *void*. Thus, suppose that in this case it had been found that there had not been any *cellars*, as described by the particulars, it could not be denied that the contract would have been void. Here, all the witnesses agreed that the house could not be occupied without this yard and wash-house; *Sherwood* v. *Robins* (*d*). [*Patteson*, J. I was not asked to put it to the jury, whether they were essential to the occupation. That certainly was established by the evidence.] It was not disputed on the other side. The nature of the ninth condition is such as to make the question in this case the same as would have arisen upon a bill in equity for a *specific performance*, which it is the invariable rule to dismiss where the vendor fails in shewing a title to a portion of the thing sold, *essential* to the enjoyment of

(*a*) 1 Bingh. 9.
(*b*) 2 Bos. & Pul. 238.
(*c*) 3 Taunt. 169.
(*d*) 3 Carr. & Payne, 339.

remainder. The lease of the yard &c., which was obtained after the day on which the contract should have been completed, came too late.

F. Kelly and *C. Cooper*, contrà. There is not in this case any agreement, or note or memorandum of an agreement, in writing, signed by the party sought to be charged, or his authorized agent. There are conflicting decisions as to how far a subsequent correspondence, relating to a contract not signed by the party sought to be charged by it, can satisfy the statute. All that the letters amount to in this case, is an admission in writing of the existence of a contract which the party *supposed* to be valid. This might be primâ facie evidence of a valid contract; but here the contract itself is before the Court, and appears, upon examination, to be invalid. [Lord *Denman*, C. J. Suppose that a *parol* contract is entered into, and that the parties afterwards write letters adopting that contract.] If the verbal contract were *recited* in the letters, so as to put the Court in possession of the *terms* of it, then the statute would be satisfied. But in such case the letters themselves would *form* the contract. There is no case in which it has been held that when a contract is signed by one party and not by the other, and such other party afterwards admits the contract, the statute is satisfied. The admission is only *evidence* of the contract. The *best* evidence of the contract is the instrument itself. Here, the contract itself was defective in two respects; first, that it was not *signed* by the vendor; and secondly, that it does not even appear *who* was the vendor. These defects cannot be supplied by parol evidence, or by other writings which require parol evidence to connect them with the contract. In *Richards* v. *Porter* (*a*), *A.* sent to *B.* an invoice of hops, in which invoice *A.* was described as seller and *B.* as purchaser. *B.* afterwards wrote to *A.* as follows:—"The hops I First point.

(*a*) 9 Dowl. & Ryl. 497; 6 Barn. & Cress. 437.

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bought of *A.* are not yet arrived: I received the invoice. The last were longer on the road than they ought to have been. However, if they do not arrive in a few days, I must get some elsewhere." It was held that the invoice and the letter, taken together, did *not* constitute a sufficient note or memorandum in writing to satisfy the statute of frauds. It was there assumed, that if the invoice had been signed by both parties, the statute would have been satisfied, for otherwise the question would not have arisen. In *Boydell* v. *Drummond* (*a*) it was held that a party's signature in a book, entitled "Shakspeare subscribers, their signatures," and not referring to a printed prospectus, which contained the terms of the contract, (and which was delivered at the time to the subscribers to the Boydell Shakspeare,) could not be connected with the prospectus so as to take the case out of the statute; as such connection could only be established by parol evidence. In *Goss* v. *Lord Nugent* (*b*) the Court excluded parol evidence with great strictness. The second defect, namely, the not appearing upon the contract *of whom* the property was purchased, is as fatal as that of the absence of the signature of the party sought to be charged, and, like that, is incapable of being supplied by parol evidence, or by letters which require parol evidence to connect them with the contract. *Champion* v. *Plummer* (*c*) (of which the marginal note is not quite correct) was an action by the vendee against the vendor; and it was held that a note signed by the vendor, but in which it did not appear who was the vendee, was not sufficient to satisfy the statute. *Wheeler* v. *Collier* (*d*) is much like the present case. There, on the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the owner's name, and was not signed by either him or the auctioneer,—Lord

(*a*) 11 East, 142.

(*b*) *Ante*, ii. 28; 5 Barn. & Adol. 58. And see *Smith* v. *Surman*, 4 M. & R. 455; 9 B. & C. 561.

(*c*) 1 New Rep. 252.

(*d*) Moody & Malkin, 122.

Tenterden appeared to consider that the seller could not maintain an action for the non-completion of the contract.

II. The language of the condition respecting compensation seems to be such as to include *all* errors, whether in matters *essential* or otherwise. There is no ground for imputing *design* in the misdescription, and therefore it is a *mistake* or *error*. Second point.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, delivered the judgment of the Court as follows:

This was an action of assumpsit, brought by the vendee against the vendors of a public-house, on a sale by auction to recover the deposit and damages for investigating the title, which turned out to be defective. Two questions arose:—First, Whether there was a *contract* binding upon the defendants within the statute of frauds: Secondly, whether the defect of title was the subject of *compensation* within the terms of the ninth condition of sale.

As to the first question, the facts were, that the plaintiff had signed a written contract on the back of printed conditions of sale, in which conditions the names of the vendors appeared as *solicitors* only, and not as *vendors*. Nothing was signed by the vendors or by the auctioneer. An abstract of title was sent, on the face of which it appeared that a yard, which was proved to be an essential part of the premises, was held from year to year only, at a separate rent of 8*l.* in addition to a rent of 55*l.*, at which the conditions described the whole premises to be held for a term of twenty-one years. The plaintiff's attorney wrote, rejecting the title, and demanding a return of the deposit. The defendants wrote in answer; and several letters passed between the parties;—the letters of the defendants insisting that the defect was matter of compensation within *the conditions of sale;* calling on the plaintiff to perform *the* contract; speaking of "*our* sale to Mr. *Dobell,*" and mentioning the premises by name and the price contracted for; and First point.

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threatening to file a bill for a specific performance. These letters were signed by one of the defendants (they being attorneys) for both. They now contend that there is *no contract* binding them within the statute of frauds. The cases on this subject are not, at first sight, uniform; but on examination it will be found that they establish this principle,—that where a contract or note in writing exists, which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them. Here, the letters of the defendants refer expressly and distinctly to the conditions of sale; and they had in their hands or the hands of their auctioneer, at that very time, the conditions of sale signed by the plaintiff, to which reference is made; so that no parol evidence of any kind was requisite to shew a contract binding both parties, except evidence of the handwriting of each, which must be adduced in all cases. In the case of *Boydell* v. *Drummond* (*a*), the book signed by the defendant *did not refer* to any prospectus or contract. In *Richards* v. *Porter* (*b*), the letter of the buyer, referring to the invoice sent by the seller, expressly *repudiated* the contract. In *Champion* v. *Plummer* (*c*), a memorandum, signed by the seller only, was held insufficient to charge even him, because *the buyer's name did not appear* on it, or on any other paper to which it referred. In *Wheeler* v. *Collier* (*d*), the same circumstance occurred, namely, that *the seller's name did not appear* on the conditions of sale signed by the buyer; and Lord *Tenterden* thought that the seller could not sue; but the case was decided on another point. On the other hand, the cases of *Saunderson* v. *Jackson* (*e*), *Allen* v. *Bennet* (*f*), and *Jackson* v. *Lowe* (*g*), shew clearly that a *subsequent*

(*a*) 11 East, 142.
(*b*) 9 Dowl. & Ryl. 497; *S. C.* per nom. *Richardson* v. *Porter*, 6 Barn. & Cressw. 437; *ante*, 257.
(*c*) 1 N. R. 252.
(*d*) Mood. & Malk. 123.
(*e*) 2 B. & P. 238.
(*f*) 3 Taunt. 169.
(*g*) 1 Bingh. 9; 7 B. Moore, 219.

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letter may be a sufficient note to bind the writer, where the requisites above are found, even where it is written after a *dispute* has arisen.

For these reasons, we are of opinion that there is a sufficient contract in this case within the statute of frauds.

Second point.

As to the second question, we are of opinion that the yard being proved to be an essential part of the premises, and being held only from year to year, instead of for a term of twenty-one years, as stated in the particulars, and at a separate rent, the defect was clearly not matter of compensation.

Rule discharged.

The KING *v.* Sir OSWALD MOSLEY, Bart., Lord of the Manor of Manchester.

A fine of 300*l.*, for not serving an office, is excessive, where the highest previous fine was 100*l.*, and was found sufficient to produce an acceptance of the office.

So, although since the last refusal the office has become more burthensome, and the number of persons qualified to serve has much diminished.

A Rule was obtained in last term, calling upon Sir *Oswald Mosley*, lord of the manor of Manchester, to shew cause why a writ of certiorari should not issue, directed to him, to remove into this Court a certain record of the proceedings in the court-leet of the said manor, relative to the appointment of *Ralph Turner* as one of the constables of the said manor, in the month of October last, or the fines imposed upon him in consequence of his refusal to serve in the said office.

The following facts were stated upon the affidavits in support of and in opposition to the rule:

A man may be liable to serve the office of constable in several constablewicks; but if chosen constable in two constablewicks for the same year, acceptance of the first appointment will excuse his non-acceptance of the second, *semble*.

A person who occupies and is rated for a *warehouse*, and occupies *lodgings*, in which he sleeps four or five nights in every week, within the same constablewick, is liable to be chosen constable of such constablewick, *semble* (*a*).

(*a*) This would be a sufficient *residence* within the Parliamentary Reform Act (2 *Will.* 4, cap. 45, sect. 27,) and a sufficient *inhabitancy* within the Municipal Reform Act (5 & 6 *Will.* 4, cap. 76, sect. 9;) but the party would not be thereby qualified as a *householder*, as required by the latter statute.

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The juries of the court-leet of the manor of Manchester annually elect the municipal officers of the manor, the principal of whom are the boroughreeve and the two constables. The government of the township of Manchester, (which is co-extensive with the manor,) is vested principally in the two constables. The leet juries have generally elected, as boroughreeve and constables, men of wealth and influence in the town. Persons elected have frequently manifested great reluctance to accept and be sworn into these offices; considerable expense and great inconvenience and loss of time being the usual consequence of the due execution of the offices. When the certificates commonly called Tyburn Tickets, were transferable by law, parties frequently purchased these certificates at a price varying from 200*l.* to 500*l.*, principally with a view to obtain an exemption from serving the office of constable. In 1808 the leet jury elected *John Drinkwater*, Esq. and *Peter Ewart*, Esq., then being respectively inhabitants of the manor, to be constables of the manor. Mr. *Drinkwater* refused to be sworn in, and was fined 20*l.*, which he paid to the lord of the manor. Mr. *Ewart* also having refused to be sworn in, was fined 100*l.*, and paid that sum; but of this sum the lord afterwards remitted one half. At the same court-leet the jury elected a Mr. *Potter*, an inhabitant of the manor, to serve the office of constable. He, however, refused to execute the duties of the office, and was fined 100*l.*, which he paid. Since that time the population of Manchester and the adjoining townships has very greatly increased, and the office of constable has in consequence become more important to the public, and more burthensome to the officer. Many of the dwelling-houses in the chief streets of Manchester, which twenty or twenty-five years ago were inhabited by the wealthy merchants and other individuals, are now used as warehouses &c., and many of such merchants &c., now reside in the neighbouring townships, and are thereby become liable to serve the office of constable in such town-

ships, although accustomed daily to frequent their warehouses &c. in Manchester. At a court-leet for the manor of Manchester, held 6th October, 1834, the jurors returned *Ralph Turner*, merchant, as a fit and proper person to be one of the constables of the manor for the ensuing year; and Mr. *Turner* was afterwards summoned to the court, attended, and was required to take upon himself the office of constable, and to take the oaths for the due execution of the office. This, however, he refused to do; and the steward, in consequence, imposed upon him a fine of 300*l.* The ground of the refusal of Mr. *Turner* to accept the office was a belief, founded on the following circumstances, that he was not liable to serve the office:—Mr. *Turner* has resided for many years with his mother, at Carter Place, near Haslingden, distant from Manchester about seventeen miles. He has there in some respects a separate establishment, for which he pays rates and taxes. He and his brother jointly rent of their mother the farms and lands belonging to Carter Place, and have a large manufacturing establishment in the township of Haslingden, where also they occupy a considerable farm, of which they are joint proprietors. For property occupied by them in Haslingden they pay a rent of 700*l.* a year, and they are assessed to and pay the rates and taxes in respect of all the property occupied by them in Haslingden. Mr. *Ralph Turner* and his brother are subject to, and actually do perform suit and service at the court-leet of Haslingden, in respect of the property so occupied by them in that township; and when from any cause they have not attended at such leet, a fine has been imposed on them, and paid. The brothers jointly occupy a warehouse in Manchester, at which they sell the goods manufactured by them at Haslingden; which warehouse is open every day for that purpose, and for which they are rated and pay rates. Mr. *Ralph Turner* is in the habit of coming into Manchester from Haslingden every Monday afternoon or Tuesday morning, and of remaining there till the Saturday afternoon, for the purpose of

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attending to his business. He does not however, nor does any person, sleep at the warehouse, nor has he any servant in Manchester, or establishment there other than the warehouse; but he occupies lodgings at a weekly rent, and there sleeps when in Manchester. It appeared upon the affidavit of Mr. *Turner*, that he objected to the proceedings of the court-leet on two grounds; first, that he was *not liable* to be elected; and secondly, that even if he were so, the *fine was excessive.* The deputy steward, in an affidavit sworn contrà, stated his belief, that unless a considerable fine is imposed upon fit persons who, being elected, refuse to serve the office of constable, much difficulty will occur in procuring the services of fit and proper persons actually resident within the town, and that many fit persons would rather pay a considerable sum of money, by way of fine, than undergo the labour and inconvenience attendant upon a due execution of the office.

Sir *F. Pollock* and *Wightman*, now shewed cause.

On neither of the two grounds suggested ought this rule to be made absolute.

First point: Liability to serve the office.

The circumstance of Mr. *Turner*'s being liable, supposing that to be the fact, to suit and service in the township of Haslingden, does not exempt him from liability to be elected constable of Manchester. If the fact of being *liable* to be elected constable elsewhere were a sufficient excuse, a party liable to be appointed by the courts-leet of two manors might refuse to serve in *either* manor. It may be denied that Mr. *Turner* is a resiant in Haslingden, but it cannot be denied that he is so in Manchester. In *Rex* v. *Adlard* (*a*), in which all the authorities are collected, and which will be relied on contrà, it was held, that a person who lived in the parish of A., and occupied for the purposes of his trade premises in the parish of B., for which he was rated and paid the rates, but in which neither he nor any one ever slept, was not liable to serve the office of

(*a*) 7 Dowl. & Ryl. 340; 4 Barn. & Cressw. 772.

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constable in B. This case is very different; for here the party does in general sleep five nights a-week in Manchester.

Then with regard to the amount of the fine, it is submitted, that under the circumstances it was not greater than those circumstances rendered necessary. Nearly thirty years ago, a fine of 100*l.* was found inadequate, and such a change of circumstances has since taken place as makes it reasonable to suppose that a fine of 300*l.* is not more than sufficient for the purpose of securing, at the present day, the services of proper persons. Second point: Amount of fine.

Campbell, A. G. and *Colquhoun*, contrà. It is quite clear that Mr. *Turner* is a resiant at Haslingden, (distant seventeen miles from Manchester). It is impossible for him to perform the duties of constable both there and at Manchester. If the Court decide that Mr. *Turner* is liable to serve the office of constable in both places, they will in effect say that he is liable to be *punished* in each place for not performing duties which his circumstances disable him from performing. A man can be constable in one constablewick only; and therefore if Mr. *Turner* is shewn to be liable to serve in Haslingden, he is exempt in Manchester. In Haslingden, Mr. *Turner* occupies buildings and lands, and has an establishment for residence, in respect of which he is rated. In Manchester he has no dwelling-house for which he is rated—no establishment of any kind. In *Rex* v. *Adlard*, the defendant occupied and was rated for premises in the parish in which he was elected constable, and occasionally passed the night at work in those premises, yet he was held not to be liable. In that case, Lord *Tenterden* observed, that it was not material whether the defendant passed the night *at work* or *asleep* (*a*). That case was decided on the ground that if a party was not a rated inhabitant within the constablewick, he was not liable to serve the office of constable. If Mr. *Turner* were in the habit of sleeping *every* night at *lodgings* First point.

(*a*) This does not appear in either of the reports of this case, but was stated by the Attorney-General, from his own recollection.

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at Manchester, he would not be a rated inhabitant. [*Littledale*, J. In *Cook* v. *Stubbs* (*a*) it was said that the rule is, that every man ought to be within a leet, and none can be of two leets. Suppose Mr. *Turner* had a dwelling-house and establishment at Manchester, and also at Haslingden, what then?] A difficulty would arise, which does not occur in the present case. [*Littledale*, J. Suppose he had a house at Haslingden, and that he slept every night at Manchester in lodgings, would he not then be liable? He would be liable to be summoned to the court-leet.] As a resiant he might be summoned to the leet, but he would not be "*idoneus*" to serve the office of constable. It is very important that a constable should be a householder, in order that he may be readily found in case of a sudden affray.

Second point. Every fine ought to be reasonable. *Com Dig.* Leet, (M. 5). A fine of 40*l.* is the highest anywhere to be found in the books. In this same manor a fine of 100*l.* was imposed in 1808, and appears to have been sufficient, as no fines from that time until now are stated to have been imposed for refusing to serve this office. No ground has been made for raising the fine at once to three times the amount of that last imposed. In the case mentioned as having occurred in 1808, there would appear to have been actual *contumacy*, as the parties do not seem to have disputed their *liability*. Here, no contumacy is imputed, but on the contrary, a *bonâ fide* doubt of his liability appears to have been the motive for Mr. *Turner*'s refusal to serve the office.

Lord DENMAN, C. J.— I think that this rule must be made absolute; not that I entertain any great doubt as to whether Mr. *Turner* is a *resiant*, so as to be liable to be called upon to serve this office, (though the point *may* certainly be open to doubt,) but because I think that the fine is clearly unreasonable. As 100*l.* was found to be a sufficient fine twenty-seven years ago, there is no reason why a

(*a*) Cro. Jac. 583.

fine of triple the amount should be imposed now. The *Court* are to adjudge whether a fine is reasonable; and it is impossible not to look with considerable jealousy at these fines, when we consider by whom they are received.

LITTLEDALE, J.—I think that Mr. *Turner* is a resiant within the jurisdiction of the court-leet of Manchester. I do not think he could exempt himself from serving the office of constable by living in a *lodging*. He is one whose *situation* in life makes him a proper person to be elected to this office. Perhaps if Mr. *Turner* had been actually chosen constable of Haslingden for the same year, he might have been discharged from being constable of Manchester. For in *Vin. Abr.* tit. Constable, (C.) pl. 8 (*a*), I find this passage: "*A.* was actually constable of the hundred of B., and lived at W. within the hundred of B., in Essex, and being chosen collector for the poor in Cornhill, in London, where he first lived, a writ of privilege was moved for and granted, 3 Keb. 627, pl. 16, *Rex* v. *Rice*;" and in the margin this is added, "2 *Jo.* 46, *Price's* case, *S. C.*; and he was discharged till his office of constableship should expire." But the fine is, I think, unreasonable. The largest fine ever before imposed was 100*l.* It is said to be difficult to get efficient persons to serve the office. This is very probable; for there is no corporation, and the government of the township is vested principally in the two constables, whose duties are burthensome. Still I think that a fine of 300*l.* is excessive. A smaller fine must first be tried, and if it is found to be insufficient, the fine may be increased, until perhaps it reaches the present amount.

PATTESON, J.—On the ground that the fine is excessive, I think that this rule should be made absolute. I wish it to be understood that the rule is not made absolute on the ground of non-liability. At the same time I confess, that, as at present advised, I see no reason why a man should

(*a*) 5 Vin. Abr. 432.

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not be *liable* to serve in several leets. If he had been already *chosen* constable for the ensuing year in one place, that might be an excuse for not serving in the other for the same year, for a man cannot duly serve that office in two places at the same time.

WILLIAMS, J. concurred.

Rule absolute.

NORRISH *v.* RICHARDS.

Where an action is removed from an inferior Court by writ, the cause is not *out of Court* till a year after the return of the writ by which the action is removed.

Where, therefore, a party arrested in a suit commenced in a borough Court, removes the cause by habeas corpus into the King's Bench, and no further proceedings are had, the suit is not determined, so as to support an action for a malicious arrest, until a year after the return of the habeas.

CASE for a malicious arrest. Plea—Not guilty (*a*).

At the trial before *Bosanquet*, J., at the Devon spring assizes, 1834, it appeared, that in an action brought by *Richards* against *Norrish*, in 1831, by plaint in the Borough Court of Tiverton, *Norrish* had been arrested upon an affidavit of debt for 20*l.*, upon a promissory note for that amount. Upon this note 15*l.* had been paid before

(*a*) This plea having been pleaded before Easter term, 1834, is not affected by the rule of Hilary term, 1834, by which it is ordered, that in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement. (*Ante*, vol. iii. 9.) Since Easter term, 1834, the termination of the former suit stated in the declaration, being no part of the breach of duty or wrongful act alleged to have been committed, but rather matter of inducement, would not be put in issue by the plea of not guilty. So, in case for the wrongful diversion of water, "not guilty" puts in issue the mere fact of the diversion, and not the matter of inducement, which gives to that fact its *wrongful* character. *Frankum* v. *Earl of Falmouth*, *ante*, iv. 330; 2 Adol. & Ellis, 452. And see *Stancliffe* v. *Hardwick*, 2 Crompt. Mees. & Rosc. 1.

Upon such a removal, the defendant is not bound to *accept a declaration* after the expiration of two terms; but the plaintiff cannot be non-prossed.

Quære—Whether an action for a malicious arrest will lie, where the cause in which the arrest was made has been removed from an inferior Court by habeas corpus by the defendant below.

Quære—Whether an action for a malicious arrest will lie, where the arrest is for 20*l.* due on a promissory note, and that promissory note has been paid, but more than 20*l.* is due upon a general account between the parties (*b*).

(*b*) And see *Beare* v. *Pinkus*, *ante*, iv. 846; *Nicholas* v. *Hoyter*, *ibid.* 882, as to costs, under 43 *Geo.* 3, c. 46.

the arrest; but there had been various dealings between the parties, and upon the balance of the accounts above 40*l.* was, at the time of the arrest, due to *Richards*. In February, 1832, the plaint was removed by *Norrish* into this Court by habeas corpus. In the same month bail was put in, but no declaration was filed or delivered within two terms next after that had been done. Search had been made at the proper office for the declaration, at the conclusion of Trinity term, 1832, and no declaration being found, the present action was then commenced. It was objected, on the part of the defendant, that there had been no determination of the former suit. The learned judge expressed no opinion upon this objection, but gave the defendant leave to move to enter a nonsuit on this point, in case there should be a verdict for the plaintiff. The defendant also objected that the action was not maintainable, by reason that the plaintiff was, at the time of the arrest, indebted to the defendant in a greater sum than 20*l.* The learned judge desired the jury to determine whether 15*l.* had been paid on the promissory note, and whether *Richards* wilfully made a false affidavit of debt, knowing at the time that that sum had been discharged. The jury found a verdict for the plaintiff, damages 30*l.* In Easter term, 1834, Sir *William Follett* obtained a rule nisi for a nonsuit or a new trial; first, on the ground that there was no determination of the former suit,—for which he cited *Pierce* v. *Street* (*a*), *Wilkinson* v. *Howell* (*b*), *Clack* v. *Dixon* (*c*), *Hutton* v. *Stroubridge* (*d*), *Bowerbank* v. *Walker* (*e*);—and secondly, on the ground that the learned judge misdirected the jury (*f*), in stating to them, that what was due from the plaintiff to

First point: Former action undetermined.

Second point: Misdirection.

(*a*) 3 Barn. & Adol. 397.
(*b*) 1 Mood. & Malk. 495.
(*c*) 3 Maule & Selw. 93.
(*d*) 1 Stra. 631.
(*e*) 2 Chitty Rep. 517.
(*f*) The learned judge did not *report* that he had stated this to the jury, but the defendant's counsel asserted that the jury had been so directed, and the argument proceeded on that assumption. The judgment, however, was upon a different point.

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the defendant at the time of the arrest was immaterial, if the promissory note had been paid. Against this rule,

Campbell, A. G. and *Erle*, now shewed cause. All the facts in the declaration were proved. The motion, therefore, should not have been for a nonsuit, but in arrest of judgment.

Plaintiff's first point: Determination of former suit.

The suit was determined; and it was determined in such a way as to authorize the plaintiff to bring the present action. It is stated in *Archbold's Practice* (*a*), that "after a cause has been removed into this Court by the defendant, the plaintiff may proceed in the action or not, at his discretion. There are no means of compelling him to do so." And it is further stated in the same treatise, "that the plaintiff must declare within the second term inclusive, after bail has been put in and perfected, otherwise the cause will be out of Court, and the defendant need not receive the declaration." The present action was not commenced until after two terms after the cause had been removed and bail put in. The defendant, *Norrish*, at the expiration of the two terms, had the option of determining the suit; and he has made his election by bringing the present action. The cases which were cited when this rule was obtained, are in accordance with the rule stated in *Archbold's Practice*. *Wilkinson* v. *Howell* is distinguishable from the present case, because there the action was put an end to by a stet processus. *Pierce* v. *Street* was an action for a malicious arrest, and it was proved that no declaration had been filed or delivered within a year after the return of the writ. It was objected that there was no evidence of the determination of the suit. The Court was of opinion that there was quite sufficient proof. Where the first suit is removed by habeas from an inferior Court, the plaintiff has two terms to declare. The period of two terms, therefore, in such case, is analogous to a period of one year, where the suit is commenced in the King's Bench. The principle of the rule, that the original suit must have been determined before the action for a

(*a*) Vol. 2, p. 816 and 817, 2d ed. by Chitty.

malicious arrest can be maintained, is, that the two actions may not go on concurrently, and that there may not be contradictory verdicts. As *Norrish* in this case could not be compelled to receive a declaration, and as by bringing the present action he signified his intention not to do so, there was no danger of the two suits proceeding at the same time.

Plaintiff's second point: Misdirection.

Norrish was arrested upon a promissory note for 20*l.* *Richards* contends, that although 15*l.* had been paid off on this promissory note, yet, as upon the settlement of accounts, a larger sum than 20*l.* was due from him, the arrest was justifiable. The learned judge left this to the jury: first, whether they believed that 15*l.* had been paid upon the promissory note; secondly, whether *Richards*, knowing that 15*l.* had been paid, wilfully made a false affidavit that 20*l.* was due on the promissory note. A verdict was returned for the plaintiff. By that verdict it must be taken to have been found, that *Richards* knew that 15*l.* had been paid on the promissory note; that he wilfully made a false affidavit; and that the general account was not in such a state as to enable him to swear that 20*l.* was due to him from the plaintiff. The defendant, therefore, must either have made the arrest from a malicious motive, or he must have made it upon an unliquidated account. In either view of the case this action is maintainable.

Sir *William Follett* and *Bere*, in support of the rule.—First, there was no evidence that the suit was determined. Secondly, there was not such a determination of the suit as to enable the plaintiff to maintain this action for a malicious arrest. Thirdly, the arrest was justifiable, as the amount for which the plaintiff was arrested was due from him to the defendant.

Defendant's first point: Fact of determination of former writ.

I. Where a cause has been removed from an inferior Court by habeas corpus cum causâ, and bail has been put in, and there has been no declaration, the suit is not determined until the expiration of a year. It is true, that after the period of two terms has elapsed, the defendant is not *bound* to accept

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a declaration; but the cause is not *out of Court* for a twelvemonth. There is no distinction in this respect as to causes removed by habeas and other cases. Whatever the practice was formerly, now, by Rule 35, H. T. 2 *W.* 4, a plaintiff is not out of Court until the expiration of a year after the process is returnable. Where a cause is removed by habeas from an inferior Court, the plaintiff is not *bound* to follow the defendant into the superior Court; and therefore the defendant cannot move for judgment of non-pros against him. For this, *Clack* v. *Dixon* (*a*) is an express authority. As there can be no *judgment* against the plaintiff until twelve months have expired, the *suit* is not at an end until the expiration of that period. [*Patteson*, J. I find it decided in the Common Pleas, that the plaintiff must have declared in the second term if ruled to declare; but if not ruled, then he had the vacation in which to declare; and if he did not then declare, he was actually out of Court, when, of course, there would be an end of the suit. In this Court the practice was different; the plaintiff had four terms, unless the defendant signed judgment of non-pros after the second term; *Worley* v. *Lee* (*b*). The rule of H. T. 2 *W.* 4, altered the practice in C. P.; and what is there to shew that it does not govern the practice of this Court with respect to causes removed from an inferior Court?]

Defendant's second point: Mode of determination.

II. The determination of the suit must be such as to furnish primâ facie evidence that the original action was without foundation; *Sinclair* v. *Eldred* (*c*), *Wilkinson* v. *Howell* (*d*). Supposing the suit of *Richards* v. *Norrish* to have been determined, still the *manner* of the determination was not such as to afford such primâ facie evidence.

Defendant's third point: Misdirection.

III. The learned judge misdirected the jury, in telling them that it was immaterial what sum was due upon the balance of accounts. The allegation in the declaration is, that the defendant arrested the plaintiff for 20*l.*, without having any reasonable or probable cause for arresting him *for that*

(*a*) 3 Maule & Selw. 93.
(*b*) 2 T. R. 112.
(*c*) 4 Taunt. 7.
(*d*) Mood. & Malk. 495.

amount. The evidence shewed, that the plaintiff was indebted to the defendant in more than 20*l*. [*Littledale*, J. The defendant was arrested for 20*l*., stated to be due *on a promissory note*.] Can it be said that the defendant had not, on that account, reasonable or probable cause to arrest for 20*l*. when it was proved that 20*l*. was due? Suppose an action be brought on a bill of exchange, and for the consideration given for the bill, and the affidavit of debt merely states that a sum of money was due upon the bill; and the plaintiff, at the trial, proves and recovers for the consideration. Would he be subject to an action for a malicious arrest? It must be so held, unless the learned judge misdirected the jury in this case.

Campbell, A. G. and *Erle* referred the Court, upon the first point, to *Barnes* v. *Jackson* (*a*), and *Worley* v. *Lee* (*b*).

Cur. adv. vult.

Lord DENMAN, C. J., in the course of the term, delivered the judgment of the Court as follows:—The question is, whether there ought to have been a nonsuit for want of proving that the former suit was determined. That suit was commenced August 1, 1832, in the Borough Court of Tiverton, and removed into this Court by habeas corpus in the February following. Search was made for a declaration to the end of Trinity term,—which did not extend to twelve months beyond the commencement of the original suit. The alleged termination of the suit was the default in declaring. No search for a declaration was made after Trinity term: consistently, therefore, with the evidence, the then plaintiff may have declared within the year from the return of the habeas corpus, and even from the commencement of the suit in the Court below.

Doubts may be raised, whether an action for a malicious arrest will lie where the defendant has removed the cause

(*a*) 1 New Cases, 545. (*b*) 2 T. R. 112.

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by habeas corpus. The point however is, whether the cause was out of Court, for want of a declaration, before the end of Trinity term. Previously to the case of *Worley* v. *Lee* (*a*), the practice both of the King's Bench and the Common Pleas, as to declaring, was this—the plaintiff was bound to declare before the end of the second term after the return of the writ: if he did not, the defendant (having ruled him to declare in the Common Pleas, but without such rule in the King's Bench) might sign judgment of non-pros: But if the defendant did not do so, still the plaintiff, after the vacation of the second term, at any rate, could not declare: The defendant was not bound to accept a declaration, nor could he rule the plaintiff to declare or sign judgment of non-pros, because the cause was out of Court.—*Tidd*, 422.

By the decisions in *Worley* v. *Lee*, and subsequent cases, the practice of this Court in actions by bill was altered, and if the defendant did not sign judgment of non-pros, the plaintiff was at liberty to declare at any time within a year,—and the cause was not considered out of Court till the end of the year from return of process; *Cooper* v. *Nias* (*b*). The old practice, however, remained in the Common Pleas, *Wynne* v. *Clarke* (*c*); and in this Court, as it should seem, in actions by original, and in actions removed hither by habeas corpus; not that there ever was anything peculiar in the practice of this Court, in actions removed by habeas corpus, but it was always necessary that the plaintiff should declare in those, as in all other cases prior to *Worley* v. *Lee*, before the end of the second term; with this difference, that the defendant could not ever sign judgment of non-pros in cases of removal by habeas corpus, because the plaintiff was not, nor is bound to follow the defendant into this Court. None of the cases, which shew what was the practice as to declaring after a habeas corpus, are later in date than the alteration which com-

(*a*) 2 T. R. 112.
(*b*) 3 Barn. & Ald. 272.
(*c*) 5 Taunt. 649.

menced with *Worley* v. *Lee*; but if there were any later cases they would not be material, for they would only shew that the practice continued after *Worley* v. *Lee*, in regard to all cases except actions by bill. By the rule 35 of Hilary term, 2 *W.* 4, it is provided, that "a plaintiff shall be deemed out of Court unless he declare *within one year* after the process is returnable." There is no *exception* in this rule, and we think that it applies to *all* cases, so that now, in all the Courts, whether the action be commenced by serviceable or bailable process, or removed hither by habeas corpus, the plaintiff may declare at any time before the end of a year from the return of the writ, unless the defendant sign judgment of non-pros for want of the plaintiff's declaring before the end of the second term. But in the case of a habeas corpus, the defendant cannot sign any such judgment, for the reason above given. It follows, that in such case the cause cannot be out of Court till the end of the year, and that, as in this case no search had been made for a declaration after the second term, there was no proof that the action was determined. The rule of Hilary term commenced on the first day of the following Easter term; and as this cause was removed in February, 1832, it is plainly within that rule.

Under these circumstances we are of opinion that the rule for a nonsuit must be made absolute.

Rule absolute. (*a*)

(*a*) The rules of H. T. 2 *W.* 4, (1832,) conclude as follows:— "And it is further ordered, that the above rules shall take effect on the first day of next Easter term."

It appears by the decision in the principal case, that as soon as these rules took effect, their operation extended over causes *then depending*, at whatever period they may have been *commenced*. And see *Paddon* v. *Bartlett*, in error, *post*.

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The provisions of 5 *Geo.* 4, c. 18, apply only to cases of *penalties* and *forfeitures*.

Therefore magistrates have no power, under that statute, to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 *Geo.* 2, c. 19, 31 *Geo.* 2, c. 11, and 4 *Geo.* 4, c. 34, to be due as wages.

In an information before magistrates, under 20 *Geo.* 2, c. 19, 31 *Geo.* 2, c. 11, and 4 *Geo.* 4, c. 34, for non-payment of wages, it should appear that the relation of master and servant in one of the occupations therein specified, existed between the debtor and the informant.

TRESPASS for assault and false imprisonment. Plea: not guilty.

By an order of *Patteson*, J., made by consent, the following case was stated for the opinion of the Court:

The plaintiff is a carpenter, living at Cheltenham. The defendants were at the time of the imprisonment, and still are, justices of the peace for Gloucestershire.

1st May, 1834, one *Willicombe* made an information and complaint in writing, upon oath, against the plaintiff, before the defendant *Cooper;* the material part of which was as follows:—"who saith that there is due to him from *Charles Wiles*, (the plaintiff,) *for wages for labour as a carpenter*, the sum of *2l. 2s. 8d.*, which he has neglected to pay."

In consequence of the above complaint, the plaintiff was summoned to appear and answer before the justices who might be sitting at the Public Office, Cheltenham, on 3d May then instant, which was the next day of petty sessions. The plaintiff appeared, in obedience to the summons, before the three defendants, who then were the sitting magistrates. *Willicombe* also appeared, and in the presence of the plaintiff and before the defendants made a statement upon oath, of which the following minute was made by the magistrates' clerk:—"*Aaron Willicombe*, sworn, saith—There is due to me from *Charles Wiles 2l. 2s. 8d. for wages as a journeyman carpenter at 14s. a week.*" The defendants then heard the statement of the plaintiff in answer to *Willicombe*'s complaint, which did not satisfy them that the wages were not due. The defendants therefore ordered and adjudged the plaintiff forthwith to pay *2l. 2s. 8d.* together with *4s. 6d.* costs. The plaintiff then stated that he could not pay those sums, and that he had not sufficient goods or chattels whereon the same could be levied by distress. Whereupon the defendants committed the plaintiff

to prison for two calendar months, unless the said sums of 2*l.* 2*s.* 8*d.* and 4*s.* 6*d.* should be sooner paid.

By the warrant of commitment,—after reciting that *Willicombe* had complained that the plaintiff had refused or neglected to pay unto him the sum of 2*l.* 2*s.* 8*d.*, *the wages justly due to him* from the plaintiff *for work and labour as a servant in the business of a carpenter*, duly performed by *Willicombe* for the plaintiff; that a summons had been issued, and that the plaintiff had appeared, but did not prove to them, the defendants, that the wages had been paid to *Willicombe*, and did not shew any just cause why the same should not be paid; that they, the defendants, had therefore, on 3d May, by writing under their hands, *adjudged*, determined and ordered that *the plaintiff should pay forthwith to A. Willicombe* 2*l.* 2*s.* 8*d.*, which appeared to the said justices to be just and reasonable to be paid by the plaintiff to *Willicombe*, and 4*s.* 6*d.* for costs, together 2*l.* 7*s.* 2*d.*; that on 3d May the plaintiff had due notice, &c. but neglected and refused to pay the same; and that it appeared to them, the justices, by the confession of the plaintiff, that he had not sufficient &c., whereon to levy &c., and that he had not paid the said sums or any part thereof;—it was, in pursuance of 5 *Geo.* 4, c. 18, commanded to the constable of Cheltenham, *to take the plaintiff*, and safely convey him to the House of Correction at Northleach, and deliver him to the keeper thereof; and to the keeper thereof to receive him into the said House of Correction, there to imprison him for two calendar months, unless the said sum of 2*l.* 7*s.* 2*d.* should be sooner paid, or until he should be discharged by due course of law.

The plaintiff remained in prison eight days, and then paid the money and was discharged.

The questions for the opinion of the Court are, First, Whether the defendants were empowered, by 20 *Geo.* 2, c. 19, and 4 *Geo.* 4, c. 34, to order and adjudge the plaintiff to pay the said sums of 2*l.* 2*s.* 8*d.* and 4*s.* 6*d.* in manner before mentioned: Secondly, Whether, upon non-payment and

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confession by the plaintiff that he had not sufficient, &c. whereon the same might be levied, the defendants were empowered, by 5 *Geo.* 4, c. 18, to commit him to prison, as above stated.

If the Court shall be of opinion in the affirmative thereof, then the plaintiff agrees that a judgment shall be entered against him by nolle prosequi or otherwise, as the Court may think fit; but if the Court shall be of a contrary opinion, then the defendants agree that judgment shall be entered against them by confession, for 5*l.* damages, or otherwise, as the Court may think fit.

First point: Authority of magistrates to *order payment* by the master.

Erle, for the plaintiff. The magistrates had no power, either by 20 *Geo.* 2, c. 19, or 4 *Geo.* 4, c. 34, to order the plaintiff to pay this sum of money. By 20 *Geo.* 2, c. 19, it is enacted, that disputes which shall arise between masters and servants in husbandry, who shall be hired for one year or longer, or which shall arise between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers, shall be heard and determined by a justice of the peace; and the justice is empowered to make an order for the payment of the wages, and in case of non-payment for twenty-one days, to levy the amount by distress and sale. By 4 *Geo.* 4, c. 34, s. 5, the justice is empowered to order payment of the amount of the wages which shall appear to be due to any servants in husbandry, artificers, labourers, or other person named in 20 *Geo.* 2, c. 19, or in 31 *Geo.* 2, c. 11, which was passed to empower justices to determine differences between masters and their servants in husbandry, though such servants should have been hired for less time than a year. It was also declared, by 4 *Geo.* 4, c. 34, that the order of justices for the payment of the wages should be final.

Sufficiency of information.

First. It does not appear in the *information* upon which the adjudication was founded that the complainant was one of the class of persons named in the acts of 20 *Geo.* 2 and 4 *Geo.* 4.

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Secondly. It does not appear upon the information, nor indeed by the evidence subsequently given, that the relation of master and servant existed between the complainant and the plaintiff. In all the cases on this subject, it has been held that the relation of master and servant must exist, and that otherwise the magistrates have no jurisdiction. *Hardy* v. *Ryle* (*a*), *Lancaster* v. *Greaves* (*b*), *Bramwell* v. *Penneck* (*c*). Relation of master and servant.

The magistrates had no authority to *commit* the party for non-payment of the sum adjudged to be due. This question arises on the 5 *Geo.* 4, c. 18, which is intituled "An act for the more effectual recovery of *penalties* before justices and magistrates on conviction of offenders, and for facilitating the execution of warrants by constables." Upon examination, it will be found that this statute applies only to *penalties* and *forfeitures*, and has no relation to *wages*. *Hutchinson* v. *Lowndes* (*d*) may be quoted contrà; but all that the Court decided in that case was, that a warrant of commitment must be *in writing*. There was no discussion upon the question whether the magistrates had the *power* to commit. Second point: Authority to *commit*.

R. V. Richards, for the defendants. The magistrates had authority under 20 *Geo.* 2, c. 19, and 4 *Geo.* 4, c. 34, to determine this matter. By those statutes, the magistrates are authorized to determine disputes between masters and servants in husbandry, and between masters and certain artificers. It was proved that the complainant was entitled to wages at 14*s.* a week, as a journeyman carpenter. [Lord *Denman*, C. J. Was any *contract* to serve shewn?] If a man be hired at 14*s.* a week, the common understanding is that he is to become the *servant* of the person who hires him, for a week at least, for 14*s.* [*Littledale*, J. The First point.

(*a*) 4 Mann. & Ryl. 295; *S. C.* 9 Barn. & Cressw. 603.

(*b*) 9 Barn. & Cressw. 628.

(*c*) 1 Mann. & Ryl. 409; *S. C.* 7 Barn. & Cressw. 536.

(*d*) *Ante*, vol. i. 674.

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information does not call the complainant a journeyman carpenter, and it is the *information* which gives the magistrates jurisdiction.] It was *proved* that the complainant was a journeyman carpenter; and there is nothing in the statutes to limit the power of the justices to such cases only, in which the information expressly shews that the case is within the jurisdiction of the justices.

Second point. If the magistrates had jurisdiction, *Hutchinson* v. *Lowndes* is an authority to shew that they had *power to commit* under the 5 *Geo.* 4, c. 18. The power of adjudication would be nugatory if there were no power to commit. It could not be the intention of the legislature that if the party refused to obey the order of the magistrates, and had no goods to be distrained, the complainant's only remedy should be by *indictment*.

Lord DENMAN, C. J.—*Hutchinson* v. *Lowndes* was only argued on one side. The Court were satisfied that *one* objection was fatal, and decided nothing with respect to the power to commit. The statute of 5 *Geo.* 4 applies only to *penalties*, and not to a case like the present, where a sum of money is adjudged to be *due for wages*.

LITTLEDALE, J.—It is quite clear that the statute of 5 *Geo.* 4 applies only to penalties and forfeitures.

To give the magistrates jurisdiction under 20 *Geo.* 2 and 4 *Geo.* 4, it should appear that the relation of master and servant existed. The *information* merely says that a sum of money is due from *Wiles* to the complainant *for wages as a carpenter*. The *evidence* is, that a sum of money is due from *Wiles* to the complainant *for wages as a journeyman carpenter at* 14*s. a week*. Two new facts are therefore added; that the complainant is a journeyman carpenter, and that he was engaged at 14*s.* a week. The *warrant* goes so far as to state that a sum of money was due from *Wiles* to the complainant for wages due to him for work and labour *as a servant* in the business of a carpenter.

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PATTESON, J.—The magistrates had no power, under the statute of 5 *Geo.* 4, to commit. It was *assumed*, in *Hutchinson* v. *Lowndes*, by the counsel who moved for the rule for a new trial, that such a power was given by that statute; but there was no *decision* to that effect by the Court.

WILLIAMS, J., concurred.

Judgment for the plaintiff.

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EJECTMENT for lands in Cambridgeshire, tried before *Vaughan*, B., at the Cambridge summer assizes, 1833, when a verdict was entered for the plaintiff, subject to the following case, and also subject to objections by either party as to the admissibility of any of the evidence adduced on the trial.

The lessor of the plaintiff claimed as eldest brother and heir of *Wm. Edwards*, deceased. The defendants admitted the heirship of the lessor of the plaintiff, and claimed under the will of *Wm. Edwards*. *Wm. Edwards*, by his will, in which he is described as *W. E.* "*of Leverington, in the Isle of Ely*," bequeathed 1400*l.* to the lessor of the plaintiff, and 100*l.* to his son; and after bequeathing several other specific and pecuniary legacies, he devised to *John Johnson*, "*of Leverington-Parsons-Drove, in the said Isle of Ely*," and others, (the defendants,) all and singular his messuages, lands, tenements, and hereditaments, of what tenure soever the same may be, situate, lying, and being in *Leverington aforesaid*, and in Wisbech-St. Peter's and Wisbech-St. Mary's, in the said Isle of Ely, or of any of them, habendum to them and their heirs, in trust,—during the minority of his great niece, *M. A. Peck*,—to set apart out

A. is seised of lands in the hamlet of Dale and of lands in the hamlet and chapelry of Sale, both townships being in the parish of Dale;—Whether, by a devise by *A.* of all his lands in Dale, the lands in Sale *necessarily* pass, *quære*.

As to the admissibility of certain documentary evidence, to shew that Sale has been treated as part of Dale, *quære*.

The register of county electors, in which Dale and Sale are treated as different parishes, is not admissible evidence for the purpose of disconnecting Dale from Sale.

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of the rents and profits 50*l.* annually for her education and maintenance, and to apply the residue of the rents and profits towards satisfaction of the legacies and annuities given by the will, and after satisfaction thereof to apply the residue as part of the residue of the personal estate; and upon further trust, upon the majority of *M. A. Peck*, to convey the said messuages &c. in Leverington, Wisbech-St. Peter's, and Wisbech-St. Mary's, to her use for life, remainder to her child or children in fee; but if she should die under age, then upon similar trusts for the benefit of the testator's great nephew, *W. A. Peck*, and his children. And he devised to the said trustees all his messuages in Newton and Tid-St. Giles, in the said Isle of Ely, upon similar trusts, except that the trusts in favour of *W. A. Peck* and his children, preceded those in favour of *M. A. Peck* and her children. And he directed that if his personal estate and the surplus rents of his said real estates should not be sufficient to pay all the legacies in full, then his trustees should retain all the said real estates, after the attainment of the respective majorities of *M. A. Peck* and *W. A. Peck*, until by and out of the rents and profits of the same, all the said legacies &c. should be fully paid. And he directed, that if both *M. A. Peck* and *W. A. Peck* should die under age, then his trustees should stand seised of all the said messuages &c. in Leverington, Wisbech-St. Peter's, Wisbech-St. Mary's, Newton, and Tid-St. Giles aforesaid, upon trust to sell the same, and to pay the proceeds to all the testator's nephews and nieces, who should be living at the death of the survivor of them the said *M. A. Peck* and *W. A. Peck*. And the testator bequeathed to his trustees all his live and dead stock, implements of husbandry, household furniture, and all other his goods, chattels, and personal estate, upon trust to sell the same, and to pay the proceeds and all ready money, and securities for money which he might have by him at the time of his death, to *M. A. Peck* and *W. A. Peck*, in equal shares, at twenty-one; and if either died before twenty-one, then to

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the survivor; and if both died before twenty-one, then to the nephews and nieces aforesaid.

In order to prove that the lands sought to be recovered in this action, which were 18½ acres, lying in *Leverington-Parsons-Drove*, passed to them under the devise of all the testator's messuages &c. in *Leverington*, the defendants gave the following evidence, almost the whole of which was objected to by the plaintiff's counsel.

Certain letters of composition, concerning the parish church of Leverington, with the annexed chapel of Parsons-Drove, dated 1397, and produced from the parish church of Leverington,—and also an exemplification of the same composition, under the seal of the Bishop of *Ely*, dated 1488,—by which the rector agreed that the inhabitants of Leverington-Parsons-Drove, getting their chapel consecrated, might have there the sacraments appertaining to marriages and burials, yet without prejudice to the parochial church of Leverington, such inhabitants acknowledging themselves to be subject to the mother and parish church of Leverington, in all things as anciently.

Certain articles of agreement, dated 1702, made between the then rector of Leverington and the churchwardens and divers inhabitants thereof, of the one part, and the then curate of the hamlet of Leverington-Parsons-Drove, in the parish of Leverington aforesaid, and divers inhabitants, owners or occupiers of land in Leverington-Parsons-Drove, of the other part, whereby, in order to put an end to suits and controversies then existing between the inhabitants of Leverington-Parsons-Drove, concerning the payment of a church-rate by the occupiers of land in Leverington-Parsons-Drove aforesaid, to the churchwardens of Leverington, for the repairs of the parish church there; it was agreed, that in every year for the future, in which a church-rate should be assessed in the said town of Leverington, the inhabitants and others of Leverington-Parsons-Drove aforesaid, should pay to the churchwardens of the said town of Leverington 10*s*., and that the same should be

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accepted in full satisfaction and discharge of all rates and assessments upon the inhabitants, owners and occupiers of lands of and in the said hamlet of Leverington-Parsons-Drove, for and towards the repairs of the parish church of Leverington.

A series of collations to "the rectory of Leverington with the chapel of Parsons-Drove."

An act of 15 *Car.* 2, for settling the draining of the Bedford Level;—and several allotments of land in Leverington-Parsons-Drove made under that act to and in respect of messuages in Leverington.

Title deeds, beginning in 1728, to the lands in question, which were formerly part of an estate of 64 acres, in which these lands were described as "lying in Leverington, in a certain place there called Paston-Drove, and Paston-Drove Fen, within the said parish of Leverington."

A witness proved that the lands, which lie west of a bank in Leverington, called Overdike Bank, are in what is called Leverington-Parsons-Drove, and that those lands paid tithe to the rector of Leverington, and that the annual sum of 10*s.* mentioned in the agreement of 1702, continues to be paid down to the present time, in lieu of the church-rate; that there are commons, droves, and wastes, partly in Leverington, and partly in Leverington-Parsons-Drove, which are open equally to the inhabitants living in either part of the parish, and that the inhabitants of the two places intercommon; that the land in question lies on the west side of the bank, and had for many years been in the possession of the testator, who also possessed 60 acres on the east side of the bank, and lived at Leverington; that there are separate overseers for the two places, separate poor-rates, and separate highway-rates; that there is a land-tax assessment for Leverington, and another for Leverington-Parsons-Drove, and a separate collector for each, but in the assessment for Leverington, part of the lands for Leverington-Parsons-Drove are included, and so vice versâ; that there is a sepa-

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rate constable for each, and that Leverington has churchwardens and Leverington-Parsons-Drove chapelwardens.

The register of electors for voters for Cambridgeshire, in which register, Leverington and Parsons-Drove are treated as separate parishes, and separate lists of voters are accordingly given.

Other unimportant evidence was adduced by the defendants, and set out in the case.

The questions for the opinion of the Court were, whether the land in Leverington-Parsons-Drove passed under the devise by the testator, of all his messuages &c. lying in Leverington.

F. Kelly, for the plaintiff. These lands do not pass by the devise. It clearly appears throughout the whole of the evidence given by the defendants, that though Leverington-Parsons-Drove was originally part of the parish of Leverington, and is so still in some sense, yet that it is commonly known and described as a distinct place, and that in many respects it is independent of the mother parish. And in the will, Leverington, and Leverington-Parsons-Drove are recognized as distinct places, for the testator describes himself as "of Leverington, in the Isle of Ely," and the defendant *Johnson* as "of Leverington-Parsons-Drove, in the said Isle of Ely." In *Stork* v. *Fox* (*a*), "the case was, there being two vills, viz. *Walton* and *Street*, in the parish of *Street*, a fine was levied of such lands in *Street*,—and whether the lands in *Walton* did pass by that fine was the question, the action (ejectione firmæ) being for them only;—and adjudged that they should not pass, for Street being a distinct vill by itself, and Walton being a distinct vill by itself, and so found by verdict, although Street, the parish, comprehends both, yet in the fine the lands in Walton shall not be said to be comprised, unless Walton had been an *hamlet* of Street, and that the fine had been levied of lands in the *parish* of Street. Then all had well passed:

First point: Construction of devise.

(*a*) Cro. Jac. 120.

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wherefore it was adjudged accordingly." In *Rex v. Sir Watts Horton* (*a*) it was held, that "wherever there is a *constable* there is a *township*." In this case there are separate *constables* for these two places, which therefore constitute separate *townships*; and the devise is not of all the testator's lands in the *parish* of Leverington. It appears that the testator had lands in Leverington upon which the devise operated, without having recourse to the lands in question.

Second point: Admissibility of evidence.

Some of the evidence given by the defendants was not admissible. [Lord *Denman*, C. J. The register of voters seems to be quite out of the question. Mr. *Andrews*, we should like to hear you.]

First and second points.

Biggs Andrews, contrà. Extrinsic evidence is receivable to shew what lands come within the description contained in the will. It was shewn by the defendants that the lands in question are within the parish of Leverington, and the devise is of all lands in Leverington, which must be taken to mean in the *parish* of Leverington. The will must be construed most strongly in favour of the devisee. *Stock v. Fox* cannot govern this case, as there the parish was divided into two distinct vills, which is not the case here. [Lord *Denman*, C. J. Surely you carry the argument too far, if you contend that where there is a parish of a particular name, and a man devises land as in a place of that name, *all* his lands in the parish must *necessarily* pass, although some of them lie in a part of the parish which is commonly known by a different name. Surely, in such case, you must have evidence to shew the probable intention of the testator. I should have agreed with you, if the devise had been of all lands in the *parish* of Leverington.] It is clear that the testator meant to speak of Leverington as a parish, as he classes it with *Wisbech St. Peter's* and *Wisbech St. Mary's*, by which names *parishes* are obviously intended to be designated. The evidence shews that the lands in question are lands *in Leverington*; and the fact of that part of

(*a*) 1 T. R. 374.

the parish of Leverington in which they lie, being commonly designated by a distinct name, does not raise such an ambiguity as will warrant the admission of evidence of intention, for the principle might often be applied to particular *estates*. To support the argument of the plaintiff, the devise must be read as if it had been "all my lands in Leverington, *except such as lie in Leverington-Parsons-Drove*." It being shewn by evidence what lands the words of the devise are capable of including, according to their literal construction, no further evidence is receivable. *Doe* d. *Templeman* v. *Martin and another* (*a*). [*Williams*, J. referred to *Doe* d. *Chichester* v. *Oxenden* (*b*), *Doe* v. *Greening* (*c*). *Littledale*, J. referred to *Waldron* v. *Ruscarit* (*d*).]

Third point: Apparent intention.

Where it is apparent upon the will that the testator *intended* that certain lands should pass, they must be held to pass if the words used by the testator are at all sufficient for that purpose; *Fen* d. *Lowndes* v. *Lowndes* (*e*). Here, the words are clearly *sufficient;* and it is impossible to read the will without seeing that the *intention* was that these lands should pass,—in other words,—that the testator meant not to die *intestate* as to any part of his property. He makes a large bequest of money to his heir at law, he describes his real estate with minuteness, and makes careful limitations of it in favour of certain branches of his family; and he concludes by a residuary bequest, in trust, of all such personal property as had not been previously disposed of. An intention to dispose by will of *every* portion of his property is quite obvious.

Third point.

F. Kelly, in reply. The heir at law cannot be disinherited except by clear unambiguous words (*f*). This principle of law is full as strong as the inference drawn from the

(*a*) *Ante*, i. 512; 4 Barn. & Adol. 771.

(*b*) 3 Taunt. 147; 4 Dow, Parl. Cases, 93.

(*c*) 3 Maule & Selw. 171.

(*d*) 1 Ventris, 170.

(*e*) 4 Burr. 2246.

(*f*) As to this supposed principle of law, see 4 Mann. & Ryl. 71, (*d*), note to *King* v. *Ringstead*.

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supposed intention of the testator not to die intestate. In *Habergham* v. *Vincent* (*a*) it was held by *Wilson*, J., that "the heir will take what is not disposed of, even against the intention." *Waldron* v. *Ruscarit* goes as far as any case that can be found for passing lands not within the strict meaning of the description, but in that case, as in *Stock* v. *Fox*, an *exception* is made, which is decisive of this case, for here there are distinct *constables* for Leverington and Leverington-Parsons-Drove. In all the documents given in evidence, and even in the will itself, these two parts of the parish of Leverington are designated by the names of Leverington, and Leverington-Parsons-Drove. The mere fact of the latter place being *commonly known* by a distinct name, is of itself sufficient to exclude these lands from passing under this devise.

Lord DENMAN, C. J.—There are very strong arguments on both sides. In cases of this sort, it is especially necessary to distinguish, more than has been done here, between the functions of the judge and the jury. We have, however, no objection to decide whether the evidence is admissible, and what is the effect of it,—provided both parties agree to be bound by our decision,—in order to avoid the expense of sending the case back for trial.

Addition made to special case.

The counsel agreed that a clause should be inserted in the case, to the effect that the parties agreed to be bound by the decision of the Court upon the evidence.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of the same term, delivered the judgment of the Court as follows:

Ejectment, by heir at law, for certain lands situate at a place called Leverington-Parsons-Drove, whereof his ancestor died seised. Defence under the will of that person,

(*a*) 2 Vesey, jun. 224.

by which he devised to the defendant all his lands at Leverington; and evidence was offered to shew that the lands sought to be recovered were in the *parish* of Leverington. The same evidence, however, proved that within the parish of Leverington was a district known by the name of Leverington-Parsons-Drove, for which a chapel of ease had been endowed in the fourteenth century,—that constables and other officers were appointed for Leverington-Parsons-Drove separately from the parish at large, and that separate assessments of taxes were made for Leverington-Parsons-Drove. The defendant further proved some ancient documents (which accompanied the title to this property,) in which some lands situate in Leverington-Parsons-Drove had been conveyed as lands situate *in Leverington*. The plaintiff drew attention to the fact that the will and codicil distinguished Leverington from Leverington-Parsons-Drove, describing the devisor as residing at Leverington, and describing one of his trustees as living at Leverington-Parsons-Drove. The plaintiff also produced some other evidence, but of so trivial a nature and so recent, that it could reflect no light on the former condition of the places, nor on the *intention* of the testator in framing his will. In fact, we have thrown it wholly out of our consideration.

We are to decide, on the special case submitted to us,—1. Whether the defendant did not at once entitle himself, under the will, to these lands, by proving them in the *parish* of Leverington, and whether therefore the *jury* could properly be required to consider whether this will passed such of the testator's lands in Leverington as lie in Leverington-Parsons-Drove also; and, 2ndly, we have undertaken, if the evidence produced be admissible, to decide upon its effect;—thus placing ourselves in the situation of jurymen, by consent of both parties.

The testator died seised of about sixty acres in that part of the parish which is not Leverington-Parsons-Drove, and about eighteen acres within that part.

The first point involves some of the most curious learn-

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ing in the law of evidence. The greatest judges have entertained much doubt, and have differed in opinion on the rules by which the admissibility of evidence should be governed; and in every case where they must be resorted to, ingenious and plausible arguments may be urged on both sides. Lord Chief Justice *Mansfield*, delivering the judgment of Common Pleas in *Doe* d. *Chichester* v. *Oxenden* (*a*), with the caution which marks many of the decisions, observes on the extreme jealousy which prevails in receiving evidence to explain written instruments, and rejects that which was there tendered, though convinced that he thereby defeated the intention. Here, however, it cannot be truly said that the admissibility of the evidence is in question,—for the *devisee*, in the course of proving these lands to be in Leverington, proved them also to be in Leverington-Parsons-Drove, and raised a very serious doubt whether the testator meant to pass them. The form of the objection is rather this;—that when shewn to be in Leverington, the learned judge ought to have told the jury that they were bound to find for the defendant, and had no right to inquire whether lands, which answered the *description* in the will, were or were not *intended* to pass by it. I should feel very great difficulty in coming to this conclusion on general grounds, and do not find it easy to state the principle which leads to it. But there is no necessity for the long discussion that such a point would demand, for we think the defendant entitled in either view of the case. If it is enough to shew that the lands are in the parish of Leverington, he has done so; and if the question is properly raised, whether they were intended to pass, being in the particular portion of the parish, we are clearly of opinion on the whole case that in fact they were *intended* so to pass.

The structure of the will, particularly the large bequest of money to the heir at law, and the minute provisions for his kindred, gave rise to many arguments in favour of the proposition, that the testator meant to die intestate as to no

(*a*) 5 Taunt. 147; *S. C.*, in error, 4 Dow, 65; *ante*, 287.

part of his property. The evidence, if proper to be admitted and taken into consideration, proves only that such *may* have been his meaning: no circumstance whatever proves that it *was* his meaning, or shews that the language he used bore in his mind any other than the natural sense, according to which the term "Leverington" comprehends all that belongs to the parish, whether found in a subdivided portion of it or not. But we do not altogether rely on this view. We think it may be enough to observe, that though, if the description of locality had been "Leverington-Parsons-Drove," that would have been *exclusive* of every other part of the parish, yet the use of the *larger* term is so far from being exclusive of the less, that it embraces it.

Postea to the defendants.

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Where a defendant, being in custody under civil process out of an inferior Court, is brought up by habeas corpus, and committed to the custody of the marshal, affidavits filed in the Court of K. B. to ground an application to be discharged out of custody, may be entitled in the *cause*.

ON the 23d June, 1834, the defendant was arrested at Cheltenham, in the county of Gloucester, upon the following process:

"Chancellor's Court of the University of Oxford. } The most noble *Arthur* Duke of *Wellington*, K. G. Chancellor of the University of Oxford: To the yeomen bedells of the University aforesaid, our officers, ministers, and ser-

A member of the University of Oxford cannot be arrested by civil process out of the Court of the Chancellor of the University, unless such process issue in a suit commenced against him whilst resident within the precincts of the University (*a*).

Upon the return to a habeas corpus cum causâ to remove the body of a defendant, in custody under a warrant of the Chancellor of the University of Oxford, the defendant will be discharged, unless it appear distinctly, and not merely by inference, that the defendant was resident within the jurisdiction of the Chancellor's Court at the commencement of the suit.

Whether a defendant can be arrested out of the precincts of the University of Oxford, upon a warrant of the Chancellor of the University, *quære*.

(*a*) And see *Thornton* v. *Ford*, 15 East, 634, where it was held, that in the case of a *common servant* of the University, whose duties are *local*, residence need not be alleged.

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vants in this behalf, jointly and severally, and especially to *Thomas James*, our yeoman bedell of the faculty of law, or his lawful deputy, executing these presents, and also to the keeper of the castle gaol in the city of Oxford, greeting: Whereas on 1st November, 1833, *Thomas Perrin*, of the city of Oxford, stable-keeper, came before *John David Mackbride*, D. C. L., assessor, and did then and there institute an action of debt, to the value of 110*l.* 16*s.* 8*d.*, against *J. F. West*, of Brazennose College, master of arts, and did allege and make oath before him the said assessor, that the said *J. F. West* was by him suspected of flight, and that he verily believed if the said *J. F. West* were to be cited to appear to our Court, there to answer the said *T. Perrin* in his action aforesaid, he would by no means appear, but would rather *withdraw himself out of the precincts of the said University*, and that he had no other hope of obtaining payment of the said debt than by arresting the body of the said *J. F. West*, according to the form of the registry: The judge aforesaid did decree according to this petition. By virtue therefore of the decree aforesaid, these are to command you, and each and every of you, jointly and severally, that you arrest and take the body of the said *J. F. West*, and that you safely keep him in your or any of your custody, until he shall have paid the said debt, with costs of suit, or shall find good and sufficient security for his appearance on the court-day next after the execution of these presents, by stipulation, according to the form of the registry, and the custom and usage of the University. And in case the said *J. F. West* shall neither satisfy nor pay the said debt, with costs of suit, nor find sufficient security or stipulation to the effect aforementioned, that then you, or any of you, so arresting the said *J. F. West*, as aforesaid, do convey and deliver over the body of the said *J. F. West* into the custody of the keeper of the castle gaol aforesaid. And you the keeper of the castle gaol aforesaid are hereby authorized and required to take, receive, and in safe custody keep the body of the same *J. F. West*, so arrested as afore-

said, until he shall be from thence discharged by due course of law. Given under our hand and the seal of our office this 23d day of June, A.D. 1834. This agrees with the decree of the judge. *Philip Bliss*, registrar. *John David Mackbride*, assessor. Debt 110*l.* 16*s.* 8*d.*, costs 3*l.* 12*s.* 6*d.*"

Upon his arrest, the defendant was taken to the castle gaol, being also the gaol for the *county* of Oxford, and was there detained in custody at the suit of *Perrin* until removed by habeas corpus on the 23d November, 1834. Immediately upon his being brought up he was committed by one of the judges of this Court to the custody of the marshal. Upon an affidavit stating these facts, and which was entitled "In the King's Bench:—Between *T. Perrin*, plaintiff, and *J. F. West*, defendant," *Campbell*, A. G., in last Easter term, obtained a rule to shew cause why the defendant should not be discharged out of the custody of the marshal, as to this action. Upon an affidavit of want of time for preparing to oppose the rule, and which was entitled in the same manner as the defendant's affidavit, the Court enlarged the rule upon the usual terms of filing the plaintiff's affidavits four days before the term, and also with liberty to the defendant to file additional affidavits.

The defendant filed a further affidavit, alleging that he had not been a member of Brazen-nose or any other college in the University of Oxford since the month of March, 1834, and stating his belief that the plaintiff was not a member of the University, and that the chancellor of the University had not any jurisdiction to authorize the arrest of the defendant, in this action, at Cheltenham; that he caused a writ of habeas corpus cum causâ to be issued, directed to the sheriff of Oxfordshire, who thereupon brought the defendant before one of the judges of this Court, who committed him to the custody of the marshal; that he had obtained from the marshal's office a copy of the causes upon which he was committed, from which it appeared that he had been committed for want of bail, upon a writ of habeas corpus, directed to the sheriff of

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Oxfordshire, and to which the sheriff returned that the defendant was received into his Majesty's gaol, in and for the county of Oxford, on 24th June, 1834, and was there detained in the said gaol under the said sheriff's custody, by virtue of a certain writ or warrant, the tenor of which was set forth in the return, and is also set forth in the former affidavit of this defendant.

The affidavits filed by the plaintiff in opposition, stated, that on 6th Nov. 1833, proceedings were commenced in the Chancellor's Court by *Perrin*, a livery-stable-keeper in the city of Oxford, against the defendant, a master of arts, and then a member of Brazen-nose College, in the University, to recover a debt of 110*l.* 16*s.* 8*d.*, contracted by the defendant in Oxford, whilst he was a member of the University; that the plaintiff having sworn to his debt, and to an allegation that the defendant was by him suspected of flight, and to his belief that if the defendant were cited to appear in the said Court, he would by no means appear, the usual warrant to apprehend was issued, directed to an officer of the Court; that on 23d June, 1834, a fresh warrant was issued upon the application of the officer, setting forth that he had been unable to arrest the defendant, and that the original warrant was then nearly destroyed by being carried about in his pocket; that the defendant remained in custody in the castle gaol of Oxford until or about the 24th November, 1834, when he was removed by habeas; that by letters-patent of King *Henry* 8, confirmed by statute of *Elizabeth* (*a*), the jurisdiction of the Chancellor's Court in all personal suits, where either party is a member of the University, or a privileged person, extends *throughout the whole realm of England;* and that it is the practice and usage of the said Court, upon allegation substantiated by oath, that a party proceeded against, being a member of the said University, is suspected of contemplating flight, for the judges of the said Court to issue a warrant for the ap-

(*a*) 13 *Eliz.* c. 29.

prehension of the defendant, and to cause the same to be executed by the officer of the said Court, or one of the yeomen bedells of the said University, specially named in such warrant, in any part of the realm of England.

Chilton now shewed cause. The affidavits in support of this rule are improperly entitled. The effect of the writ of habeas corpus cum causâ,—*i. e.* cum causâ *detentionis*,— is to remove the *body* only of the defendant, not to remove the *cause* into this Court from the inferior Court. Therefore the affidavits were improperly entitled in the cause in this Court. It is true, that after the writ of habeas corpus has been executed, the plaintiff cannot proceed in the Court below, but that is because the *person* of the defendant is taken out of the jurisdiction of the Court. Until the plaintiff commences de novo in this Court, (which he may do, as the person of the defendant is in the custody of the Marshal,) there is no cause in this Court. The *proceedings* of the Court below must be removed by *certiorari*,—the *person* of the defendant by *habeas*. [*Littledale*, J. You must go the length of saying, that where there is a suit in C. P. in which the defendant is in the custody of the warden upon mesne process, and the defendant is brought into this Court by habeas, you cannot entitle affidavits in K. B. until the plaintiff has declared de novo in K. B. Suppose in that case of a suit originally in C. P., that the defendant is removed by habeas into this Court, and the plaintiff does not afterwards take any step, and the defendant wishes to apply for a supersedeas because the plaintiff has not declared in time, what is he to do?] The *cause* would still be in C. P. [*Littledale*, J. How is he to get out of custody? Must there be a new habeas corpus?] It would seem so. But it is not necessary to go that length. Whatever effect this writ might have had as to removing the cause, had it been directed to the *Chancellor or to the Court*, it can remove only the person of the defendant, when, as in this case, it is directed to the *sheriff*. The dif-

First point: Affidavits entitled *in the cause*.

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ference between a writ of habeas corpus directed to the *sheriff*, and one directed to the judge or other proper officer of the *Court* below, is not one of form, but of substance. The sheriff can only return that he received the defendant into his custody, and detained him in prison under a certain warrant; whereas the judge or other officer of the Court may return the special matter, shewing the jurisdiction of the Court below,—or he may return that judgment has been given against the defendant, in which case he cannot be removed until agreement of the party, or payment of the sum recovered.

The following authorities were mentioned in the course of this argument: *Com. Dig. tit. Habeas Corpus* (A) (G 1) (C); *Bacon's Abr. tit. Habeas Corpus* (A) (C); *Year Book, 9 Hen.* 6, fo. 44 (*a*); *Ellis* v. *Johnson* (*b*); *Fazacharly*

A return to a writ of certiorari to remove a cause, directed to the judge of an inferior court, certifying the cause and claiming conusance by charter, is sufficient if good upon the face of it.

Having no day in court, he cannot be required to produce the charter.

Nor can any traverse be taken upon the return.

A party coming to a Court in a civil suit, is not protected from arrest at the King's suit.

(*a*) M. 9 *Hen.* 6, fo. 44, pl. 24. "A writ of corpus cum causâ issued to the Sheriff of Oxfordshire,—who returned, in the Common Bench, quod habet, &c. et *causam* habere non potest, quia pendet in curiâ Cancellarii Oxon: whereupon a writ issued to the Chancellor of Oxford to certify the cause, who returned divers causes, and claimed to be keeper of the peace by charter and by prescription also.

"*Godr.* We pray that he show the charter.——MARTIN, J. That he shall not do, for he has no day in court; and also it is enough for us if the cause be sufficient *in itself*.——*Godr.* It is true if the cause *be* sufficient in itself; but if he be unable to show the charter, then their cause is false; for it may be that they have no charter: then shall he be remanded to prison upon the other's false return?—MARTIN, J. Yes, Sir; you are at no mischief; if the case be that they have no franchise or charter, for you can have a writ of false imprisonment; and if the Chancellor had returned that he had been arrested because of a plaint, shall that make an issue (to be tried) here, whether there is such a plaint or no? quod non.—BABINGTON, J. If the cause appears to us sufficient in itself, notwithstanding it be false, it is enough for us. (Quod tota curia concessit,) and if he had returned that he was his villein, that should not make an issue (to be tried) here, whether he is a villein or no. Wherefore if you cannot prove but that the cause is sufficient in itself, he shall be remanded.

"Ad alium diem *Godr.* There is in the record 'detentus est et de extortione convictus est,'—which is void; for it should be *indictatus* et convictus.——MARTIN, J. It is further 'moris Universitatis,' by which it shall be intended that he is *lawfully* convicted; and also it

v. *Baldo* (*c*); *Dorrington* v. *Edwin* (*d*); *Lawes* v. *Hutchinson* (*e*); *Tidd's Forms*, 191 to 195.

Campbell, A. G., contrà, as to the preliminary objection. The rule was enlarged upon an affidavit, which was entitled in the same way as the affidavit of the defendant. *Lawes* v. *Hutchinson* is not at all in point. That was not the case of a writ of habeas corpus *cum causâ*. The defendant pursued the only course that was open to him. The judge of the Court in which the cause is depending has nothing to do with the *body* of the defendant: therefore the habeas corpus cannot go to him, but must go to the sheriff or other person having the custody of the defendant's person. This appears to be the well-established practice; *Tidd's Pract.* 349, &c. (*f*); and the practice is not opposed by any statute or decision. First point.

The COURT called upon *Chilton* to go into the other points of the case.

Chilton. The arrest at Cheltenham under the warrant of the Chancellor of the University was lawful. [*Littledale*, J. Does it appear that at the time of granting the warrant the defendant was resident in the University?] Not in terms; but the party applying for it swore that he believed that the defendant would *withdraw himself* out of the precincts of the University, if cited in the usual way. [*Littledale*, J. I suppose you do not mean to contend that if a party were resident in Northumberland, he could be arrested upon process out of this Court?] Perhaps, after the decision in *Hayes* v. *Long* (*g*), it must be admitted that in order to give Second point: Legality of the arrest.

appears before us that he was arrested veniens ad istam curiam, &c.—BABINGTON, J. That is nothing to the purpose; for in all cases where a man is arrested at the suit of the king, he shall never have a supersedeas in this Court (of C. P.)—Quod tota curia concessit."

(*b*) Cro. Car. 261.

(*c*) 1 Salk. 352.

(*d*) Skinner, 244.

(*e*) 1 Crompt., M. & R. 766.

(*f*) 8th edit.

(*g*) 2 Wils. 310.

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the Chancellor's Court jurisdiction, it is necessary that the defendant should have been resident within the University at the commencement of the suit. [Lord *Denman*, C. J. Does that appear upon this return? It is but very *inferentially* stated, I think.] [*Campbell*, A. G., contrà, observed that upon the affidavits it was only stated that the defendant was a *member* of the University.] [Lord *Denman*, C. J. Must not the return state fully the facts, from which the Court may see whether the defendant was strictly within the custom? In *Smith* v. *Dr. Bouchier* (*a*), which was trespass for a false imprisonment, the defendant justified under the customs of this University, and the Court held it necessary that the custom should be shewn to have been strictly pursued. Surely you must be as accurate in your return as you would be required to be in your plea, if sued in trespass. From an observation of Lord *Hardwicke* in that case, he appears plainly to intimate it as his opinion, that if a party *withdraws* from the jurisdiction, he must be *without* the jurisdiction, and that therefore care must be taken to *prevent* his withdrawing.] That case turned principally upon a close distinction between the swearing to a *belief* that the party would withdraw himself, and to a *suspicion* to that effect. It is expressly sworn in this case, that at the time of the commencement of the suit the defendant was a scholar of the University. By stat. 14 *Ric.* 2, and 14 *Hen.* 8, confirmed by st. 13 *Eliz.* c. 29, the University of Oxford may hold pleas in all things personal, ubi scholares servi aut ministri sunt una partium, secundum statuta vel consuetudines, &c. vel secundum legem Regni, ad voluntatem Cancellarii,—ita quod justiciarii de B. R. de C. B. vel de Assisis non se intromittant. See *Com. Dig. tit. Courts* (M), and *tit. University* (C), citing *Lit.* 10 (*b*), and 1 *Salkeld*, 343 (*c*). In *Castle* v. *Lichfield* (*d*), *Hale*, C. B., went very fully into the question of the peculiar jurisdiction

(*a*) 2 Stra. 993; Ca. temp. Hardw. 62.

(*b*) *Ralph Bradwill's* case.

(*c*) *Rush* v. *Chancellor and Scholars of Oxford.*

(*d*) Hardres, 505

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of this University Court. It appears here, that the application for the warrant was on the same day as the commencement of the action, and upon applying for the warrant the plaintiff swore to a belief that the defendant would *withdraw* himself if cited in the usual way,—which necessarily implies a belief that he was then within the jurisdiction: and it ought to be intended that the defendant, being a member, was within the jurisdiction at the time of commencing the suit, unless the contrary is made to appear. In *Hayes* v. *Long*, non-residence was distinctly shewn. Here, it is only shewn that at the time of *the arrest*, the defendant was not resident. *Wilcocks* v. *Bradell* (*a*) shews that a privileged person cannot *waive* his privilege of being sued in a University Court; *à fortiori*, he cannot *withdraw* himself from the jurisdiction after the suit is commenced.

Campbell, A. G., contrà, was stopped by the Court.

First point: Title of affidavit.

Lord DENMAN, C. J.—With regard to the objection to the affidavit, I think that if the defendant is removed by habeas corpus cum causâ, the plaintiff may proceed without a recommencement of his suit. Therefore, for *some* purposes, the *cause* is in this Court.

Second point: Legality of the arrest.

It does not appear by the return or by affidavit that the party was resident within the precincts of the University at the commencement of the suit. Although it is said that the plaintiff swore that he believed that the defendant would *withdraw* himself, we cannot thence assume that it was sworn that the defendant was at that time *resident* in the University. We are not in the habit of *intending* any thing to the prejudice of the liberty of the subject. The party must shew clearly that the case is within the custom.

Without touching the question as to the goodness of the custom to arrest in a distant county, I think that this rule must be made absolute.

(*a*) Cro. Car. 52; reported more fully in Hetley, 27, and Littleton's Reports, 40. And see *Thornton* v. *Ford*, 15 East, 634.

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LITTLEDALE, J.—Suppose a prisoner, in the custody of the Warden of the Fleet, be removed here by habeas corpus cum causâ, and the plaintiff does not choose to proceed against him, and the defendant wishes to have a supersedeas,—I apprehend that he might entitle his affidavit in this Court. The cause is in this Court in some sense, although no proceedings be taken after the removal. So, where merely a warrant of attorney is given, the cause is sufficiently in Court: *Sowerby* v. *Woodroff* (*a*).

First point.

Second point.

In *Hayes* v. *Long* (*b*), it was held that the right of the University of Oxford to conusance of suits (*c*), brought in other courts against members of that University, was restricted to the case of *resident* members. It appears to have been considered that the *jurisdiction* of the Court extended only to persons resident. Possibly in this case the defendant was resident at the commencement of this suit; but that is not stated.

(*a*) 1 Barn. & Alders. 567.

(*b*) 2 Wils. 310.

(*c*) As to which, see Bla. Comm. iii. 83, iv. 277; *Welles* v. *Traherne*, Willes, 233; *Williams* v. *Brickenden*, 11 East, 543.

The letters-patent of *Ric.* 2 expressly required that the party in respect of whom the jurisdiction was claimed, should be *resident*. *Vide Dr. Chase*'s case, H. 8 *Hen.* 6, fo. 18, pl. 7, in which the Chancellor claimed conusance where he was *himself* a co-defendant in trespass for a distress taken, pursuant to an alleged custom, to reimburse Dr. *Chase* (the Chancellor) for the expense of repairing the pavement before the plaintiff's house, and in which *Rolfe* supports the defendants' claim of conusance by the judgment of a pope, afterwards canonized, *judico me cremari*.

For the form of a claim of conusance by the University of Oxford, see Willes, 233 (*a*); 2 Wils. 406: and for a similar claim by the University of Cambridge, see *Brown* v. *Renouard*, 12 East, 12; 1 Lee's Dict. Pract. 380; *Wild* v. *Villers*, Comberb. 319; 1 Barnardist. K. B. 65. And see *University of Cambridge* case, 10 Mod. 125; 1 Barnardist. K. B. 49; *Paternoster* v. *Graham*, 2 Stra. 810; *Kendrick* v. *Kynaston*, 1 W. Bla. 454; *Hampton* v. *Phillips*, Palm. 456; *Bishop of Ely*'s case, 1 Sid. 103; *Neal* v. *Deucton*, 1 Lev. 89; *Crosse* v. *Smith*, 12 Mod. 644; *Foster* v. *Mitton*, 1 Salk. 183; *S. C. Foster* v. *Heram*, 1 Lord Raym. 427, 8, 475, 2 Lord Raym. 836, 7, 3 Salk. 79; *Rex* v. *Agar*, 5 Burr. 2823; Gilb. C. P. 195; Bro. Abr. *Conusance*, pl. 51; Hale, C. L. 33; Jenk. 31, 34; Godb. 201; 4 Inst. 227.

PATTESON, J.—I think it quite immaterial whether the writ was directed to the sheriff, or to the judge, or to both. The question is, whether the cause is not for *some* purposes in Court. If it is not, the Marshal has no right to keep the defendant at all. If the plaintiff choose to follow the defendant, he may declare without recommencing his suit. If he do not choose to follow him, the defendant may apply for a supersedeas. No answer has been given to the suggestion of my brother *Littledale*. The defendant cannot have a supersedeas, unless, in some sense, the cause be in Court. The affidavits were, I think, properly entitled. First point.

It ought to appear that the defendant was *resident*. Second point.

The question as to the custom does not arise. Third point.

WILLIAMS, J.—It does not at all appear that the party was resident at the time of the commencement of the suit. We cannot infer it. The statement is quite consistent with the defendant's *not* being a resident. Second point.

Rule absolute (*a*).

(*a*) "Privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the Emperor *Frederick*, A. D. 1158, (Cod. 4, tit. 13)." 3 Bla. Comm. 84.

The "Tribunal of the University of Leyden" was instituted at the foundation of that university, by *William* 1, Prince of Orange in 1575. The Court consisted of a president—who was the rector magnificus,—four assessors—who were professors annually elected from each of the four faculties,—the burgomaster of Leyden, three other superior magistrates (wethouders), and two inferior magistrates (leden der Schepensbank,—*échevins*.) The jurisdiction of this Court extended over all cases, civil or criminal, in which a member of the university was concerned; and their decision was final. In criminal cases, the superintendent of the police, under the title of *Promotor*, acted as the public accuser. After the subjugation of Holland in 1795, the jurisdiction of this Court was continued with some slight modifications; but it was abolished in 1811, when this university was incorporated with the Imperial University of Paris; and it has not since been restored. Siegenbeck, Hist. Univ. Leyden, i. 30, 385, ii. 144, 9.

The Tribunal of the old University of Paris, though with less extensive jurisdiction, was nearly similarly constituted. Ferriere, Dict. de Droit, verbo *Université*.

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HODGSON and another *v.* MEE.

Where the defendant, having given a bail bond, does not put in special bail until more than eight days after the execution of the writ, the plaintiff may declare de bene esse between the expiration of the eight days and the putting in of special bail.

And if he omit so to do, he is not entitled to have the bail-bond stand as a security.

The defendant cannot, after giving a bail-bond, surrender within the eight days in discharge of his bail, without putting in and perfecting special bail.

JANUARY 3, 1835. The defendant being arrested by an officer of the sheriff of Middlesex, gave a bail-bond.

10th January. The defendant returned into the custody of the sheriff, and having sued out a habeas corpus he was on the same day committed to the King's Bench prison in discharge of his bail.

14th January. Special bail not having been put in, the plaintiffs applied for an assignment of the bail-bond, and were informed that the defendant had returned into the custody of the sheriff on the 10th, for the purpose of vacating the bail-bond, and that he had been removed by habeas corpus to the King's Bench prison in discharge of his bail. The plaintiffs, however, insisted on having an assignment of the bail-bond,—which was thereupon given them, with a memorandum in the margin of the bail-bond, stating the defendant's surrender.

16th January. The defendant and his bail were served with a writ of summons, issued against them at the suit of the plaintiffs, as assignees of the sheriff.

21st January. Special bail was put in and perfected.

22d January. A summons was served on the plaintiffs to show cause why all proceedings on the bail-bond should not be stayed. Upon the hearing of such summons, the plaintiffs contended, that the bail-bond ought to stand as a *security*, for that they had lost a trial by reason of the neglect to put in special bail in due time. On the part of the bail it was contended, that the plaintiffs might have declared *de bene esse* before bail put in, and that therefore they had not lost a trial. *Patteson*, J. ordered that all proceedings on the bail-bond should be stayed, on payment of costs; the bail-bond to stand as security. An application was made at Chambers to set aside so much of the order as directed the bond to stand as a security; and afterwards a further summons was taken out to set aside that part of the order

which related to the payment of costs. Both summonses were referred to the Court, upon the terms of the defendant's bail paying the costs which had been incurred by the plaintiffs. A rule nisi having been obtained accordingly,

J. Jervis now showed case. The bail-bond ought to stand as a security. Whether the plaintiffs can be said to have lost a trial, depends upon the question, whether they could have declared de bene esse before special bail was put in. This question (which arises upon Reg. Gen. M. 3 *W.* 4, 1, (*a*),) has been raised in the Court of Exchequer, and the judges of that Court have reserved the point, in order that they may consult with the judges of the other Courts. [*Patteson*, J. The judges have considered this question, and are of opinion that the plaintiff may declare *de bene esse* before special bail is "put in." We have determined that the word "perfected," in the rule, means "put in." You might, therefore, have declared de bene esse in this case, and consequently the bail-bond ought not to stand as a security.]

The proceedings on the bail-bond were perfectly regular. After a bail-bond given, the defendant cannot surrender in discharge of his bail, unless the condition of the bond has been satisfied by putting in and perfecting special bail. The condition is, that the defendant shall *put in special bail* within eight days from the execution of the writ of capias; and there is no ground whatever for saying, that the defendant's *returning into custody* within the eight days is such an equivalent to the putting in of special bail, as will satisfy the condition. According to the modern practice, the sheriff may, immediately after the execution of the writ, be ruled to return it in four days. [*Littledale*, J. Can the

(*a*) "That upon all writs of capias, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare de bene esse *in case special bail shall not have been perfected;*" *ante*, vol. i. 221, 222.

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sheriff be ruled within eight days? By the old law he could not be ruled until the return day of the writ.] One of the officers of this Court has stated that it is now the practice to rule the sheriff immediately. The form of the writ of capias, in the schedule (No. 4,) to the Uniformity of Process Act, contains a command to the sheriff to return the writ *immediately* after the execution of it. Then supposing the sheriff of Middlesex to be ruled on the day of the execution of the writ, and to return that he had taken the body of the defendant, and had obtained a bail-bond, could the defendant afterwards have returned into the custody of the sheriff in lieu of putting in special bail, without a forfeiture of the bail-bond? It is submitted that he clearly could not. The plaintiff might in such case have taken an assignment of the bond at any time after five days from the execution of the writ, *i. e.*, after the expiration of the four-day rule. Section 16 of the Uniformity of Process Act (*a*) enacts, "that all such proceedings as are mentioned in any writ, notice, or *warning* issued under this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be." The third *warning* subscribed to the writ of capias, according to the form given in schedule No. 4, is as follows: "If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond." The act obviously contemplates that the plaintiff shall have power to put the bond in suit, unless the condition of it be strictly performed. *Turner* v. *Brown* (*b*) will be referred to contrà; but the learned judge by whom that case was decided has since observed, that his attention was not fully drawn to the provisions of the Uniformity of Process Act. [*Patteson*, J. My attention certainly was not called to the 16th section.] Under the old practice, the defendant could not surrender in discharge of his bail,

(*a*) 2 *W.* 4, c. 39. (*b*) 2 Dowl. P.C. 547.

during the five days grace given after the return day. As the sheriff is now bound to return the writ immediately, the time which elapses between the arrest and the day for putting in special bail, is analogous to the *days of grace* under the old practice.

Butt, in support of the rule. The proceedings on the bail-bond were irregular, and consequently the rule must be made absolute, with costs to be paid *by the plaintiffs*. The defendant returned into the sheriff's custody within the eight days mentioned in the condition of the bond. By the new practice, the defendant has these eight days for putting in bail, and the eighth day, for the present purpose, may be likened to the *return-day of the writ* under the old practice. Formerly, it was competent for a defendant, who had given a bail-bond, to surrender himself to the sheriff before or on the return-day; upon which, the bail-bond might have been given up to be cancelled, and the plaintiff could not afterwards have taken an assignment of it, or ruled the sheriff, or maintained an action against him for not assigning the bond. *Tidd's Practice*, 9th edition, 226; *Jones* v. *Lander* (*a*). In *Plimpton* v. *Howell* (*b*), which was an action on a bail-bond against the bail, the principal surrendered himself to the gaoler of the county gaol before 12 o'clock on the first day of Easter term, being the return-day of the writ,—which surrender was not, in point of fact, accepted by the under-sheriff, who lived seventeen miles off, until the next day, by a letter by the post:—This was held to discharge the bail-bond, and the proceedings thereon were set aside for irregularity. Since the alteration in the practice, *Patteson*, J. has decided in the Bail Court, in *Turner* v. *Brown* (*c*), that although a bail-bond is given, a render may be accepted at any time within eight days from the arrest. [*Patteson*, J. The question is very important, and I do not

(*a*) 6 T. R. 753.
(*b*) 10 East, 100.
(*c*) 2 Dowl. P. C. 547.

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wish to be bound by that decision.] The Uniformity of Process Act contains no express provision on the present point, and therefore it is important to look at the old practice, which was founded on good sense and convenience, and to govern the present practice by it, so far as it is consistent with the act of parliament. It will be perfectly consistent with the statute, to hold, that as a surrender of the person before the return-day of the writ, was formerly considered equivalent to putting in and perfecting bail, so as to prevent any forfeiture of the bail-bond, so under the present practice, where a bail-bond is given, a surrender within the eight days shall prevent any forfeiture of the bond, and be deemed a satisfaction of the condition. This will be a plain and reasonable rule of practice; and a contrary decision will amount to this—that when a bail-bond is given upon an arrest, the principal cannot, under any circumstances, surrender to the sheriff within the eight days, so as to discharge the bail, but bail above must in all cases be put in. Now this would be an inconvenient practice; for bail who enter into a bond, instead of at once obtaining a surrender of the defendant, would be obliged to incur the expense of putting in bail above, and then rendering the principal. The only effect of this practice would be to increase the expenses to the bail for no beneficial object, and without in any degree furthering the ends of justice. The better course then will be to consider, for the present purpose, the return of the writ of capias to be the eighth day after the execution of the process,—and this has hitherto been the understanding in the profession.—*Price's Practice*, 138; *Chapman's Practice*, 149.

Cur. adv. vult.

On a subsequent day in the term,

Lord DENMAN, C. J., delivered the judgment of the Court. Before the passing of the act for uniformity of process, a defendant who had given a bail-bond might ren-

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der in discharge of his bail at any time before the return-day of the writ. But under the new law, writs are returnable immediately upon their execution, and sheriffs may immediately be ruled to return them. If the sheriff had been so ruled in this case, he must have made a return according to the fact. Here, however, the sheriff was not so ruled; and the question is, whether, that being so, the defendant could render himself in discharge of his bail on the eighth day. According to the third warning to the defendant, required by the statute to be subscribed to the writ, the plaintiff may proceed on the bail-bond if the defendant omits to put in special bail as required, that is, within eight days from the execution of the writ; and we are of opinion that if special bail is not put in, the plaintiff may notwithstanding the render, proceed on the bail-bond.

LITTLEDALE, J.—As the sheriff may now be ruled to return the writ immediately, it would be productive of great inconvenience if the defendant were allowed to surrender himself in discharge of his bail at any time within the eight days.

Rule absolute, for staying the proceedings on the bail-bond, upon payment of costs *by the bail.*

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A jury cannot, *from the same evidence*, find a *customary* right in all the inhabitant occupiers of land within a district, and a *prescriptive* right to the same subject-matter, in respect of a particular estate within the district.

Whether, in point of law, a prescriptive and a customary right to the same subject-matter, may exist in respect of the same land, if each be proved by proper evidence applicable to each: *Quære.*

Enjoyment of a profit-a-prender by the owners and occupiers of a particular estate, during living memory, without any evidence of user or non-user at any antecedent period, is evidence of a prescriptive right, but will not support a plea of a lost grant.

In order to support such plea of a lost grant, some evidence tending to point the user, as regards its commencement, to the period of the supposed grant, must be given.

Where an adverse witness, upon his cross-examination, *voluntarily* gives evidence which would have been inadmissible as evidence in chief, and the counsel cross-examining does not object to such evidence being admitted or retained upon the judge's notes, the opposite counsel has a right to re-examine as to that evidence.

THE declaration and the 10th plea in this case are stated *ante*, p. 234.

2d plea: Prescription in a que estate under *George Simmons*, the defendant's landlord, in respect of a messuage and land in the parish of St. Erme, for a right to take sand in the locus in quo.

5th plea: A non-existing grant before the restraining statute of 13 *Eliz.* c. 11, s. 3, to wit, 10th April, 1570, by the dean and chapter of Exeter, then being owners of the locus in quo, to Sir *Richard Bevil*, who was then seised in fee of the messuage and land.

6th plea: A non-existing grant from King *Henry* 3, to wit, 1st June, 1260, then being seised jure coronæ (*a*), to *John de Trewaters*.

7th plea: A similar grant to all the inhabitants of Cornwall, occupying messuages and lands there.

8th plea: A similar grant to the inhabitant occupiers of lands &c. in the parish of St. Erme.

9th plea: A non-existing grant by *Richard* Earl of *Cornwall*, to the inhabitants of Cornwall, occupying messuages or lands there.

(*a*) The earldom of Cornwall was in *Richard*, King of the Romans, and his second, but eldest surviving, son *Edmund*, from 1231 to 1298, (see the table of succession of the earls and dukes of Cornwall, Mann. Exch. Prac. 2d ed. Appendix, 392,) but this day (1 June, 1260) being laid under a videlicet, would admit evidence of an actual or presumed grant in an earlier part of the reign of *Hen.* 3. The traverse of the grant admits that the alleged grantor was seised at some time while the alleged grantee was seised, but beyond this it leaves the time at large.

The replication traversed the prescription and the several grants.

At the trial before *Williams*, B., at the Cornwall spring assizes, 1834, the plaintiff called witnesses who proved the taking of sand by the defendant from the locus in quo,—which was a sandy hillock, called Geare-right. Upon cross-examination, these witnesses were asked whether the inhabitants of the neighbouring parishes had not always, within their memory, been accustomed to take sand from the Geare-right; and one of them who answered in the affirmative, added, that sand was more often taken from *Jenkyns's-right*,—which was an adjoining hillock, not then separated from the Geare-right. Upon his re-examination, the witness was asked whether Jenkyns's-right, and also Sir Richard Vyvyan's-right, (another adjoining hillock,) had not been stopped up by the owners, and the *sanders* prevented from coming upon them to take sand. This question was objected to on the part of the defendant; but the learned judge held that the *generality* of the evidence given in cross-examination, made it open to the plaintiff to put these questions. The questions were put, and answered in the affirmative.

The evidence for the defendant consisted of the testimony of aged witnesses, who proved that the owners of the estate now occupied by the defendant had, as long as they remembered, been accustomed to take sand from the locus in quo for the purpose of manuring their land; and the same witnesses also proved, that the inhabitant occupiers of land in St. Erme, and 5 or 6 neighbouring parishes, had also been accustomed to take sand from the same place; and most of them being asked by the learned judge whether they knew of any particular farmer living on any particular farm, claiming more right than the other people generally, answered in the negative. The learned judge, in summing up the evidence, told the jury that there was no evidence applicable to the pleas of lost grants, for that there was nothing tending to point the usage to any particular grant;

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that the evidence bore only upon the 2d plea, in which the *prescriptive* right was claimed, and the 10th, in which the *customary* right was claimed; that in order to establish the claim by prescription, in respect of the farm occupied by the defendant, it should be shewn that the particular farm was *more favoured* than the rest; that the owners of it had possessed *peculiar rights;* and he observed, that the farm did not *stand out differently* from the rest, but that every farm in the same and adjoining parishes claimed and enjoyed an *equal right* with it, and that it appeared to him that the evidence did not shew that there was any *right of preference* to the defendant's particular farm; and his lordship left the question, as to the alleged *custom*, to the jury, as a simple question of fact.

The foreman said that the jury found for the defendant upon the 2d and 10th pleas. His lordship explained the 2d plea, and asked the jury whether they found any right in the particular farm of the defendant, *beyond the general custom*. The jury answered, that they thought that the particular farm had no right *independent of the custom*, but only in common with all the other farmers and parishes.

The verdict was entered for the defendant on the 10th plea only, and for the plaintiff upon the other pleas.

Coleridge, Serjt., in the following term, obtained a rule nisi for a new trial, in case the Court should set aside the verdict upon the 10th plea. That verdict having been set aside (*a*),

Sir *W. Follett* shewed cause against the rule for a new trial. This rule was obtained on the ground of the reception of improper evidence and of misdirection with respect to the plea of prescription and the pleas of non-existing grants.

First point: Whether evidence properly received.

The evidence as to the stopping up the access to *Jenkyns's* and Sir *R. Vyvyan's* rights was properly received, after the evidence which the witness had given upon his cross-

(*a*) *Ante*, 234.

examination. Besides, as the jury have found in favour of the right claimed, there can be no ground for objecting now to the evidence having been received.

Second point: Misdirection.

The effect of the direction of the learned judge was this, that the jury were to consider whether the owners of the particular farm had enjoyed any right *independently of the general custom*. This was a correct direction. It appeared that the sanders went to take the sand, not under any claim in respect of a particular estate, but merely as occupiers of lands *in the county of Cornwall*. The whole of the evidence went to establish a *general* right, by usage, in all the inhabitant occupiers of lands in the county of Cornwall. Could this be said to be evidence of a grant to the owner of any or each particular messuage? Yet a prescription must have its origin in a grant. The learned judge was right in intimating an opinion that the evidence did not support a claim by prescription. This is an attempt to turn a bad custom into a good prescription.

Third point: Effect of evidence.

The pleas of non-existing grants were not supported by the evidence of usage from all time of living memory. The evidence given, if it applied to any other plea than the plea of the *custom*, applied to the plea of *prescription*. There was nothing to point the usage to the particular times at which the several supposed non-existing grants were alleged to have been made; *Livett* v. *Wilson* (*a*).

First point.

Crowder and *Butt*, contrà. Upon the cross-examination of the witness, he *volunteered* a statement as to the taking sand from *Jenkyns*'s right. [Lord *Denman*, C. J. But if it appears in any way in the judge's notes that the witness gave evidence as to *Jenkyns*'s right, has not the plaintiff a right to explain that evidence?] The plaintiff went further, for in his re-examination he inquired about Sir *R. Vyvyan's* rights, which had not been before alluded to by the witness. The only question was, whether the defend-

(*a*) 3 Bingh. 115; 10 B. Moore, 439. And see *Lopez* v. *Andrew*, 3 Mann. & Ryl. 329, n.

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ant was entitled to take sand on the Geare-right. [Lord *Denman*, C. J. Of that there can be no doubt. The question is,—what was your mode of proof? You may have asked questions as to other rights, with a view to establish your claim in respect of the Geare-right.] Nothing was said in cross-examination about Sir *R. Vyvyan*'s right. [*Williams*, J. I feel satisfied that there was a *cross-examination* as to *Jenkyns*'s right. My note is, that I said, "As your cross-examination has been *general*, I think that the plaintiff may inquire as to other rights." *Patteson*, J. "General" may mean general as to persons or as to places. If the cross-examination was general as to persons only, then the evidence was not admissible.] The witness was adverse to the defendant, and being asked, on cross-examination, whether he went to Geare's right, he answered "yes; but I went to *Jenkyns*'s more, five to one." [*Patteson*, J. Certainly I do not think that an adverse witness can be allowed, by making a statement of that sort, to let in evidence for his own party, on re-examination; but it should have been made to appear on the judge's notes, how this was. Lord *Denman*, C. J. You should have objected, at the time, to the reception of the statement as evidence.]

Second point.

There was abundant evidence of a taking of sand by the owners of the particular estate which the defendant now occupies, from as far back as the memory of the oldest inhabitants of the neighbourhood could carry them. This was evidence of a *prescriptive* right. To support the 2d plea, it was not necessary to shew that the right had been enjoyed by the owners of the particular farm *in exclusion of others;* that they enjoyed "peculiar rights" or any "right of preference," or that the particular farm was "more favoured" than the rest. That other occupiers of lands in St. Erme and the neighbouring parishes took sand by virtue of a supposed custom, was no answer, under the plea of prescription, to the evidence of a taking by the owners of the defendant's farm. [*Patteson*, J. The evidence of

custom was your's, not your adversary's. The difficulty arises from your having a plea of custom and a plea of prescription. The jury could not help considering the evidence of custom. *Littledale*, J. The jury could not have found both the custom *and* the prescription. The custom stated in the 10th plea, is a custom applicable to *land*, not to persons.] There was evidence applicable to both pleas, and it should at least have been left to the jury to say whether *either* plea, and if so, *which* was supported; whereas they were in effect told that the evidence supported the plea of custom only. [*Littledale*, J. Upon consideration, I think there is some little doubt of the correctness of what I said just now—that the jury could not find both the custom and prescription. *Patteson*, J. It is *possible* that there may be a right by custom and a right by prescription. In the case of a prescriptive right of way, if the owner of the soil dedicates it to the public as a road, he does not destroy the prescriptive right of the individual, so that by going before magistrates and getting the way stopped, he could get rid of the private right.]

Third point.

The learned judge was wrong in saying that there was no evidence applicable to any other pleas than the 2d and 10th. The evidence was applicable to the pleas of lost grants, as fully as to the general plea of prescription. That which is evidence under one is evidence under the others. The seisin of the grantor and of the grantee of their respective estates, is admitted by the traverse of the grant; *Cowlishaw* v. *Cheslyn* (*a*), *Stott* v. *Stott* (*b*); and the subsequent usage is evidence of the grant. [*Patteson*, J. Was there any evidence as to when the usage commenced?] None. [*Littledale*, J. I apprehend that before Lord *Tenterden*'s Act, as to 20, 30, 40, and 60 years' usage, the doctrine about presuming modern grants from long user, was beginning to lose ground (*c*). Lord *Denman*, C. J. I remember Lord *Tenterden*, before he was on the bench,

(*a*) 1 Crompt. & Jerv. 48.
(*b*) 16 East, 343.
(*c*) Vide *Lopez* v. *Andrew*, 3 Mann. & Ryl. 329, n.

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saying to me, that he thought it a very strong thing to require a jury to say upon their oaths, that a lost grant,—of which there is not the slightest evidence,—had been made.] These pleas have been constantly used in cases of this sort, down to the present time. In *Livett* v. *Wilson*, cited contrà, there were peculiar circumstances which took the case out of the ordinary rule.

First point. Lord DENMAN, C. J.—It is quite clear, upon looking at the report of the evidence, that upon the cross-examination it came out that sand used to be taken from other rights than the Geare-right. It is said that this came out not in answer to a question; still, as the defendant's counsel did not *object* to the evidence being retained upon the judge's notes, I think that the plaintiff's counsel were entitled to re-examine as to those rights.

Second point. (Cur. adv. vult.) The second objection is, that the learned judge misdirected the jury in saying, that under the plea of prescription it should appear that the owners of the defendant's farm had enjoyed peculiar favour. If what the learned judge said was said only as a test, by which the jury were to determine *which* of the two pleas was supported by the evidence, then I think he was right, unless the defendant could in point of law have *both* a customary and a prescriptive right attached to his land. We will consider further of this question.

Third point. Then it is objected that the judge misdirected the jury, in telling them that there was no evidence to support the pleas of lost grants. The evidence was equally applicable to *all* those pleas as to any one, and this consideration alone seems really sufficient to make an end of the question.

Second point. LITTLEDALE, J.—I am entirely of the same opinion with regard to the question, whether evidence was improperly received. The defendant's counsel should have prevented the evidence from getting on the judge's notes, if it was volunteered by the witness.

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With regard to the supposed misdirection, in putting it to the jury whether the owner of the defendant's farm was more favoured than others, I do not apprehend that the judge meant to say that this was necessary in order to prove a prescriptive right, but that what he said was merely a remark directing the jury to consider whether the evidence proved a custom or a prescriptive right conferred upon the particular farm.

Third point.

With regard to the objection in relation to the pleas of lost grants, there is this general answer,—that where user is proved, and it is not shewn that there ever was a time when the user did not exist, the jury are bound to find a *prescription*. If they are bound to find a prescription, they have no *right* to find a lost grant since time of memory, unless an actual grant be shewn, or unless something be proved, which affords a probable ground for supposing that a grant was made at the time laid. You must have some evidence applicable to the particular grant, as stated in the plea. Therefore the judge was right in his direction.

The same argument would apply to the 10th plea. You cannot by the same evidence shew a custom existing from all time, and also a lost grant.

I am not prepared to say, whether the custom and prescriptive rights in respect of the same land *can* co-exist.

First point.

PATTESON, J.—The first objection is, that evidence was improperly admitted. In the declaration, no *name* is given to the close: therefore there was nothing to call the attention of the judge to the name of the close, and when the witnesses spoke of Geare-right, he may have thought they meant some extensive tract, and not the close in question. If it had merely appeared in cross-examination, that other *persons* than the defendant had exercised a right in the same close, I should have said that the plaintiff's counsel was not entitled to re-examine as to a right in other *places*. But here it appears that *Jenkyns's right* was introduced in evidence in cross-examination. If this was introduced voluntarily by an adverse witness, it should have been ob-

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jected to and expunged from the judge's notes; for certainly the witness had no right, in this way, to let in evidence not admissible in chief. But no objection was made: the defendant has admitted this evidence by allowing it to stand in the judge's notes, and therefore I think that the plaintiff might re-examine as to it. The evidence was let in by the act of the defendant himself, and not by the fault of the judge.

Third point. I think all the pleas of non-existing grants completely out of the question. The evidence, if it proved any private right in respect of the farm of the defendant, shews a prescriptive right. The usage was not evidence of a lost grant, because you cannot apply it to any particular time. In support of a plea of a lost grant, you ought to shew a grant, or give some evidence to shew that the usage probably arose *about the time* at which the grant is said to have been made. There was no evidence here from which the jury could say that the usage was by virtue of a grant by *any* of the persons named in the pleas. The reason that usage for a long time, of which no origin is shewn, supports a prescription, is that *no particular time* is fixed when the usage commenced.

The direction of the judge was in effect, that the jury should say whether the evidence given was evidence of a general custom or of a prescription. We are not to look at the individual words of a judge, but at the general effect of his direction.

Second point. Upon the other point we entertain some doubt. No case as to whether a prescriptive right in respect of a particular farm may exist together with a public right, has been brought before us. We wish to consider further of this question.

WILLIAMS, J.—I am glad that the Court takes time to consider that point, which is a very important one.

At the trial I was put in great doubt by these two pleas. I certainly put it to the jury, that in order to support the plea of prescription, it must be shewn that the right attached

to the *particular tenement*, and that a general sweeping claim made by all the *inhabitant-occupiers* of lands in all the surrounding parishes would not support it.

With regard to the pleas of lost grants, it seems sufficient to say, that there was nothing to apply the evidence to one of them more than another. How can you say that it is any evidence at all of a *particular* grant, when it is applicable equally to *all?*

Cur. adv. vult.

On a subsequent day in the term, Lord DENMAN, C. J., delivered judgment upon the point reserved, as follows:

This case, when last argued, we considered to be in the same position as if there had been only two pleas of justification, one under a prescription to take sand upon the plaintiff's close, the other under a custom; and as if my learned brother, who tried the cause, had told the jury that they were to consider *which*, if either, of these pleas was proved, for that they could not find *both* in the affirmative. We desired time to consider whether this proposition of law was correct, but upon reflection it appears to us that this was not the question, but that the ruling must be taken with this qualification, viz. that they could not find both these things *upon the particular evidence* laid before them, but must decide which of the two they thought it proved. Whether a prescriptive and a customary right to the same privileges can by possibility exist in respect of the same land, if each be distinctly proved by proper evidence, applicable to each, is an abstract question which we need not determine. On looking back to the statement made at the time of moving for a new trial, we find reason to doubt whether the learned judge did so submit it to the jury; for he was ready to receive their verdict on the 2d plea, affirming the prescriptive right, if they had chosen to persevere in it. But the ruling, if it had been in those terms, must be taken with reference to the fact, that the *same evidence* was offered in support of both the issues. It was evidence of enjoyment only, by which the party pleading his right

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undertook to prove it. But it would be inconsistent with common sense to say, that the very same facts could prove two rights of a completely different nature, such as a right of taking sand by prescription in himself and his ancestors alone, in respect of particular lands, and in himself in common with his brother farmers in respect of all lands in the parish, in respect of which the prescription is claimed, *and also to himself and all the inhabitants of the county.* It was manifestly necessary that the jury should make that election among inconsistent rights, which the evidence should appear to them to establish. We think, therefore, that the question was properly submitted and the direction right.

Rule discharged.

CLAY *v.* STEPHENSON and others.

Under 1 *W.* 4, c. 22, s. 4, the Courts there named may order a commission to issue for the examination of witnesses abroad, *omitting the usual clause requiring the commissioners to take an oath as such*, where it is shewn that such omission is requisite for the purpose of rendering the commission effectual.

A Rule had been obtained in this case, calling on the defendants to shew cause why a commission should not be issued for the examination, upon interrogatories, of certain witnesses at Hamburgh, directed to the judges of the Court of Commerce at Hamburgh; and why, in such commission, *the usual clause, rendering the commissioners' oath necessary, should not be omitted;* or otherwise, why the commissioners to be named in the said commission should not, if necessary, and in their capacity of commissioners appointed by this Court, and in the name of this Court, be authorized to apply to the said Court of Commerce, or

Where therefore it appeared that witnesses residing at Hamburgh, whose testimony was necessary to the case of a plaintiff suing in this Court, refused to give evidence voluntarily before ordinary commissioners, and by the law of Hamburgh could not in any manner be compelled to do so, and that the judges of the Court of Commerce there would have power to compel the attendance and examination of witnesses upon oath, under a commission directed to them by this Court, and would be willing to render it effectual, provided they were not called upon to take any special oath as commissioners, this Court ordered a commission to be directed to them, omitting the clause requiring the usual oath.

The Court refused to make any special order respecting the costs of a rule for such a commission, leaving them to be costs in the cause.

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other proper tribunal at Hamburgh, to render the said commission effectual, by compelling the attendance of witnesses, and obliging them to be examined upon oath; and also why, if necessary, a clause, authorizing such application, should not be inserted in the said commission.

These facts appeared upon the affidavits:

The action was brought for 521*l.* The cause was at issue, but could not be tried owing to the absence, in Hamburgh, of several witnesses whose evidence was necessary to the plaintiff's case, and who had refused to come over to this country and give their testimony. A commission had issued out of this Court, directed to certain individuals at Hamburgh, who having taken the necessary oath, summoned the witnesses to come before them, and give their evidence. The witnesses refused to comply; and by the law at Hamburgh they could not be compelled to attend and give evidence before any private individuals. The commissioners (supported by a note from Mr. *Canning*, the British consul-general residing at Hamburgh) petitioned the Senate of Hamburgh to lend its aid for the purpose of compelling the parties to appear before the commissioners, and give evidence; but the Senate refused to do so. The parties still persisting in their refusal to give evidence voluntarily, the commissioners next petitioned the Court of Commerce (*a*) at Hamburgh to lend its assistance, and enable them to enforce the attendance of the witnesses; but that Court decided that the petitioners' request could not be complied with. The commission was in consequence returned to this country unexecuted. The Senate and the Court of Commerce (or one of its members) alone have power to compel the attendance of witnesses, and cannot depute that power to others. If the Court of K. B. were, by a clause in the commission, to authorize the commissioners to apply in the name of the Court of K. B. to the Court of Commerce, or were, by a letter or by rule of the Court, to state their desire to have the witnesses examined under the authority of such Court of

(*a*) Handelsgericht.

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Commerce, by or in the presence of the commissioners appointed, leaving it to such Court to proceed conformably to its own practice, and to the said commissioners to do whatever they could for assimilating the forms as much as possible to those required by the laws of England, the Court of Commerce would in such case,—considering the persons so appointed to be the commissioners of a foreign Court,—be willing to afford every assistance which it might consider itself authorized to give, and would allow the commissioners to be present to watch the proceedings, and to put the questions to the witnesses and to sign the examinations, and in fact to allow them to do whatever the witnesses could be compelled to suffer them to do. But the Court would have no power to compel the witnesses to be put to an oath by others than by a judge, and it could not leave the performance of its official duties to others. Unless therefore the Court of King's Bench could allow the witnesses to be sworn and examined by a deputed member or deputed members of the Court of Commerce, (who, however, would never submit to take a special oath), though in the presence of the commissioners, the execution of the commission would only be practicable where the witnesses *consent* to appear and give evidence; or, if this Court would direct a *commission*, for the examination of witnesses, to the Court of Commerce of Hamburgh, omitting the clause calling on them to take the usual oath as commissioners, the Court of Commerce would execute the commission.

Upon the application for the rule nisi in this case, it was admitted by *Campbell*, A. G., that though it was the practice of some foreign Courts to write letters to other judicatures, requesting them to take the examinations of witnesses within the jurisdiction of such other judicatures, yet such a course (*a*) could not be pursued by this Court.

Wightman now shewed cause. This is an application

(*a*) This course however seems to be somewhat analogous to the writ to the bishop to certify bastardy, espousals, profession, &c.

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of great novelty. [*Campbell*, A. G., contrà. All that is asked is, that the commission may issue without the clause requiring the commissioners to take oath. If the Court think that they cannot do that, then the question is at an end.] It is an application to this Court, for it to ask a Court in a foreign country to interpose with its authority to compel the attendance of witnesses before them, in an action over which they have no jurisdiction; and, moreover, to dispense with the oath which is invariably required in the case of commissions to examine witnesses abroad. There is no precedent for such an application. The Court had certainly no power before the recent act of 1 *Will.* 4, c. 22, to issue such a commission. Then, what authority have they under that act? Section 1 enables the Court to issue writs or commissions to the Courts and judges of the colonies, islands, plantations, and places *under the dominion* of His Majesty in foreign parts, for the examination of witnesses in such colonies, &c. in the same manner as had been provided by 13 *Geo.* 3, c. 63, with respect to the examination of witnesses in *India*. Section 4 authorizes the Courts at Westminster and Court of C. P. at Lancaster, and the Court of Pleas at Durham, and the several judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order a commission to issue for the examination of witnesses, on oath, at any place or places out of their jurisdiction, by interrogatories or otherwise, and by the same, or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examinations, as may appear reasonable and just. It was intended by this section to give the power to order commissions to issue to *individuals* as commissioners, but not to a *judicial body*, having the power to compel the attendance of witnesses. These words, "as may appear reason-

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able and just," cannot, as will probably be contended contrà, be intended to authorize a commission to judges, or to warrant the dispensing with the sanction of an oath. Were the Court to issue this commission, it would establish a *dangerous* precedent.

Campbell, A. G. The first clause undoubtedly extends only to the case of British colonies. The Court is not called upon by this application to send a commission to a foreign *court* of justice, but to the individuals who compose that court, *as such individuals*, they having power which they are willing to exercise—though not judicially—for the execution of the commission. All that is asked is, that the *oath* may be dispensed with. The high character and office of these individuals is shewn, and it is stated that they will not submit to take an oath as commissioners. Would the Court refuse to direct a commission to *Quakers* or *Moravians* without requiring them to take an oath? [*Patteson*, J. Has any commission of this sort issued out of the Court of Chancery?] It would seem not. All that is asked in this case is, a commission in the common form,—valeat quantum,—omitting the oath. There is nothing in the act to prevent such an omission. Section 4 requires that the *witnesses* examined, shall be *upon oath* (*a*); but not a word occurs in the whole act as to any oath to be taken by the commissioners. On the other hand, the Court has power to give all such directions touching the manner of the examination, and *all other matters and circumstances* connected with such examinations, *as may appear reasonable and just*. This is a very ample power; and if this Court think it would be reasonable and just to direct that the commissioners should be at liberty, in their capacity of commissioners and in the name of this Court, to apply to

(*a*) The examinations may be taken by *affirmation* in cases where affirmation is allowed by law instead of an oath. *Vide* sect. 7.

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the Court of Commerce to render the commission effectual, by compelling the attendance of witnesses and obliging them to be examined upon oath, it may do so under the power given to it by this section. But the part of the rule which prays the Court to proceed thus may be abandoned; for it is apprehended that under this clause the rule may clearly be made absolute for a *commission* in the common form, omitting the oath. This will be a *useful* rather than a *dangerous* precedent. [*Patteson*, J. In the 44th section of 13 *Geo.* 3, c. 63, which enables the Court to direct a commission to the Courts in India, nothing is said about an oath. In practice, we have proceeded by mandamus: no oath has been required. That is a sort of authority to shew that an oath is not indispensably necessary.]

Lord DENMAN, C.J.—I think this may be done. There is nothing in the act forbidding us to issue a commission without requiring an oath, and it authorizes us to proceed with a general view of the justice of the case. When therefore we see by affidavit that by dispensing with the oath we may attain to the truth, which could not otherwise be got at, we ought not to require an oath to be taken. The Court of Chancery would, I think, feel itself bound to issue the commission as prayed; and we have the same power.

LITTLEDALE, J.—I must own that I have very great doubts as to the propriety of dispensing with the oath. Although it is true that the act does not require an oath, it never has been dispensed with before. My lord and my brothers, however, think that the commission may go.

PATTESON, J.—I think that we may direct a commission to issue as prayed.

WILLIAMS, J.—I must own I see no danger in issuing

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this commission, omitting the oath. Our present decision will not form a precedent except in a case like it.

Rule absolute for a commission to be directed to the Judges of the Court of Commerce (*a*) at Hamburgh, omitting the usual clause requiring the commissioners' oath.

Wightman applied for costs, on the ground that the rule was discharged as to the greater part of it, and that the applicants had asked a favour out of the ordinary course.

Campbell, A. G.—The rule is made absolute for that which is not in the nature of an indulgence. The Court were asked to take one or other of two courses. They have taken one of them.

Per CURIAM.—By section 9 of the act (1 *Will.* 4, c. 22,) the costs of every rule or order for the examination of witnesses under any commission, and of the proceedings thereon, are made costs of the cause, unless otherwise directed. We think that the rule must be made absolute without any special direction as to the costs.

(*a*) A new Court of Commerce (Handelsgericht), framed nearly upon the model of the French Tribunaux de Commerce, (as to which, see Code de Commerce, Livre 4, Titres, premier et troisième), was erected in Hamburgh in 1816. *Vide* Conversations-lexicon, verbo Handelsgerichte.

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IN Easter term a rule had been obtained, calling upon Mr. *Ramsden*, and several other gentlemen, to shew cause why an information in the nature of a quo warranto should not be exhibited against them, to shew by what authority they respectively claimed to exercise the office of governor and director of the poor of that part of the parish of St. Andrew, Holborn, which lies above Bars, in the county of Middlesex, and St. George the Martyr, in the same county,—on the ground that their elections were invalid, not being in accordance with the provisions of 6 *Geo.* 4, c. clxxv (*a*).

By this statute it is enacted, sect. 5, that on 25th March in each year, the rated inhabitants within the above district should elect twenty-five gentlemen and twenty-five tradesmen, who, with certain official persons, were constituted the governors and directors of the poor of the district for the ensuing year, with power to make orders and rules for the government, relief &c. of the poor, and for the ascertaining, charging, collecting, managing, and regulating of the poor-rate, and for the appointment of watchmen and beadles, and for the regulation of the constables.

By sect. 8 it is enacted, that the governors &c. shall, on the Wednesday next after their election, meet together and make out a list of sixteen inhabitants or occupiers, of whom justices at a petty session are to appoint four to be overseers of the poor of the district for the ensuing year.

By sect. 10, all the messuages &c. occupied or used for

By a local act, the inhabitants of an incorporated district are directed to elect governors and directors of the poor,—who are authorized to make orders and regulations respecting the poor and the poor-rates,—are to make out a list of sixteen inhabitants or occupiers, from which list justices at a petty session are to elect four to be overseers of the poor,—are empowered to appoint watchmen and beadles, (who are to be sworn in as constables, and act as such whilst in execution of the powers of this act, and who, together with the constables duly appointed, are to be under the direction

(*a*) Repealing 39 *Geo.* 3, c. xli.

and control of the governors and directors,) clerks, collectors, treasurers, inspectors, assistant overseers, and all such other officers as they may think fit,—to dismiss them, and pay them such salaries as they may think proper,—are to ascertain and settle the sum to be assessed for parochial purposes, (for which sum poor-rates are to be made by the inhabitants,)—are to have vested in them all houses &c. used for the accommodation of the poor, and of the watchmen and beadles, and all other property purchased for those purposes, and are to sue and be sued, and to prosecute by indictment or information.

Held, that the office of governor and director is not such an office that an information in the nature of a quo warranto will lie for an usurpation of it.

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the accommodation of the poor, and the watchmen and beadles of the district, and all moneys and rates, fixtures, furniture, &c. were vested in the governors &c., who were thereby empowered to bring and to defend suits or actions, and to prefer indictments or lay informations, laying the property as the property of the governors and directors.

By sect. 12, the governors &c. are to meet in August and in February, or oftener if necessary, to ascertain and settle the amounts to be assessed for the relief of the poor, and for defraying the expenses of the watch and beadles.

By sect. 13, the inhabitants and occupiers present at any meeting to be held for that purpose, within twenty days after the several sums of money shall have been so ascertained as aforesaid, are directed to make two distinct rates, one to be applied towards the relief of the poor, and the other towards defraying the expenses of the watch and beadles.

By sect. 32, the governors &c. are authorized to appoint watchmen and beadles, who are to be sworn in as constables, and to act as such whilst in the execution of their office, and who, together with the constables, duly appointed, are to be under the direction of the governors, &c.

By sect. 36, the governors &c. are empowered to repair, hire, rent, purchase, or erect watch-houses.

By sect. 38, the governors &c. are authorized to appoint and remove a clerk, collectors, a treasurer, overseers, and inspectors, and other officers and servants, and to pay them such salaries as they shall think proper.

Sir *F. Pollock*, *Merewether*, Serjt., *Thesiger*, and *Comyn*, now shewed cause. A quo warranto will not lie in this case. It is a high prerogative writ, which issues only where the *crown* is interested. In this case no office or franchise under the crown has been invaded. The governors &c. in this case, have only such duties to perform as are usually discharged by the churchwardens and overseers; and it was

determined in *Rex* v. *Danbeny* (*a*) and *Rex* v. *Shepherd* (*b*), that no quo warranto lies for the office of *churchwarden*. Nor are the parties without a remedy; for the validity of the election of the governors &c. may be tried in an action of trespass, property being vested in them by the act. There is no case similar to this. In *Rex* v. *The Corporation of the Bedford Level* (*c*), it was held, that a quo warranto information did not lie for the office of registrar, an officer whose duty it was to register the titles to land within the Level, and who was bound to take an oath of office. [*Patteson*, J. That decision proceeded on the ground that the registrar was the *servant of the corporation*. Here, the question will turn on the nature of the office.] A quo warranto does not lie against the clerk of the commissioners of land-tax; *Rex* v. *Thatcher* (*d*). In one case (*e*) it was held to apply to the office of steward of a court-leet, but not to that of steward of a court-baron; the former being a court of record, which the latter is not. In *Rex* v. *Highmore* (*f*) it was held, that a quo warranto would lie for exercising the office of *bailiff* in a borough which was not a corporate town. But there the bailiff was the *returning officer*. *Rex* v. *M'Kay* (*g*) is open to the same observation. Formerly, where a private right was in question, and a franchise had been usurped, the practice was to refer the matter to the Attorney-General, who might file an information. The rule now is, that the Court will not grant an information unless the *public* are interested. In this case there is no encroachment on the crown, and the public at large are *not* interested. The office is created by statute, and the operation of that statute is confined to the limited district. [*Patteson*, J. In *Rex* v. *Badcock* (*h*), in which an information was granted, a power was given to the commissioners to impose rates

(*a*) 2 Stra. 1196; *S. C.* 1 Bott, 288, pl. 326.
(*b*) 4 T. R. 381.
(*c*) 6 East, 336; 2 Smith, 535.
(*d*) 1 Dowl. & Ryl. 426.
(*e*) *Rex* v. *Hulston*, 1 Stra. 621.
(*f*) 5 Barn. & Ald. 771.
(*g*) 8 Dowl. & Ryl. 393; 5 Barn. & Cressw. 640.
(*h*) Cited in 6 East, 359.

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and taxes on the inhabitants. In this case the rates are to be made by the inhabitants, and not by the directors, &c.] They have no power to appoint constables. They have only a power to name watchmen and beadles.

Campbell, A. G., *Erle*, and *Jardine*, in support of the rule. It is not contended that a quo warranto lies for the office of churchwarden. That is an *ecclesiastical* office, the right to which may be determined in the ecclesiastical court. The duties which the governors and directors have to perform, are very different and far more extensive than those of churchwardens and overseers. This is manifest upon an examination of the different clauses of the act. By the 5th section, the governors &c. may make orders for the government, relief, maintenance, and employment of the *poor;* for the ascertaining, charging, collecting, managing, and regulating of the *poor-rates;* for the appointment, regulation and management of the *watchmen* and *beadles;* and for the regulation of the *constables*. By sect. 8, the governors &c. are to make out a list of sixteen substantial householders, to be returned to the justices, in order that they may appoint out of that list four persons to be overseers. By sect. 12, they are to *ascertain and settle* the amount of the sums of money which shall be requisite for the maintenance of the poor, and for defraying the expenses of maintaining the nightly watch and beadles. By sect. 13, the inhabitants are to make rates accordingly. The discretion as to raising money is vested in the governors &c., and not in the inhabitants; since the latter are bound to raise such sums of money as the former may think necessary. The governors &c. may likewise appoint watchmen and beadles, who are to act as constables, and they are to have control over the constables duly appointed. A quo warranto will lie for the office of bailiff or of constable. [*Patteson*, J. It does not necessarily follow, that because a quo warranto lies for the office of constable, it will lie for the office of the person who appoints the constable. I find an instance to the con-

trary in *Comyns's Digest* (*a*), by which it appears that a quo warranto lies for the office of steward of a court-leet of a manor, but not for the ownership of the manor.] In *Rex* v. *Nicholson and others* (*b*), an information in the nature of a quo warranto was granted against persons who acted as trustees under a private act of parliament, for enlarging and regulating the port of Whitehaven; and the ground of that decision was, that the office was one in which the *public* were interested. In this case, the *public* are much interested in the mode in which the very extensive power and authority entrusted to the governors &c. is exercised. In *Rex* v. *Badcock*, the Court granted the information, on the ground that the officer had a power to *raise money*,—which power the governors &c. possess. In no shape could a rule for a *mandamus* be made absolute. To whom could it be directed? [*Patteson*, J. A mandamus might be directed to the parish.] It may be admitted that a *quo warranto* is an ancient prerogative writ, and that it issued only where a franchise and authority of the crown had been usurped; but in later times the practice has been to grant an information in the nature of a quo warranto, for the usurpation of a statutory office of a *public nature*, which this office manifestly is.

Cur. adv. vult.

Lord DENMAN, C. J.—This was an application for a quo warranto. The case was argued upon a preliminary objection, namely, whether a quo warranto would lie in a case of this sort. The Court has come to the conclusion that a quo warranto will not lie in a case of this description. It would have been more satisfactory to us to enter at large into the discussion of the case, than to give an opinion on this narrow point alone. The same point was the subject of consideration three or four years ago, in *Rex* v. *Handley* (*c*), when Lord *Tenterden*, Mr. Justice *Taunton*, and my brother *Patteson*, were of opinion that a quo warranto

(*a*) See Com. Dig. *tit.* Quo Warranto, (A.) (B.)

(*b*) 1 Stra. 299.

(*c*) Not reported.

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would not lie. Mr. Justice *Parke*, on the contrary, thought that it would lie. But in consequence of this difference of opinion, no judgment was given at that time. My brothers *Littledale* and *Patteson*, before whom, with myself, the question was recently argued, now think that the quo warranto will not lie. I confess that I entertain a good deal of doubt upon the subject, but as the majority of the Court is of that opinion, we think it better that judgment should be given now, than that the public should be put to further inconvenience by further delay.

Rule discharged.

BARRONS *v.* LUSCOMBE and others.

Where magistrates are empowered to settle and allow the accounts of a public officer, and, in case of a neglect or refusal by such officer, for fourteen days after the allowance, to pay over the balance found to be due from him, are directed, upon application of the parties interested, to issue a distress-warrant for such balance,—they cannot after issuing a warrant in conformity with the power given to them, but before execution of it, order that the execution be suspended, on the ground of an error in the settlement of the accounts, unless the parties interested consent to such suspension.

Thus, in the case of a warrant under 50 *Geo.* 3, c. 49, for the balance adjudged by magistrates to be due from churchwardens and overseers at the expiration of their office.

Dubitatur, whether the order might not be suspended, on the ground that it had since appeared to the magistrates that there had been no neglect or refusal to pay for fourteen days after the allowance (*a*).

Semble, that if the distress-warrant were a *nullity*, the magistrates might suspend it.

Whether the magistrates have, in ordinary cases, where no party is specially interested in having the execution of the warrant, power to suspend a warrant which they have in due form issued, *quære*.

Where magistrates, without authority, order the suspension of the execution of a distress-warrant duly issued, and the officer afterwards executes such warrant, he is entitled, before action brought for the taking under such warrant, to a demand of a copy and a perusal of the warrant, under 24 *Geo.* 2, c. 44.

The adjudication of magistrates, under 50 *Geo.* 3, c. 49, s. 1, upon the accounts of churchwardens and overseers rendered by them at the expiration of their office, is in the nature of an *award*, and cannot be re-opened by those magistrates for the purpose of correcting a supposed mistake in the settlement of the accounts.

In case of a mistake, an appeal lies to the sessions.

TRESPASS for taking goods and chattels. Plea: the general issue.

At the trial before *Bosanquet*, J., at the Devon spring assizes in 1834, the following facts appeared:

(*a*) If, as recommended by the Court in *Rex* v. *Justices of Stafford*, *ante*, 94, the magistrates summon the party before them previously to the granting of a distress-warrant, this reason for attempting to suspend the execution of the warrant can hardly arise.

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The plaintiff, who had been overseer of the parish of ——, was called upon by the defendants, who were the succeeding overseers, in pursuance of the 50 *Geo.* 3, c. 49 (*a*), to deliver in, and did deliver in an account of all moneys received and paid by him. Two magistrates investigated the accounts, and adjudicated that 99*l.* 13*s.* was due from the plaintiff to the parish, and signed an allowance of the accounts accordingly. The plaintiff neglecting for fourteen days to pay the sum adjudged to be due from him, a distress-warrant was signed and sealed by the two magistrates, directed to the defendants, and placed in the hands of the defendant *Luscombe*. Before the distress-

(*a*) The 50 *Geo.* 3, c. 49, s. 1, enacts, "That in all cases where any account is required to be made and yielded, and to be signed and attested, by virtue of the 17 *Geo.* 2, c. 58, every such account shall be submitted, by the churchwardens and overseers, to two or more justices of the peace of the county, dwelling in or near the parish or place to which such account shall relate, at a special sessions for that purpose to be holden within the fourteen days appointed by the said act, for delivering in such account; and such justices are hereby authorized and empowered, if they shall so think fit, to examine into the matter of every such account, and to administer an oath or affirmation to such churchwardens and overseers, of the truth of such account, and to disallow and strike out of every such account all such charges and payments as they shall deem to be unfounded, and to reduce such as they shall deem to be exorbitant, specifying upon, or at the foot of such account, every such charge or payment, and its amount, so far as such justices shall disallow or reduce the same, and the cause for which the same was disallowed or reduced; and in case such churchwardens and overseers, or any of them, shall refuse or neglect to pay to their successors, within fourteen days from the signing and attesting such account, any sum or sums of money or arrearages, which, on the examination and allowance of such account, in manner aforesaid, shall appear or be found to be due and owing from such churchwardens or overseers, or any of them, or remaining in their hands, the subsequent churchwardens and overseers are authorized, by warrant from any two or more justices of the peace, to levy all such sum and sums of money, by distress and sale of the offender's goods, rendering to the parties the overplus; and in default of such distress, it shall be lawful for any such two justices of the peace to commit the offender or offenders to the common gaol of the county, there to remain, without bail or mainprize, until payment of such sum or sums of money or arrearages as aforesaid."

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warrant was executed, but some days after it had been delivered, a representation was made to the two magistrates, that they had made a mistake in their adjudication, and the two magistrates, believing they had done so, proposed to the parties that the accounts should be referred to an accountant, and by letter, directed to *Luscombe*, ordered that the execution of the distress-warrant should be suspended. At the time of writing this letter the magistrates did not sit together, but it was separately signed by them both. Notwithstanding the receipt of this letter, *Luscombe* afterwards, in conjunction with the other defendants, took the goods mentioned in the declaration. No demand had been made of a copy and perusal of the warrant, pursuant to the 24 *Geo.* 2, c. 44. It was objected on the part of the defendants, that such demand was necessary, as they had acted under a legal warrant, and for this *Price* v. *Messenger* (*a*) was cited; and further, that the warrant having once issued could not be revoked or suspended; and that, even assuming that it might be suspended, it had not, under the circumstances of the case, been suspended in a legal manner. The learned judge, without expressing any opinion upon the objections, directed the jury to find a verdict for the plaintiff, and gave the defendants leave to move to set aside the verdict and enter a nonsuit. Verdict for the plaintiff, damages 29*l.* In Easter term, 1834, *Bompas*, Serjt., obtained a rule nisi for a nonsuit; against which,

Plaintiff's first point: Whether distress-warrant properly suspended.

Sir *W. Follett* now shewed cause. If the distress-warrant was properly suspended, no demand of a copy and of a perusal of the warrant was necessary. The question, therefore, for the determination of the Court is this,—whether magistrates, having once signed a warrant, can afterwards legally prevent the execution of it? The proposition to be contended for on the other side is, that a magistrate who signs an illegal warrant, and delivers it to a constable to be executed, is liable for the consequences

(*a*) 2 Bos. & Pull. 158.

of that execution, although he expressly desires the constable not to execute it. To establish such a doctrine would be highly inconvenient and impolitic. Suppose an information is laid before a magistrate, who, after hearing the evidence, grants a warrant for the apprehension of a supposed felon, but immediately afterwards, being satisfied that the charge was unfounded, rescinds his warrant;—would the constable be justified in executing the warrant, after he has had express notice that it has been rescinded? That case resembles this. Here, the magistrates sign a warrant of distress, revoke it before execution, and give notice of the revocation to the parties to whom it is directed. It will be objected on the other side, that the order of revocation was illegal, since the magistrates did not sit together when they signed it. Whether they were *together* or not is immaterial. They both *agreed* to the revocation of the former order, and that is sufficient. It is idle for the defendants to say that they were acting in *obedience* to the order of the magistrates, when they must have known that they were acting in express *contradiction* to it. [Lord *Denman*, C. J. Is there any authority for saying that magistrates have the power to *suspend* a warrant of this description? Here, the inhabitants of the parish are *interested*. Have they not a right to object to the revocation, and to insist upon the execution of the warrant? *Patteson*, J. In *Rex* v. *Justices of Norfolk* (*a*), the magistrates superseded an order of removal which they had made; but that was with the *consent* of the removing parish, who were the parties interested.] Magistrates may supersede any order they have made. [Lord *Denman*, C. J. That is what I want an authority for.] The constable derives his authority solely from the magistrates, and is in fact only their servant. To hold that the magistrates have not power to suspend a warrant would be most mischievous. When a *judge* makes an order for the execution of a prisoner, he frequently suspends it; and the sheriff is

(*a*) 1 Dowl. & Ryl. 69; *S. C.* 5 Barn. & Alders. 484.

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bound to obey the order of suspension. The same authority which issues, may, before execution, revoke, a warrant. In this, and in every other court, before actual execution, process may be stayed. In *Nolan's Poor Laws* (*a*), it is laid down, that "if justices have made an order of removal by surprise, they may issue another, reciting that they were surprised, and suspending the first order, and commanding the parish officers to return it to be cancelled;" and for this two authorities are cited; *Pancras* v. *Rumbold* (*b*), and *Rex* v. *Smith* (*c*). [*Littledale*, J. There the magistrates acted together.] That is the second point. The question at present under discussion is, whether the magistrates had any right to revoke their warrant. The existence of this power of revocation must be highly conducive to the ends of justice. Suppose information is given to a magistrate, that a party is suspected of having stolen goods in his possession, and he issues a search-warrant: that subsequently other information is given to him, from which it is apparent, that if the search-warrant be executed, the object of the parties will be frustrated:—will not the magistrate be justified in revoking the warrant? Could it be said that the constable might, in that case, execute the search-warrant after he had received notice of its revocation? Every authority, until acted upon, is revocable by the party granting that authority: *e. g.*—The Lord Chancellor, by affixing the great seal, gives authority to commissioners of bankrupts: He has power, under the great seal, to revoke and suspend that authority.

Plaintiff's second point: Protection of officers.

Then it is objected, that the magistrates did not sit together when they revoked the warrant. That is not the question, since the plaintiff relies on the general proposition, that he who has authority to *issue* process, has power, at any time before execution, to *revoke* that authority; and the officer in whose hands the process is placed, after he has received notice that it is revoked, executes it at his

(*a*) 2 Nol. P. L. 3d ed. 187,—4th ed. 213.
(*b*) 2 Bott, 624, pl. 638. (*c*) 2 Bulstr. 343.

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own peril. [Lord *Denman*, C. J. How long is the magistrates' authority to continue? The officer is placed in an unfortunate situation by the act of the magistrates. Might he not be indicted for *not* executing the warrant entrusted to him?] That is the same question. It is submitted, that he would not be subject to an indictment. [Lord *Denman*, C. J. Can the magistrates, by *verbal* notice, get rid of their warrant *under seal* (*a*)?] It is sufficient if the constable has notice not to execute the warrant. The defendants, not acting under the warrant of the magistrate, cannot claim the protection of 24 *Geo.* 2, c. 44. [*Patteson*, J. If the original warrant was valid, and was not revoked by the subsequent order, the defendants have a right to the protection of the statute.]

Bompas, Serjeant, and *Crowder*, in support of the rule. The magistrates acted under 50 *Geo.* 3, c. 49, s. 1. Under the provisions of that section, they ascertained that a sum was due, and issued a distress-warrant to levy on the goods of the plaintiff, the balance ascertained to be in his hands.

Defendants' first point: Justices functi officio.

It is contended, in the first place, that the warrant being perfectly legal, the magistrates, when they signed it, were functi officio, and could not by any subsequent act revoke it; and, secondly, that if the magistrates had such a power of revocation, they did not exercise that power in a proper and legal way; and that the defendants were consequently entitled to a demand of a copy and perusal of the warrant, before the present action could be brought. The instances which have been mentioned of the revocation of an authority before execution have no application to the present case. A judge, when he suspends the execution of sentence of death, acts on behalf of the Crown. When a judge suspends a warrant for the apprehension of a prisoner, and in all the other instances put of the revocation of an

(*a*) That they cannot, see *Rex* v. *Bingham*, 3 Younge & Jerv. 101, 1 Crompt. & Jerv. 245, 379, 1 Tyrwh. 46.

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authority before execution, no third party is interested. In the argument for the plaintiff, the circumstance that a sum of money is *adjudged* to be due from him to the parish is overlooked. A power of appeal is given by the statute in case the magistrates make a mistake; but unless there have been an appeal, the adjudication is final. Even when the party does appeal, if the warrant issue, he must pay the money. It is not necessary to contend, that if the warrant had not been *legal*, the magistrates, before execution, had no power to revoke it. [Lord *Denman*, C. J. You admit that if the warrant had been a *nullity*, and the magistrates had told the constable not to execute it, and he afterwards executed it, he would do so at his peril.] That may be so. Here, the magistrates act in a character analogous to that of *arbitrators*, and their adjudication is analogous to an *award*. An arbitrator having published his award, cannot afterwards alter it on the ground that he has made some mistake as to the accounts between the parties. [*Patteson*, J. If the revocation of the warrant would have the effect of *opening the accounts*, I quite agree with you.] If the magistrates could revoke their warrant once, they could revoke it as often as they pleased.

Defendants' second point: Protection of officers.

If persons act bonâ fide in the belief that they are acting under a warrant, they will be protected, though they may be mistaken; *Price* v. *Messenger* (*a*). These parties did believe that they were acting under a valid warrant, and they considered the suspension not legal.

Lord DENMAN, C. J.—The very general ground on which the argument for the plaintiffs was placed, startled me a good deal. I should have thought, that a warrant under the hand and seal of two magistrates would have authorized the officer to execute it, notwithstanding any *notice* which he might receive. Here, the warrant was in itself perfectly good. If the warrant had been a *nullity*, or had issued *without any refusal* on the part of the plaintiff to pay

(*a*) 2 Bos. & Pul. 158.

the balance, the magistrates might, perhaps, have authority to revoke it. But that is not the present case. I should say that magistrates are not in general authorized to revoke their warrant after it had been delivered to an officer to be executed. The officer would be placed in a situation of very great difficulty if a magistrate could recall a warrant perfectly good. That question, however, does not arise in the present case, because here a third party, namely, the parish, is interested in insisting upon the execution of the warrant. It is clear, that in the opinion of the magistrates, upon the settling of the accounts there was a balance due from the plaintiff. The magistrates come to this decision, and subsequently issue their warrant to enforce payment of the money. Both the adjudication and the warrant were perfectly legal. The execution of the warrant is ordered to be suspended, because the magistrates entertain doubts whether the accounts were well settled between the parties. The magistrates had no right, in my opinion, to suspend the execution of the warrant on this ground. Nor had the magistrates, acting separately, any more right to suspend the execution of the warrant, than any individual judge has to set aside an order of the Court of which he is a member. The officers were, therefore, in my opinion, justified in acting under this warrant; and it cannot be said that they acted of their own wrong. The defendants were therefore entitled to have a demand of perusal and copy of the warrant made before action brought, under 24 *Geo.* 2, c. 44. If the warrant were wholly invalid, and the magistrates gave notice of nullity to the officer before it was executed, more especially if the party interested had not then required him to execute it, possibly the officer, if sued, would not be entitled to a demand of perusal and copy of the warrant.

LITTLEDALE, J.—By 50 *Geo.* 3, c. 49, s. 1, the accounts of the parish officers are to be submitted to two or more justices at a special sessions; and such justices are empowered to examine the accounts, and to disallow and reduce

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charges; and in case the overseers neglect to pay to their successors, within fourteen days, the sum of money which on the allowance of the account shall be found to be due, the subsequent overseers may, by warrant from any two or more justices, levy such sum by distress and sale of the offender's goods. After the justices have examined the accounts, they are in that respect functi officio. In this case, the accounts were examined and a warrant issued. But it is said, that the execution of the warrant was suspended; and the ground of suspension is suggested to be, that the magistrates had made a mistake in the investigation of the account. They had, in my opinion, no right to alter their award, in respect of the accounts, any more than arbitrators, to whom matters of account are referred, have a right, after they have published their award, to re-examine the accounts referred to them. If the parties had any reason to be dissatisfied with the settlement of the accounts by the magistrates, they might have appealed to the sessions. Had the magistrates discovered that there had been no refusal by the plaintiff to pay over the sum of money adjudged to be due from him, they might, perhaps, on *that* ground have suspended the execution of the warrant; but they had no right to grant a suspension on the ground that they had made a mistake in settling the accounts.

PATTESON, J.—The doubt which has weighed on my mind during the argument, has been upon the general question, whether a magistrate has power to revoke a legal warrant? I do not mean to say either that he can do so or that he cannot. If the argument for the defendants had gone the length of saying that a magistrate, *in no case*, can revoke a legal warrant, I should have wished for time to consider the question. But the warrant in this case was revoked on the ground that the magistrates had committed a mistake in the settlement of the accounts. This is the only ground suggested for the suspension. In short, the order of revocation is made that the magistrates may re-consider the accounts,

which, by the statute, I think, they are not empowered to do. When I look at the evidence, I find that this was the ground of suspension; for I find that, subsequently to the revocation, it was proposed to refer the accounts to arbitration. By the 49 *Geo.* 3, after the justices have examined the accounts at the special sessions, it is enacted, "that it shall and may be lawful for the subsequent churchwardens and overseers, by warrant from any two or more justices of the peace, to levy all such sum and sums of money by distress and sale of the offender's goods." The act does not say that the justices who *examined the accounts* and those who are to *grant the warrant*, shall be the *same* persons. The subsequent churchwardens and overseers may go to other justices besides those who examined the accounts, for the distress-warrant. What right then can those justices who examined the accounts have to suspend the execution of the warrant, merely that they may re-examine the accounts?

If the warrant had been suspended on the ground that the magistrates had discovered that there had been no *refusal* on the part of the plaintiff to pay the money adjudged to be due from him, that would have raised the general question, whether a warrant, which has issued *without* authority, can be revoked before execution. On that question I give no opinion at all.

The defendants were, in this case, in my opinion, entitled to a demand of copy and perusal of the warrant.

WILLIAMS, J.—The real question here is, whether the justices can revoke their warrant because they entertain a doubt as to the allowance of the accounts, and are desirous of reinvestigating them. Magistrates have no right to revoke their warrant on that ground; and that being so, the defendants were entitled to the protection of the 24 *Geo.* 2, c. 44.

Rule absolute.

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LEES *v.* KENDALL, REFFITT, RADCLIFFE, and STENSON.

Where, in trespass against *A.* and *B.*, the verdict is for *A.* and against *B.*, the costs of *A.* may be set off against the costs payable by *B.*, without regard to the lien of the plaintiff's attorney, although *A.* and *B.* plead separately, and appear by separate attorneys and counsel.

TRESPASS for an assault and battery.

Plea—by *Kendall;* first, son assault demesne; secondly, that *Kendall* was lawfully possessed of a public-house at Leeds, and that the plaintiff was unlawfully therein making a disturbance; and that the plaintiff refusing to go out, *Kendall* endeavoured to turn him out. Plea by *Reffitt;* first, not guilty; secondly, that the plaintiff had beaten *Kendall,* and that *Reffitt,* to preserve the peace, and to prevent plaintiff from further beating *Kendall,* molliter manus imposuit. Plea by *Radcliffe;* not guilty. Plea by *Stenson;* not guilty.

The replications to the special pleas alleged excess; which was denied by the rejoinders.

The defendants *Kendall* and *Reffitt* pleaded by the same attorney; and the defendants *Radcliffe* and *Stenson,* each pleaded by his own attorney (*a*). At the trial before *Parke,* B., at the last York spring assizes, each of the defendants appeared by his own counsel, and the jury found for the plaintiff on both the pleas by *Kendall,* with 40*s.* damages; for the plaintiff, without damages, upon the plea of not guilty by *Reffitt;* and for *Reffitt,* upon his second plea; and for the defendants *Radcliffe* and *Stenson,* upon their respective pleas of not guilty.

Upon the taxation of costs, the Master allowed the plaintiff 70*l.* as costs of increase, as against *Kendall,* which, with 40*s.* damages and 40*s.* costs, made 74*l.* And he taxed the defendant *Reffitt's* costs at 19*l*; the defendant *Radcliffe's,* at 32*l.* 10*s.*; and the defendant, *Stenson's,* at 18*l.* 15*s.*; which three sums, together amounting to 70*l.* 5*s.*, if deducted from the 74*l.* allowed to the plaintiff, would leave a balance in his favour of 3*l.* 15*s.* only.

(*a*) This circumstance is not adverted to in the judgment, and the decision proceeded on the authority of a case in the Common Pleas, in which the defendants did not so sever.

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The attorney for the defendants *Kendall* and *Reffitt*, contended before the Master, that he was entitled to have the 19*l.* allowed for *Reffitt's* costs set off against the 74*l.* allowed as against *Kendall;* and the respective attorneys of *Radcliffe* and *Stenson* also claimed to be entitled to have their costs set off against the plaintiff's 74*l.*

The Master referred the matter to the Court, and made a report stating the above facts.

Creswell now moved for a rule, calling upon the plaintiff to show cause why the Master should not set off the costs allowed to the defendants *Reffitt*, *Radcliffe*, and *Stenson*, against the costs allowed for the plaintiff against *Kendall*. In *George* v. *Elston*(*a*), which was trespass against *B.*, *C.*, and *D.*, who pleaded jointly, and appeared by the same attorney, a verdict was had *against* *B.*, with 10*l.* damages, and *for* *C.* and *D.*; and upon motion, the Court of Common Pleas held, that the costs payable to *C.* and *D.* might be set off against those payable to the plaintiff by *B.* The ground of the decision was, that the rule of H. T. 2 *W.* 4, s. 93 (*b*), does not apply to a set-off claimed by parties in the same suit. The principle of that decision applies to the present case.

Alexander showed cause in the first instance. The question may be considered as if the rule of Court alluded to had not been made. There has always been a distinction between the practice of the Common Pleas and King's Bench, as to preserving the attorney's lien for costs. In the Common Pleas, from the earliest cases down to the new Rules, the attorney's lien has been invariably disregarded. *George* v. *Elston* was decided by the Court of Common Pleas on

(*a*) 1 Bingh. N. C. 513.

(*b*) "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 in which the set-off is sought: provided nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted."

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the authority of *Schoole* v. *Noble* (*a*), which was also a case in the Common Pleas, and decided according to the peculiar practice in that Court. In *Randle* v. *Fuller* (*b*) it was held, in the King's Bench, that the lien of the plaintiff's attorney upon the debt and costs recovered in the cause, must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff. In *Middleton* v. *Hill* (*c*) also, the attorney's lien was in the same manner expressly recognized, in preference to the right of set-off. In both those cases, the distinction between the practice of the Common Pleas and the King's Bench was observed on by the Court. *Holroyd* v. *Breare* (*d*) much resembles this case: That was trespass against *A.* and *B.*, who pleaded the general issue and separate justifications (*e*): Verdict for *A.* generally, and for *B.* on the justification, but against him on the general issue:—Upon motion to refer it back to the Master, to review his taxation, one of the points made was, that the costs allowed to *A.* might be set off against those to be paid by *B.* *Bayley*, J., says, "As to the liberty of setting off the costs against each other, that cannot be allowed, because it would destroy the lien of the plaintiff's attorney." According to the old law, therefore, supposing that there had been no rule of Court, the Court would have said that the plaintiff's attorney should be first protected.

But further, this case may be treated as if there had been *separate* actions, for the defendants appear by separate attorneys, plead separate pleas, and are represented by separate counsel. If there had been separate actions, instead of separate pleas, &c. to one action, the Court would have had no authority to interfere with the costs in the

(*a*) 1 H. Bla. 24.
(*b*) 6 T. R. 456.
(*c*) 1 Maule & Selw. 240.
(*d*) 4 Barn. & Alders. 43.
(*e*) Though it is not so stated in the printed report, the justification by *B.* must have been pleaded to *part* only of the causes of action stated in the declaration; as otherwise *B.*, upon obtaining a verdict upon a plea which barred the whole action, would have been entitled to *receive*, instead of being liable to *pay* costs.

manner prayed. The parties who now apply are those who have severed the action. In *George* v. *Elston*, the defendants pleaded *jointly*, and appeared by the *same* attorney: Verdict for one defendant, and against the other. It was prayed that the costs might be set off, and objected that the lien of the plaintiff's attorney should first be satisfied. Such lien was, as of course in that Court, disregarded. [*Patteson*, J. But the practice of the Courts had been previously *assimilated*.] Supposing that to be so, the course pursued by the several defendants makes that case no authority here. By severing the action and appearing by separate attorneys and counsel, the expenses of the defence have been greatly increased. [*Patteson*, J. The plaintiff and his attorney were wrong in suing those persons who defended separately.] There is, however, that distinction in the circumstances between *George* v. *Elston* and this case. It may be doubted whether the rule of H. T. 2 *W.* 4, was rightly construed by the Court in *George* v. *Elston*. [*Patteson*, J. I take it that the case is quite independent of that rule. The rule applies only to costs between the *same* parties.] It is submitted, that the rule ought to be discharged altogether, or, at all events, as far as regards the costs of *Radcliffe* and *Stenson*.

Cresswell, in support of his rule. In all the cases cited, except *Holroyd* v. *Breare*, in which the matter was but little considered, the costs which were sought to be set off were the costs of a *different action*. To deny the right to set off, in a case such as this, in favour of the attorney's lien, would be to hold out a premium to attorneys to make several persons defendants, to prevent their giving evidence. If there had been separate actions, the defendant in each might have given evidence in the other actions, and there might, in consequence, have been no verdict at all for the plaintiff. No principle, upon which the attorney's lien ought to be protected where the costs sought to be set off are costs in the same cause, can be found. The principle of the decision in *George* v. *Elston*, which was decided since the

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assimilation of the practice of the Courts, applies expressly, and is a reasonable principle. There can be no doubt that *Reffitt's* costs ought to be set off; and the rule ought, it is submitted, to be absolute as to the other defendants also.

Cur. adv. vult.

On the following day,

Lord DENMAN, C.J., said—There was a case before us yesterday, which was an action of trespass against four persons:—one of the defendants pleaded two special pleas, and a verdict passed against him on both; a second pleaded not guilty, which was found against him, and a special plea, which was found for him; and the other two defendants pleaded pleas of not guilty, which were found for them. The costs of those issues which were found against the plaintiffs were sought to be set off against the plaintiff's costs of the issue found for him; and a case of *George* v. *Elston*, lately decided in the Common Pleas, was cited in support of the claim of set-off. We feel that case to be an authority which we cannot get over, and we think that the rule must be made absolute to the full extent.

Rule absolute.

The KING v. The WILTSHIRE and BERKSHIRE Canal Navigation Company.

Where a canal act gives the control over the Company's affairs to a committee, and authorizes every proprietor to inspect the books in which the committee are directed to enter accounts, &c., a mandamus will not be granted to compel the Company to permit a proprietor to inspect the books, where there has been no refusal by the committee, although there has been a direct refusal by the clerk, in whose possession the books are.

So, although upon an application to the committee, they say that they must consider of the application, as it is a novel one, and inspection is afterwards positively refused by the clerk.

Before the Court will grant a mandamus there must be a direct refusal by the proper parties to do the act.

IN Michaelmas term last, *Bere* obtained a rule nisi for a mandamus, commanding the Company to allow *Thomas Vincent*, a proprietor, to inspect all books, papers, and writings, belonging to the Company, and kept in pursuance

of the provisions of 2 *Geo.* 4, c. xcvii, and to take copies thereof, or extracts therefrom.

This act directs that the affairs and business of the Company, except such matters as are directed to be done at a meeting of the proprietors, shall be transacted and managed by a committee of management; authorizes the committee to appoint clerks, superintendents, surveyors, and all other officers, except the treasurer, and to settle all accounts of the treasurer, collectors, and other officers; and directs them to enter in books an account of all moneys disbursed and received by them, and of all their contracts, orders, transactions and proceedings; and every such book of account, and all books, papers, and writings belonging to the Company are at all seasonable times to be opened to the inspection of all the proprietors, who may take copies thereof, or extracts therefrom, without fee or reward. The committee are also required to take an account of the rates, tolls, and duties, and other moneys collected and received, and of the expenses incidental to the maintaining the navigation and other works, and to balance that account *annually* up to the Saturday nearest the last day of December; and such account is at all seasonable times to be opened to the inspection and perusal of every proprietor.

The committee appointed *Crowdy* clerk to the company, and *Dunsford* agent or superintendent.

15th February, 1834, *Vincent* became a proprietor of four shares.

10th July, 1834, *Vincent* inquired of *Crowdy*, where the books, papers, and writings of the Company were kept, and was informed by him that the minute book and list of the proprietors were kept by him, and that all the other books, papers, and writings were kept at the office of the Company at Swindon, under the care of *Dunsford*.

10th August, *Vincent* applied at the office at Swindon, during the usual hours of business, to inspect the books, &c. belonging to the Company, when *Dunsford*'s clerk

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refused to permit him to see any books, except the book which contained the account of the *annual* expenditure.

21st August, *Vincent*, in consequence of such refusal, addressed a letter to *Crowdy*, informing him that he had been refused a sight of the books, &c. at the canal office at Swindon (except as aforesaid), and expressing a wish to see them, and also the minute book and list of the proprietors in *Crowdy's* possession; to which letter *Crowdy* replied, that he should submit the application to the committee, at their meeting on 12th September.

12th September, *Vincent* waited upon the committee to request a sight of the books, &c., and read to them the clause of the act under which he made the application; upon which the chairman stated, that it was such an application as never had been made to them before, and that it would therefore require time to consider of it.

18th September, *Vincent*, not having heard from the committee or any other person upon the subject of his application, wrote to *Crowdy*, insisting upon his right, as a proprietor, to see the books and papers, and informed him of his intention to move for a mandamus, if his application were not complied with.

20th September. No answer being returned, *Vincent* wrote again to *Crowdy* and *Dunsford*, stating that he would, with his solicitor, call upon them on 22nd September to inspect the books, &c. in their possession.

22nd September, *Vincent*, with his attorney, called at the office of *Crowdy*, during the usual hours of business; but was informed by *Crowdy's* clerk that *Crowdy* was from home. He thereupon requested inspection of the books, &c. in the possession of *Crowdy*; upon which the clerk stated that *Crowdy* denied his right to an inspection of such books, &c. *Vincent* then left the office, stating that he would call again shortly; but, before doing so, *Crowdy's* clerk came to him, and stated that *Crowdy* had returned home and had gone out again, and declined to see him upon the

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subject of his application. *Vincent* went again to the office of *Crowdy* about two in the afternoon of the same day, and repeated his demand to see the books, &c. in the possession of *Crowdy*; when the said clerk repeated that *Crowdy* was from home, and that he denied *Vincent*'s right to inspect. Later in the same day *Vincent* went to the office of the Company at Swindon, and, as a proprietor, demanded of *Dunsford* an inspection of the books, &c. *Dunsford* then refused, in the most peremptory manner, to allow him an inspection of the books, &c. or any of them; at the same time stating that he had no personal objection to do so, but that he declined to do it until a judicial decision had been obtained as to the extent to which an individual, circumstanced as *Vincent* was, might go in demanding such inspection.

The rule nisi having been obtained upon affidavits stating the above facts, an affidavit in answer stated that the only object which *Vincent* (who was a bargeman) had in applying to inspect the books was to harass and annoy *Dunsford*, in consequence of a quarrel between them, and that it was for that purpose that he had become a proprietor.

First point: Motive of application.

Campbell, A G., and *R. V. Richards*, now shewed cause. This application is made merely for the purpose of annoying the officers of the Company; and therefore, assuming that the applicant has a right as a proprietor to inspect the books of the Company, yet this Court will not permit the mandamus to issue.

Second point: Whether mandamus lies.

This is a mere private company, and to such the Court will not send a mandamus. In *Rex* v. *The London Insurance Company* (*a*), a mandamus to that Company to compel them to permit a transfer of stock to be made in their books, was refused by this Court, on the ground that the Company, although incorporated by charter, was a mere private partnership, and that a mandamus is a high prerogative writ, confined to cases of a public nature.

(*a*) 5 Barn. & Alders. 899.

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The applicant states no special reason for desiring to see the accounts. In *Rex* v. *Clear* (*a*), an application was made for a mandamus to compel churchwardens and overseers to permit a rated inhabitant to inspect their accounts, according to the directions of 17 *Geo.* 2, c. 38. The Court refused the rule, because the applicant had not stated the *grounds* upon which he desired to inspect the books.

Third point: Insufficient demand and refusal.

There has been no positive *refusal* by the proper parties. It may be admitted that there was a refusal on the parts of the clerk and of the superintendent; but the books are under the control of the committee of management, and *they* did not positively refuse an inspection. The chairman said that they must take time to consider of the application, as it was one of an unusual description; and no further application was addressed to the committee.

rst point.

Bere, in support of the rule. This is an application made on the part of a proprietor, who wishes to see how the affairs of the Company are conducted. It is difficult to see how this application can be any annoyance to *Dunsford*, who is only the servant of the Company.

cond point.

The act contains an express power to every proprietor to inspect the books of the Company. The applicant, therefore, possessed a statutory right, and he has no adequate remedy except by mandamus. *Rex* v. *The Severn and Wye Railway Company* (*b*), shews that where a party possesses a right, and has no other adequate means of enforcing it, this Court will grant him a mandamus. *Rex* v. *The London Insurance Company* is distinguishable from the present case, for there it did not appear that the applicant had any positive right to inspect. *Rex* v. *Clear* is also distinguishable, for the 17th *Geo.* 2, c. 38, gives the parishioners not a general but merely a limited right of inspection—for the remedy of the evils mentioned in the preamble of that statute. This appears from the judgment of *Bayley*, J., in

(*a*) 7 Dowl. & Ryl. 393; *S. C.* 4 B. & C. 899.
(*b*) 2 Barn. & Ald. 646.

the report of the case in *Dowling* and *Ryland*'s Reports. [*Littledale*, J. in that case says, that the words of the section are not so general as to entitle a parishioner to an inspection, without having some public ground for desiring it. *Here* the right to inspect is *general*.

It is said that there is not sufficient evidence of a *refusal* to allow inspection. There was an application to, and a refusal by both the clerk and the superintendent of the Company. [Lord *Denman*, C. J. The committee of management have the control over the books.] The books appear to have been in the possession of *Crowdy* and *Dunsford*. [*Littledale*, J. The mandamus is moved for as against the Company. If the mandamus goes to the Company, a general meeting of the proprietors must be called.] The Court has power to mould the rule for the mandamus (*a*), and it may be issued to the committee of management, to the Company, or to the clerk. As the clerk is shewn to be in the actual possession of the books, &c. the mandamus ought to be directed to him. [*Littledale*, J. The mandamus cannot be directed to the clerk. That has been decided. (*b*)]

It is submitted that there was a sufficient refusal *by the committee*. The continued silence of the committee amounted to a refusal to allow the applicant to inspect. [Lord *Denman*, C. J. There should have been an application to the committee after they said they would take time to consider.] At all events the clerk, in express terms, denied the applicant's right to inspect. Even at the present moment, the committee, who appear to answer this application, do not say that they will permit the applicant to examine the books.

Lord DENMAN, C. J.—There is no doubt that every proprietor has a right to inspect the books and accounts of the Company; but those books and accounts are under

(*a*) *Vide Rex* v. *Trustees of St. Pancras New Church*, *ante*, 219.

(*b*) *Rex* v. *Jeyes*, *ante*, 101.

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the control not of the particular officers of the Company, but of the committee of management. It appears that the committee have appointed certain officers, and an application is made to them to allow this party to inspect the books and accounts: After the applicant has seen the officers, he applies to the committee of management, and the answer they give is, that the application is novel, and that they will take some time to consider of it. This is no *refusal*. The party satisfies himself with this application to the committee, and applies again to *Dunsford* and *Crowdy*, with whom it appears he was not on very good terms. It does not appear that they were authorized by the committee to give the answer which they did give to this second application. The party ought to have applied again to the *committee*. Until the committee have refused to grant an inspection, there is no ground for issuing a mandamus against any one. It appears to me, therefore, that as there was no refusal by the committee of management, this rule must be discharged.

LITTLEDALE, J.—I am entirely of the same opinion. There is no doubt upon the construction of the act of parliament. Every proprietor has a right to inspect the books and accounts at seasonable times, and upon a proper application. But the application must be made *to the committee* of management, and not to the officers of the Company. There is no refusal by the committee. They say, "This is a novel application, and we will take time to consider of it." That ought to have been followed up by another application, as there was no intention expressed by the committee to refuse to allow the applicant to have an inspection of the books and accounts. I think this rule should be discharged.

PATTESON, J.—I am also of opinion that there has been no sufficient refusal on the part of the committee, to authorize this application. There is no doubt of the party's

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right to inspect. Before this Court directs a mandamus to issue, the motive of the party for desiring to inspect the accounts should appear, in order that the Court may see that the motive is a proper one.

WILLIAMS, J.—I am of the same opinion. It does not appear that the party had any good motive for wishing for an inspection of the accounts.

Rule discharged with costs (*a*).

(*a*) And see *Rex* v. *Brecknock and Abergavenny Canal Company*, *ante*, iv. 871.

FLETCHER v. LEW.

THE plaintiff resided in the kingdom of Belgium. *Campbell*, A. G. in Easter term last,—on 30th of May,—obtained a rule on the behalf of the defendant, who was the commander of his Majesty's revenue cutter *Defence*, in the service of the Customs, calling upon the plaintiff to shew cause why the proceedings should not be stayed until the plaintiff should give such security for the costs in the cause, in case he should become nonsuit or discontinue, or the defendant should obtain a verdict, as the Master should approve of. Notice of action was given on the 24th of March last, and served on the defendant on the 6th of April. In this notice the abode of the plaintiff was described as of No. 7, Feston Street, Nieuport, in the kingdom of Belgium. On the 12th of May, a copy of a writ of summons was served. On the 15th of May, an appearance was entered. On the 25th May, a copy of the declaration was delivered, and a plea demanded; and on the 27th of May, a plea of Not Guilty was left with the

Where the plaintiff resides abroad, the Court, by the 98th rule of H. T. 2 *Will.* 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad.

So, it may be required after issue joined, *semble* (*a*).

(*a*) *Vide Du Belloix* v. *Lord Waterpark*, 1 Dowl. & Ryl. 348, n.

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plaintiff's attorney; but no copy of an issue has been delivered.

Platt now shewed cause. This application is made too late, as the defendant has pleaded.

Campbell, A. G. (and *Barlow* was with him) in support of the rule. Formerly, after plea pleaded, a defendant could not apply for security for costs; but this is altered by the late rule (*a*), which provides, that an application to compel the plaintiff to give security for costs must be made in *ordinary* cases *before issue joined*. The reason of the making of this rule was, that pleading may now proceed during vacation. This application was made within the first four days of term, and therefore is in time. [*Patteson*, J. The reason of the late rule was not what you have stated, but to assimilate the practice of the Courts. *Littledale*, J. The application was made within eight days after the declaration was delivered.] In *Fry* v. *Wills* (*b*), it was determined by *Littledale*, J., that the defendant did not lose his right to require security for costs, by obtaining further time to plead; and that the rule of Hilary term, 1832 (*a*), gives the Court a *discretion*, although a fresh step has been taken by the defendant after a knowledge of the plaintiff's absence or residence abroad.

Lord DENMAN. C. J.—We are of that opinion. The rule will be absolute on payment of costs.

Rule absolute accordingly (*c*).

(*a*) Rule 98, Hil. 2 *Will.* 4; 8 Bingh. 303; 1 Moore & Scott, 429; 3 Barn. & Adol. 389; 2 Crompt. & Jerv. 196.

(*b*) 3 Dowl. P. C. 6.

(*c*) And see *Wilson* v. *Minchin*, 2 Crompt. & Jerv. 87; 2 Tyrwh. 166; 1 Dowl. P. C. 299; *S. C.* per nomen *Minchin* v. *Minchim*, 1 Price, P. C. 159; *Brown* v. *Wright*, 1 Dowl. P.C. 95; *Rex* v. *Day*, ibid 32; *Rex* v. *Patteson*, ibid; *Walters* v. *Frythall*, 5 East, 338; *Duncan* v. *Stent*, 1 Dowl. & Ryl. 348, and 5 Barn. & Alders. 702; *Doe* d. *Hudson* v. *Jameson* 4 Mann. & Ryl. 570.

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The KING *v.* JOHN HENRY MANNERS SUTTON, Esq. an Infant.

INDICTMENT for the non-repair of Kelham Bridge, in the county of Nottingham, upon an alleged liability to repair ratione tenuræ. Plea: not guilty.

At the trial before *Tindal*, C. J., at the Derby spring assizes, in 1834, it appeared that the defendant was of the age of eleven years, and that he was the son and heir of Mr. *Sutton*, who died intestate, and who in his life-time was seised of the estate in respect of which the liability to repair was charged. The defendant, who was in the course of education, was in the habit of passing his vacation at Kelham, and occasionally visiting it at other times. His mother was his guardian in socage (*b*). At the trial, numerous objections were made, some of which are stated

An infant seised of lands in the actual possession of his guardian in socage (*a*), is not indictable for the non-repair of a bridge ratione tenuræ.

The guardian in socage, if in possession of the lands charged with the repairs, is indictable.

So, any *occupier* of the lands charged.

Whether the guardian in socage, or other owner of the lands charged, *not in possession*, would be also indictable, *quære*.

(*b*) It was stated on the motion for the rule nisi, that she had an allowance from the Court of Chancery, but it did not appear that she was the *receiver* appointed by that Court. *Vide post*, 359, (*b*).

(*a*) Guardian in socage is the next friend in blood to whom the inheritance *cannot* descend; Litt. 123; Perk. 65; Dyer, 359 b; 2 Roll. Abr. 40, l. 10, citing 27 *Edw.* 3, 79 b, (of the first edition of the Year-Books, being 27 *Edw.* 3, fo. 3, pl. 26, of the 2d edition,) 14 Vin. 178, pl. 2.

By 3 & 4 *W.* 4, c. 106, s. 6, every lineal ancestor is made capable of inheriting. This however would not prevent the mother from being guardian in socage in respect of lands which had descended ex parte paternâ; it being provided by s. 2, that in every case descent shall be traced from the purchaser, such lands could not descend to the mother; for though by her entry as guardian in socage the son would become actually *seised* of the freehold, yet as he would not have been the *purchaser*, the mother could not upon his death *trace* a *descent* to herself from a purchaser.

The late statute appears however to have taken the wardship in socage from persons related to the infant of the half blood, when related on the side from which the land descended,—or, in other words, on the same side with the purchaser,—although they should be also of half blood to the purchaser, inasmuch as by s. 9, such persons are made capable of inheriting next after relations of the same degree of the whole blood. *Before* that statute, a brother or other relation of the half blood was not only capable of being guardian, but was even preferred to more remote relations of the whole blood,—provided he were not of the blood of the ancestor from whom the land descended. Com. Dig. *tit.* Gardian, (B. 1); *Swan* v. *Gateland*, Cro. Eliz. 825; 2 Roll. Abr. 40, pl. 61; 14 Vin. Abr. 178, pl. 6; Sir F. Moore, 635; 2 Anders. 171, *S. C. Secus*, if the brother &c. of the half-blood to the infant were of the whole blood of the purchaser; because in that case the land might by possibility descend from the infant to some collateral relation, and from that relation to the brother &c. of the half blood. Co. Litt. 88 b.

"At common law, it was a good objection to remove a guardian in socage, that a remainder was limited to him; upon a presumption that such a guardian would destroy the ward. But it is no objection where a parent is guardian; for it would be a monstrous presumption, that a man would destroy his own child to inherit his estate." Per *West*, C. in the Court of Chancery in Ireland; Pasch. 11 *Geo.* 1; *Morgan* v. *Dillon*, 9 Mod. 142.

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below. By the direction of the learned judge, a verdict was entered for the crown, and leave was reserved to the defendant to move to enter a verdict of not guilty. In Easter term, 1834, *Campbell*, A. G. obtained a rule nisi to set aside the verdict, and enter a verdict for the defendant, or for a new trial, on the four following grounds; viz.

1. The infancy of the defendant.

2. The admission of improper evidence on behalf of the prosecution.

3. That the *occupier*, and *not* the *owner*, is liable.

4. The improper rejection of certain proceedings, offered in evidence on behalf of the defendant, of the 18th and 20th years of *Edw.* 3.

In support of the first ground, *Com. Dig.* tit. Chimin, (A 4,) and 1 *Roll. Abr.* 392; and in support of the third ground, 4 *Bla. Com.* 22, 1 *Hale's P. C.* 20, were cited (*a*).

Sir *F. Pollock*, *Balguy*, *N. R. Clarke*, and *Waddington*, in Easter term, 1835, shewed cause.

Third point: Liability of occupier.

I. It is said that the *occupier* is liable, and not the *owner*. The authorities cited from *Roll. Abr.* and *Com. Dig.* relate to *highways*, and not to *bridges*. All the cases as to the liability to repair *bridges* ratione tenuræ, throw the burden upon the *owner* of the land, and not upon the *occupier*; though it is not contended that the occupier is not liable, where the owner cannot be found. There is a passage in 2 *Inst.* which shews that the liability to repair is not in relation to the *occupation*, but is a charge upon the *estate*. Lord *Coke*, in his exposition of the stat. 22 *Hen.* 8, c. 5 (*b*), says, that "an infant that hath house or lands by descent or purchase, is liable to this public charge; and so is the husband of a feme covert." There is a case in *Palmer's* Reports (*c*), in which it was held that the occupier

(*a*) As the judgment proceeded upon the first and third grounds of objection, the arguments founded on the other objections are omitted.

(*b*) 2 Inst. 703, s. 5.

(*c*) Page 389.

was liable to an indictment for non-repair; but that was a case on 2 & 3 *Phil. & Mary*, c. 8, by which the occupier, and not the owner, was made liable. It is to be collected from all the authorities (although it is not distinctly laid down) that the public may make the occupier liable, but that is only where the owner cannot be found. [*Littledale*, J. In *Regina* v. *Sir John Bucknell* (*a*), it was laid down by *Holt*, C. J., "that a man is not bound to repair a bridge because he has a manor, or is lord of a manor; but it must be said that there is some charge upon the manor that can oblige the man to repair, and that only can be one of these two ways:—First, that he held the manor by the service of repairing the bridge &c., *that is ratione tenuræ*; and this being a charge *upon the possession*, is like any other service for which the tenant in possession is chargeable. Every tenant in possession, be he but tenant for years or at will, is bound to repair; and immediately upon default of repair he is indictable. The other way of charge is *by prescription*, and then it must be—the ter-tenant and all those whose estate he has, did use and were bound to repair." Is there any distinction in principle between highways and bridges?] *Regina* v. *Bucknell* is reported also by Lord *Raymond* (*b*). It would appear from that case,—and it is admitted,—that a tenant for years, or even a tenant at will, would be liable, where the owner cannot be found, but where he can be found, he is the person to be indicted. The owner is the person ultimately liable; and if it was necessary in the first instance to indict the occupier, and leave him to his remedy against the owner, there would be a multiplicity of proceedings. [*Littledale*, J. According to your argument, if the owner of the fee were to make a lease for ninety-nine years to *A.*, and *A.* were to grant an under-lease for twenty-one years to *B.*, and *B.* were to grant a lease from year to year, every one of the parties would be liable to an indictment.] A corporation is clearly

(*a*) 7 Mod. 55. (*b*) 2 Lord Raym. 792, 804, 856, 1175, 1249.

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liable to be indicted for the non-repair of land ratione tenuræ; yet there can be no actual occupation by a corporation. It is therefore manifest that it is in respect of the *estate* that the liability arises, and that it is not a charge upon the *person* in respect of the land. If the public could only proceed against the *occupier*, the remedy by indictment would be of little use. The occupier might be a man in bad circumstances, and there is no way of levying the fine upon the land. The *owner* is always a responsible person, since he receives the rents.

II. Assuming that the occupier is the party liable, the defendant in this case *was* the occupier. The land was occupied by his mother, who was his guardian in socage, and the occupation of the guardian in socage is the occupation of the ward; 1 *Cruise's Digest* (*a*), *Goodtitle* d. *Newman* v. *Newman* (*b*), *Reg.* v. *Duchess of Buccleugh* (*c*), *Co. Lit.* 89 a.

First point: Infancy.

Then it is said that the defendant is an infant, and is therefore not liable to this indictment; and in support of this position a passage from *Bla. Com.* was cited. *Blackstone*, as an authority for the proposition which he lays down, refers to a passage from *Hale's P. C.* Upon a reference to *Hale* it will be found, that he lays down the *reverse* of that which is stated by *Blackstone*. *Hale*, after speaking of the case of an infant indicted for a misdemeanor, or for a riot or battery, proceeds thus—"But if the offence charged by the indictment be a mere non-feasance, (*unless it be of such a thing as he is bound to by reason of tenure, or the like, as to repair a bridge &c.*) there in some cases he shall be privileged by his nonage, if under twenty-one, though above fourteen years, because laches in such a case shall not be imputed to him." [*Coleridge*, J. Do you contend that the infant may be *imprisoned?*] The authorities certainly shew that the infant cannot be imprisoned. There is a case mentioned in *Hawk. P. C.*, in which trespass was brought against a child of four years old, for knocking out a man's eye. It was put to the plaintiff's coun-

(*a*) Page 59. (*b*) 3 Wilson, 516. (*c*) 1 Salkeld, 358.

sel (*a*), whether he ought not at once to abandon the action. It does not appear how the case ended, but it was assumed that the infant was *liable* to the action. The law distinguishes the ages of infants into several periods for several purposes. An infant may be indicted for felony. This is not however like a case in which malus animus is charged upon the infant. It is a mere civil proceeding to try the *right*. The indictment does not charge any thing of a criminal nature. It was argued on a former occasion, that the passage in *Hale* which has been cited, applies to infants *above the age of fourteen*. There is however no reason why an infant under 14 should be exempt, and one above that age be liable. There is no difference in the *rights* of infants during these two periods, to furnish a principle for this difference of liability. Lord *Coke*, in the passage which has been already alluded to, draws no such distinction. In *Bac. Abr.* tit. *Infancy and Age*, (H), it is said, that as to misdemeanors and offences which are not capital, in some cases an infant is privileged by his nonage; and herein the privilege is all one, whether he be above the age of 14 or under, if he be under 21 years; but with these differences,—and then the passage from *Hale* is copied verbatim, and several additional authorities are cited in the margin It is therefore evident that *Hale* was not considered as applying the proposition to infants above 14. This is a *civil*, and not a *criminal* proceeding. The duty to repair is a mere *service*. The principle which makes a corporation liable, applies to an infant. In many cases infancy is no protection. Thus, in *Conny's* case it was held, that in a *per quæ servicia*, the

(*a*) Et cum hoc *Moile*, J., lifted up the very person, i. e. the infant, in his hand, and placed him on the Bench (en le Place), and said to *Wangford* (the plaintiff's counsel)—You see here the very person: therefore consider well, &c. *Wangford*, pointing to the eyeless socket of his client, said that he must act upon his instructions. Upon which *Billing*, for the defendant, prayed that a guardian might be recorded. *Copley*, the guardian appointed, prayed leave to imparl to Cras Mich. M. 35 *H.* 6, fo. 11, pl. 18.

The imparlance was probably effectual, as the case is not afterwards mentioned.

Trespass for assault and battery lies against an infant of the age of four years.

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defendant shall not have his age (*a*). When a public right intervenes, age cannot be claimed. If an infant is not liable, a bridge may remain out of repair for twenty years.

The defendant has pleaded not guilty: if he is protected by his infancy, he ought to have pleaded it *in abatement*, since, as far as regards the right, the *liability* is beyond question. [*Coleridge*, J. May it not be said that an infant *cannot be guilty* of an offence of this description; and if so, could not infancy be given in issue under the plea of not guilty?] It has been shewn that an infant *can* be indicted for this description of offence.

First point: Infant not indictable for non-reparation.

Campbell, A. G., *Adams*, Serjt., and *Amos*, in support of the rule. It is admitted that the defendant is in the same situation as an infant of six weeks old. Would an infant of that tender age be compellable to plead, and if found guilty be liable to be brought up for judgment? The interests of the public do not require such an absurdity; for the *occupier* is liable. It was said that the infancy should have been pleaded in *abatement*. How can an infant plead in abatement any more than in bar? It is admitted also that an infant cannot be *imprisoned*, in case the fine is not paid. What useful purpose then would the indictment answer? The offence of not repairing a bridge is by law a *misdemeanor*. It is a proceeding which subjects the offender to *fine and imprisonment*. [*Coleridge*, J. How is the infancy of the defendant to appear after verdict?] The matter is full of difficulties:—How is the infant to *plead*? In an action, if an infant is plaintiff, he appears by his prochein amy; if defendant, by his guardian. But he cannot appear by guardian in a criminal proceeding. Assuming that the possession of the guardian is that of the infant, the latter cannot be considered as the occupier for the purpose of making him liable to this criminal charge. If an infant is now liable, he must have been liable always. Before the abolition of tenure by knight's service, the guardian in chivalry took the profits of land which belonged to the infant

(*a*) 9 Co. Rep. 84 b, cited 2 Vin. Abr. 140, pl. 14.

ward to his own use. The infant then surely could not be liable to an indictment for the non-repair of a bridge. Does the abolition of tenure by knight's service at all alter the infant's liability? The rents and profits of the land are received by, and by law belong to the guardian in socage; and he has such an interest in the estate as would enable him to gain a settlement; *Rex* v. *The Inhabitants of Oakley* (*a*). Where the indictment is against the county, and the inhabitants are found guilty, the land of each individual is subject to a rate, and there may be a distress for the amount. 2 *Inst.* 703, is an authority merely to shew that where the inhabitants of a county are found guilty of an indictment for non-repair of a bridge, an infant, who is an inhabitant, is liable to the rate, and to a *distress* for the non-payment of it. But the passage is no authority for the position that an infant is liable to an *indictment*. The case cited from *Coke's Reports* (*b*) was a civil action, and the decision is therefore not applicable to the present question. The passage in Lord *Hale* will be found on examination to be an authority for the position, that an infant under the age of fourteen years is not liable to be indicted for the non-repair of a bridge. [Lord *Denman*, C. J. Suppose the infant to be in receipt of the rents and profits;—could he say, "I know my estate is liable, but I am an infant, and therefore I will not pay."] There was no evidence in this case of any knowledge on the part of the infant that he was liable. [*Littledale*, J. Suppose an infant above fourteen years of age, who had no guardian either testamentary or in socage, to be in possession and in receipt of the rents and profits.] In that case, the infant might be liable to an indictment; but here the infant is *under* fourteen, and his *guardian* is in possession and in receipt of the rents and profits. [*Coleridge*, J. Suppose a case where there could be no guardian either testamentary or in socage, as where a devise is made to a child, under fourteen, who is nullius filius.] The Court of Chancery would in that case appoint a guardian. [*Patteson*, J. A receiver appointed by the Court of Chancery

(*a*) 10 East, 491. (*b*) *Conny's* case, *ante*, 357.

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has no interest in the land (*a*): he is a mere bailiff or agent.] The Court of Chancery might interfere and grant a special power. The Court will not lay down a general rule in order to meet a contingency—which is scarcely possible—of there being no occupier. [*Patteson*, J. There is no case in which infancy can be pleaded in an action for a tort. Suppose a person were to fall over a bridge which is out of repair, and which an infant is bound to repair ratione tenuræ; the party injured might maintain an action on the case against the infant.] That is a petitio principii, as it assumes that the infant is liable. *Com. Dig. tit.* Chimin (A, 4), and 1 *Roll. Abr.* 392, shew that an infant is not liable to be indicted for the non-repair of a *highway*. The law applicable to highways is equally so to bridges, for a bridge is *part* of the highway.

Second point: Occupier alone liable.

Supposing there is a doubt as to the liability of an infant in the occupation of the estate in respect of which the liability arises, there can be no doubt that where an infant is not in the occupation, he is not liable. The defendant in this case is not in the occupation. The occupation is in the guardian in socage. For this the cases in *Com. Dig. tit.* "Gardian" (B. 4), and *Vin. Abr. tit.* "Guardian and Ward," are authorities. The *occupier* should have been indicted.

Adams, Serjt., and *Amos*, were heard upon the two other points; but as *Campbell*, A. G., was called away by official business, the Court said they would hear him the next day, if they thought it necessary. On the following day, *Campbell*, A. G., was about to argue upon the other points, when he was stopped by the Court.

Lord DENMAN, C. J.—We feel so much difficulty upon the first and third points, that we will look into the authorities upon those questions before we hear you upon the other points.

Cur. adv. vult.

(*a*) As to other receivers, *vide Doe* d. *Mann* v. *Walters*, 5 Mann. & Ryl. 357; 10 Barn. & Cresw. 626.

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Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court as follows:

This was an indictment for the non-repair of Kelham bridge, in the county of Nottingham, to the reparation of which the defendant was alleged to be bound ratione tenuræ. The indictment was in the common form, and the verdict passed for the crown. Upon the argument of a motion for a new trial, several points were insisted on, but as this case will be decided upon one only, it is unnecessary to do more than to state that one, with the facts on which it rested, and the reasons for our decision.

It appears that the defendant was son and heir of —— *Sutton*, who died intestate and seised of the property on which the obligation to repair attached,—that he was an infant of the age of eleven years, in a course of education from home, passing his vacations there, and occasionally visiting it,—that his mother was his guardian, and resided on the property.

It was contended that the defendant was not the *occupier*, and that the occupier only could be indicted for non-repair. As we are of opinion that the defendant was neither an owner nor an occupier in the sense required to make him chargeable upon this indictment, it will be unnecessary for us to decide generally whether *owners*, merely as such and not in occupation, are liable to charges of this description, as no doubt can exist as to the liability of *occupiers*. Considering it then as settled law that the *occupier* of land charged with the repair of a bridge is liable to the performance of that duty, and assuming only, for the purpose of the argument, that the *owner* as such may be *also* liable, the question for our consideration will be, whether the defendant is either the owner or the occupier of the lands charged, in such a sense as is required for the purposes of the present indictment. This will depend upon a consideration as well of the *facts* above stated as of the nature of the *duty* for the neglect of which he is charged.

Now, as to the former, we can only take the possession of the defendant's mother to be that of a guardian in

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socage; and it is clear from several authorities that, for some purposes, the infant whose guardian in socage has entered and is in possession, is considered in law as not merely the owner *in right*, but the owner in *actual seisin* of the lands (*a*). This is so for the purpose of transmitting lands by descent; *Bro. Abr. tit.* Descent, pl. 19(*b*); or excluding the half blood by a possessio fratris; *Goodtitle* v. *Newman*(*c*); in each of which cases an actual entry and possession, at least by construction of law, are necessary. The defendant therefore may be taken to be an *owner actually seised;* but then it is by his guardian; and his wardship precludes him entirely from any *control* over the land or any *disposal* of the issues (*d*). He can at present claim his maintenance from it, and no more. This is the nature of the defendant's present relation to the land.

Next, as to the duty to be performed,—it is to be observed that this is not merely the duty of any *inhabitant* of a county, with regard to a bridge reparable by the county, namely, to submit to an assessment on his lands, and a distress in case of non-payment, the amount of the assessment being to be paid over to public officers, who are charged with the actual superintendence and performance of the repairs. To this duty, an infant is expressly declared by Lord *Coke* (*e*) to be liable, if he hath house or lands by descent or purchase. But an individual charged as the defendant is here charged, is *himself* required to do the act, the law not interfering either to control or assist him in the manner of procuring or applying the necessary funds. It should seem reasonable therefore to suppose that the owner or occupier, who is to be held liable *criminally* for non-repair, should be one in whom the law supposes to be vested a *command* over and *actual possession* of the profits of the land; and we ought to require some principle or authority for holding that the liability attaches under other circumstances.

(*a*) *Podger's* case, 9 Co. Rep. 106 a. 2 Tho. Co. Litt. 180, note (W).
(*b*) Citing 8 Ass. fo. 14, pl. 6. And see *ante*, 353, (*a*); Co. Litt. 15 a; and the cases collected in
(*c*) 3 Wils. 616.
(*d*) *Vide* Keilw. 46 b.
(*e*) 2 Inst. 703.

It is true that if it could be shewn that *no other person* was in a situation to be called on for the performance of the duty, and that the *public* would receive *detriment* by considering the ward not liable, there are not wanting analogies in the law which would justify us in enforcing the performance of it *by him*. It is sufficient to refer for this purpose to the numerous cases collected in *Bac. Abr. tit.* "Infancy and Age" (L), in which an infant, suing or being sued, his age was not allowed, nor was the parol permitted to demur; the principle of which was, that by allowing the privilege in the particular case, some *inconvenience* would ensue to the *public*, or some *injustice* be done to the *parties*, more than countervailing the acknowledged inconvenience of suffering the suit to proceed during the non-age.

The remaining question therefore is, whether the guardian in socage in possession is such an owner or occupier as to be properly liable to the discharge of this burthen. Now it is clear that the guardian in socage, after entry, has the legal possession of the land to the use of the infant. It is observed by *Bayley*, J., in *Rex* v. *Oakley* (*a*), that the form of pleading by a guardian in socage, is, that he entered as such, and was possessed. During the continuance of his interest, he is in the entire receipt of the profits, and he is invested with the absolute control over their immediate disposal, subject only to the maintenance of the heir. He may bring trespass or ejectment in his own name, and make a lease also in the same until the infant's age of fourteen; *Wade* v. *Baker and Cole* (*b*); Courts should be held in his name, *Shoplane* v. *Roydler* (*c*); and he may grant copyholds in reversion even, the grants of which will be good, though they come not into possession during the non-age of the ward; 2 *Roll. Abr.* 41 (*d*).

The guardian then being in possession, and receiving and disposing of all the issues, subject only to the infant's maintenance and a future account, is undoubtedly such an *owner* and *occupier* as may properly be looked to by the

(*a*) 10 East, 495.
(*b*) 1 Lord Raym. 131.
(*c*) Cro. Jac. 99.
(*d*) 14 Vin. Abr. 185, pl. 3.

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The KING v. SUTTON.

public for the discharge of all those obligations to which the land is subject. And there is no injustice or inconvenience in this; because upon the *account* which he is to render to the infant, he shall have allowance of all his reasonable costs and *expenses; Litt.* s. 123.

Upon the whole therefore we conclude, that assuming it to be true generally that an *owner* not in possession may be bound, as well as the *occupier*, to the performance of the repairs of a bridge ratione tenuræ, still an infant in ward to a guardian in socage in possession, does not fall within the reason of that rule,—and consequently that the defendant, upon the facts now appearing, should have been acquitted.

Rule absolute.

REX *v.* The Justices of the County of CARNARVON.

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application.

A Bastard child, born on the 13th November, 1834, became chargeable to the parish of Llanfihangel-y-Pennant three weeks after birth. An order under 4 and 5 *W.* 4, c. 76, s. 72, on one *Williams*, as the putative father, was applied for at the Carnarvonshire Easter sessions, 1835, by the overseers of that parish. The justices considered that the application ought to have been made at the Epiphany sessions, and was now too late, and refused to make the order.

When a bastard child becomes chargeable a month before the Epiphany sessions, an application for an order to charge the putative father is not too late at the Easter sessions; *semble.*

Archbold, in Easter term last, moved for a rule for a mandamus to the justices to hear the application, and contended that the words (in s. 72) "may apply to the *next* General Quarter Sessions" were *directory* only, and did not preclude the overseers from applying at any subsequent sessions; that if the limited construction given by the sessions to these words were to be adopted, the enactment

The sessions cannot entertain an application, by the overseers of a parish, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his *appearance* in Court.

would in many cases be ineffective, as the overseers might often be unable to procure sufficient evidence to substantiate the charge against the putative father until after the first sessions; that sect. 73, by providing that in case an order be made against the putative father, the maintenance of the child shall be calculated from its birth, if that shall have taken place within six months previously, but if the birth shall have taken place more than six months previously, the maintenance shall be charged for six months only,—plainly indicates that the legislature contemplated that an application under sect. 72 might be made after the child had been *chargeable* more than six months.

The Court granted the rule nisi.

In the affidavit upon which the rule was obtained, the deponents were described as "*Owen Jones*, of Wanpeny Cogwyn, and *Owen Evans*, of Dewmback, *late overseers of the poor of the parish of Llanfihangel-y-Pennant*, in the county of Carnarvon, and *Robert Williams*, of Carnarvon, in the said county, attorney at law."

J. Jervis, on shewing cause, objected that the affidavits could not be read, on the ground that they did not contain the proper additions of the deponents, *Jones* and *Evans*, pursuant to Reg. H. T. 2 *W.* 4, No. 5, which directs that "the addition (*a*) of every person making an affidavit shall be inserted therein."

Archbold, contrà, urged that *Robert Williams* was properly described, and that enough of the matters in the affidavit were deposed to by him to enable the Court to decide the question intended to be raised.

Lord DENMAN, C. J.—The affidavit is not in the form required by the rule of court. We cannot go through it to see how much *Robert Williams* has deposed to.

Per Curiam. Rule discharged. (*a*)

(*a*) *Vide* 2 Inst. 665. (*b*) And see *Lawson's case*, 3 Tyrwhitt, 489.

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The affidavit having been amended and re-sworn, the Court granted a second rule.

J. Jervis in this term showed cause upon an affidavit, which stated, that upon the hearing of the case at the sessions, the overseers being called upon to prove their notice of application, put in a paper purporting to be a notice or a copy of a notice to *Williams*, but not signed. There had been no notice to produce any original notice. It was objected that this evidence was insufficient; but the sessions overruled the objection.

He was stopped by the Court.

Archbold, contrà, contended that the party must, by his *appearing* in pursuance of the notice, be considered as having *waived* any right to object that the notice was insufficient; that the paper which was put in was a mere *copy* of the notice; and that it lay upon the party, defendant, to produce the real notice, and shew that it was insufficient.

Lord DENMAN, C. J.—It is quite clear that the notice was insufficient. The objection was taken, and was never waived. We cannot enter into the other question.

Et per Curiam. Rule discharged, without costs.

MACDOUGALL *v.* NICHOLLS.

Where upon a summons attended at chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not.

If the party summoned considers that the order pronounced is in his favour, he should take out a cross-summons for the purpose of obtaining a similar order.

If parties, being before a judge at chambers, go by consent into matter not within the summons, and the judge makes a minute of an order, the party in whose favour such minute is made is entitled to draw up an order accordingly, *semble*.

SEWELL obtained a rule calling upon *Nias*, the plaintiff's former attorney in this action, to shew cause why he should not draw up an order made by *Coleridge*, J., at chambers,

or why he should not produce to the judge's clerk the original summons, with the judge's minute indorsed thereon, that the plaintiff might draw it up; or why, in case he should not produce such original summons, the plaintiff should not be at liberty to draw up the order from the minutes indorsed on his counsel's brief,—with costs.

It appeared upon the affidavit, that *Nias* having obtained a summons to amend or rescind a certain order of *Taunton*, J., made in 1834, respecting certain bills of costs, served it upon *Green*, the present attorney for the plaintiff; that the parties accordingly appeared before *Coleridge*, J., who indorsed upon the summons a minute of an order upon certain terms; that *Nias* received the summons so indorsed, and neglected, and upon application by *Green*, declined to draw up an order in pursuance of the judge's minute, or to give up the summons to *Green*; that *Green* applied to the judge's clerk to draw up the order without the summons and indorsement; that the clerk declined to do this, and stated that a party might abandon his order, if dissatisfied with it, and was not obliged to draw it up; that *Nias* had proposed a rehearing before the learned judge, but that *Green* had refused to accede to such proposal, and said that he should apply to the Court.

Platt now shewed cause. Mr. *Nias* was not bound to draw up the order, but, as stated by the judge's clerk, might abandon it at any time before it was drawn up, and might have done so even though the judge's minute had ordered exactly that which had been prayed for in the summons,—which was not the case here.

Sewell, contrà. If a party having called another before a judge, is at liberty to draw up any order made by the judge or not, according as that order may happen to be to his advantage or otherwise, he is, in effect, allowed to make experiments at the cost of his adversary, without any risk of prejudicing himself. It may be admitted that *Nias* was

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not bound to draw up the order himself, but he is not at liberty to withhold from the plaintiff the means of drawing it up. The decision of the judge is an *adjudication*, and either party is entitled to avail himself of it. Were it otherwise, the consequence would be to multiply expenses,—as parties would be obliged to have *cross* summonses, or summonses for the very purpose concerning which the judge has already made an order. A judge's order is analogous to an allocatur by the master, which, it has been held, is the property of the person in whose favour it is made. *Doe* d. *King* v. *Robinson* (*a*).

Lord DENMAN, C. J.—It is understood that a party is not bound to *take* an order for which he did not apply. If the other party thinks the order in his favour, he may have a summons. If the matter was in the nature of res judicata, the case might be different.

LITTLEDALE, J. concurred.

PATTESON, J.—I always understood that a party was not bound to draw up an order which was made upon his own application. When a party has objected to the form of the order which I have made upon his summons, I have said, "You have a remedy in your own hands." Where the order is upon a *different matter*, and the parties have waived any objection to the want of a summons as to that matter, it may be regarded as in the nature of an order obtained at the instance of the party in whose favour the order is made, and then *he* ought to have the order.

Rule discharged (*b*).

(*a*) 2 Dowl. P. C., 503.

(*b*) Where a party who moves for and obtains a *rule* of Court does not choose to draw it up, the Court will not compel him to do so. *Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883.

1835.

REX v. CURWOOD and others.

INDICTMENT against members of a Gas Company, for a nuisance in throwing poisonous matter into the river Thames, and in sinking barges and making erections in the river. The indictment contained twelve counts, charging a variety of nuisances — some in Middlesex, and some in Surrey. The indictment was removed from the Central Criminal Court by certiorari; and *Curwood* obtained a rule,—upon reading the indictment only,—calling upon the prosecutors to give the defendants a note in writing, stating the particular acts of supposed nuisance, upon which they intended to rely at the trial.

The Court ordered the prosecutor of an *indictment* for a nuisance, to give the defendant a notice of the nuisances intended to be proved.

A rule for this purpose may be granted without affidavit, upon reading the indictment only.

R. V. Richards now shewed cause. This is a novel application. The only case of the sort which has occurred, is that of *Rex* v. *Marquess of Downshire*, now pending in this Court; in which a rule, calling upon the prosecutor to state what roads were indicted, was granted; but there the judge required very strong affidavits, stating that the party could not, by any possibility, ascertain what roads were indicted. Here, however, the rule was granted upon reading the indictment only.

Curwood, contrà. The principle is perfectly clear, that an indictee should be informed what is the offence with which he is charged, in order that he may have an opportunity of defending himself. Here, it is impossible to say for what the defendants are indicted. Perhaps a motion to quash this indictment for multifariousness might have been supported. No affidavit was necessary, for it is only necessary to read the indictment, to see that the defendants could not know for what acts the prosecutors are proceeding. This is no novelty in principle. In Barratry, it is said by *Hawkins* (*a*), that "it seemeth to be settled practice

(*a*) 1 Hawk. P. C. c. 81, pl. 13.

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not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a *note* of the particular matters which he intends to prove against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances." The learned counsel added, that, in a case of embezzlement, a similar rule was once obtained by him.

Lord DENMAN, C. J.—We think it reasonable that the defendants should have the information prayed for. The rule should be made absolute.

LITTLEDALE, J.—In the case of an action, we should have no doubt upon the propriety of the plaintiff's being called upon to give this note. I see no reason for a different practice in the case of an indictment.

PATTESON, J. and WILLIAMS, J., concurred.

Rule absolute.

MADDOCKS, Executor, &c. *v.* PHILLIPS.

An order to exempt an executor plaintiff from costs after a verdict for the defendant, is a matter within the discretion *either* of a single judge *or* of the whole Court; and if a single judge has made an order, such order cannot be reviewed,—the decision, either of the whole Court or of a single judge, being final.

ASSUMPSIT for 5*l.* due to the testator. Plea: non assumpsit. A verdict having been found for the defendant, before *Williams*, J., the learned judge was applied to for an order under 3 & 4 *W.* 4, c. 42, s. 31 (*a*), to exempt the

(*a*) Which enacts, "that in every action brought by the executor in right of the testator, such executor shall, unless the *Court* in which such action is brought, or *a judge of any of the superior Courts*, shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

plaintiff from the payment of costs; but his lordship declined to make any such order at that time. A summons was afterwards taken out to appear before the same learned judge, who, upon an examination of his notes taken at the trial, made an order to exempt the plaintiff from the payment of costs.

Chilton, in Easter term last, moved to set aside that order. The learned judge ought not to have looked at his notes for the purpose of ascertaining the facts which were proved at the trial. Those facts should have appeared upon affidavit. In *Southgate* v. *Crowley* (*a*), *Tindal*, C. J. said "According to the general rule established by the act, an executor, when unsuccessful, is liable to costs. His occasional exemption is an excepted case, and, like other exceptions, must be made out clearly." The learned judge should not have referred to his notes, but, if necessary, should have laid them before this Court. The legislature did not intend that the power given by the statute should be exercised by the judge at nisi prius. *Southgate* v. *Crowley* was an application to the Court to exercise its discretion. This is a similar application to the discretion of the Court. [Lord *Denman*, C. J. Here the judge has exercised his discretion, with a full knowledge of all the facts. *Coleridge*, J. The authority of the learned judge in this matter is *co-ordinate* with our own.] The order may be set aside quia improvidè emanavit.

By the COURT.—The authority of a judge of any of the superior Courts, under this statute, is co-ordinate with that of the whole Court. We therefore cannot interfere.

Rule refused.

(*a*) 1 New Cases, 518; *S. C.* 1 Scott, 374.

1835.

AVERY v. CHESSLYN.

Trespass by lessor against lessee, for removing a cornice fixed to the freehold. Plea, that the cornice was of wood, was put up by the defendant, was fixed by screws only, was for ornament, and that it was carefully removed during the term, and that all injury was amended. Replication: that the cornice was not removable by law. Held, that the issue raises a question of fact and not of law, and that the question was substantially whether the cornice was so affixed to the freehold that it could be removed without injury to the freehold.

TRESPASS for, amongst other things, removing a cornice affixed to a house demised to the defendant for a term which had expired. Plea, not guilty; and also, as to the cornice, that it was of wood; that it had been put up by the defendant; that it was fixed with screws only, and was for ornament; that it was carefully removed during the term; and that the defendant had amended all injury done in removing it. Replication, that the cornice was affixed to the freehold, and was not removable by law (*a*). Upon which replication issue was joined. At the trial before *Coleridge*, J., at the last spring assizes at Monmouth, the facts of the special plea were proved; and *Coleridge*, J., in summing up to the jury, told them that the question was, whether the cornice was for ornament, and whether it was removable without injury to the freehold; and he observed strongly upon the fact, that in the actual removal no material injury to the freehold had been done. The jury found their verdict for the plaintiff, with considerable damages; and in last Easter term,

R. V. Richards moved for a new trial, on the ground of misdirection. The proper question was, whether the cornice was for ornament, and whether it was removable without injury to the freehold. The learned judge, however, went further, and put it to the jury *whether it was so removed*. [*Coleridge*, J. I summed up strongly that no substantial injury was done.] The *right to remove* cannot in any way depend upon the mode in which the cornice was removed. If it had been improperly or negligently removed an action would have lain. [*Patteson*, J. The

(*a*) *Quære*, whether this replication would not have been bad upon special demurrer, as amounting either to a traverse of the legal *result* of the facts stated in the plea, as to which see 1 Wms. Saund., or as an informal replication de injuriâ or informal traverse of *all* the facts from which that legal result was inferred.

mode of removing may be very good evidence as to the capability of being removed without injury to the freehold.] That would be a very good *test* of the removability, but it was not put as a test, but as a question for consideration. The question raised by the replication, whether the cornice was removable by law, was a question for the Court, and not for the jury.

Lord DENMAN, C. J.—The summing up seems to me to be right. It appears to me that the question was substantially, whether the cornice was so affixed to the freehold that it could be removed without injury to the freehold, and upon this question the *fact* of a removal without injury was a good *test*.

LITTLEDALE, J.—The direction was perfectly right.—The question, whether a substantial injury was done to the freehold in removing, was put rather as a test.

PATTESON, J.—The issue does involve a question of fact. It cannot be taken in the sense of involving a point of law. The replication is to be understood as traversing that allegation in the plea, upon which the defendant relied as shewing the cornice to be removable. The fact of removal without substantial injury, was used rather as a test.

Rule, upon the ground of misdirection, refused (*a*).

(*a*) A rule nisi was, however, granted, on the ground of excessive damages.

1835.

In the matter of the Arbitration between ALLEN and PERRING.

Where an award is to be made by *A.*, *B.*, and *C.*, or if they cannot all agree, by any two of them, and *A.* says that he will have nothing more to do with the business, *B.* and *C.* may immediately make their award without submitting it to *A.*, *semble*.

But if, after such disclaimer, *B.* and *C.* send to *A.* for his opinion of the draft of an award, which he returns with certain written objections, *B.* and *C.* are bound to take such objections into their consideration; and they cannot make an award different from the draft sent to *A.*, and not adopting his objections, without communicating to *A.* the terms of the award intended to be made.

ONE arbitrator was appointed by each of the parties: The two arbitrators were to choose an umpire, if they could not agree; and in such case, the award was to be made by the three, or, if they were not all agreed, by any two of them. Several meetings of the arbitrators, and much discussion, took place; and an umpire was appointed. On 3d June the arbitrator appointed by *Perring* declared that he would have nothing further to do with the business. However, on 4th July a draft of a proposed award was sent to him for his consideration, by the other arbitrator and the umpire, which he returned, with certain written objections to the draft, as not being sufficiently favourable to *Perring*. The other arbitrator and the umpire, without again consulting him, made an award, differing materially from that which they had proposed, and not in accordance with the suggestions made by *Perring*'s arbitrator.

A rule nisi having been obtained to set aside the award, *Wightman*, in Easter term last, shewed cause, and Sir *F. Pollock* and Sir *W. Follett* supported the rule.

Lord DENMAN, C. J.—This award has not been properly made. By the submission, the three were appointed to arbitrate together, and any two of these were authorized to make the award. But these two were bound to act upon a full consideration, and were, if possible, to come to an agreement upon them with the third. It was only in the case of the three not being able to agree, that the majority had the power to make the award. That has not been the case. It appears that the arbitrator appointed by *Perring* took a view of the circumstances of the case favourable to his interest, but finding that he was not likely to convince the others, he said, in effect, that he would have nothing further to do with the matter. If the others had acted at that

moment, and made an award, I am not prepared to say that they would not have been right; but they made an award which got into the hands of *Perring*'s arbitrator, and which it may be inferred was sent to him for his opinion. He wrote an opinion upon it. They then proceed to publish, not the award which they had prepared, or an award in the terms desired by *Perring*'s arbitrator, but another, wholly different, and more prejudicial to *Perring*. They may have regarded the objections made by *Perring*'s arbitrator to have been insufficient, but surely they were bound to consider them, and also to submit the new award to his consideration. We cannot enter into the probable *effect* of another discussion among these parties; but these two persons had no right to publish an award until they had *apprized* the third party of their intention, and had heard his opinion.

LITTLEDALE, J., concurred.

PATTESON, J.—The other arbitrator and umpire did not make an award when *Perring*'s arbitrator said that he would have nothing further to do with the business, but they subsequently took his opinion, and they should have done so in the *second* instance as well as in the *first*.

COLERIDGE, J.—The two arbitrators were bound to submit the award to the other arbitrator. In upholding awards we must take care that parties have the benefit of the opinion for which they stipulate. Here, the parties distinctly stipulated to have the opinion of three persons. That implied that no two should make the award until they had ascertained the opinion of the third. If one had withdrawn himself from the business, and the other two had at once made an award, I do not say they would not have been right. But that is not the case here. On the 3d of June a disagreement takes place. On the 4th of July we find *Perring*'s arbitrator again acting, since he then received proposals for an award and gave his opinion upon them.

1835.

ALLEN v. PEARING.

Either the other parties did or did not take his objections into consideration. If they did, they should have let him know the result of their deliberation. They did not, however, do so, but made *another* award wholly different from that which had been submitted to him for his consideration. This they had no authority to do.

Rule absolute.

VAN NIEUWVEL *v.* HUNTER.

Upon moving to make absolute a rule under 43 *Geo.* 3, c. 46, s. 3, to deprive the plaintiff of costs, the Court will permit the defendant to refer to the judge's notes at the trial, as to the amount of the verdict, in order to supply an omission of a statement of that fact in his affidavit.

And, *semble*, that the fact may be ascertained by reference to the nisi prius record.

To entitle a party to avail himself, in support of a rule, of a fact appearing on the nisi prius record, it is not necessary that the rule should have been drawn up as upon reading that record.

ASSUMPSIT for work and labour, with the money counts. Plea, non assumpsit. At the trial before Lord *Denman*, C. J., at the summer assizes at Winchester in 1834, the plaintiff, who had been the defendant's clerk, claimed 290*l.* for various services performed for the defendant: Verdict for the plaintiff, 30*l.* The defendant had been arrested for 200*l.* In Michaelmas term the defendant obtained a rule nisi for his costs, under 43 *Geo.* 3, c. 46.

Erle and *Butt* showed case. The amount of the verdict does not appear on the face of the defendant's affidavit. This preliminary objection is fatal. The affidavit cannot be amended, and the fact is essential to the inquiry. (It was stated by *Crowder*, who appeared in support of the rule, that the action was in this Court (*a*), and that it would appear on the record of nisi prius what the amount of the verdict was.) The rule is not drawn up on reading the record of nisi prius. [*Littledale*, J. That is not necessary.] In practice the amount of the verdict is always shewn in the affidavit. In *Fountain* v. *Young* (*b*), it was held, that the notes of the judge before whom the cause was tried could not be referred to.

Crowder, in support of the rule. In *Glenville* v. *Hutchins* (*c*), Lord *Tenterden* referred to the judge's notes.

(*a*) Otherwise the Court would have had no jurisdiction.

(*b*) 1 Taunt. 60.

(*c*) 1 Barn. & Cress. 91.

[*Littledale*, J. That was a very different case. Lord *Denman*, C. J. There Lord *Tenterden* referred to his notes in order to see that the affidavit did not impose upon the Court.] The record of nisi prius in this case is a record of this Court.(*a*) [*Littledale*, J. If the cause had been tried before the judge of another Court, and had been the record of another Court, we should not have known what the amount of the verdict was.] It is the duty of a judge to take the verdict, and the notes of the judge of another Court may be obtained by this Court, and are usually furnished to it.

Lord DENMAN, C. J.—We will inquire what the practice is.

In Easter term, 1835, *Erle* and *Butt* urged the same preliminary objection, and again cited *Fountain* v. *Young*. [*Patteson*, J. I understand that case to mean that the defendant cannot move on the judge's notes *alone*, but must have an affidavit.]

Crowder stated, that a few days before, in a case on the same statute, in the Court of Exchequer, *Parke*, B., referred to the notes of *Alderson*, B.

Lord DENMAN, C. J.—It is impossible that we can refuse to see the notes taken by the judge at the trial. The cause was tried before me, and I cannot dispossess myself of the recollection of what passed at the trial. I am surprised that the plaintiff recovered *any* sum. The difference between the sum recovered and the sum for which the arrest was made, is extremely great. This is as clear a case as ever was brought before a Court.

The other judges concurred.

Rule absolute.

(*a*) Though the cause was tried before the chief justice of this Court, yet, being tried at the assizes, it might have been a record of another Court. But in that case the motion could have been made in such other Court only, and not here.

1835.

IN THE EXCHEQUER CHAMBER.

Coram TINDAL, C. J., Lord ABINGER, C. B., VAUGHAN, J., PARKE, B., BOLLAND, B., and ALDERSON, B.

BESWICK *v.* SWINDELLS, (in error.)

Upon the marriage of *A.* with *B.*, the widow and successor of *C.*, a trader, *A.*, in consideration of the stock in trade, which he receives with *B.*, gives a bond to *D.*, conditioned to pay to the children of *B.* by *C.*, within twelve months after her death, 300*l.*, if, upon an account taken, the stock in trade and effects of the business, *if then carried on* by *A.*, shall amount to 400*l.*; but in case, upon such account, the stock in trade shall amount to less than 400*l.*, *A.* then shall pay to such children 120*l.* *A.*, during the lifetime of *B.*, discontinues the trade, and ceases to have any stock: Held, that the obligation is discharged.

ERROR having been brought upon this judgment (*a*), the errors assigned were argued in Easter vacation, by Sir *W. Follett* for the plaintiff, and *Wightman* for the defendant; when, in addition to those cited in the King's Bench, the following authorities were referred to:—*Bro. Abr.* Condition, pl. 127 (*b*); *Com. Dig.* Condition, (L. 7.) (M. 3.); *Bac. Abr.* Obligation, (E.); *French* v. *Campbell* (*c*).

Cur. adv. vult.

(*a*) See the Report, *ante*, iii. 159.

(*b*) Citing 4 *H.* 7, 3 (*H.* 4 *H.* 7, fo. 3, pl. 7, 1488-9, in C. P.) "An action of debt was brought upon a bond, and the condition was such, that if the obligor, within three months after the death of his father, made a sufficient and sure estate in certain tenements to a certain woman, then &c. And the bond was made to a stranger, and not to the woman &c. The obligor shows (in his plea) how the same woman took (him) the obligor to husband in the life-time of his father, and the espousals continued between them after the death of the father for three months, so that he could not make the feoffment &c.

Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is void. Where the condition subsequently becomes impossible by the act of the obligor or of a stranger, the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved.

Jay, Serjt. (for the plaintiff). It appears that he has forfeited his bond, since he has not performed the condition as much as he could. As if one be enfeoffed (upon condition) to enfeoff two men, if one die, still he shall enfeoff the other. So here ought he, notwithstanding the espousals, to cause the feoffment to be made.

Rede, Serjt.,* contrà. Now the wife is in such a case that she cannot receive the feoffment, therefore is the party excused &c.

Fineux, Serjt.,† contrà. I conceive the bond is forfeited. For he is bound to make his feoffment to a woman who is a stranger to the bond, therefore he must make it at his peril. For if I be bound to marry the daughter of one, and

* Justice of K. B. in 1496.—C. J. of C. P. in 1506.
† C. J. of C. P. in 1494.—C. J. of K. B. in 1496.

TINDAL, C. J., now delivered the judgment of the Court.—The question in this case arises on the construction

she will not marry with me, I shall forfeit my bond, and this has been adjudged. [BRIAN, C. J., to him. What, if the daughter be of tender age that she will not have him, but will cause him to forfeit his bond, &c.]

Keble, Serjt., contrà. And, sir, the condition of a bond is made in advantage of the obligor. Notwithstanding that one be bound to do a thing, whether to a stranger or to him who is a party, I conceive that the reason is all one; for if he do all that in him is, he is excused; for when he is bound to make a feoffment, also when he shall make the feoffment there must be one to receive (feoffment), and the receipt must be on the part of the stranger who accepts the feoffment, which he cannot do unless he who should have the feoffment will receive it. Therefore by reason if no default be in him, on his part, but he is at all times ready to make it, he is excused from that bond. Whether (the act to be done) be towards one who is a stranger to the bond or a party, all is one. And to say that he shall be bound to do all that is made and contained in the bond, upon the condition, that is not so; for if he be bound to make a feoffment to his obligee by a certain day, and he tenders the feoffment, and the other refuses it, he is excused. And the reason is, because he can do no more on his part. And yet, if it should be as it had been said, he shall cause him to take by the words of the bond, or otherwise he shall forfeit. And the law is contrary: and therefore the construction by reason shall go to this point, that he shall do to the extent of his power (a tout son pouvoir); but if I be bound to a man that My Master *Brian* shall take a feoffment of me of such lands &c.; now if he will not take, my bond is forfeit, for there I am bound by express words that *he* shall do such a thing, and so there is a diversity; and if one be bound to pay a certain sum, at a certain day, to a stranger, if the stranger will not take it he is excused, because it belongs to him to do, and the stranger to receive, and so the condition is severed by reason part to one man and part to another. Sir, therefore, here in this case at the bar, the husband is not in default, for he is able and has power to make feoffment, but the (intended) feoffee, on her part, is disabled to receive it, therefore the husband is excusable. And though it is not so now, yet, at the time of making the bond, the condition was possible, and now it is become impossible, therefore the party is excused; so if the wife had died or entered into religion, &c. And as to what has been said, that he shall cause an estate to be made &c., that is not so, for it is not limited by the words that he must be a *feoffor*, and therefore the conditions, executed in any other manner, are not performed. And that was admitted by the Court, &c.

Vavisor, Serjt.* contrà. If a man be bound to do a thing which is in my advantage, he must do it at

* Justice of C. P. in 1490.

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of the condition of a bond, expressed in such terms as to be open to doubt and uncertainty; but, taking the whole of his peril. And this condition may be performed, for he may cause a stranger to sue a writ of covenant against him and his wife, and levy a fine &c. And, sir, in this Place it has been adjudged, that when a condition has to be performed to a stranger, he must do it at his peril, or he shall forfeit his bond, notwithstanding he does all that in him is. And, sir, in the case of one *Abel*, it is adjudged otherwise (than *Keble* has contended).

Fisher, Serjt.* He might perform the conditions in this case, for he might, within three months, make a lease for the term of a month, remainder to the wife, and that shall be good, and so by this way he might perform the condition &c.

Haws, Serjt.† contrà. This is not a plea, because the obligor, by his own act, has made the condition to be impossible, and therefore it is reasonable that he shall forfeit his bond; for if a man be bound to another that *A.* shall marry *B.*, if the obligor in this case take *B.* to wife, now *A.* cannot marry her, but that is by the act of the obligor, wherefore he shall forfeit his bond: Which was granted by the justices. So here. Wherefore, &c.

TOWNSEND, J. I conceive that this is no plea, and when a condition extends to be performed to a stranger, the obligor must do it at his peril, or otherwise he has lost his bond, for when he is bound to perform a condition to a stranger, he undertakes that the stranger shall be ruled by him, and also that he, the stranger, has knowledge of his, the obligor's, conditions, and thus all is implied in such a condition in respect of a stranger; but the act of God may cause that the conditions shall not be performed, as if she had died &c.; and this was granted by all the Court. And, sir, suppose I am bound to *B.*, that such a one, his servant, shall serve him well and honestly during ten years, and afterwards his servant enters into religion and is professed, — the bond is forfeited, because I have taken upon me the charge of him, namely, the third person; and so in this case, notwithstanding that the wife had entered into religion, he would have forfeited his bond. So, I conceive, that if the third person to whom the condition shall be made, *will* not do that which in him is, to perform the condition, the bond is forfeit, for he is in a manner surety for him that he *shall* do it. And if this be true, it goes to *Keble's* argument (al raison del *Keble*). And on the other hand, if the obligee be not (Query, be) the cause, that the condition is not performed, then the obligation is not forfeit, &c.

BRIAN, C. J.—I think this is no plea; and I put a diversity when the condition is made impossible by the act of the parties &c. And in the case that *Haws* put, if the bond be made between strangers, that *A.* shall marry *B.* by a certain day, and the obligor marries *B.*, and the espousals continue until that day, there is no doubt but that the bond is forfeit. On

* Afterwards Justice, C. P. † Query. *Haugh*, afterwards Justice, C. P.

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the condition together, we agree in opinion that the Court of King's Bench has put the proper construction upon the condition, and that the judgment ought to be affirmed.

The bond appears to have been given to secure the performance of an agreement entered into between the defendant and the plaintiff, previously to the marriage of the defendant with one *Elizabeth Etchells*; and the question in the case does therefore become this:—What was the real *intention* of the parties to the agreement, as *expressed* upon the face of it? The agreement is contained, in part, in the recital prefixed to the condition, and, as to the residue, it is to be collected from the condition itself; and taking them both together, the agreement will be found in its terms to be this: That if the marriage should take place, the defendant should, within twelve months next after the decease of his intended wife, pay to her child or children, by her former husband, the sum of 300*l.*, if upon an account of the stock in trade and effects, "if then carried on by the defendant," the same should amount to the sum of 400*l.*; but in case, upon such an account to be taken as aforesaid, the stock in trade and effects should amount to less than that sum, then that the defendant should pay to such child or children the sum of 120*l.* within twelve months next after the decease of their mother. And whether it was the intention of the parties to this agreement that the money should be payable at all events within twelve months after the wife's decease, as contended for by the plaintiff, or that it should be payable only in case the trade continued to be

the other hand, if the obligee marry *B.* before that day, now the bond is not forfeit, because the obligee is party &c. And if I be bound to an abbot that *A.* shall enfeoff him by a certain day of certain lands &c., if *A.* enters into religion I have forfeited my bond. But if *A.* enters into religion under the same abbot to whom I am bound, now my bond is not forfeit, because he is party to that whereby the condition of the bond cannot be performed &c. And he said, that if the condition be against law, then all is void, otherwise it is if it be impossible. And so the justices held clearly that it was no plea." "Quod nota" (adds the Reporter).

And see Sir *Anthony Main's* case, 5 Co. Rep. 20, b.; *Luxmore* v. *Robson*, 1 Barn. & Ald. 584.

(*c*) 2 H. Bla. 163.

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carried on up to the time of the wife's death, as contended for on the part of the defendant, is the question between them.

Now it seems to us to be the proper interpretation of that agreement, that it was made in contemplation of the trade being carried on up to the time of the wife's death; and that the money is to be payable amongst the children in that event, and in that event only.

The agreement is express, "that the money is to be paid in the event hereinafter specified." The agreement is also express, that "the stock shall be taken," and that the amount of the sum to be paid shall depend on the value of the stock. The agreement is further express, "that the stock is only to be taken," (indeed it *could* only be taken) "if the trade be then carried on by the defendant." The event, therefore, which has actually happened, namely, that the trade and business shall be actually given up and abandoned long before the wife's death, appears to us to be an event not provided for by the agreement; it is *casus omissus*, and we think we should *make* an agreement for the parties, instead of putting a construction upon that which they have made for themselves, if we should hold that the defendant was under this condition to pay either of the two sums therein mentioned, in the event which has actually taken place. The construction contended for by the plaintiff would either make it compulsory on the husband to carry on the trade during the life of his wife, though it became a failing or even ruinous concern to the husband; or would render him liable to the payment of the money in the event of his yielding to the pressure of unforeseen circumstances, and of his giving up the business. And we think, that if the parties had intended this, they would have used the very simple expedient of making the bond conditional for the payment of a certain sum of money within twelve months after the death of his wife.

We agree entirely in the position laid down by the counsel for the plaintiff in the course of his argument,—that when a condition becomes impossible by the act of the

obligor, such impossibility forms no answer to an action on the bond. But we differ from him in the application of that principle to the present case; because we think we must infer the intention of the parties to have been to leave it open, either to the prudence of the husband, or to casualties, or to circumstances which could not be foreseen, to put an end to the trade, and consequently to the liability to pay the money. It is not, therefore, that the obligor has made the performance of the condition impossible by his voluntary act, but that he has exercised a power of closing the concern, which the very condition itself reserved to him.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

Before TINDAL, C. J., Lord ABINGER, C. B., PARK, J., BOSANQUET, J., VAUGHAN, J., and ALDERSON, B.

PADDON *v.* BARTLETT and another (*a*).

DEBT for 1600*l.*, being 20 years' rent at 80*l.* a year, upon an indenture of lease, dated 2nd February, 1812, whereby the plaintiff demised certain premises to the defendant for 21 years. Pleas: first, non est factum: secondly, actio non accrevit infra sex annos: thirdly, as to 1420*l.*, part of the rent for the space of 17¾ years, ending 2nd February, 1833;—that the plaintiff, by indenture, assigned all his estate and interest in the demised premises to *J. S.*, and that no part of the 1420*l.* became due from the defendants to the plaintiff at any time before the day and year last mentioned. In a fourth plea the assignment of the reversion. To debt for 1600*l.* for 20 years rent, at 80*l.* a year, defendant pleaded to the whole action, actio non accrevit infra sex annos; and also as to 1420*l.*, parcel &c., that 17¾ years before, plaintiff assigned over his reversion, and that no part of the 1420*l.* accrued before the assignment. Verdict for the plaintiff on the first issue, and for the defendant on the second. *Semble*, that the plaintiff was entitled to judgment for 180*l.*

(*a*) See the previous Report of this case, *ante*, iv. p. 321.

The statute of 3 & 4 *W.* 4, c. 27, s. 42, (which limits the recovery of arrears of rent to six years,) has not a retrospective operation.

Quære, whether the Court of Exchequer Chamber can grant a repleader.

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sion was differently stated. Replication to the second plea, actio accrevit infra sex annos, and to the third and last pleas, non est factum (*a*). The record then stated, that the jury found on the first issue, that the deed mentioned in the declaration was the deed of the defendant; and as to the second issue, that the causes of action did accrue within six years; as to the third issue, that the indenture of 13th June, 1815, in the third plea mentioned, was the deed of the plaintiff; and there was a similar finding as to the last issue. The record concluded as follows: "Therefore it is considered that the plaintiff take nothing by his said writ, but that he be in mercy for his false claim, and that the defendants do go thereof without day, &c.; and it is further considered by the Court here, that the defendants do recover against the plaintiff 83*l.* for their costs and charges by them about their defence in that behalf laid out and expended, adjudged to the defendants by the Court of our said lord the king now here with their assent, according to the form of the statute in such case made and provided."

Two errors were assigned: (*b*)—1st, That by the record it

(*a*) As to the sufficiency of the replication, *vide ante*, iv, 324, n.

(*b*) The judgment in this case was signed on the 20th December, 1834, and was originally entered up as follows: "Therefore it is considered that the plaintiff, *as to the last two counts in the said declaration*, take nothing by his said *bill*, but that he be in mercy, &c. for his false claim. And that the defendant do go thereof without day, &c. And it is further considered that the *defendant* do recover against the plaintiff eighty-three pounds for *his* costs and charges *as to the said two last mentioned counts laid out by him about his defence in this behalf* adjudged to the *defendant*, as to the said two last mentioned counts, by the court of our said lord the king now here by his own assent, and that the defendant have execution thereof, &c." In addition to the assignment of errors above stated, the following errors were also assigned: "That by the judgment it appears that it was considered that the plaintiff, as to the last *two* counts in his said declaration, should take nothing by his said *bill*, and that he should be in mercy &c.; whereas the declaration contained *one* count only, and the action was commenced by *writ* and not by *bill*, as in and by the judgment is supposed; that by the record it appears that judgment was given for one only of the defendants, whereas the defendants *joined* in pleading, and the issues

The Court will allow the amendment of clerical mistakes in a judgment, on payment of costs, although one term has elapsed since the judgment was entered up, and although a writ of error has been sued out, and error assigned, amongst other causes, on those clerical mistakes.

appears that judgment was given against the plaintiff, whereas judgment ought to have been given in his favour for the sum of 180*l.*, inasmuch as the third and last pleas (being the only two pleas the issues upon which were found for the defendants) were pleaded in bar to *part* only of the action, that is to say, to the sum of 1420*l.*, part of the said rent or

thereupon raised and found by the jury at the trial applied to and affected both the defendants alike and without distinction, and do not warrant a judgment in favour of one of the defendants only, and that it does not appear for which of the defendants judgment is given, and that therefore the said judgment is, in this respect, ambiguous and uncertain, and that no judgment whatever is given either for or against one of the defendants, whereas by the Great Charter, and by the law of the land the King's Courts of Justice are bound to give judgment on the matters, between the parties, properly brought in question, and appearing before the said Court.

In Easter term *Crowder* obtained a rule nisi directing the officer of the Court to amend the judgment, on the ground that the mistakes were mere clerical errors. It did not appear in the affidavit on which the rule nisi was obtained, whether the officer of the Court or the defendants' attorney had made the mistakes.

Newman, in Easter term, shewed cause. The defendants are too late in their application. The judgment was entered up in Hilary term, and an amendment of the entry of a judgment cannot be made after the term in which the judgment was entered up. Here the application is made after error brought and assigned. The errors are mistakes in matters material. [*Littledale*, J. These errors are the mistakes of the officer of the Court, who has not drawn up the judgment correctly.] They must be considered as mistakes made by the attorney for the defendants, in whose bill of costs, which has been taxed, is included his charge for *drawing* this judgment. If the *officer* is to be made responsible, he should have had *notice* of this rule.

At all events the judgment can only be amended *on payment of costs.*

Crowder in support of the rule. The mistakes in the judgment are mere clerical errors made by the officer of the Court. As it was not the defendants' attorney who committed the mistake, it would be unjust to make the defendants pay the costs of amending the judgment.

By the Court.—The judgment may be amended; but the plaintiff ought to have the costs occasioned by the mistake.

Rule absolute on payment of costs.

The judgment was amended by making it as above set out.

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sum of 1600*l.*, and therefore the plaintiff was entitled to recover 180*l.*, being the difference between 1600*l.* and 1420*l.*;—2ndly, that the second plea was bad in law.

Plea: in nullo est erratum.

Newman for the plaintiff. The plaintiff is clearly entitled to judgment for 180*l.*, as no answer has been given to his demand as to two quarters' rent. The only plea which could apply to that period of time is the plea of the statute of limitations, and the issue on that plea has been found for the plaintiff. (Here he was stopped by the Court.)

Crowder, for the defendant. The intention of pleading the second plea was to deny that the plaintiff had any claim for any rent for the *last* six years. The third plea was intended to deny the plaintiff's claim for any rent for a period of time subsequent to the assignment of the reversion, which took place more than 17 years ago; consequently, looking at the whole record, the whole of the plaintiff's claim is denied. The issue on the plea of the statute of limitations has been found for the plaintiff, but the effect of that finding is, that the plaintiff is entitled, upon the lease, to rent for the last six years, all the *previous* rent being excluded by the necessary operation of the statute (*a*). The meaning of a verdict for the plaintiff on that issue is, that rent is due within six years, but it can be no more than the last six years' rent, evidenced by the production of the lease. Suppose, in an action for goods sold, the statute of limitations be pleaded, and the plaintiff proves sales of goods for the last 12 or 14 years, a verdict will pass for the plaintiff on that issue; but he can only recover for the goods sold within the last six years. Therefore if this plea of the

(*a*) In this view of the case, it seems to be immaterial whether this issue were found for the plaintiff or for the defendants. If in the former case the defendants could say that the finding for the plaintiff only supported the claim for the *last* six years, so in the latter the plaintiff might have said that the finding for the defendants merely destroyed the claim for the *antecedent* years.

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statute had stood alone, only the rent for the last six years could have been recovered. But the third and fourth issues have been found for the defendants; and the effect of that finding is, that, as to the *last* six years and upwards, the plaintiff is *not* entitled to recover, by reason of the assignment of the reversion. Although therefore the jury have found the issue as to the plea of the statute of limitations against the defendants, yet as they have found an assignment of the reversion more than six years before the action was commenced, the plaintiff is entitled to no rent. Looking therefore at the whole record, it appears that no debt was due from the defendants to the plaintiff, and consequently there can be no damages for the detention of a debt. It can make no difference that there are two separate pleas, one of the statute of limitations, and one of an assignment of the reversion. If there had been one plea it would have been thus: As to the first 14 years, the statute of limitations, and as to the last six years, the assignment of the reversion, and then the case would have been perfectly clear.

TINDAL, C. J., intimated that the inclination of the opinion of the Court was against the defendants on this point (*a*), and that there was a doubt whether the Court could award a repleader, and recommended that the defendants should agree to enter a verdict.

The Court called upon *Newman* to argue the question of the invalidity of the plea of the statute of limitations.

Operation of 3 & 4 *W.* 4, c. 27, s. 42.

Newman. The second plea is no answer to the action. It is a plea framed on the statute 3 & 4 *W.* 4, c. 27, s. 42.

I. That act does not apply to the present action at all, because it was commenced before the act came into operation. This action was commenced on the 22d July, 1833, and the statute received the royal assent on the 24th July, 1833.

(*a*) As to which, *vide ante*, iv. p. 324, note.

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II. The 42nd sect. of that statute has not a *retrospective* operation; the language used being "that after the 31st day of December, 1833, no arrears of rent shall be recovered by any action but within six years next after the same respectively shall have become due." Besides, that section does not apply to actions for rent on *specialty*. But assuming that it does so, it is repealed by 3 & 4 *W.* 4, c. 42, s. 3, which limits the action of debt on a specialty to 20 years.

Crowder, contrà. The 42nd section of the 3 & 4 *W.* 4, c. 27, has a *retrospective* operation. That section enacts, that, after the 31st December, 1833, no arrears of rent shall be *recovered*, but within six years after the same shall have become due. If the plaintiff were to succeed in this action upon the plea of the statute of limitations, he would recover, after the 31st December, 1833, arrears of rent which had not become due within the last six years. It is evident that the legislature intended that section 42 should have, from the difference of language, a retrospective operation. The former section enacts, that after 31st December, 1833, '*no action shall be brought*.' The language of the latter is 'no arrears of rent shall be *recovered*.' There are various instances in which the Courts have given a retrospective effect to statutes in pari materiâ. Thus in *Towler* v. *Chatterton* (*a*), it was held that Lord *Tenterden*'s act had a retrospective effect. Again in *Freeman* v. *Moyes* (*b*), it was held that the third section of 3 & 4 *W.* 4, c. 42, had a retrospective operation. [Lord *Abinger*, C. B. The peculiar words of that statute made it apply to that action. Generally speaking, unless the words plainly and distinctly apply to actions already commenced, a statute is not construed to have a retrospective effect.] In *Cox* v. *Thomason* (*c*), the new rules of H. T. 2 *W.* 4 were held to have a

(*a*) 6 Bingh. 258; 3 Moore & Payne, 619.

(*b*) *Ante*, iii. p. 838.

(*c*) 2 Cro. & Jerv. 498.

retrospective operation. [Lord *Abinger*, C. B. How do you get over section 3 of 3 & 4 *W.* 4, c. 42? Is it not inconsistent with the 42d section of 3 & 4 *W.* 4, c. 27?] The two statutes do not conflict so that one necessarily repeals the other. The two enactments may exist together; although it must be admitted, that, by reason of the one, the other is unnecessary and nugatory. The 42nd section of 3 & 4 *W.* 4, c. 27, enacts, that no arrears of rent shall be recovered for more than six years, which is in substance an enactment that actions for rent must be brought within six years from the time when the rent is due. The subsequent statute enacts, that in the case of a demise by indenture, an action of debt must be brought within 20 years. Now this clause does not repeal the former, but it is nugatory: because if *all* actions for rent must be brought within six years, which is the provision of the 42nd section of 3 & 4 *W.* 4, c. 27, it was certainly unnecessary to enact that any one class of actions for rent must be brought within 20 years. For not only must it be brought within 20, but it must be brought within six years. It cannot be said, therefore, that the latter of these statutes is a *repeal* of the former. But the effect of the two statutes taken together is, that the provisions of the later statute are *nugatory*. There can be no *virtual repeal* of a statute unless by an enactment in a later statute wholly *inconsistent* with the continuing operation of the former.

TINDAL, C. J.—We are all of opinion that the plea of the statute of limitations in this case is a *bad plea*. Admitting that the question depends on the earlier statute,—the 3 & 4 *W.* 4, c. 27,—still, on looking at the 42nd section of that statute, it is clear that it has a *prospective* and not a *retrospective* operation. The reason why it has a prospective operation only, is that such is the meaning of the language of the clause. It enacts, that after the 31st day of December, 1833, no arrears of rent shall be recovered by any action but within six years next after the same shall

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have become due. The natural meaning and import of those words is, that as it has no operation until after the 31st of December, 1833, it will only affect actions brought subsequently to that time, unless there be some other words in the section which will include actions previously commenced. On looking at the language of the proviso in the very same section, we find it providing for actions which *shall be brought*;—Why are we to suppose that the former part of the section applies to actions previously commenced, while the proviso applies to those only which shall be subsequently commenced? Without going through the different clauses of the statute, it is enough to say that they are all manifestly framed with one common object and design, and ought therefore to be construed in the same manner.

Acts of Parliament not to be construed retrospectively without express words.

Acts of Parliament ought to be cautiously interpreted with respect to actions already brought. Before we deprive parties of rights which they possess, we ought to see plainly and clearly that such was the intention of the legislature, and the meaning of the words which they have used.

Judgment for the defendants reversed, and judgment for the plaintiff for 180*l.* (*a*).

(*a*) The two years and one quarter's rent, to which there was no plea, but non est factum, and the statute of limitations,—the former of which pleas had been negatived by the jury, and the latter of which was now rejected by the Court of Error.

MICHAELMAS TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

DOE *d.* PREEDY *v.* HOLTON and another.

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EJECTMENT for cottages at Swancliffe, tried before *Williams*, J., at the last Oxfordshire assizes.

Joseph Preedy, by will, dated 1st January, 1816, devised to *B.*, *J.*, and *J. Preedy*, and their heirs, all his real estate, upon trust, during the minority of his eldest son *Joseph P.*, to receive the rents and profits (upon certain trusts) of all that messuage or tenement in Swancliffe, wherein he, the testator, then resided, with the offices, outhouses, barns, stables, and other edifices and buildings, yards and gardens *to the same adjoining;* and all the several closes, or inclosed grounds, pieces and parcels of ground, called and known by the several names of Cowhouse &c., with the appurtenances, part of the farm and lands then *in his own occupation* &c.; and when and so soon as the said *Joseph P.* should have attained the age of twenty-one, that they, the trustees, should be seised of the above-mentioned premises, in trust for *Joseph P.* and his heirs &c. for ever; and upon further trust, during the minority of *Benjamin*, (the testator's younger son,) to receive the rents and profits (upon certain trusts) of all that messuage or tenement in Swancliffe called the Old Grange, with the offices, outhouses, &c. to the same adjoining, and of all other the testator's closes or inclosed grounds, pieces or parcels of land, and

A. devises to *B.* the messuage and tenement in Dale, wherein he, *A.*, then resided, with the offices, outhouses, barns, stables, and other edifices and buildings, yards and gardens, *to the same adjoining*, and all those several closes and parcels of closes called by the names of &c., with the appurtenances, part of the farm and lands then in his, *A.'s, own occupation;* and to *C.* he devises all his hereditaments in Dale, not before devised:—Held, that cottages *adjoining A.'s* place of residence, though (in some sense) separated by a wall, and not in his own occupation, passed to *B.*; and that evidence of declarations by *A.* that he meant that the cottages should go to *C.*, was inadmissible.

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other hereditaments in Swancliffe, with their appurtenances, except what he had thereinbefore devised in trust for his son *Joseph P.*; and when and as soon as *Benjamin P.* should have attained the age of twenty-one, upon trust that the said trustees should be seised of the last-mentioned premises, in trust for *Benjamin P.* and his heirs &c. for ever.

Joseph and *Benjamin P.* have respectively attained the age of twenty-one.

Benjamin P., the lessor of the plaintiff, claimed the property in question, as passing under the residuary devise.

The defendants, as mortgagees of *Joseph P.* the son, claimed the property, as passing under the devise in trust for him, of all *edifices and buildings &c. adjoining* to the messuage or tenement wherein the testator resided at the time of making his will.

The property in question consisted of two cottages, purchased by the testator in 1795, together with the messuage &c. in which he resided at the date of his will, and adjoining it. In 1797, the testator separated the cottages from the messuage &c. by a stone wall, and let them off to tenants; and at the time of making the will they were not in his own occupation.

Certain declarations, made by the testator at the time of giving instructions for his will, and at the time of executing it, to shew his intention with respect to the two cottages, were offered in evidence by the plaintiff's counsel, but were rejected by the learned judge.

The learned judge being of opinion that the cottages passed under the devise to *Joseph P.*, a verdict was found for the defendants, with leave to move to enter a verdict for the plaintiff, in case the Court should be of opinion that upon the construction of the will, having reference to those circumstances the evidence of which was admitted, the lessor of the plaintiff was entitled to the premises in question; and for a new trial, in case the Court should be of opinion that the evidence of intention was improperly rejected.

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Ludlow, Serjt. now moved accordingly. These two cottages are not included in the devise to *Joseph*, for they are not edifices and buildings *adjoining* to the testator's place of residence, *and in his own occupation* at the date of his will. It may be questionable, whether the cottages can be said to be "*adjoining*" in the sense in which the word appears to be used in the will; and if there be a doubt upon the point, the heir generally (*a*), and in this case the residuary devisee, who stands in the place of heir, is entitled to the benefit of the doubt. Then these cottages were not in the testator's *own occupation*, and this, it is submitted, is, upon a fair construction of the whole demise, a part of the *description* of the property intended to pass to *Joseph*. If this also is doubtful, the residuary devisee must have the benefit of the doubt (*a*).

First point: Construction.

Extrinsic evidence of intention was admissible in this case,—which, it is submitted, falls within the second class of cases described by *Tindal*, C. J., in *Miller* v. *Travers* (*b*).

Second point: Admissibility of extrinsic evidence.

Lord DENMAN, C. J.—Under this will the lessor of the plaintiff is entitled to all hereditaments not expressly devised to *Joseph*. The devise to *Joseph* is of the tenement wherein the testator then resided, with the offices, outhouses, barns, stables, and other *edifices and buildings*, yard and gardens, *to the same adjoining*. It is admitted that these cottages are on land adjoining, which I think is sufficient to bring them within the description in this part of the devise. But the devise goes on, "and all the several closes &c., called &c., part of the farm and land *now in my own occupation*." From this it is sought to be inferred, that the testator intended to make his own occupation the test by which it was to be known whether any particular part of the property adjoining his residence was to pass; but this latter clause in the devise applies to the distinct property which is there specifically described, and the

(*a*) *Vide ante*, 287. (*b*) 8 Bingh. 244—8.

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words "and now in my own occupation" were a part of the description of *that* property.

The property in question answers to the description in the former part of the devise, and therefore we should not be warranted in admitting proof of declarations of intention by the testator. The evidence raised no ambiguity to be removed by extrinsic evidence. The learned judge was, I think, quite right in refusing to receive the evidence.

First point. PATTESON, J.—I am entirely of the same opinion. My brother *Ludlow* wants us to read the devise as if the words had been of "edifices and buildings *adjoining and in my own occupation.*" There is nothing within the four corners of the will to lead us to think that we ought so to construe the devise.

Second point. In every case extrinsic evidence must be received for the purpose of shewing the *state* of the property, so as to see what comes within the clear terms of the devise, but not to clear up any difficulty arising upon the will itself. If the declarations were received in this case, they would be received to shew that "*adjoining*" means "*adjoining and now in my own occupation.*" The evidence is therefore offered for the purpose of expressly contradicting the will.

First point. COLERIDGE, J.—I am of the same opinion. Upon the construction of the will there can be no difficulty. The only restriction of the devise is, that the edifices &c. must be "*adjoining.*" They need not be in the testator's own occupation.

Second point. I see no *ambiguity* in this case. Whenever a will comes in contest, there must be some extrinsic evidence in order to shew its *application;* as if a man devises his estate Blackacre, it must be shewn by evidence that the property in question *is* Blackacre. But we must not give a more extended or a more limited meaning to the will than the words themselves will warrant.

Rule refused.

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UPON appeal by "The Proprietors of the River Wey," against a poor-rate of the parish of Woking, Surrey, whereby the proprietors are rated on 325*l.* at the sum of 16*l.* 5*s.*,—upon the ground that they were not liable to be rated, and that, if liable, they were over-rated,—the sessions quashed the rate, subject to the following case:

By 23 *Car.* 2, c. 26, "for preserving and settling the River Wey," the Wey, from Guildford to the Thames, was declared to be a navigable river, and the soil of that portion of the river, and certain parts of the banks, and the locks, sluices, &c., towing-paths, wharfs &c. of the river, vested in trustees, with certain powers for keeping the river navigable; and it was provided, that Lord *Montague*, and his heirs &c., should receive out of the profits of the navigation 2½*d.* for every ton &c. navigated on the river, and that *Thomas Dalmahoy*, and his heirs &c., should receive 4*d.* for every ton &c. navigated on the said river, within his own lands, (situate at Dapdune, in the parish of Stoke-next-Guildford,) besides 20*l.* per annum for a wharf; and that the corporation of Guildford should receive 1*d.* for every ton &c. navigated on the river; and that the trustees should pay to the persons to whom any shares of the profits of the navigation should be allotted, in the manner provided by the act, such respective shares of the net profits of the navigation, after deducting the costs, charges and expenses of repairing &c., and executing the trusts; and that the two chief justices and the chief baron should appoint recompence in money, to be paid out of the profits of the navigation, to persons receiving any damage in their lands &c., by cutting new passages &c.; and that the river should not be used or navigated without the licence of the trustees,—who were authorized to receive certain tolls.

A river navigation company is to contribute to the relief of the poor in a parish through which a portion of the navigable river passes, in proportion to the profit resulting from that portion.

Such profit is to be calculated at the amount of rent which a tenant would pay.

When therefore the company receive the tolls to their own use, the amount of the repairs, and of the expenses necessary to the carrying on of the undertaking, and also a percentage equal to a reasonable tenant-profit, must be deducted from the gross receipts, in fixing the *ratable* value.

But no deduction is to be made in respect of burthens imposed upon the profits of the navigation, or in respect of compensation payable to the owners of property injured by the navigation.

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The following tolls have been fixed, and are received by the present trustees:

	s.	d.
Between Guildford Wharf and the Thames	4	0
Between Dapdune Wharf and the Thames	4	0
Between Stoke and the Thames	3	6
Between Bowers and the Thames	3	0
Between Triggs or Send Heath and the Thames . . .	2	6
Between Newark and the Thames	2	0

And so on, according to the distances, with similar rates, decreasing in the same proportion from the Thames to Guildford.

Triggs is in Woking, and Send Heath is in the parish of Ripley, and that part of the navigation which is in Woking extends from a spot between Bowers and Triggs to a spot between Triggs and Newark. If this increased toll is considered to be earned for the use of the navigation, between the points above named, then the sum of 3*d.* per ton is payable in respect of that part of the navigation situate in Woking.

There are no toll-houses on the river, and the tolls are not paid in parts at the different places on the river, but the entire tolls for the whole navigation performed are paid at once, when the vessels are known, generally at the end of each quarter; but if they are strange vessels, at the end of each voyage.

The whole length of the navigation is 27,060 yards.
The length in Woking is 4049½ yards.

	£.	s.	d.
The gross receipts for the tonnage upon the navigation, upon an average of the last three years, are . .	5923	16	10
The gross receipts, deducting the receipt for tonnage not passing through Woking, upon an average of the same three years, are	4705	12	6

The 4705*l.* 12*s.* 6*d.* is made up of receipts in respect of the "through" trade, that is, the tonnage going the whole line of the navigation, and what is called the "short" trade.

The receipts of the "through" trade upon the same average of three years, are	£4311	13	1
The "short" trade passing through Woking . . .	393	19	5
	£4705	12	6

	£.	s.	d.
The share of Woking in the gross receipts for the whole tonnage of the navigation, upon a milage calculation, is	886	9	11
The share of Woking in the gross receipts for the whole tonnage, deducting the receipts for tonnage, not passing through Woking, upon a milage calculation, is	688	14	2½
That is to say,			
Woking share of the "through" trade, 630 5 4½ / of the "short" trade 58 8 9½ }	688	14	2½
The share of Woking in the tolls, upon a calculation of 3*d.* per ton (being half the 6*d.* rise for Triggs and Send Heath, according to the scale set forth in the case) for every ton passing Woking, upon an average of three years, is	309	0	0
The general expense of the navigation (exclusive of compensations) upon an average of the same three years, are	2566	19	4
The compensations upon an average for the same three years, are	1226	3	0
Total expenses	£3793	2	4

The compensations are made up as follows:

The Groats to Mr. Dalmahoy	450	12	9
The corporation (Guildford) pence	214	1	8
Lord Montague's 2½*d.*	301	11	1
Mills	259	17	6
Total	£1226	3	0

The mills are in number three. One only is in Woking, and the annual compensation paid in respect of that particular mill is 65*l.* 6*s.*

The expenses of the navigation in Woking, have been upon an average of years in proportion to the expenses in the other parts of the navigation.

The share of Woking in the whole expenses, exclusive of the compensations, upon a milage calculation, is	384	2	10
The share of Woking in the compensations, upon a milage calculation, is	183	9	10
Total	£567	12	8
The net income of the navigation upon an average of three years, is	£2230	14	6

£10 per cent. would be a reasonable sum to be deducted for tenant's profits,—leaving 2007*l.* 13*s.* 1*d.*

The share of Woking in the net profits, without any deduction, upon a milage calculation, is	£333	16	10
The share of Woking in the net profits, after the deduction for tenants' profits, upon a milage calculation, is	300	8	10

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The questions for the opinion of the Court are—1st. Whether the sum in which the appellants are liable to be rated in Woking, is to be ascertained by the *proportion* which the *length* of the navigation in Woking bears to the whole length thereof; and if so, what deductions are to be made from that sum. 2dly. Whether the sum in which the appellants are to be rated is to be ascertained by the amount of *tonnage*, on all goods carried through Woking, at the rate of 3*d.* per ton; and if so, what deductions are to be made from that sum.

If the Court shall be of opinion that the sum upon which the appellants are to be rated in Woking, is to be ascertained by the *proportion* which the *length* of the navigation in Woking bears to the whole length thereof, the appellants' claim, from the share of Woking in the gross receipts for the whole tonnage of the navigation, upon a milage calculation (amounting to 886*l.* 9*s.* 11*d.*), to make the following deductions:

1st. The tonnage not passing through Woking, leaving the share of Woking in the gross receipts, after making such deduction, 688*l.* 14*s.* 2½*d.*

2dly. The share of Woking in the general expenses on a milage calculation, exclusive of compensations, (amounting to 384*l.* 2*s.* 10*d.*)—it being found that the expenses incurred in Woking equal its share of the general expenses on a milage calculation.

3dly. The share of Woking in the compensations, on the same calculation, amounting to 183*l.* 9*s.* 10*d.*

These last two sums, deducted from 688*l.* 14*s.* 2½*d.*, (the gross receipts for the tonnage which passes through Woking,) leave a balance of £121 1 6½

4thly. From this sum the appellants claim to deduct 10 per cent. for tenant's profits, amounting to 12 2 0

Leaving, as the sum at which they are to be rated £108 19 6½

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If the Court shall be of opinion that the gross receipts applicable at Woking, are to be calculated at 3*d.* per ton, on all goods carried *through* Woking, then the appellants claim, from the sum produced by such calculation, to make the 2d, 3d and 4th deductions, and in such case the deductions will exceed the receipts.

The respondents deny the right of the appellants to make any of the foregoing deductions.

Thesiger, N. R. Clarke, and *Montagu Chambers,* in support of the order of sessions. The first question is, what is the *principle* to be adopted in rating the profits of this navigation. The principle laid down in the older cases is, that the tolls of a canal navigation are ratable in that parish only where the voyage is completed and the tolls become due. Thus, in *Rex* v. *Aire and Calder Navigation Company* (*a*), where a navigation passed from A. to B. through several intervening townships, and the tolls were collected for the whole navigation in A. and B., it was held that the assessment might be in A. and B., according to the proportion collected in each. *Rex* v. *Page* (*b*) establishes the same principle; which, however, has been broken in upon by the late decisions in *Rex* v. *Milton* (*c*), *Rex* v. *Palmer* (*d*), and *Rex* v. *The Earl of Portmore* (*e*). The principle established by those cases is, that the proprietors of a canal navigation, extending through several parishes, are ratable in respect of the profits of the land used for the navigation in *each* parish. The profits may be ascertained in two modes; first, by the proportion which the *length* of the navigation in each particular parish bears to the whole length, on a milage calculation; or, secondly, by the proportion which the earnings for the tonnage of goods in the particular parish bear to those for the goods conveyed throughout

First point: Principle of rating.

(*a*) 2 T. R. 660.
(*b*) 4 T. R. 543.
(*c*) 3 Barn. & Ald. 112.
(*d*) 2 Dowl. & Ryl. 793; *S. C.* 1 Barn. & Cressw. 546.
(*e*) 2 Dowl. & Ryl. 798; *S. C.* 1 Barn. & Cressw. 551.

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the whole line. The question in the present case is, which of these two modes is to be adopted. If the tonnage which is paid can be shewn to coincide with a milage calculation, there can be no objection to the first principle. But where the rate of tonnage varies on different parts of the line of navigation, the principle of a milage calculation is inapplicable, and recourse must be had to the second mode of ascertaining the amount for which the proprietors are ratable in each particular parish. In *Rex* v. *Kingswinford* (*a*) it was held, that where a canal passes through several parishes in which the tonnage-dues payable vary, the Company are ratable to the relief of the poor in each parish for the amount of tonnage-dues actually earned there, and not for a part of the *whole* amount carried along the *whole* line of the canal, in proportion to the length of the canal in that parish: and in *Rex* v. *Lower Mitton* (*b*), *Bayley*, J., who delivered the judgment of the Court, said, "The proprietors of a canal or navigation are ratable as occupiers of the land covered with water in the particular parish in which the land lies; and it follows from thence, and was so decided in *Rex* v. *Kingswinford*, that they are ratable in each parish, *in proportion to the profit* which that part of the land covered with water, which lies in the parish, produces. If it is more productive than other parts of the canal, either because there is more traffic, or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at a higher proportionate value." In *Rex* v. *Chaplin* (*c*), Lord *Tenterden* recognizes the same principle. This being the established principle when the tonnage varies on the line of navigation, the question is, how far it is applicable to the present case. Here, a four shillings toll is paid for the whole line, and the trustees have apportioned this four shillings, and distributed it over the whole length of the navigation, so that different

(*a*) 1 Mann. & Ryl. 20; 7 Barn. & Cressw. 236.

(*b*) 4 Mann. & Ryl. 711; 9 Barn. & Cressw. 810.

(*c*) 1 Barn. & Adol. 926.

sums are paid for tonnage on the respective voyages over the different parts of the river. In descending towards the Thames, the tolls on the respective parts of the navigation decrease; in ascending, the tolls increase; so that the rate of four shillings of toll upon the whole navigation is averaged by calculating the tolls which are payable on the upward and downward navigation. In this case therefore the tonnage varies; and the first mode of ascertaining the profits, namely, by a milage calculation, by taking an average of the tolls earned upon the whole line, would be extremely unjust to Woking. The first mode being therefore inapplicable, the only other mode which can be applied is, that of a rate upon the amount of tonnage which is earned in the particular parish. If this principle be adopted, and the proper deductions are made, it will be found that the proprietors derive no profit from that part of the navigation.

Second point: Deductions.

The next question is, what are the proper deductions to be made out of the receipts? That must depend upon the outgoings and state of the particular portion of the navigation in each parish. The several sums paid amount to 1226*l.* Before the sum for which the proprietors are to be rated can be ascertained, a deduction must be made of all outgoings; and the rate must be made upon such a sum as a tenant would give after a deduction had been made of all outgoings: *Rex* v. *Trustees of Duke of Bridgewater* (*a*), *Rex* v. *Adames* (*b*). With respect to the sums for compensation, it is to be remarked that so much of the receipts as would go to discharge them never come into the hands of the proprietors of the navigation. The case, in this respect, resembles *Rex* v. *Aire and Calder Navigation* (*c*); and in *Rex* v. *Liverpool* (*d*) it was held that the Company were not ratable as to compensation of this description. It is clear that the sums expended in repairs must be deducted; *Rex*

(*a*) 4 Mann. & Ryl. 143; 9 Barn. & Cressw. 68.

(*b*) *Ante*, i. 662; 4 Barn. & Adol. 61.

(*c*) 3 Barn. & Adol. 533.

(*d*) 7 Barn. & Cressw. 61. And see *Rex* v. *Avon Navigation Company*, 4 Mann. & Ryl. 23.

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v. *Oxford Canal Company* (*a*). [*Campbell*, A. G., admitted this.] Then the only remaining question is, whether a sum equivalent to a tenant's profits ought not also to be deducted. It is clear from *Rex* v. *Joddrell* (*b*), and *Rex* v. *Trustees of Duke of Bridgwater*, that such a deduction ought to be made.

First point.

Campbell, A. G., and *Gaselee*, contrà. This is not a case in which the proprietors of a navigation are rated in respect of a sum greater than their receipts, nor is it a case in which a lower toll is taken than they are by act of parliament entitled to receive. The proprietors have arbitrarily distributed the sum to which they are entitled upon the whole line of navigation between Guildford and the Thames. If the principle contended for on the other side is allowed to prevail, the consequence will be, that the proprietors may, if they think proper, make the deductions exceed the amount of tolls taken in any particular parish. It would be extremely unjust to give the proprietors the power of so apportioning the tolls, and thereby avoiding the payment of rates in any parish in which the relief of the poor might happen to be particularly burthensome. It is manifest, upon an examination of the act of parliament which gives the proprietors authority to take toll, that this was intended to be a milage toll. The *principle* of *Rex* v. *Kingswinford* is not disputed, but it is inapplicable to the present case. That was a *canal* company; this is a *river* navigation, which is regulated by a local act of parliament. If the principle of *Rex* v. *Kingswinford* is to be adopted when the expenditure in a particular parish exceeds the profits, the proprietors could not deduct that excess of expenditure from the profits in the other parishes; the consequence would be, that the Company would be rated for more profit than they actually received. As this is a river navigation, a greater quantity of land in a given direct distance, is proba-

(*a*) 5 Mann. & Ryl. 106; 10 Barn. & Cressw. 163.

(*b*) 1 Barn. & Adol. 403.

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bly, by reason of greater circuity of course, occupied in some parishes than in others; and therefore a milage rate is the most equitable mode of rating.

Then, with respect to the deductions, it is admitted that the sum expended in *repairs* must be deducted. But there is no reason why the *compensations* should be allowed; nor why 10 per cent. should be deducted for tenants' profits. Mr. *Dalmahoy's* groats ought not to be deducted, since they are paid in respect of land not in Woking. The sums paid in respect of the mills, and the per-centages to Lord *Montagu* and to the Corporation of Guildford, are in the nature of *charges* upon the property, and ought not to be considered in determining the amount of ratability. *Rex* v. *Aire and Calder Navigation* and *Rex* v. *Adames* are distinguishable.

Second point.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of this term delivered the judgment of the Court as follows:

The rule by which canal companies are to be rated is thus laid down in *Rex* v. *Kingswinford* (*a*). "A canal company is to contribute to the relief of the poor in each parish through which the canal passes, *in proportion to the profit* which they derive from *the use of their land in that parish.*" It is also truly observed in the same judgment, that if the traffic be the same through the whole line, every part of the canal will earn an equal proportion of the tolls; and that, on the other hand, if the profit vary in different parishes, the rate also must vary. Apply that principle to the present case:—The "through" trade pays one gross sum for the whole line, and all parts of the line are equally profitable: the proportion of Woking must therefore be ascertained by a milage calculation with reference to the whole line. Again, the "short" trade pays one gross sum for the whole distance gone over, and all parts of that dis-

First point: Principle of rating.

(*a*) 1 Mann. & Ryl. 20, and 7 Barn. & Cressw. 236.

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tance are equally profitable. The proportion of Woking must therefore again be ascertained by a milage calculation with reference to the whole distance gone over. The tolls earned by passing over parts of the canal which do not include Woking, will be wholly excluded. By the facts found in the case, the true proportion of Woking in the gross receipts, according to this calculation, is 688*l.* 14*s.* 2½*d.*

Second point: Deductions.

The next question is, what deductions ought to be made from this sum? The necessary repairs and expenses must of course be deducted; and as they are found to be equal throughout the line, the proportion of Woking is to be ascertained by a milage calculation, and is found by the case to be 384*l.* 2*s.* 10*d.*

Mr. *Dalmahoy*'s groats are payable in respect of the use of the canal within his land in Stoke; and therefore if they could be deducted at all, they must be deducted from the profits in that parish, and not from the profits in Woking. But these groats, as well as the per-centages to Lord *Montagu* and to the Corporation of Guildford, are payable out of the profits of the canal, and are in truth nothing more than *rents-charge*. They do not affect the value of the *occupation* or the rent which a *tenant* would give, but only show amongst whom and in what proportions the rent or profit is to be divided. The poor-rates must be paid on the whole of the profits by those who receive them, viz. the proprietors; and they must settle the matter as they can with those who are entitled to share the profits with them. The same reasoning applies to the compensations to the mills; for they also are payable out of the profits. One only of the mills is situate in Woking, the compensation paid to which is 65*l.* 6*s.*; but, for the reasons stated above, we think that not even this sum can be deducted.

Upon the whole, the gross receipts earned in Woking are found, according to the principles here laid down, to be 688*l.* 14*s.* 2½*d.* From that sum must be deducted 384*l.* 2*s.* 10*d.* for repairs and expenses, leaving a balance of

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304*l.* 11*s.* 4½*d.*, from which 10 per cent. for tenants' profits, amounting to 30*l.* 9*s.* 1½*d.*, must be deducted, according to the rule laid down in *Rex* v. *Trustees of Duke of Bridgwater* (*a*). The case, indeed, does not state distinctly that lands are rated at such rent, and no more, in Woking; but as it finds that 10 per cent. is a reasonable deduction for *tenants' profits*, we presume that the fact is so; and this deduction must be made in order to equalize the rate; and the sum at which the appellants ought to be rated in Woking will then stand 274*l.* 2*s.* 2¾*d.*

Rate amended accordingly.

(*a*) 4 Mann. & Ryl. 143, and 9 Barn. & Cressw. 68.

CANN *v.* FACEY.

The Court will not set aside a judge's certificate, under 43 *Eliz.* c. 6, to deprive the plaintiff of costs, if the judge has power to certify, although the certificate may have been granted on an erroneous ground.

The Court refused to increase the damages found by the jury to the amount of damages proved, and not contradicted or impeached at the trial.

AT the trial before *Gurney*, B., at the last summer assizes at Exeter, it appeared that this was an action brought by the plaintiff, who kept a pack of harriers, against the defendant, for shooting one of his dogs. Some gentlemen came to try the dogs in the vicinity of the defendant's lands. They started a hare, which ran across the defendant's lands, followed by the dogs. The defendant came out in a great passion and drove them off. In the course of the same day another hare was started, which also ran across the defendant's lands. Upon this the defendant came out with two of his servants, and directed one of them to shoot the dogs. The man hesitated, when the defendant snatched the gun from him and shot one of the dogs. The only plea upon the record was a special plea of justification, containing an allegation that the defendant had given notice to the plaintiff, that if the dogs returned he would shoot them. This allegation was not however proved. The plaintiff shewed, by a witness wholly uncontradicted, that the price of a couple of the hounds was 5*l.*; and the de-

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fendant's counsel did not attempt to dispute the value thus given. The jury found a verdict for plaintiff, damages 20s. *Erle*, who was counsel for the defendant, then applied for a certificate, under 43 *Eliz.*, c. 6, s. 2, to deprive the plaintiff of his costs, suggesting that the plaintiff might have proceeded on the Malicious Trespass Act (*a*). The learned judge, on this ground, granted the certificate.

Crowder now moved for a rule, calling upon the defendant to shew cause why the damages should not be increased to 50s., or why the plaintiff should not be allowed his costs, notwithstanding the certificate granted by the learned judge.

First point: Increasing damages.

The verdict should be increased to 50s. There was no other evidence of value except that a couple cost 5*l*. The value of the dog shot was not a matter in dispute at the trial, the plaintiff seeking damages for the outrage committed, beyond the mere value of property lost (*b*).

Second point: Costs non obstante certificatione.

Secondly, the plaintiff is entitled to his costs, notwithstanding the certificate granted. This was not a case within the Malicious Trespass Act. It is true that act imposes a penalty for damage done to any personal property, but the proviso in the 24th section shews that the statute is not applicable to this case. The proviso is as follows:—"Provided always, that nothing herein contained shall extend to any case where the party trespassing acted *under a fair and reasonable supposition that he had a right to do* the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act." [*Coleridge*, J. How do you get over the words of the statute of *Elizabeth*?] The certificate was granted on an erroneous ground. [*Coleridge*, J. Where the certificate has been granted in a

(*a*) 7 & 8 *Geo.* 4, c. 30.

(*b*) Though the Court will not, unless leave has been reserved, (which implies consent,) increase or diminish the damages, a new trial is sometimes granted on the ground of excessive or insufficient damages, *unless* the other party will consent to their being diminished or increased.

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form of action in which it is not grantable, then indeed this Court may treat it as a nullity; but how can we interfere where the judge had power, under the 43 *Eliz.*, to certify, and has exercised that power?] If an arbitrator in his award states reasons for his decision which are inconsistent with law, the Court will set it aside, although, if he had given no reasons, it would stand. In this case the learned judge set forth the ground upon which he deemed it right to deprive the plaintiff of costs. That ground was, that the plaintiff had another remedy. Now if it turns out that there is no such remedy, and that the learned judge mistook the effect of the act of parliament to which he referred, this Court will interfere to prevent injustice being done to the plaintiff. In *Twigg* v. *Potts* (*a*), the Court of Exchequer made an order that the certificate should be *returned* to the judge who had granted it, for the purpose of his *reconsidering* the case. The same course may be pursued here.

Lord DENMAN, C. J.—There is, in my opinion, no foundation for this application. In the first place, we are required to increase the damages, and put ourselves in the situation of a jury. The amount of the damages is peculiarly a question for the jury. If they thought the witness was overstating the value of the dog, they might reduce the amount, and find a verdict accordingly. First point.

With respect to the costs, the statute authorizes the Court to reduce the costs *below* the damages, but not to give *more*. The words of the statute are—"That if any personal action, to be brought in any of Her Majesty's Courts of Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same Court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40*s.*, in every such case the judges or justices before whom such action Second point.

(*a*) 1 Crompt., Mees. & Rosc. 89.

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shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less, at their discretion." If the judge grants that certificate, there is an end of the question. The motive which the judge assigns may be erroneous, and yet there may have been good ground for granting the certificate. Indeed it would be a strong measure for a judge to refuse to grant a certificate in a case within the statute.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule refused

SMITH *v.* ELDRIDGE.

Under rule T. 1 *W.* 4, requiring the delivery of a particular of the sum or balance claimed, the plaintiff is not bound to specify the sums received by him on account. It is sufficient that he state the balance remaining due.

But if the plaintiff has not complied with this rule, the Court will not require him to pay costs for the violation of it, where the question of costs has been referred to and decided by an arbitrator.

ASSUMPSIT for work and labour and materials. The plaintiff had been employed by the defendant to erect a building for him. During the progress of the work, the defendant had paid to the plaintiff about 1200*l.* The amount of the plaintiff's bill was 1300*l.*, and no credit was given for the various payments which had been made by the plaintiff to the defendant. The writ of summons was indorsed for 1303*l.*, and the bill of particulars delivered demanded the same sum. The defendant, previously to the trial, took out a summons for better particulars, and insisted before the judge that it was the duty of the plaintiff to give credit for all sums received by him on account. The attorney for the plaintiff said that there was no credit to give, and the judge dismissed the summons. At the trial, the cause was referred—the costs to abide the event. When before the arbitrator, the plaintiff claimed no more than 400*l.* The arbitrator made his award, and found that 68*l.* was due from the defendant to the plaintiff, from which 9*l.* was to be deducted, so that the balance to be actually paid was only 54*l.*

Thesiger now applied for a rule, calling upon the plaintiff

to shew cause why he should not be deprived of his costs, for a breach of the rule of T. T. 1 *Will.* 4, (1831) (*a*). The defendant has been much prejudiced by the conduct of the plaintiff. If the real balance had been stated, the defendant might have paid it into Court. In *Adlington* v. *Appleton* (*b*), the plaintiff had delivered a particular of his demand, but had given the defendant no credit for payments admitted to have been made. Lord *Ellenborough* thus expresses himself—"This particular is a contempt of the authority of the Court. The plaintiff was *bound* to state the precise sum he sought to recover, and for this purpose to have given the defendant credit for all payments made on account. Such a particular misleads the defendant, instead of giving him the information to which he was entitled. Had he known that a balance of 10*l.* was all the plaintiff went for, he might very probably have paid that sum into Court. It is most unjust that, under these circumstances, the defendant should be burthened with the costs of the action. I think it right that the plaintiff should take a verdict for his balance, without costs. If this is not agreed to, I will direct an application to be made to the Court, who will most likely order the plaintiff's attorney to pay the costs on both sides." The only difficulty in granting this application is, that it was agreed that the costs should abide the *event* of the award; and it is true, that where a cause has been referred, and it has been agreed that the costs shall abide the event, and the arbitrator has no power to enter a verdict, the plaintiff cannot be deprived of his costs under 43 *Geo.* 3, c. 46 (*c*). That is owing to the particular language of the

(*a*) Which is as follows:—"That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in indebitatus assumpsit, or debt on simple contract, the plaintiff shall deliver *full particulars* of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the *sum* or *balance* which he claims to be due, as may be comprised within that number of folios."

(*b*) 2 Campb. 410.

(*c*) *Holder* v. *Raith*, *ante*, iv. 466.

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statute. [*Patteson*, J. That case in *Campbell* has been much misunderstood. It has been supposed to decide that the plaintiff is obliged to give the items in reduction of his demand. That is not necessary. All that is necessary is, that the *balance* of the demand should be stated.]

Lord DENMAN, C. J.—We have no power to grant this application. The arbitrator has decided the whole merits of the case, and this particular matter amongst the rest.

Rule refused.

HALL *v.* MIDDLETON.

In indebitatus assumpsit (*a*), the defendant pleads payment and acceptance in satisfaction; the plaintiff new assigns a different debt of the same amount with that confessed in the plea; non-assumpsit is pleaded to the new assignment. The only question for the jury is, whether *two* debts were incurred or one only.

ASSUMPSIT for money lent. Plea: payment and acceptance of 15*l.* 4*s.* in satisfaction of the promise and of damages by non-performance thereof. Replication: new assignment of a different promise. Plea to the new assignment: non assumpsit. The cause was tried before the under-sheriff of Derbyshire, when the plaintiff's witnesses proved an admission by the defendant, in October, 1833, that he owed the plaintiff 15*l.* The defendant called his own son, who stated that the sum of 15*l.*, together with 4*s.* 6*d.* for interest, had been paid by the defendant at the latter end of October, 1833. The jury, however, found a verdict for the plaintiff for 15*l.* and interest. The under-sheriff, upon his notes of the evidence, stated, that *after* the verdict had been returned, the defendant's attorney

If therefore the plaintiff proves one debt, and the defendant proves payment of the amount, the effect of the defendant's evidence is to shew that the debt proved by the plaintiff is the debt confessed and avoided by the plea, and not the debt newly assigned (*b*); which latter debt, therefore, remains unproved upon the issue of non assumpsit.

(*a*) The rule would of course be the same in *debt on simple contract*.

(*b*) Before the new rules of pleading, (*ante*, iii. 1 to 13,) payment would have been admissible in evidence under the plea of non-assumpsit to the new assignment. But at that time also, non assumpsit put in issue the whole of the allegations in the new assignment, and not only the creation, but the continued existence of a *second* debt. Before the new rules, therefore, the defendant might have said, "My evidence of payment either shews that the debt you have proved is the debt confessed and avoided in the special plea, or if you can apply your proof to the second debt, I have an equal right to apply my evidence of payment to that debt."

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applied to have it put to the jury, whether *two* sums of 15*l.* had been lent, but that he, the under-sheriff, refused to do so. Upon affidavits verifying the under-sheriff's notes, and stating, inter alia, that the under-sheriff had not, in summing up, put it to the jury to say whether these two sums had been lent, and that the defendant's attorney was in the act of asking the under-sheriff to put that question, when the jury turned round and gave their verdict,—*Maule*, in last Hilary term, obtained a rule nisi to enter a verdict for the defendant, or for a new trial.

First point: Evidence applicable to debt newly assigned.

W. H. Watson now shewed cause. It is clear that if a plaintiff new assigns a debt or a trespass, or a cause of action of any kind, and it appears that there was only one debt &c., he cannot recover. Here, the plaintiff proved a debt before the under-sheriff. The defendant does not thereupon take objection that only one debt has been proved, but he calls a witness to shew a payment applicable to the specific debt proved, by which he seems to admit that there were two debts. In *Oakley* v. *Davis* (*a*), it appeared *affirmatively* that there was only one arrest and imprisonment. In such a case, the plaintiff should no doubt have traversed the justification, and not have new-assigned. In *Pratt* v. *Groome* (*b*) also, it was admitted, that there was only one close and one trespass. Here, the defendant, by attempting to shew payment of the specific debt proved, admitted that there was a *second* debt, for the payment of the first debt is admitted by the new assignment.

Second point: Objection not taken at the trial.

But supposing this were not so, this objection cannot be taken now, because the point was not made at the trial. The defendant evidently rested his case upon his evidence of *payment*. [*Patteson*, J. The effect of the defendant's evidence was merely to identify the debt proved with that admitted on the record to have been paid; it was not given for the purpose of shewing payment of the debt which was

(*a*) 16 East, 82. (*b*) 15 East, 235.

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proved.] Whether it was given to identify or to prove payment, it is submitted that the rule ought to be discharged.

Maule, contrà. The only question which the jury had to try was, whether two sums or one sum only had been lent; and (*a*) the objection is, that the under-sheriff did not put this question to the jury; the omission to do which was a clear misdirection. The only question now is, whether the defendant has deprived himself of the right to object to this misdirection. It is not the duty of an advocate, nor is it in general proper, that he should interfere while a judge is directing the jury, and tell him what is the proper question to be put. The defendant's attorney took the earliest opportunity of requesting that the question might be put. It is said that the defendant put his case on the wrong ground; but there is no statement or affidavit that the defendant did rest his case on the evidence of *payment*. That evidence was given to shew that the sum which the plaintiff had proved, was the same sum that was mentioned in the special plea.

Lord DENMAN, C. J. (stopping *Maule*.)—The only issue was, whether there was a second debt. The evidence of payment, as such, was altogether immaterial. If there were no evidence of a second debt, the defendant would be entitled to a nonsuit.

PATTESON, J.—If there were no evidence at all of any second debt, the defendant would be entitled to a nonsuit. As there was *some* evidence of a second debt in this case, by reason of the defendant's failing distinctly to identify the sum proved with the sum admitted to have been paid, the question whether there were two debts should have been left to the jury.

Rule absolute for a new trial.

(*a*) See the judgment of Lord *Ellenborough* in *Pratt* v. *Groome*, 15 East, 237. And see *ante*, ii. 407.

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BROAD *v.* M'CALMAR.

ASSUMPSIT for 52*l.* Plea, payment as to 26*l.*, and non assumpsit as to the rest. At the trial before Lord *Denman*, C. J., at the London sittings after last term, the following facts appeared:

The plaintiff, a ship-broker, had procured for the defendant, a ship-owner, a charter-party for a homeward-bound cargo of logwood from South America. Five pounds per cent. is the commission usually paid for procuring a charter-party on goods from South America, and the abandonment of the contract by the ship owner does not affect the broker's right to commission. The defence was, first, that the defendant had received no benefit from the charter-party: and, secondly, that some time after the charter-party was made, the defendant not being able to procure an outward cargo to South America, induced the plaintiff to agree to take only two and a half per cent. It was objected that this agreement was a new contract, which should have been specially pleaded, and was inadmissible in evidence upon the present record. Lord *Denman* was of opinion that it was admissible, as shewing what was the *original* contract between the parties. A verdict was found for the defendant, but leave was given to the plaintiff to enter a verdict for 26*l.*

M. D. Hill now moved accordingly. The second branch of the defence set up was not admissible under the plea upon the record. It was a new agreement entered into subsequently to the original contract, and ought to have been pleaded. It was subject-matter for a plea of accord and satisfaction; for the original contract was unquestionably for the commission at the usual rate, viz. 5*l.* per cent. *Fidgett* v. *Penny* (*a*) is precisely in point. This is one of

(*a*) 1 Crompt. M. & R. 108.

Where *A.* employs a broker, *B.*, to procure a charter-party, on a commission of 5 per cent., to be paid whether the contract be executed or abandoned, *A.* cannot, under a plea of payment of a smaller sum and non assumpsit ultrà, give evidence of a subsequent agreement to accept 2½ per cent. only on account of the abandonment of the contract.

But where the terms of the original contract are only inferred from the usage of the trade, a conversation in which *B.* agrees to take 2½ per cent. only, on account of the abandonment of the contract, is admissible, to show that such reduction was, as a contingent reduction, part of the original contract.

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those cases which is not only within the letter, but also within the spirit of the new rules.

Assuming that the new agreement was admissible in evidence, under the plea, there was no *consideration* for it. The rule of law is, that after breach of a contract, a discharge is not good without deed or consideration.

Lord DENMAN, C. J.—We all think that this evidence would not have been receivable if it could be considered that the original contract was proved to have been, to pay the full commission. But I left the evidence to the jury, as shewing what that contract was. The question I left to the jury was, whether the conduct of the plaintiff did not shew that under the circumstances he was to have only two and a half per cent. My own impression was, that, under the circumstances, the broker was to have only half the usual commission, and that the contract to pay 5*l.* per cent. was not proved in such a way as not to be liable to be changed by subsequent circumstances, and that by the circumstances which did subsequently arise, it *was* changed.

PATTESON, J.—If the original contract was to pay 5*l.* per cent., evidence of an alteration of that contract subsequently made, could not be given in evidence under the plea upon the record. But the evidence was clearly receivable for the purpose of shewing what the *original* contract was.

WILLIAMS, J.—The evidence which was received in this case was given to shew what the *original* contract was, and in that point of view it was admissible, and fit for the jury to take into their consideration.

COLERIDGE, J.—Mr. *Hill* assumes, as the foundation of his argument, that the original contract was proved to be, that the defendant was to pay 5*l.* per cent. under all cir-

cumstances. The evidence received was given to shew that under the circumstances which did arise, the contract was only to pay two and a half per cent.

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Rule refused.

ROSSET v. HARTLEY.

THE defendant having been arrested, made an application, on the 12th January last, to a judge at chambers, to be discharged on filing common bail, on the ground that he had been arrested by the name of *William Saville Hartley*, whereas his real name was *Wincombe Henry Savile Hartley*. The judge refused to order the discharge of the defendant, who thereupon paid to the sheriff the sum sworn to, with 10*l.* for costs. The sheriff paid the money into Court under 43 *Geo.* 3, c. 46, s. 2. Bail above not having been put in, the plaintiff made the usual motion in the Outer Court to take the money out of Court, and a rule nisi was obtained, which afterwards, upon argument before the same learned judge, was discharged, on the authority of *Cadby* v. *Parsons*(*a*). *Cowling*, for the plaintiff, afterwards obtained a rule nisi, in the same form as before, to take the money out of Court, on affidavits, stating circumstances (detailed in the latter part of this report) to shew that the plaintiff had used due diligence in endeavouring to discover the defendant's name, in order to bring the case within the rule of Hilary term, 2 *W.* 4, r. 1, 32, and that the former decision ought not to be final. *Campbell*, A. G., subsequently, in Easter term last, obtained a rule calling upon the plaintiff to shew cause why the proceedings should not be set aside for irregularity, and why the money should not be paid back to the defendant, and directing that the two rules should come on together.

(*a*) 5 Taunt. 623.

irregularity, on the ground of misnomer, was discharged

Where a rule is discharged, the party is not entitled to a second rule to the same effect, upon affidavits stating additional facts, which the party might have presented to the Court on the first motion.

Where reasonable diligence has been used to obtain the true christian name of a defendant, the plaintiff, upon a motion to set aside proceedings for irregularity, on the ground of misnomer, is protected by Reg. H. 2 *Will.* 4, I. 32.

But where the defendant was not *conusant* of the inquiries made respecting his name, a rule for setting aside the proceedings for *without costs.*

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Campbell, A. G., now shewed cause against the plaintiff's rule. This rule being the same as was previously obtained and discharged, must necessarily be discharged also. The same rule cannot be repeated. The Court (*a*) then called on

Cowling, in support of the rule. There is no inflexible rule against the renewal of an application which has been once rejected by the Court. A second application cannot, it is true, be made *vexatiously*. There must be different grounds for it; and some explanation must be given to account for those grounds not having been brought forward in the first instance. Here, it is shown that reasonable pains to find out the defendant's name had been taken by the plaintiff. Applications to judges are frequently repeated after being refused on account of their being made upon imperfect affidavits. Besides, this objection ought to have been taken in the first instance, being in the nature of an estoppel, and it has been waived by obtaining a cross-rule directing both cases to come on together, which must mean that they shall be heard on their *merits*.

By the Court.—The rule is inflexible. All the grounds on which the plaintiff meant to rely should have been brought forward on the original motion. The rule nisi, in the present instance, was therefore irregular, and must be discharged with costs (*b*).

(*a*) *Patteson*, *Williams*, and *Coleridge*, JJ. Lord *Denman* was absent from severe indisposition.

(*b*) *The King* v. *The Sheriff of Devon*.—A rule nisi was obtained for an attachment against *Partridge*, the defendant, in an action of *Webber* v. *Partridge*, for the non-payment of a sum of money in pursuance of an award. After argument before *Patteson*, J., in the Outer Court, the rule was made absolute. The defendant took out a summons before *Patteson*, J. to shew cause why the proceedings on the attachment should not be stayed, but that learned judge declined to review his *former decision*. *The Sheriff of Devonshire* levied under the attachment, and was subsequently ruled to return the writ. In Michaelmas term last, a rule was obtained by the defendant, calling upon the sheriff to shew

The affidavits upon which the second rule was grounded disclosed the following circumstances. The defendant's real name was *Wincombe Henry Savile Hartley*, and he had always passed by that name, or by that of *Winchcombe Savile Hartley*. The affidavits in answer stated that the agent of the plaintiff, who resides in Switzerland, knew the defendant there by the name of *William Saville Hartley*. Before the arrest, an application was made at the bank of Messrs. *Hammersley*, where the defendant's aunt kept an account, and upon that application the agent was informed that it was believed there that the defendant bore the last-mentioned name. Other circumstances were also stated to shew the pains taken to ascertain the name.

Cowling now shewed cause against the second rule. A similar application was refused at chambers during term time, and no objection having been made to the ruling of the judge, the defendant is precluded from making the rule absolute, by the decision which has just been pronounced (*a*).

The plaintiff has used due diligence and brought himself within Reg. H. 2 *W.* 4, r. 1, c. 32, and the objection made by the defendant is in the nature of a plea in *abatement*, and such a plea must state that the defendant has

cause why he should not retain the sum of 16*l.* levied under the attachment, until the further order of the Court; and why he should not refund to the defendant the sum of 10*l.* 2*s.*, levied at the same time for fees and poundage. The latter part of this rule was obtained on the ground that the sheriff had taken larger fees than he was entitled to. Against this rule *Jeremy* shewed cause in the Outer Court before *Littledale*, J., who referred the matter to the full Court. The rule was argued in Michaelmas term last before Lord *Denman*, C. J., *Taunton*, J., *Patteson*, J., and *Williams*, J.

Bere, for the defendant, admitted, that so far as the rule related to the 16*l.*, it had been obtained for the purpose of reviewing the decision of *Patteson*, J.

By the COURT.—The question has already been disposed of; and as the single judge represents the full Court, we cannot review the decision. If such applications were allowed, parties failing in the Outer Court would constantly come to this Court for a rehearing.

The remaining part of the rule and the costs of the rule were referred to the Master.

(*a*) That decision related to the determinations of a judge sitting *in banc* in the co-ordinate Outer Court, created by 1 *W.* 4, c. 70, s. 1, not to orders made at chambers, which were always subject to revision.

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always been known by one name. Such a plea, therefore, could not have been supported by the defendant, as he has not always been known by the same name. Objections of this sort should not be encouraged; as it is difficult, particularly for a foreigner, to ascertain the correct name. In a case argued yesterday, a person was before the Court whose christian name was compounded of five names; and it is very hard on a plaintiff to be saddled with heavy costs, because he may not have the means to ascertain, or the memory to recollect, all those appellations. [*Coleridge*, J. But if the plaintiff cannot take the money out, what is to become of it?] The plaintiff can take no steps until he takes the money out, by virtue of the statute of 43 *Geo.* 3, c. 46, s. 2; and since he cannot get it, he will be out of Court at the end of a year, and the defendant will have it as a matter of course, unless something intervenes; but if the defendant's present application is to have it *now*, it is too soon.

Campbell, A. G., in support of the rule. The conduct of the plaintiff is pertinacious. *Cadby* v. *Parsons* (*a*) decides that his proceedings are void. As to the variance in the name, it merely appears that the defendant has sometimes omitted writing "*Henry*." There will be no difficulty as to the plea in abatement; for the plaintiff may reply, that the defendant was as well known by one name as the other, if the fact be so. [*Patteson*, J. This forms no answer to the argument founded on the new rules.] The plaintiff did not take sufficient pains.

By the COURT.—We cannot say that reasonable diligence was not used to ascertain the defendant's name; and therefore the case falls within the rule.

The attempts to discover the name, however, appear to have been made behind the defendant's back; and there being nothing to show that they came to his knowledge, we think that the rule should be discharged *without costs* (*b*).

Rule discharged, without costs.

(*a*) 5 Taunt. 623. (*b*) See *Finch* v. *Cocken*, 3 Dowl. P. C. 678.

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In re NEWBURY, Gent., one &c.

Where a rule is made absolute by consent, ordering that *A.*, an attorney, who has fraudulently retained in his hands the money of his client, shall invest the amount by a particular day, that he shall pay the costs of the application, and that otherwise an attachment shall issue,—it is no answer to a motion for such attachment that on the day after that appointed for the investment, a fiat in bankruptcy issued against *A.*, under which he has obtained his certificate, and that no service of the rule and allocatur took place before the bankruptcy. Whether the supervention of the fiat and certificate would have excused the non-obedience to the rule, by *A.*, so as to have exempted him from an attachment, if no fraud had been shewn, *quære.*

AGREEABLY to a direction contained in the will of *J. George*, that a certain part of his personal property should be invested in the funds, the dividends to be paid to *Sarah Spratly* for her life, and after her death the principal to be distributed amongst her children, his executors purchased 658*l.* 18*s.* 7*d.* five per cent. Bank Annuities, and paid the dividends to Mrs. *Spratly*. In August, 1831, Mrs. *Spratly*, being informed by *Newbury*, who was the attorney of *Hiscock*, the surviving executor, that greater interest might be obtained from the money if invested on mortgage, and that he could procure proper security for her, requested *Hiscock* to invest the money on mortgage accordingly. *Hiscock* thereupon executed a power of attorney to *Newbury* for the sale of the stock. The stock was sold out by *Newbury* in December, 1831, and produced 555*l.* 14*s.* 4*d.* *Newbury* did not, however, invest the amount on mortgage, but retained it in his own hands, paying Mrs. *Spratly* 5*l.* per cent. In November, 1832, Mrs. *Spratly* applied to *Newbury* to be informed upon what security the money had been invested, and who had the title-deeds; to which inquiries *Newbury* merely replied, that the money was safe, and should be called in and invested in the funds again if Mrs. *Spratly* wished that to be done. Mrs. *Spratly* being dissatisfied with *Newbury*'s answers, gave to *Bellringer* and *Frankum*, two of her relations, an authority to act on her behalf and insist upon *Newbury*'s re-investing the money. In the autumn of 1833, *Bellringer* and *Frankum* made several applications personally to *Newbury* respecting the money, and requested him to re-invest it; but on those occasions they were always put off by evasions, until at length *Newbury* admitted that the money remained in his hands uninvested, and said that if they would wait till

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Michaelmas term, the money should be re-invested in their names as trustees for Mrs. *Spratly*. *Bellringer* and *Frankum*, relying upon *Newbury's* promise, waited till Michaelmas term; but the money was not then invested. They afterwards repeatedly applied to him to re-invest the money or to place it out upon mortgage, but without effect. In January, 1834, they applied to Messrs. *Henson*, *Staniland* and *Long*, attorneys, to take the necessary steps for compelling *Newbury* to re-invest. *Henson* & Co. wrote to *Newbury*, requiring him to do so; and he, in consequence, proposed to give a mortgage upon certain property for the amount. Messrs. *Henson* & Co. were not satisfied of the sufficiency of the property, which was already mortgaged, and refused to accept the proposed mortgage. On 3d February, 1834, they had an interview with *Newbury*, who admitted to them that the money remained in his hands uninvested, and promised that if they would not take proceedings to compel a re-investment before that day month, he would then re-invest. No re-investment being made, this Court, upon the motion of *Curwood*, on 24th April, 1834, granted a rule, calling upon *Newbury* to shew cause—why he should not re-invest the sum of 658*l.* 18*s.* 7*d.* three per cent. Bank Annuities, which, on 27th December, 1831, was sold out, and received at the Bank of England by virtue of a power of attorney executed by one *W. Hiscock*, the surviving trustee under the will of *James George*, deceased, and since applied by the said *Newbury* to his own use, and why he should not pay the costs of that application, to be taxed, &c. No affidavit was sworn by or on behalf of *Newbury* in opposition to this rule, but on 6th May following he appeared before the Court by counsel, and the rule was then made absolute for the re-investment of the money and payment of the costs on 24th June then next; and it was further ordered by the Court, that in default thereof an attachment for a contempt should issue against him. On 8th August, the rule and the Master's allocatur for 21*l.* were served upon *Newbury*, and the 21*l.* demanded. *Newbury* has not invested the money, and has become a bankrupt.

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In Hilary term, *G. T. White* obtained a rule for an attachment against *Newbury* for not re-investing the money and for non-payment of the 21*l.*

Newbury, in an affidavit in answer, stated that a fiat in bankruptcy issued against him on June 25th, and that he had obtained his certificate in the following October.

Platt now shewed cause. Mr. *Newbury* is discharged by his certificate from all liability to be sued in an *action* for not re-investing this money; and it would therefore, it is submitted, be improper to issue an *attachment* for the purpose of compelling him so to re-invest. Writs of attachment against persons over whom the Court has a peculiar jurisdiction, are intended only as a substitution of *a more speedy remedy* against those persons than the ordinary remedy by action; and ought not to be issued for the purpose of enforcing claims, the ordinary remedies for which are barred by force of an act of parliament. The proceeds of the stock was money had and received to the use of the trustees, and might have been proved under the fiat. The rule of 6th May was not served until after the bankruptcy, nor does it appear that there was any demand of a re-investment made on 24th June. When the rule was served and the re-investment demanded, obedience had become *impossible.*

G. T. White, contrà. [*Coleridge*, J. When do you say that *Newbury* was in contempt?] On 24th June, 1834, being the day upon which he was ordered by the rule to re-invest. The rule was made absolute upon the hearing of counsel on behalf of Mr. *Newbury* as well as of Mrs. *Spratly*. [*Coleridge*, J. *Baron* v. *Martell* (*a*) shews that it is necessary that the party should have been in contempt before his bankruptcy. Lord *Denman*, C. J. The practice uniformly is, not to issue an attachment for a contempt in non-performance of an act on a particular day, unless there has been an actual demand and refusal,—which of course

(*a*) 9 Dowl. & Ryl. 390.

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implies that the demand must be made at a time when the party is of *ability* to perform that which is required of him.] It is submitted that a demand is not necessary when the original rule provides that an attachment shall issue in case of disobedience. [Lord *Denman*, C. J. I do not see how that makes any difference.] In *Bonner, in re* (*a*), referred to in another case of *Bonner, in re* (*b*), Lord *Tenterden* appears to have said, "Let the attorney dare to tell the Court, that having obtained this money in his professional character, he will not pay it over because he is protected by his certificate, and I shall know how to deal with him." Case would have lain against *Newbury* for *fraudulently* neglecting to re-invest; and a bankrupt's certificate is no bar to an action of *tort*. In *Parker* v. *Crole* (*c*) it was held, that bankruptcy and certificate are no bar to an action in tort against a broker for selling out the plaintiff's stock contrary to orders; and the language of *Best*, C. J., in that case is very strong to shew that, under circumstances such as the present, a bankrupt's certificate is no bar. If the *action* for not re-investing is not barred, à fortiori the remedy by *attachment* is not so. *Newbury fraudulently* procured the original sale of the stock, or at least fraudulently retained the produce of the sale, with a view to apply it to his own use. [Lord *Denman*, C. J. The original rule does not impute *fraud*: it merely says that he had applied the money *to his own use*, which he *might* honestly do for a time.] It also provides that a writ of attachment shall issue in case of non-compliance. The whole rule, taken together, clearly contains an imputation of fraud. The facts also of the fiat in bankruptcy issuing on the very day after the 24th June, and of the certificate having been obtained before the next term, savour strongly of fraud. It is hoped that the Court, if they are not at present satisfied that there was fraud on the part of *Newbury*, will refer the question of fraud to the Master.

(*a*) Shortly reported *ante*, i. 555, (*a*).

(*b*) *Ante*, i. 555; 4 Barn. & Adol. 811.

(*c*) 5 Bingh. 63.

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Lord DENMAN, C. J.—I am extremely unwilling to proceed under our summary jurisdiction over an officer of the Court, unless I see clearly that the case is such as properly calls for our interference. Upon the whole, I think that this attachment may go, upon both grounds. Independently of the fraud, I think it might go. The attachment may be said to have been in progress before the bankruptcy; and I think we may now give effect to the former rule, and punish the party for his contempt in disobeying it. I think also that a distinct case of fraud is made out. Looking at the whole matter together, there was clearly a fraudulent proceeding to defeat the claim of the client.

PATTESON, J.—I entirely agree. A long while ago the stock was sold out,—*not* fraudulently, as I should say; and it was retained by *Newbury* in his own hands for a time; and I do not see that this either was fraudulent, as he does not appear to have led Mrs. *Spratly* to believe that he had invested the money. Still, when required to re-invest the money, he from time to time evaded giving answers to the applications or complying with them, from which it is pretty clear that he had applied it to his own purposes. Then a rule was obtained, and it was made absolute for the re-investment on a certain day. It was not so re-invested; and on the very day after the appointed day a fiat in bankruptcy issued. The whole appears to be a scheme of fraud, which we must defeat by issuing this attachment.

WILLIAMS, J.—I entirely concur. The former rule was made absolute on 6th May, when *Newbury* could have shewn cause, if he had any cause to shew. On 24th June, the money ought to have been paid or re-invested. It is not pretended upon the affidavits that *Newbury* had taken any steps towards complying with the rule, and then, on the 25th, the fiat in bankruptcy issues. Upon the ground of fraud, I think that this rule should be made absolute.

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COLERIDGE, J.—On the ground of an almost irresistible proof of fraud, we may safely make this rule absolute. The stock was sold out that it might be invested on mortgage. *Newbury* holds it for a considerable time, paying interest at five per cent., which is a strong circumstance to shew fraud; for why should he have done that as an attorney waiting for an opportunity to invest. Afterwards, on 6th May, he consents that the rule to re-invest, which had been previously obtained, should be made absolute with costs. By that he gets an opportunity of having a particular day appointed for the re-investment. That *consent* is another circumstance of fraud. On the day following that appointed for the re-investment, a fiat in bankruptcy issues against him. Upon the whole of these circumstances, I think such a case of fraud is established that we ought to order this attachment to issue.

I express no opinion as to what we ought to do supposing the fraud not to have been established.

Rule absolute.

TIPTON *v.* GARDINER.

An application for costs under 43 *Geo.* 3, c. 46, on the ground that the plaintiff arrested for 35*l.*, and recovered only 19*l.* 19*s.*, is not answered by affidavits stating that the plaintiff's demand was reduced at the trial by the false evidence of a witness who was in fact a *partner* of the defendant, but stated herself to be his servant only.

DEBT for money paid, and on an account stated. Pleas, non assumpsit, and a set-off for work and labour and materials. At the trial before Lord *Denman*, C. J., at the last Gloucester assizes, the plaintiff had a verdict for 19*l.* 19*s.* Upon affidavits, stating that the defendant had been arrested and held to bail for 35*l.*, but that 19*l.* 19*s.* only had been recovered, and alleging that the plaintiff well knew at the time of the arrest that he was indebted to the defendant in such an amount for business done, &c., as a tailor, as to reduce his debt below 20*l.*,—*Busby* obtained a rule nisi for costs under 43 *Geo.* 3, c. 46, s. 3.

The affidavits, in answer, stated that the set-off had been

proved at the trial by the evidence of one *Frances Inch*, who stated herself to be the *servant* only of the defendant; that in fact she was his *partner*, as appeared by, inter alia, two orders since made by the Insolvent Debtors' Court, upon the filing of the petitions and schedules of the defendant and *Frances Inch*, in which they were severally described as being in partnership one with the other, as oil and colour merchants, and retail brewers, and tailors, and that her evidence was wholly false; and that the goods alleged to have been furnished, and for which the set-off was claimed and allowed, had not, with the exception of one article, been furnished.

Talfourd, Serjt., and *Greaves*, now shewed cause. The claim of the plaintiff was reduced by the evidence of a witness who ought not to have been examined, as she was herself a partner of the defendant, and whose evidence, moreover, is stated to be wholly false. The plaintiff might have obtained a rule for a new trial or to increase the damages upon the affidavits sworn in this case, but it appeared useless to apply for such a rule against an insolvent. This application is of course made on behalf of the defendant's attorney, not of the defendant himself.

Busby, contrà. These affidavits are merely a charge of perjury by one of the witnesses, which is no answer to the application. This case is, in principle, precisely analogous to *Glenville* v. *Hutchins* (*a*). The defendant proves a certain debt due to him, which, when deducted from the sum claimed, leaves a balance of 19*l.* 19*s.*

Lord DENMAN, C. J.—It might have been made the ground of a *motion for a new trial*, that the evidence of Mrs. *Inch* was fraudulently palmed upon the jury as the evidence of an independent witness; but there seems to me to be nothing to take the case out of the general rule that the amount of the verdict is primâ facie proof of the want

(*a*) 1 Barnw. & Cressw. 91.

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of reasonable and probable cause to arrest for the amount sworn to.

PATTESON, J.—I am of the same opinion. We cannot try the case over again upon affidavits.

WILLIAMS, J., and COLERIDGE, J., concurred.

Rule absolute.

BARLOW et UX. v. LEEDS.

The Court will not stay proceedings in an action, on the ground that the money recovered will be held by the plaintiff in trust for the defendant.(b)

MOTION for a rule calling upon the plaintiff to shew cause why proceedings should not be stayed.

The plaintiff's wife and her sister had lent to the defendant, their brother, 50*l.* each. To secure the repayment, the defendant gave his two sisters a promissory note for 100*l.* One sister died, and bequeathed to the defendant the principal part of her fortune, and the defendant took out administration with the will annexed; notwithstanding which, the present action was commenced to recover the whole of the 100*l.*(a) Under a judge's order the defendant paid 50*l.* and interest into Court..

F. Kelly, for the defendant, submitted that he was entitled to this rule, as when the plaintiffs had recovered the 100*l.* they would be trustees for him as to the unpaid 50*l.* [Lord *Denman*, C. J. Have you any example of this being done?] The Court frequently interferes to stay proceedings on equitable grounds.

Lord DENMAN, C. J.—We think we cannot grant this rule.

Rule refused.

(a) The plaintiffs had no mode of enforcing payment of their own moiety except by bringing an action upon the indivisible security. After payment of that moiety and costs, any further proceedings would be against conscience and a breach of trust, and would probably be restrained by injunction from a court of equity.

(b) That a trustee may recover in ejectment against his cestui que trust, *vide Roe* d. *Reade* v. *Reade*, 8 T. R. 122; *Weakley* d. *Yea* v. *Rogers*, 5 East, 138, n.

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The KING *v.* BENJAMIN ROUND.

To a mandamus requiring *A.*, a waywarden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody, power, or possession, it is a good return to say, that on and since the teste of the writ, *A.* had not, nor has had the books &c., or any of them, in his custody, power, or possession.

UPON the application of the churchwardens of the parish of Wednesbury, Staffordshire, a writ of mandamus to the following effect issued, of the teste of 7th May, 1834:

"Whereas We have been informed that you *B. Round* exercised the office of a surveyor of the highways within the parish of Wednesbury, from Michaelmas 1827, to 6th October, 1832; and that divers books of accounts, assessments, rates, and other documents, relating to the highways within the said parish, during the aforesaid period, *are now in your custody, power, or possession*, which books of accounts &c. of right ought to be delivered to *J. A.* and *S. C.*, churchwardens of the said parish, to be kept for the use

If *A.* goes on unnecessarily to state that he had them not on a prior day, when it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession intermediate between the demand and the teste of the writ.

Whether, under the circumstances, the books &c. were in the *power* of *A.*, is a question to be raised by a traverse to the return (*a*), or by an action for a false return (*b*).

(*a*) At common law, a return to a mandamus was not traversable. If the return were good upon the face of it, the only remedy of the party ousted of his remedy by mandamus by the falsity of the return, was an action on the case, (*post*, 430, n., and see *Anon.* Lofft, 371;) but now by stat. 9 *Ann.* c. 20, after reciting that persons who have a right to the office of *mayors or other offices*, within cities, towns corporate, boroughs and places, or to be *burgesses or freemen* thereof, have either been illegally turned out or have been refused to be admitted thereto, and have no other remedy to procure themselves to be admitted or restored, than by writs of mandamus, the proceedings on which are very dilatory and expensive,—it is enacted, that the persons prosecuting such writ may *plead to*, (i. e. may confess and avoid,) or *traverse* all or any of the material facts contained within the return; to which the persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein for the determination thereof, as might have been had if the persons suing such writ had brought their action on the case for a false return; and if any issue shall be joined on such proceeding, the persons suing out such writ shall try the same in such place as an issue joined in such action on the case should have been had; and in case a verdict shall be found, or judgment given for them upon demurrer, or by *nihil dicit*, or for want of a replication or other pleading, they shall recover damages and costs, and a peremptory writ of mandamus shall be granted without delay for them for whom judgment shall be given, as might have been if such return had been adjudged *insufficient*; and in case judgment shall be given for the persons making such return, they shall recover *costs*; such damages and costs to be levied by ca. sa., fi. fa., or elegit.

By this statute the power of traversing, or of confessing and avoiding the return, appears to be limited to the particular cases of the admission or restoration of mayors and other municipal officers, burgesses, and freemen, and the Highway Acts do not *expressly* give any such power; *ideo quære.*

"It appears from the wording of the statute, that there are many cases to which it does not extend, therefore in all those cases the proceedings must be according to the course of the common law." Bull. N. P. 206.

(*b*) The Court will not try the truth of a return upon *affidavits*, though a strong case of fraud be disclosed; *Gosset v. De Crouy*, 1 Crompt. & Mees. 778, 3 Tyrwh. 906, 2 Dowl. P. C. 86.

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of such parish; and that although you have been oftentimes required, on behalf of the said churchwardens, to deliver to them the said books &c. to be kept as aforesaid, yet you have hitherto neglected and refused, and yet do neglect and refuse to deliver up the same to the said churchwardens for the purposes aforesaid, but, on the contrary thereof, still unjustly detain the same in your custody, possession, or power, in contempt &c.:—We do command you the said *B. R.*, that immediately after the receipt of this, Our writ, you do without delay deliver or cause to be delivered to the said *J. A.* and *S. C.*, churchwardens of the said parish, all books of accounts &c. *in your custody, power, or possession*, relating to the highways within the said parish, during the period of your serving the said office, or any part thereof, to be kept &c., or that you shew cause to the contrary thereof &c."

In Trinity term, 1834, the following return was made by the defendant:—"I had not on the 7th day of May, 1834, nor have I since hitherto had, nor have I now in my custody, power, or possession, any book or books of account &c., relating &c.; nor had I any such in my custody, power, or possession, when I was required, on the behalf of the within-named churchwardens, to deliver the same to them; therefore I am unable to deliver any such to the within-named *J. A.* and *S. C.*, as within I am commanded."

A rule nisi to quash the return, and for a peremptory mandamus, having been obtained, the case was set down in the crown paper for argument.

Sir *F. Pollock*, for the crown. The return is insufficient and evasive, inasmuch as the defendant only says that he had not the books &c. in his possession on the day of issuing the writ, nor since, and that he had them not when required by the churchwardens to deliver such books &c. to them; and it is quite consistent with the return that he may have had them in September, 1832, when he went out of office, and also in all the intervals between the applica-

tions of the churchwardens down to the day previous to that on which the mandamus issued. The defendant is called upon to deliver the books &c. to the churchwardens, or shew cause to the contrary. By 13 *Geo.* 3, c. 78, s. 48, a positive duty to have these books &c., and to transmit them to the churchwardens or overseers, is thrown upon the surveyor of the highways of any parish &c., and therefore even supposing the return to mean that the defendant had not the books when first applied to for them, and has not had them since, that is insufficient, for he ought to *account* for not having them as in duty bound. Unless he does this, he fails to shew sufficient cause why he does not deliver the books &c. He may have parted with the possession illegally. He may have delivered the books &c. to some person to hold during the discussion with respect to them, or to some person bonâ fide entitled to hold them as against him. If the return had stated fully what had become of the books &c., the Court might have determined whether, in point of law, they were in the custody, possession, or *power* of the defendant, whereas on this return nothing is stated but an inference of law, which may not be warranted by the facts. In the cases already suggested, it could not be truly said that the books &c. were not in the *power* of the defendant, yet he might *think* himself warranted in returning that such was the fact. Further, if the return had stated the facts, the Court might have proceeded against the party in whose custody, possession, or power the books actually were.

Sir *W. Follett*, contrà, was stopped by the Court.

PATTESON, J. (*a*).—In the absence of any authority, I see no reason to doubt the sufficiency of the return. The command is, that immediately after the receipt of the writ, the defendant shall deliver to the churchwardens all

(*a*) Lord *Denman*, C. J., was absent on account of severe indisposition.

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books of accounts &c. in his custody, power, or possession, (that is, at the time of issuing the writ,) relating to &c., or shew cause to the contrary thereof. The return states *more* than is necessary, for it states that the defendant had not the books &c. on the day of issuing the writ, nor has had them since, and then adds, that he had them not when required on behalf of the churchwardens to deliver them. An argument is raised,—and perhaps the inference is legitimate,—that in the intervals he had them. Supposing that were so, yet if he had them not on the day of *issuing the writ*, or since, it is sufficient to return that fact. Then it is objected that the facts relating to the custody &c. of the books &c. should have been stated, in order that the Court might see whether they were in the defendant's custody, *power*, or possession; but whether they were so or not is a question *of fact*. The allegation in the return might have been traversed by the prosecutor; or now an action for a false return (*a*) might be brought, and then the question whether the books &c. were in the defendant's power might be discussed. If there were any *authority* to shew that the party was bound to state in his return *what he had done with* the books, the case would have been different. No such authority has been shewn to us, and I know of none.

WILLIAMS, J.—If the defendant has employed the language of the return in a sense different from that which properly belongs to it, an action for a false return will lie; for instance, if he had collusively delivered over the books to another person.

Rule discharged without costs.

(a) As to the action on the case for a false return, see 2 Wms. Saund. 150 a, 155; Com. Dig. tit. Retorn, (F) 2: Bac. Abr. tit. Sheriff; *Griffith v. Walker*, 1 Wils. 336; *Anon.* 2 Chitt. Rep. 392; *ante*, 427, (*a*).

WILTON v. CHAMBERS. 1835.

In discussing a rule nisi for an attachment against a sheriff for an insufficient return to a writ, the Court will not take cognizance of the return unless an office copy be produced, verified by affidavit, although there be an affidavit by a party as to his belief that no sufficient return has been made.

THE late sheriff of Dorsetshire having been ruled to return the writ of fieri facias in this cause (*a*), made a special return, setting out all the circumstances arising out of *Chambers's* bankruptcy, the various rules, and the several facts set out in the report of this case (*a*).

A rule was thereupon obtained by Sir *William Follett*, calling upon the sheriff to shew cause why an attachment should not issue for the insufficiency of the return. The rule was drawn up on reading an affidavit of the plaintiff *Wilton*, and of a person who swore to the service of the rule to return the writ, and of another person who swore that he had searched for the return, and that "he was advised and believed that no sufficient return had been made." But no copy of the return was annexed to the affidavit.

Campbell, A. G., and *Barstow*, shewed cause. The affidavits upon which this rule has been drawn up do not warrant the rule. The sheriff is called upon to answer for a supposed contempt, but the circumstances necessary to enable the Court to form a judgment do not appear. The rule assumes the insufficiency of a return which is not before the Court. It is not pretended that the sheriff has made *no* return. The belief of an individual as to its insufficiency does not warrant the Court even in calling upon the sheriff to make any answer. There should have been an office copy of the return verified by affidavit, and the rule should have been drawn up on reading it. The point is the same as that which was decided in *Sherry* v. *Oke* (*b*).

Alexander (with whom was Sir *William Follett*), contrà. It would have been idle, if not vexatious, to burthen the proceedings with an office copy of a record already before

(*a*) See the report of this case in 3 Dowl. P. C. 333.
(*b*) 3 Dowl. P. C. 349.

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the Court. The writ and return are supposed in fact to be in Court, as in point of law and for all practical purposes they undoubtedly are. The rule refers to the return, although it is not drawn up "on reading" it; and the Court must take judicial cognizance of a document already filed before them, and of which the law presumes them to be in full possession. The case cited is no authority for the present objection. There, the motion was to set aside an award, of which the Court could have no knowledge until brought before them. Indeed, it appears by that case that the Court will take judicial notice of the nisi prius record in the action, although it be not verified by affidavit (*a*), and although the rule nisi be not drawn up "on reading" it. That case therefore is, in principle, an authority *against* the objection.

By the COURT.—We cannot properly pronounce upon the supposed insufficiency of a return which is not brought before us. Had no more been read to us when the application was first made than the affidavits, as upon reading which this rule has been drawn up, we should have refused to grant the rule, unless an office copy of the return, properly verified, were produced to us. The rule must be discharged, and, as it seeks to bring the sheriff into contempt, we think it should be discharged *with costs*. Parties who make such motions must, at their peril, come with proper materials.

Rule discharged, with costs (*b*).

(*a*) And see *Van Nieuwvel* v. *Hunter*, *ante*, 376.

(*b*) The motion was renewed on the following day, upon an affidavit to which an examined copy of the sheriff's return was annexed; whereupon the Court granted a rule nisi for an attachment.

REED *v.* GAMBLE. 1835.

Assumpsit against the drawer of a cheque on a banker. Plea: that the amount for which the cheque was drawn was illegally won at play; and issue thereon. Unless notice has been given to produce the cheque, the plaintiff is not bound to produce it.

ASSUMPSIT against the drawer of a banker's cheque. Plea: that the cheque was given to secure money illegally won at play (*a*). Replication: issue on the plea.

At the trial before *Williams*, J., at Guildhall, the plaintiff did not produce the cheque. The counsel for the defendant contended that he was bound to do so. When the defendant opened his defence, he called upon the plaintiff to produce the cheque; which he refused to do. No notice to produce had been given. The jury found a verdict for the plaintiff; and the learned judge gave the defendant leave to move to enter a nonsuit.

Butt now moved accordingly for a nonsuit or a new trial. The plaintiff should have produced the cheque, although he was not called on to prove it, the making of it being admitted on the record. At all events the defendant was entitled to have it produced as a part of his case.

Lord DENMAN, C. J.—The defendant was entitled to give notice and then call for the production of the cheque, for the purpose of going into secondary evidence, but it was not necessary for the plaintiff to produce it.

The non-production of the cheque did not prevent the defendant from going into his defence.

Rule refused (*b*).

(*a*) *Vide* 5 & 6 *W.* 4, c. 41.

(*b*) Where, from the nature of the action, or from the form of the pleadings, it is obvious that the production of a particular instrument will be necessary, then, if even without notice it is withheld by the party in whose possession it is, the opposite party may go into secondary evidence of its contents. Thus, in trover for a bill of exchange, notice to produce the bill is unnecessary; per *Gibbs*, C. J. in *Scott* v. *Jones*, 4 Taunt. 868. And see *Bucher* v. *Jurratt*, 3 Bos. & Pull. 143; *Wood* v. *Strickland*, 2 Meriv. 461; *Rex* v. *Ackle*, Leach, C. C. 330; *How* v. *Ball*, 14 East, 274; *Jolley* v. *Taylor*, 1 Campb. 143; contrà, *Cowan* v. *Abrahams*, 1 Esp. N. P. C. 50. Here, as the issue might have been proved by the defendant without the production of the check, no such *obvious necessity* appears to have existed.

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DOE, on the several demises of EDMUND WILKINS and JOHN WILKINS *v.* JAMES WILKINS.

Where a title-deed, under which both parties in ejectment claim, comes out of the possession of the defendant, upon notice to produce, it may be read against him on behalf of the plaintiff, without calling the attesting witness.

Where, during coverture, a lease for years is granted to the wife, and the husband survives, an adverse possession, having its inception during the coverture, may be treated as a possession adverse to the wife:

Or as a possession adverse to the husband, *semble.*

EJECTMENT, brought in 1835, for a cottage and garden in the parish of Henbury, tried before Lord *Denman*, C. J., at the last Gloucestershire assizes.

Ann, the wife of *Joseph Wilkins* the elder, long before the year 1812, left her husband, and went to live at Henbury, where she cohabited with one *Bryant*, and was herself commonly called Mrs. *Bryant*.

25th March, 1812. The lords of the manor of Henbury granted a small plot of land in Henbury for ninety-nine years, determinable on three lives, to Mrs. *Wilkins*, by the name of "*Ann Bryant, widow*,"—*Bryant* having previously died.

1813. Mrs. *Wilkins* signed a memorandum, purporting to be an assignment to her son, *Joseph Wilkins*, of all her property, for maintaining herself and her two children by *Bryant*.

Joseph Wilkins thereupon took possession of the plot of land, and erected upon it the cottage, which with the garden, (being the remainder of the land,) form the subject of this action; and he continued in possession many years, Mrs. *Wilkins* and her children being maintained by him. At his death, the present defendant took possession under a devise from him.

1823. *Ann Wilkins* died.

1826. *Joseph Wilkins* the elder died.

Edmund Wilkins subsequently took out administration to *Joseph Wilkins* the elder, and as administrator claimed the cottage and garden. *John Wilkins*, having obtained administration to *Ann Wilkins*, claimed as her representative.

Two of the cetteux que vies are alive.

The lease of 1812 was produced by the defendant in pursuance of a notice, and some evidence was given to shew that he claimed to hold the property under it. Upon its being proposed to read it, the defendant's counsel objected that it ought first to be proved in the regular way. Lord *Denman*, C. J., thought that as the lease formed a part of the title of both parties, it might be read; and it was read accordingly. His lordship, however, gave the defendant leave to move upon this point.

The plaintiff relied upon the demise by *Edmund Wilkins* as representative of *Joseph Wilkins*, senior. The defendant ultimately rested his case upon the twenty years' possession by *Joseph Wilkins*, junior, and himself. Lord *Denman* left it to the jury to say whether they thought that the possession had been held adversely *to the mother*, and directed them, if they were of that opinion, to find for the defendant,—otherwise for the plaintiff. Verdict for the plaintiff.

Ludlow, Serjt., now moved for a nonsuit or a new trial. The plaintiff's case depended entirely upon the lease, whereas that of the defendant was, as against the plaintiff, wholly independent of it. The defendant in ejectment is not required to shew any title until a primâ facie case is established by the plaintiff. At the stage of the cause at which the lease was read in this case, it was improper to say that the lease formed a part of the defendant's title. The lease ought therefore to have been proved, and this not having been done, the defendant is entitled to a *nonsuit*.

The defendant is entitled to a *new trial* on the ground of *misdirection*. The learned judge left it to the jury to say whether the possession was adverse *to the mother;* whereas the question submitted to them should have been, whether it was adverse *to the father;* because the lease being granted to a *married woman*, enured as a grant to her *hus-*

1835.

DOE d. WILKINS v. WILKINS.

band (*a*). If the jury had been asked whether the possession was adverse to the *father*, they would probably have been of opinion that it was so.

Lord DENMAN, C. J.—The first question is, whether the plaintiff was bound to call the attesting witness to the lease of 1812. *Knight* v. *Martin* (*b*) shews, that where an instrument *under which both parties claim* is produced in pursuance of a notice, regular proof of the instrument is dispensed with; and indeed it is admitted that in principle this is so. The fact of the party producing the deed claiming an interest under it, must always be shown by some extrinsic evidence.

As to the second point. If the possession was adverse to the wife, it was also adverse to the husband. The question whether it was adverse to the wife was in fact identical with the question whether it was adverse to the husband. He must be taken to have left her in possession in order to manage the property for him. She let her son build a house on the land and live in it, on condition of supporting her.

Devolution of chattels real which have vested in the wife during coverture.

(*a*) "Chattels real (being of a mixed nature, viz. partly in possession and partly in action,) which happen during the coverture, the husband shall have them by the intermarriage, if he survive his wife, albeit he reduceth them not into possession in her life-time; but if the wife surviveth him, she shall have them." Co. Lit. 351 a.

Here, the husband survived. From the granting of the lease, in 1812, to the death of Mrs. *Wilkins*, in 1823, although the legal *possession* would be said to be in the husband and wife in right of the wife, the *estate* would be in her, subject to the marital rights of possession and disposition, if her husband chose to exercise them. From 1823, the *estate*, with the absolute right of property and possession, would be in the husband by survivorship. As against that absolute right, the possession must perhaps be considered to have been adverse from 1813, when *Joseph Wilkins*, jun. took possession.

If the wife had survived, the adverse possession, as against her continuing estate, could have been computed only from her husband's death, inasmuch as her coverture would have prevented the statute from beginning to run from an earlier period.

(*b*) Gow, N. P. C. 26. And see *Pearce* v. *Hooper*, 3 Taunt. 60; *Orr* v. *Morrice*, 3 Brod. & Bingh. 139; *Doe* d. *Tyndale* v. *Heming*, 6 Barn. & Cressw. 28.

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DOE d. WILKINS v. WILKINS.

PATTESON, J.—I am of the same opinion. *Dallas*, C.J., says, in *Knight* v. *Martin*, that where an instrument comes out of the possession of a party who claims the same interest as the party by whom notice to produce the instrument is given, it is not necessary to call the attesting witness to prove the execution of it. Here, there was but *one* interest; the question being, who was entitled to that interest.

Rule refused.

PEPPER *v.* WHALLEY.

A plea in abatement, with judgment of *respondeat ouster*, need not now be entered on the issue or in the nisi prius record.

COVENANT. The defendant first pleaded a plea in abatement, upon which there was judgment of respondeat ouster; and afterwards he pleaded in bar. The issue, when made up and delivered to the defendant, did not contain the plea in abatement or the judgment of respondeat ouster; and the defendant returned it to the plaintiff on the ground of these omissions. The plea and judgment were also omitted in the nisi prius record; and at the trial before *Taddy*, Serjt., at the last Chester assizes, *J. Jervis*, for the defendant, objected that the record was defective. The objection was not, however, allowed to prevail; and the plaintiff had a verdict.

J. Jervis now moved in arrest of judgment or to set aside the verdict, on the ground of a mis-trial. The plea in abatement and judgment of respondeat ouster ought to have been entered on the issue; for if they be not, the nisi prius record and the judgment roll, in which such plea and judgment are always entered (*a*), will not correspond. A

(*a*) Unless the plea in abatement, the demurrer thereto, and the joinder in demurrer, and the judgment of respondeat ouster, appeared on the *judgment roll*, the defendant would have no opportunity of insisting, before a Court of Error, upon the sufficiency of the plea in abatement. *Quære*, as to the mode of effecting this since the new rules.

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similar objection was taken in *Combe* v. *Pitt* (*a*), and the Court treated the omission as an irregularity, but held that it was cured by the defendant's accepting the issue and paying for it. Here there has been no waiver of the right to object to the irregularity, but, on the contrary, the defendant refused to accept the issue, and also took the objection at the trial. In *Dubartine* v. *Chancellor* (*b*) it was held that a plea in abatement must be entered on the nisi prius record. An *Anonymous* case in 1 *Anne, B. R.* (*c*) appears to be somewhat opposed to the other decisions, as it is there intimated, that the Court made a rule for the future that a copy of the declaration and issue only, omitting the plea in abatement, &c., should be *paid for* by the defendant. This case is, however, of earlier date than *Combe* v. *Pitt*. [*Patteson*, J. You cannot have a rule *in arrest of judgment*, because by the 15th new rule (*d*) it is ordered, that "the entry of the proceedings on the record for trial, or on the judgment-roll (according to the nature of the case) shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatsoever." Formerly the proceedings were supposed to be entered from time to time on the roll. *Coleridge*, J. The old nisi prius record was a *transcript* of the plea roll, and it was required that it should be a correct transcript. Now it is no longer a transcript.] The judgment roll ought still to contain the entry of the plea in abatement and judgment; and therefore the nisi prius record was defective by reason of the omission.

If the Court will not grant a rule in arrest of judgment, they will perhaps grant a rule to shew cause why a new trial should not be had.

Cur. adv. vult.

(*a*) 3 Burr. 1682.
(*b*) 5 Mod. 399, 400.
(*c*) 1 Salk. 5.
(*d*) Reg. H. 4 *Will.* 4, *ante*, iii. 6.

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Lord DENMAN, C.J., on a later day in the term, delivered judgment as follows:

This was a motion for a new trial, or to arrest the judgment after verdict for the plaintiff: and the ground was, that there having been a plea in abatement and judgment of respondeat ouster, no entry of that plea and judgment was made on the nisi prius record. The case of *Doberteen* v. *Chancellor*, in 10 *Will.* 3 (*a*), was referred to, in which a judgment was set aside under similar circumstances, except that in that case the plea roll had the plea in abatement, but the nisi prius record had not; and it would rather seem that the Court proceeded on this variance. At present, since the 15th rule of Hilary term, 1834, the entry of the proceedings in the nisi prius record is the first entry on record, and therefore no such variance can exist. In a subsequent case, in 1 *Anne* (*b*), it is stated that the Court altered the practice, and directed that for the future only the declaration and issue should be paid for, thereby making it unnecessary to enter the plea in abatement and judgment of respondeat ouster on the nisi prius record; and this appears to be reasonable, for they are quite immaterial to the question ultimately to be tried between the parties. In *Combe* v. *Pitt* (*c*) a similar objection was made; but as the defendant had *accepted* the issue, the Court held that he had *cured* the irregularity, if any. In the present case it is stated that the defendant refused the issue, and the irregularity, if any, is not cured.

We are, however, of opinion that there is no irregularity,—that the part of the proceedings omitted is wholly immaterial,—and therefore no rule should be granted.

Rule refused.

(*a*) 1 Ld. Raym. 329, *S. C.* by the name of *Dubartine* v. *Chancellor*, 5 Mod. 400.

(*b*) *Anon.* 1 Salk. 5.

(*c*) 3 Burr. 1682.

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Justices cannot make an order for stopping up part of a highway, as unnecessary, under 55 *Geo.* 3, c. 68, s. 2, unless they have viewed the highway together; nor, unless the finding that it is unnecessary be the result of that view.

But it is no objection, that previously to the view the road had been stopped up *de facto* by the owner of the adjoining land, without legal authority.

The view is sufficiently stated upon the face of the order in these terms, "We &c. *having upon view found*," &c.

AT the special sessions, held 11th September, 1834, for the division of Linton, in the county of Cambridge, the following order was made:

"Cambridge, to wit.—We, &c., three of his majesty's justices of the peace, acting in and for the division of Linton, in the said county, assembled at a special sessions held on the 11th September, 1834, *having upon view found* that a certain part of a common and ancient king's highway, called the Walden Way, leading from &c., towards &c., situate &c., in the parish of Babraham, in the said county, (here the contents, the termini, and the direction of the part of the highway are stated,) is *useless and unnecessary*, do hereby order the same to be stopped up and discontinued, and the land and soil thereof to be sold by the surveyor of the highways of the said parish of Babraham, to *H. J. Adeane*, esq., whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof. Given, &c."

This order was appealed against by a Mr. *Mortlock*, but was confirmed by the sessions.

It is no objection to such order, that in the part of it which directs that the soil of the road to be stopped up shall be sold to the owner of the adjoining land, if he be willing to purchase, or to some other person, that the words "for the full value thereof," occur only at the end, and not also after the part which directs a sale to the owner of the adjoining land, if willing.

Nor, that it does not contain any direction as to the application of the money arising from the sale.

Nor, that no certificate of a sale is written by the justices at the foot of the order.

Nor, that the owner of the land adjoining to the road stopped up was himself, at the time of making the order, waywarden of the parish in which the road is situate.

Nor, that the road has become unnecessary by reason only of the *substitution*, by the owner of the adjoining land, of another road over his own land, and the adoption by the public of such substituted road.

Semble, that upon motion for a certiorari to bring up an order of sessions confirming an order of justices for stopping up a highway, the Court cannot entertain objections to the validity of the order, whether on the ground of *want of jurisdiction*, or otherwise, unless such objections arise upon the face of the order itself.

Mr. *Adeane*, through whose land the whole of that part of the Walden Way, to which the order relates, ran, had stopped it up in 1825, without any magistrates' order, he having, six months previously, set out a new way over his own land.

At the time of making the order for stopping up the road Mr. *Adeane* was himself one of the surveyors of the highways for the parish of Babraham.

Upon affidavits stating the above facts, *Pollock*, A. G., in last Hilary term, obtained a rule nisi for a certiorari to remove into this Court the order of sessions confirming the above order, and all things touching the same.

Sir *W. W. Follett*, *Biggs Andrews* (for Mr. *Adeane*), and *Byles*, now shewed cause. The only question that can properly be raised upon the present motion is, whether the order of justices is good upon the face of it? Upon the motion for the rule nisi it was suggested that the order was, upon the face of it, defective in two respects; viz. first, that the *view* by the magistrates was not properly stated, for that, consistently with the magistrates "having *upon view* found &c.," their finding might have proceeded upon a view had by *other persons*, or had at a *distant period* of time, or upon a view taken by the justices *separately*. This order is made under 55 *Geo.* 3, c. 68, s. 2, which enacts, that when it shall appear upon the *view of any two or more of the said justices* of the peace, that any public highway, bridleway or footway, is *unnecessary*, it shall and may be lawful, by order of such justices, or any two of them, to stop up and to sell and dispose of such unnecessary highways &c., by such ways and means, and subject to such exceptions and conditions, in all respects, as is mentioned in 13 *Geo.* 3, c. 78, in regard to highways to be widened and diverted, with the exception that the money to arise from the sale shall be paid to the surveyor, and to be applied towards the general repairs of the highways &c. of the parish.

First point: Mode of stating the view.

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The sections of 13 *Geo.* 3, c. 78, which relate to the widening and diverting of highways, are s. 16 and s. 19. In each of those sections the enactment commences thus: "When it shall appear, upon the view of any two or more of the said justices of the peace, that" &c., which are precisely the same words as those used in the enactment in 55 *Geo.* 3, c. 68, s. 2; yet the forms (Nos. XVI. and XXI.) given in the schedule, and which forms are, according to s. 69, "to be used upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case," run thus: "We &c., *having upon view found* that" &c. So that in this case the form given in the schedule of the act is exactly pursued. This objection must have arisen out of a misconception of *Rex* v. *Justices of Worcestershire* (*a*). [Lord *Denman*, C. J. We need not trouble you any further on that point.]

Second point: Sale of old road for the value thereof.

It was also objected, that it does not appear to have been ordered, that in case the soil of the old road was sold to Mr. *Adeane*, it should be sold "for the value thereof," as the act requires. The words "for the full value thereof" occur at the end of the order, and over-rule the whole of that part of it which relates to the sale of the soil. It is true that in the form (No. XVIII.) given in the schedule to 13 *Geo.* 3, c. 78, the words occur immediately after that part which directs that the land be sold to the owner of the adjoining land, if he be willing, as well as at the end of the order; but in s. 17, which contains the enactment to which the form in the schedule is applicable, the words are used as in this order, once only, and at the end. It cannot, therefore, be said that the order does *not substantially* pursue the form; and by sect. 69 it is enacted, that no objection shall be made or advantage taken *for want of form*, in any of the proceedings. [*Patteson*, J. The certiorari is taken away by 13 *Geo.* 3, c. 78. Is it not also

(*a*) 8 Barn. & Cressw. 254, *S. C.* per nom. *Rex* v. *Rogers*, 2 Mann. & Ryl. 289.

taken away by 55 *Geo.* 3, c. 68?] It has been held that the certiorari is *not* taken away by 55 *Geo.* 3.

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Other objections were stated upon the motion; but as these arise only out of the *affidavits*, it is apprehended that they cannot be discussed.

Third point: Matters in affidavits.

Sir *F. Pollock*, *F. Kelly*, and *Starkie*, contrà.

First point.

The magistrates should follow precisely the language of the statute on which they profess to act (*a*). The words of which are (*b*), "when *it shall appear upon the view* of any two or more of the said justices" &c. Here, the magistrates do not say that it appeared to them upon their view, that the road was unnecessary, but say merely "having *upon view* found" &c., which is consistent with their having viewed it *separately*, or at some remote period of time, or of their having found the fact upon evidence given of a view by others.

Second point.

The words "for the value thereof," should have occurred after the direction to sell to Mr. *Adeane*, if he should be willing to purchase, according to the form given in the schedule to 13 *Geo.* 3. The omission is material; *Davison* v. *Gill* (*c*)

Fourth point: No certificate of sale of old highway and application of money arising from sale.

In the schedule of 13 *Geo.* 3, next after the form of an "order for stopping up an old highway, and selling the land and soil thereof," is given a form (No. XIX.) for a "*certificate to be wrote under the order above mentioned*," which is as follows:—"We the above-named justices do certify, that the old highway hereinbefore mentioned and described, was sold by the said surveyor to ——, with our approbation, for the sum of ——, which sum we do order the said —— to pay to the said surveyor, to be applied in purchasing that land and making the said new highway; and if any surplus remains, we do order that the same shall be applied for the use of the highways within the said (parish &c.) of ——."

(*a*) 55 *Geo.* 3, c. 68.
(*b*) S. 2.
(*c*) 1 East, 64.

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And the next form is that of a "receipt for the purchase-money, to be indorsed upon or wrote under the certificate above-mentioned." Upon the order in question in this case, there is no such certificate or receipt, nor is there any direction as to the application of the money. On this ground also, it is submitted, the order is defective upon the face of it.

Third point.

Then with regard to the objections arising out of the statements upon the affidavits:—It may be shewn *by affidavit* that the magistrates *had no jurisdiction* to make this order, and that the order is therefore void; *e. g.* it might be shewn by affidavit, that the persons by whom it was made were *not magistrates of the county*, although stated to be such upon the face of the order.

In *Rex* v. *Standard-Hill* (*a*) it was held, that an appointment by two justices of overseers of the poor, may be removed into this Court by certiorari, without appealing against it to the quarter sessions, and this Court will go into the question *upon affidavit*, whether the place for which the appointment is made is a township or vill; and that if it appear by the affidavits that it is not, the appointment will be quashed. And in *Rex* v. *Great Marlow* (*b*), it was held, distinctly and after deliberation, that affidavits may be read in support of objections of the want of jurisdiction, against appointments of magistrates, which upon the face of them are good. The principle of those cases applies here. Objections such as are now proposed to be moved against this order, may be taken *at the trial of an action* in which the validity of the order comes in question; *à fortiori*, they may be taken upon affidavits *upon an application for a certiorari*.

Upon the affidavits, three grounds of objection to the jurisdiction of the magistrates to make this order, appear.

Fifth point: Waywarden, himself vendee of old road.

I. Mr. *Adcane* was himself one of the surveyors of highways for the parish in which the road lay, at the time of making the order; and therefore the order contains a direction for him to sell to himself. It is a rule in equity, and also

(*a*) 4 Maule & Selw. 378. (*b*) 2 East, 244.

in law, that no trustee shall sell to himself (*a*). That principle applies here.

(*a*) "Nothing can be more just than the principles which govern a Court of Equity in relation to purchases made by the trustee of trust property. He pledges his honest endeavours to promote the interest of the cestui que trust by disposing of the property on the best terms which he can obtain; and equity will not permit him to create an interest in himself inconsistent with this pledge, and which may seduce him from an upright fulfilment of his duty. Whatever profit is gained by the sale belongs to the cestui que trust, and the trustee never can purchase or hold the property discharged of the equity of the cestui que trust to call upon him in a reasonable time to account for this profit or to have a re-sale. The purchase, however, by the trustee, is not absolutely void, but voidable at the election of the cestui que trust, if he be dissatisfied with it, and in a reasonable time after a knowledge of the fact impeaches its validity. But if after such knowledge he confirm the sale, or unequivocally acquiesces in it, it will stand ratified by those general principles which prevail as well in Courts of Law as of Equity." Per *Washington*, J., 1 Peters's Rep. 367, 368. See also *Davoue* v. *Fanning*, 2 Johns. Chan. Rep. 260. "The object of the rule is to keep trustees within the line of their duty, and it extends to buying *securities* upon the trust estate, as well as to buying in the estate itself." 1 Johns. Chan. Rep. 36; *Matthews* v. *Dragaud*, 3 Desaussure, Chan. Rep. 26. See also *Munro* v. *Allaire*, 2 Caines's Ca. 192; *Arrowsmith* v. *Van Harlingen's Ex.*, Coxe's Rep. 26; *Parkist* v. *Alexander*, 1 Johns. Chan. Rep. 394; *Schieffelin* v. *Stewart*, ib. 620; *Quarles* v. *Lacy*, 4 Munf. 251. "There has been a difference of opinion in South Carolina with regard to the capacity of a trustee, having also an interest coupled with the trust, to become the purchaser of the trust property. The point was not determined in consequence of a division of the Court upon a particular circumstance of the transaction." *M'Guire* v. *M'Gowan*, 4 Desaussure, Chan. Rep. 486. "In another case a trustee, who had an interest to about one-fifth of the value, purchased the whole property, which he had obtained leave from the Court of Ordinary to sell, apparently at a full price. Two of the judges thought the sale ought to be set aside, on the broad principle of his incapacity to become a purchaser. A third concurred, because he thought from the facts of the case there was unfairness in the sale, but he was of opinion that having an interest, he might become a purchaser. The other two judges were in favour of the general authority to purchase." *Perry* v. *Dixon*, 4 Desaussure, Chan. Rep. 504 (in note). "There seem," says Chancellor *Desaussure*, in a subsequent case, decided after a very long and laborious examination, in which most of the English cases were referred to, "to be two classes of decided cases on this subject; one where the relation of the parties is such that no contract can be permitted to

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Sixth point: Whether a diversion or a stopping up.

II. This order is in reality an order for a *diversion* of a highway, although it purports upon the face of it to be an order for *stopping up* an old highway, as useless and unnecessary. The new road made by Mr. *Adeane* was a substitution for the old road, and it was only by reason of such substitution that the old road was become useless and unnecessary. If this was in fact the case of a *diversion* of a highway, then the magistrates had no *jurisdiction* to make

subsist on any terms, if sought to be relieved against, as the case of attorneys dealing with their clients, or trustees selling to themselves: the other, where the relation of the parties does not interdict all contracts on the subject, but where, a confidence being reposed, the Court looks with a jealous eye at the conduct of the agent, and will set aside the contract if there be any considerable inadequacy of price in the transaction, and more particularly if there be any weakness or necessity in the vendor." *Butler* v. *Haskell*, 4 Desaussure, Chan. Rep. 702. "But cases, it has been said, where the trustee has procured the requisite formal legal title, are to be distinguished from those where the suit is by him to effectuate a purchase, either by having the thing purchased decreed to him specifically, or by having the means decreed to him whereby he may recover at law. In the latter case it seems that the rule, that a trustee can never be a purchaser, is to apply as unlimitedly as it is expressed; but that in the former case a Court of Equity will not always interfere, as of course; for if the cetteux que trust, or a majority of them, will agree to allow the purchase, it may be allowed without fear from the precedent." Per *Benson*, J., 2 Caines's Ca. 193, 194. "But the distinction has been denied by Chancellor *Kent*, who has placed the question on the true principle." 2 Johns. Cha. Rep. 260. "Any person interested may apply, and set aside a sale by a trustee to himself." *Anderson et al.* v. *Fox*, 2 Hen. & Munf. 245; "but a stranger will not be permitted to disaffirm it;" *Jackson* v. *Van Dalfsen*, 5 Johns. Rep. 47. "No principle, however, of equity will invalidate the title of a trustee to land, which the law has taken out of his hands, and which he purchases from one appointed by the same authority to sell it. It is precisely like the case of an executor who purchases at a sheriff's sale the personal property of his testator, seized and sold under execution. The reasons which forbid a trustee from purchasing the trust property, where he himself is the seller, do not apply to such a case." 1 Peters's Rep. 378. "A guardian ad litem in partition may therefore be a purchaser at a sale made by the commissioners, pursuant to an order of Court." *Jackson* v. *Woolsey*, 11 Johns. Rep. 446. "No decision, say the Supreme Court of Pennsylvania, has been shewn, that where two or more executors sell lands openly and fairly, and another person buys them for one of them at a

an order such as the present. *Welch* v. *Nash*(*a*) shews how cautious the Court has been not to allow roads to be stopped up, unless upon the express authority of the legislature. [*Coleridge*, J. Does not that case shew that if the magistrates had no jurisdiction to make this order, you are not without a remedy, for that you may treat the order as a nullity?] Lord *Ellenborough* says, "The magistrates have only jurisdiction conferred on them in a given case: they may divert an old road so as to make it nearer or more commodious to the public, that is, by making a new road. The whole section contemplates that a new highway is to be made in lieu of the old one, which is to be stopped up; and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state." *Lawrence*, J. says, "The justices cannot give themselves jurisdiction in a particular case, by finding that as a fact what is *not* the fact." The words of the 15th section are *divert or turn*, which certainly mean altering the direction of the road. The 16th section forms a comment on the 19th, which it is difficult to get rid of,

full price, such sale has been ruled void." *Eichelberger* v. *Barnitz*, 1 Yeates, 307. See also *Fuqua's ex.* v. *Young*, 4 Hen. & Munf. 430; 1 Desaussure, Chan. Rep. 567. "What shall be deemed a reasonable time, within which the cestui que trust must apply to set aside a sale, is not susceptible of any definite rule, but must, in a degree, depend upon the circumstances of the case, and the sound discretion of the Court. In the case of *Butler* v. *Haskell*, eleven years were deemed a reasonable time; but the Court, in *Bergen* v. *Bennett*, 1 Caines's Ca. 1, refused the application after sixteen years. But length of time will in no case afford a presumption of acquiescence in a purchase, unless it appears that the cestui que trust had *notice* that the trustee had become the purchaser." 1 Peters's Rep. 370; Note to 3 Ves. 740, American edit.

And see *Whelpdale* v. *Cookson*, 1 Ves. sen. 9, more fully reported 5 Ves. 682; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Lister* v. *Lister*, 6 Ves. 631; *James*, Ex parte, 8 Ves. 348; *Coles* v. *Trecothick*, 9 Ves. 234; *Bennett*, Ex parte, 10 Ves. 381, 385; *Sanderson* v. *Walker*, 13 Ves. 601; *Attorney-General* v. *Lord Dudley*, Cooper, 146; *Gregory*, Ex parte, ibid. 201; *Downes* v. *Graybrook*, 3 Meriv. 200; *Chambers* v. *Waters*, 3 Sim. 42; *Fosbrooke* v. *Balguy*, 1 Mylne & K. 226; *Whitcombe* v. *Minchin*, 5 Madd. 91: *Chalmer* v. *Bradley*, 1 Jac. & Walk. 59.

(*a*) 8 East, 394, 403.

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for the latter uses the words "diverted and turned," as different from "widened or enlarged," in the former section.

III. The magistrates could not stop up the highway which they describe, for it has had no existence since the year 1825. The order should have been obtained in 1825, whilst the road was in existence, and therefore capable of being viewed and stopped up.

Seventh point: Non-existence of road at time of view and order.

Lord DENMAN, C. J.—This is an application for a certiorari to bring up an order of sessions confirming an order of three justices, for the purpose of quashing it. Several objections are taken to the order for matters apparent upon the face of it; and it is said also, that the order is void for want of full jurisdiction in the magistrates.

First point.

Of the objections to the order itself, the first is, that the words "having upon view found," do not necessarily import that the finding of the magistrates was upon their own view, or that that view was taken *in company*, or shew *when* the view was taken. In point of law, these objections would be well founded, if such were the right construction of the language of the order; and I wish to be very distinctly understood as saying, that no view would be good unless it were taken by the magistrates *together*, and that the finding must be the result of such view. It is very important that it should be understood that the magistrates are to act *together*. The language, however, which is here used, is precisely the same as that which occurs in the form given in the schedule to 13 *Geo.* 3. The legislature has declared these words sufficient.

Second point.

The next objection is, that the words "for the full value thereof," are not repeated. The *enacting part* of the statute has the expression *once* only in the same manner as in this order, whilst in the *form* given in the schedule it is *twice* repeated. I must own that it appears to me that the objection is not entitled to any weight. The words at the close of the order are used in the same sense as in the clause of the act, and are intended to over-ride the whole of the preceding part.

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Then it is objected that there is no certificate written under this order. Upon looking at the second act (*a*), it appears that the part of the former act (*b*), which requires the certificate, is repealed by a new enactment (*c*), respecting the appropriation of the money to be received from the sale of the soil. A certificate is not necessary, therefore, to give validity to the order.

On the face of the order, I am of opinion that there is no defect.

Then it has been contended that facts may be brought before the Court by affidavit, to shew that the magistrates had no jurisdiction to make the order; and upon the supposition that this course may be taken, Third point.

It is contended that the magistrates could not make the order to stop up a road which had *already* been closed; for that by the act of parliament they are required to *view* the road, in order to see whether it is unnecessary, and that such view should have been had whilst things remained as they were before the change which was made by Mr. *Adeane*. I do not think this argument just. It is not necessary that there should still be a road over which travellers may pass: it is sufficient that a *right* should be possessed by the public to go over particular land. If the magistrates find, upon view had at the time of making the order, that the road is useless, from whatever cause it has become useless, that is sufficient. Here, the road had become useless by reason of its having been stopped up by this gentleman, and a new one set out by him, and used by the public. I see nothing to object, on this ground, to the magistrates' making the order. Seventh point.

Then it is said that Mr. *Adeane* was himself surveyor of the highways of the parish, and that the order required him to sell to himself. I do not mean to say that it would not have been better to have had the order made in some year when he was not surveyor, yet there is nothing in the act to Fifth point.

(*a*) 55 *Geo* 3, c. 68.
(*b*) 13 *Geo.* 3, c. 78.
(*c*) 55 *Geo.* 3, c. 68, s. 2.

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prevent the surveyor from being the purchaser. I am not prepared to say that if *fraud* were manifestly made out, the Court would not, even in this proceeding, quash the order. From *Rex* v. *Great Marlow* (*a*), it appears to be questionable whether the Court may not interfere in some cases on the ground of defects shewn by affidavit. But there is not the slightest ground for imputing any thing discreditable to Mr. *Adeane*. Upon the whole, I think the order good upon the face of it, and also upon the facts disclosed.

PATTESON, J.—I am entirely of the same opinion. This order is on 55 *Geo.* 3, c. 68, s. 2, which says that two justices may stop up unnecessary highways, and sell and dispose of such unnecessary highways by such ways and means, and subject to such exceptions and conditions, in all respects, as in the recited act is mentioned in regard to highways to be widened and diverted, "except that the money to arise from such sale, when by the said act it would be applicable to the purchase of the ground and soil of the new highways therein mentioned, shall be paid to the surveyor, and be applied to the general repairs of the highways &c., of the parish &c., within which such highway so stopped up shall be situate."

First point.

The order in question is drawn up, apparently, from two forms in the schedule to 13 *Geo.* 3, c. 68,—Nos. 16 and 18. In No. 16. the form is, "having upon view found," as in the order in question. It is objected that the order does not shew that the road was found to be unnecessary upon the view had by the justices together, or upon a view had by themselves at all. In s. 19 of 13 *Geo.* 3, c. 68, the words are, "when it shall appear, upon the view of any two or more of the said justices of the peace." No doubt this means on the personal view of two or more justices viewing it together. Then what does the legislature say shall be the form in which such view shall be stated in the order? "Having upon view found;" which we are bound to believe

(*a*) 2 East, 244.

means "having upon our own joint view found," according to the directions of the section.

Then it is objected, that the words "for the full value thereof," should have been inserted after the direction to sell to Mr. *Adeane*, if he was willing. In the clause of the act the words occur only at the end, as in the order, and manifestly apply to the whole of that which precedes. But in the schedule, the words occur twice; and it is argued that the form in the schedule should be *closely* pursued. This, however, is clear, that the words in the clause and the schedule are intended to be ad idem. It is true that by the 69th section it is enacted, that the forms given in the schedule shall be used; but the same section provides that no advantage shall be taken of a defect of *form*. Second point.

Then, objections arising out of the facts in the affidavits are stated. I protest against its being understood *as laid down*, that we can, on any occasion, look into extrinsic matter upon affidavit, upon a rule for a certiorari to remove an order of sessions into this Court. I give no opinion upon the point. The general rule certainly is, that where any thing is brought up by certiorari, no objection can be taken which does not arise upon the face of it. Here, the objections which have been taken might have been brought before the quarter sessions. However, supposing there were not such a rule, and that we could look into the affidavits, as it has been contended, I can see no valid objections to this order. Third point.

The road had been stopped up for ten years without any proper authority, and this it is said merges, if I may use the term, the power of the justices to stop up. I dare say, that when the magistrates went to view they could not see the *actual road* in length and breadth, but they may, at all events, have seen the *line* and *direction*. The magistrates' saying that they had viewed, is sufficient. If the road existed in point of *law*, that is enough. Seventh point.

But then it is said that this was in fact a *diversion*. I see nothing in this act to prevent a private person, through Sixth point.

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whose land a road runs, from setting out another road, letting the public use both perhaps for a while, and then calling upon justices to stop up the old road as unnecessary. If the magistrates stop up an old road, when they ought not, the parties aggrieved may appeal to the sessions.

Fifth point. As to Mr. *Adeane*'s being the surveyor, that is clearly no ground of objection to the order. There is nothing to shew that all was not done fairly and honestly. If it had been shewn to be otherwise, that would have been matter for the sessions, not for this Court.

Fourth point. It was also objected, that nothing is said in the order as to the application of the money to be paid for the soil of the highway. In the Forms Nos. 16 and 18, nothing is said about the application of the money, but a form of a certificate to be written underneath the order is given. The certificate is done away with by the part of the statute (*55 Geo.* 3, c. 68, s. 2,) which directs that the money to be paid for the soil of the unnecessary road, shall be applied to the *general* fund for the repairs of the highways of the parish.

Third point. I feel strongly, that the Court cannot enter into the question, whether the magistrates have done rightly in making this order; but supposing that we may look at these affidavits, I see no ground for saying that the magistrates have acted without full jurisdiction.

Third and seventh points. WILLIAMS, J.—The most important question is, as to how far we can, on affidavit, go into the question whether there was a total absence of jurisdiction; but upon this point I give no opinion. Here, it is *not* made out that the magistrates were wholly without jurisdiction. The road may, at the time of the view, have been converted into arable land, but still it remained sufficiently a road to found a jurisdiction in the magistrates to stop it up. The case of *Welch* v. *Nash* (*a*), which was relied upon by Mr. *Starkie*, unquestionably leaves it open to parties to question the jurisdiction *in an action*, but it goes no further.

First point. Objections are made to this order as arising upon the

(*a*) *Ante*, 446.

face of it; and the first objection is, as to the words "having upon view found." We must read these expressions in the ordinary way. We must not make a violent construction in favour of it; nor must we force it into nonsense. It must be taken to mean that the finding was upon the joint view of the justices who make the order.

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The other objection is, that the words "for the full value thereof," are not repeated. Upon this, I agree with the rest of the Court. Independently of observations upon the act itself, the rule is, that we must give a fair construction to the language used, and accordingly these words must be referred to the whole of the previous part of the order.

Second point.

The objection, that Mr. *Adeane* was himself surveyor, does not arise upon the face of the order.

Sixth point.

COLERIDGE, J.—I am of the same opinion. Two classes of objections have been taken, namely, objections arising out of matters not on the face of the order, and objections arising upon the face of it. The former objections raise by far the most important question.

I always understood it to be perfectly clear, that upon an application of this sort we cannot go into objections arising upon *affidavit* only. I do not mean to say, that in *no* case will this Court, when any thing is brought up by certiorari, inquire into its validity upon affidavits, for in some cases this Court is in the nature of a court of appeal; and then we must see the merits upon affidavits. This Court checks other Courts from transgressing beyond the bounds of their jurisdiction; and we should be careful that *we* keep within the limits of our jurisdiction. When the Court below has a conclusive jurisdiction, we ought not to inquire whether it has decided rightly.

Third point.

This order might have been open to three sorts of objections. First, it might have been inconveniently or unjustly made; and thus would form the subject of an appeal to the sessions. Secondly, it might have been made without jurisdiction; and then the order would be null and void,

Three distinct modes of questioning the validity of order, according to the class to which the objection belongs.

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and the validity of it might be tried in an action of trespass; and this Court could not therefore interfere. Thirdly, it might have been bad upon the face of it, and then it would be proper that it should be brought up to be quashed.

Third point. If this order was made without *jurisdiction*, I think we cannot, upon affidavits, interfere. The more strongly objections on the ground of *inconvenience* are pressed, the more are we pressed not to interfere; for this is a matter for the sessions, which we must assume they will decide rightly. I say nothing of the particular objections which have been raised upon the affidavits; for I think I cannot go into them.

First point. The objections arising upon the face of the order are two. First, as to the expression "having upon view found." This is an expression, the meaning of which is well known amongst lawyers, and in using which, the justices must be taken to mean to say "We, the justices &c., having viewed, do find," &c.

Second point. Then, as to the objection that the words "for the full value thereof" are not repeated:—the legislature, in the very section upon which this part of the order is founded, use the expression once only. Can we then say that it is not sufficient to use it once, as here in this order. I think that we certainly cannot do so.

Fourth point. It was objected also, that there is no direction as to the application of the money. The form in the schedule to 13 *Geo.* 3, c. 78, certainly contains directions as to the application of the money. That was a necessary part of the order then, because the money was to go to a specific fund; but by 55 *Geo.* 3, c. 68, the money becomes part of the general fund for the repairs of the highways of the parish or other district.

The certificate of the sale never can come concurrently with the order for sale, but must be subsequent to it.

Rule discharged with costs.

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Since the statute 1 *W.* 4, c 21, several pleas may be pleaded to an action in prohibition.

PROHIBITION. The defendant having pleaded several pleas, the plaintiff took out a summons to confine him to one plea; whereupon *Patteson*, J. made an order that the defendant should be so confined. The defendant then stated his several matters of defence in *one* plea, to which the plaintiff demurred. The defendant then obtained a rule calling on the plaintiff to shew cause why he should not be allowed to plead several pleas.

Godson now shewed cause. Formerly one plea only could be pleaded in prohibition. From *Comyns*'s Digest (*a*) it appears, that the action of prohibition is founded on a *contempt*, and for this reason the plaintiff must sue as in a qui tam action, and the king was consequently a party; and the king not being named in 4 *Ann.* c. 16, s. 4, which allows several pleas, that statute was held not to extend to the action in prohibition. For this *Law qui tam* v. *Crowther* (*b*), and *Morgan* v. *Luckup* (*c*), are authorities. The late statutes and rules relative to pleading have not altered the law in this respect. 1 *W.* 4, c. 21, enacts, that "it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party, *and of His Majesty*, and shall contain and set forth in a concise manner, so much only of the proceedings of the Court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ, or any contempt, and shall conclude by praying that a writ of prohibition may issue;

(*a*) Com. Dig. *tit.* Prohibition, (I), Ibid. *tit.* Pleader, (3 H.)
(*b*) 2 Wils. 21.
(*c*) 2 Stra. 1044.

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to which declaration the party defendant may demur or plead such matters by way of traverse or otherwise, as may be proper to shew that the writ ought not to issue, and conclude by praying that such writ may not issue." The intention of the statute was only to abbreviate the pleadings, and not to alter the nature of the action. 3 & 4 *W.* 4, c. 32, which authorizes the judges to make rules as to pleading, does not apply to pleadings in prohibition. But assuming that it did, the power given to them by that statute, has not been exercised by them so as to extend the rules of H. T. 4 *W.* 4, to proceedings in this description of action.

Humfrey, contrà, was stopped by the Court.

PATTESON, J., (*a*).—The Court entertain no doubt upon this question. It is quite clear that formerly several pleas could not be pleaded in an action of prohibition, *because* the king was a party to the suit, and was not bound by the statute of *Anne*, as he was not named in it. Since the statute of 1 *W.* 4, c. 21, the king is no longer a party to the suit, and the reason for the former practice is therefore altogether taken away.

WILLIAMS, J. concurred.

COLERIDGE, J.—The action of prohibition was founded upon a supposed contempt in disobeying the writ of prohibition:—But the writ was in fact never delivered. It was a mere matter of form that the king was a party, and was a mere fiction of law to give the party suing a right to damages. But that fiction is now done away with by 1 *W.* 4, c. 21.

Rule absolute, with leave to amend on payment of the costs of the demurrer only.

(*a*) Lord *Denman*, C. J. was absent from severe indisposition.

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The KING *v.* The Inhabitants of WILLOUGHBY, in the County of WARWICK.

UPON appeal against an order of two justices of Northamptonshire, for the removal of *Wm. Roddis*, his wife and four children, from the parish of Byfield, Northamptonshire, to the parish of Willoughby, Warwickshire, the Northamptonshire quarter sessions, held 10th April, 1834, confirmed the order, subject to the opinion of this Court upon the following case:

The pauper rented a house in the parish of Willoughby, from Michaelmas, 1832, to Michaelmas, 1833, of a Mr. *Judd*, at the yearly rent of 17*l.* He occupied the house under this hiring for the whole year, and in the month of July paid a half-year's rent, 8*l.* 10*s.* He continued to occupy this house until the 6th of December, 1833, without paying any more rent. On that day he was removed with his family from Willoughby to Byfield, by an order of removal,—he having become chargeable to the parish of Willoughby. Against which order, the parish of Byfield appealed to the quarter sessions for the county of Warwick. The appeal was tried on the 1st of January 1834, and the order confirmed on the merits. On the 7th December, 1833, the pauper's family returned to their house at Willoughby, and on the next day the pauper himself returned and remained there in the same house until the 27th of the following January. On the 11th December, 1833, the pauper borrowed the sum of 8*l.* 10*s.* and paid his landlord his second half-year's rent, due at the preceding Michaelmas. On the 27th of January, the pauper left Willoughby with his family, and went to Byfield, where he remained until the 17th of the following March, when he was removed, by an order of two magistrates, back to Willoughby; and against that order the parish of Willoughby appealed.

The question for the opinion of the Court is, whether or not the pauper gained a settlement in the parish of Wil-

Where a party rents and occupies for a year, a tenement in A. at the yearly rent of 10*l.*, and before payment of the full rent, is removed to B. by an order, which is not appealed against, or is confirmed on appeal, he may, by a subsequent payment of the remainder of the rent, acquire a settlement in A., under 6 *Geo.* 4, c. 57, and 1 *Will.* 4, c. 18.

The forty days' residence required under this head of settlement, must be within the year of occupation; but at what period of the year it takes place is immaterial.

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loughby subsequent to the order of removal of the 6th December, 1833.

Humfrey and *Wildman*, in support of the order of sessions. At the time when the removal of the pauper from Willoughby to Byfield took place, he undoubtedly was not settled in Willoughby, inasmuch as he had not at that time paid rent to the amount of 10*l.* That order was therefore properly confirmed upon appeal. But by payment of the remainder of the rent since the removal, and thus satisfying the only remaining requisition of the acts, the pauper has acquired a settlement in Willoughby, subsequent, in point of date, to the order of removal. In *Rex* v. *Fillongley* (*a*) it was held, that where a person renting and residing in a tenement of 10*l.* a year in A., was removed to B. by an order of justices, and immediately returned to the same tenement without making any new contract, and resided there more than forty days, he thereby gained a settlement, though the order of removal was unappealed against. That case depended upon 13 & 14 *Car.* 2, c. 12, and in principle much resembles the present case. *Rex* v. *Barham* (*b*) is almost exactly this case. There, a pauper on 6th April, 1823, hired a house for a year, at the rent of 12*l.* per annum, in the parish of A: In January, 1824, he became chargeable to that parish, and was, by an order of justices, removed to the parish of B: There was no appeal against the order of removal: The pauper returned on the same day to his house in the parish of A., and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year. It was contended that the effect of the order of removal was to prevent the gaining of any settlement, unless *all* that the act (59 *Geo.* 3) requires had been complied with after that order was made. But the Court held that the pauper had acquired a settlement in A. *Rex* v. *Ampthill* (*c*) will probably be cited

(*a*) 2 T. R. 709.
(*b*) 8 Barn. & Cressw. 99.
(*c*) 4 Dowl. & Ryl. 447; 2 Barn. & Cressw. 847.

contrà, but that case, so far from being against the settlement in Willoughby, is strongly in favour of it. There, a pauper legally settled in A., took a house in St. B. at the yearly rent of 10*l.*: After residing in it a year, but before he had paid any rent, he became chargeable, and was removed by an order of justices to A: In a few days he returned, sold his goods, and paid the rent. An appeal against the order having been entered, it was contended that the pauper had, at the time of the removal, an inchoate settlement in St. B., and that by payment of the rent afterwards, the settlement had become complete, and that therefore the order should be quashed. But this Court held, that as the pauper had not gained a settlement at the time of the removal, the order was good and could not be quashed. This shews that when all the requisites of the act, except the payment of the rent, are complied with before an order of removal, and afterwards the rent is paid, such payment does not *relate back* to the time when the compliance with the other requisites became complete. If the payment in this case had so related back, then undoubtedly the confirmed order would have been conclusive. But as the payment does not relate back, the settlement, which was inchoate on 6th December, must have become perfect from the date of such payment, unless it be considered that the rent must be paid within the year of the occupation. The statutes of 6 *Geo.* 4, c. 57, and 1 *Will.* 4, c. 18, upon which the settlement in this case depends, together make it necessary that the rent shall be paid by the party hiring and occupying the tenement, but it is not said that it must be paid within the year, or within any given time afterwards. If the payment of the rent at a period subsequent to the completion of the year of occupation, perfects a settlement in all other respects complete, *Rex* v. *Ampthill* shews conclusively that a settlement was in this case gained *subsequently* to the order of removal of 6th December, 1833. *Rex* v. *Kenilworth* (*a*) will be relied on contrà, but that was a case

(*a*) 2 T. R. 598.

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of hiring and service, and Lord *Kenyon*, C. J., in the subsequent case of *Rex* v. *Fillongley*, satisfactorily distinguishes it from the case of renting &c. a tenement.

If it should be considered to be necessary that a residence for forty days in the parish of Willoughby, subsequent to the order of removal, should be shewn, then it is submitted that forty days of the subsequent residence may be connected with the previous occupation. Upon this point, *Rex* v. *Ormesby* (*b*), and *Rex* v. *Child-Okeford* (*a*), were cited.

Waddington and *Miller*, contrà. The residence must be during the year of the occupation. Under 13 & 14 *Car.* 2, a settlement was gained by forty days' residence in a parish with an interest, as tenant or otherwise, in a tenement within the parish. To this, which is still, however, the foundation of the settlement, the requisitions of 59 *Geo.* 3, 6 *Geo.* 4, and 1 *Will.* 4, are added. According to the argument which has been offered contrà upon this point, if a man occupied a tenement within the parish for a year, and performed all the other requisites, except a residence of forty days, he might then leave the parish, and upon returning at any subsequent period, and residing for forty days, would gain a settlement. [*Williams*, J. The residence must clearly be within the year of occupation.]

Where an order for the removal of a pauper is confirmed, the pauper is conclusively settled in the parish to which he is removed, unless every act necessary to acquire a settlement is done in another parish subsequently to such order. In *Rex* v. *Kenilworth* (*c*) it was held, that after an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the order of removal. *Rex* v. *Fillongley* (*d*) was decided at the time when all that was required in order to gain a set-

(*a*) *Ante*, i. p. 27; 4 Barn. & Adol. 214.

(*b*) 3 Barn. & Adol. 809.

(*c*) 2 T. R. 598.

(*d*) 2 T. R. 709.

tlement, was a residence of forty days, connected with some interest in a tenement. There was good reason therefore for holding that the forty days' residence after the removal, in that case, was sufficient. It is true that the residence was connected with an interest, originating in a contract entered into antecedently to the removal; but whether the interest took its origin from a contract antecedent to the removal, or subsequent to it, was immaterial, provided that there was an interest existing subsequently to the order, and a residence of forty days coupled with such interest. In *Rex* v. *Barham* (*a*) also, there was a residence for forty days subsequently to the order, and upon this fact the decision of the Court appears to be mainly founded. [*Patteson*, J. Lord *Tenterden* said that there was forty days' residence both before and after the removal, and all that the act required in other respects had been complied with. The residence after the removal was immaterial. It was the *holding* after the removal that made the settlement subsequent to the removal. It is quite clear that a residence for forty days at any time of the year is sufficient, provided there be an occupation for a year. In *Rex* v. *Kenilworth*, Mr. Justice *Buller* expressly put his decision on the ground that the order of removal unappealed against was a dissolution of the contract of *hiring and service*. In *Rex* v. *Fillongley* it was held, that the order (though not appealed against) did not dissolve the contract for *renting a tenement*.] *Rex* v. *Fillongley* was decided expressly on the ground that there had been, subsequently to the order, a residence for forty days, coupled with an interest in a tenement; which was all that was then requisite. [*Coleridge*, J. Suppose a sufficient occupation for a whole year, and a residence of forty days during that year, and that the rent were not paid until the 366th day, would not a settlement be gained? Surely the rent need not be paid within the year.] It need not; and if it be paid before an order of removal is made, a settlement will be gained. [*Patteson*, J. Then the ques-

(*a*) *Ante*, 458.

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tion is, what would be the date of that settlement?] If an order of removal intervenes, the payment of the rent cannot be connected with the previous occupation &c., so as in effect to annul the order. *Rex* v. *Kenilworth* and *Rex* v. *Fillongley*, it is submitted, clearly shew that a complete settlement must be *gained* after the order of removal. In *Rex* v. *Kenilworth*, *Buller*, J. uses these strong words, "Now in this case, the pauper returned after the order of removal, to the parish of Birmingham, where he served a month; but that could not give him a settlement there; for the act subsequent to the order of removal, by which he was to gain a settlement, *should be complete in itself*." The main and substantial ground of gaining a settlement being the residence for forty days, it may perhaps be conceded that if there be a residence for forty days subsequent to the order, during the continuance of a year's occupation, commenced before the order, a settlement subsequent to the order is acquired. Upon that ground, *Rex* v. *Barham* appears to have been decided; as Lord *Tenterden*, C. J. in that case, after stating the effect of 59 *Geo.* 3, c. 50, says, "It should seem, therefore, that if a pauper resides for forty days upon a tenement, and the other requisites of the act have been complied with, he gains a settlement. Now in this case the pauper resided in the house more than forty days, both before and after the removal, and all that the act requires in other respects was complied with." The principle does not apply to all the other ingredients of a settlement, which have been added by way of restriction.

PATTESON, J. (*a*)—This case depends upon the construction which we are to put on the statute, which requires that in order to gain a settlement by residence and renting and occupation of a tenement, the rent shall be paid for the same. There has not been any case in which the Court has decided that the rent must be paid within the year of

(*a*) Lord *Denman*, C. J. was absent on account of severe indisposition.

occupation, or within a limited time after the expiration of it. It is said that it is not the occupation for a year, nor the payment of rent for a year, but the residence for forty days, that is the substantial ground of the settlement. That I do not deny: I admit that it is so: but still the question is,—what is the *date* that is to be given to the settlement when acquired? The *time* of the forty days' residence, whether at the beginning or the end of the year, is immaterial. In this case there was an occupation for a year, residence for forty days, (which residence may be in any part of the year of occupation,) and half a year's rent paid. Under these circumstances, an order of removal was made; and there can be no doubt but that at that time no settlement was gained. The order was appealed against, and pending the appeal the party returned to Willoughby, and paid the remainder of the rent, so as to complete the conditions of the act of parliament. It is quite clear that this having been done, so as to fill up all the requisites, the party gained a settlement, unless it is affected by the order of removal which intervened. The order has been treated in the argument as if it had the effect of putting an end to every inchoate settlement. I do not find any authority for so treating it. *Rex* v. *Kenilworth* (*a*) is relied on, but does not support the position for which it is cited. That was a case of hiring and service: the servant was removed under an order, which was not appealed against; and he returned to his master's service at Birmingham. If there had been an appeal against that order, it is not doubtful but that the party would have had a right to return to his master, and might have completed his service; and if he had done so, he would have acquired a settlement in Birmingham. So Mr. Justice *Buller* appears to have considered; for he says, "The question here is, whether the pauper gained any settlement in Birmingham subsequent to the order of removal? Now, in this case he did no act by which he could gain a settlement in Birmingham after the order of removal. *What*

(*a*) 2 T. R. 598, *ante*, 460.

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I rely on is this, that after the order of removal, unappealed from, the pauper *could not legally return* to the parish from whence he had been removed." From this it follows, that, in his opinion, if the order *had* been appealed from, the pauper might have returned, and would have gained a settlement subsequent to the order. The learned judge then says, that it would have been a crime in the pauper to have returned, and that the order of removal therefore put an end to the contract of service. Whether he was right or wrong in this reasoning, is not now to be determined; but it shews how far his remaining words, which are the words relied on, are properly applicable to this case. The words are, "Now in this case the pauper returned after the order of removal, to the parish of Birmingham, where he served a month; but that could not gain him a settlement there; for the act subsequent to the order of removal, by which he was to gain a settlement, *should be complete in itself.*" It is sought to be inferred from this, that all that is done towards gaining a settlement before the order of removal, must in every case be put out of consideration. These words, taken by themselves, might seem to warrant such an inference; but they must of course be construed *secundum subjectam materiam*, and being so construed, the inference is altogether shut out. The decision in *Rex* v. *Kenilworth* appears to me to rest on no legal principle. Can it possibly be said that if a man is serving or renting a tenement, and the parish officers choose to get him removed, the contract is thereby put an end to? I see no reason for so saying. It is true that the order of removal is conclusive, that at the time of making the order the pauper had no settlement in Willoughby; but the whole question comes to this,—whether, when a man has done all that is required except one thing,—the payment of the rent,—and such payment is made after an interval, the settlement is to take effect from the time of completing the *main* requisites, or from the final completion by payment of the rent. We have the authority of *Rex* v. *Ampthill* for saying, that the payment has no reference back; and there-

fore, if the settlement is not to be dated from the time when the last requisite is complied with, there never can be a settlement gained in such case. The argument of Mr. *Waddington* would indeed go this length. That, however, cannot be right. The pauper did in this case, in my opinion, gain a settlement in Willoughby subsequent, in point of date, to the order; and therefore the order of sessions must be confirmed.

WILLIAMS, J.—I am of the same opinion. There is no case to shew that the payment of the rent must be within the year of the occupation; and there is nothing in the nature of an order of removal to make a payment of the rent, after the order, have a different effect from a payment where no such order has been made. The words of Mr. Justice *Buller* have been relied on; but those words, when taken in connection with the doctrine which he had just laid down, and with which (whether the doctrine be right or wrong) they are consistent, are no authority for the position in support of which they have been cited.

COLERIDGE, J.—It was conceded in the argument, that all the facts of this case might have existed, with the exception of the order of removal, and that a settlement would in such case have been gained. The whole question therefore turns upon the effect of the order. Mr. *Waddington* argues, that where an order of removal has been made, every thing necessary to the gaining a settlement must be commenced anew after the order; and for this position he cites *Rex* v. *Kenilworth*. Now the decision in that case, when examined, will be found to be no authority at all here, as it arose upon a different state of things, and proceeded on a supposition that the order of removal dissolved the contract, which, after *Rex* v. *Fillongley*, certainly cannot be said to be the case here. The dictum of Mr. Justice *Buller* must be considered with reference to the subject-matter. The question then is, what is the effect of the order of removal?

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It merely determines the conclusion of law upon the facts existing at the time when it was made. If, at the time of making the order, nine only out of ten requisites had been complied with, then the order is conclusive, that a settlement was not gained by the performance of the nine requisites; but there is no authority whatever for saying that, upon the tenth requisite being added, the order is to have the effect of preventing a settlement from being gained.

Order of Sessions confirmed.

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In an action brought by *A.* against *B.*, the Court, upon a motion under the Interpleader Act, made by *B.*, direct that an action for money had and received shall be brought by *C.* against *A.*, to try the right to certain money.

ASSUMPSIT for money had and received, and on an account stated. Plea: non assumpsit. At the trial before Lord *Abinger*, C. B. at the last Liverpool assizes, a verdict was entered for the plaintiff for 150*l.* upon the following facts:

The defendant was employed by the commissioners for paving and lighting Manchester, to superintend the building of a town-hall &c., and was to receive 7½ per cent. upon the money expended, for his commission. Up to 1829 he

Held, first, that in an action brought in pursuance of such order, a special agreement might be given in evidence, which, in ordinary cases would be admissible only under a special count.

2. That in such action, the copy of an affidavit sworn by *A.* in the action against *B.*, but not filed or used, in which an agreement was set out by *A.*, and which copy his attorney had admitted to be correct, might be given in evidence by *C.* as secondary evidence of such agreement, which was lost.

3. That in the absence of evidence to the contrary, the agreement so set out must be taken to have been duly stamped.

4. *A.*, an architect employed to superintend the erection of certain buildings upon commission, by deed, assigns to *D.*, a creditor, all the commission to which he then was or might thereafter be entitled in respect of such superintendence, upon trust to pay *C.* a certain debt due from *A.*, and to retain the residue towards satisfaction of a certain debt due from *A.* to *D.*; and in which deed are contained a power of attorney to receive the commission, and covenants that *A.* would pay the debt due to *D.*; would not receive the commission, or revoke the power thereby given, or do any act by which *D.* might be hindered in receiving payment; that he had a right to assign; had not encumbered, and for further assurance. Held, that this deed was not a mortgage, but an absolute conveyance of the commission money; and that a conveyance stamp, calculated upon the amount of commission eventually received, was sufficient.

was regularly paid his per centage. In 1829, being indebted to the plaintiff in 150*l.*, he wrote and delivered to Mr. *Thorpe*, the comptroller of the commissioners, the following letter:—"I hereby authorize you to pay to *John Pooley*, Esq., sen., 150*l.* from my commission as architect to the Town-hall of Manchester, out of the first monies ordered to be paid to me. His receipt shall be a sufficient discharge for the same, this being the balance of an account between Mr. *Pooley* and myself, as settled this 22d day of September, 1829."

Under this letter Mr. *Thorpe* wrote and signed the following memorandum (*a*):—"In compliance with the foregoing order, I do hereby engage to see that the first 150*l.* ordered to be paid to Mr. *Goodwin*, on account of the commission for the town-hall, shall be paid to Mr. *Pooley*."

The plaintiff, on the same day, added the memorandum following:—"I, the undersigned, do hereby engage to give Mr. *Goodwin* a receipt in full of all debts and charges against him, on being paid the 150*l.* above directed by him to be paid out of his commission."

At the time of this transaction nothing was due to the defendant from the commissioners.

15th July, 1830. The defendant executed a deed of assignment to *Barber* and *Marshall*, bankers; whereby, after reciting that he was indebted to the plaintiff in 150*l.*, and that he was also indebted to *Barber* and *Marshall* in 997*l.* 8*s.* 11*d.*, for money advanced and lent to him, and paid for his use, with interest thereon; and that he was employed by the commissioners as architect for building a new town-hall &c. in Manchester; and that being unable

(*a*) As to the effect of such a memorandum, as binding the writer to make such an appropriation out of the first moneys which should afterwards come to his hands, see H. 21 H. 6, Fitz. Abr. Dette, pl. 43; H. 37 H. 6, fo. 15; F.N.B. 121 F.; *Maber* v. *Massias*, 2 W. Bla. 1072; *Stevens* v. *Hill*, 5 Esp. N. P. C., 247; *Ardern* v. *Rowney*, ibid, 254; *Yeates* v. *Groves*, 1 Ves. jun. 280; *Clark* v. *Adair*, 4 T. R. 343, cited; *Langston* v. *Corney*, 4 Campb. 176; *Morris* v. *Stacey*, Holt, N. P. C., 153; *Priddy* v. *Rose*, 3 Meriv. 86, 102.

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to pay the said debts, he had agreed to assign to *Barber* and *Marshall* all and every the sum and sums of money which was or were then, or should thereafter become due to him for his commission and expenses as such architect—the defendant assigned to *Barber* and *Marshall* all and every the sum and sums of money which then was and were, or should at any time thereafter become due to him from the said commissioners, for or on account of his commission, upon trust, to pay the costs and the 150*l.* due to the plaintiff, and to retain the residue towards the payment of the 997*l.* 8*s.* 11*d.* and interest. The deed contained a power of attorney to *B.* and *M.*, to receive the commission, and covenants by the defendant—that he would pay the sum of 997*l.* 8*s.* 11*d.*,—that he would not receive the money or revoke the power, or do any act whereby *B.* and *M.* might be hindered in recovering payment,—that he had right to assign—that he had not incumbered—and for further assurances. This deed was stamped with a stamp of 5*l.*

A copy of the deed was served on the comptroller.

At the date of this deed, about 30*l.* was due from the commissioners to the defendant.

The defendant being greatly embarrassed, took the benefit of the Insolvent Debtors' Act, and on the 28th February, 1832, obtained his discharge. At this time about 70*l.* was due to him from the commissioners.

Subsequently the commissioners engaged the defendant in the completion of the building, and in 1834 his commission amounted to upwards of 250*l.*; but Mr. *Wroe*, who had succeeded Mr. *Thorpe* as comptroller of the commissioners, refused to pay the money to the defendant, it being claimed by the assignee under the insolvency,—by the plaintiff,—and by *B.* and *M.*

In H. T. 1834, the defendant brought an action against the commissioners to recover the commission which had accrued due subsequently to his discharge: whereupon the commissioners applied to the Court under the Interpleader Act, and on hearing all parties interested, the Court made a rule declaring the assignee under the insolvency barred of

his claim, but without costs:—And it was ordered that the money should be paid into Court by the then defendants (the commissioners), and that an action should be brought, for money had and received, by *Pooley* against *Goodwin;* and that the defendant should admit on that trial, the receipt of the money for the per-centage since his discharge, and that such verdict as should be given on that trial should be binding as to the claim of *B.* and *M.*

The plaintiff had notice to produce at the trial the order to *Thorpe* and the deed to *B.* and *M.* Instead of producing the order, evidence was given of diligent search for it among the papers of the plaintiff. Objections were raised by the defendant's counsel to the insufficiency of the search, but Lord *Abinger*, C. B. considered that there was sufficient evidence of the loss to warrant the admission of secondary evidence. The plaintiff's counsel then put in a copy of an affidavit sworn by the defendant in the action brought by him against the commissioners, but not filed or used, in which the order was set out; and it was objected that the affidavit itself, even if it could be evidence, ought to have been produced; but plaintiff's witness swore that defendant's attorney had admitted the copy to be a true copy, except in the jurat, and Lord *Abinger* held it to be good secondary evidence. An objection was then urged against the order to *Thorpe*, as being unstamped and unaccepted; which was over-ruled. The deed of 15th July, 1830, being offered in evidence, three objections to its admission were urged; viz. first, that the expressed consideration was, two sums amounting together to more than 1000*l.*, and that the stamp it bore was for a less sum. Secondly, that if it was a conveyance of defendant's entire interest in the per-centage, it should have been a 9*l.* or 12*l.* stamp, according to the 55 *Geo.* 3, c. 184, schedule, part I., title Conveyance. Thirdly, that at any rate it was a mortgage, and in trust to pay creditors; for that the covenants to pay the plaintiffs and *B.* and *M.*, and not to revoke, clearly implied defendant's equity of redemption in the

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money assigned; and that as a mortgage for more than 1000*l.*, it ought to have had a 6*l.* stamp. Lord *Abinger* was of opinion that the deed was not a mortgage deed, and that as the amount which was received or paid into Court was under 300*l.*, the stamp was sufficient. His lordship, however, gave the defendant leave to move on several points.

Boileau now moved accordingly.

First point: Sufficiency of search.

Search ought to have been made for the order, not only among the plaintiff's papers, but also amongst the books and papers of the commissioners and their comptrollers. The latter ought to have been witnesses, Mr. *Thorpe* being alive, and Mr. *Wroe* being in Court at the trial.

Second point: Legal operation of order of appropriation.

The order was revocable, and did not direct payment out of any existing fund; *Watson* v. *The Duke of Wellington* (*a*).

Third point: Admissibility of copy of affidavit.

The copy of the affidavit, which had not been filed nor used, was inadmissible. No examination of it with the original was proved, nor was it shown when or where the admission of its correctness was made. An admission by defendant's attorney should not be taken, unless in writing.

Fourth and fifth points: Stamps on, and acceptance of order.

The order was not proved to be stamped or accepted by the commissioners, or by their treasurer, or comptroller.

These defects were not cured by the reference to the plaintiff's debt and the trust for its payment, contained in the assignment to *Barber* and *Marshall*.

Sixth point: Sufficiency of stamp on deed.

With respect to the deed of July 15, 1830, the defendant insists upon the objections to the stamp, urged at the trial.

Seventh point: Deed fraudulent against creditors.

He also objects, that the deed being an assignment of future profits, it was against public policy, and tended to defraud creditors, or to give a voluntary preference; and was therefore void.

Eighth point: Assignment of a possibility.

It is also the assignment of a possibility. The case, in this respect, is analogous to and comes under the decision in *Robinson* v. *M'Donald* (*b*), and that class of cases, and therefore is not valid at law.

Ninth point: Deed not executed by the plaintiff.

The deed containing a recital of the plaintiff's debt, and

(*a*) 1 Russell & Mylne, 602.

(*b*) 5 Moore & Payne, 229. *Et vide ante*, i. 170, 1.

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a covenant to pay it, should have been executed by him; and as he was not a party to it, he was not intitled to any benefit under it, or to sue upon it (*a*).

Tenth point: Form of action.

Assuming all the evidence produced at the trial to be admissible, it will not support a declaration without a special count; *Morgan* v. *Jones* (*b*), *Williams* v. *Everett* (*c*).

Cur. adv. vult.

On a subsequent day in the term Lord DENMAN, C. J. delivered the judgment of the Court to the following effect:

First point.

In this case several objections were relied on. In the first place, it was said to be necessary for the plaintiff to shew the original order to *Thorpe*, for payment out of the commission. The order was probably left in the possession of the plaintiff, and a careful search having been made among the papers of the plaintiff, it could not be found. Secondary evidence was, I think, admissible.

Fourth point.

There was no evidence that the order was stamped, or that it was not. But the defendant had introduced a copy of this order into an affidavit, and the contents of it were therefore known, and the affidavit was given in evidence against him. In the absence of proof that the order was *not* stamped, we think we are justified in presuming that it *was* stamped. The defendant had received the full amount of his commission from the commissioners at the time when he made the order.

Sixth point.

The defendant afterwards executed a deed, assigning to certain persons therein named the commission to which he was then or thereafter might become entitled. It was argued that this deed was a mortgage; but we think that it was not a mortgage, but an absolute conveyance of the commission money: And as that money was proved not to exceed 300*l*., we think that the amount of the stamp was more than sufficient.

Tenth point.

An objection has been made, that the evidence in this

(*a*) Vide *Berkeley* v. *Hardy*, 8 D. & R. 102; 5 B. & C. 355.

(*b*) 1 Crompt. & Jer. 162.

(*c*) 14 East, 582.

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case did not support the action in its present form, but that there ought to have been a special count. As the case, however, was tried under an order made by us to decide a certain issue of fact, we do not think it proper that upon that account there should be a new trial, though some part of the evidence might not, in ordinary cases, have been strictly admissible under these counts.

Rule refused.

BROWN and others *v.* TAYLEUR.

Under an insurance at and from the port of loading, a loading at one single place only is authorized.

Where therefore a ship, insured at and from her port of loading in North America to Liverpool, takes in part of her cargo at Cocagne, on the coast of New Brunswick,—her afterwards sailing to Bouctouche, another place on the same coast, within seven miles of Cocagne and within the same legal port, taking in part of her cargo there, and returning to Cocagne, and there completing her cargo, is a deviation (*b*) avoiding the policy.

ASSUMPSIT on a policy on the ship "Penrith," "at and from her *port of loading* in North America to Liverpool," with liberty to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to the insurance. Loss by perils of the seas. Plea: non-assumpsit. At the trial before Lord *Denman*, C. J., at the London sittings after Trinity term, 1834, these facts appeared:

The "Penrith" was built at Cocagne, on the coast of New Brunswick, and was insured as alleged. She took in a part of her cargo at Cocagne, proceeded thence to Bouctouche (*a*), where she took in a further portion of her cargo, and afterwards returned to Cocagne, and there completed her cargo. From Cocagne she sailed on her voyage to Liverpool, and was soon afterwards totally lost. Cocagne and Bouctouche are ports or places in the same bay on the coast of New Brunswick, situate within seven miles from each other, having at each of them an officer of customs, with power of clearing vessels out, and being both subject

(*a*) Written in some of the documents in the English form "Buctush."

(*b*) As to deviation (*changement de route*) see Pothier, Traité du Contrat d'Assurance, Nos. 51 & 72; Code de Commerce, No. 351.

to the custom-house at St. John's, distant upwards of 120 miles, and Bouctouche being the more remote from England. It was contended by Sir *James Scarlett*, for the defendant, that there ought to be a nonsuit, for that the policy attached upon the commencement of the ship's loading at Cocagne, and that the going to Bouctouche to take in part of her cargo, and thence returning to Cocagne, was a *deviation*. Lord *Denman* refused to nonsuit on this ground, but reserved the point. A verdict having been found for the plaintiffs, Sir *Jas. Scarlett*, in the following term, moved for a rule nisi for a nonsuit; which having been granted,

Campbell, A.G., *Wightman*, and *Crompton*, now shewed cause. If the terms of this policy had been "from her *ports* of loading in North America," there could be no doubt of the plaintiff's right to recover. The word "port," as used in this policy, has the same meaning as "ports," and the effect of the language employed is to protect the ship whilst honestly employed in loading in North America, provided there be no improper delay or extraordinary risk. Indeed, Cocagne and Bouctouche being inconsiderable places, situate in the same bay and distant from each other at the most seven miles only, cannot properly be said to be two ports. Suppose the case of a large cove, as the cove of Cork,—could it be said that a vessel insured at and from her port of loading, would not be at liberty, after taking in part of her cargo at one extremity of the cove, to go to and take in goods at the other extremity, and then to return and complete her cargo at the place at which she commenced loading? But further, *neither* Cocagne nor Bouctouche is a "port." Both are within the port of St. John's, as regards custom-house regulations; and the word "port" may have been used in this well-understood sense, with a view of giving greater latitude to the parties. In *Bond* v. *Nutt* (*a*) the voyage insured was "at and from Jamaica to London." The vessel having sailed from St. Anne's Bay, with her

(*a*) Cowp. 601.

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cargo and clearances on board, went to Bluefields, in another part of the same island, but out of the direct course of her voyage, for the purpose of joining convoy. It was held that this was no deviation. *Warre* v. *Miller* (*a*) was on a policy of insurance "at and from Grenada to London." It was proved that there was only one custom-house for the whole island of Grenada; that the vessel arrived in safety at Grenada, and discharged part of her outward cargo at three different bays, and was proceeding to a fourth bay to discharge the remainder of her outward cargo, and to take in part of a homeward cargo which had been engaged, when she was lost by the perils of the sea. It was held that there had been no deviation. The judgment proceeded mainly upon the ground that there was only one *custom-house* for the whole island. Suppose the policy had been "at and from her *port of loading in Grenada*,"—could it have been contended that the vessel would have been confined to one bay in Grenada? *Constable* v. *Noble* (*b*) and *Payne* v. *Hutchinson* (*c*) will probably be relied on contrà; but they cannot govern this case. *Constable* v. *Noble* was the case of a policy upon flour, "at and from *Lyme* to London;" and it was held that flour, shipped at *Bridport Harbour*, was not protected, although Bridport Harbour had no custom-house and was a member of the port of Lyme. But that case was so decided because the word "Lyme" was considered to be properly only referable to the *town* of that name; and it may be admitted that if in this case the policy had been "at and from Cocagne," the vessel would not have been at liberty to proceed out of her direct course to other places within the same port. Those, however, are not the terms of the policy; nor is it said "at and from her *place* of loading," which might have been the same thing in effect. *Payne* v. *Hutchinson* is open to the same observations as *Constable* v. *Noble*; for that was the case of a policy upon goods upon a ship "at and from Carmarthen

(*a*) 7 Dowl. & Ryl. 1; 4 Barn. & Cressw. 538.

(*b*) 2 Taunt. 403.

(*c*) Ibid. 405 (in notis).

to London;" and the goods were shipped and the vessel cleared out at Llanelly, which was a member of the port of Carmarthen, but having a distinct custom-house. It was held that the vessel was not protected on her voyage from Llanelly to London. Probably if the terms of the policies in those two cases had been "at and from the *port* of Bridport," or "of Carmarthen," the Courts would have come to an opposite conclusion; and it is submitted that the terms of the policy in this case are similar in principle.

Maule and Sir *W. Follett*, contrà. The parties to this policy have departed from the usual language, and instead of saying "port or ports of loading," or "ports of loading," have used the word *port* in the singular number only. This must be taken to have been done with a design; and the object would of course be defeated if the Court were to hold that "port" was used synonimously with "port or ports." According to one of the plaintiffs' arguments, the ship might, without forfeiting the policy, have sailed from Cocagne to New York; thence up the Mississippi to New Orleans; and from New Orleans to England. If the policy had been from Cocagne to her port of discharge in England, no one would have ventured to contend that if the vessel were to discharge half her cargo in London, and were then to proceed to Liverpool to discharge the remainder, she would be protected on her voyage from London to Liverpool. It is quite impossible that the words of the policy can have the latitude of meaning which has been contended for. Then it was argued that the term "port" includes all places which, for the purposes of custom-house regulations, are within the port of St. John's; and according to this argument, the vessel was at liberty to range up and down between points distant from each other about 400 miles. But the word "port" is used in this policy in a sense perfectly independent of all custom-house regulations. "Port of loading" means nothing more than "place of loading," and in that sense, and indeed in a more strict

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sense (for there is something in the nature of a custom-house at each), Cocagne and Bouctouche are both *ports of loading*. The relative *distance* of the two places cannot be considered, for it would be impossible to draw any line of distinction between greater and smaller distances. It matters not therefore whether the two places be 7 or 700 miles from each other. *Bond* v. *Nutt* and *Warre* v. *Miller* do not favour the argument for the plaintiffs. The point decided in those cases is so clear, that it is wonderful that it should ever have been raised. If the words of *this* policy had been "at and from *North America*," it would have been equally clear here that the vessel was protected. Unless the Court are prepared to go the length of saying that the words of this policy are tantamount to "at and from North America," those cases do not apply.

Lord DENMAN, C. J.—It appears to me that the rule must be made absolute for a nonsuit, as it is quite clear that at the close of the plaintiffs' case, Cocagne and Bouctouche appeared to be two distinct places, and two places at which a loading might take place. The words "port of loading," have nothing technical in their meaning. The only question in my mind has been, whether the defendant was entitled to a nonsuit, or whether the case should not have gone to the jury; but I think that the plaintiffs' evidence made out a clear primâ facie case for the defendant; and that it lay upon the plaintiffs to give distinct evidence that Cocagne and Bouctouche were in fact but *one place*.

PATTESON, J.—I am of the same opinion. The words being "*port* of loading," we are not, in my opinion, at liberty to construe the policy as if it had contained the words usually inserted, viz. "port or ports." We must construe the word "port" as meaning a single port; and we must not give to it a *technical* meaning. Were we to do so in a case like the present, where, technically speaking, there is a large port, comprising many places of loading,

the vessel might sail about from port to port in search of a cargo. "Port" in this policy means the same as "place," and it means *one* place of loading. The vessel should have finished taking in cargo in the first instance at Cocagne, and should not have gone afterwards to Bouctouche: her doing so was a deviation. The Attorney-General quoted the Grenada case, and assumed that that case was the same as if the policy there had been "at and from her *port of loading* at Grenada;" but this is not a correct argument, as the whole island is named generally Grenada. The fact of Cocagne and Bouctouche being within the jurisdiction of the same custom-house, is immaterial; otherwise the vessel might have gone to St. John's. When I state that "port of loading" means one place of loading, I would not be understood as saying that a vessel would by those words be confined to one *spot*; for example, I should not say that it would be a deviation for a vessel, after taking in part of her cargo at a particular place in Liverpool, to proceed a mile or two farther from the sea; that would be all *one* port, *one place*. But here the vessel went to another place, which might have been of itself a distinct place of lading. I think that under the circumstances the rule should be made absolute for a *nonsuit*. I do not see that any evidence could have altered the case; and if it could, it should have been given by the plaintiffs.

WILLIAMS, J.—I agree that there should be a nonsuit. It is impossible to construe this policy as if it had been "at and from her *ports* of loading." The words used mean port *or* place. In a policy "at and from Jamaica," or "Grenada," "Jamaica" or "Grenada" means the whole island and every port therein.

COLERIDGE, J.—We must come to the conclusion that this rule should be made absolute, unless we are prepared to say that "port" means "port or ports," or "ports;"—in other words, that "port" is an *aggregate* term. But we are

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not at liberty so to construe it. The word is synonimous with "place." Then, merely construing it as a place of lading, the Attorney-General seemed to say that it might include the *neighbouring* places. I do not assent to that argument. The risk is greater if the vessel goes from place to place, on a sort of roving voyage. I think therefore that we are bound to make this rule absolute.

Rule absolute.

WILLIS and another, Assignees of CHARLES NORCLIFFE, a Bankrupt, *v.* The GOVERNOR and COMPANY of the BANK OF ENGLAND.

The assignees of *A.*, a bankrupt, are entitled to recover, in trover against the Bank of England, the amount of bank post bills converted into money by *A.* at a Bank of England branch bank, after notice given at the Bank of England in London, that *A.* had committed an act of bankruptcy.

But they cannot recover the amount of a bank post bill paid to *B.*, a bonâ fide holder for value, who had received it of *A.* after the commission of an act of bankruptcy, but without notice thereof.

Bank post bills, issued by the Bank of England in London, are not made payable at the branch banks, by 7 *Geo.* 4, c. 46, s. 15.

TROVER for three bank post bills of 500*l.* each. Plea: not guilty. At the trial before *Alderson*, B., at the last Lancashire spring assizes, a verdict was found for the plaintiffs, damages 1500*l.*, subject to the following case:

2d March, 1833. Messrs. *Blackstock* and *Bunce*, solicitors in London, received 1600*l.* on account of *Norcliffe*, who carried on trade at Liverpool, and paid it to the Bank of England, and obtained the three bank post bills in question, and one for 100*l.*, payable to *Norcliffe*, or order, at seven days' sight, and accepted by the Bank at the time when they were issued. The bills were remitted by *B.* and *B.* to Mr. *Grace*, at Liverpool, then the attorney of *Norcliffe*, who, on 4th March, paid them over to *Norcliffe*.

12th March, 1833. *Norcliffe* absconded, and committed an act of bankruptcy.

16th March, 1833. *B.* and *B.* applied to the Bank of England, in London, to stop the payment of the bills, and informed the Bank that *Norcliffe* had absconded from his

creditors with the bills in question; whereupon the following entry was made in the defendants' books:

"Messrs. *B.* and *B.*, on behalf of *R. G.* of Liverpool, apply to stop payment of the four following bank post bills, with which *Charles Norcliffe*, of Liverpool, has absconded, viz. No. M. 7040, to *Charles Norcliffe*, 500*l.* &c. &c."

8th April. The defendants were informed by Messrs. *B.* and *B.* that the necessary documents for a fiat in bankruptcy against *Norcliffe* were expected by every post.

12th April. *Norcliffe* stated to Mr. *Smallridge*, an attorney at Gloucester, with whom he was acquainted, that he wanted 1000*l.* in gold, to pay off a mortgage in exchange for two of the bank post bills, which he then produced. *Smallridge*, on the same day, applied to the agent for the Bank of England branch bank at Gloucester,—to whom he was known,—and received from the agent 1000*l.* in gold, in exchange for the two bills. *Smallridge*, who was called as a witness on behalf of the plaintiffs, stated that he had no interest in the bills, but handed the whole 1000*l.* in gold over to *Norcliffe*, without any deduction whatever, acting in the transaction merely as the friend and agent of *Norcliffe*.

These two bills had been indorsed in blank by *Norcliffe*, after 12th March, and before he delivered them to *Smallridge*.

On applying for change, *Smallridge* was required by the agent of the branch bank to indorse the bills; and he did so before receiving the cash, as follows, "Pay the Governor and Company of the Bank of England, *C. Smallridge*."

At this time, *Smallridge* did not know that *Norcliffe* had absconded or committed an act of bankruptcy.

16th April, 1833. The said two bills were in the usual course of business remitted to the Bank of England by the Gloucester agent.

On the arrival of the bills the defendants gave notice thereof to Messrs. *B.* and *B.* by the following letter:

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"Secretary's Office, Bank of England,
"Gentlemen, 17th April, 1833.

"Two bank post bills for 500*l.* each, No. M. 7040, dated 2d March, 1833, stated by you to have been embezzled, were this day presented at the Bank for payment, and upon application at this office, you will be furnished with the particulars of the information collected as to the holder of the bills.

"The Governor and Directors of the Bank of England cannot engage to withhold payment of the bills, unless they are furnished by you, and that immediately, with evidence to impeach the title of the holder.

"Messrs. *Blackstock* and *Bunce*, I am, &c.
18, Serjeant's Inn, Fleet Street." *M. B. Sampson.*"

The bills, when remitted to London, were not cancelled. Bank post bills changed at the Branches are required to be indorsed, and are not cancelled at the Branches. Such bills frequently circulate about the country as cash for a very considerable period, and they have a great circulation.

11th April, 1833. *Norcliffe* applied to *Tugwell* & Co., bankers, at Bath, to whom he was known, to change one of the bank post bills for 500*l.*, and *Tugwell* & Co. gave him cash for the same, and *Norcliffe* thereupon indorsed the bill and delivered it to *Tugwell* & Co. *Tugwell* & Co. afterwards paid away the bill for value, and after passing through the hands of several persons for value, the same bill was, on 29th May, paid for value to one *W. Templeton*, who, on the same day, paid the same to a clerk of the Bristol Bank of England branch bank, as cash to be remitted to His Majesty's Exchequer on account of the collection of the taxes, and the defendants gave credit to His Majesty's Exchequer for the amount.

11th May, 1833. The last-mentioned bill was remitted in the usual course of business, by the said branch bank at Bristol to the defendants, who thereupon gave notice thereof

to the said Messrs. *B.* and *B.* by a letter to the same effect as that before set forth.

18th April, 1833. A fiat in bankruptcy issued against *Norcliffe*, under which he was duly found and declared a bankrupt, and the plaintiffs were duly appointed his assignees.

28th December, 1833. Before action brought, the three bank post bills in question were demanded of the defendants and refused.

The bank post bills were in the following form:

"Bank Post Bill.

No. M. 7042. London, 2d March, 1833.

At seven days' sight I promise to pay this my sola bill of exchange, to *Charles Norcliffe*, Esquire, or order, five hundred pounds sterling, value received of Messrs. *Blackstock* & Co.

Accepted, 2 March, 1833. For the Governor and Company
H. Brent, of the Bank of England,
£500. *S. S.* *T. Needham.*"
Entd. *E. R.*

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the value of the bank post bills for 500*l.* each, or any of them, from the defendants.

This case was argued in Trinity term last, before Lord *Denman*, C. J., *Littledale*, J., *Patteson*, J., and *Williams*, J.

Wightman, for the plaintiffs. I. With respect to the right to the bills which were changed at Gloucester. It is submitted, that if that which took place at the branch bank at Gloucester had occurred at the Bank of England in London, the assignees would have been entitled to recover. An indorsement of a bill of exchange, after the holder has committed an act of bankruptcy, of which the indorsee has notice, gives the latter no title to the bill. *Thomason and others* v. *Frere* (*a*), and *Pinkerton* v. *Adams and another* (*b*), fully establish this proposition. In the present case, the act of bankruptcy was committed on 12th March, 1833;—

(*a*) 10 East, 418. (*b*) 2 Esp. N. P. C. 611.

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of this the defendants had notice on 16th March:—On 12th April the bills were indorsed to the defendants. It is therefore evident that if the gold had been given in exchange for the bills by the defendants in London, the plaintiffs would have been entitled to recover them. Then it remains to be considered, whether the circumstance of the transaction having occurred at the branch bank at Gloucester, instead of taking place at the Bank of England in London, varies the case. This raises the question, whether the notice to the defendants in London is or is not sufficient. In the ordinary case of principal and agent, notice to the principal has been held to be sufficient. Thus, in *Mayhew* v. *Eames* (*a*), the plaintiffs carried on trade in London, and employed an agent to collect their debts in the country: The agent delivered to the defendants, who were coach proprietors, a parcel containing bank notes, to be forwarded to his principals in London; and the parcel was lost: The defendants had given notice to the *principals*, that they would not be accountable for parcels containing bank notes, but the *agent* had no knowledge of the notice. It was holden, that the defendants were protected by the notice. The knowledge of one partner as to the dishonour of a bill, is the knowledge of all; *Porthouse* v. *Parker* (*b*). So knowledge at the principal establishment may be holden to be knowledge at the branch. There is nothing in 7 *Geo.* 4, c. 46, (by which the establishment of branch banks was authorized,) which alters this rule. The argument on the other side will be, that it would be highly *inconvenient* for the Bank, in every case of the stoppage of a bill, to send notice to all the branches; but it would be much more inconvenient for the party stopping the bill to give such notice. Suppose two persons are carrying on business in partnership at London and Bath, and that a bill is drawn by the firm in London on the partner at Bath, in his individual character, and accepted by him:—would it be neces-

(*a*) 5 Dowl. & Ryl. 484; *S. C.* 3 Barn. & Cressw. 601.

(*b*) 1 Campb. 82. And see *Jacaud* v. *French*, 12 East, 317.

sary, in that case, to give notice of dishonour to the firm in London? The knowledge of the acceptor would be the knowledge of the drawers. In this case, the knowledge of the act of bankruptcy by the bank in London, was sufficient knowledge by the branch bank at Gloucester. This is a case of negligence on the part of the defendants. Although they may have taken the bills innocently, yet the rule of law is, that the loss shall fall on the party guilty of negligence.

II. Perhaps after the decision in *Hill* v. *Farnell* (*a*), it is not open to the plaintiffs to contend that they are entitled to recover the value of the bill which *Tugwell* & Co. received and gave value for, in ignorance of the commission of any act of bankruptcy by *Norcliffe*.

Maule, (with whom was *J. L. Adolphus*,) for the defendants. By the 82d section of the Bankrupt Act (*b*), all payments really and bonâ fide made to any bankrupt before the date and issuing of the commission, are rendered valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with the bankrupt had not, at the time of such payment, notice of any act of bankruptcy. That clause is an extension of the provision contained in the 14th section of 1 *Jac.* 1, c. 15; and in *Wilkins* v. *Casey* (*c*) it was declared, that a liberal construction ought to be put upon this provision; and it was said that even *goods* given in exchange would be considered as a *payment* within the meaning of that provision. Wherever money passes from an individual to a bankrupt, in exchange for any thing, the receipt of the money by the bankrupt is a *payment* within the meaning of the 82d section. In *Hill* v. *Farnell*, where a bankrupt, after having committed an act of bankruptcy, made a bonâ fide sale of his goods, it was held that his assignees could not recover them without paying to the purchaser the price paid by him for them.

(*a*) 9 Barn. & Cressw. 45.
(*b*) 6 *Geo.* 4, c. 16.
(*c*) 7 T. R. 711.

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It is evident, from the statement of the circumstances of the case, that this was a *purchase* of the bills by *Smallridge*, who had no notice of the act of bankruptcy, and a purchase by the branch bank of the interest which *Smallridge* had acquired. The bankrupt, who is acquainted with *Smallridge*, asks him to give him a 1000*l.* in gold for the two bills. *Smallridge* gives this gold to him in exchange for the bills. It is true that *Smallridge* obtains this money from the agent of the branch bank, but it is perfectly immaterial from what source he obtained the money. As it is clear that *Smallridge* had no notice of any act of bankruptcy, the plaintiffs could not have recovered against him. The agent purchased *Smallridge*'s interest, and therefore the plaintiffs cannot recover against the defendants, who have the same right to the bills as *Smallridge* had.

It appears to have been assumed in the argument for the plaintiffs, that the transaction at Gloucester was a presentment of the bills *for payment*, and that the agent *paid* them. The bills however were not cancelled, as the indorsement by *Smallridge* conclusively shows; besides, the bills were not *payable* at Gloucester. The Co-partnership Banking Act (*a*), sect. 15, enacts, that notes issued at any branch bank shall be payable at the place where the branch is established, as well as in London; but bills issued in London are not made payable at the branch banks. [*Patteson*, J. The case finds no such fact as that this was a *purchase* by the agents of the Bank of England.] That is the plain inference to be drawn from the circumstances stated.

But it is said that the defendants, before they received these bills, had notice of an act of bankruptcy. The communication which was made to the bank was merely to stop the payment of the bills. But assuming that the communication did amount to a notice of an act of bankruptcy, still it was not sufficient to give notice to the bank in London. A great part of the trade of the country is carried on by means of travelling agents, and it would be highly

(*a*) 7 *Geo.* 4, c. 46.

inconvenient if it were established as a principle, that in cases such as the present, or analogous to it, notice to the principal without notice to the agent is sufficient. Are the defendants, in each case of a notice of this description, to communicate the notice to every one of their branches in the kingdom? If they are so bound, within what period is the notice to be given?

The defendants however have a good title to these bills, independently of the 82d section of the Bankrupt Act; since in receiving them they were not guilty of gross negligence. It was formerly held, that a bonâ fide holder of a negotiable instrument had a good title against all the world. That principle was full of convenience. Subsequently the law varied, and it was held that a party holding a negotiable instrument, which had been lost by a former holder, must shew that he took the bill under such circumstances as would have justified a cautious and prudent man in taking it(*a*); but it is now held that the question is, whether the party receiving the bill has been guilty of gross negligence; *Crook* v. *Jadis*(*b*), *Foster* v. *Pearson*(*c*). The law therefore has come back to the state in which it was formerly. Bona fides is now the criterion, since gross negligence is, in matters of this sort, regarded as mala fides. [Lord *Denman*, C. J. The same facts might raise an inference either of gross negligence or of fraud. *Patteson*, J. Is not a bank post bill like a common bill of exchange;—do they differ in point of law? I do not see any distinction.] The case states that bank post bills circulate *as cash*. [*Patteson*, J. They do not circulate after they come to the hands of the branch bank.] They are not cancelled at the branch bank, but are transmitted to London.

(*a*) *Gill* v. *Cubitt*, 5 Dowl. & Ryl. 324, 3 Barn. & Cressw. 466; *Down* v. *Halling*, 6 Dowl. & Ryl. 455, 4 Barn. & Cressw. 330; *Yarborough* v. *The Bank of England*, 16 East, 6; *Snow* v. *Peacock*, 2 Carr. & Payne, 215; *Beckwith* v. *Corrall*, ibid. 261; *Snow* v. *Sadler*, 3 Bingh. 610; *Easley* v. *Crockford*, 10 Bingh. 243.

(*b*) *Ante*, iii. 257; *Backhouse* v. *Harrison*, ibid. 188.

(*c*) 1 Crompt., Mees. & Rosc. 849.

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Wightman, in reply. It may be admitted, with respect to the bank post bill received by *Tugwell* & Co., that the decision in *Hill* v. *Farnell* shews that the plaintiffs are not entitled to recover. [*Patteson*, J. I have some doubt whether there is not a distinction between the purchase of *goods* in the ordinary way of trade, and the purchase of a *bill of exchange*. If there be no distinction, would it not come to this, that any person might discount a bill of exchange for a bankrupt, after he had committed an act of bankruptcy?] There certainly may be a distinction between the two cases. Perhaps the concession made upon this point was premature.

Then as to the other two bills: It is said that this was a *purchase* by *Smallridge*; but the facts of the case shew that *Smallridge* was the messenger or agent of *Norcliffe*. The bank post bill is like an ordinary bill of exchange, and would therefore be payable anywhere. Here, it is presented for payment to the agent. He does not treat the transaction as a purchase, since he gives in gold the exact amount of the bill. If it had been a purchase, there would have been an allowance for interest and commission. *Coles* v. *Wright* (*a*) was an action by assignees, to recover a sum of money under these circumstances:—The bankrupt had been committed to prison, and whilst in prison employed an auctioneer to sell certain goods: the auctioneer sold the goods, and delivered the money produced by the sale to the defendant, to be carried to his brother, the bankrupt, who received it and paid part of it away. The Court held that the defendant was not liable, as he had received the money merely as a messenger and carrier of the money between the auctioneer and the bankrupt, and as such he was not liable, he having paid it over. *Smallridge*, in the present case, acted in the same character as the defendant in *Coles* v. *Wright*, and was merely a *carrier* between the bankrupt and the agent. It cannot be contended that this

(*a*) 4 Taunt. 198.

was a purchase by the agent of the defendants, in his individual character. It was a *payment* by the defendants; and this is evident from the indorsement by *Smallridge* being made to the Governor and Company of the Bank of England. [*Patteson*, J. If the agent had attempted to put it into circulation, he must have indorsed it for the Governor and Company of the Bank of England. *Maule*. He might have struck out the indorsement (*a*).]

Then it is said that sufficient *notice* was not given of *Norcliffe's* being a bankrupt. It is sufficient to give notice of such facts as constitute an act of bankruptcy. On the 16th of March, the Bank were informed that *Norcliffe* had absconded from his creditors, and on the 8th of April they were told not only that *Norcliffe* had absconded with the bills, but also that the necessary documents for a fiat in bankruptcy were expected by every post.

But then it is urged, that notice to the Bank in London was not sufficient. Suppose a private firm had two places of business, and that a notice of this description was given at one;—would it avail to say that the transaction occurred at the place where no notice was given? [*Littledale*, J. It would be highly inconvenient if the Bank of England were obliged to give notice to all their branch banks.] It is an inconvenience attendant upon an extension of their business, from which they derive great profit. It would be much more inconvenient for the *public* to be obliged to give notice to all the branch banks.

If the Court determine that the Bank of England are entitled to have a reasonable period of time to give notice to their branch banks, of the stoppage of a bill, before they are to be considered liable for paying it, there was in this case sufficient time for that purpose.

Cur. adv. vult.

Lord DENMAN, C. J., in the course of this term, deli-

(*a*) As to which see *Thced* v. *Lovell*, 2 Stra. 1103.

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vered the judgment of the Court, as follows:—This was an action of trover to recover the value of three bank post bills for 500*l.* each, all of which were in the possession of *Norcliffe* at the time when he committed an act of bankruptcy by absconding, on the 12th March, 1833, and all of which he disposed of after that act of bankruptcy, and before the issuing of the fiat, which took place within two months from the act of bankruptcy, viz. on the 18th of April.

On the 16th of March, notice was given to the Bank of England in London, that *Norcliffe* had absconded from his creditors with the bills. And on the 8th of April, further notice was given to the Bank of England in London, that the necessary documents for a fiat in bankruptcy against *Norcliffe* were expected by every post.

One bill was passed by the bankrupt on the 11th April, to Messrs. *Tugwell* & Co., bankers, at Bath, who gave cash for it, and from them it passed through several other hands, and ultimately came to the Bank of England branch bank at Bristol, on the 31st May, 1833. Messrs. *Tugwell* & Co. had no notice of any act of bankruptcy committed by *Norcliffe;* and with respect to the bill passed to them, the only question is, whether the case comes within the 82d section of 6 *Geo.* 4, c. 16, as a payment bonâ fide made to the bankrupt, and therefore valid. Now the cases of *Cash* v. *Young* (*a*) and *Hill* v. *Farnell* (*b*), have established the position, that a purchase of *goods* for ready money, paid at the time, comes within the purview of that section, and we see no reason why the taking of a bank post bill, for which cash is given at the time, should not be equally within it. Messrs. *Tugwell* & Co. therefore acquired a property in the bill, and could pass the same to others. It follows, that the plaintiffs cannot maintain this action as to that bill, and indeed that point seems to have been conceded in the course of the argument.

(*a*) 3 Dowl. & Ryl. 652; 2 Barn. & Cressw. 413.
(*b*) 9 Barn. & Cressw. 45.

The other two bills were delivered by *Norcliffe*, indorsed in blank, to Mr. *Smallridge*, at Gloucester, on the 12th of April, in order that he might obtain cash for them from the branch bank at Gloucester. *Smallridge* being acquainted with the agent there, obtained cash for the bills from the branch bank, and by his direction indorsed the bills "Pay the Governor and Company of the Bank of England, *J. Smallridge.*" *Smallridge*, however, was merely *agent* for *Norcliffe*, to whom he immediately handed over the cash, and had no interest of any kind in the bills. He had no notice of any act of bankruptcy committed by *Norcliffe*, nor had the agent at Gloucester.

It is contended, and we think rightly, that these bills were not presented for *payment* to the branch bank; for though the 7 *Geo.* 4, c. 46, s. 15, requires that bank post bills issued by the branch banks shall be payable there as well as in London, yet the *converse* is not enacted; and bank post bills issued in London are not payable at the branch banks. They were presented as they might have been to any other bankers, asking for change. Still the question is, *to whom* were they presented and delivered at Gloucester? And the answer is undeniable, that they were presented and delivered to the Bank of England, (the defendants,) at Gloucester, not to the individual who was their agent there, as an individual. The Bank of England carry on business at Gloucester by the agent, who, in the terms of 7 *Geo.* 4, c. 46, s. 16, was carrying on the banking business there for and on behalf of the said Governor and Company. The money paid for the bills was the money of the Bank of England, and the bills were indorsed to the Bank of England. The transaction at Gloucester took place therefore between the defendants by *their* agent on the one hand, and *Norcliffe* by *his* agent (*Smallridge*) on the other. Without the aid of the 82d section of the Bankrupt Act (*a*), no property in the bills would pass to the defendants from *Norcliffe*, on account of the previous act

(*a*) 6 *Geo.* 4, c. 16.

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of bankruptcy, and the payments by the defendants to him, whether made by way of purchase of the bills, or by way of discharging their liability as acceptors, can only be protected under the 82d section, provided they had *no notice* of any act of bankruptcy committed by him.

This reduces the case to the question, what was the effect of the notices given to the Bank of England in London? We are clearly of opinion that those notices, taken together, (even if any doubt could be raised as to the first,) amount to notice of an act of bankruptcy committed by *Norcliffe*. The general rule of law is, that notice to the principal is notice to all his agents; *Mayhew* v. *Eames* (*a*);— at any rate, if there be reasonable time (as there was here) for the principal to communicate that notice to his agents, before the event which raises the question happens. We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere, whatever notices they may receive; but considering that direct notice was in this case given to the defendants themselves, of the bankruptcy of the holder of the bills, we steer clear of the doctrine (lately much disputed (*b*)) of negligence or imprudence in the party receiving negotiable instruments for consideration, and without fraud. The argument ab inconvenienti is seldom entitled to much weight in deciding legal questions; and if it were, other inconveniences of a more serious nature would obviously grow out of a different decision.

For these reasons, we are of opinion that the plaintiffs are entitled to recover the value of two of the bills in question, but not of the third.

Verdict reduced to 1000*l*.

(*a*) 5 Dowl. & Ryl. 484; 3 Barn. & Cressw. 601.

(*b*) *Vide Backhouse* v. *Harrison*, *ante*, iii. 188, and *Crook* v. *Jadis*, ibid. 257.

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SHERIFF, Gent. one &c. *v.* Dame MARIA ELIZABETH GRESLEY.

THE plaintiff, an attorney, having delivered his bill of costs, *Gaselee*, J., on 23d May last, made an order for taxation, which at the same time he suspended for 10 days. On 7th June the plaintiff obtained a rule nisi in the Common Pleas for setting aside the order; which rule was discharged on 17th June. On 19th June, no appointment for taxation having been yet obtained, the plaintiff issued a capias against the defendant, for 800*l.* and upwards; under which she was arrested on the 23d. The defendant applied to *Patteson*, J., at chambers, to be discharged from the arrest. The plaintiff admitted that the arrest was for his demand on the bill of costs, but contended that the arrest was regular, and relied upon *Steventon* v. *Watson*(*a*). *Patteson*, J., however, ordered the discharge with costs. The defendant commenced an action against the plaintiff for the arrest.

An attorney cannot commence an action for his costs after an order obtained to tax his bill, until the taxation is completed, or the order is waived.

The omitting for three days to obtain an appointment for taxation is no waiver of such order.

The Court will not, unless a strong case be made out, review the decision of a judge at chambers, as to costs.

Knowles having obtained a rule nisi to set aside the order of *Patteson*, J., or so much of it as required the plaintiff to pay costs,

Whateley now showed cause. The order for taxation is made under 2 *Geo.* 2, c. 23 s. 23, which expressly provides, that pending the reference and taxation, no action shall be commenced or prosecuted touching the attorney's demand upon the bill so referred. *Steventon* v. *Watson* was considered by Mr. Justice *Patteson* as not law; and obviously it cannot be law. It is in direct contradiction of the statute, which does not appear to have been under the notice of the Court. In *Hewitt* v. *Bellott*(*b*), it appears to have been assumed by both the counsel and the Court, that an action could not be commenced upon the attorney's demand until the taxation was at an end. It is impossible to say that this case is not directly within the prohibition in

(*a*) 1 Bos. & Pul. 365. (*b*) 2 Barn. & Ald. 745.

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the statute. It is an action commenced, pending the reference and taxation.

Knowles, contrà. *Steventon* v. *Watson* has never been overruled, and is good law. The right to bring an action upon any demand which a party may have against another, is a common-law right, which cannot be taken away except by the clear words of an act of parliament. The words of the enactment which has been relied on here do not amount to a clear and positive enactment. In *Steventon* v. *Watson* the act of parliament must have been considered. *Le Blanc*, Serjt. must have moved upon the statute, as otherwise there could have been no ground for the application. But further, it was the duty of the party who obtained the order, to have obtained an appointment for taxation immediately. Here was three days neglect to proceed with the taxation. [Lord *Denman*, C. J. We should require a very strong case to make us think that an abstinence for three days was a *waiver*.] It is understood to be the established practice to get an appointment immediately. Were the party not bound to proceed immediately, he might delay the attorney's claim indefinitely. [*Patteson* J. Why may not the attorney get an appointment? The act of parliament contemplates that in case of the party's not following up the order, the attorney may get an appointment ex parte.] It is a proceeding *adverse* to the attorney: It cannot be expected that an attorney should proceed ex parte to taxation. By analogy to the ordinary cases of orders, a neglect to proceed immediately is a waiver. If a party obtains a summons and an order thereon, a delay of a single day is a waiver of the order (*a*).

But it is hoped that the Court will at all events so modify the order of *Patteson*, J., as to relieve the plaintiff from costs, and prevent the defendant from proceeding in any action for the arrest. He acted upon a decision, which has never been over-ruled, and ought not therefore to be

(*a*) *Vide Macdougall* v. *Nicholls*, *ante*, 366.

mulcted in costs. It is undoubtedly settled that a judge at chambers has power to grant costs, but it is also settled that the power ought only to be exercised in extreme cases; *In the matter of Bridge and Wright* (*a*). This can hardly be said to be an extreme case.

Lord DENMAN, C. J.—Immediately after the Court of Common Pleas had made an end of his own suspension of the order for taxation, the plaintiff arrests the defendant for the demand upon his bill. The case, therefore, is not precisely analogous to *Steventon* v. *Watson*. The question, however, is, whether that case is or is not law. I think that it in terms contravenes the act of parliament, and therefore of course it is not law. That being so, this rule must be discharged, as far as it is for setting aside the order for discharging the defendant out of custody. With regard to the costs, I must say that I think that we cannot relieve the plaintiff from costs. The Court would be extremely unwilling to review the decision of the learned judge as to costs. There certainly is not a sufficient case made out. I think, however, that it should be made a term of giving the defendant the costs of this rule, that the action which has been commenced by the defendant shall not be proceeded with, nor any other action commenced by her in respect of this arrest.

PATTESON, J.—In *Steventon* v. *Watson* the Court proceeded, not upon the act of parliament, but upon a notion that the application was for an attachment, and that they could not grant an attachment for a contempt in another Court. When this rule was granted we were under a misapprehension of the facts as to the extent of the delay.

Rule discharged with costs, the defendant undertaking to discontinue the action already commenced, and to bring no other action.

(*a*) *Ante*, iv. 5.

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The KING *v.* The Archdeacon of MIDDLESEX and another.

Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be sworn in, *admitt*: (c)

Held, that the ordinary is bound to swear in churchwardens-elect immediately upon their applying to be sworn in (*d*), notwithstanding an usage not to swear in until the first visitation after Easter.

A RULE had been obtained for a mandamus to be directed to Dr. *Potts*, the archdeacon of the archdeaconry of Middlesex, and Dr. *Phillimore*, his surrogate, to admit *James Haywood* and *Robert Taylor* as churchwardens, and *Michael Staunton*, *Richard Cobbett*, the younger, *Benjamin James*, and *William Henry Clark*, as sidesmen (*a*) of the parish of St. Martin's in the Fields, for the year ensuing.

The application was made under the following circumstances:—On the 20th of April, 1835, a vestry meeting was held for the purpose of electing churchwardens and sidesmen for the parish. The election being contested by two parties, a poll was demanded and taken, and a scrutiny was afterwards demanded. Scrutineers were appointed by each party. Those appointed by one party objected to the reception of a plurality of votes, which the chairman had received, and which the other scrutineers contended that certain of the voters were entitled to under 58 *Geo.* 3, c. 69, sect. 3 (*b*). By allowing such plurality of votes a large majority was given to the parties applying for this mandamus, and a report was made to that effect by the scrutineers appointed by their party; but the other scrutineers refused to sign the report. On the 27th April the present applicants attended at the chambers of Dr. *Phillimore*, at Doctors'

(*a*) For the nature of this office, and for the origin of the term sidesmen or *synodsmen*, see Burn's Eccl. Law, *tit.* Churchwarden.

(*b*) By sect. 3, "Every inhabitant who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon, or in respect of any annual rent, profit,

(*c*) Or to a mandamus to swear in one of the two sets, &c., containing the usual surmise, that the prosecutors of the mandamus were duly elected, the officer may, at the peril of an action, return that the prosecutor was not duly elected. *Rex* v. *P. Williams*, 3 Mann. & Ryl. 402; 8 Barn. & Cressw. 681; *Anthony* v. *Seger*, 1 Hagg. 10. Such a return could not be quashed for insufficiency: *Rex* v. *P. Williams*, *ubi suprà*. Nor does it appear to be traversable: *ante*, 296, n., 427, n.

(*d*) On the other hand, a churchwarden duly elected may be *required* by the Spiritual Court to take the oath of office before the proper ordinary. *Cooper* v. *Allnutt*, 3 Phillim. 166.

Commons, and applied to be admitted and to take the oaths of their several offices. Dr. *Phillimore*, in answer to this application, said, that he considered that he could not admit the parties until the annual visitation, which would take place on the 9th of May. He also stated that it was customary in the archdeaconry of Middlesex, for the churchwardens and sidesmen to wait for admission until the annual visitation next after Easter; but that the custom had been departed from, and the parties admitted immediately after their election (*a*),

or value not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in respect of any annual rent or rents, profits, or value, amounting to 50*l.* or upwards, (whether in one or in more than one sum or charge), shall have and be entitled to give one vote for every 25*l.* of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so, nevertheless, that no inhabitant shall be entitled to give more than six votes; and in case where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge."

(*a*) By the 90th canon of 1603, churchwardens are to be chosen in Easter week, (1 Gibs. Cod. first edition, 242). The 118th canon requires the swearing in to be in the first week after Easter, *or some week following, according to the direction of the ordinary*, (Ibid. 243).

The 140th canon of 1603 declares, that "whosoever shall affirm that no manner of person, either of the clergy or laity, not being themselves particularly assembled in the sacred synod, are to be subject to the decrees thereof, in causes ecclesiastical (made and ratified by the king's majesty's supreme authority), as not having given their voice unto them; let him be excommunicated, and not restored until he repent and publicly revoke this his wicked error." (2 Gibs. Cod. 474.) Notwithstanding this denunciation, it has been questioned how far these canons are binding upon the laity even in matters ecclesiastical. See *Grove* v. Dr. *Elliot*, 2 Vent. 41; *Hill* v. *Good*, Vaugh. 302; *Middleton* v. *Croft*, 2 Stra. 1056; *S. C.* Cas. temp. Hardw. 57, 326, 395, and 4 Vin. Abr. 320, pl. 14, from MS.; Com. Dig. *tit.* Canons (C). And see *Caudrey's* case, 5 Co. Rep. i—xxxii b; Cases of Convocations, 12 Co. Rep. 72; 2 Inst. 653, 8; *Bird* v. *Smith*, Fra. Moore, 781, 783, third point; *Matthew* v. *Burdett*, 2 Salk. 412; 2 Gibs. Cod. 974, 984; Wats. C. L. 23, 24; *post*, 497 (*a*).

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upon the surrogate's being satisfied that a case of emergency had arisen to justify such a course. The parties intimated that they intended to apply for a mandamus, which Dr. *Phillimore* stated he would very readily obey.

Campbell, A. G. now shewed cause. It is admitted that where two parties have made out a colourable title to the office of churchwarden, the ecclesiastical authority is bound to admit and swear in both parties. Before, however, the Court grants a mandamus, it will see that there has been a direct refusal to do the act which by the proposed mandamus is to be commanded to be done. In the present instance there has been no direct refusal to administer the oath to the parties.

The application to Dr. *Phillimore* was premature. The practice of the archdeaconry of Middlesex is, for the churchwardens-elect to be admitted and sworn in by the surrogate, upon the first visitation which takes place after Easter, and for the former churchwardens to remain in office until that period.

The application was irregular, being made to Dr. *Phillimore* at his chambers, and not to him while acting in his official character of surrogate. It does not appear that any application was made on the 9th of May, which was the day on which the applicants were informed by Dr. *Phillimore* that they might be admitted.

Sir *W. Follett* (with whom was *Steer*) in support of the rule. No good reason for not admitting and swearing in the parties on the 27th of April has been shewn. There was a direct refusal on the part of Dr. *Phillimore* to admit and swear in.

The usage which has been mentioned is not a custom in the legal sense. If it is to be considered as a custom, it is one which cannot be supported. Churchwardens are, by statute (*a*), to be elected on Easter Monday, and they have

(*a*) By 43 *Eliz.* c. 2. the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought

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a right to be sworn in immediately upon election. The practice undoubtedly is, for the churchwardens to be sworn in by the surrogate of the archdeacon, but the place is immaterial. They may be sworn in at the surrogate's chambers or any where else.

Dr. *Phillimore*'s answer amounted to a *refusal* to swear the parties in on the day on which the application was made. He had no right to require them to wait until the day of the visitation. (Here he was stopped by the Court.)

Lord DENMAN, C. J.—It is to be lamented that the surrogate did not swear in the parties when they applied to him for that purpose. That which he said amounted to a refusal. His answer amounts to this, "I will not admit you now, because it is customary in the archdeaconry of Middlesex, to swear in the churchwardens upon the first visitation day, which will be on the 9th of May." The churchwardens had a right to be admitted when they applied. This rule must therefore be made absolute.

It is clear, according to the old practice, that where there are two sets of parties who have each a colourable title to the office of churchwarden, both sets must be sworn in.

The other judges concurred.

Rule absolute (*a*).

meet, to be nominated yearly in Easter week, or within one month after Easter, under the hand &c., shall be called overseers of the poor of the same parish. This statute requires the *supplementary* overseers,—those whom it *associates* with the churchwardens,—to be elected within one month after Easter; but seems to treat the churchwardens themselves as persons already in office. And see *ante*, 495 (*a*).

(*a*) The form of the oath to be administered is, "You shall swear truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge, present such things and persons as, to your knowledge, are presentable by the laws ecclesiastical of this realm." Gibs. Cod. 216. Where the ordinary knows that the party applying to be sworn in has no legal title, it seems to be less objectionable to return non debito modo electus to a mandamus, (*vide ante*, 494, (*a*)), than to administer an oath under circumstances which render it idle and inoperative.

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The KING *v.* The NOTTINGHAM OLD WATERWORKS COMPANY.

Where a statute provides that a Waterworks Company shall make compensation for damage done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured be not within the line.

And *semble*, that the act would protect the company from any action at law for the injury.

SIR *WILLIAM FOLLETT*, in last Easter term, obtained a rule nisi for a mandamus to the Company of the Proprietors of the Old Nottingham Waterworks, commanding them to issue a warrant for the summoning of a jury to be impanelled according to the directions of 7 & 8 *Geo.* 4, c. lxxxii, "For more effectually supplying with water the inhabitants of the town and county of the town of Nottingham, and the neighbourhood thereof," to assess the damages sustained by *Sarah Turner* in her lands, &c. by reason and in consequence of certain works done and erected by the said Company in the execution of certain of the powers of the said statute. This rule was obtained upon affidavits which stated the following facts:

Mrs. *Turner* is tenant for life of a water-mill on the river Leen, at Lenton, Nottinghamshire. Before the act the Company possessed certain works for raising water at a point below Mrs. *Turner*'s mill, and had there erected a weir across the river. After the passing of the act the Company erected their works 100 yards higher up the river, where also they erected a new and a higher weir, which penned back the water upon Mrs. *Turner*'s mill, whereby the power, and consequently the value, of the mill was greatly diminished. Applications to the Company for a removal of the weir, or for compensation for the injury sustained by her, were made by Mrs. *Turner*, and afterwards by her attorney, but without effect. A notice, requiring the Company to make compensation according to the provisions of the act, or to issue their warrant for the summoning of a jury for the purpose of assessing such damages, was served in November last; but the Company neither tendered compensation nor issued their warrant as required.

Affidavits in answer stated that the new weir is one mile and a half below the mill, and is erected for the purpose of

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turning the water of the river to work the water wheel which raises the water brought from certain springs mentioned in the act, to a higher level, for the supply of the inhabitants of Nottingham.

The act of 7 & 8 *Geo.* 4,—after reciting that the inhabitants of Nottingham had long been supplied with water from the river Leen, by means of works constructed at the expense of the proprietors of such works, that through the increase of manufactures, &c., the water of the river had become impure, and that it was desirable that Nottingham and some of the neighbouring parishes should be regularly supplied with water from certain springs in the parish of *Basford*,—incorporated the proprietors of the old works for completing &c., the waterworks &c., thereby authorized to be done, constructed &c., by the name of "The Company of Proprietors of the Nottingham Old Waterworks."

Sect. 2 enacted, that it should and might be lawful to and for the Company to continue, make, maintain, complete, sink, lay down, fix, and keep waterworks, houses and other buildings, reservoirs, cisterns, tanks, aqueducts, *weirs* &c., in or near the several parishes there named, of which *Lenton* was one; and from time to time to regulate, conduct, continue, cleanse, open, widen, enlarge, alter, amend, and use the same, and to discontinue the same, and make and maintain other works of the like or a different nature and sorts, as the said Company should think fit and proper, subject to the restriction thereafter contained. And the Company were authorized to enter lands &c., mentioned and specified in the plans and books of reference, and to ascertain and set out such parts thereof as they should think necessary and proper for continuing, making &c., and using the said waterworks, reservoirs &c., and all other such works, matters and conveniences as they should think necessary for effecting the purposes aforesaid; and also to construct, erect, do, and perform all other matters and things which should be deemed necessary and convenient, for the making, completing, improving and continuing the said waterworks, and

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for conveying and bringing a sufficient supply of water to and through the several streets &c., in Nottingham, and the parishes or townships of Basford, Radford, and Lenton; and they were empowered to supply the waterworks with water from certain springs in Basford parish; they doing as little damage as might be in the execution of the powers thereby granted, and making full satisfaction, in manner thereinafter mentioned, to the owners and proprietors of, and all persons interested in any lands &c., which should be taken, used, removed, diverted, or injured, for all damage to be by them sustained, in or by the execution of all or any of the powers thereby granted.

Sect. 3 recited, that maps or plans describing the sites of the springs, and the several intended reservoirs and line of pipes and other works, and the lands or places upon or through which the same were respectively made or built, or were intended to be carried, together with a book of reference containing a list of the names of the owners, that respectively had been deposited with the clerks of the peace of Nottingham and of Nottinghamshire; and then the section enacted, that the maps &c., should remain in the same custody, and be open to inspection, and that copies should be given on certain terms; and that the Company, in making such reservoirs, aqueducts, conduits, and other works, and laying such pipes as aforesaid, should not deviate from the line described in the maps or plans.

Sect. 4, empowered the Company to purchase, and bodies politic &c., to sell and convey lands &c.

Sect. 7 enacted, that the owners and occupiers of lands, springs, &c., through, in or upon, over or under which the works thereby authorized were, or were intended to be made or laid, might receive satisfaction for the value of such land &c., and for the damages to be sustained in making and completing the said works, in such gross sums as might be agreed upon; and in case of disagreement as to the amount or value of such satisfaction, the same should be assessed by a jury.

Sect. 8 contained the usual provisions with respect to the summoning &c., of a jury, who were to give a verdict for the sums to be paid for such lands &c., to be taken or made use of for the purposes of the act, and also a separate and distinct sum for compensation for damages which had or should be occasioned to the owners &c., of such lands &c., for or by reason of the severing or dividing the same from other lands &c., belonging to them, or by reason of the making &c., the works, or by reason of the execution of any of the powers given to the Company.

Sect. 15 enacted, that if at any time thereafter any person should sustain any damage in his lands, tenements &c., by reason of the execution of any of the powers of that act, and for which a compensation was not thereinbefore provided, then, and in every such case, such damages should be assessed by a jury as before directed with respect to such damages &c., as were thereinbefore provided for.

The mill of Mrs. *Turner* was not mentioned in the schedule, or book of reference, or marked in the maps or plans; nor was the old weir so mentioned or marked; but the part of the river Leen, which runs through the parish of Lenton, was delineated in the maps or plans.

M. D. Hill and *Humfrey* shewed cause, and contended that Mrs. *Turner*'s remedy was by action at law, and not under either of the compensation clauses of the local act; that those clauses applied only to cases where injury was done in the execution of the *compulsory* powers of the act, and that the injury done to Mrs. *Turner*'s mill was not an injury so caused, for that neither the mill nor the weir were entered in the schedule, the map or plan, or the book of reference, in relation to property pointed out, in which alone they contended that the compulsory powers were given to the Company. *Rex* v. *The Hungerford Market Company*, (*Ex parte Yeates*) (*a*), and *Scales* v. *Pickering* (*b*), were relied on.

(*a*) *Ante*, ii. p. 340; 1 Adol. & Ellis, 668.

(*b*) 4 Bingh. 448; 1 Moore & Payne, 195.

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Sir *W. Follett* contrà, contended, that the statute would be an answer to any action brought by Mrs. *Turner*; that section 15 extended to *consequential* injury occasioned to any individuals through the execution of any of the powers of the act; that the Company were authorized to make or alter weirs, provided they did not deviate from the line marked in the map or plan, and that the river Leen, and consequently the weir, was within the map or plan; and that it was not necessary that Mrs. *Turner*'s mill should be within the plan &c., or any of them, as the Company did not claim a right to purchase or take the mill for the purposes of the act.

Lord DENMAN, C. J.—It seems to me that the act by which the injury is caused in this case, is directly within the powers of the act. The statute might, I think, be pleaded to any action brought by Mrs. *Turner*. This is precisely the case which the 15th section appears to contemplate.

PATTESON, J.—The words of the second section are large. The Company are thereby authorized to continue and make weirs in the several parishes there named, and of which Lenton is one. That being so, I think this case is within the 15th section of the act.

WILLIAMS, J.—I am entirely of the same opinion. There is no doubt that this weir is within the district in which the Company are empowered to erect weirs. I think that the clause regarding the plan does not apply; and if it did, it would be sufficient that the *river* is in that plan. Were we to refer Mrs. *Turner* to the ordinary remedies by action, we should drive her to a nonsuit.

COLERIDGE, J.—In the very nature of things, it is not to be expected that the cases to which this clause applies, can be within the clause relating to the plan &c.

Rule absolute.

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The KING *v.* The Justices of SUFFOLK.

A Rule nisi had been obtained for a mandamus, commanding the justices to enter continuances, and hear the appeal of the overseers of Manningtree against an order for the removal of a pauper from the parish of St. Margaret, in Ipswich, to Manningtree.

The affidavits disclosed these facts:

17th Sept. 1835, the order of removal was made, a copy of which, together with a copy of the examinations and a notice of chargeability, was on the following day transmitted to the overseers of Manningtree.

9th October, the overseers of Manningtree sent to the officers of the removing parish a notice of appeal for the next General Quarter Sessions to be holden *for the borough of Ipswich*, accompanied with a statement of the grounds of appeal.

13th October, the overseers of Manningtree, discovering that they had erroneously given notice of appeal for the *borough* sessions, sent to the officers of the removing parish a notice of appeal for the next General Quarter Sessions to be holden for the county of Suffolk, and referred to the statement of the grounds of appeal, sent with the former notice.

By the practice and rules of the Suffolk Quarter Sessions, eight days' notice of appeal is sufficient.

23d October, the county sessions commenced; and the justices, considering that notwithstanding the practice of the sessions, notice of appeal ought, under the Poor Law Amendment Act (*a*), to have been given within twenty-one

(*a*) 4 & 5 *Will.* 4, c. 76.

Under 79th section of the Poor Law Amendment Act, notice of appeal against an order of removal need not be given within twenty-one days from the time of sending the notice of chargeability and the copies of the order and examination to the overseers of the parish charged by such order.

Held, that the practice as to notices of appeal not being expressly altered by the act, remains as before, although, by sect. 81, the statement of the grounds of appeal is required to be delivered with such notice, or at least fourteen days before the sessions; and therefore where, by the practice of the sessions, eight days' notice only is required, a notice of appeal, given eight days before the sessions, is sufficient, provided such statement of the grounds of appeal be delivered fourteen days before the sessions; at least where the delivery of such statement is accompanied with the service of a notice of appeal *de facto*, although such notice be erroneous, as purporting to be given for the *borough*, instead of the *county* sessions.

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days from the time of sending the notice of chargeability, &c., and that the notice of 9th October was a nullity, refused to hear the appeal.

Biggs Andrews shewed cause. It will probably be contended that the notice of appeal to the *borough* sessions was a sufficient notice, and *Rex* v. *Justices of Carmarthen* (*a*) will probably be cited in support of that argument. The notice of appeal to the borough sessions in this case is, however, clearly erroneous in itself, and cannot be considered as tantamount to a notice of an intention to appeal to the county sessions; and *Rex* v. *Carmarthen* is manifestly distinguishable. The notice of 13th October was too late. Notice of appeal ought, since the passing of the Poor Law Amendment Act, to be given within twenty-one days from the time of sending the notice of chargeability, &c. Sect. 79 of that statute enacts, that no poor person shall be removed under any order of removal until twenty-one days after a notice in writing of his being chargeable or relieved, accompanied by a copy or counterpart of the order of removal, and by a copy of the examination upon which such order was made, shall have been sent by the overseers of the parish obtaining such order to the overseers of the parish to whom such order shall be directed. Then there is a proviso that if the last-mentioned overseers shall agree to submit to such order, and to receive the pauper, it shall be lawful to remove him, although the twenty-one days shall not have elapsed; and a further proviso is, that if notice of appeal against such order of removal shall be received by the overseers of the removing parish within the twenty-one days, it shall not be lawful to remove the pauper until after the time for prosecuting such appeal shall have expired, or in case such appeal shall be duly prosecuted, until after its final determination. The main object of this enactment appears clearly to be to prevent

First point: Whether notice of appeal must be given within twenty-one days after notice of chargeability.

4 & 5 *W.* 4, c. 76, s. 79.

(*a*) 4 Barn. & Ald. 291.

the pauper from being removed whilst his settlement is in litigation; and unless the Court hold that no appeal can be prosecuted unless notice be given within twenty-one days, the section will, virtually, be almost repealed. There are four cases in which the legislature intend that the parish obtaining the order shall have power actually to remove the pauper; viz.—1st, where the twenty-one days have elapsed without any notice of appeal having been received by the removing parish; 2dly, where the overseers of the parish charged by the order agree at once to submit to the order; 3dly, where, notwithstanding notice within the twenty-one days, no appeal is prosecuted in due time; and 4thly, where the appeal is determined against the appellants. In each of the last three cases, it is quite clear that the settlement of the pauper is no longer capable of being litigated; and it is submitted that the legislature clearly contemplated putting the only remaining case on precisely the same footing as regards the completion of the right of removal in the one parish,—right of actual removal being concurrent with the extinction of the right of litigating the settlement in the other. The twenty-one days allowed give abundant time for determining upon the propriety of appealing against the order. Unless the notice is required to be given within the twenty-one days, the ordinary course will probably be for the parish charged by the order to take no notice of the order, until executed by actual removal, in the hope of procuring from the pauper evidence of his being settled elsewhere. An appeal against an order of removal is always to the quarter sessions of the county in which the removing parish is situate; a circumstance which, in some cases, may make the removal of the pauper, whilst a right of appeal remains in existence, highly inconvenient. As long as the right to appeal continues, the order of removal is of course liable to be quashed; and if it be quashed, the actual removal will have caused a useless expenditure of the parochial funds. Upon the 79th section the intention of the legislature is abundantly clear,

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but if the 80th and 81st sections be taken in conjunction with the 79th, the intention becomes even far more manifest. By the 80th section the overseers of the parish, giving *such notice of appeal*, have the right of free access to the pauper for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual examination of the pauper that he should be taken out of the removing parish, such overseers are to be permitted to remove him therefrom (at the expense of the parish charged by the order) for the time that may be necessary for that purpose. This section also clearly contemplates that the pauper is in no case to be removed until after the right of appeal is gone, and that all notices of appeal are to be given within the twenty-one days. The 81st section enacts, that in every case where notice of appeal against such order shall be given, the overseers of the appellant parish shall, *with such notice*, or fourteen days at least before the first day of the sessions to which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of *such* appeal, unless such notice and statement shall have been given as aforesaid. In various parts of this section there are words of reference, which shew that the notice mentioned is such a notice as is spoken of in section 79, and that the appeal contemplated is an appeal entered in pursuance of such notice. The overseers of the appellant parish are not to be heard *unless such notice shall have been given as aforesaid*. It seems to be impossible to give any other meaning to these words than this,—that no appeal shall be entertained unless such a notice as is mentioned in the 79th section has been given.

Sect. 80.

Sect. 81.

Second point: Whether fourteen days' notice of appeal required.

But, supposing that the Court should be of opinion that the notice need not be within the twenty-one days, still a notice, given on the 13th October, of an intention to appeal to the sessions commencing on the 23d of that month,

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is too late. The 81st section requires that a statement of the grounds of appeal shall be given with the notice *fourteen days at least* before the first day of the sessions at which the appeal is intended to be tried. Here the *notice* was only ten days before the sessions. [Lord *Denman*, C. J. If the notice on the 9th of October is sufficient, there was a notice fourteen days before the sessions.] But that notice was erroneous. [Lord *Denman*, C. J. The mistake in the notice of appeal does not affect the statement of the grounds of appeal, delivered at the same time with such notice, under this act of parliament, unless you were misled by it.] The removing parish may have known that there could be no appeal to the borough sessions; but they may also have been in error upon the subject. [*Coleridge*, J. I do not see how the 81st section helps you. The appellants, by delivering the *statement* of the grounds of appeal fourteen days before the sessions, have in terms complied with the enactment in that section.] It is to be inferred from that section that the *notice* must also be at least fourteen days before the sessions; for otherwise the statement of the grounds of appeal may *precede* the notice of appeal. [*Patteson*, J. Which certainly seems absurd.] According to the argument which will be pressed contrà, the notice of appeal will be sufficiently early if given *eight* days before the sessions, although the statement of the grounds of the intended appeal must be given at least *fourteen* days before the sessions. The notice of appeal ought, of course, either to precede the statement of grounds or to accompany it.

Thesiger, contrà. The first notice was sufficient for the purpose for which it was required. It is quite clear that the appeal could not lie to the *borough* sessions. The 3 *Will. & Mary*, c. 11, gives the appeal against any order of removal to the next general quarter sessions of the peace to be held for the county, riding, city, town corporate, or liberty, from which the pauper was removed. The 8 & 9 *Will.* 3, c. 30, gives the appeal to the general or quarter

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sessions of the peace for the *county, division or riding*, wherein the parish, township or place, whence the pauper shall be removed, doth lie, and not elsewhere, any former law or statute to the contrary thereof notwithstanding. The overseers of the removing parish must have known by this notice that it was intended to enter an appeal at the next quarter sessions for the county, that is to say, at the next quarter sessions at which such appeal *could* be entered. In *Rex* v. *Justices of Carmarthen* (*a*) an order of removal was made by two justices of Carmarthen, which is a county of itself, having (by charter) general sessions twice a year, and not quarter sessions. A notice of appeal, stating an intention to appeal to the next *quarter* sessions of the borough of Carmarthen having been given, it was held that the justices at the next *general* sessions were bound to receive the appeal. The notice in the present case is, for all the purposes for which the notice is required, as good as if the error in question had not existed.

But, supposing the notice of 9th October not to be a valid notice, that on the 13th is in every respect unobjectionable. The act of 13 & 14 *Car.* 2, c. 12, s. 2, gives all persons aggrieved by any order of removal an unconditional right to appeal to the sessions. A statutory right, such as this, cannot be limited except by express enactment; and however open the act of 4 & 5 *Will.* 4, c. 76, may be to speculation as to the intention of the legislature with respect to notices of appeal, there is no enactment sufficiently express to alter the existing state of the law. (Here he was stopped by the Court.)

Second point.

Lord DENMAN, C. J.—We think that by this act it was not intended to interfere with the practice of the sessions. Such an intention, if it had been entertained, would have been expressed in plain terms. It appears to us, therefore, that the practice as to notices of appeal must stand exactly

(*a*) 4 Barn. & Ald. 291.

as it did before the act passed. The act requires that a statement of the grounds of appeal shall be given with the notice, or at least fourteen days before the commencement of the sessions. It appears to me that this was done on the 9th October, for that though the notice of appeal which accompanied the statement was a notice to the wrong sessions, yet the statement of the grounds of appeal was available to all purposes. As, therefore, the notice was in due time according to the practice of the sessions, and the statement of the grounds of appeal was sufficiently early under the act of parliament, the sessions ought to have entertained the appeal.

PATTESON, J.—The notice on the 9th of October stated the grounds of appeal. That is a compliance with the act. If it be an absurdity that the statement of the grounds of appeal is required to be given earlier than the notice need be given, then it is an absurdity introduced by the act of parliament itself. Second point.

WILLIAMS, J.—The only novelty introduced by the 79th section of the act is,—that the pauper shall not be actually removed within twenty-one days unless with consent, nor, if there be a notice of appeal, within that period, until the time for prosecuting the appeal has expired, or the appeal has been heard and determined. That is the only change effected by that section. First point.

And the novelty introduced by the 81st section is,—that a statement of the grounds of appeal must be sent or delivered to the respondent parish at least fourteen days before the sessions. That has been effectively done here. Whether timely *notice* of appeal was given depends upon the practice of these particular sessions,—which stands as it did before the passing of the Poor Law Amendment Act. Second point.

COLERIDGE, J.—It is admitted that there was no notice within the twenty-one days: therefore if Mr. *Andrews* is First point.

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right in his argument, that the 79th section imperatively requires every notice of appeal to be given within the twenty-one days, the sessions have acted properly in refusing to entertain the appeal. The *words* of the statute do not, in my opinion, require the notice of appeal to be given within the twenty-one days: I think it quite clear that it never was intended to go that length. The mischief intended to be provided against was the immediate removal of paupers. Paupers were de facto removed immediately upon the making of the order of removal, without previous communication with the parish charged by the order, and without giving any time for investigating the grounds of the removal. The intention was only to prevent a removal within twenty-one days. The words of the act are only that the pauper shall not be "removed or removable," &c. It does not say that there shall be no appeal unless a notice of the intention to appeal be given within twenty-one days. If this had been intended, the obvious course would have been to have inserted plain words to that effect.

Second point.

Then, with regard to the 81st section. We are called upon to make a general alteration in the practice of all the Courts of Quarter Sessions in the kingdom, upon the ground of a mere implication arising out of a supposition that some absurdity will be introduced if the practice be not so altered. The section does not say that the *notice* shall be given fourteen days before the sessions, or at any particular time. I think that the obvious meaning of the act is, that where any greater time than fourteen days is required by the sessions for the notice of appeal, then you may deliver the statement of grounds with your notice, or if not, that you should deliver the statement of grounds at least fourteen days before the sessions.

If any practical absurdity does arise out of this enactment, it is one which we cannot remedy.

Rule absolute.

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FRANCIS COOKE ROGERS v. JOHN HUMPHREYS.

REPLEVIN for taking and detaining the plaintiff's goods, on 14th October, 1833. Avowry, for rent. Plea, non tenuit. The case was tried before *Patteson*, J., at the Salop spring assizes, when a verdict was found for the defendant for 150*l.*, the amount of the rent in arrear, subject to the opinion of the Court upon a case stating to the effect following:

24th & 25th September, 1830. By indentures of lease and release, the latter being made between *Elizabeth Rogers*, widow, (tenant for life,) of the first part; *Milward Rogers*, (tenant in tail,) of the second part; *W. H. Rosser*, (tenant to the præcipe for suffering a common recovery,) of the third part; *John Williams*, (demandant in such recovery,) of the fourth part; *John Humphreys*, (the now defendant,) of the fifth part; *Wm. Humphreys* and *John Lloyd* of the sixth part; and *Thomas Lloyd* of the seventh part; after reciting (inter alia) a loan by *John Humphreys* to *Milward Rogers* of 800*l.*, the said *Elizabeth Rogers* and *Milward Rogers* &c. conveyed the locus in quo to *Rosser*, for barring estates tail, and to the intent that *Rosser* might become tenant to the præcipe for suffering a common recovery, wherein the said *John Williams* should be demandant, *Rosser* tenant, and *Milward Rogers* vouchee. And it was thereby agreed that the recovery should enure to the use of *Wm. Humphreys* and *John Lloyd*, their executors &c., for 1000 years, upon trusts &c. thereinafter expressed; By a deed to lead the uses of a recovery, lands are limited to *A.* for 1000 years, and, subject thereto, to *B.* for life, remainder to *C.* for 2000 years, remainder to *D.* for life, remainder to trustees to preserve &c., remainder to the issue of *D.* successively in tail, with the ultimate remainder to the heirs of *D* The trusts of the first term are declared to be, upon non-payment of 800*l.*, lent by *A.* to *D.*, to raise that sum by sale, mortgage, or other disposition. The trusts of the second term are, to repay *B.* for any interest paid by her to *A.*, and to raise a further sum for *B.* Power to *B.* to demise for ten years, or for seven years from her death, to take effect in possession, reserving the best rent &c. *B.* demises, under the power, for seven years from her death to *E.*, reserving rent to *D.* or to the person entitled for the time being to the freehold or inheritance. The lease takes effect as an appointment under the power, in advance of the term for 1000 years.

B. and *D.* die. *A.* may distrain upon *E.* for the accruing rent.

To an avowry by *A.*, *E.* pleads non tenuit. The tenure (if any (*a*)) under *A.*, created by the lease, is not negatived by shewing that *A.* has joined with the issue of *D.* as a co-lessor with them in an action of ejectment against *E.*, which is still pending.

Such tenure could not be affected by the result of such action, *semble*.

(*a*) *Vide post*, 516 (*b*).

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and after the determination of the term, and in the meantime subject thereto to *Elizabeth Rogers* for life: remainder to *Thomas Lloyd*, his executors &c., for 2000 years, from the decease of *Elizabeth Rogers;* remainder, and in the meantime subject thereto, to *Milward Rogers* for life: remainder to trustees to preserve contingent remainders: remainder to the sons of *Milward Rogers* in tail: remainder to his daughters in tail: with divers remainders over, with the ultimate remainder to the right heirs of *Milward Rogers*. And the term of 1000 years was thereby declared to be limited to *Wm. Humphreys* and *John Lloyd*, upon trust, on non-payment by *Milward Rogers* of the 800*l.* and interest, on 25th March then next, to *John Humphreys*, that it should be lawful for *Wm. Humphreys* and *John Lloyd*, by sale, mortgage, or other disposition, at the request of *John Humphreys*, to raise and pay to him the 800*l.* and interest; and as to the term for 2000 years, to raise, by sale &c. all such sums as *Elizabeth Rogers* should during her life pay to *John Humphreys*, on account of interest on the 800*l.*, and also a certain further sum for her; and upon further trust to suffer the person next in remainder, expectant in the term of 1000 years, to receive the residue of the rents and profits, after execution of the trusts thereby declared as to that term. Proviso, that when the trusts of the two terms should be fully executed, and costs of trustees paid, the terms should cease. And it was further declared, that it should be lawful for *Elizabeth Rogers* to demise all or part of the premises, for any term not exceeding ten years from the date of the said indenture of release, or seven years from her death, to take effect *in possession* (*a*), so as

The power.

(*a*) It seems difficult to reconcile this clause with the suggestion that the lease was to be postponed to the term of 1000 years. The power, unless it overreached the term for 1000 years, would be wholly suspended, both at law and in equity, during the continuance of the term,—unless, indeed, the deed to lead the uses could be considered as enabling the donee of the power to create a quite novel species of estate—a lease, equitable, *quoad* the term, and legal, *quoad* the freehold remainders and the reversion.

the best rent should be reserved, without taking any premium, and so as there should be contained in any such lease a condition for re-entry, on non-payment of the rent for thirty days, and proper and usual covenants &c. (*a*). The release also contains covenants for title and for quiet enjoyment (*b*).

M. 1 *Will.* 4. A recovery was suffered accordingly.

17th September, 1831. By indenture of lease between *Elizabeth Rogers* and the plaintiff, after reciting the indentures of 24th and 25th of September, 1830, *Elizabeth Rogers*, by virtue of the power, demised to the plaintiff the premises aforesaid, for the term of seven years, to be computed from the day of her decease, paying unto *Milward Rogers*, or to the person or persons for the time being entitled to the freehold or inheritance, immediately expectant on her decease, the yearly sum of 150*l.*, by half-yearly payments, the first payment to be made six calendar months after her death.

20th November, 1831. *Elizabeth Rogers* died, and the plaintiff entered under the lease, and continued in possession till the distress.

26th June, 1832. *Milward Rogers* died, leaving an infant daughter, *Emma*.

30th July, 1832. *Wm. Humphreys* and *John Lloyd* assigned to the defendant the term of 1000 years, and *Thomas Lloyd* assigned the term of 2000 years to a trustee for the defendant.

October, 1832. The plaintiff paid to *Mary Rogers*, the widow of *Milward Rogers*, 75*l.*, being one half-year's rent due under the lease from the death of *Elizabeth Rogers*; and at Christmas, 1832, the plaintiff tendered to *Mary Rogers* another half-year's rent, which was not accepted.

Michaelmas term, 1832. An ejectment was brought upon

(*a*) These restrictions appear to be introduced for the general benefit of the estate, upon which the mortgage debt is secured; and which could derive no benefit from them, unless the lease sprung up in *advance* of the term.

(*b*) *Vide post*, 520.

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the demises (laid on 16th May, 1832,) of *Emma Rogers* and *Mary Rogers*, and *J. G.* and *W. M.*, the guardians of *Emma Rogers*, and of *Wm. Humphreys* and *John Lloyd*, against the now plaintiff and his tenants, to defeat the lease; in which action the now plaintiff claimed to hold under the lease. This ejectment is still pending.

This case was argued in Hilary term, 1835.

R. V. Richards, for the plaintiff. The defendant was not entitled to distrein for the rent reserved under the lease made to the plaintiff by *Elizabeth Rogers*.

First point: Power of mortgagee to distrein.

The ordinary relation of mortgagor and mortgagee, is not such as to authorize the mortgagee to distrein for rent, under a lease created by the mortgagor subsequently to the mortgage (*a*), unless some act has been done by which the mortgagee and the tenant have acknowledged themselves to stand in the relation of landlord and tenant upon the terms of the lease, or the mortgagee has given notice to the tenant to pay the rent to him; and even when such notice has been given, it is very doubtful whether the mortgagee is not, for want of privity, restricted to suing the tenant for use and occupation; *Moss* v. *Gallimore* (*b*), *Alchorne* v. *Gomme* (*c*), *Pope* v. *Biggs* (*d*). A mortgagee may at any moment, without a previous demand of possession or notice to quit, eject the mortgagor (*e*), or any tenant let into possession by him after the mortgage, unless by giving notice to pay the rent to himself, the mortgagee

(*a*) Sometimes an express power is reserved to the mortgagor to demise the mortgaged premises under certain restrictions. In such cases, the nature of the relation to arise between the mortgagee and the lessee of the mortgagor, will depend upon the mode in which the mortgage is created and the leasing power is reserved. *Vide* 3 Mann. & Ryl. 109, n.

(*b*) 1 Dougl. 279.

(*c*) 2 Bingh. 54; 9 B. Moore, 130.

(*d*) 4 Mann. & Ryl. 193; 9 Barn. & Cressw. 245.

(*e*) Either by action of ejectment, or by an actual entry without action; *Jayson* v. *Rash*, 1 Salk. 209: *Taylor* v. *Cole*, 3 T. R. 292, 296; *Taunton* v. *Costar*, 7 T. R. 431; *Rogers* v. *Pitcher*, 6 Taunt. 202, 207; *Turner* v. *Meymott*, 1 Bingh. 158, and 7 B. Moore, 574; *Girdlestone* v. *Porter*, Woodf. L. & T. 542; Co. Litt. 245 b; 1 Mann. & Ryl. 221 (*c*).

has waived the trespass; *Doe* d. *Fisher* v. *Giles* (*a*), *Doe* d. *Rogers* v. *Cadwallader* (*b*), *Doe* d. *Roby* v. *Maisey* (*c*), *Keech* v. *Hall* (*d*), *Thunder* v. *Belcher* (*e*). Here, at the time of taking the distress, there had been no waiver of the trespass. Under these circumstances, it seems impossible to say that the mortgagee could be entitled to distrein. A man can only distrein by reason of his having the reversion expectant on the estate of the tenant. Here, the mortgagee had no such reversion. In no case has it been held that a mortgagee may distrein upon a tenant let into possession by the mortgagor *subsequently* to the mortgage (*f*).

Second point: Necessity of a reversion in the distreinor.

Looking at the deed of 25th September, 1830, it appears to be impossible that the persons entitled to the term of 1000 years thereby granted, can have power to distrein upon the tenant under the lease of *Elizabeth Rogers*. They could have no reversion expectant on his estate. The estate of the plaintiff is nothing more than an enlargement of the life estate of *E. Rogers*. It is apprehended that the trustees clearly could not have distreined upon *E. Rogers* during her life; for there would have been no relation of landlord and tenant between them. The term of 1000 years, and the life estate, were concurrent estates, carved out of the freehold by the same deed, and therefore the term was not a reversionary estate, which could give the possessors of it a right to distrein. If the termors could not distrein upon *E. Rogers*, neither can they distrein during the enlargement of the estate.

Third point: Rent reserved to freeholder only.

The rent is reserved to *Milward Rogers*, or to the person or persons for the time being entitled to the *freehold or inheritance* of the demised premises, immediately expectant upon the decease of the said *Elizabeth Rogers*. The trustees of the term of 1000 years were not so entitled.

Fourth point: Disaffirmance of the lease by bringing ejectment.

The trustees of the term, by joining in an action of

(*a*) 5 Bingh. 421; 2 Moore & Payne, 749.
(*b*) 2 Barn. & Adol. 473.
(*c*) 3 Mann. & Ryl. 110; 8 Barn. & Cressw. 767.
(*d*) 1 Dougl. 21.
(*e*) 3 East, 449.
(*f*) *Vide ante*, 514 (*a*).

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ejectment against the present plaintiff, declared affirmatively that they elected to treat him as a trespasser, and not as a tenant, and their assignee cannot now distrein.

Fourth point.

Talfourd, Serjt., contrà. The action alluded to, is an ejectment brought by *Emma Rogers*, without the privity of the defendant. It is true, that demises by *Humphreys* and *Lloyd* (who were trustees for the present defendant) were inserted in the declaration as a matter of form, but it does not appear that either the trustees or the defendant had ever heard that such was the fact.

First point.

There is no analogy, with respect to the right to distrein, between the ordinary legal relation of mortgagor and mortgagee, and the case now under consideration (*a*). The question here turns entirely upon the deed of 1830, which creates a peculiar relation between the parties. The leasing power takes precedence of the term of 1000 years, and the trustees of that term are entitled to the immediate reversion (*b*), to which the right of distress is incident. This point was in effect decided in *Doe* v. *Rogers* (*c*), in which an objection, taken by Mr. *Maule*, to the right of the plaintiff to recover against the present defendant, was, that the term of 1000 years was outstanding; but the Court held, on the authority of *Doe* d. *Courtail* v. *Thomas* (*d*), that this objection was not entitled to prevail.

(*a*) As to which, see 3 Mann. & Ryl. 110, n.

(*b*) It seems to have been intended that the lease should spring up in advance of the unexpired portion of the term for 1000 years, and that the rent should be paid to the termors; but as the lease, when executed, would take effect as a limitation originally contained in the deed of 1830, (*post*, 531,) the lessee must *hold* under the chief lord of the fee, and the termors would have, not a reversion, but a remainder; the effect being the same as if the limitation had been originally to the plaintiff for seven years, paying rent to *H.* and *L.*; remainder to *H.* and *L.* for 993 years; in which case the statute would execute the use of the rent in *H.* and *L.* as appointees under the power, Butler, Co. Litt. 271 b, 22d page of note. Such rent, however, would not be a rent-service to support the *general* avowry given by 11 *Geo.* 2, c. 19, s. 22, but a rent-seck, requiring a special avowry under 4 *Geo.* 2, c. 28, s. 5.

(*c*) *Ante*, ii. 550.

(*d*) 4 Mann. & Ryl. 218; 9 Barn. & Cress. 288.

The case is not, however, reported upon that point. In *Doe* v. *Thomas* it appeared that before lease granted, the premises were settled for life on *A.* with power to charge the estate with an annuity for any husband she might marry, and portions for younger children, and power to grant leases for 21 years. *A.* granted, bargained, sold, demised, limited, and appointed the same to trustees for the term of 500 years, upon trust that they should, (if she should by deed so direct and appoint,) by mortgage or sale for the whole or any part of the term of 500 years, raise portions for younger children. It was held, that the term, until called into action, was subservient to the leasing power; and that to an ejectment brought by a lessee, holding under a lease granted subsequently to the deed of settlement, the term of years was no answer. Lord *Tenterden*, C.J. in that case says,—"If we were to hold that the term vested in the trustees was to be the first legal estate, uncontrolled by any other matter, the leasing power would be null and void, because the person in whom the term vested might then at any time turn out the lessees. In order to avoid that inconvenience, and to give effect at the same time to the whole import of the instrument, we must consider the leasing power as controlling and superseding the term, and hold that the term ought not to have effect until the period when the trustees call that term into action." The leasing power given to Mrs. *Rogers* would be of no avail whatever, if the term were to have precedence of the power (*a*). It cannot be doubted, looking at the situation of the parties, that the lease to be granted by Mrs. *Rogers*, was to be the *first* estate, and that the term for 1000 years was to be the next estate. [*Littledale*, J. The term for 1000 years was to secure 800*l.* actually lent. Surely, it cannot have been intended that the leasing power should have precedence of

(*a*) In the common case of a conveyance in strict settlement, where a long term is limited, and then an estate for life, with a power to lease, it appears never to have been doubted that the power, when exercised, overreaches the term; otherwise, as observed here, the power would be nugatory.

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the term.] The best improved rent is to be reserved by the lease; therefore the trustees cannot be in a worse situation than if they were enabled to have the land in possession.

Third point.

Then, with regard to the objection that the trustees of the term of 1000 years were not persons entitled to the *freehold or inheritance* of the demised premises immediately expectant on the decease of *Elizabeth Rogers*, and therefore not entitled under the reservation in the lease,—the lease is made in execution of a power granted by the same deed which creates the term, and therefore the expression must be taken to mean "the persons entitled to such *part* of the freehold and inheritance as constitutes the estate immediately expectant on the life estate." But supposing that this argument is not strictly correct, the law will construe the reservation in favour of the person entitled to the immediate reversion, *Isherwood* v. *Oldknow*(*a*); *Co. Lit.* 47 a.; *Sacheverel* v. *Frogate*(*b*), per Lord *Hale*. The immediate reversion is in the defendant, and as incident to that reversion he has a right to distrein. If the defendant cannot distrein, no power of distress exists, as none but the defendant is entitled to the immediate reversion.

R. V. Richards, in reply. It is believed, that in *Doe* v. *Rogers*, the only point decided was that which is reported, and which was upon the question as to the validity of the execution of the leasing power. It is impossible to say that the term of 1000 years was intended to be postponed to the leasing power. Nothing more seems to be contemplated, than the ordinary case of the legal estate being in the termor, and the other estates being postponed in strict law. The lease contemplates the payment of the rent, not to the trustees, but to *Milward Rogers*, or such other per-

(*a*) 3 Maule & Selw. 382; where it was held that a remainder-man was, within 32 *H.* 8, c. 34, an assignee of a reversion, resulting to a tenant for life, upon the execution under a power of a lease for years, to take effect during his own life. In the present case there seems to have been no reversion of which there *could* be an assignee.

(*b*) 1 Ventr. 161.

sons as should be entitled to the *freehold* and *inheritance*, immediately upon the death of *Elizabeth Rogers*.

Cur. adv. vult.

On a subsequent day Lord DENMAN, C. J. delivered the judgment of the Court. After stating the pleadings his lordship proceeded as follows:—

The substance of the deeds which govern the present case appears to be, that *Elizabeth Rogers* was tenant for life under the marriage settlement of the 6th and 7th January, 1789, with remainder to her eldest son, *Milward Rogers*, in tail.

In 1830 *Milward Rogers* was desirous of raising 800*l.* upon the security of the estate; and to effectuate that, his mother and he suffered a recovery to bar the estate-tail, and the uses of the recovery were declared by the deeds of the 24th and 25th September, 1830, to be, to the use of *William Humphreys* and *John Lloyd* for 1000 years, upon trust, on non-payment by *Milward Rogers* of the said sum of 800*l.* and interest, by sale, mortgage, or other disposition of the premises comprised in the said term of 1000 years, to raise that sum, and pay the same to *John Humphreys*, the avowant: and, subject to this term, to the use of *Elizabeth Rogers* for life: remainder to the use of *Thomas Lloyd* for 2000 years, to commence from the death of *Elizabeth Rogers*, upon certain trusts which are not material to this case: remainder to such uses as *Milward Rogers* should appoint: and in default thereof, to himself for life: remainder to his sons in tail: remainder to his daughters in tail, with the ultimate remainder to his right heirs.

The deed contained a power for *Elizabeth Rogers* to make leases not exceeding ten years from the date of the deed, or for seven years from the day of her death, under certain restrictions.

The deed also contained covenants by *Milward Rogers* with *William Humphreys* and *John Lloyd*, the trustees of

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the term of 1000 years, that on non-payment of the 800*l*., they, their heirs, executors, administrators, and assigns, might enter, and peaceably and quietly have, hold, occupy, possess and enjoy, receive and take the rents, issues, and profits, in manner therein-mentioned, without any lawful let, suit, &c. from or by *Elizabeth Rogers*, or any person lawfully claiming the premises.

On the 17th September, 1831, *Elizabeth Rogers*, by indenture reciting the indentures of 24th and 25th September, 1830, by virtue of the power given to her, demised the premises to the plaintiff for seven years from her death, paying to *Milward Rogers*, or to the person who should be entitled to the freehold or inheritance of the premises immediately expectant on her death, the rent of 150*l*. by half-yearly payments. *Elizabeth Rogers* died on the 20th of November, 1831, leaving children, when the plaintiff took possession under the lease, and continued in possession till the distress was taken. *Milward Rogers* died the 25th June, 1832, leaving a widow and an infant daughter.

On the 30th July, 1832, *William Humphreys* and *Thomas Lloyd* assigned the 1000 years term to *John Humphreys* the avowant.

Many cases were cited at the bar to shew what the rights of a mortgagee are against the mortgagor and those claiming under him, where there is a lease *prior* to the mortgage, and also what they are when there is a lease *subsequent* to the mortgage; which cases it is not necessary to cite or comment upon, as they establish this principle,—that if the mortgagor himself remains in possession, the remedy against him on default in payment at the day is by *ejectment*.

And if there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him, that the mortgagor had, and no other than he had; and his remedy must be on the lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title; but if the lease be *subsequent* to the mortgage, then the mortgagee

may treat the lessee, and all those who may be in possession, as wrong-doers, and may bring an ejectment, but he cannot distrein or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, unless they choose to pay the rent to the mortgagee and he accepts it; in that case a relation of landlord and tenant is created between the mortgagee and the tenant, and the remedy of the mortgagee will depend upon the particular circumstances of each case. No notice is necessary to be given by the mortgagee, that he means to proceed against such tenants where they come in subsequently to the mortgage, because in such case their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary.

But this case differs from all the cases cited, for here the lease is neither *prior* nor *subsequent* to the mortgage, but is in point of law contemporaneous with it; for though the lease is not in fact made until nearly a year after the mortgage, yet as the lease is made under a power, it is referable to the instrument creating the power, and is derived out of it, and has the same effect as if it had been made under the instrument itself (*a*).

It is to be considered, in the first place, whether, being made conformably to the power as to the rent and other requisites, the lease is to be regarded as binding on the trustees of the term for 1000 years, so as that they could not disturb the lessee in the enjoyment of the land; and we have no doubt but it is binding on them. They are parties to the deed under which the lease is authorized to be executed; they assent to it and give it confirmation, and therefore they cannot disturb the lessee; they are not indeed

(*a*) *Vide Ray* v. *Pung*, 5 Barn. & Alders. 561; 5 Madd. 310; *Moreton* v. *Lees*, Sugd. Pow. 5th ed. 350; 5 Mann. & Ryl. 195, note (*c*); *ante*, vol. iii. 491, note (*e*).

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entitled to an estate of *freehold* or *inheritance*, in the technical sense of those terms. We think the reservation is not to be so confined, but that if they are entitled to receive the rents, the reservation was sufficient to give them the legal interest therein, and that the trustees might therefore have distreined for the rent; and that their legal interest being assigned to the defendant, *John Humphreys*, he may do so.

But it is alleged for the plaintiff, that even supposing the defendant had otherwise a right to distrein, he is precluded from doing so by having treated the plaintiff as a trespasser, manifested by the trustees, before the assignment to *John Humphreys*, the defendant, having joined with some of the family of the *Rogerses* in bringing an action of ejectment.

In that action, however, the right of entry is denied by the present plaintiff, the parties are at issue upon it, and the matter is undecided.

There are many cases where the conduct of a party is taken into consideration, where the question is, whether the person against whom he seeks to enforce his claim is to be treated as a person liable *upon a contract* or *as a trespasser*; but here is a *lease*, executed under the seal of the plaintiff, and as long as he continues in possession (*a*), he is liable to the payment of the rent by the usual remedies which the law gives for the recovery of it. If he had been actually *evicted* by a person claiming by title, or if the lessor or those claiming under him, or, in this case, if the trustees under the 1000 years' term, had entered upon the plaintiff, that would have been a good answer to the avowry; but in the present case there is not even a judgment in the ejectment. And there being no eviction, or re-entry, or surrender of the term, the lease is in existence, and there is nothing to prevent the defendant from avowing.

There is a very short abstract of the avowry in the special case; it is not stated for what length of time the claim is made, but it is to be collected from the amount found by the verdict, that it is for a *year*; but this defendant can

(*a*) *Vide ante*, vol. iv. 28, n. (*b*), 29 n.

only claim for *half a year*, for the trustees did not assign to him till after half a year's rent had become due.

Postea to the defendant. (*a*)

(*a*) Elaborate explanatory clauses are sometimes introduced into settlements, to fix the priority of uses arising under powers. (See Butler's Co. Litt. 271, note (1), 19th page of the note; 1 Sanders on Uses, 4th ed. 64.) The decision in the principal case, however, appears to shew that the position which the uses shall take inter se may be safely left to be adjusted by the nature and objects of the powers under which such uses are created.

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ASSUMPSIT for the amount of a deposit paid upon the sale of an estate to the plaintiff, moiety of auction duty, interest, and expenses of investigating the title. Besides the special count, the declaration contained counts for money lent, money paid, money had and received, for interest, and on an account stated. At the trial, the plaintiff obtained a verdict for 85*l.* 16*s.* 8*d.*, being the amount of the deposit and the moiety of auction duty, on the count for money had and received; and the defendant had a verdict upon the other counts. Leave was given to move to increase the damages by adding 30*l.* 11*s.* 2*d.* for the expenses of investigating the title, and 6*l.* 19*s.* 8*d.* for interest; and a rule nisi was afterwards granted accordingly, with leave to the parties to state a special case for the opinion of the Court, upon the question, whether the plaintiff was entitled to have the damages so increased. A special case was accordingly stated, and argued in Hilary term last, when the Court decided against the plaintiff upon the question submitted, and directed a verdict to be entered for the plaintiff

Upon the trial of issues joined upon several counts, the plaintiff recovers on one of the issues with damages, the defendant having a verdict upon the other issues: The plaintiff afterwards, in pursuance of leave reserved, moves to increase the damages by adding certain sums, and a rule being granted, a special case is stated by the parties, in which the question submitted to the Court is, whether the damages ought to be so increased. Upon the argument of the special case, the Court hold, that the damages ought not to be increased, but direct judgment to be entered on another issue, in addition to that on which the verdict was taken. Held, that the defendant was entitled to the costs of the special case.

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on the counts for money had and received, and money paid (*a*), and for the defendant on the other counts. On taxation, the master allowed the costs of the special case to the defendant. In E. T. 1835, *Carrington* obtained a rule calling on the defendant to shew cause why the master should not be directed to tax the plaintiff's costs of and occasioned by the application to the Court to increase the verdict in this cause, and of preparing, settling, and arguing the special case, or why the master should not disallow the costs of the special case, which he had allowed to the defendant. Against this rule,

W. Clarkson now shewed cause. The master has done right in allowing the defendant the costs of the special case; the plaintiff having failed on the argument of it.

Sir *F. Pollock* and *Carrington*, in support of the rule. The plaintiff retained his verdict on the count for money had and received, and had judgment for him on the count for money paid. In *Garland* v. *Jekyll* (*b*), there was a special case for the opinion of the Court; and the defendant succeeded as to the point which was argued; but it was held, that the plaintiff, who retained the verdict, was entitled to the costs of the special case. [*Patteson*, J. The question which was stated for the opinion of the Court in this case, arose upon a motion to increase the damages, and the plaintiff failed on the argument of the special case, the Court refusing to increase the damages. *Garland* v. *Jekyll* proceeded on the ground that as *two* questions were submitted for the opinion of the Court on the special case, and one of them was withdrawn by consent, it was impossible for the Court to say that the point which had not been argued was decided against the plaintiff, and that as he retained the verdict he was entitled to costs.] The new rules as to setting off the costs of *issues* found for the defendant, can-

(*a*) *Ante*, iv. 485. (*b*) 2 Bingh. 273; 9 B. Moore, 502.

not apply to costs of the *special case*; such costs not being mentioned in that rule. Upon the special case the judgment was in favour of the plaintiff, and he is therefore entitled to costs.

PATTESON, J.(*a*)—I am of opinion that the rule must be discharged, for I think that the master did right in allowing the costs of the special case to the defendant. To ascertain who is entitled to costs on the special case, we are bound to look at the special case to see what points were raised for argument and for the decision of the Court. The question submitted on the special case was,—whether the plaintiff was entitled to recover 30*l.* 11*s.* 2*d.*, and 6*l.* 19*s.* 8*d.*, which sums were claimed in addition to the amount of the damages found by the verdict at the trial. The parties came by agreement to this Court to discuss that question, and it was determined in favour of the defendant. The defendant having succeeded upon the whole that he came to argue on the special case, was entitled to the costs.

WILLIAMS, J., concurred.

COLERIDGE, J.—Mr. *Carrington* says, that the words "special case" do not appear in the rule which allows the defendant the costs of those issues on which he succeeds. They do not: neither does the rule mention the costs of *consultations*, or *retainers of counsel*. It declares that the defendant shall be entitled to the costs of the *issues* found for him. The question therefore is, to what issues are the costs of the special case to be attributed. It appears to me that the costs incurred by reason of the special case are attributable to the issues found for the defendant, and that he is therefore entitled to those costs.

Rule discharged.

(*a*) Lord *Denman* was absent on account of severe indisposition.

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In order to constitute a "coming to settle" within 13 & 14 *Car.* 2, c. 12, the party must have come into the parish animo morandi or residendi; but it is not necessary that he should have come with an intention to reside *permanently*.

The residence intended need not be for such a time and under such circumstances as would, at the time of passing of 13 & 14 *Car.* 2, c. 12, have conferred a settlement. Per *Patteson*, J. and *Williams*, J.

Secus, semble, per *Coleridge*, J.

But whether a party came to settle within the meaning of 13 & 14 *Car.* 2, c. 12, is a question of fact, to be decided by the sessions alone.

And where, upon a case stating the facts, the sessions find in the negative, this Court will not interfere with that finding, unless they see that upon the facts stated the finding is necessarily wrong.

The sessions found that *A.* hired and paid for lodgings for the pauper in Dale,—that the pauper came to Dale, and resided in the lodgings for a week, married, and continued afterwards to reside in the lodgings until his removal under the order appealed against:—Held, per *Patteson*, J. and *Williams*, J.—dissentiente, *Coleridge*, J.,—that a finding by the sessions that the pauper did not come to settle in Dale within the meaning of 13 & 14 *Car.* 2, c. 2, was repugnant to the facts found, and was therefore necessarily wrong.

Special cases from the sessions should be drawn by counsel.

UPON appeal against an order for the removal of *Dennis Brown* and his wife from the parish of Woolpit to the parish of Haughley, the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper's present wife, then *Mary Ann Pilbrow*, was pregnant by him before marriage. *M. A. Pilbrow* at that time lived at Woolpit, and the pauper in the workhouse of the incorporated hundred of Stow. The parish of Haughley is in the hundred of Stow, but the parish of Woolpit is not. *Mary Ann Pilbrow* having charged the pauper with having gotten her with child, the pauper was, on 21st October, 1833, apprehended by one *Redsall*, a constable of Woolpit, and on the 22nd was taken by him before a magistrate. On the same 22d October the pauper was committed by the magistrates, for want of sureties, to the county gaol at Bury St. Edmund's. About the beginning of November, *Pilbrow*, the father of *Mary Ann Pilbrow*, became surety for the pauper; and the pauper returned immediately from Bury to Woolpit. On the pauper's coming to Woolpit, *Pilbrow* took lodgings for him at Woolpit with one *Howe*, upon terms agreed upon between *Howe* and *Pilbrow*; and *Pilbrow* subsequently paid *Howe*'s charge for the lodgings. The pauper having resided about a week in the lodgings procured for him by

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Pilbrow, on 12th November, at Woolpit, married the said *Mary Ann Pilbrow*, his present wife. He continued to reside in the same lodgings until he was removed, on the 20th November following, by the order of two justices, to Haughley. The pauper was relieved by the parish of Woolpit after his marriage; but there was no evidence that the parish had been put to any expense either by his lodgings or his marriage. The respondents' counsel offered to prove the pauper's settlement in Haughley, but the appellants' counsel insisted on resting their case on the irremovability of the pauper, on the ground that he had not come to inhabit in the parish of Woolpit. The sessions quashed the order, on the ground that the pauper had not come to inhabit in Woolpit within the meaning of the statute 13 & 14 *Car.* 2 (*a*).

First point: What a coming to settle.

Biggs Andrews and *Austin* in support of the order of sessions. The pauper was not removable, because he did not, in the words of 13 & 14 *Car.* 2, *come to settle* in the parish of Woolpit (*b*). Section 1 of that statute,—after reciting that, by reason of some defects in the law, poor people were not restrained from going from one parish to another, and therefore did endeavour to settle themselves in those parishes where there was *the best stock*, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy; and when they had consumed it, then to another parish, and at last became rogues and vagabonds, to the great discouragement of parishes to provide stock where it was liable to be devoured by strangers,—enacted that it should and might be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of the peace, within forty days after

(*a*) This case was signed by the chairman of the Suffolk Quarter Sessions and by the clerk of the peace, but not by counsel.

(*b*) *Andrews* was about to discuss the effect of 35 *Geo.* 3, c. 101; but the counsel for the respondents admitted that they could found no additional argument on that statute.

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any such person *coming so to settle as aforesaid* in any tenement under the yearly value of 10*l.*, for two justices of the peace of the division where any person that was likely to become chargeable to the parish should come to inhabit, by their warrant to remove such person to such parish where he was last legally settled. The mere fact of a man's being chargeable to a parish in which he is for the time being, is not sufficient to give the justices jurisdiction to remove him to the place of his last legal settlement. He must have come into the parish *animo morandi* or *manendi*, and with an intention to consume a portion of the stock of the parish. Here, no intention to remain or to consume the parish stock appears. The pauper came into the parish rather as a visiter to *Pilbrow* than as intending to settle there. The pauper came into Woolpit immediately upon *Pilbrow*'s becoming surety for him. The lodgings, in which the pauper resided for a week before his marriage and a week afterwards, were both taken and paid for by *Pilbrow*. Suppose the pauper had resided during that time as a *guest* in *Pilbrow*'s house,—could that be said to be a coming to settle in Woolpit? It is submitted that it could not. What difference is there between such a case and the present, in which the lodgings were probably taken owing to the smallness of *Pilbrow*'s own residence? *Rex* v. *St. James, in Bury St. Edmund's* (*a*); *Rex* v. *Ashton under Lyne* (*b*); *Rex* v. *St. Lawrence, Ludlow* (*c*). [*Williams*, J., referred to *Rex* v. *Chediston* (*d*).]

Second point: "Coming to settle in a parish" to be decided by the sessions.

Whether there was a coming to settle, is a question of fact to be decided by the sessions. The sessions have in this case found that the pauper did not come to settle; the question has been decided by the only competent authority.

The Court will, if it can possibly do so upon the facts stated, support the finding of the sessions.

(*a*) 10 East, 25.
(*b*) 4 Maule & Selw. 357.
(*c*) 4 Barn. & Ald. 660.
(*d*) 6 Dowl. & Ryl. 269; 4 Barn. & Cressw. 230.

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Second point.

Byles and *J. W. Smith*, contrà. [*Coleridge*, J. The difficulty in my mind is, that the coming to settle is a conclusion to be drawn from all the circumstances of the case; and if the sessions have decided the question one way, we cannot interfere, unless the decision appears clearly to be *without any foundation*.] The sessions found that the pauper *returned* from Bury to Woolpit,—and "returned" is tantamount to "*came*;" that in the pauper's *coming* to Woolpit, *Pilbrow* took lodgings for him,—which was a preparation for residence; that the pauper *resided* in the lodgings a week, and then married; and that he continued to *reside* until his removal. The sessions have therefore found that the pauper *came* and *resided* in Woolpit. "*Reside*" is synonimous with or even stronger than "*inhabit*;" and "come to inhabit" is used, in the statute of 13 & 14 *Car.* 2, synonimously with "come to settle." Coming to reside is therefore the same thing as "coming to settle;" and as the sessions have found that the pauper came and resided, (which is even stronger than coming to reside,) they have themselves negatived their own conclusion that the pauper did *not* come to settle. In reality, the sessions have not found as a fact that the pauper did not come to settle. Their conclusion is intended to be a conclusion of *law*; and the question intended to be submitted by them was, whether they were right in saying that in point of law there was no coming to settle *within the meaning of the statute*. In the several cases which have been quoted, the Court treated the question as one of law. In each case, as indeed must always necessarily be, the sessions decided one way; and if the question had been considered by the Court as a question of fact, the Court would not have entered, in the manner in which they did, into the inquiry whether the conclusion drawn by the sessions was correct. So, with regard to *Rex* v. *Birmingham* (*a*). In the ordinary case of a settlement by hiring and service, the sessions, by

(*a*) 14 East, 251.

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quashing or confirming the order of magistrates, always decides that either there was or was not a hiring and service sufficient to confer a settlement: yet this Court never refuses to review the decisions of the sessions in such cases.

First point.

But further, the finding of the sessions that the pauper did not come to settle within the meaning of 13 & 14 *Car.* 2, is so clearly and manifestly wrong, upon the facts stated, that the Court will not support it. The act of 13 & 14 *Car.* 2 authorizes the removal of the person coming to *settle* to such parish where he was last legally *settled*, either as a native householder, *sojourner*, &c.; so that the statute contemplates a person being *settled* in a parish in the capacity of "sojourner," i. e. of "temporary resident," as it is defined by Dr. *Johnson*. In *Rex* v. *Helsham* (*a*) Lord *Tenterden* says, "There is no authority to shew that the original intent of the party must be absolute and unqualified to continue for forty days; and I am unwilling to introduce a new term or condition to the gaining of a settlement by coming to settle on a tenement." "It has been properly observed (said his lordship) that the recital in the 13 & 14 *Car.* 2 does not import a permanent intent, but applies only to persons coming to settle for a short time." All the authorities cited contrà are distinguishable on one broad ground, viz. that in each case the pauper remained in the removing parish animo invito, or at least plainly *without* any intention to settle. In *Rex* v. *St. James, Bury St. Edmund's* (*b*), the pauper was detained in the removing parish owing to his breaking his leg at a time when he was preparing to leave the parish. In *Rex* v. *St. Lawrence, Ludlow* (*c*), the pauper, having fractured his thigh in an adjoining parish, was brought into the removing parish to be cured. In *Rex* v. *Ashton-under-Lyne* (*d*) the pauper came into the removing parish for the purpose of escaping the pursuit of justice: he came *animo latitandi*, and not

(*a*) 2 Barn. & Adol. 625.
(*b*) *Ante*, 528.
(*c*) *Ante*, 528.
(*d*) *Ibid.*

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residendi. Here the party came into Woolpit of his own free will, with the intention (as it must be assumed in the absence of any negation of that fact) of residing in it. Whether it was his intention to reside for a temporary purpose or for a permanency is immaterial. In *Rex* v. *St. James, Bury St. Edmund's*, Lord *Ellenborough* says, "The expression of *coming to settle* denotes that the party comes animo morandi or manendi: *it may be for a temporary purpose.*"

PATTESON, J. (*a*)—It appears to me that the real question (and upon this the Court do not altogether agree) is, whether we are concluded by the finding of the sessions. If we are concluded by the finding, that the pauper did not come to settle, then we have nothing to do with the matter, and it was absurd and ridiculous to send the case for our opinion. If, upon the statement of the case, it appears that the sessions have found what is perfectly contradictory; if, according to my construction of this statement, they show that the pauper did come to settle, and afterwards say that he did not, the intention must have been to submit to us a question of *law*. I do not see that we are absolutely precluded from entering into the inquiry, the more especially, as, in my view, the finding of the sessions, that there was not a coming to settle within the meaning of the statute of *Charles*, is contrary to the tenor of all the authorities. The sessions find, that the pauper, being in the Stow workhouse, had a child sworn to him by *Pilbrow*'s daughter, and was, for want of sureties, committed to Bury gaol; that *Pilbrow* became surety, and the pauper came (or *returned*, as the sessions improperly say,) immediately from Bury to Woolpit; that on his *coming* to Woolpit, *Pilbrow* took lodgings for him, and he resided in them until removed. The pauper came into Woolpit entirely of his own accord; he was not brought there,

(*a*) Lord *Denman*, C.J. was absent on account of severe indisposition.

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animo invito, by any one. I do not see how it is possible to say that the sessions have not found that the pauper came to reside in Woolpit. In *Rex* v. *Helsham*, the Court held distinctly, that the pauper need not have come into the parish with an intention to reside permanently. And indeed this is quite plain; for the preamble to the enactment in 13 & 14 *Car.* 2, contemplates the case of persons that *go about* from one parish to another. It strikes me at present, that if any man comes under any circumstances, except such as those in *Rex* v. *St. Lawrence, Ludlow*, and *Rex* v. *St. James, Bury St. Edmund's*, for the purpose of inhabiting in that parish for any length of time, it would be a coming to settle within the meaning of the act. I do not even say, that the circumstances must be such that he would gain a settlement by forty days' residence. Even though the party comes as an inmate of another man's house, yet if he comes *animo morandi*, that would, as it seems to me, be a coming to settle. The sessions have here stated the fact, distinctly to my mind, that the pauper came to Woolpit for the purpose of inhabiting or residing. Then with respect to the cases cited: *Rex* v. *St. Lawrence, Ludlow*, and *Rex* v. *St. James, Bury St. Edmund's*, have nothing to do with the case before us; for in both those cases the pauper did not *come* to the parish at all, but was, in fact, *cast* there by accident. In *Rex* v. *Birmingham*, the pauper was taken by the overseer of Inkberrow, without any order, to the parish of Fakenham, and was kept there by the threats of the officers of the parish of Fakenham, that they would send her to prison if she returned to Inkberrow. Yet it was held, that she was removable from Fakenham to the place of her settlement. *Rex* v. *Birmingham* has certainly been somewhat shaken by the observations of Lord *Tenterden*, in *Rex* v. *St. Lawrence, Ludlow*; but without going the full length of that case, it is certainly a strong authority to shew, that in such a case as this,—which is very distinguishable, and much stronger, because the pauper came of his own accord into Woolpit, and resided there voluntarily,

—there was a coming to settle, so as to make the pauper removable.

The whole question is, whether or not we are concluded by the finding of the sessions. I think not; because on the face of the case, I think they have found the fact, that the pauper *did* come to settle, and afterwards that he *did not* come to settle, within the meaning of the statute; intending to submit to us a question of law.

WILLIAMS, J.—I am of the same opinion. I will not pretend to say, whether it would have been well if the Court had always uniformly held, that when a question of fact was found by the sessions, they would, under no circumstances, enter into an examination of the correctness of that finding. It is now infinitely too late to entertain any doubt but that they will, under some circumstances, interfere. The books are full of cases in which the question, being one of fact, and the sessions having found it one way, this Court has nevertheless, when the circumstances have been stated in a special case, examined the grounds of the decision of the sessions, and have reversed their finding. What is more a question of fact than that of fraud? None. Yet the Court has examined into, and reversed, the decision of the sessions on a question of fraud. And so, over and over again, in other cases which are as clearly questions of fact. So long ago as the time of Lord *Hardwicke*, I find it was said, "If they (the sessions) had *generally* found the fraud, we might have been bound by such a general finding; but when they state the facts particularizing matter, the matter is as much for our determination as it was for their's (*a*)"; and accordingly the Court did enter into the grounds of their decision. And in *Rex* v. *St. Mary-the-less, Durham* (*b*), the sessions having found the fact upon a question of occupation, *Law* and *Chambre* relied on the conclusion of fact. What says Lord *Kenyon*—peculiarly conversant with ses-

(*a*) *Per* Lord *Hardwicke*, C. J. in *Rex* v. *Tedford*, Burr. S. C. 57. So, in a special verdict, *Rowe* v. *Huntington*, Vaugh. 66, 77.

(*b*) 4 T. R. 479.

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sions, as with all other law?—"If the sessions had confined themselves to the finding of the fact of occupation on the face of their order, the consequence stated would have followed; but that is the very question which they have left for the decision of the Court." And the Court, in that case, entered into the inquiry as to the occupation;—and for very good reason, because it was perfectly plain that that was the point about which the sessions had doubt, and to have the opinion of the Court upon which, they stated the case. For what purpose have the sessions stated the case here? For no other purpose, that I am aware of, than to have the opinion of the Court, as to whether the pauper was, in point of law, removable. The sessions might, if they had thought proper, have contented themselves with acting upon the impression that the pauper was not removable; but having stated the facts in a case sent for our opinion, we are bound to examine the grounds upon which they have decided, and to come to a conclusion upon them. I cannot entertain the slightest particle of doubt on the question submitted. "Coming to settle," does not mean a coming to settle under such circumstances, that, if the duration were long enough, the party would gain a settlement. It merely means a coming to inhabit; for how long? Is it to be for a week, month, or year? There is no case to shew for how long it must be intended to inhabit. There is nothing in this case to limit or restrict the generality of the intent as to the duration of the residence of this party. It is stated generally, that the pauper came to Woolpit, and that lodgings were taken for him, not for any limited period, but generally. If the pauper intended to stay only for a limited period, that fact should have been shewn by the appellant. As the matter stands, the purpose as to the duration is entirely unexplained. The cases which have been referred to, negative any thing like a coming for the purpose of residing. The *deserter* did not stay one hour for the purpose of residing. So with the men with the broken legs. On the whole facts, the statement of the ses-

sions appears to me to lead to the inevitable conclusion that the pauper was coming to settle indefinitely, and not for any limited or restricted period. As the sessions have stated the facts, we are at liberty to inquire into them, and I think that, upon those facts, there is not one particle of foundation for the finding of the sessions.

COLERIDGE, J.—It is with very great regret that I have found myself not able to concur with my brothers. I say it quite unfeignedly, that I have little doubt but that I am in error; still I am bound to state the opinion which I entertain. I have this satisfaction, that I do not think that we shall be found to differ much *in principle*. As to what this Court *has* done as to questions of fact in settlement cases, most lawyers are of opinion that this Court has often, from a desire to do justice between the parties, and at the particular request of the sessions, gone out of its province, and has adjudicated upon matters of fact, which, no lawyer will doubt, ought to have been left to the sessions. As this course is not a correct one, we ought to be careful not to advance it. The general rule ought to be, that where the sessions have found the fact, we should not interfere with their finding unless we see that the sessions have come to a conclusion entirely without foundation, or decidedly contrary to the weight of the evidence,—in which case we might, by analogy to the practice of the Court with regard to the verdicts of juries upon questions of fact, interpose. The province of a jury is to find the facts one way or the other; and the Court will not in general interfere with their finding; but it has become an inveterate practice for the Court to say that the jury have done wrong, if they have come to a conclusion quite contrary to the evidence. Then, I ask myself, whether, in this case, the question is one of fact or of law? In all the cases it has been treated as a question of fact, whether the Court has agreed or disagreed with the finding of the sessions. Whatever may be the meaning of the expression, "coming to settle," we may start

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with this,—that whether or not a party comes to settle, is a question of fact. This has not been much controverted, either by the bench or the bar. Then, if this be a question of fact, have the sessions come to a conclusion? and if they have, have they submitted that conclusion to the Court? or if they have not intended to submit that conclusion, is it clearly wrong?—When I read the case, I cannot doubt (except by reason of one of my brothers having come to a contrary opinion) that the sessions have come to a conclusion of fact, whether their conclusion be right or wrong. I find certain evidence stated, a point taken, and the sessions acting upon it, and saying that they quashed the order because they believed that the pauper did not come to inhabit within the meaning of the statute. The sessions have drawn that conclusion. Then, have they drawn a conclusion *necessarily* wrong? I admit, that if they have, we are bound to revise their decision? Now what are the facts? The pauper being discharged from Bury gaol, upon *Pilbrow*'s becoming surety for him, immediately came to Woolpit; and this is an ambiguous act, for he may have come either to reside or pass through. He took no house, but lodgings were taken for him by *Pilbrow*, and he resided in them for a week, married, and resided afterwards until his removal. These are all the facts. Then I ask myself, whether it is a *necessary* conclusion, from the facts stated, without more, that the pauper came to reside? It is said, that if he did not come to reside, something negativing the intention to reside ought to have been stated. I cannot agree to that; for the respondents came to justify their order, and a necessary part of their justification is, that the pauper was removable at the time of making the order. The affirmative, with respect to the animus residendi, lies therefore upon them; just as it lies upon them to prove affirmatively, that the pauper was *chargeable*. It would be monstrous to say, that chargeability must be inferred from the absence of negative proof. If the fact of the intention to reside is to be made out at all, it must be made out by the respondents. Then, I ask

again, is it a *necessary* conclusion, from the facts stated, that the pauper came to reside? I think not. Minds are differently constituted; and I think it very possible for different minds to draw various conclusions from these facts. I do not say, that if the question were put to me as a question of fact, whether the pauper came there to reside, I should not have held that he did come to reside. It may be that he did come to reside, but I think that is not a *necessary* conclusion. *Rex* v. *Chediston* differs so much in the facts as to be no authority in this case; and, indeed, the point in issue here was not raised in that case. *Rex* v. *Birmingham* is, I think, an authority by which the Court ought not to be bound. I fairly say so. The negative of the animus is so strong there, that I think it impossible to support the conclusion. The judgment of Lord *Ellenborough* is very short, and his whole attention appears to have been directed to a somewhat different point. I was very much struck with the very able argument of Mr. *Smith* upon the words of the statute. I do not say that there is any necessity for any intention to reside permanently; but upon looking at the whole of the preamble and enactment in the statute of the 13 & 14 *Car.* 2, I think it must appear to any one that the party must come to settle with the intention of acquiring a right to some portion of the *stock* of the parish. I do not think that the mere coming to reside in the house of another, merely as an inmate or guest, would be sufficient.

I cannot see here that the sessions are clearly wrong, and therefore, I think, that we cannot interfere with their conclusion.

PATTESON, J.—The case should go down again to the sessions: the order of sessions to be quashed, and the sessions to enter continuances and hear the appeal again. The Court agree that the coming to settle animo morandi is a question of fact.

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COLERIDGE, J.—It is much to be regretted that special cases from the sessions are not always drawn by counsel.

Order quashed, but the case to be re-heard by the sessions.

LANCASTER v. HEMMINGTON.

The Court will not infer that the decision of an arbitrator has proceeded solely upon certain facts set out in the award, unless the award state that the decision is founded upon those facts.

CASE. The declaration stated a retainer of the defendant, an attorney, by the plaintiff, to prepare a conveyance from one *T.*, of certain land; that the defendant had not used due skill and care in preparing the conveyance, but that, through his negligence and carelessness, the land was not duly, properly, and effectually conveyed; and that a conveyance which the defendant had prepared was not a proper and effectual conveyance, and contained divers erasures and interlineations, without any notice thereof in the attestation of the execution of the deed, and insufficiently described the plot of land, and was in other respects insufficient and informal, and in consequence thereof &c. the plaintiff was prevented for a long time from mortgaging the land, and was put to expense in procuring an effectual conveyance before he could mortgage the land. Plea: that the land was properly and effectually conveyed, and that the conveyance prepared by the defendant was a due and proper and effectual conveyance.

By an order of *nisi prius*, it was ordered that a verdict should be entered for the plaintiff for 50*l.*, subject to the award of *J. S.*, attorney at law, who had liberty to direct for whom and for what sum the verdict should be finally entered, the costs of the *cause* to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator.

The arbitrator made his award, reciting the order, and directing that the verdict should be entered for the defend-

ant, and he adjudged, awarded and declared, that it was proved before him, that all the erasures and interlineations appearing in the conveyance, were made before it was executed by any of the parties, and before livery of seisin made; and he awarded that the plaintiff should pay the defendant 10*l.* 10*s.* for his costs of the reference.

Waddington obtained a rule nisi to set aside this award, on the ground that the facts found by the arbitrator in his award, do not warrant a finding for the defendant, and that it appears from the award that the arbitrator mistook the question referred to him.

Goulbourn, Serjt. shewed cause. The arbitrator need not have stated the fact which he has set out, and the statement may be rejected as surplusage; and if the statement be not rejected, it does not follow that the fact stated was the only fact proved. [Lord *Denman*, C. J. I do not see that this award proceeds upon this fact. The arbitrator does not say, that *in consequence thereof* he finds, &c.]

He was then stopped by the Court.

Waddington, contrà. When an arbitrator, who is not bound to do so, states facts in his award, he must do it with an intention that the statement shall be understood to have constituted the grounds upon which his finding proceeded. The arbitrator appears by this statement to have mistaken the issue raised by the pleadings, which are referred to in the award. These defects in the preparation of the conveyance, to which the statement in the award has reference, were not the only defects mentioned in the pleadings. [Lord *Denman*, C. J. I do not think that the arbitrator must necessarily be taken to have intended this statement as a statement of the grounds of his determination. I can conceive that he may have had another object. The *character* of the defendant may have been in question.]

Per CURIAM. Rule discharged.

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It is a question of fact for the sessions to determine whether an agreement to serve is a contract of hiring or of apprenticeship.

And where, upon a case for the opinion of this Court, the sessions state the facts and draw their conclusion, this Court will not disturb the finding, unless it appear that the evidence was contrary to the finding, or that there was no evidence to support it.

The true test, whether an agreement was a contract of hiring or of apprenticeship, is the apparent object of the parties, and if that object is for one party to teach and the other to learn, the agreement is a contract of apprenticeship.

It is not necessary that the precise words, to teach or to learn, should occur in the agreement, to constitute it a contract of apprenticeship.

UPON appeal, an order for the removal of *Thomas Harman* and his wife from Kidderminster to the parish of Great Wishford, Wilts, was confirmed, subject to the following case.

The pauper's father being settled in Great Wishford, died in 1818, and in 1823 the pauper's mother applied to one *West*, a carpet-weaver at Kidderminster, to take the pauper into his employment. *West* agreed with the mother to take the pauper on trial for two years, after which, if the pauper and *West* agreed, the pauper was to be apprenticed. The pauper was to be found in board, lodging, and washing by *West*, but was to have no wages, except what *West* pleased to give him as pocket money. The pauper *was to draw*. The pauper went to *West* as agreed, and worked for him for about a year and a half, living in *West's* house in Kidderminster during that period. The pauper then ran away from Easter to wheat harvest, when he returned and worked for *West* for a short time at weekly wages, when he again ran away, and they parted. It was stated by a magistrate on the bench, and assented to, that every carpet-weaver is first taught the art of drawing *as a draw-boy*. The chairman took the opinion of the Court, whether the service was under an imperfect contract of apprenticeship, or a hiring and service: and the Court found that it was an imperfect contract of apprenticeship(*a*).

(*a*) The case was drawn up by the chairman of the sessions, *as the counsel could not agree on the facts to be stated for the opinion of the Court*. It appears to be the duty of counsel to take care, that as well all material facts given in evidence as the inferences of fact to be drawn from the evidence, are found by the justices, and that those facts and inferences are duly noted down. When the special case is drawn by counsel, their signatures must be considered as guaranteeing that this has been done.

F. V. Lee (and *Merewether Turner* was with him,) in support of the order of sessions. The question for the consideration of the Court is, whether the contract was one of imperfect apprenticeship or of hiring and service. The sessions having found that it was an imperfect contract of apprenticeship, and as there are facts to justify that finding of the sessions, this Court will not question it, however slight the facts upon which it is founded may appear to them to be; *Rex* v. *Edingale* (*a*). It clearly appears on this case, that it was the intention of the parties that the pauper should be apprenticed to *West*. It was agreed that the pauper should be apprenticed, *i. e.* apprenticed in due form, after the two years, if *West* and the pauper agreed, and it was stipulated that the pauper should at once *draw*, which appears to be the first step in learning the business of a weaver.

In *Rex* v. *Edingale*, a pauper applied to a master to take him as an apprentice, and the master said he would not, because, if he did, he should offend the farmers, but would take him on agreement for four years; and a week afterwards it was agreed between the master and the pauper's step-father that the pauper should serve the master four years, to learn his trade, to have meat, drink, washing, and lodging for the whole time, and 2*s.* 6*d.* per week the last two years: Held, that the principal object of the parties being that the pauper should learn the trade of the master, it was a contract of apprenticeship, and not one of hiring and service. Applying that test to the present case, it is quite clear that this is an imperfect contract of apprenticeship, since the object of the parties evidently was, that the pauper should be taught the trade of the master. [*Patteson*, J. It is sufficient for you to negative that this was a contract of hiring and service. Taking a party on trial does not imply a contract of hiring and service.]

The Court then called upon the counsel on the other side.

(*a*) 10 Barn. & Cressw. 739.

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W. J. Alexander and *Whitmore*, contrà. This is a case in which the finding of the sessions is contrary to the facts stated in the case. Upon the facts stated, the sessions have drawn a conclusion manifestly wrong. The Court will therefore not feel itself bound by the finding; *Rex* v. *Woolpit* (*a*). In every case where the order of sessions is quashed, there is a reversal of a finding of the sessions. In *Rex* v. *Tedford* (*b*), a finding of *fraud* by the sessions was reversed. In *Rex* v. *St. Margaret's, King's Lynn* (*c*), the sessions found that a contract was a contract of hiring and service, yet this Court being of opinion that, upon the facts stated, the contract between the parties appeared to be an imperfect contract of apprenticeship, reversed that finding. *Rex* v. *Crediton* (*d*), and *Rex* v. *Newtown* (*e*), are also instances in which this Court reversed the finding of the sessions; and numerous other similar cases might be adduced. It is manifest, upon reading the case, that it was intended to submit to the consideration of this Court, the questions—whether the contract was an imperfect contract of apprenticeship, or whether it was a contract of hiring. Both questions are therefore within the cognizance of this Court. The very circumstance of granting a case shews, that the finding was not intended to be conclusive, but that the whole question was intended to be submitted to the consideration of this Court. It is therefore open to discussion, whether this is a contract of hiring or of apprenticeship.

This was a contract of hiring and service. In *Rex* v. *Hitcham* (*f*), the pauper let himself to his brother, who was a carpenter, for a year. He was to receive no money by way of wages, but his brother was to teach him as much as he could of the trade during the time, and provide him with meat, drink, washing and lodging; the pauper to do all his brother's lawful business in his farming way. This was

(*a*) *Ante*, 526.
(*b*) Burr. S. C. 57.
(*c*) 2 Mann. & Ryl. 32; *S. C.* 6 Barn. & Cressw. 97.
(*d*) 2 Barn. & Adol. 493.
(*e*) *Ante*.
(*f*) Burr. S. C. 498.

held to be a contract of hiring. *Rex* v. *Edingale* is distinguishable; for there the object of the parties expressly appeared to be for the master to *teach* and the apprentice to *learn*. So in *Rex* v. *St. Margaret's, King's Lynn* (*a*), *Rex* v. *Newtown* (*b*), *Rex* v. *Crediton* (*c*). In this case there was no engagement on the part of the master to *teach*; no premium is paid; no written instrument is executed. There are no words of *instruction* in the contract, and there is no instance in which the Court have held the agreement to be a contract of apprenticeship where words of *instruction* were wanting. The very arrangement for a *future* apprenticeship, excludes the supposition of there being a *present* contract of that description. [*Coleridge*, J. The pauper was to go two years on trial. The trial might end at the expiration of a month.] Then the hiring was conditional, and as there was a service for a year, a settlement was gained. But the true construction of the contract is, that the trial was to continue for two years. The pauper was, by the contract, to *draw*; but it does not appear that he had not *previously* been taught to draw, nor was there any *contract* on the part of the master to teach him to draw, if in fact he was then ignorant of the art. It was merely incidental to the service.

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PATTESON, J. (*d*).—In this case the sessions have, in my opinion, found that this was not a contract of hiring. The chairman says, in the statement made by him, that he took the opinion of the Court, "whether the service was under an imperfect contract of apprenticeship, or a hiring and service." The question was therefore put in the alternative, and the Court found that the service was referable to an imperfect contract of apprenticeship. They must therefore be taken to have negatived that it was referable to a hiring and service. There are two grounds on which the counsel

(*a*) *Ante*, 542.
(*b*) *Ibid.*
(*c*) 2 Barn. & Adol. 493.
(*d*) Lord *Denman*, C.J. was absent, on account of severe indisposition.

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for the respondents contend that the order of sessions should be confirmed. First, that the sessions have found that this was an imperfect contract of apprenticeship, and that we are concluded by the finding of that Court; and secondly, that the finding is right. The line of demarcation between the cases, where this Court is concluded by the finding of the sessions and where not, is not very clear or distinct. But this is clear, that in no instance has this Court reversed the finding of the sessions, unless they have seen that the sessions have manifestly come to a wrong conclusion upon the circumstances stated. I was pressed with the case of *Rex* v. *Woolpit*, decided on Saturday last, in which there was some difference of opinion on the bench. My brother *Williams* and I thought that the finding of sessions was contradictory, and that therefore we could enter into the question sent up by them for the opinion of this Court. My brother *Coleridge* thought that this Court was concluded by the finding. We did not, however, differ in principle, but only in our view of the circumstances stated. In this particular case we are, I believe, all agreed that the sessions have come to a conclusion in which they were warranted by the circumstances of the case. The contract is capable of two constructions. It may be either a contract of hiring and service, or a contract of imperfect apprenticeship. *Bayley*, J., in *Rex* v. *St. Margaret's, King's Lynn*, says, "Every case of this description must depend upon its own particular circumstances. If, from all that passed between the parties at the time when the contract was made, they appear to have contemplated the relation of master and apprentice, then the contract must be considered one of apprenticeship. If, on the other hand, it appears that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring; and a settlement will be gained by serving under it." The test adopted in that case was, whether the parties appear to have contemplated "the relation of master and apprentice." In *Rex* v. *Crediton* and *Rex* v.

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Newtown, the test adopted was, whether the parties contemplated "teaching and learning." The law, I apprehend, now is, that the Court of Quarter Sessions are to look to all the circumstances of the case, and determine whether the contract is one of hiring and service or of imperfect apprenticeship. I confess I should have determined the case in the same way as the sessions have done. But it is sufficient that the sessions were *warranted* in coming to the conclusion which they have drawn. There was to be a teaching by the master of the business of a weaver. The pauper was to go for two years on trial. That might mean either that the pauper was to go as an apprentice on trial, or that he was to be a servant for two years absolutely, and that if the parties liked each other at the expiration of the two years, the pauper was to be then apprenticed. The sessions were the proper tribunal to decide what was the meaning of the parties. The inclination of my opinion is, that the contract was an improper apprenticeship. We are pressed with the argument that if the sessions intended to find the fact that this was an imperfect contract of apprenticeship, they would not have granted a case. I do not feel the force of that argument, because I know that the sessions do frequently send a case even where they entertain no doubt upon the facts; and this practice will continue unless they determine to send up no case unless drawn by counsel (*a*).

WILLIAMS, J.—I am of the same opinion. There are circumstances sufficient to sustain the finding of the sessions. We are pressed with a supposed difference of opinion in a former case (*b*). There was no difference of opinion in *principle*. The difference of opinion arose from the different view which was taken of the practice of the sessions. There is no ground, in my opinion, for saying that this is not a contract for *teaching* and *learning*. The terms of the contract are, not to take the pauper into the master's

(*a*) *Vide ante*, 538, 540 (*a*). (*b*) *Rex* v. *Woolpit*, *ante*, 526.

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service, but to take him into his *employment*;—an equivocal phrase, which may apply to a service as an apprentice or as a servant. Although the language of the contract is not express that the master was to teach and the pauper to learn, yet the pauper is to go on trial, and was also to draw, which was to prepare himself for the business. The term, that the pauper is to go on trial, is equivocal; but the stipulation that he is to draw, refers to a business which is to be taught on the one hand and learnt on the other. I should have been sorry if the facts had been contradictory to the conclusion which has been drawn by the sessions; because they appear to have acted on *Rex* v. *Crediton*, in which this Court had the fortitude, if I may so express myself, to overrule *Rex* v. *Little Bolton* (*a*), and many other preceding cases, which had produced infinite mischief at the sessions. Whether the parties *intended* a contract of hiring and service or of apprenticeship, is a plain and intelligible test for determining the nature of the contract, and I hope to see the sessions act upon it. Unless the sessions are clearly wrong in the conclusion which they draw from the facts, we ought not to disturb it.

COLERIDGE, J.—I should have been satisfied with merely stating my concurrence in opinion with the rest of the Court, had not so much of the argument turned on the *jurisdiction* of this Court, and the difference of opinion which was supposed to exist on the bench. There is no difference of opinion in principle. It is the jurisdiction of the sessions to determine matters of fact. This Court will reverse the finding of the sessions either when they come to a conclusion without *any* evidence, or when the evidence is *contradictory* to the finding.

Have, then, the sessions come to a conclusion? They have. They have found that this is an imperfect contract of apprenticeship. Is that finding *necessarily* wrong? In my opinion the sessions have come to a right conclusion.

(*a*) Cald. 367.

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What is an imperfect contract of apprenticeship? An imperfect contract is that which has the same object as a perfect contract, but by which the object has not been fully effected. The object of parties to an apprenticeship is, that the master should teach and that the apprentice should learn; and it seems to me that this was the object of the parties in this case. The parties say, we will try for two years if the master can teach and the boy can learn the trade; if they can, then we will perfect the contract. That is an imperfect contract of apprenticeship. It has been said that no contract has been held a contract of apprenticeship, unless the parties expressly undertook to *teach* and *learn*. I do not see the precise words in this case, and I cannot accede to the proposition that those precise words are necessary. It is sufficient if, from all the circumstances of the contract, it can be inferred that that was the object of the parties.

Order of Sessions confirmed.

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UPON appeal, an order, whereby *Rebecca Thompson* was removed from West Bromwich, Staffordshire, to the township of Oldbury, Salop, was confirmed, subject to the following case:

By an order, unappealed against, a pauper is removed from A. to the parish of B., in the county of S. B. at that time consists of two townships, C. and D. (jointly maintaining their own poor,) in the county of S., and one township, E. (separately maintaining its own poor,) in the county of W.

The parish of Hales-Owen consists of the borough of Hales-Owen, the township of Oldbury, and ten other divisions situate in Shropshire, and three townships (Lutley, Cradley, and Worley,) situate in Worcestershire.

The three Worcestershire townships have always sap-

This order is conclusive upon that part of B. which lies in the county of S., *semble*.

After the removal, C. and D., being required by mandamus, elect separate overseers and maintain their poor separately; the same pauper is afterwards removed from A. to the township of C. C. is not estopped by the former removal.

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ported their poor apart from each other, and from the rest of the parish.

The township of Oldbury, the borough of Hales-Owen, and the ten divisions above mentioned, which lie in Shropshire, and which form the remaining part of the parish, until the separation of the township of Oldbury from them, as hereafter mentioned, always supported their poor *jointly*, and the affairs of the Shropshire part of the parish had, until that event took place, been administered by the churchwardens and four overseers, appointed respectively for four quarters, (Oldbury being one,) into which that part of the parish was divided.

In 1832, this Court made absolute a rule for a mandamus to compel the appointment of overseers for the township of Oldbury, pursuant to the 13 & 14 *Car.* 2, c. 12, s. 21; since when that township has maintained its own poor distinct and apart from the other parts of the parish.

In 1816, the pauper, together with her father and the rest of his family, was removed by an order of justices from Harborne, Staffordshire, to the parish of Hales-Owen, in the county of Salop. Against this order no appeal was made, and no subsequent settlement has been gained by the pauper.

The pauper having become chargeable in West Bromwich, (where she resided,) was removed to the *township of Oldbury*, by an order of 6th January, 1834.

Against this order an appeal was entered, and came on for trial at the last Easter sessions for Staffordshire; when the respondents put in the order of removal made in 1816, and unappealed against. The appellants then proposed to prove that the pauper had never gained any settlement in Oldbury, but the respondents contended that the last-mentioned order being unappealed against, was conclusive upon the parish of Hales-Owen, and every part thereof, and that as Oldbury at that time formed part of the parish of Hales-Owen, it was now *estopped* from contesting the question of the pauper's settlement not being in that township. And the Court of Quarter Sessions being of this

opinion, declined to hear the evidence of the appellants, and confirmed the order.

The question for the opinion of this Court is, whether, under the circumstances above stated, Oldbury was precluded from contesting the question of the pauper's settlement, in an appeal against the present order.

Uvedale Corbett, in support of the order of sessions. It is clearly settled that an order of removal, unappealed against, is conclusive against that parish to which the pauper is removed by it. And *Rex* v. *Kirkby Stephen* (*a*), and *Spitalfields* v. *Bromley* (*b*), shew that the division of a parish into townships, is entirely a matter of convenience to the different parts of the parish, and is a matter with which the public have no concern. If a parish consists of two or more distinct vills, and it appears that the parish cannot otherwise conveniently enjoy the benefit of 43 *Eliz.* c. 2, this Court will grant a mandamus to appoint separate overseers to the distinct vills or townships; but how can such a division get rid of a liability previously contracted? In the present case, the order of 1816 could only be addressed to the parish at large, and being unappealed against, was conclusive that the pauper was settled in the parish generally. It would be unjust, if the division which has subsequently taken place, should affect the interests of third parties. [Lord *Denman*, C. J. You think proper to say that Oldbury in particular is the pauper's place of settlement. Are you not bound to shew that such is the fact? How could there be any estoppel against the township, when it was not in existence, for purposes of settlement, at the time when the order was made?] The parish may unite again, and then the order will most assuredly be binding and conclusive on every part of the parish. [Lord *Denman*, C. J. If the present order of removal had been directed to the parish of Hales-Owen, possibly under it the pauper might have been removed to the particular part

(*a*) Burr. Sett. Cases, 664. (*b*) 18 Viner's Abridg. 463.

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of the parish to which he really belonged. Here, the order of removal is directed to the township of Oldbury. If you choose to act on the division of the parish, by removing to the newly-severed township, are you not bound to shew that the settlement is in that particular division of the parish? According to your argument, all paupers belonging to the whole parish might be removed to one division. Are the inhabitants of that division to be estopped from giving evidence that the pauper was not settled in that division?] In *Rex* v. *Oakmere* (*a*), a district previously extra-parochial was by act of parliament made a township, and it was provided that from thenceforth it should maintain its own poor, and have the like powers, privileges, and immunities, and be subject to the same regulations as other townships in the county; and it was held that this clause was prospective only, and that a bastard born in the district, previously to the passing of the act, was not settled there. The case itself is not directly to the present question, but the following passage in the judgment of Lord *Tenterden*, C. J. is—" This is not like the case of a modern appointment of overseers to places that formerly had no such officers, because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." [Lord *Denman*, C. J. That is assuming a question about which there is great doubt, whether an immemorial vill is under a legal obligation to maintain its own poor.] If the townships take the convenience of the division, they must likewise take the inconvenience. As between the several townships into which the parish is divided, the order is not conclusive; and any one of the townships would, as between itself and another of the townships, be at liberty to shew that the settlement was in any other of the townships. But as be-

(*a*) 1 Dowl. & Ryl. 427; 5 Barn. & Alders. 775.

tween the particular township and West Bromwich parish, the appellants were estopped from going into evidence, to shew that the pauper was not settled in their township. If the present order of removal, instead of being directed to the township of Oldbury, had been directed to the parish of Hales-Owen, there would have been good ground of appeal against the form of the order, since the parish of Hales-Owen does not now maintain its own poor. [*Coleridge*, J. The whole amount of the inconvenience which you contend you suffer, is the being deprived of the benefit of an estoppel. You seek to have the benefit of an act which never has been adjudicated on,—of a removal, the propriety of which has never been discussed.] Upon the former order of removal, it was adjudicated by the removing justices, that the settlement was in the parish of Hales-Owen, and it is only sought to make the order of removal conclusive of that fact, against the inhabitants of the parish.

Whateley, contrà. The general rule is not disputed,—that an order unappealed against is conclusive; but there is no instance in which it has been held, that an order of removal is conclusive against a township not named in it. The order of removal made in 1816 was invalid, and never did operate as an estoppel. There are two distinct divisions in the parish of Hales-Owen—the one in the county of Salop, the other in the county of Worcester. The several townships in that part of the parish which is in the county of Worcester have always maintained their own poor apart from each other, and apart from that division of the parish which is in the county of Salop. The latter part of the parish maintained their poor jointly until 1832. No valid order of removal could therefore, at any time, be made to the parish of Hales-Owen, since there was no such parish maintaining its own poor. Suppose the order of removal, made in 1816, had been delivered to the overseers of one of the townships lying in the county of Worcester, that division of the parish which is in the county

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of Salop would not have been bound to take any notice of it, and, in fact, might not have been aware of its existence. If this order of removal is conclusive on the township of Oldbury, it would be equally conclusive against any other township in the parish. Consequently it would be left to the mere caprice of the removing parish, to remove a pauper to any particular township, and the order of removal would be evidence for or against a particular township, according to whether the service was upon one set of overseers or another. According to the main argument on the other side, the order of sessions would be conclusive even if the removal had been from one of the townships of the parish to another. [*Coleridge*, J. Suppose the question had been between two third parishes, what would you have said was the effect of the first order unappealed against?] The appellants might have shewn that there was no such parish, for the purposes of settlement, as Hales-Owen.

Lord DENMAN, C. J.—Can you contend, Mr. *Corbett*, that an order of removal, addressed to the parish of Hales-Owen, could be supported?

Corbett. *Spitalfields* v. *Bromley*, and *Rex* v. *Kirkby Stephen*, are authorities to shew that the order was valid. [Lord *Denman*, C. J. In *Rex* v. *Kirkby Stephen*, there was merely a misdescription,—a wrong description of a real place.] The order being upon the parish of Hales-Owen, *in the county of Salop*, might have been appealed against by the overseers of that part of the parish which is in Shropshire, and which had overseers distinct from the townships in Worcestershire.

Whateley. The first order of removal might have been served on the overseers of one of the townships in the county of Worcester, and in that case that part of the parish which is in Shropshire would not have been bound

by the order; *Rex* v. *Bishop Wearmouth* (*a*); *the case of the parish of St. Botolph without Aldgate* (*b*).

Lord DENMAN, C. J.—I remember that when I first read the case, I thought that the respondents were right in contending that the order of removal was conclusive. But upon more consideration, I think that the township of Oldbury is not estopped. In 1816, a removal was made to the whole parish of Hales-Owen, which then consisted of fifteen divisions; three in Worcestershire, and twelve in Shropshire. There is a good deal of difficulty introduced into the case, in consequence of the mode in which the parish of Hales-Owen is described in the first order of removal. The words "in the county of Salop," may be considered as introduced in order to identify the parish. Upon this I entertain much doubt. Supposing, however, the order to have been properly made to the whole parish, it appears to me that the township of Oldbury, which began to maintain its own poor some time after the order had been made, was at liberty to deny that it was estopped from giving evidence to shew that the settlement was not gained in that part of the parish of Hales-Owen which constitutes the township of Oldbury. Were it otherwise, a removing parish would be at liberty to select any township in the parish. There is no estoppel, unless the parties are the same. The party in the order of 1816 was the parish. The party now is the township. As the parties removing the pauper thought fit to say that the pauper was settled in the township of Oldbury, they ought to have proved that fact. *Rex* v. *Oakmere* is inapplicable, since it relates to a district newly made parochial—not to an immemorial vill. Lord *Tenterden* says (*c*), "This case arises on the act 52 *G.* 3, for inclosing the forest of Delamere, and the question is, whether the district newly created into a township under this statute, which before was neither in any parish nor town-

(*a*) *Ante*, iii, 77.
(*b*) Raym. 476.
(*c*) 5 Barn. & Ald. 778.

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ship, is to be considered as if it had formerly been a parish or township with regard to settlement, or only as becoming so from the time of its creation under the act, and as if it had been formerly uninhabited. And we are of opinion, that the latter is the true construction and effect of the statute." It would rather seem, therefore, that if that, instead of being a new district, had been an ancient division which could have maintained its own poor, when it began to have separate overseers, it would have become a separate township as from the earliest time, and would have constituted such a division as a removal might have been made to. Under these circumstances, it appears to me that we must take it that the township is not concluded by any order made on the parish of Hales-Owen.

PATTESON, J. — I entertain very considerable doubts upon this question. I thought, when the case was mentioned last term, that the township was estopped altogether, and precluded from denying that the pauper was settled in their township. My doubts are not cleared up now; but my lord and my brothers think that the township was not estopped, and I do not feel the doubts so strong as to lead me to say that I entirely differ from the rest of the Court. The parish seems to have been divided long before the first order of removal was made, and it ought to be taken that the order was made on that part of the parish which lies in Shropshire; and the order being so made, the pauper was continuously settled in that division of the parish, and in the Oldbury part of the division, as well as in the other parts. If it had been proved that the settlement had been gained by renting a tenement, not in Oldbury, that would not shew that the pauper was not settled in Oldbury as to a third parish. Since the making of that order Oldbury has been separated from the rest of the division of the parish, but I cannot fully understand how, by a district's dividing itself into partitions, any particular portion can get rid of a liability that previously attached to the whole. At the

same time there are great inconveniences in deciding the other way, because it would follow that every part would be estopped, as well as Oldbury. I confess I am not fully satisfied, but my doubts are not so strong as to make me differ entirely.

WILLIAMS, J.—There is certainly the difficulty pointed out by my brother *Patteson*, that the parish, by their own act, are to get rid of a liability previously fixed upon them by the order of removal. Then, on the other hand, there is this difficulty, that if the pauper is conclusively settled in the whole and every part of the parish, and the parish were subsequently divided into twenty parts, a third parish might choose any one of the parts in which to fix the settlement of the pauper. It therefore comes to this, whether the precise ground on which the sessions have acted can be sustained. They have acted on the ground that this was an estoppel, and on that ground the evidence was refused. I think the township of Oldbury was not estopped. Admitting that the township is as distinct from the parish as Cumberland from Cornwall, I cannot conceive how a decision that the party was settled in the whole parish is any decision that he is settled in the particular district.

COLERIDGE, J.—I am of the same opinion. I do not think this is a question of estoppel. The ground on which an order of removal unappealed from or confirmed, is conclusive, is not that it is an estoppel, but that it is an adjudication by a Court of competent jurisdiction. The ground of my decision is this: The respondents have removed to Oldbury, and are therefore bound to prove a settlement in *that township*. They put in the order of removal to Hales-Owen. That alone will not do for them. They must, therefore, make out their case by shewing, by parol evidence, that at the time when the order was made Hales-Owen and Oldbury were identical. The sessions prematurely stopped the inquiry. At the same time, I am aware

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the Court may have great difficulty in dealing with the case when it comes before them again. On the present statement I think the sessions have done wrong.

Order quashed; the case to be re-heard.

DOE *d.* HIGGS and others, Churchwardens and Overseers of St. Mary, Reading, *v.* TERRY and others.

By 39 *Geo.* 3, c. 12, s. 17, all parish property is vested in the churchwardens and overseers for the time being.

Evidence of payment of rent to the churchwardens in respect of premises in the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the lands of the parish church, is primâ facie evidence that the premises were parish property.

EJECTMENT on a demise of certain messuages in St. Mary, Reading, on 1st May, 1834. At the trial, before *Alderson*, B., at the Berks summer assizes, 1834, a verdict was found for the plaintiff, subject to the following case:—

The lessors of the plaintiff were the churchwardens and overseers at the time of the demise and the bringing of the action. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors to the defendants in the tenancy to the different successive churchwardens of the said parish, for many years prior to the passing of 59 *Geo.* 3, c. 12; and since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants down to the time of the expiration of 1834. A notice to quit the premises in question, dated 20th March, 1833, by the then churchwardens and overseers of the parish, was, on 23rd March, 1833, duly served on the defendants. This notice required the defendants to deliver up the premises which they then held of the churchwardens and overseers of the poor of the parish of St. Mary, Reading, to the churchwardens and overseers of the poor of that parish, on Michaelmas-day then next, or at the expiration of the current year of their tenancy.

The defendants gave the following evidence:—

23rd April, 1753. By lease between *Thos. Knapp* and *John Knott, wardens* of the said parish of &c. of the one part, and *William Earles* of the other part; by which *Knapp* and *Knott*,

in consideration of the surrender of a former lease, and also of a fine of 20*l.*, demised the premises in question to *Earles* for fifty-one years, from Lady-day 1753, at the yearly rent of 30*s.*

Deduction of title to the lease, from *Earles* to *Mary Searle*.

29th April, 1802. By lease, between *John Moore* and *Nathaniel Clissold*, churchwardens of the parish church of St. Mary, in Reading aforesaid, of the one part, and *Mary Searle* of the other part, the premises in question, therein described to be parcel of the lands and tenements belonging to the parish church of St. Mary in Reading, were, in consideration of the surrender of the lease of 1753, and of a fine of 70*l.*, demised to *Mary Searle*, her executors, &c. from the feast of the Annunciation then last, for fifty-one years, paying yearly unto the said churchwardens and their successors the rent of 30*s.*

It was admitted on the part of the plaintiff, that the defendants were the legal representatives of *Mary Searle*.

It was contended on the part of the plaintiff, that the last-mentioned lease was void,—that the estate and interest in the premises had vested in the churchwardens and overseers, by the operation of 59 *Geo.* 3, c. 12,—and that the defendants' only interest therein had been a tenancy from year to year, which the notice to quit had determined.

Talfourd, Serjeant, for the plaintiff. The churchwardens had no authority to grant leases of the property in question. Consequently the leases were void: *Phillips* v. *Pearce* (*a*). The only question is, therefore, whether the property was vested in the lessors of the plaintiff as churchwardens and overseers for the time being, by 59 *Geo.* 3, c. 12. This point was expressly decided in *Doe* d. *Jackson* v. *Hiley* (*b*); in which Lord *Tenterden*, C. J., in delivering the judgment of the Court, thus expresses himself:—"Upon the second point, whether the statute 59 *Geo.* 3, c. 12, s. 17, extends to tene-

(*a*) 8 Dowl. & Ryl. 43; 5 Barn. & Cressw. 433.

(*b*) 10 Barn. & Cressw. 885.

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ments, the profits of which are applicable to the purpose for which a church-rate is levied, or is confined to those which are applicable merely to the relief of the poor, it is undoubtedly true that the *primary* object of the statute (as appears from the title, preamble, and the early sections,) was the better and more effective execution and amendment of the laws for the relief of the poor. The 17th section goes *much further*. It enacts, "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments, belonging to such parish." The latter words are most general, and comprehend all buildings, lands, and hereditaments, belonging to the parish; and although the poor may be the primary object of the statute, we think the safest course for us to adopt, in construing this section of the act, will be to give full effect to that *generality* of expression, there being nothing to shew that lands or buildings which are applied in aid of the church-rate, do not require the aid of this provision as well as those which are applied to the relief of the poor. The property being vested in the lessors of the plaintiff, and the lease being void, the only relation in which the defendants could stand with respect to the lessors of the plaintiff was, that of tenants from year to year.

It has been suggested, that the subsequent receipt of rent by the successive churchwardens operated as a *confirmation* of the lease; but no receipt of rent will set up a lease

which is *void*. Thus, in *Doe* d. *Simpson* v. *Butcher* (*a*), it was held that a lease void against a remainder-man cannot be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest has vested in possession. *Jenkins* d. *Yate* v. *Church* (*b*), is to the same effect.

Ludlow, Serjt. (with whom was *Talbot*,) for the defendants. The lessors of the plaintiff did not, by the evidence given, entitle themselves to the possession of this property, upon which the lessees, the defendants, have expended a very considerable sum of money, and it would be extremely unjust to deprive them of this property. In 1753 a lease is made by two individuals, who are described as *wardens* of the parish of St. Mary, in Reading. It is to be presumed, at this distance of time, that the grantors in that lease, either in their own right or as trustees, had power to make that lease; for in 1801, in consideration of the *surrender* of the lease of 1753, another term is granted, which is vested in the defendants. A valid surrender requires a sufficient estate in the *surrenderee* to accept a surrender. It is therefore to be presumed, from the fact of a surrender having taken place, that the term was granted by the lease in 1753, and that consequently the grantors had an estate in fee, out of which the term was carved. In 1801 a new term is granted, and the statute transferred to the succeeding churchwardens, the reversion subject to the term. The reversion may each year have been conveyed by the preceding churchwardens and overseers to the succeeding officers; and at this distance of time this should be presumed to have been done, rather than that it should be held that the lease was invalid. *Philips* v. *Pearce* is distinguishable. There, the lease was granted *after* the passing of the act. In the present case, the first lease is long *anterior* to the statute. Assuming, however, that the

(*a*) 1 Dougl. 50. (*b*) Cowp. 482.

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grantors in the lease of 1802 had no interest in the property, then that lease is good by way of *estoppel;* and by the receipt of rent under it, the lessors of the plaintiff are precluded from disputing its validity. But it is said that the statute of 59 *Geo.* 3 vested this property in the churchwardens and overseers. The effect of the statute was to vest the reversion expectant on the determination of the lease in the churchwardens and overseers for the time being, and nothing more. It is questionable whether, under the circumstances of this case, the statute transferred any property in these premises to the lessors of the plaintiff. The land is described as belonging to the *parish-church* of Reading. *Doe* d. *Jackson* v. *Hiley* decides that where the profits of the land are applicable to those purposes for which church-rates are levied, it is vested by the statute in the churchwardens and overseers; but there is a great difference between land *belonging to the parish-church,* and land, the profits of which may be applied to the same purposes as *church-rates. Doe* d. *Jackson* v. *Hiley* is therefore distinguishable from the present case.

Talfourd, Serjt., in reply. The two cases cited fully make out that the property passed to the lessors of the plaintiff. [*Patteson,* J. I do not see how it appears that this property belonged to the parish.] The payment of rent to the churchwardens, after the passing of the statute, is an admission that this is *parish property.* The churchwardens are bound to apply the rents to the use of the parish; and the Court will presume that the churchwardens have acted rightly, and that the rents were so applied.

PATTESON, J.—The difficulty that I have had, has been to see how it appears that this is parish property. That is not very satisfactorily made out. I should have expected that something of the history of the former ownership of

the property would have been detailed. In *Doe* v. *Hiley* all the facts relative to the property appeared. It was held under the trusts of a will; and a lease for forty years had been granted, subject to the same trusts. Then came the statute. There were several demises, of which one was by the heir at law of the surviving trustee; and Lord *Tenterden* said, that the verdict ought to be entered on that count in the declaration in which the demise was laid to have been by the churchwardens and overseers of the poor of the parish. That is a strong case to shew that parish property, by the operation of the statute, is transferred to the churchwardens and overseers. Here, it does not appear in *whom* the legal estate was vested. If it was parish property, the fee-simple became vested in the parish officers by the operation of the statute. They received rent from the defendants, who must be taken to know the law, and that by doing so they became their tenants.

The only remaining question is, whether the defendants became tenants to the parish officers *from year to year*, or held *under the lease*. The parties to the lease in 1753 are described as the *wardens* of the parish, and it must be taken to be a demise by the *churchwardens*. The lease in 1802 is also made by the churchwardens and overseers. It passed therefore no legal interest. Nor do I see how it could operate by way of *estoppel* against the present lessors of the plaintiff, since they do not claim through the persons who were grantors in that lease. The act could not operate to convey the reversion from the grantors in that lease to the lessors of the plaintiff, since the former had no reversion (*a*). The defendants, therefore, were tenants; and there being no privity between the grantors and the lessors of the plaintiff, and the defendants having had due notice to quit, the plaintiff is entitled to a verdict.

WILLIAMS, J.—There is no pretence for saying that the churchwardens for the time being had, as such, any au-

(*u*) *Vide ante*, 518, (*a*).

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thority to grant the lease in 1753, or that in 1802. In each lease the property is described as belonging *to the parish church*. It seems to me therefore that this must be considered as belonging *to the parish*; and consequently, by the 59 *Geo.* 3, it was vested in the churchwardens and overseers for the time being. It is clear that the lessors of the plaintiff are not estopped by the lease of 1802, because they are strangers to that lease. The defendants therefore were tenants to the lessors of the plaintiff, and they are entitled to recover in the name of their nominal lessee.

COLERIDGE, J.—I do not think that on this or on any other occasion we are to enter into the consideration of any hardship to result from the decision of the particular case. Here, the only question is, whether a primâ facie case was made for the plaintiff. If it was, no doubt the plaintiff was entitled to a verdict. That primâ facie case was made out, if this was parish property, and not otherwise. Is this shewn to be parish property? Evidence was given of the payment of rent to the churchwardens and overseers. In one of the leases this is described as "parcel of the lands and tenements *of the parish church*." These words must be taken in a *popular* sense. Then, the rent is reserved to the churchwardens and overseers *for the time being*.

The evidence produced on the part of the defendants rather helps out what was before a weak case; and it appears to me that upon the whole of the evidence this is shewn to be *parish property*. The case is consequently resolved into the ordinary case of landlord and tenant.

Judgment for the plaintiff.

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HOLMES v. MENTZE.

ON the 17th February 1835, under a fi. fa. against the defendant, the sheriff of Lancaster seized a quantity of wine and spirits deposited in a warehouse where the defendant carried on the business of a wine and spirit merchant.

18th of February, the following notice, signed by *John Heap*, was served upon the plaintiff and the sheriff:—"I hereby give you notice, that all the goods, chattels, and effects, in George Street, Manchester, in the county of Lancaster, seized by you, or some or one of you, by virtue of or under colour of a writ of execution issued against the goods and chattels of *L. Mentze*, of Manchester, wine and spirit merchant, are the property of the partnership concern subsisting between me and *L. Mentze*, and carried on under the firm of *L. Mentze* & Co. And that *L. Mentze* hath not any property, part, or share, in the said goods, chattels, and effects, but is, on the contrary, considerably indebted to me on the balance of accounts of the co-partnership, and I am alone beneficially entitled to and interested in all the goods, chattels, property, and effects of the said partnership; and I, therefore, require you, and every of you, forthwith to withdraw from and quit the possession of the premises, and to deliver up to me the quiet possession thereof, without any injury or damage to the same. And in default of your so doing, I shall commence against you respectively such actions, suits, and other proceedings, as I may be advised. Dated the 18th day of February, 1835."

Heap had become a dormant partner with *Mentze* in April, 1831. On the annual account balanced on the 30th June, 1834, *Mentze* was indebted to the partnership in 2557*l*, which debt had been since increased.

In Easter term, 1835, *Knowles* obtained a rule on behalf of the sheriff, requiring the plaintiff and *Heap* to

The sheriff is not entitled to call a party before the Court under the Interpleader Act, 1 & 2 *Will.* 4, c. 28, on the ground of claim set up in respect of an interest as a partner in goods seized under a writ of execution.

So, although the claim states that the balance of accounts is so much in favour of the claimant as to give him the sole beneficial interest in the property seized.

But where the execution creditor refuses either to admit or to deny the alleged partnership, the Court will enlarge the time for the sheriff's return to the writ until he is indemnified.

The Court will not interfere under the Interpleader Act, unless a dispute as to the *legal* interest in the property seized, has actually arisen. *Semble.*

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appear and state the nature and particulars of their respective claims to the wine and spirits seized, and maintain or else relinquish the same, and shew cause why the Court should not make such rule or rules respecting the same, as the Court should think fit, pursuant to the statute in that case made and provided.

Campbell, A. G., and *Montagu Chambers*, for the plaintiff, now shewed cause. This case does not come within the purview of the Interpleader Act(*a*). The sixth section of that statute gives the Court a power, where claims are made to the goods by persons not being the parties against whom the process issues; but it has been decided that the claim must be of a *legal* interest in the goods, and not of an equitable interest; *Sturgess* v. *Claude*(*b*). According to *Heap*'s own statement, the sheriff had a right to sell the goods, since all he says amounts to this, that upon the balance of the partnership accounts *Mentze* is indebted to him. The sheriff's course is free from difficulty: He may seize the whole and put up the defendant's share for sale. This point was decided in *Parker* v. *Pistor*(*c*), and *Chapman* v. *Koops*(*d*). The law is correctly laid down in *Watson's Sheriff*(*e*), where it is said, that on a writ of fi. fa. against one of two partners, the sheriff must seize all the joint property, because the moieties are undivided; for if he seize but a moiety and sell that, the other partner has a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

Sir *Fred. Pollock* (with whom was *Tomlinson*), for *Heap*, cited *Harvey* v. *Crickett*(*f*).

(*a*) 1 & 2 Will. 4, c. 58.
(*b*) 1 Dowl. P. C. 505.
(*c*) 3 Bos. & Pul. 288.
(*d*) Id. 289.
(*e*) p. 152.
(*f*) 5 Maule & Selw. 336.

Sir *William Follett* and *Knowles*, in support of the rule. The sheriff is entitled to the benefit of the Interpleader Act; for it relates to all claims upon property seized by the sheriff under process. Here, *Heap* claims the whole of the property. [Lord *Denman*, C. J. The Interpleader Act only relates to such a claim as would expose the sheriff to an *action*.] If the Court refuses to interfere, the sheriff will be placed in a situation of great difficulty. If he sells the whole of the goods as *Mentze's* sole property, he will be liable to an action at the suit of *Heap*; and if he sells *Mentze's* interest only, he will be liable to an action at the suit of the plaintiff. [*Coleridge*, J. Does your affidavit show that after you had received the notice, you had any communication with the plaintiff? There must be a *dispute* before you are entitled to come to the Court.] That has not been the practice. [*Patteson*, J. In what jeopardy is the sheriff, if he puts up to sale *Mentze's share* in the goods?] There is a *dispute* whether or not *Heap* and *Mentze* are partners. [Lord *Denman*, C. J. You contend that the issue to be tried is, whether *Heap* and *Mentze* are partners. *Coleridge*, J. Quâcumque viâ, the sheriff has a right to sell.] But in case there is no partnership the sale will be of the whole interest in the goods; whereas, if there is a partnership, the sale must be limited to *Mentze's* interest. The Court has decided, that if a party claims a *lien* on the goods seized, the sheriff may come to this Court for protection; *Cotter* v. *The Bank of England*(*a*). What difference is there between the claim made in this case by *Heap*, and a claim of lien? In the latter case it might be said that the sheriff could sell the *interest* which the defendant had in the goods, subject to the lien. The sheriff's course is not so clear as it has been assumed to be. In *Burton* v. *Green*(*b*), Lord *Tenterden*, C. J., said: "I am not quite satisfied as to the interest in the partnership property which the sheriff might have sold under the execu-

(*a*) 3 Moore & Scott, 180; 2 Dowl. P. C. 728.
(*b*) 3 Carr. & Payne, 306.

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tion. There is a difficulty in making the sheriff a tenant in common with the partners."

Lord DENMAN, C. J.—This rule must be discharged. Assuming that *Heap* is a partner, it is the duty of the sheriff to sell. Nothing has occurred which can be called an *adverse claim*. A party does not make an adverse claim merely by saying "I have an interest as partner." My brother *Coleridge* informs us, that it is the practice of the Court of Common Pleas to require proof of an actual dispute, before that Court interferes on behalf of the sheriff.

If the plaintiff insists upon the sheriff's selling the whole of the goods as *Mentze*'s sole property, he ought, in our opinion, to indemnify the sheriff. That, however, is matter for another application.

Rule discharged.

On a subsequent day in this term, *Knowles* obtained a rule, calling on the plaintiff to shew cause why the sheriff should not have time to return the writ, until he was indemnified by the plaintiff. In support of this application, an affidavit was made by the attorney for the sheriff, who stated, that after the determination of the former rule, he had addressed a letter to the plaintiff's attorney, requiring him either to admit or deny that *Heap* was a partner with *Mentze*. The plaintiff's attorney in reply said, that acting under the advice of counsel, he declined answering the question.

Campbell, A. G. and *Montagu Chambers*, shewed cause, and cited *Parker* v. *Pistor* (*a*), and *Chapman* v. *Koops* (*b*).

Rule absolute (*c*).

(*a*) 3 Bos. & Pul. 288.

(*b*) Ibid. 289.

(*c*) And see *Eddie* v. *Davidson*, 2 Dougl. 650; *Taylor* v. *Fields*, 4 Ves. jun. 396; *Barker* v. *Goodair*, *Dutton* v. *Morrison*, 17 Ves. jun. 193, and 6 Rose, 213; *Sadler* v. *Hickson*, *ante*, ii. 258.

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BLANCHARD v. BRIDGES.

No licence or covenant from *A.*, the owner of adjoining land, to put out or not to obstruct windows in the house of *B.*, is to be inferred from the circumstance of *A.*'s being a party to the deed by which the house, with the windows in it, was conveyed to *B.*, and by which deed *A.* conveyed part of the adjoining land to *B.*

Or from the circumstance of *A.*'s witnessing, without objection, the progress of the building.

The right to the unobstructed access of light and air through a window, is lost by a material alteration in the site of the wall in which the window was placed.

A., in licensing *B.* to build to the extremity of *B.*'s ground, adjoining that of *A.*'s, expressly reserves to himself the right of building to the extremity of his own ground when he shall think proper to do so. *A.* may, at any time within twenty years, build to the extremity of his own land, though he thereby render the house of *B.* dark, damp, and unhealthy.

CASE, for building a wall and thereby darkening certain windows, and otherwise injuring the house of the plaintiff. Plea: not guilty. At the trial before *Bosanquet*, J., at the spring assizes for the county of Hants, 1834, a verdict was found for the plaintiff, subject to a case, which stated in substance as follows:

15th May, 1816. *Wm. Rolph* being seised in fee of a field called the Seven Acres, within the manor and tything of Portswood, within the town and county of the town of Southampton, and wishing to sell it in building lots, by deed of feoffment, (with livery of seisin,) made between *Wm. Rolph* of the first part, *John Primer* of the second part, *Richard Close* of the third part, and *Charles Martill* of the fourth part, for the consideration therein mentioned, did infeoff *Close* of—all that piece or parcel of arable land, lying on the west side of a certain field called the Seven Acres, situate &c., admeasuring from north to south 22 feet, and from east to west 100 feet, and bounded on the north by land of *Rolph*, occupied by *Martill;* on the east by land also of *Rolph*, occupied by *Rogers;* and on the west by a road 12 feet wide, next Southampton Common; together with all ways &c., easements &c. whatever, to the said piece of land appertaining: Habendum, to *Close*, his heirs and assigns for ever. This conveyance contains only the usual covenants for title.

Close occupied the land conveyed to him, for the first two or three years, as a garden. *Rolph* continued to occupy the remainder of the field. He proposed to sell it all out in strips for building, and marked out the lands so occupied by him, and offered it for sale in lots for building,

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but only sold one lot to one *Elderfield*, on the east side. Three or four years ago, a board was put up by *Rolph*, announcing that the land was on sale for building. The houses were not to be built in any particular manner, form, or plan. At the end of two or three years, *Close* contracted for the sale of the portion bought by him, to *Snelgrove*, who built thereon a cottage. No conveyance was ever made to *Snelgrove*. The cottage so built was about 14 feet from north to south, being built to the extremity of the land conveyed by *Rolph* to *Close*, and leaving a space of 8 feet on the south side, which was used as a passage, and was fenced off from the remainder of the land in *Rolph*'s occupation, by posts and rails.

There were two small windows at the east end of the cottage, and one on the west end. Subsequently *Snelgrove* contracted with *Elderfield* for the sale to him of the property in question. *Elderfield* wishing to enlarge his cottage, applied to *Rolph* to grant him more land on the *south* side for that purpose, which *Rolph* refused to do. *Rolph* afterwards consented to let him have 10 or 12 feet on the *west* side of the cottage.

11 & 12 September, 1822. By lease and release, made between *Close* and *Martill* of the first part, *Snelgrove* of the second part, *Rolph* of the third part, *Elderfield* of the fourth part, and *Wade* of the fifth part, reciting the feoffment of 15th May, 1816, and that *Snelgrove* had afterwards purchased the piece of land, and erected thereon a cottage, and had then agreed to sell the land and cottage to *Elderfield* and *Close*, and that *Martill* and *Rolph*, at the request of *Snelgrove*, had agreed to join in conveying the same to *Elderfield*: It was witnessed, that for the considerations therein mentioned, *Close*, *Martill*, and *Rolph*, at the request and by the direction of *Snelgrove*, did, and each of them did, as to all their estates in the premises, grant, bargain, sell, alien, release and confirm, and *Snelgrove* did ratify and confirm unto *Elderfield*, all that piece or parcel of land, (describing it as before,) and also the

messuage or cottage lately erected and built thereon, which piece or parcel of land admeasured from north to south 22 feet, and from east to west 112 feet, and was bounded on the north-east and south by land of *Rolph*, and on the west by Southampton Common, and had been lately occupied by *Snelgrove;* together with all ways &c., *lights*, easements, &c. to the said piece or parcel of land, newly-erected cottage, hereditaments and premises belonging: Habendum, to *Elderfield* and his heirs.

Immediately after the execution of this conveyance, *Elderfield* commenced alterations in the cottage, and employed *Kent* as the architect. *Kent* told *Rolph* what he was going to do. *Rolph* was often present whilst the work was in progress, and saw the alterations going on, but knew nothing of the plan. He knew that a wall adjoining the land was intended to be built, in order to enlarge the house. The old windows on the east were merely carried out in a straight line five feet, and additions made to form them into bow windows. Part of the footings of the exterior of the new south side were built by *Kent*, on *Rolph*'s land. *Kent* spoke to *Rolph* about the footings after the wall was built, but not before. *Rolph* consented to their remaining, on condition that if he himself built, he should be at liberty to build up to the south wall of the cottage. Two new windows were put in on the western side, one on the old part, another on the new. The old windows were altered by putting in new mouldings; after this was done, *Kent* applied to *Rolph* for leave to put up a cornice spout, projecting over his land from the southern wall, which *Rolph* consented to, on condition that he should be at liberty to remove it when he liked, and build home to the wall.

Elderfield occupied the cottage in its altered state, without any interruption, until 1828, when he let it to *Cobb*. *Rolph* continued to occupy the adjoining land principally as arable land, and on the application of *Cobb*, who then occupied the cottage, and who wished to make a further addition to it on the north side, he, by indenture of 1st

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June, 1828, demised to *Cobb*, for 21 years, at the rent of 10*l.* a year, all that piece or parcel of land, situate &c., adjoining the dwelling-house of *Cobb*, on the north side thereof, and containing in depth, from west to east, 55 feet, and in breadth, from north to south, 14 feet 9 inches; bounded on the west by the public road leading from Southampton over the common to Portswood, on the south by the dwelling-house of *Cobb*, and on the north and east by the land of *Rolph*, and on which piece or parcel of land *Cobb* had begun to erect a chaise-house and stable; together with all and singular the *easements*, privileges and appurtenances, to the said piece or parcel of land belonging, or in anywise appertaining.

28th November, 1828. *Cobb* assigned the last-mentioned term to *T. R. Burden*. By indenture of 30th August, 1831, *Burden* assigned to the plaintiff, who occupies the remainder of the premises as tenant from year to year, under *Elderfield*.

In 1829 *Rolph* built a new house on that part of his land which adjoined the south side of the cottage and premises occupied by the plaintiff; up to that time the field had been used principally as arable land. A low wall belonging to plaintiff, about 4 feet high, divided the two properties.

14 & 15 February, 1832. By lease and release between *J. K.* and *M. J.* of the first and second parts, *Rolph* of the third part, and the defendant of the fourth part, reciting (inter alia) certain indentures of December, 1812, *J. K.* and *M. J.*, at the request and by the appointment of *Rolph* and also *W. Rolph*, did, and each of them, according to their several and respective interests and estates, did grant, bargain, &c. unto the defendant, all that newly-erected messuage or dwelling-house, with the stables &c., and the shrubbery in front and the garden behind the same, the boundary of such garden being in a straight line from the south or adjoining wall of premises belonging to Mr. *Blanchard*, (the plaintiff,) to &c., situate &c., containing by admeasure-

ment, in length, on the north side 315, on the east side 184, on the south side 281, and on the west side or front 184 feet; bounded in part on the north by premises belonging to Mr. *Blanchard*, and on the remainder part by land belonging to *Rolph*, on the east and south by &c., and on the west by the public road towards Southampton Common, formerly part of the said piece or parcel of land lately called or known by the name of the Seven Acres; together with all houses &c., fences &c., ways &c., easements &c., advantages, emoluments, rights, members and appurtenances, to the hereditaments thereby released, belonging or in anywise appertaining, and therewith usually held and occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel or member thereof, or of any part thereof: Habendum, to the defendant, his heirs and assigns.

In 1832, some disagreement having arisen between the plaintiff and defendant, the latter erected first a wooden fence, and afterwards a brick wall, parallel and close to, and extending the whole length of, the plaintiff's house. The wall for thirty-one feet was 14 feet 6 inches high, and within two feet of the eaves of the plaintiff's house, and for the remainder of the distance the wall was 8 feet 11 inches high. Before the erection of this wall, the rooms at the east side of the cottage were light, cheerful and healthy. The erection of the wall has materially diminished the light, is likely to create dampness, signs of which have made their appearance on the plaintiff's wall.

This case was argued in Michaelmas term, before *Patteson*, J., *Williams*, J., and *Coleridge*, J. The arguments are omitted, as they are fully noticed in the very elaborate judgment given by the Court.

Sir *W. W Follett*, with whom was *Sewell*, appeared for the plaintiff, and cited the following authorities, *Palmer* v. *Fletcher* (*a*), *Cox* v. *Matthews* (*b*), *Compton* v. *Richards* (*c*),

(*a*) 1 Levinz, 122. (*b*) 1 Ventris, 237. (*c*) 1 Price, 27.

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Swainborough v. *Coventry* (*a*), *Rivier* v. *Bower* (*b*), *Chandler* v. *Thompson* (*c*), *Bridges* v. *Blanchard* (*d*).

Smirke appeared for the defendant, and, after distinguishing the several cases cited for the plaintiff, quoted the following authorities: *Earl of Portmore* v. *Bunn* (*e*), *Right* d. *Jefferys* v. *Bucknell* (*f*), *Cherrington* v. *Abney* (*g*), *Moore* v. *Rawson* (*h*), *Barker* v. *Richardson* (*i*), *Canham* v. *Fisk* (*k*), *Aldred's* case (*l*).

Follett, in reply, also cited *Doe* d. *Shepherd* v. *Allen* (*m*), *Doe* v. *Wilson* (*n*).

Cur. adv. vult.

PATTESON, J., in the course of this term, delivered the judgment of the Court as follows:—This was a special case, argued before my brothers *Williams* and *Coleridge*, and myself. The action was for darkening certain windows, and otherwise injuring the house of the plaintiff, and the material facts on which our judgment proceeds are the following:

Rolph, being a tenant in fee of a close called the Seven Acres, by a deed, executed in 1816, and containing only the usual covenants for title, granted a portion of it in fee to one *Close*, describing it as a parcel of *arable land*. *Close* occupied this parcel as a garden for two or three years, and then contracted to sell it to one *Snelgrove*, who entered without any conveyance, and erected a cottage with two small windows at the east and one at the west end. *Snel-*

(*a*) 9 Bingh. 305; 2 Moore & Scott, 362.
(*b*) 1 Ryan & Moody, 24.
(*c*) 3 Campb. 80.
(*d*) *Ante*, iii. 698; *S. C.* 1 Adol. & Ellis, 536.
(*e*) 2 Dowl. & Ryl. 145; 1 Barn. & Cressw. 694.
(*f*) 2 Barn. & Adol. 278.
(*g*) 2 Vernon, 646.
(*h*) 5 Dowl. & Ryl. 234; 3 Barn. & Cressw. 332.
(*i*) 4 Barn. & Alders. 579.
(*k*) 2 Crompt. & Jervis, 128.
(*l*) 9 Co. Rep. 58.
(*m*) 3 Taunt. 78.
(*n*) 11 East, 56.

grove being still without any conveyance, contracted to sell to one *Elderfield*, who, wishing to enlarge the cottage, procured from *Rolph* a grant of twelve additional feet on the western side of the cottage. This grant was effected by deeds of lease and release, dated respectively the 11th and 12th September, 1822, in which *Rolph*, *Close*, and *Snelgrove* were granting parties, and the erection of the cottage was recited. The parties, "as to all their estates in the premises," granted "all that parcel of land," and the cottage lately erected thereon, the parcel admeasuring from north to south 22 feet, and from east to west 112, bounded on the north-east and south by land of *Rolph*, together with all ways, &c., lights, easements, &c. This grant of 112 feet included the premises contained in the deed of 1816. Upon the execution of this conveyance *Elderfield* enlarged his cottage on the south side, carrying it to the extremity of his land, on grounds which before had been used as a passage, and in the western end of this newly-built part he inserted a small window. At the eastern end of the house he carried forward a projection about 5½ feet, terminating in bay windows, and these bay windows were substituted for, but were not in the same places, though in the same direction, as the two former windows at that end of the house. It is for the inconvenience occasioned by darkening these three newly-made windows that the action is brought. The cottage, in its altered state, was occupied by *Elderfield* till 1828, *Rolph* continuing to occupy the remainder of the field, principally as arable land. In that year the cottage was let to one *Cobb*, who being desirous of making a further addition to it on the north, for the purpose of erecting a chaise-house and stable, procured from *Rolph* a lease for a term of years of a small portion of the field, described as bounded on the south by *Cobb*'s dwelling-house. The plaintiff is the assignee of this term, by an assignment in 1831, and holds the remainder of the premises as tenant from year to year to *Elderfield*.

The defendant claims under a subsequent conveyance

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from *Rolph*, who built a dwelling-house on the field in 1829.

First point: Derogation from party's own grant.

The right to maintain the present action was rested in the argument on two grounds; first, upon the principle established, that no man shall derogate from his own grant; in considering which, it was rightly assumed that the defendants stood in precisely the same situation as *Rolph*;

Second point: Presumption of licence or covenant.

and, secondly, that from the grants above stated, coupled with certain grants to be mentioned hereafter, a licence or a covenant for the unobstructed access of light and air through the windows in question, was to be presumed; and that such licence or covenant was in law either irrevocable and absolute, or determinable only under conditions of fact, which had not been performed.

That the plaintiff's argument should have its full weight, it was obviously necessary to contend, that no distinction is to be made between the windows in the cottage when first built and the windows now in question, as no grant has been made by *Rolph* to those under whom the plaintiff claims, since the formation of the present windows, except by the lease of 1828. But we are of opinion that this point cannot be successfully contended. With respect to the western window, the part of the house in which it is placed had no existence until after the conveyance of 1822: the land on which the structure was afterwards raised had, up to that time, been used only as a *passage*.

First point: Alteration of site of windows.

As to the windows at the east, the case finds that they do not occupy the places of the old windows. The wall in which those windows were no longer exists; and assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely, the right to enjoy the unobstructed access of light and air from adjoining land may be acquired, (a question of admitted nicety) still the act of the owner of

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such lands from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions, and in the same position) which existed at the time when such consent is supposed to have been given. It appears to us, that convenience and justice both require this limitation. If it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree often of a very uncertain nature, and upon very unsatisfactory evidence; and a party who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented, if it had come in question in the first instance. *Chandler* v. *Thompson* (*a*) is not at all inconsistent with this reasoning. There an antient window had been enlarged in the same place, the original aperture remained—and the case only decided that that aperture remained privileged, as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, are not claimed as *antient* windows, or, in the ordinary way, from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration.

The inquiry, therefore, as to the first ground on which the plaintiff's case is rested, is limited to the effect of the

(*a*) 3 Campb. 80. And see *Saunders* v. *Newman*, 1 Barn. & Ald. 258; *Martin* v. *Goble*, 1 Campb. 322; *Roberts* v. *Macord*, Mood. & Rob. 230.

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lease of 1828, in considering which we are not at liberty to attach any weight to the fact that the conveyance of 1816 and 1822 proceeded from the same grantor. Now it seems a strong thing to contend, that a lease for years of some feet of land on the north side of an existing dwelling-house, for the purpose of erecting a chaise-house and stables, will, in itself, prevent the lessor from making erections on the south side, by which the eastern and western windows may be darkened. Admitting, as we are disposed to do to the fullest extent, the principle that no man shall be allowed to derogate from his own grant, the only grant here is the *lease*, and it would be extending the principle to very indirect and remote consequences to consider the act complained of as derogating from that grant.

Second point.

But it is said, secondly, that the several grants by *Rolph*, coupled with his acts and declarations, amount to a licence, or to a covenant that the light and air should have free access to the house through the present, as well as the former windows. In considering these, it is proper to go back to the commencement; but we are not at liberty to attach any weight to the statement that *Rolph* desired to sell *in building lots*, by which it is sought to give a character to the grant of 1816, which on its face it will not bear. Unless we are allowed to alter the terms of the contract, by the introduction of previous wishes or intentions, we must regard it as a mere conveyance of *arable land*, and there is no doubt that at any time previously to the erection of the cottage by *Snelgrove*, *Rolph* was at liberty to erect any buildings or walls on the residue of the field, which were not prejudicial to the occupation of the parcel granted away *as arable land*. Nor would the erection of the cottage make any difference in his rights, because, as to this cottage, *Snelgrove* did not claim under him. The land not having been granted for building purposes, the parties were, as to the cottage, strangers to each other, and no mere *acquiescence* for a shorter period than twenty years would have precluded him from obstructing the windows.

It was contended, however, that the grant of 1822 altered the position of the parties, and confirmed the building use which had been previously made of the land. By the grant itself nothing passed from *Rolph* but twelve feet of land, although, in the same deed, the cottage itself, with all its existing lights, is conveyed *by Close*. Subsequently to the grant, the alterations now in question were made; and it appears, that although *Rolph* was ignorant of the precise plan intended to be adopted, yet he was often on the spot during the progress of the work, and had a general knowledge of the nature of the alterations. He appears to have made no objection, but at the same time to have specifically reserved to himself, on two occasions, the right to build close up to the southern wall.

Upon the evidence of these facts, the Court,—which by the agreement of the parties is to draw any conclusion which a jury ought to have drawn,—is desired to infer, that the windows now in existence were placed in their present position with such an acquiescence or consent on the part of *Rolph*, as warrants the presumption of whatever legal instruments may be necessary to convert the plaintiff's parcel into a dominant, the defendant's into a servient tenement, in respect of these lights. Before, however, the Court will feel warranted in making such a presumption, it must consider what right or power *Rolph* had to *prevent* the throwing out of these windows. The fullest knowledge, with entire, but mere, *acquiescence*, cannot bind a party who has *no means of resistance*. There may appear to be some hardship in holding, that the owner of a close, who has stood by without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, shall be at liberty, by subsequent erections, to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his *right* to do so at any time before the expiration of twenty years from their erection; and this with good reason, for it is far more just and convenient that the party who seeks to add to the enjoy-

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ment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well understood *grant* of it from the owner of that land, (who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant it on such terms as he may think fit to impose,) than that such right should be acquired gradually, as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact, to be decided, as we daily see, by litigation. If a party, who has neglected to secure to himself rights so important, by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence for twenty years, we think the onus lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or a covenant. It is difficult, perhaps impossible, to define the necessary *amount* of such evidence; but we are of opinion that the amount in the present case is clearly *insufficient*.

This disposes of the action as regards the windows.

With respect to the injury, alleged to be occasioned by the building of the wall, to the body of the house, it is sufficient to say, that when that part of the house was built, and incroached on *Rolph*'s land, it was stipulated that he should be at liberty, at any subsequent time, to build close up to the wall in question.

Postea to the defendant.

REX *v.* The JUSTICES of CUMBERLAND.

The justices at petty sessions have no original jurisdiction to allow the accounts of waywardens or surveyors of highways.

Nor is such want of jurisdiction cured by the acquiescence of the waywardens and of the vestry.

A Rule nisi had been obtained for a certiorari to remove an order made at a special session, in Cumberland, for the allowance of the accounts of the surveyor of highways for

the township of Houghlan. The accounts were produced at a vestry meeting held in the township, and some dispute arising as to an item of the account, it was unanimously resolved, that the surveyor should submit the accounts at once to the justices at the next special session. The surveyor, accordingly, without first laying the accounts before a single magistrate, submitted them to the next special session, at which an order was made for their allowance.

Sir *F. Pollock* shewed cause. The justices at special sessions have an original jurisdiction to allow the accounts of surveyors of highways within their division. *Rex* v. *The Justices of Somersetshire* (*a*), which was cited when this rule was moved for, is distinguishable. There the vestry, by a resolution, directed the surveyor to submit his accounts to a particular magistrate, to which he assented; but instead of doing so, he carried his accounts at once before a special session, when they were allowed by the justices. Here, on the contrary, the surveyor was directed by the vestry to lay the accounts at once before the special session, and he acts in obedience to that direction. This objection to the jurisdiction of the justices, at the special session, should have been taken when the case was heard at the special session. It cannot now be objected, after the express assent which was given, that the accounts were not laid before one justice previously to their being brought to the special session. If the parties felt themselves aggrieved by what was done at the special session, they might have appealed to the quarter sessions. [*Patteson*, J. It has been expressly held in a case in 5 Term Rep. (*b*), that no appeal lies from the adjudication of the special sessions to the Court of Quarter Sessions. How can the agreement give the justices at the special session jurisdiction?] There

(*a*) 6 Dowl. & Ryl. 469; 5 Barnw. & Cressw. 816.

(*b*) *Rex* v. *Justices of W. R. of Yorkshire*, 5 T. R. 629, and *Rex* v. *Mitchell*, 5 T. R. 701.

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are many instances in which it has been held that the consent of parties gets rid of the provisions of an act of parliament. The agreement is in the nature of an estoppel (*a*).

Creswell, contrà, was stopped by the Court.

Lord DENMAN, C. J.—The justices at petty sessions have no *original* jurisdiction; and it certainly would be a very safe rule to adopt, that the consent of parties cannot confer a jurisdiction which does not legally exist, and that no such estoppel can take place.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule absolute.

(*a*) Consensus tollit errorem, Co. Litt. 37 a, 126 a, 180 a. But in the cases to which this principle appears to have been applied, the efficacious consent was the consent of all parties whose *interests* were to be bound. *Vide Bastelhal Castle* case, H. 39 *E.* 3, fo. 2; *Doune* v. *Darby*, H. 44 *E.* 3, fo. 6, pl. 2; *Anon. Dyer*, 367 a; *Baynham's* case, 5 Co. Rep. 36 b.; *Dormer's* case, ibid. 40 b; *Fineux* v. *Hovenden*, Cro. El. 664; *Commins* v. *Massam*, March, 196, pl. 241; *Blake* v. *Page*, 1 Keb. 36; *Turner* v. *Burnaby*, 12 Mod. 564; *Rex* v. *Clerk*, ibid. 626; Vin. Abr., vol. v., 402, *tit.* Consent; vol. xii. 62, *tit.* Evidence (X a); vol. xiv. 625, *tit.* Judgment (Z), pl. 1; vol. xxi. 120, *tit.* Trial (S a 2); ibid. 554, *tit.* View (C) pl. 32, in marg. Here, on the contrary, by the consent of the special vestry, it was sought to bind not the vestrymen only, but every rate-payer in the parish. And see *Rex* v. *Guyer and another*, *ante*, iv. 158.

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ON appeal, an order for the removal of *Ann Cotterall* and her male bastard child from the parish of St. Leonard's, Shoreditch, to the hamlet of Mile-End Old Town, was confirmed, subject to the following case:

Ann Cotterall, aged eighteen years, who has never done any act to gain a settlement in her own right, was born in wedlock, in Mile-End Old Town, of Irish parents, who have not gained any settlement in England. On 20th August, 1834, she was delivered of a male bastard child in St. Leonard's, Shoreditch, in the house of her father, with whom she continued to reside as part of his family, occasionally going out charing; and on 21st August, 1834, application was made by her mother to the overseers of St. Leonard's, Shoreditch, for relief for *Ann Cotterall* and her bastard child only; upon which, the order appealed against was made.

The question for the decision of the Court is, whether, reference being had to the provisions of 3 & 4 *Will.* 4, c. 40, s. 2, and 4 & 5 *Will.* 4, c. 76, ss. 56 and 71, the pauper and her bastard child were settled in Mile-End Old Town.

Prendergast, in support of the order of sessions. By sect. 2 of 3 & 4 *Will.* 4, c. 40, two justices, upon the complaint of the churchwardens or overseers of any parish that any person born in Ireland or Scotland, &c. has "become chargeable to such parish by himself or herself, or his or her

The English-born and unemancipated daughter of Irish parents, residing in England, but not having done any act to gain a settlement, cannot, upon becoming actually chargeable, be removed to the place of her birth.

But in such case, the parents, together with all such of their children as have not acquired a settlement in their own right, may be passed to Ireland, under 3 & 4 *Will.* 4, c. 40.

Relief given to a child of Irish parents, above sixteen years of age, but residing with his father's family, renders the father actually chargeable within the meaning of 3 & 4 *Will.* 4, c. 40, notwithstanding sect. 56 of the Poor Law Amendment Act, 4 & 5 *Will.* 4, c. 76, which was held not to apply to Irish and Scotch paupers.

Whether relief to a child of *English* parents, above sixteen, but residing with his father, given since the passing of the Poor Law Amendment Act, renders the father chargeable, *quære.*

Where the daughter of an Irish pauper is removed with her father to Ireland, under 3 & 4 *Will.* 4, c. 40, her bastard child, born in England, cannot be removed with her, although within the age of nurture.

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family," may cause such person to be brought before them, and examine him touching the place of his birth or of his last legal settlement, and if it shall be found that he was born in any of the aforesaid places, and has not gained any settlement in England, and that he has become actually chargeable to the complaining parish "by himself or herself, or his or her family," then such justices shall, by an order of removal, cause such poor person, his wife, and such of his or her children so chargeable as shall not have gained a settlement in England, to be removed to his birth-place. The language of this enactment is precisely the same as that of 59 *Geo.* 3, c. 12, s. 33, upon which *Rex* v. *Whitehaven* (*a*) was decided. In that case the pauper, an unmarried and unemancipated daughter of Irish parents, being pregnant, was removed from Whitehaven, where she resided with her parents, to Workington, as the place of her birth. The pauper's parents had not gained any settlement in England. The father had not applied for any relief for himself or any of his family. It was held, that the pauper was properly removed to Workington, for that the chargeability contemplated was the actually asking for relief, and not the mere constructive chargeability by means of the pregnancy of the unmarried daughter. That case decides that the child of Irish parents, not settled in England, is legally settled in the parish in which it is born, and upon becoming individually chargeable, is removable to such parish, although unemancipated. *Ann Cotterall* was therefore legally settled in Mile-End Old Town. This case is much stronger than *Rex* v. *Whitehaven*, by reason of the changes introduced by the Poor Law Amendment Act (*b*). Before that statute, relief to any unemancipated member of a man's family was considered as relief given to the man himself. By sect. 56 of 4 & 5 *Will.* 4, c. 76, it is enacted, "that all relief given to or on account of the wife, or to or on account of any child *under the age of*

(*a*) 5 Barn. & Ald. 720; 1 Dowl. & Ryl. 384.

(*b*) 4 & 5 *Will.* 4, c. 76.

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sixteen, not being blind, deaf, or dumb, shall be considered as given to the husband of such wife, or to the father of such child, as the case may be; and any relief given to or on account of any child, *under the age of sixteen*, of any widow, shall be considered as given to such widow: provided always that nothing therein contained shall *discharge* the father and grandfather, mother and grandmother, of any poor child, from their liability to relieve and maintain such poor child in pursuance of the provisions of 43 *Eliz.* c. 2,"—*i. e.* from liability to support a child no longer a member of the family. The legislature clearly contemplated that thenceforth relief given to a child *above* the age of sixteen, should not be considered as given to the father or widowed mother of such child. This is shewn not only by the enactment of that section, but also by the *proviso*, which is nugatory, unless upon the supposition that such was the effect of the enactment. This construction of the enactment is further confirmed by sect. 57, which enacts, "that every man who shall marry any woman having children, shall be liable to maintain such children as a part of his family, and shall be chargeable with all relief granted to or on account of such children, until they shall have respectively attained the age of sixteen, or until the death of their mother." The legislature, by the enactment in sect. 56, intended to make the attainment of the age of sixteen tantamount to emancipation, for the purposes of relief and of liability of the father. If this argument be correct, the pauper's parents could not have been passed to Ireland; and unless her parents were removable, the pauper was clearly not liable to be passed to Ireland. In *Rex* v. *Bennett and Broughton* (*a*) it was held, that under 59 *Geo.* 3, c. 12, s. 33, an Irish female pauper, having a bastard child born in a parish in England, and within the age of nurture, may, on becoming chargeable, be passed to Ireland, though the child cannot be sent with her; the act not authorizing the removal of any settled person. Birth in wedlock confers a

(*a*) 2 Barn. & Adol. 712.

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settlement if there be no settlement in the parents. In *Rex* v. *Great Clacton* (*a*) the case was:—An Irish man, and an Irish woman, his wife, not having gained a settlement, resided in Great Clacton, and had a child born there. They afterwards removed to St. Margaret's, Ipswich, where the husband died, and the woman afterwards married a settled inhabitant of St. Margaret's. The child, when eight years old, became chargeable, and was removed to Great Clacton as the place of its birth. It was objected that the child should have been passed to Ireland, according to 59 *Geo.* 3, c. 12, s. 33. But the Court held that the statute applied only to persons *born* in Ireland; that without determining what would have been the case if the mother had been also chargeable, and had not acquired a settlement, yet as she could not then be removed by pass to Ireland, he must be regarded as if he had *no* parent alive; and that if so, he was clearly not within the purview of the statute. The act of 3 & 4 *Will.* 4, c. 40, is very restrictive upon the liberty of Irish and Scotch subjects, and should therefore be construed with great strictness.

Thesiger, contrà. I. What was the law upon this subject, before the passing of 4 & 5 *Will.* 4, c. 76?

Under 59 *Geo.* 3, c. 12, s. 33, or 3 & 4 *Will.* 4, c. 40, s. 2, the legitimate child of Irish parents, born in England, is not settled in the parish of its birth, so as not to be liable to be passed to Ireland with its parents. In *Rex* v. *Leeds* (*b*) it was held, that by 59 *Geo.* 3, c. 12, s. 33, the wife and unemancipated children of a Scotchman, who has not acquired any settlement in England, must, if chargeable, be sent by a pass with the husband to Scotland, and cannot be removed to the maiden settlement of the wife. One of the arguments in that case was, that the children had settlements by birth in England, and that therefore they, at all events, could not be removed: and *Holroyd*, J., says, "It seems to me that it is altogether immaterial, provided the

(*a*) 3 Barn. & Ald. 410. (*b*) 4 Barn. & Ald. 498.

head of the family be born in Scotland, whether the children be born in England or not. The only exception is as to those children who have gained settlements in England in their own right" (*a*). In *Rex* v. *Whitehaven* the only point considered was, whether a *constructive* chargeability, by reason of the pregnancy of the unmarried daughter of Irish parents, was such a chargeability as was contemplated by the act; and it was held that an *actual* chargeability was intended. Then, was there such a chargeability in this case as made the pauper's father liable to be passed to Ireland? The words of the statute are, "become actually chargeable by himself or herself, or his or her family." Relief, therefore, administered to a subordinate member of the family, will authorize a removal of the whole family. Relief to a child, part of the father's *family*, of whatever age, is relief to the father. In this case the pauper was, to all intents and purposes, a part of her father's family.

The Poor Law Amendment Act does not apply to this case. There is nothing in that act to shew that it was intended that Irish and Scotch poor should be within the purview and operation of it. It is entitled "An Act for the amendment and better administration of the laws relating to the Poor in *England* and *Wales*" (*b*), and Irish and Scotch poor are not mentioned in it; nor are the enactments in general in their nature applicable to the case of Irish and Scotch poor.

(*a*) In *Rex* v. *Leeds*, the special case did not state that the children were born in England, and did expressly state that they had not gained any settlement in their own right. And "it was only decided in that case that where the husband (who was born in Scotland) and his wife were living together, the wife must be sent along with him to Scotland." Per *Bayley*, J., in *Rex* v. *Cottingham*, 7 Barn. & Cressw. 647. The dictum of *Holroyd*, J., cited in the argument, appears therefore to be extra-judicial.

(*b*) The *title* is no part of an act of parliament: *Powlter's* case, 11 Co. Rep. 33 b; *Attorney-Gen.* v. *Hutchinson*, Hardr. 324: *Chance* v. *Adams*, 1 Lord Raym. 77, 78; *Mills* v. *Wilkins*, 6 Mod. 62, 2 Salk. 609; *Rex* v. *Williams*, 1 W. Bla. 95.

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The pauper's bastard child is settled in the parish of St. Leonard's, Shoreditch, by reason of its birth, and cannot be passed to Ireland with the rest of the family. *Rex* v. *Bennett and Broughton* (*a*).

Cur. adv. vult.

On a subsequent day in this term, the judgment of the Court was delivered by PATTESON, J. (*b*), as follows:

The question in this case is, whether the removal of the pauper, with her infant bastard child, to the appellant hamlet, can be sustained; and that depends upon this further (and principal) question, whether she ought not to have been removed with her father to Ireland, under the provisions of 3 & 4 *Will.* 4, c. 40, s. 2.

The case states that the pauper was born in the appellant hamlet, of Irish parents, who have gained no settlement in England. They, therefore, are directly within the section of the statute above referred to, if, at the time of this order made, the father had become chargeable to the parish of St. Leonard's, Shoreditch,—provided the effect of it has not been altered by the subsequent statute of 4 & 5 *Will.* 4, c. 76. And it seems to us that the pauper's father was so chargeable at the time in question. The language of the 2d section of the first-mentioned act, with reference to this subject is, "hath become chargeable by himself or herself, or his or her family." Now the pauper was, at the time of her removal, living with her father as a part of his family, having done no act, nor having contracted any relations, inconsistent with that character. Relief therefore to the pauper under her father's roof, in the manner stated in the case, did render the father removable to Ireland, and as a consequence the daughter also.

It is now to be considered how far the former act is affected by the 4 & 5 *Will.* 4, c. 76. And it is at once observable that the object of the two statutes is perfectly

(*a*) *Suprà*, 583.

(*b*) Lord *Denman*, C. J., having been absent at the time of the argument on account of indisposition.

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distinct. The former is confined merely to making provisions for the removal of certain persons born in Ireland, Scotland, &c. who have gained no settlements in this country. No question, affecting the removal or settlement of persons born in *England* is touched or attended to; whereas the objects and provisions of the latter statute are purely and exclusively *English*. Various and important alterations are made in the laws respecting the gaining of settlements, the duty of overseers, and the management of the poor; all of which are of necessity applicable and confined to England. It is observable also, that the title of the act itself purports to concern England and Wales, and them only; nor do we perceive any regulation which has the slightest relation to Ireland, Scotland, &c.—the places enumerated in the first-mentioned statute. We think therefore that the sound construction and interpretation of the two statutes is to hold them to be in effect and operation, as they are in object, wholly separate and distinct. This being so, we are of opinion that the provision in the 56th section of 4 & 5 *Will.* 4, c. 76, as to the *age* up to which the parent is to be deemed answerable for relief given to a child, viz. sixteen, (whatever might have been its effect upon relief given to a child above that age, as to the chargeability of the parent, if the parties had been English,—on which we give no opinion,) does not apply to the present case, depending, as it has been already stated it does, on the 3 & 4 *Will.* 4, c. 40, s. 2.

We think therefore that the character of the daughter's residence with the father, and his liability to maintain her and to be considered chargeable by relief given to her, are to be considered as they would have been if the latter act had not passed.

It is true that in *Rex* v. *Whitehaven* (*a*) the sessions had quashed an order of justices removing an Irish woman, pregnant, and living with her parents unemancipated, to her birth settlement, upon the ground (as stated in the

(*a*) *Ante*, 582.

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case) that she ought to have been sent with her parents by a pass to Ireland, under the 59 *Geo.* 3, c. 12, (which has the same expressions as to the chargeability of the father as the 3 & 4 *Will.* 4, c. 40, viz. "became chargeable by himself or his family:") and this Court quashed the order of sessions, upon, as it seems, but little discussion, and with not very much consideration. Upon that case two things are to be observed; first, that the question how far the woman, circumstanced as she was, could gain a settlement by birth, was not noticed at all; whereas, in the case of *Rex* v. *Leeds* (*a*), that question was considered, and it was held, that birth in such case gave no settlement,—next, that the decision proceeds expressly upon the ground that under the 59th *Geo.* 3, the chargeability contemplated by the statute was the actual asking for relief, and not the constructive chargeability (by pregnancy) under the 35th *Geo.* 3, c. 101; upon which it may be sufficient to observe, that the defect upon which the Court held the decision of the sessions wrong, does not exist here. Relief in this case was actually asked for and given before the order of removal was made.

It remains to be added, that according to the authority of *Rex* v. *Bennett and Broughton* (*b*), the bastard in this case cannot be removed with the mother to Ireland. This, however, is a circumstance not necessary for our decision, which is, that the removal of the pauper, which should have been to Ireland, having been made to the appellant hamlet, is wrong; and that therefore the order of removal, and the order of sessions confirming the same, must be quashed.

Order of Sessions quashed (*c*).

(*a*) *Ante*, 585.

(*b*) 2 Barn. & Adol. 712; *ante*, 583. And see *Rex* v. *St. Mary, Leicester*, *ante*, 215.

(*c*) *Vide* observations upon this decision and as to its probable consequences, in Leigh's Practical Treatise on the Poor Laws, 672, n.

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A Rule had been obtained on behalf of *William Henry Carmichael Smyth*, calling upon the Lords Commissioners of the Treasury to shew cause why a mandamus should not issue, commanding them to make and issue a Treasury minute or authority for the payment to Mr. *Smyth* of the arrears (*a*) of a certain retired allowance granted to him upon his removal from the office of Paymaster of Exchequer Bills.

This rule was obtained upon the affidavit of Mr. *Smyth*, which stated the following facts:—

That on 21st June, 1811, the deponent was duly appointed one of the Paymasters of Exchequer Bills, and discharged the duties of such office with diligence and fidelity during a period of nearly thirteen years.

That, in 1826, the deponent transmitted to the then Lords Commissioners of the Treasury, a certificate from four eminent physicians, certifying that he was incapable, from infirmity of body, to discharge the duties of his said office, and solicited a retired allowance.

That, in October, 1826, he received a letter from the then Assistant Secretary to His Majesty's Treasury, of which the following is a copy:—

"Treasury Chambers, Oct. 11th, 1826.

"Sir,—I have it in command from the Lords Commissioners of His Majesty's Treasury to acquaint you, that upon a review of all the circumstances which led to your removal from the situation of Paymaster of Exchequer Bills, and the continued distressing state of your health, my

Held, that a mandamus lies to the Lords Commissioners of the Treasury to make and issue a Treasury minute or authority for the payment to *A.* of the arrears of a pension admitted to be held by them for his benefit.

Whether the Lords Commissioners might return that the state of public affairs rendered it expedient to withhold such payment, *quære.*

Where, under a parliamentary vote, money was placed under the control of the Lords of the Treasury, for the benefit of *A.*, they are not authorized to impose on *A.* a collateral condition of payment.

(*a*) This motion being founded on the circumstance of money being actually in the hands of the Lords Commissioners of the Treasury, the application would be limited to so much of the arrears as was shewn by the affidavits to have been actually voted,—the vote of credit not being prospective. *Vide post*, 596.

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Lords will submit a vote to parliament for granting to you a retired allowance, at the rate of 166*l.* per annum, to commence from the 5th of April, 1826. I am, &c.

"To *W. C. Smyth*, Esq." "*W. Hill.*"

That, on 25th November, 1829, the deponent received a letter from *G. R. Dawson*, Esq. one of the then joint Secretaries to the Treasury, from which the following is an extract:—

"I am further to acquaint you, that three years have elapsed since my Lords communicated to you their intention, in consequence of the distressing state of your health, as described in a medical certificate annexed to your application to this Board, to grant to you a retired allowance of 166*l.* per annum, to commence from the 5th of April, 1826. And I am to inform you, that that allowance, with any arrears which may be due upon it, will, like any other retired allowance, be paid to you on application to the Paymasters of Exchequer Bills."

That, on 28th May last, the deponent applied personally to *E. H. Nevinson*, one of the Paymasters of Exchequer Bills, for payment of his said retired allowance, but was informed by him, that they, the Paymasters, had no fund from which to pay the said retired allowance to him.

That in consequence of such information the deponent, on the same day, wrote and transmitted to Lord Viscount *Melbourne*, then and now First Lord of the Treasury, a letter, of which the following is a copy:—

"My Lord,—In 1827 I received a written communication (*a*) from the then Secretary to the Treasury, informing me, that a pension of 166*l.* a year had been voted to me, by parliament, from the 5th of April preceding; and that the same would be paid to me upon application to the Paymasters of Exchequer Bills.

"Circumstances, unnecessary here to explain, induced

(*a*) The written communication here alluded to is not set out in the affidavit.

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me to refrain from making that application, until this day, when I applied in person to Mr. *Nevinson*, (the Paymaster in attendance,) but was informed by him, that they (the Paymasters) had no funds; I therefore have to request the favour of your Lordship to inform me, at what office or place I am to apply for the payment of that pension.

"I am, &c. *W. C. Smyth.*"

That, on 5th June last, the deponent received a letter from *George E. Anson*, Esq. then and now Private Secretary to the said Lord Viscount *Melbourne*, of which the following is a copy:—

"Downing Street, 5th June, 1835.

"Sir,—I am directed by Viscount *Melbourne* to acknowledge the receipt of your letter of the 28th instant, and in reply to acquaint you that you may receive your pension, on application to the Paymaster of Civil Services at the Treasury. "I remain, &c.

"*W. C. Smyth*, Esq." "*G. E. Anson*, Priv. Sec."

That, in consequence of the receipt of this letter, he, on 8th June last, wrote and transmitted to *William Sargent*, Esq. Paymaster of Civil Services, a letter, requesting him to appoint an early day when he might wait upon him, to receive the arrears of his retired allowance; but that, on the day following, he received a letter from the said *W. Sargent*, informing him that he (*W. Sargent*) had not received any authority from the Lords of the Treasury for the issue of the said retired allowance: That in consequence of such information, he called upon and had an interview with the said *G. E. Anson*, to whom he communicated the purport of the answer which he had received from the Paymaster of Civil Services: That the said *G. E. Anson* appeared much astonished thereat, but promised him that he would speak again to Lord *Melbourne* on the subject, and request his lordship to direct the necessary authority for the payment of the said retired allowance to be issued forthwith.

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That, on 19th June, the deponent received a letter from said *G. E. Anson*, of which the following is a copy:—

"Downing Street, 19th June, 1835.

"Sir,—On inquiry, I find it will be necessary for you to obtain authority for receiving your pension from the Commissioners of the Treasury.

"And I have the honour to be, &c.

"*W. C. Smyth*, Esq." "*G. E. Anson*, Priv. Sec."

That, on the 22d June, the deponent wrote and transmitted the following letter to *E. I. Stanley*, Esq. then and now one of the joint Secretaries to the Treasury:—

"Sir,—On the 5th instant I received a letter from Mr. *Anson*, Private Secretary to Viscount *Melbourne*, acquainting me, by direction of his Lordship, that I might receive my pension, on application to the Paymaster of Civil Services at the Treasury.

"I am however informed by that officer, that he has not yet received any authority from the Lords of the Treasury, for the issue of my pension; I have, therefore, to request the favour of you to forward the requisite instructions for that purpose.

"I have the honour to be, &c. *W. C. Smyth.*"

"To *E. I. Stanley*, Esq. M.P. Sec. to the Treasury."

That the deponent never received any reply to the last-mentioned letter, but that on 15th August last he received a letter from a gentleman, (whom the deponent had requested to ascertain from the authorities at the Treasury the cause of the delay in the payment of the said retired allowance,) from which the following is an extract;

"The answer which I have received from Mr. *Stewart* is in these words,—'If Mr. *Smyth* will call on the Solicitor to the Treasury, he will know *on what conditions* his allowance will be paid.'"

That, on 17th August, he received the following letter

from *Charles Bourchier*, Esq. one of the joint Solicitors to the Treasury:—

"Treasury, 17th August, 1835.

"Sir,—I beg leave to inform you, that I have been directed by the Lords of the Treasury to prepare an instrument to be signed by you, previously to your receiving the arrears of your retired allowance, to secure your instituting no further legal proceedings in respect of your late office, or your late colleagues in that office.

"It appears to me that a bond is the most proper instrument for this purpose; and I beg the favour of your informing me whether you are willing to enter into such a bond, with one sufficient and responsible surety, in such penalty as their Lordships may direct. I am, &c.

"*W. Carmichael Smyth*, Esq." "*Charles Bourchier*."

That, on the day following, the deponent wrote and transmitted the following answer to the letter of the said *Charles Bourchier*:—

"Sir,—In reply to your letter of yesterday's date, I beg to be informed, whether the bond which it is proposed I should enter into, is to prevent my instituting *criminal* as well as civil proceedings, against my late colleagues, in my late office of Paymaster of Exchequer Bills; and further I request to know the amount of the penalty I and my surety will incur, by an infringement of the terms of the proposed bond. "I am, &c.

"To *Charles Bourchier*, Esq." "*W. C. Smyth*."

That, on 24th August, the deponent received from said *Charles Bourchier* the following letter:—

"Treasury, 24th August, 1835.

"Sir,—I have to acknowledge the receipt of your letter of the 18th instant, and in answer thereto beg to acquaint you, that it is intended that the security to be given by you should extend to all proceedings whatsoever, so as to afford the gentlemen for whose *quiet* it is required, complete se-

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curity in respect of all supposed causes of complaint, arising out of past transactions.

"The obligation will be in the penalty of 1000*l.* from yourself, and one responsible surety in 500*l.* If you will favour me with the name and description of the gentleman who will become the surety, and a reference to some one acquainted with his affairs, from whom I may satisfy myself as to his sufficiency, the bond shall be prepared.

"I am, &c. *Charles Bourchier.*"

"*W. Carmichael Smyth*, Esq."

That, on 26th August, the deponent wrote and transmitted to the said *Charles Bourchier* the following letter:—

"Sir,—In reply to your letter of the 24th instant, I have to request that you will inform me whether, upon me and my surety executing the bond therein mentioned, it is the intention of the Lords of the Treasury to pay me the arrears of my pension of 166*l.* per annum, from the 5th day of April, 1826, only, or whether their lordships will be pleased also to make or cause to be made to me any and what pecuniary recompense for the loss of fortune, of health, and of character, which I have been subjected to during the last twelve years, through the machinations of my late colleagues in the office of Paymaster of Exchequer Bills.

"I am, &c. *W. C. Smyth.*"

"To *Charles Bourchier*, Esq."

That, on 8th September last, the deponent received the following answer to the last-mentioned letter:—

"Treasury, 8th Sept. 1835.

Sir,—I beg leave to acquaint you, that your letter of the 26th ult. addressed to my colleague, Mr. *Bourchier*, has been submitted to the Lords of His Majesty's Treasury, and that I am informed by my Lords that they have no intention of making any payment to you in addition to your pension. "I am, &c.

"*W. C. Smyth*, Esq." "*George Maule.*"

That, on 11th September, the deponent wrote to the said *George Maule*, as follows:—

"Sir,—With reference to the several letters of your colleague, Mr. *Bourchier*, bearing date respectively the 17th and 24th August last, and to that of yourself, bearing date the 8th instant, I beg leave to acquaint you, for the information of the Lords of his Majesty's Treasury, that I have no intention of executing any instrument or bond of the nature or to the effect therein described; and further, that unless the whole of the arrears of my pension be paid to me on or before Saturday the 19th current, I shall forthwith institute legal proceedings for the recovery thereof.

"I am, &c. *W. C. Smyth.*"

"To *Geo. Maule*, Esq."

That, on the same day, the deponent wrote and transmitted to Lord *Melbourne* a letter, as follows:—

"My Lord,—I have the honour herewith to transmit to your lordship a copy of a letter I have received from Mr. *Maule*, together with a copy of my reply thereto.

"I humbly, but confidently, hope that your lordship will not suffer me to be subjected to further delay and vexation, or put to additional expense in obtaining my just and legal rights; but that, in conformity with the spirit and with the letter of the communication made to me so far back as the fifth of last June, (by your lordship's own directions,) you will be pleased to order that the arrears of my pension be paid to me forthwith.

"I have the honour to be, &c. *W. C. Smyth.*"

"To the Right Hon. Lord Viscount *Melbourne*."

That, on 18th September, the deponent received a letter from the said *G. E. Anson*, of which the following is a copy:—

"Downing Street, Sept. 17, 1835.

"Sir,—I am directed by Viscount *Melbourne*, to acknowledge the receipt of your letter of the 11th instant, and to acquaint you that his Lordship has instituted inquiries

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at the Treasury, from which it appears that your letter of the 11th instant, addressed to the Solicitor of the Treasury, is considered as having terminated the present communication with you on the subject of the retired allowance alluded to in your note.

"I have the honour to be, &c.

"*Mr. W. C. Smyth.*" "*G. E. Anson.*"

That the deponent never has received the said pension or retired allowance, or any portion thereof. And that he has been informed and believes that the whole amount of his said pension or retired allowance has been regularly voted to him by parliament, from the 5th of April, 1826, up to the present period, and that the same is now in the possession, custody, or control of the present Commissioners of the Treasury.

No affidavit was sworn on behalf of the Lords of the Treasury.

Campbell, A. G. and *Wightman* now shewed cause.

First point: No vested right.

I. Mr. *Smyth* has not acquired such a *vested right* to this pension as is inconsistent with a discretionary power in the Lords of the Treasury to withhold the payment of it. Let it be assumed, although the fact is not strictly stated in the affidavit, that a pension of 166*l.* to Mr. *Smyth* has formed an item in the estimates submitted to the House of Commons, and that the amount of the estimates has been regularly voted by that House, still no legal vested right to the pension is conferred. Reliance will be placed, in support of this rule, on sections 3 and 4 of 3 *Geo.* 4, c. 113, which authorize the Commissioners of the Treasury to grant superannuation allowances to certain public officers under the age of sixty-five, who are incapacitated from infirmity of mind or body to discharge the duties of their situations, and who shall have discharged their duties with diligence and fidelity, to the satisfaction of the Commissioners. But any grant made by the Commissioners under this act does not

give a legal right to the pension granted. They are not able to pay the pension unless a fund be created by a vote of the House of Commons. It is the Appropriation Act (*a*) which authorizes them to pay it; and perhaps if in that act the pension granted to Mr. *Smyth* was specifically mentioned, he might have a legal right to demand it. But by the Appropriation Act one whole sum is appropriated for the payment of all the pensions mentioned in the estimates and voted by the House; and there is nothing in the act to shew that the crown is not to have any discretion as to the payment of any of the pensions voted. *Rex* v. *Hornby*, or *The Bankers'* case (*b*), is the only decided case at all bearing upon this question (*c*). That was a petition (*d*) to the Treasurer and Barons of the Exchequer exhibited by *Joseph Hornby*, for the allowance of letters-patent granted by King *Charles* 2, for payment of an annuity out of the excise, &c.: The Attorney General demurred generally: The Court gave judgment for *Hornby*, but the judgment was reversed in the Exchequer Chamber, upon error brought. It was admitted that the annuity was properly granted, but it was held that the Lord High Treasurer had a *discretion* (*e*) as to paying money, and that the barons had no control over him in that respect. *Treby*, C. J. says, "The case, in short, is no more than this; suppose the king be indebted to the petitioners and also to the army, the fleets, &c.:—Who shall direct the payment of these debts,—the barons or the treasurer? who is the best judge of the state of the kingdom and its necessities? So that suppose there was only four thousand pounds in the Exchequer, and we were threatened with a foreign invasion, how shall this money be disposed? Says the Treasurer,—to raise men, to pay the army and our fleets,

(*a*) Annual:—See, for instance, 3 & 4 *W.* 4, c. 96, sect. 5 & 6.

(*b*) 5 Mod. 29.

(*c*) *Vide tamen post*, 605.

(*d*) *In the nature of* a petition of right, *vide Rex* v. *Hornby*, *ubi suprà*, reported also in 11 Hargr. St. Trials, 136; 14 Howell, St. Tr. 1; 2 Jones's Index to Exch. Records, Addenda, *tit.* Excise; 1 Freem. 331; Skinner, 601; Carth. 380; Comberb. 270.

As to the proceeding by *Petition of Right*, see Mann. Exch. Pract. 2d edit. 84.

(*e*) *Post*, 605.

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that by their assistance we may prevent the enemy from coming amongst us: No, say the Barons, we must pay the bankers with this money, though at the same time we open the gates and let in *Hannibal*, to our utter ruin and destruction;" and then he proceeds further to argue that the treasurer alone had the power to order the payment of the money.

Second point: Whether a mandamus lies to the Lords Commissioners of the Treasury.

II. A mandamus does not lie to the Commissioners of the Treasury. The mandamus prayed for would be in effect a command *from* the king in one character, *to* the king in another character. There is no precedent for the issuing of such a mandamus, notwithstanding the frequent controversies which have arisen between claimants and the lords of the treasury (*a*).

Third point: Whether proper case for a mandamus.

III. And supposing that in strictness the mandamus lies, it is submitted that the Court ought, in its discretion, to refuse to issue it in such a case as this. The argument of *Treby*, C. J., in the *Bankers'* case, is applicable to this point. Insurmountable difficulties might arise from pursuing the course which the Court are called upon to adopt. Although no difficulty might be created in this particular instance, yet the precedent might form the foundation of a dangerous practice.

J. Jervis and *Welsby*, contrà. The Lords of the Treasury have not, it is submitted, any discretionary power of withholding the payment of this pension. The pension appears to have been granted by the Lords Commissioners under 3 *Geo.* 4, c. 113. The amount of the pension appears to have been voted by parliament, and, of course, received into the Treasury. The vote was specifically for Mr. *Smyth*, according to the estimates laid before parliament; and there appears to be no reason for contending, that because by the Appropriation Acts one entire sum is appropriated to all the superannuation allowances to officers in public departments, therefore Mr. *Smyth* cannot claim a

(*a*) *Vide* note at end of this case.

legal right to the specific portion intended for him. In the letters set out in the affidavits in this case, there is a clear acknowledgment that the Commissioners had received the amount of a pension which had been granted and voted to Mr. *Smyth*. The Commissioners have no power, after a pension has been voted by parliament, to revoke their grant of it. In the case of a grant of a retiring allowance, under special circumstances, the Commissioners are directed (by sect. 5,) to lay the special circumstances before parliament. In such a case as *that*, could the Commissioners, after the House of Commons had, upon a consideration of the special circumstances, voted the allowance, revoke their grant or refuse to pay the money voted? Surely not. This is not one of those cases; but it appears not to be essentially different as regards the present question. The Commissioners have no right, after receiving the money for a specific purpose, to refuse to apply it to that purpose. It is somewhat surprising, that the *Bankers'* case should have been quoted, as shewing that the party has no legal right. That case was decided by lord keeper *Somers*, (there being at the time no lord treasurer,) who admitted a *legal right* to the annuity, but held that there was no legal remedy. Here, there is a legal right, *but no specific remedy;* and therefore the Court are asked to enforce that right by mandamus.

Then it is said, that there has been no *precedent* for issuing a mandamus as prayed, and that the mandamus would be a command from the king to the king. That there has been no precedent is admitted; and it is to be hoped that no case of the sort will ever occur in future. The Court has jurisdiction to issue this mandamus to compel *a public board*, not to command the king, to pay over money which it has received for the benefit of a subject, and to which that subject is legally entitled.

Lord DENMAN, C. J.—The affidavit on which this application is founded, states, that Mr. *Smyth* was, in 1826, in

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that situation in which the Lords of the Treasury had authority, under 3 *Geo.* 4, c. 113, to grant him a superannuation allowance, and by the letters set out it would appear, that they *did* grant him a retiring pension of 166*l.* Mr. *Hill*, the Secretary of the Treasury, in his letter of October, 1820, informed Mr. *Smyth* that the Lords Commissioners would submit a vote to parliament for granting him a retired allowance of that amount. It appears further, that parliament did grant the pension; and Mr. *Smyth* is directed, by the letter of Mr. *Dawson*, to which officer to apply for the pension and all arrears, and informed that the officer would pay it upon his application. I do not look at the vote of the House of Commons, but to the letters of Mr. *Hill* and Mr. *Dawson*. It seems to me that the statement in the letter of Mr. *Dawson* makes the Lords Commissioners the depositories of Mr. *Smyth*'s money. It appears further, that Mr. *Smyth* applied to Mr. *Nevinson*, who was the officer pointed out by the letter of Mr. *Dawson*, and he informed Mr. *Smyth* that he had no funds. Then Mr. *Smyth* is referred, by a letter of the Private Secretary of the First Lord of the Treasury, to the Paymaster of Civil Services. That which passed between the Lords of the Treasury and Mr. *Smyth*, was a clear recognition of his title to the pension, and an admission that they *had* his money. Nevertheless, they now refuse to pay it, except upon a condition, which, in point of law, they had no right to annex.

I see nothing to prevent our issuing this mandamus. I cannot assent to the argument that the Court cannot issue a mandamus to the Lords of the Treasury, because they are *officers of the Crown*. The crown has nothing more to do with these than with any other public officers. They have received money as trustees for an individual, and then avoid paying it by annexing an illegal condition to the receipt of the money by that individual. I think that we may issue a mandamus to the Lords Commissioners of the Treasury as well as to any other public officers. *Rex* v. *Hornby* (*a*) is

(*a*) *Ante*, 597.

very distinguishable. That was not an application for a mandamus, and the circumstances were peculiar.

There may possibly be a return made by the Commissioners, shewing that by reason of public necessities they cannot apply any portion of the money in their hands to the satisfaction of the claims of Mr. *Smyth*; but as the matter stands now, I think that this mandamus ought to issue.

PATTESON, J.—I am entirely of the same opinion. The application is resisted on two grounds; first, that there is no legal right; and secondly, that a mandamus cannot issue to the Commissioners of the Treasury.

First point.

On the first point, the argument was, that the Appropriation Act did not vest in *individuals* the right to the pension voted to them: but it appears that the Lords of the Treasury had power to grant, and by the first letter of their agent, it appears that they had agreed to submit a vote to parliament for the granting Mr. *Smyth* a certain retired allowance; and by the letter of 1829, it appears that they had received the pension for Mr. *Smyth*. The letter of Mr. *Dawson* is tantamount to a statement, that out of the whole sum appropriated for the payment of retired allowances, they held 166*l*. per annum for Mr. *Smyth*. I think that there was a legal appropriation of so much money to meet this individual's claim.

Second and third points.

Then what is the legal remedy? Mr. *Smyth* has no other remedy; and I think he is entitled to this mandamus. In 1829 Mr. *Smyth* is referred to the Paymaster of Exchequer Bills, who informs him that he has no funds. In 1835, he is referred to the Paymaster of the Civil Services, who says that he has received no authority from the Commissioners of the Treasury. Mr. *Smyth* then applies to the Commissioners for an authority to the Paymaster of the Civil Services. The Commissioners do not answer that they have no sum applicable to the claim of Mr. *Smyth*, but they say that he shall not have it unless he will execute a bond not to institute any further legal proceedings in respect of his

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late office, or his late colleagues in that office. The Commissioners, having the money in their hands, had no right to impose any such condition. The *Bankers'* case cannot apply. This is not the case of a debt due *from the crown*, —but of money in the hands of a public officer, who holds it in trust for the applicant. In the *Bankers'* case, the demand was generally *against the crown*, or upon the general *unappropriated* revenue.

WILLIAMS, J.—I am of the same opinion. It is said that the Court will not grant a mandamus where there is another remedy, or where the party to whom the Court is asked to direct it, has a discretionary power (*a*). It is not contended that there is any other legal remedy, and I take it for granted that there is none; and whatever discretion the Lords Commissioners ever had, has been long ago determined. The *Bankers'* case does not apply.

It appears here, that money has been actually appropriated for the specific purpose of paying Mr. *Smyth*'s pension, and payment is only refused until Mr. *Smyth* shall have complied with a certain condition; which condition the Commissioners had no right to impose. Here is then, in this case, money in the hands of a public officer, to which the applicant has a *right*, but in respect of which he has no other *remedy* than a mandamus.

First point.

COLERIDGE, J.—I am of the same opinion. The Lords of the Treasury are empowered to grant retiring pensions to public officers under the age of 65, under circumstances such as are stated in the affidavit in this case; and in this case they did so grant. Are the Court to think that the pension was so granted as to be in the power of the Commissioners? Primâ facie, at least, it is the other way. The grant of the commissioners is stated in the estimates; parliament grants the pension, and the Appropriation Act gives a gross sum for the purposes of the retired pensions to public

(*a*) *Vide Priddy* v. *Rose*, *post*, 606.

officers. The Lords of the Treasury have received the amount of all pensions of this sort in gross. It is their duty to appropriate the particular pensions to the various persons to whom they are granted. Then have they done that? It appears that they have actually appropriated to Mr. *Smyth* the amount of the pension granted to him. Mr. *Smyth* makes applications for his pension: The answers are, "There it is, in the hands of an officer; go to him, and he will pay you." Mr. *Smyth* goes to him, and he says —"I must have authority from the Commissioners." This application is to compel them to grant that authority. I think that Mr. *Smyth* has certainly a legal right.

Then, has he any other legal remedy? Only two can be suggested;—one is a petition of right to the king. I do not think that a petition of right could possibly lie in this case, as that supposes that the king is in full *possession* of the chattel or hereditament; whereas here the king has no control over the money. Then an action for money had and received against the Paymaster for Civil Service, might be suggested, but the answer would be—that the defendant was the servant of, and had no authority from the Lords of the Treasury. Second and third points.

Rule absolute (*a*).

action against the g's clerk of works for ds supplied him for the g's use. But to esta- h the de- ce it must ear that the ointment of defendant, uch clerk, f record.

(*a*) A writ of debt was brought (in C. P.) against *John Isak*, and the plaintiff declared that when the defendant was clerk of the works to the king (des overaignes le roy), the defendant bought of him certain carriage and cart loads of gravel and other things, amounting to 40*s*., for which the defendant is allowed of record in the Exchequer, and became debtor to us, and oftentimes we demanded &c.

After a frivolous plea in abatement, (that the defendant was not named clerk &c., in the writ,) which was over-ruled, the defendant pleaded by

Horton. The plaintiff has declared for a duty come to the use of the king,—wherefore we do not intend that you will go further rege inconsulto (sans le Roy counseil), and we pray aid of the king.

HILL, J.—The duty arises from your own deed and contract, wherefore it is not reason to give you the aid.

COLEPEPER, J.—If a purveyor or buyer takes victuals to the king's hostel, and then is impleaded for the duty, he shall have aid of the king &c., and so here.

HILL, J.—Not alike: for the

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buyer in your case may take victuals according to the statute, against the will of the vendor, for a reasonable price, to the use of the king, and in such case it is reason that he shall sue to the king; but in this case the defendant could not have had the plaintiff's things against his will.

HANKFORD, J.—What will you more in this case, when it was of your own contract? for of that you shall never have the aid.

THIRNING, C. J.—He who is a buyer for the king, that which he does is by the king's commission, and you shew no commission.

Horton. We will aver, and it is of record that we were *clerk*, ut suprà.

COLEPEPER, J.—It is also good reason that he shall have the aid in this case, as in the case which I have put.

THIRNING, C. J.—Will you say any thing else?

Horton. Willingly, if you award. And then,

Horton, Sir, we will aver, that the king has not paid to us the said 40*s.*, so the king is debtor to him in this case, and not we; without this that we were paid. Wherefore we pray the aid &c.

Till (for the plaintiff). It is of record in the Exchequer, that the 40*s.* were allowed to him upon his account, and further, by express words it is entitled thus: "memorandum, that such a one *owes to* such a one 40*s.* for carriage and cart loads, &c."

HANKFORD, J.—He is willing to aver that he is not paid the money; and although they are allowed, it is not proved that he is paid; and it may be that the plaintiff hath pardoned the debtor, or released to the king, wherefore it is reason that he should have the aid upon this averment that he is not paid.

Till. We say that he had an assignment, in the Receipt of our lord the king, of 100*l.*, in the name of all the debt which the king owed him, and for this payment he had pardoned to the king of his debt 40 marks; which payment is of record: Judgment, &c.

THIRNING, C. J.—You do not say that he was paid.

Till. Yes, Sir; we will aver the payment.

THIRNING, C. J.—You have shewn in your count that it was bought by reason of his office, to the use of the king, of which the king is debtor; therefore sue to the king &c.," M. 11 *H.* 4, fo. 28, pl. 53. *S. C.* Fitz. Abr. *tit.* Ayd de Roy, pl. 46.

Lord *Brooke* abridges this case thus: "A purveyor, buyer, or taker for the king, after that he is allowed and paid by the king, shall be debtor to the party; but until payment, the king himself is debtor." Bro. Abr. *tit.* Contracte bargaine et achate, pl. 10; and ibid, pl. 39; thus, "If buyer, surveyor, or clerk of the market, buy stuff to the use of the king, debt does not lie against them, *adjudged*—but he shall sue to the king, for he is debtor. Tamen conceditur, that if upon his account he afterwards receive money from the king for his debt, then he is debtor. *Quære*, for he was not debtor at first (*a*). Tamen videtur, that action of Account

(*a*) And the judgment would rather appear to proceed upon that distinction.

lies against him." As to the latter point, see M. 3 *H.* 4, fo. 8, pl. 36.

noval of ies relating he king's nue, into Exchequer.

Instead of praying in aid of the king, the modern practice has been to apply to the Court of Exchequer by motion, where questions have arisen in other Courts, the decision of which may affect the king's revenue.

On such occasions that Court directs the proceedings to be removed into the Exchequer, to be there in the same state of forwardness as in the Court out of which they are removed. The order of the Court of Exchequer for removing the action out of the Courts of King's Bench or Common Pleas, or out of any other Court having jurisdiction over the matter in question, does not operate as a *certiorari* to remove the proceedings, but as a *personal order* on the plaintiff in those Courts, to stay his proceedings there, with liberty to commence his action in the Office of Pleas in the Exchequer, a branch of that Court originally instituted for the purpose of deciding controversies between private parties, where, in respect of the matter in controversy, or of the personal engagements of one or both of the parties, the crown was directly or indirectly interested. The order also calls upon the defendant in the proceedings so stayed, to appear in the Office of Pleas, to accept a declaration, and to put the plaintiff in the same state of forwardness as he was in in the other Court. See Mann. Exch. Pract. 2 ed. 187—196. And see *Rowe* v. *Brenton*, 3 Mann. & Ryl. 133, 134.

Where money is recovered against the crown by Petition of right, Monstraunce de droit, or Traverse of office, the writ of execution for the plaintiff is directed to the treasurer and chamberlains of the Exchequer. Registr. Brevium, 183; Plowd. 382, 459.—It is said that these officers are personally responsible to the plaintiff, if, after delivery of the writ of execution, they do not appropriate the first moneys that come to their hands towards satisfying the plaintiff's demand. F. N. B. 121, F.; H. 21 *H.* 6, Fitz. Dette, 43; H. 37 *H.* 6, fo. 15, pl. 5; *ante*, 467. If in the principal case Mr. *Smyth* had brought his action of debt for money had and received (or of account, Bro. Abr. ubi supra,) against the officers under whose *control* the money appropriated by parliament was placed, such action would have been removable into the Exchequer by the above process. Whether such action would have lain—*quære*.

Lord *Brooke* seems to consider, that though the officer, by receiving the money from the king, would not become debtor as upon the original contract, yet he would be liable to account to the creditor as his *receiver*.

Remedy in equity against a public officer, for money in his hands for the use of another.

A suit in equity may be maintained against a public officer having in his hands money issued by government for the use of an individual, for the recovery of such money. But where government has ordered the money to be withheld, the question is only between government and the individual or his assignee, and equity has no jurisdiction. *Priddy* v. *Rose*, 3 Merivale, 82, 102.

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TOWNLEY, Assignee of WRIGHT, a Bankrupt, *v.* CRUMP and others.

The unpaid vendor of goods remaining in his own warehouse, rent free, may stop in transitu, although he has given the vendee a delivery-order, under which part of the goods have been removed.

But such unpaid vendor is not the true owner of the goods within the 72d section of the Bankrupt Act, so as to give an indefeasible property to the assignees of the vendee, as goods in his possession, order, and disposition, with the consent of the true owner.

TROVER for 28 pipes of wine, tried before Lord *Abinger*, C. B., at the last (and first) Liverpool assizes.

The defendants, who were warehousemen, sold to *Wright* a quantity of wine in pipes, then in their possession as owners; and upon the sale gave him a delivery-order accompanied with an invoice, which stated the marks stamped upon the pipes sold to him. It was agreed upon the sale, and stated in the invoice, that the wine, whilst it remained in the defendants' possession, was to be "rent free." *Wright* gave the defendants a bill at —— months, in payment for the wine; but before the maturity of the bill, he became bankrupt, and the plaintiff was appointed his assignee. Part of the wine had been delivered to the order of *Wright*, before his bankruptcy; but 28 pipes still remained in the possession of the defendants. By the usage of the trade at Liverpool, the delivery of an invoice and delivery-order is equivalent to a delivery of the goods; and a delivery-order is never given until payment, or that which the seller considers an equivalent to payment, has been obtained. By reason of the usage of the trade also, a party possessed of a delivery-order is able to *sell* the goods to which it relates.

It was contended on behalf of the plaintiff, that there had been such a delivery of the goods as to put an end to any right of stoppage in transitu by the defendants; and secondly, that the goods were in the constructive possession of *Wright*, at the time of his bankruptcy, and that he was consequently the *reputed owner* within the meaning of the 72d section of the Bankrupt Act (6 *Geo.* 4, c. 16.)

Lord *Abinger* was of opinion that there had been no such delivery as to put an end to the right of stoppage in transitu, and he remarked that a delivery-order resembled a bill of lading. His lordship therefore directed the plaintiff to be nonsuited, but gave him leave to move to set that non

suit aside, and enter a verdict for the value of the 28 pipes of wine.

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Cowling now moved accordingly. There was a constructive delivery of the wine to *Wright*, by the giving of the delivery-order and the actual delivery of part of the goods sold, so as to determine the defendants' right of stoppage in transitu. It is clear that if the goods had been in the hands of third persons, the giving of the delivery-order would have vested the possession in *Wright*. In *Abbott on Shipping* it is said (*a*), "If no act on the part of the seller is to precede the actual delivery of the goods, and the order has been handed by the buyer to the warehouseman,—the handing of the order to the warehouseman is a constructive taking of possession." In *Stoveld* v. *Hughes* (*b*), and *Green and another* v. *Haythorne and others* (*c*), and that class of cases, it was holden that where the original vendor is the warehouseman, and he has transferred the goods to the buyer, he has no longer any claim upon the goods. The sending of a delivery-order in those cases, was held to be an executed delivery. In Judge *Story's* American edition of *Abbott on Shipping*, there is the case of *Barrett* v. *Goddard*, from *Mason's Reports*, in which it was decided that where goods are lying in the vendor's warehouse upon credit, with the sold marks and numbers on them, so that no further designation is necessary to distinguish them from the rest of the goods in the warehouse, and they remain there till the vendor shall want the room that they occupy, no further delivery of them is necessary. [Lord *Denman*, C. J. We cannot admit that case as an *authority*. We can only regard the passage as the *opinion* of a very able commentator on mercantile law. *Patteson*, J. We did not decide to the extent now contended for in *Dixon* v. *Yates* (*d*). Lord *Denman*, C. J. The cases which have been cited were cases where the delivery-order was given to a third person,

First point: Sufficiency of delivery to determine the transitus.

(*a*) 5th ed. 379.
(*b*) 14 East, 308.
(*c*) 1 Stark. N. P. C. 447.
(*d*) *Ante*, ii. 177; 5 Barn. & Adol. 313.

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and the question arose as with that third person. Here, the question arises as between the purchaser and the original vendor.] The expression "rent free" in the contract of sale, shews that the defendants, after the sale, considered themselves as *warehousemen* only, and as no longer claiming as vendors any control or right over the goods. It is a question for the jury, whether what was done did not amount to a taking of possession by the bankrupt.

Second point: Goods in possession of bankrupt, with consent of true owner.

By the custom of the trade at Liverpool, a party who has a delivery-order can *sell* the goods it relates to. If *Wright* could *sell* the goods, he must have had the *reputed ownership*. It was said by the Lord Chief Baron, at the trial, that a delivery-order resembles a bill of lading. It has, however, more resemblance to a dock-warrant, which, when indorsed and delivered to the purchaser, operates as a transfer of the goods; *Spear* v. *Travers* (*a*), *Lucas* v. *Dorrien* (*b*).

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day in the term, delivered the judgment of the Court. After stating the circumstances of the case, and the usage of the trade at Liverpool, his lordship thus proceeded:

First point.

There was a failure of proof that the usage or custom of the trade extended to the case of a warehouseman being the vendor. Several authorities were cited to shew that this was a constructive delivery, but in those cases the delivery-order was given to a third person: the question did not arise between the original vendor and the vendee. We concur, therefore, in the view taken of this case by the Lord Chief Baron.

Second point.

With regard to the second point, this is clearly not a case within the purview of the 72d section of the Bankrupt Act, because the bankrupt was the *true owner* of the goods, subject to the rights of the vendor.

Rule refused.

(*a*) 4 Campb. 251. (*b*) 7 Taunt. 278.

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TIBBITS, Gent. one &c. *v.* YORKE.

DEBT. The introductory part of the first count stated that the defendant was the proprietor of the tolls and duties arising from the navigation of the river Neene, in the county of Northampton, between Oundle North Bridge and Thrapston Bridge, and in the eastern division of the navigation of the said river from Northampton to Peterborough, mentioned in an act of 34 *Geo.* 3, c. 85, intituled &c. The third count stated, that the defendant so being the proprietor of such tolls and duties as in the first count mentioned, as such proprietor became indebted to the plaintiff, as clerk to the commissioners acting in the eastern division of the said navigation, duly elected and appointed under and by virtue of the statutes in such case &c., in the sum of 87*l.* 2*s.* 1*d.*, the moiety of a certain sum of 174*l.* 4*s.* 2*d.*, before that time duly allowed and appointed to be paid to the plaintiff by certain of the said commissioners, not being less than nine in number, duly assembled &c., the same being a reasonable sum of money for his attendance &c., as such clerk as aforesaid, for a long space of time before then elapsed, to be paid by the defendant, so being the proprietor of &c., to the plaintiff, when he, the defendant, should be thereunto afterwards requested, whereby an action hath accrued &c. Plea: nil debet.

Sect. 6 of 34 *Geo.* 3, c. 85, authorizes the commissioners for making the river Neene navigable from Northampton to Peterborough, or any of them, at a meeting duly assembled, to appoint a clerk, and to allow and appoint to be paid to such clerk, from time to time, such reasonable sum and sums of money for his attendance &c., as they shall think proper.

By a river navigation act, commissioners are authorized to appoint a clerk, and to allow and appoint to him a reasonable sum for his attendance &c., and it is enacted, that such sum *shall be paid* by the proprietors of the tolls of the navigation. By a distinct section, if such proprietors shall neglect or refuse to pay such sum of money &c., which shall be so allowed and become due or payable to the clerk, *upon demand thereof made* of the proprietors or their collector, such sum may be recovered by action of debt &c., with double costs of suit; such action to be brought in the name of the clerk. No action can be brought upon

the prior enactment alone; and an action on the statute must be taken to be founded on the two sections conjointly, although the declaration omit to state an actual demand.

Where, therefore, in debt upon the statute, the plaintiff obtains a verdict upon nil debet pleaded, he is entitled to double costs, notwithstanding such omission.

Quære—whether the omission would have been ground of special demurrer.

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Sect. 7 enacts, that one moiety of the money to be allowed to such clerk shall be paid by the proprietor or proprietors of the tolls and duties arising from the said navigation between Peterborough and Oundle North Bridge, and the other moiety thereof by the proprietor or proprietors of the tolls &c. arising from the said navigation between Oundle North Bridge and Thrapston Bridge.

Sect. 9 enacts, that if any or either of the proprietors of the said tolls &c., shall neglect or refuse to pay such sum and sums of money which shall be allowed and shall become due or payable to such clerk, *upon demand thereof made* either of such proprietor or proprietors by whom the same ought to be paid, or of the collector or receiver of the tolls &c. for such proprietor or proprietors, then and in every such case, such sum or sums of money shall and may be recovered by action of debt &c., *with double costs of suit;* such action to be brought in the name of such clerk, against the proprietor or proprietors of such tolls &c. who ought to pay the same under the directions of this act, or if he or they cannot be found, then against the agent in the receipt of the tolls &c.

The plaintiff recovered judgment upon the third count only, and upon taxation of his costs the Master allowed *double costs of suit.* In Hilary term, 1835, *Follett,* S. G., obtained a rule calling upon the plaintiff to shew cause why the Master should not review his taxation, and allow the plaintiff single costs only. In this term

Sir *F. Pollock* and *Miller* shewed cause. The ninth section of the act (which must be taken in connection with the seventh) is the only clause giving a right of action by the clerk against the proprietors; and by that clause double costs of suit are given. It is true that a *special demand* is required by that section, and that no such demand is, by the third count, alleged to have been made; but the absence of such allegation in the count is no ground for depriving the plaintiff of his double costs. The demand was necessary

to support the action, and after judgment it must be presumed that a demand was proved.

Sir *William Follett* and *Humfrey* contrà. Upon the assumption which has been made contrà, that the 9th section is the only clause upon which the plaintiff's action could be founded, it must be admitted that it is correctly argued, that a demand ought now to be presumed, and that the plaintiff would be entitled to his double costs; but the assumption is unwarranted, for upon the *seventh* section the action may be sustained, and by that clause a demand is not required, nor are double costs given. The seventh section enacts, in general terms, that one moiety of the salary of the clerk *shall be paid by* one set of proprietors, and the other moiety by another set; and although nothing is there said, in terms, of an *action* to be brought for the purpose of enforcing such payment, yet the right to sue is impliedly given. And as by this section no special demand is required, the third count of this declaration must be presumed to have been founded upon this rather than upon the ninth section. The object of the ninth section is, in case of neglect or refusal to pay the moiety of the salary after actual demand, to impose a *penalty* upon the proprietor, who ought to pay such moiety under the directions of the act. The seventh section gives, by implication, the ordinary remedies; the ninth section gives extraordinary remedies, and in order to entitle himself to such extraordinary remedies, the clerk must make an actual demand, and thus give the proprietor notice, that if he neglects or refuses to pay, he will be sued for the debt and the extra costs.

Cur. adv. vult.

On a subsequent day in the term the judgment of the Court was delivered as follows by

Lord DENMAN, C. J.—This was a rule calling on the plaintiff to shew cause why the Master should not

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review his taxation of costs. The action was brought by the clerk of certain commissioners under an act of 34 *Geo.* 3, c. 85, respecting the navigation of the river Neene, by the seventh section of which it is provided, that the clerk's salary shall be paid by the proprietors of the navigation; and by the ninth section, that if the proprietors shall neglect or refuse to pay, upon demand thereof made, such sum may be recovered by action of debt. The third count of the declaration in this case (upon which count alone the verdict was taken) is in debt, stating generally, that the defendant, as proprietor, was indebted to the plaintiff, as clerk duly elected, in a sum of money duly allowed to the plaintiff by the commissioners, but does not state any demand made of such sum. It is contended for the defendant, that this count is framed on the seventh section, which does not give double costs, and that it cannot be taken as framed on the ninth section, which does give double costs, for want of any averment of a demand. But, on considering the clauses of the act, we are of opinion that the action is given to the clerk by the seventh and ninth sections conjointly, and that the third count must be taken as framed on both sections. Whether the objection to that count for want of an averment of demand would have been fatal on a special demurrer, or not, we do not think it necessary for us to determine, inasmuch as the question arises after *verdict;* and if the demand be necessary to the maintenance of the action, it must be presumed, after verdict on an issue of nil debet, that it was proved at the trial (*a*).

Upon the whole we are of opinion that the Master has done right in taxing the plaintiff his double costs, and that this rule must be discharged.

Rule discharged.

(*a*) *Vide* 1 Mann. & Ryl. 285 (*a*); *Doe* d. *Rogers* v. *Bath*, *ante*, vol. ii. 240.

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BAYLIS *v.* HAYWARD.

THE plaintiff declared in scire facias (upon a writ tested 3d November, 5 *Will.* 4,) upon a judgment for 56*l.*, recovered by him, against the defendant, in an action of assumpsit.

Plea: first, nul tiel record; secondly, that the plaintiff, before and on the 20th December, 1831, and from thence continually until the issuing of the commission hereinafter mentioned, was a printer, and did exercise the trade &c., and so using the trade &c., afterwards, to wit, on the day and year aforesaid, became and was indebted to *Charles Martyr*, in 100*l.*, and to other persons in large sums, and being so indebted, and being a subject of this realm, and so using and exercising the trade &c., "afterwards, and on the day and year last aforesaid," and the said debt to the said *C. M.*, and the said other debts, being then wholly due and unpaid, became and was a bankrupt within the intent and meaning of the statutes concerning bankrupts; and that thereupon afterwards, to wit, on 3d January, 1832, a commission of bankrupt under the great seal, bearing date on that day, upon the petition of the said *C. M.*, was duly awarded and issued against the plaintiff, directed &c. By virtue of which commission, the commissioners afterwards, to wit, on 7th January, 1832, did in due form of law find that the plaintiff had become and was a bankrupt within the true intent &c., before the date and suing forth of the said commission, and did then and there adjudge him to be a bankrupt accordingly. Averment,—that afterwards, and after the passing of the 1 & 2 *Will.* 4, c. 56, and before the issuing of the writ of sci. fa., and before the commencement of the proceedings in sci fa., to wit, on 16th January, 1832, the plaintiff still remaining a bankrupt and the commission being still in full force, *C. M.*, *C. M.*, and *P. H. A.*, were appointed assignees of all the personal estate and effects of the plaintiff as such bankrupt, and thereby and by force of the said statutes all the personal estate and effects of

A defendant cannot plead any matter to a sci. fa. on a judgment which he might have pleaded to the original action.

And where to a sci. fa. on a judgment the defendant pleaded the bankruptcy of the plaintiff, but it did not distinctly and affirmatively appear that the bankruptcy had occurred since the judgment in the original action, the plea was held bad on special demurrer.

Quære—Whether it would be good on general demurrer.

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the plaintiff became and are now absolutely vested in the said *C. M.*, *C. M.*, and *P. H. A.*, as such assignees. By virtue of which premises and by force of the said statutes, the said *C. M.*, *C. M.*, and *P. H. A.*, as such assignees, became entitled to the damages, execution whereof is prayed.

Special demurrer to the second plea, stating for cause, inter alia, that it does not appear with sufficient certainty whether the judgment recovered by the plaintiff was so recovered before or after he became bankrupt, and that it is a maxim in law, that no matter of defence can be pleaded to a scire facias upon a judgment which existed anterior to the recovery of such judgment: yet, nevertheless, the said plea sets up such defence.

Alexander, in support of the demurrer. Inasmuch as it is not stated in the plea *when* the plaintiff became bankrupt, it must, upon the principle that a plea must be construed most strongly against the party pleading it, be taken that the bankruptcy occurred after the original cause of action accrued (*a*), and before the judgment recovered in the original action, and might therefore have been pleaded in bar of that action:—Consequently, it cannot now be pleaded to the declaration in sci. fa., *Cooke* v. *Jones* (*b*), 2 Wms. Saunders, 72, t. in the notes.

Mansel, contrà. In *Kinnear* v. *Tarrant and another* (*c*), it was held, that to sci. fa. against bail upon their recognizances, it is competent to the defendant to plead in bar, that before the issuing of the alias writ, the plaintiff became bankrupt, and a commission issued against him, in which he was declared a bankrupt before the return of the writ, and his effects &c. assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendant, &c. That case much resembles the present. But

(*a*) *Vide Hayllar* v. *Sherwood*, *ante*, ii. 401.

(*b*) Cowper, 727, 728.

(*c*) 15 East, 592.

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upon principle alone, the plea may be supported. This mode of proceeding in sci. fa. is in reality an *action;* and any thing may be pleaded in bar of an action, which shows that the right of action is not in the party suing. Now here the plea states, that before the issuing of the sci. fa. the plaintiff became bankrupt, and that certain persons were appointed his assignees, whereby, and by force of the statutes, all the personal estate and effects of the plaintiff became and are now absolutely vested in such persons as such assignees; by virtue whereof and by force of the statutes, the assignees became entitled to the damages, execution whereof is prayed. By force of the statutes, the beneficial interest in the damages became vested in the assignees. If this be so, the *right of action* cannot be in the bankrupt.

Alexander, in reply. *Kinnear* v. *Turrant* is no answer to the proposition that the defendant cannot plead any matter to the scire facias on a judgment, which he might have pleaded to the original action. It would appear from the plea in that case, that the bankruptcy intervened between the recovery of the judgment and the issuing of the alias sci. fa.

PATTESON, J. (*a*).—This is a proceeding in scire facias, on a judgment in assumpsit, recovered by the plaintiff. The defendant has pleaded that the plaintiff has become bankrupt, but it is not distinctly stated *when* he so became bankrupt. The plea begins by stating, that before and on and after December, 1831, the plaintiff carried on trade as a printer, and that afterwards, *to wit,* on the day and year aforesaid, he became and was a bankrupt. This date, which is laid under a videlicet, is immaterial. It is not averred *when* he became a bankrupt. And with the latter part of the plea also (which his lordship read) it is perfectly consistent that the bankruptcy may have taken place before the judgment. Therefore, perhaps, the defendant might

(*a*) Lord *Denman* was absent on public business.

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have pleaded the bankruptcy in bar of the original action; and there is no point more clear than that the defendant cannot plead any matter to the scire facias on a judgment, which he might have pleaded to the original action. This, indeed, is not controverted by Mr. *Mansel*. I have been looking into the authorities referred to in *Williams*'s *Saunders* (*a*), and I find that in those cases it appeared affirmatively, that the matter *might* have been pleaded before. Here it does not; but I think that the defendant was bound to state affirmatively when he became bankrupt. The plea is to be taken most strongly against the party pleading it. In *Kinnear* v. *Turrant*, I find, upon looking into the pleadings, that it appears negatively that the bankruptcy could not have been pleaded to the original action. I think therefore that the plea is bad on special demurrer. I do not say whether it would or would not be good on general demurrer.

WILLIAMS, J.—I entirely agree. It is left in uncertainty upon this plea whether this matter might or might not have been a defence to the former action.

COLERIDGE, J.—I am of the same opinion, and on this short ground: The plaintiff having a cause of action against the defendant, recovers judgment; and it is to be presumed, that he is entitled to the fruits of his judgment. But it is said that something has occurred to deprive him of his primâ facie rights; namely, the bankruptcy of the plaintiff. Whether this is an answer to the plaintiff's claim, depends upon *when* the bankruptcy happened; and as the defendant seeks to take from the plaintiff a primâ facie right, he should state clearly in his plea all that is necessary for that purpose.

Judgment for the plaintiff.

(*a*) Vol. ii. p. 72, t.

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The Baron de RÜTZEN and Wife *v.* FARR.

DEBT for 8*s.* 4*d.* for tolls in respect of twenty-five oxen, &c. bought by the defendant at a certain fair and market, alleged to belong to the plaintiffs in right of the Baroness, held at Narberth on the 26th Sept. 1833. Plea: nil debet.

At the trial before *Gurney*, B., at the Pembrokeshire spring assizes, 1834, certain accounts of the receipt of rents and of tolls of Narberth market, found amongst the muniments of the ancestors of the Baroness de *Rützen*, were tendered in evidence in support of the plaintiffs' claim, in right of the Baroness, to hold markets and fairs at Narberth, and to receive the tolls demanded in this action. Of these accounts, some were in the handwriting of and signed by one *James*, deceased, who had been bailiff or agent of a Mr. *Simmons*, a former owner of the property inherited by the Baroness de *Rützen*, and others were in the hand-writing of one *Protheroe*, deceased, who was proved to have been managing clerk to *James*, and to have been in the habit of making out his accounts for him, and signed by Mr. *Simmons*, but not by either *Protheroe* or *James*. The former set of accounts were not objected to, but to the admissibility of the latter accounts the defendant objected, on the ground that they did not purport to charge the person by whom they were written. Both sets of accounts were, however, admitted by the learned judge, and read. A verdict having been found for the plaintiffs, Sir *James Scarlett*, in the following term, obtained a rule nisi for a new trial, on the ground (amongst others which it is not necessary to mention) that the accounts written by *Protheroe* ought not to have been admitted. In Easter term, 1835,

Accounts of the receipts of tolls of a market, signed by a person since deceased, styling himself managing clerk of a deceased steward of the claimant's ancestor, are not evidence of title, although such accounts are found among the family muniments (*a*).

The alleged immateriality of evidence improperly admitted, is not a ground for refusing a new trial, unless the Court can see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict, given upon the remainder of the evidence, must have been set aside as against evidence.

Cresswell and *Evans* shewed cause. The accounts

(*a*) The facts stated in the *text* are those reported by the learned baron and proved at the trial. This *marginal note*, on the contrary, is framed from the judgment, and from a supposed state of facts assumed in that judgment,—inasmuch as the judgment ought not to be considered as an authority with reference to any facts which, though proved at the trial, were not either expressly or impliedly adopted in the judgment.

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written by *Protheroe*, who was shewn to have been the managing clerk of *James*, and to have been in the habit of making out his accounts, and signed by Mr. *Simmons*, and found amongst the family muniments, must be taken to have been accounts rendered by *James*, and charging him with the receipt of the rents and tolls mentioned in these accounts. Either *Protheroe* may be considered to have been the agent of *James* for the purpose of rendering these accounts, or it may be inferred from the facts that the accounts, though not signed by *James*, were in fact rendered by him.

But, indeed, it is immaterial whether this evidence was admissible or not, for it cannot have materially influenced the jury; and therefore the Court will not, although it should consider the accounts inadmissible, make the improper reception of them the ground for granting a new trial. There were several similar documents, to which no objection was made, which sufficiently established the point, to prove which they were all produced. [Lord *Denman*, C. J. It is not enough for you to say that the reception of this evidence could have made no difference: you should have taken care not to put in bad evidence. *Coleridge*, J., referred to *Creuse* v. *Barrett* (*a*) (then lately decided in the Exchequer, and not at that time reported,) as having decided that the alleged unimportance of a piece of evidence improperly rejected or admitted, was no ground for refusing to send the case down for a new trial.] The Court of Exchequer must, in order to come to that decision, have overruled many cases; as *Doe* d. *Lord Teynham* v. *Tyler* (*b*), and other cases upon which it is founded. It is submitted, that if the Court see that the evidence is not material, they will not send the case back for a new trial. [*Patteson*, J. Notwithstanding the ruling of the Court of Exchequer, we have much doubt upon this point. There is clear authority to the contrary,—that the Court will *not*

(*a*) 1 Crompt., Mees. & Rosc. 919; 1 Tyrwh. & Grang. 112.

(*b*) 6 Bingh. 561; 4 Moore & Payne, 377.

grant a new trial on the ground of the improper reception of *immaterial* evidence.]

Sir *William Follett*, contrà. The documents in question were not admissible. The entries could not charge *Protheroe* himself; nor is there any evidence to shew that *Protheroe* was clothed with such authority that an account rendered by *Protheroe* would have been evidence against *James*, in an action brought against him by *Simmons*. Nor is there any ground for saying that the accounts, coming from amongst the family muniments, and signed by the owner for the time being of the property, must be taken to have been *rendered* by his agent. There is no evidence of a render by him, and the absence of his signature affords an inference that they were *not* rendered by him. The signature of *Simmons* shews only that he had received the money from *some* quarter.

Then it is said that this evidence is not material, and that this is a ground for refusing a new trial. The evidence was, at the trial, treated as material; for it was objected to,—the question of its admissibility was argued,—and the evidence was eventually put in. After this, it can hardly lie in the mouth of the plaintiff to say that the evidence was immaterial. The case in the Exchequer, the judgment in which was given after taking time for consideration, seems to be a conclusive authority to shew that the alleged unimportance of the evidence can be no ground for refusing the rule for a new trial. At all events, the new trial will be granted, unless the *Court* can see that a contrary verdict, given upon the *remainder* of the evidence, would beyond doubt have been a bad verdict. In this case, it is impossible for the Court to take upon themselves to say that the evidence improperly admitted was entirely immaterial,—the more especially as the accounts themselves are not at present in Court.

Wilson and *Vaughan Williams* appeared on the same

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side, but the Court said that they would consider whether it was necessary to hear them.

The judgment of the Court was now delivered by

Lord Denman, C. J., as follows:—In order to prove the plaintiffs' title to a market, for disturbing which this action was brought, recourse was had to certain leases found among their muniments, and also to certain accounts of rent for the same market, found in the same place. Some of these were accounts signed by the person who was then steward of the plaintiffs' ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Other accounts of the same nature were produced, signed, not by such steward, but by a person styling himself clerk to such steward (*a*). There was no parol evidence to shew that this person was ever employed by the steward, but the papers were tendered as speaking for themselves (*a*). They were severally objected to when tendered; but the learned judge admitted them in evidence. We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear.

We were, however, strongly urged to discharge this rule for a new trial, even though this evidence may have been improperly received, on account of the manifest preponderance of the proof arising from that which was unobjectionable. To induce us to adopt this course, *Doe* d. *Lord Teynham* v. *Tyler* was strongly pressed upon us, founded, as it was, upon some former precedents both in this Court and in the Common Pleas. The same argument was urged in the Court of Exchequer, where evidence had been improperly rejected, in *Crease* v. *Barret*, but the answer was given,—"It may be that the evidence may be readily explained, and may not weigh in the least against the very strong evidence to which it was opposed; but we cannot

(*a*) *Sed vide ante*, 617.

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on this account refuse to submit it to the consideration of a jury." Baron *Parke*, who pronounced the judgment of that Court, discusses the point at large; and a new trial was granted because the Court could not say that if the evidence had been received, it would have had no effect with the jury, nor that it was clear beyond all doubt, that if the verdict had been the other way, it would have been set aside as improper.

In like manner we are not convinced that the documents improperly admitted did not weigh with the jury in forming their opinion, or that their verdict, if given for the defendant, must have been set aside as against evidence. On this point therefore the rule must be made absolute; and we need not refer to the numerous other points that have been debated.

Rule absolute.

Biddlecombe *v.* Bond.

A stipulation that judgment shall not be entered up on a warrant of attorney before a certain day, unless the conusor shall in the meantime have become bankrupt *or insolvent*, does not oust the conusee from the right to enter up judgment before the day specified if the conusor be *in insolvent circumstances*, although he may not have become bankrupt or taken the benefit of an insolvent debtors' act.

ON 16th December, 1834, the defendant executed a warrant of attorney to enter up judgment for 170*l.* By the defeazance indorsed thereon, it was agreed that no judgment should be entered up or execution issued unless or until default should be made in payment of 170*l.*, by three instalments on certain specified days. Previously to the first instalment's becoming due, the parties entered into an agreement that in consideration of 30*l.* and 26*l.*,—to be paid by the defendant in the manner and at the times therein mentioned, and the remainder of the debt by instalments of various small sums, according to his ability, so that the whole should be discharged, with interest, on or before 1st April, 1836,—then, unless the defendant should in the meantime have disposed of his business, *or unless he should*

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have become bankrupt or insolvent, the plaintiff should not enter up judgment on his warrant of attorney; but that otherwise it should remain in full force.

8th of July, 1835, the plaintiff entered up judgment on the warrant of attorney, and issued a writ of fi. fa. against the goods of the defendant, who at that time had not become bankrupt or taken the benefit of the Insolvent Act, but was not in a situation to pay the whole of his debts.

An order having been made by *Williams*, J., to set aside the judgment and execution, the plaintiff subsequently obtained a rule nisi to set aside that order. Against this rule,

Hodges now shewed cause. The execution issued contrary to the terms of the agreement entered into between the parties, and therefore issued contrary to good faith. The true meaning of the agreement is, that execution should not issue unless the defendant became bankrupt or took the benefit of the Insolvent Debtors' Act. It was certainly laid down in *Bayly* v. *Schofield* (*a*), by *Le Blanc*, J. and *Bayley*, J., that insolvency with respect to a trader means that he is not able to keep his general days of payment; and the same doctrine appears to be recognized in *Cutler* v. *Sanger* (*b*); but the contrary was established by the case of *The Birmingham Benefit Society* (*c*), which is precisely in point. That case turned upon the construction to be put upon 33 *Geo.* 3, c. 54, which enacted, that if any person entrusted with or having in his hands or possession any money belonging to any friendly society, should die or become *bankrupt or insolvent*, his executor or administrator, assignee or assignees, should pay out of the effects of such person all sums of money remaining due. The Vice-Chancellor was of opinion that by the term "insolvent" in that statute, it was not intended to designate a person who had made a mere assignment for the benefit of his creditors,

(*a*) 1 Maule & Selw. 354.
(*b*) 2 Glyn & Jam. 459.
(*c*) 3 Simons, 421.

but a person who had taken the benefit of the Insolvent Debtors' Act. In that act of parliament, as in the agreement in the present case, the term "insolvent" is coupled with the word "bankrupt;" from which it is evident that the legislature in the one case, and the parties in the other, used the term "insolvent" as designating a person who had taken the benefit of the Insolvent Debtors' Act. In *Parker* v. *Gossage*, which was decided in the present term in the Exchequer, the same construction was put upon the word "insolvent" as in the case of *The Birmingham Benefit Society*. The word "insolvent" in the agreement could not refer to mere inability on the part of the defendant to pay all his creditors, because it is evident, by his entering into this agreement, that he was not able to do so.

Erle, in support of the rule. If the construction contended for on the other side is to prevail, the authority to enter up judgment in the event of the defendant's *becoming insolvent* was useless; for it would be idle to issue execution against a party immediately after he has taken the benefit of the Insolvent Debtors' Act. The meaning of the agreement was, that judgment might be entered up and execution issued at any time when the defendant should have contracted greater debts than he had the means of satisfying.

Lord DENMAN, C. J.—This rule, which is obtained for the purpose of rescinding an order for setting aside a judgment and execution founded on a warrant of attorney, is opposed on the ground that the judgment was signed contrary to a stipulation contained in an agreement entered into between the parties. That agreement stipulates that unless the defendant shall have become bankrupt or insolvent, the plaintiff shall not enter up judgment before a certain time; and it is argued that the defendant was not insolvent within the meaning of that agreement, because he

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had not taken the benefit of an insolvent debtors' act, I think that we should not be justified in so restricting the meaning of the word "insolvent." It does not follow from the fact of the creditor's having entered into this agreement that he was aware that the defendant was already insolvent. The word "insolvent" must have a larger construction than is contended for.

PATTESON, J.—It requires a very strong case indeed to make the word "insolvent," in an agreement like this, mean insolvency by taking the benefit of an insolvent debtors' act. It is a forced construction.

COLERIDGE, J.—The burthen of the argument lies upon the defendant. It is for the defendant, who seeks to oust the plaintiff of an ordinary remedy, to satisfy us that the word "insolvent" cannot have any other meaning than that which the defendant gives to it.

Rule absolute.

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To a declaration upon a money demand and also upon an account stated, the defendant may, in his plea, allege that the several sums mentioned in the two counts are the *same* debt and not *distinct* debts, and then plead over to the debt so consolidated.

But where the plaintiff declares, 1st, for work and labour,—2ndly, for money paid,—and 3dly, on the account stated, a plea alleging that 20*l.*, parcel of the sum mentioned in the third count, and 20*l.*, parcel of the several sums demanded in the first and second counts, are one and the same debt of 20*l.* and not distinct debts of 20*l.*—was held bad, on special demurrer, for not shewing how much of the 20*l.* admitted to be due on the first two counts, is admitted to be so due on each of those two counts separately (*a*).

A plea of set-off of a certain sum against a larger sum claimed in the declaration, which sum offered to be set off, the defendant alleges to be equal to the *damages* sustained by the plaintiff by reason of the non-performance of the promises mentioned in the declaration, was held bad on special demurrer.

ASSUMPSIT. The declaration contained a count for 200*l.* for work and labour, &c. as attorneys, &c.,—a count for 200*l.* for money paid,—and a count for 200*l.* on an account stated; and the damages were laid at 200*l.* Fifth

(*a*) A contrary opinion has, it is understood, been since expressed in the Court of Exchequer.

plea (*a*): as to 20*l.*, parcel of the said 56*l.* 11*s.* 8*d.*, parcel of the moneys in the first two counts mentioned, and as to 20*l.*, parcel of the said 56*l.* 11*s.* 8*d.*, parcel of the money in the last count mentioned, *actionem non*, because he says that the 20*l.* so found to be due on an account stated is the same 20*l.*, parcel of the moneys in the first two counts mentioned; and that the said sums of 20*l.* each are one and the same debt of 20*l.*, and not other and different debts of 20*l.* The plea further alleged payment and acceptance of 20*l.* in full satisfaction and discharge of the promises in the declaration, so far as the same relate to the said debt of 20*l.* and all damages sustained by reason of the non-performance thereof. Fifth plea.

Seventh plea: as to 17*l.* 17*s.* 8*d.*, parcel of the 72*l.* 3*s.* 9*d.* in the 2nd plea, parcel of the moneys in the 1st and 2nd Seventh plea.

(*a*) The pleas not set out in the text were to the following effect: First, non assumpsit as to all except as to 111*l.* 13*s.* 5*d.*, parcel of the two sums of 200*l.* in the first two counts mentioned, and except as to 111*l.* 13*s.* 5*d.*, parcel of the sum of 200*l.* mentioned in the last count: Secondly, as to 72*l.* 3*s.* 9*d.*, parcel of the first sum of 111*l.* 13*s.* 5*d.*, that the said supposed debt accrued for work and labour and money paid in and about the demanding a debt due from one *Whitelock* to the defendant, and that through the fraudulent conduct of the plaintiff, *Mee*, the defendant was prevented from recovering: Thirdly, as to 7*l.* 2*s.* 10*d.*, parcel of the said sum of 72*l.* 3*s.* 9*d.*, a plea nearly similar to the last: Fourthly, as to 56*l.* 11*s.* 8*d.*, parcel of the said sum of 72*l.* 3*s.* 9*d.*, and as to 56*l.* 11*s.* 8*d.*, parcel of the sum of 111*l.* 13*s.* 5*d.*, parcel of the sum in the last count mentioned, actio non accrevit infra sex annos: (Fifth plea, set out above:) Sixthly, as to 72*l.* 3*s.* 9*d.*, parcel of the 111*l.* 13*s.* 5*d.*, parcel of the money in the last count mentioned, that it is the same debt as the 72*l.* 3*s.* 9*d.* in the 2nd plea mentioned, and accrued as in the said plea mentioned, and that *Mee* so acted fraudulently and against his duty as an attorney as in the said 2nd plea mentioned, whereby, &c. Averment, that at the time of stating the account in the last count mentioned, and of promising to pay the sum of 72*l.* 3*s.* 9*d.* so found due as aforesaid, the defendant was ignorant of the fraud: (Seventh plea, set out above:) Eighthly, as to 9*l.* 2*s.*, parcel of the several sums of 72*l.* 3*s.* 9*d.* in the 2nd and 6th pleas mentioned, but not parcel of the sum of 17*l.* 17*s.* 8*d.* in the 7th plea mentioned, (being a sum claimed by the plaintiffs as paid for officers' fees, &c. &c.) non assumpsit.

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counts,—and as to 39*l.* 9*s.* 8*d.*, residue of the 111*l.* 13*s.* 5*d.* in the 1st plea first mentioned, and to which the 2nd plea is not pleaded,—and as to 17*l.* 17*s.* 8*d.*, part of the 72*l.* 3*s.* 9*d.* in the 6th plea, and parcel of the money in the last count,—and as to 39*l.* 9*s.* 8*d.*, residue of the 111*l.* 13*s.* 5*d.* in the 1st plea secondly mentioned, and to which the 6th plea is not pleaded,—*actionem non*, because the plaintiffs owed the defendant 57*l.* 7*s.* 4*d.*, which "equals the *damages* sustained by the plaintiff by reason of the non-performance by the defendant of the said promises in the declaration mentioned, so far as they relate to the sums to which this plea is pleaded," and out of which money so due to the defendant, he, the defendant, is ready and willing to set off and allow to the plaintiffs the full amount of the said damages, according to the form of the statute, &c.

First objection to fifth plea.

Demurrer to the 5th plea for the following special causes: For that although the plaintiffs have in and by the declaration declared in 200*l.* for work and labour as attorneys, &c. and in 200*l.* for money paid, and in 200*l.* for money due upon an account stated, yet the defendant in his 5th plea hath averred that a sum of 20*l.*, parcel of the moneys in the first two counts mentioned, and a sum of 20*l.*, parcel of the moneys in the last count mentioned, are one and the same debt of 20*l.*, and not other or different debts, and the defendant hath not, in and by his 5th plea, offered to take or taken a proper issue upon the declaration, but hath pleaded and shewn other matters, and hath attempted to confine and reduce the plaintiffs to one cause of action in lieu of

Second objection.

three distinct causes of action; and for that the 5th plea is double, in this, that the defendant hath pleaded that part of the cause of action in the 1st and 2nd counts mentioned, and part of the cause of action in the last count mentioned, are one and the same, and hath denied that they are other and different, and yet hath also, by the 5th plea, pleaded other and distinct matters, to wit, an accord and satisfaction, as a further answer to the causes of action in the

Third objection.

introductory part of the 5th plea mentioned; and for that

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it does not state to how much in particular of the sum in the first count mentioned, and to how much of the sum in the second count, the said last-mentioned plea is pleaded.

Objections to seventh plea.

Demurrer to the 7th plea, stating the following causes of demurrer: For that the defendant in the introductory part of the 7th plea, the same being a plea of set-off, hath pleaded as to 17*l.* 7*s.* 8*d.*, parcel &c. as therein mentioned, and as to 39*l.* 9*s.* 8*d.* residue &c. as therein mentioned, and as to 17*l.* 17*s.* 8*d.* parcel &c. as therein mentioned, and as to 39*l.* 9*s.* 8*d.* also residue &c. as therein mentioned, and then pleads that the plaintiffs were indebted in 57*l.* 7*s.* 4*d.*, and offers to set off that sum against the damages in respect of the said several sums in the introductory part of that plea mentioned, whereas that sum is insufficient to be set-off against, and to pay and satisfy the sums in the introductory part of that plea mentioned, or the damages in respect thereof; and that the sum of 57*l.* 7*s.* 4*d.* is pleaded to the whole of the sums in the introductory part of that plea mentioned, and not to a part thereof, and to the damages in respect of those sums, and not to a part thereof; and for that the said sum of 57*l.* 7*s.* 4*d.* does not, and could not, equal the damages sustained by the plaintiffs, by reason of the non-performance of the said promises, so far as they relate to the sums mentioned in the introductory part of the said 7th plea.

Joinder in demurrer.

Fifth plea: First and second objections.

John Bayley, in support of the demurrer. By the 5th plea, the defendant has attempted to confine the plaintiff to one action in respect of three causes of action, by averring that the causes of action in the three counts are the same. This he has no right to do. In actions of assault, in which there were two counts stating two assaults, it was always considered that a plea which averred that the two assaults were one and the same, was bad on special demurrer. There is no hardship on the defendant in com-

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pelling him to plead his defence according to the true state of the case. If the fact be that the defendant has paid 20*l.* for work done, and never owed the plaintiffs any further sum, he may plead as to 20*l.* parcel of the moneys in the first count mentioned, payment, and as to the rest non assumpsit; and then he might have pleaded non assumpsit to the second and third counts. To the plea, as it now stands, the plaintiff could not reply, traversing that the causes of action are the same, and then take issue on the accord and satisfaction pleaded; and he would take an immaterial issue if he were to say that the three causes of action stated in the declaration were not the same.

Fifth plea: First and second objections.

Joseph Addison, for the defendant. One debt or sum of money may be demandable on two different grounds, and in two different counts; *i. e.* first, on the original consideration; and secondly, upon an account stated; and in that way two demands may be in fact but one and the same. Now here it is not averred that the *three* causes of action are the same, but merely that 20*l.*, parcel of the sums in the first two counts, is the same debt or sum of money as 20*l.* parcel of the sum in the last count,—which may well be. [*Patteson*, J. You might have pleaded that the parties accounted, and that a certain sum was found due, and as to that sum accord and satisfaction. Suppose in a declaration there is a count for goods sold and delivered, and another count upon a bill of exchange, it might be pleaded that the sum due for the goods sold and delivered was the consideration for the bill of exchange.] That is another instance of one debt being demandable in two counts or forms of action. By one of the new rules (*a*) it is provided, that a count for money due on an account stated may be joined with any other count for a money demand, although it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts; which recognizes the possibility of two demands being in respect of

(*a*) Reg. H. 4 *W.* 4, *ante*, iii. p. 3.

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one debt. Moreover, *Sheldon* v. *Clipsham* (*a*) is a direct authority on this part of the case.

The COURT called upon *Bayley* to proceed with his argument.

Bayley. The 7th plea, after mentioning the several sums to which it is intended to be pleaded, and which amount to 114*l.* 4*s.* 8*d.*, pleads a set-off of 57*l.* 7*s.* 4*d.* The payment of a smaller sum cannot be pleaded in satisfaction of a larger, nor can a smaller sum be pleaded by way of set-off in entire satisfaction of a larger, though of course it may be pleaded as satisfaction of a part of the larger sum; *Thomas* v. *Heathorn* (*b*). Seventh plea.

Joseph Addison, contrà. *Thomas* v. *Heathorn* is distinguishable. Here, there is an averment that the sum of 57*l.* 7*s.* 4*d.* equals the *damages* sustained by the non-performance of the promises, which is equivalent to an averment that there is no more *due* in respect of the demands to which the plea is pleaded. There was no such averment in the plea in *Thomas* v. *Heathorn*. In that case *Bayley*, J. says, "The plea does not allege that no more than 400*l.* was *due*, but only that that was the *finding* when the account was taken." The damages, which are unliquidated, may have been less than the amount of the debt,—indeed they are laid at less,—the aggregate of the sums mentioned in the counts being 600*l.*, and the damages being laid at 200*l.* It is sufficient if the sum pleaded by way of set-off exceed or equal the damages sustained by reason of the non-performance of the promises stated in the declaration. [*Coleridge*, J. The plea admits the non-payment of the larger sum, and seeks to set off a smaller sum, in satisfaction of the larger, admitted not to have been paid.] The plea does not admit that the *damages* sustained by reason of the Seventh plea.

(*a*) Sir T. Raym. 449; Sir T. Jones, 158.

(*b*) 3 Dowl. & Ryl. 647; 2 Barn. & Cressw. 477.

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non-payment, are greater than the sum sought to be set off. If a greater sum had been inserted, and not a smaller, the evidence necessary to support the plea would have been precisely the same. All that is necessary is, to shew that the sum pleaded by way of set-off, exceeds or equals the amount of the damages. The amount stated in the plea of set-off is immaterial. The material question is, whether the sum sought to be set off exceeds or equals the demand proved, and in assumpsit the demand is in *damages;* and here is an averment that the sum set off equals the damages.

Fifth plea: First objection.

Then as to the 5th plea, *Sheldon* v. *Clipsham* disposes of the first cause of demurrer. In that case the plaintiff declared on an indebitatus assumpsit for 100*l.* received to the plaintiff's use, and also on an insimul computasset for another 100*l.*: The defendant pleaded that the several sums of 100*l.* in the declaration specified, were one and the same cause of action for one sum of 100*l.* only, and not for several sums of 100*l.*; and that after the time of the said several promises respectively specified, the defendant paid to one *B.*, by the plaintiff's order, 30*l.* in part of payment and satisfaction of the moneys in the declaration specified; and that the defendant, in full payment and satisfaction of the said moneys, demanded by the plaintiff in his declaration, did then become bound to the plaintiff in a bond of 120*l.*, conditioned for payment of 65*l.* to the plaintiff, at a certain day in the said condition specified, as yet not incurred, which 30*l.* and bond the plaintiff accepted. To this plea the plaintiff demurred, but the Court were of opinion that

Second objection.

the plea was good. Then it is said that the plea is *double.* But duplicity is where a plea avers matter which contains two distinct defences, and the plea is not double in that sense. The averment that the 20*l.* parcel of the sum in the last count alleged to have been found due on an account stated, is identical with 20*l.* parcel of the sums claimed in the first two counts, is in itself no plea, but merely an explanatory averment, introductory to what follows. The whole matter of the plea is together but one answer to the

cause of action to which it is applied. And further, if the two sums of 20*l.* be really two distinct causes of action, the plaintiff may reply that fact. Then as to the cause of demurrer lastly alleged: It was not necessary to specify how much is admitted to be due on the first count and how much on the second. No such specification is ever made in pleading a *tender*, and there can be no more necessity for such particularity in a plea of payment than in a plea of tender. [*Coleridge*, J. The plea admits a sum to be due on the first and second counts. If you do not specify how much is due on each count, the plaintiff cannot know how much the defendant admits to be due on one count and how much on the other.] If this plea is bad for this reason, so likewise is every plea of tender. Men do not usually appropriate their payments so nicely as to be able, where the payment is made in respect of different considerations, to prove how much they have paid on one account and how much on another. In many cases such a separation would not be practicable. Third objection.

John Bayley, in reply. *Sheldon* v. *Clipsham* was decided when the practice was different from that which now prevails. The objection as to the *duplicity* of the 5th plea may be abandoned. But that plea is bad in not shewing how much is admitted to have been due upon the first count, and how much upon the second. Fifth plea.

Then as to the 7th plea: It is palpably bad. After alleging that 57*l.* 7*s.* 4*d.* was due from the plaintiffs to the defendant, it thus continues, "which said sum of money so due and owing from the plaintiffs to the defendant, equals the damages sustained by the plaintiffs by reason of the non-performance by the defendant of the promises in the declaration mentioned, so far as they relate to the sums to which this plea is pleaded, as in the introductory part thereof is mentioned and set out." These promises relate to a debt *exceeding* 57*l.* 7*s.* 4*d.* This plea therefore is clearly incorrect. Seventh plea.

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PATTESON, J. (*a*) (after briefly stating the pleadings)—The first cause of demurrer to the 5th plea is, that the defendant has pleaded that 20*l.*, part of the sums of money demanded in the first two counts, and 20*l.*, part of the sum demanded in the last count, are one debt of 20*l.* My first impression was, that this was a good ground of demurrer. In actions of trespass, where the declaration alleges that the trespass was committed on divers days and times, it has always been considered demurrable to aver the identity of the trespasses (*b*). It appeared to me, therefore, that *à fortiori* it was demurrable to aver identity in actions of debt or assumpsit. In actions of assault also, it was considered a substantial ground of demurrer to aver the identity of the assaults, where there were two counts. Mr. *Addison* has however satisfied my mind that the averment of identity in the 5th plea is not a good ground of demurrer. It is averred that the sum of 20*l.* in the count upon an account stated, is part of the moneys mentioned in the two other counts. The new rules have allowed an account stated to be joined with another money count, although it may not be intended to establish a *distinct* subject-matter of complaint in respect of each count. Looking at the new rules and the reason of the thing, there is nothing objectionable in this averment.

Fifth plea: First objection.

Third objection.

The objection principally relied on is, that the plea does not state how much is due on the first count, and how much on the second. I think that this is a good objection. Since the new rules of pleading, we must consider that a count for work and labour is founded on a different cause of action from a count for money paid, and the plaintiff has a right to know how much is admitted to be due in respect of one cause of action, and how much in respect of the other. The only difficulty is, that the course of pleading a plea of tender to the whole declaration has been different. It is

(*a*) Lord *Denman*, C. J. was absent on account of indisposition.

(*b*) See *Gale* v. *Dalrymple*, R. & Moo. 118; *Walsh* v. *Shaw*, 1 Alcock & Napier's (Irish) Rep. 9. So in *case* for a libel, *Edmonds* v. *Walter*, 2 Chitt. Rep. 291.

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sufficient however to say, that the course of pleading has been such, that the practice in that particular case has become inveterate. It does not follow that we are to extend that form of pleading to a new case, especially since the new rules, the object of which was to cure the objections to the old system, arising from generality in pleading. On this ground, therefore, the plaintiff is, in my opinion, entitled to judgment on the demurrer to the 5th plea.

Seventh plea.

The 7th plea pleads a set-off of 57*l.* 7*s.* 4*d.* to 114*l.* 14*s.* 8*d.*, and avers that the sum of 57*l.* 7*s.* 4*d.* equals the damages sustained by the plaintiffs, by reason of the non-performance of the promises in the declaration mentioned, so far as they relate to the sums to which that plea is pleaded. It is contended that a smaller sum may be set off by way of deduction from a larger. I have never seen such a thing as a plea of set-off by way of *reduction* of damages. The practice has been to plead a larger sum than that mentioned in the declaration, to make the plea consistent on the face of it, and then to say that the sum offered to be set off *exceeds* the damages. I do not know that the averment, that the sum offered to be set off exceeds the damages, is necessary; but the plea must be consistent on the face of it. It is argued that the defendant by his plea says, I do not deny that there was a debt of 114*l.* due, but there is a debt due to me from the plaintiffs, which equals the *damages* sustained by the non-performance of the promises as to the 114*l.* This, at all events, is a *new* mode of pleading. I have always understood that a plea of set-off admits the sum stated in the declaration to be due; and if a defendant pleads a set-off to a portion of the sum stated in the declaration, he admits that portion to be due, and should set off a sum of money at least *equal* in amount. If it is intended by the plea of set-off not to plead to the debt, but to the damages arising from the non-performance of the promises stated in the declaration, then the defendant is treating the damages as *unliquidated*, and a set-off cannot be pleaded to unliquidated damages (*a*). The defendant might either have

(*a*) *Hardcastle* v. *Netherwood*, 5 Barn. & Ald. 93; *ante*, iv. 201, (*b*).

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made an averment of identity, and pleaded a set-off of a sum equal in amount to the sum in one of the counts, or he might have omitted the averment of identity, and increased the set-off to double the amount. Upon the face of the 7th plea there is an attempt to set off a smaller, in bar of a demand for a larger sum; which, according to the principle of *Thomas* v. *Heathorn*, cannot be done. That which is alleged in the 7th plea cannot, I think, be considered as tantamount to an averment that 57*l.* 7*s.* 4*d.* only is due from the plaintiffs to the defendant. On the demurrer to the 7th plea also, there must therefore, in my opinion, be judgment for the plaintiffs.

WILLIAMS, J. concurred.

Seventh plea: Set-off by way of *reduction*.

COLERIDGE, J.—I have nothing to add to what has fallen from my brother *Patteson*, with respect to the demurrer to the 7th plea, except that I cannot conceive any possible objection in principle to a plea of set-off by way of *reduction*.

Fifth plea: Third objection.

As to the 5th plea, I cannot see how it is possible to sustain it consistently with the rules and principles of pleading. Here, the plaintiff by his declaration alleges that he has two causes of action, the one for work and labour, the other for money paid. The defendant admits by his plea, that *some* money is due on both counts. The plaintiff has a right to know *how much* the defendant admits to be due on *each* cause of action. I did not observe that Mr. *Addison*, when this was pressed upon him, gave any answer, except by a reference to the practice with respect to a plea of tender. Whenever a plea of tender is brought before the Court, it may be an answer to this objection to it, that such has become the inveterate practice of the Court. There is no reason why an irregularity, which has prevailed with respect to a plea of tender, should be extended to a new case. The whole is an attempt at a novel mode of pleading, and is not entitled to the favour of the Court.

Judgment for the plaintiff on both demurrers.(*a*)

(*a*) *Vide Heyden* v. *Thompson*, *ante*, ii. 403; *Marrack* v. *Ellis*, 1 Mann. & Ryl. 511.

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COOPER *v.* STEVENS and Wife.

ASSUMPSIT for goods sold and delivered to the wife, dum sola. Plea: Non assumpsit infra sex annos. Replication: Assumpsit infra sex annos. At the trial before Lord *Denman*, C. J., at the last Gloucester assizes, it appeared that more than six years before the commencement of the present action, the plaintiff had sold and delivered hay to the wife, dum sola: In January, 1832, previously to her marriage, she requested the plaintiff to allow her to sell him some spirits, saying, "it will diminish the debt I owe you;" and a gallon of gin was subsequently sent by her to the plaintiff and accepted by him. It was objected, that this evidence was not sufficient to take the case out of the statute of limitations, and for this *Tippetts* v. *Heane* (*a*) was cited. The learned Chief Justice was of opinion that it was sufficient, and a verdict was found for the plaintiff for 54*l.* 14*s.*

The delivery of goods by a debtor to a creditor, expressed to be in diminution of the debt, is a sufficient part-payment to take a case out of the statute of limitations.

Ludlow, Serjeant, now moved for a new trial, on the ground of misdirection. The evidence amounted neither to an acknowledgment nor to a part-payment sufficient to take the case out of the statute of limitations. All that it amounted to was, proof of a *special agreement* to deliver a certain quantity of gin, in consideration of the existing debt.

Lord DENMAN, C. J.—In *Hart* v. *Nash*, in the Exchequer, which had been tried before me at Kingston, it was held, that the delivery of a quantity of bats might be considered as *part payment*, so as to take the case out of the statute of limitations. We cannot find that that case has been reported. It appears to us to be precisely in point. We had better, therefore, see some of the judges of the Court of Exchequer.

Cur. adv. vult.

(*a*) 1 Crompt., Mees. & Rosc. 258.

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Lord DENMAN, C. J., on a subsequent day in the term, said—On a motion for a new trial the question was raised, whether the delivery and acceptance of a quantity of gin, in reduction of a debt, operated as part payment so as to take the case out of the statute of limitations. *Hart* v. *Nash*, in the Exchequer, was supposed to determine that point. We find that it does so. When goods are taken on an agreement in part payment of a debt, we consider such a transaction to *be* a part payment, so as to take a case out of the statute of limitations.

Rule refused.

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Trespass quare clausum fregit. Plea: first, general issue: secondly, lib. ten.: thirdly, a private way: fourthly, a highway. The cause was referred, and it was agreed that the fourth plea should be withdrawn, and that the arbitrator should have power to direct what should be done by either party, and what road the defendants should have; that he should decide on the costs of the cause as if the fourth plea remained; and that the costs of the cause, and of the reference, to be taxed by the proper officer, should be in his discretion. The arbitrator found for the plaintiff on the 1st and 2nd issues, and for the defendants on the 3d, and directed that the plaintiff should pay the defendants the costs of the cause, of the reference, and of the award, to be taxed &c., and set out a road to be used by the defendants:—

The plaintiff is entitled to costs on the 1st and 2nd issues, and the defendants to the costs of the cause upon the 3d issue.

Neither party is entitled to costs on the 4th issue.

TRESPASS quare clausum fregit. Plea: first, not guilty: secondly, liberum tenementum: thirdly, a private way: fourthly, a public highway. The plaintiff joined issue on the first plea, and traversed the others.

At the trial before *Taunton*, J., at the Yorkshire Spring assizes, 1834, a verdict was entered for the plaintiff for 100*l.* damages, and 40*s.* costs, subject to the award of a barrister, to whom the cause and all matters in difference between the parties were referred. By the order of reference it was ordered that the fourth plea should be withdrawn; that the arbitrator should have power to direct what should be done by either party, and what road the defendant should have; that he should hear and decide on the costs of the cause, as if the fourth plea remained; and that the costs of the cause, and of the reference and award, should be in the discretion of the arbitrator, who should

direct by whom and to whom, and in what manner, the same should be paid; and that the same should be taxed, allowed, or deducted by the proper officer, and should be recovered, if necessary, in like manner as if the same were costs in the cause.

20th December, 1834. The arbitrator awarded that a verdict should be entered for the defendants on the third issue, and for the plaintiff on the first and second issues, with one shilling damages on each; that the plaintiff should pay to the defendants their costs of the cause, and also their costs of the reference and of the award, to be taxed by the proper officer; such payment to be made on demand after the expiration of fourteen days from and after the taxation thereof. The award then set out a road to be used by the defendant *Proudlock*, his family and servants, over the locus in quo.

The postea stated a verdict for the plaintiff on the first and second issues with one shilling damages on each, and a verdict for the defendant on the third issue.

It became a matter of dispute before the Master, in what way he ought to tax the costs—whether the direction that the plaintiff should pay to the defendants their costs of the cause, extended to all the costs of the cause, or only to the general costs of the cause with reference to the third issue,—and assuming that it applied only to the costs of the cause with reference to the third issue, whether the plaintiff was not also entitled to costs on the issue upon the fourth plea. It was contended for the plaintiff, that the arbitrator's direction in respect of the road to be thenceforth enjoyed, was tantamount to a finding against there being a public way, and that consequently the plaintiff was entitled to the costs of the fourth plea. The Master was of opinion that the defendants were entitled to costs of the cause in respect of the third issue only, and that the plaintiff was entitled to the costs on the issue of the fourth plea, as well as to the costs of the first and second issues, and to have them deducted from the defendants' costs.

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The defendants obtained a rule calling upon the plaintiff to shew cause why the postea should not be amended pursuant to the terms of the award, or why it should not be referred to the Master to tax the defendants *their general costs* of the cause.

Cresswell now shewed cause. The defendants having failed on the first and second issues, cannot have the costs of those issues; but the plaintiff who has succeeded on them is entitled to the costs of those issues. The meaning of the order of reference is, that the arbitrator shall have power to give costs on the fourth plea, as if that plea had remained on the record, and as he has negatived the public right of road, he must be considered as having found that issue for the plaintiff:—If so, *the plaintiff* is entitled to the costs of it. By the terms of the award the costs are to be taxed by the Master, so that it is evident that it was the intention of the arbitrator that the Master should have some discretion with respect to the costs; and by the determination of the Master the plaintiff is willing to abide.

Alexander and *Tomlinson* in support of the rule. There is no restriction on the discretion of the arbitrator, with respect to costs, and by his award he has directed the plaintiff to pay to the defendants the costs of the cause. There is, no doubt, something to be done by the officer with respect to the taxation of the costs, but his duty is simply to see that no improper charges are made by the party to whom, by the award, the costs are given; and that is the mere ordinary duty he would have to discharge, howsoever the costs might be payable. The Master seems to have thought that he was bound to give the plaintiff the costs of the first and second issues, on account of the manner in which the postea was indorsed. But his authority is limited by the award, and can only be co-extensive with the power which that imparts. Now it is impossible to read the award and to doubt that it was the intention of

the arbitrator that the plaintiff should pay the general costs of the cause. Whether the postea has been framed otherwise than according to such intention is immaterial. It is *the plaintiff's* entering, and must be *amended* to meet the obvious justice of the case. As to the costs of the fourth issue; it is impossible that the plaintiff can have them. He cannot have them by virtue of the record, for that issue is, by mutual consent, removed from the pleadings; nor can he have them under the award, for it is wholly silent as to any costs in his favour.

Lord DENMAN, C. J.—This rule ought, in my opinion, to be made absolute to a certain extent. The fourth plea was withdrawn by consent, and the arbitrator was authorized to give costs as if that plea had remained on the record. The arbitrator has not, in terms, said that the plaintiff shall pay to the defendants the costs of that issue: He has merely said that the plaintiff shall pay the defendants the costs of the cause. If the arbitrator intended to give the costs of the issue upon the fourth plea, he should have expressly said so. I think the Master has done right in allowing the costs of the first and second issues to the plaintiff. But I think that he was not justified in giving the plaintiff the costs of the fourth issue. As to the costs of the third issue, the defendants are of course entitled to them upon the postea. The language of the award being, that the plaintiff shall pay the defendants the costs of the cause, to be taxed by the proper officer, the Master was authorized to tax the costs which the several parties were entitled to by the postea: and, according to the postea, he has done quite right in taxing the costs of the first and second issues for the plaintiff, and the costs of the cause, with reference to the third issue, for the defendant.

PATTESON, J.—The arbitrator had absolute power over all the costs of the cause. If he intended that the defendants should have the costs of the issues found against them,

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as well as of that found for them, he should have said so in express terms. The Master has done wrong in allowing the plaintiff costs *on the fourth issue*. Neither party is entitled to those costs, as the arbitrator has not awarded to whom they are to be paid. When the arbitrator awards that the costs of the cause shall be taxed by the proper officer, he must mean that the costs are to be taxed according to the postea. By the postea, the plaintiff is entitled to the costs on the first and second issues, and the defendants to the general costs of the cause on the third plea. The Master, therefore, has acted rightly in allowing the plaintiff the costs of the first and second issues.

WILLIAMS, J., and COLERIDGE, J., concurred.

Rule absolute as to taxing the defendants their costs of the cause, except upon the first and second issues, and the fourth plea. Neither party to be entitled to the costs of the fourth plea, and the plaintiff to be allowed his costs on the first and second issues.

REX *v.* SILLIFANT, Esq.

APRIL 2, 1835. The churchwardens of Stoke in Teign-head, Devon, in pursuance of a resolution of the parishioners in vestry assembled, made a church-rate for 24*l.* 5*s.* 5*d.*, which, on the face of it, purported to be "for the repairs of the church of the said parish, and for such other purposes as church-rates may by law applicable for the present year," but which was in fact made principally for the purpose

Semble, that justices have in no case jurisdiction, under 53 *Geo.* 3, c. 127, s. 7, to make an order for the payment of an assessment to a church-rate the validity of which has at any time been questioned in the Ecclesiastical Court,—although such court had also *acceded* in

Where magistrates are called upon, under 53 *Geo.* 3, c. 127, to enforce a church-rate, good upon the face of it, it is no ground of objection before them, that the rate was in fact made

The Court will not call upon justices to make an order for the payment of a church-rate, when there is any doubt whether the justices have jurisdiction to make such order.

of reimbursing the churchwarden for moneys expended by him as such, during the previous year. One *George Nichols*, an inhabitant occupier of lands, being assessed in such rate, at the sum of 4*l.* 10*s.* 4*d.*, appeared before the Consistorial Court of the Bishop of Exeter, and made objection to the rate that the glebe lands were not rated. This objection was however over-ruled, and the rate was confirmed in due form on 23d May. *Nichols* having refused to pay to the churchwarden the rate of 4*l.* 10*s.* 4*d.* upon demand made, the churchwarden obtained a summons, under 53 *Geo.* 3, c. 127, s. 7, convening *Nichols* before the magistrates to be assembled at Teignmouth, on 8th June following. On that day *Nichols* attended at Teignmouth, before Mr. *Sillifant* and another, magistrates of the county of Devon, and after the churchwarden had sworn to a demand and refusal of the rate, objected to the validity of the rate on the ground of the omission to rate the glebe lands, and therefore disputed his liability to pay the amount in which he was rated. A further objection was taken by Mr. *Sillifant*, that the rate was made in order to *reimburse* the churchwarden for money previously expended by him as churchwarden, whereas by law a rate could not be made for such purposes. The magistrates upon this dismissed the summons, and refused to make any order for the payment of the rate. Upon an affidavit of the churchwarden, stating these facts, Sir *W. W. Follett*, in Trinity term, obtained a rule, calling upon Mr. *Sillifant* to shew cause why a mandamus should not issue, commanding him to make an order for the payment by *Nichols* of the assessment of 4*l.* 10*s.* 4*d.*

Crowder now shewed cause. The validity of this rate has been questioned in an ecclesiastical court, and therefore the justices could not, under 53 *Geo.* 3, c. 127, s. 7, issue a warrant to levy the sum in which *Nichols* was assessed. The act gives jurisdiction to the justices in respect only of rates, "the validity whereof has not been questioned in any ecclesiastical court." There does not appear to have

First and second points: Absence of jurisdiction, because rate dispated before magistrates and in ecclesiastical court.

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beeh any express decision upon this part of the enactment, but the decisions in *Rex* v. *Milerow* (a) and *Rex* v. *Wrattesley* (b), upon the *proviso* in the same clause, throw light upon this point. The proviso is, "that if the validity of the rate, or the liability of the person from whom it is demanded, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereon." And it was held, in *Rex* v. *Milnrow*, that the justices cannot proceed against a party who says to them, bonâ fide, that he disputes the validity of the rate, even though at the same time he gives a reason of very doubtful sufficiency, but grounded upon a matter which might be litigated in the ecclesiastical court. *Rex* v. *Wrattesley* supports that decision. Here, not only had the validity of the rate been disputed in the ecclesiastical court, but it was again disputed before the magistrates.

Third point: Rate for reimbursement of churchwardens.

The rate is illegal upon the ground taken by the magistrates, and therefore they cannot be called upon to issue a warrant to enforce it. A rate cannot legally be made for the purpose of *reimbursing* churchwardens for money expended by them in their office; *Tawney's* case (c), *Dutton* v. *Wilkinson* (d), *Rex* v. *Chapelwardens of Haworth* (e), *Lanchester* v. *Thompson* (f).

Fourth point: Justices not compellable to act in doubtful cases.

This Court will not issue a mandamus to compel magistrates to issue a distress-warrant (g) to enforce the payment

(a) 5 Maule & Selw. 248.
(b) 1 Barn. & Adol. 648.
(c) 2 Lord Raym. 1009.
(d) Ca. temp. Hardw. 381.
(e) 12 East, 556.
(f) 5 Maddock, 4; *coram Leach*, V. Ch.

(g) In a doubtful case, justices will not be required to do an act which may render them liable to an action—as the granting of a distress-warrant; *Rex* v. *Justices of Bucks*, 2 Dowl. & Ryl. 689; 1 Barn. & Cressw. 485; *Rex* v. *Justices of Bucks*, *ante*, iii. 68. Here, though no action would have lain against the justices for doing the act which the mandamus would have required, yet the making of the order for the payment of the rate would have placed them in this predicament, that, in case of disobedience, they must either have seen their authority disregarded with impunity, or have taken the next step—that of issuing a distress-warrant, which would have brought them within the peril of an action.

of rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding; *Rex* v. *Hall and Dyer* (a). Here, there is still events *doubt*, whether an order issued under the circumstances would be legal, and the churchwardens have a remedy by proceeding in the ecclesiastical court.

1831. The King v. Shillibeer.

This rule is for a mandamus to *one* magistrate, commanding him to make an order, which the statutes require should be made by *two* justices. This is a clear ground for dismissing the application. Fifth point: Application against one justice only.

Sir W. W. Follett, contrà. If the party had, upon attending before the justices in pursuance of the summons, said that he had a bonâ fide objection to make to the rate, and that he meant to appeal to the ecclesiastical court, *Mr. Shillibeer* would have been justified in refusing to make an order. Here, however, the only objection the party takes is, that the glebe lands were not included in the rate, and this objection *had already* been made by him in the ecclesiastical court, and that court had *decided against it*. First point.

The next objection is, that this is a rate the validity of which *has been* questioned in the ecclesiastical court, and that therefore the justices have no jurisdiction. As the validity of the rate has not only been questioned but also decided in that court, this case is precisely that in which the magistrates ought most especially to interfere. [*Coleridge*, J. Is that clear? The words of the act are, "if any one duly rated to a church-rate or chapel-rate, the validity whereof *has not been* questioned in any ecclesiastical court, shall refuse," and so on.] If the magistrates have no jurisdiction in a case such as this, then there is no mode of raising the rate, for it would appear from the second proviso in the 7th section of 53 *Geo.* 3, c. 127, that the ecclesiastical court has no power to enforce the payment of any rate, unless the amount due from the party proceeded against exceeds 10*l*. The words of the act must be Second point.

(a) *Ante*, iv. 546.

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understood to refer to some proceeding *pending* in the ecclesiastical court.

Third point.

The objection to the rate on the ground of its being retrospective was not properly raised as the rate was upon the face of it good. In *Rex* v. *Haworth* (a) the objection arose upon the face of the rate, and *Dawson* v. *Wilkinson* (a) and *Lancaster* v. *Thompson* (a) were cases of applications made for the purpose of compelling the making of a rate to reimburse churchwardens. Those cases are therefore not applicable here. Moreover, this objection ought not to have been taken by the magistrate. The party opposing the rate made no objection on this ground, but contented himself with taking another objection which had already been over-ruled in the ecclesiastical court. But supposing the question to be properly raised, there appears to be no ground whatever for holding a rate made, as in this case, by churchwardens, in pursuance of a resolution of the inhabitants in vestry assembled, for the amount of disbursements made by such churchwardens, during the current year, to be illegal.

Fifth point.

It does not appear that the other magistrate refused to make the order, (which *Cholder* denied).

Lord DENMAN, C. J.—This act is not easily to be understood. It appears, however, that in this case one of the circumstances which ground the jurisdiction of the justices is wanting, because the validity of the rate had been questioned in the ecclesiastical court. Besides, the party stated his objection before the justices. It is very doubtful whether this is not exactly within the description of cases to which the jurisdiction of the justices does not apply, and therefore they could not be called upon to issue a warrant.

First and second points.

Fourth point.

Fifth point.

The last objection is well founded. Two magistrates are required to act.

The rule must be discharged with costs.

Second point.

PATTESON, J. I was at first much struck with the

(a) *Supra*, 637.

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words "the validity whereof has not been questioned in any ecclesiastical court." At first I thought it must mean to refer to a rate the validity of which is not *to present* under discussion; but I now think that it means, the validity whereof *has* not been questioned.

Fourth point.

COLERIDGE, J.—It is enough to say that it is a matter of doubt on these words, whether the magistrates had authority to proceed to enforce this rate. There is no rule more correctly adhered to, than that magistrates shall not be exposed to actions the event of which may be doubtful.

Third point.

Lord DENMAN, C. J.—I believe we are quite satisfied that it is no valid ground of objection that the rate is retrospective, as it is good upon the face of it.

Rule discharged with costs.

SMITH v. BARNES.

A cause in which the defendant had been held to bail for 52*l.* is referred to an arbitrator, of whom also the question of costs generally, and of costs under 43 *G.* 3, c. 46, is referred: An award that 15*l.* 17*s.* was due to the plaintiff at the time when he held the defendant to bail, and that the verdict shall stand for that amount and that the plaintiff had reasonable and probable cause for *holding the defendant to bail*, (without saying for what amount,) and that the defendant shall pay the costs of the cause, is sufficient.

UNDER an order of nisi prius, a verdict was entered for the plaintiff, damages 100*l.*, costs 40*s.*, subject to the certificate of *P. G.*, attorney-at-law, to whom the cause was thereby referred, and who was to direct whether the verdict should stand, and if to stand, for what amount of damages, or whether a verdict for the defendant or a nonsuit should be entered: the costs of the cause, to be taxed by the proper officer, and the question of costs, under 43 *Geo.* 3, c. 46, and the costs of the reference, to be in the discretion of the arbitrator, who was to direct to and by whom, and in what manner, they should be paid.

The arbitrator certified, that 15*l.* 17*s.* 1*d.* was due to the plaintiff at the time when he held the defendant to bail,

1835. Sarel v. Bruce.

and that the verdict should stand for that amount; and that "*the plaintiff had reasonable and probable cause for causing the defendant to be arrested and held to bail in this action;*" and he directed that the defendant should pay the costs of the cause, and that each party should pay his own costs of the reference. Upon an affidavit, bringing the award before the Court, and stating that the defendant had been arrested for 52*l.*, *Erle* obtained a rule, calling upon the plaintiff to show cause why so much of the award as relates to the arrest, and the allowance of costs, under 43 *Geo.* 3, c. 46, should not be set aside, on the ground that the arbitrator had not directed whether the plaintiff had reasonable and probable cause for arresting *for fifty-two pounds*, the amount for which the defendant was arrested and held to bail.

Sir *William Follett* shewed cause.

Erle and *W. C. Rowe*, contrà, contended that the question referred with relation to the costs under 43 *Geo.* 3, c. 46, must be taken to have been, not whether the plaintiff had reasonable and probable cause for arrest, but whether he had reasonable and probable cause to arrest for the amount of 52*l.*, yet that the arbitrator had decided only that the plaintiff had reasonable and probable cause to arrest, which may mean for any sum above 20*l.* They contended, that for this cause the part of the award which relates to these costs should be set aside, or that the matter should be referred back to the arbitrator.

Lord DENMAN, C. J.—The arbitrator had power to decide whether the plaintiff should pay costs under 43 *Geo.* 3, c. 46. He has done so; and has accompanied his decision with a statement—that the plaintiff had reasonable and probable cause for causing the defendant to be arrested and held to bail. I do not know that if it appeared that the arbitrator had acted under a mistake, we could inter-

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SYKES v. BARNES

fone. But I cannot say that this statement shews the mistake on his part. He may have thought that though only 5*l.* 17*s.* was due, the plaintiff had reasonable and probable cause to arrest for 52*l.*

Parke, J. It is quite clear that the arbitrator is entitled to adjudicate upon the matter referred to him. It would be doing great violence to the words of the arbitrator, if we said that he meant that there was reasonable cause for arresting for 21*l.*

Rule discharged.

MINTER *v.* WILLIAMS.

CASE for an infringement of a patent for recumbent chairs, by which patent the plaintiff, his executors &c., by himself and themselves, or by his or their deputy or deputies, servants, agents, and such others as the plaintiff, his executors &c., should at any time agree with, and no others, from time to time and at all times thereafter, during the term of fourteen years, were authorized to "*make, use, exercise and vend*" his invention; and whereby it was required that no one, except those persons before mentioned, should, during the continuance of the term, "make, use, or put in practice," the said invention.

In an action for the infringement of a patent, which granted to the plaintiff the sole right to "make, use, exercise, and *vend*" his invention, and required that no others should "make, use, or put in practice" such invention, a count for "*exposing to sale*" is bad on general demurrer.

The infringement alleged in the fourth count was, that the defendant, without the consent of the plaintiff &c., did wrongfully and unjustly *expose to sale* divers chairs which were then and there intended to imitate and resemble, and did then and there imitate and resemble the said invention of the plaintiff.

Demurrer to the fourth count; and joinder in demurrer.

Channell, in support of the demurrer. The mere *expo-*

1835. WHITE v. WINTER and WILLIAMS.

sure to sale or chain resembling those supplied by the plaintiff, is not a breach of the privilege granted to him.

The fourth count does not charge that the defendants made the chains which he exposed to sale, and it is quite consistent with the allegations in that count, that the chains may have been placed in the defendant's shop by a party duly authorized. Certainly it is consistent with these allegations, that the defendant may never have completed the sale of any chain,—that he may have withdrawn them immediately upon discovering that by selling them he should infringe the plaintiff's patent. Construing this patent with reference to the statute of monopolies, (21 *Jac.* 1, c. 3,) and it cannot be carried further than that statute warrants, there is no ground for saying that a mere *exposing to sale* can be an infringement of the patent. By the patent the plaintiff is to have the exclusive right to "make, use, exercise, and vend" his invention. An exposing to sale does not come within any of these terms. It is not a "vending," for to vend signifies to sell, and is so treated in many statutes of this sort, in which the expression "expose to sale" is commonly superadded to the word "sale." Thus, in the Game Act, (1 & 2 *Will.* 4, c. 32,) by which it was intended to prohibit an exposing to sale as well as a vending, without a licence, the words "shall not sell or offer for sale" are used (*a*). So in the statute of 8 *Ann.* c. 19, (the first Copyright Act,) the words "sell, publish, or expose to sale," are used. So in 12 *Geo.* 2, c. 36, and 16 *Geo.* 3, c. 59, and the other Copyright Acts, (41 *Geo.* 3, c. 107, and 54 *Geo.* 3, c. 156,) the titles and preambles of which shew that it must have been intended to prohibit the exposing to sale, as well as the selling of the literary works intended to be protected. And the same language is used in the acts for encouraging the art of making new models and casts of busts and statues &c. (*b*). From the omission of the words "expose to

(*a*) The words are, "buy, sell, or offer to [illegible] 14, [illegible] 28, c. 56.

(*b*) 38 *Geo.* 3, c. 70, s. 4; 54 [illegible]

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"sale" in this patent, it must be supposed that it was intended to create a distinction between them. Nothing can be deemed an infringement of a patent or a copyright, which does not come aptly within the meaning of the words of the patent or statute; *Coleman* v. *Wathen* (a), *Murray* v. *Elliston* (b).

Here he was stopped by the Court.

PATTESON, J. This is quite a new attempt. I never saw such a declaration before. All the precedents are for *selling*, and none for *exposing to sale*.

J. Evans, contrà. The word "sell" is not found in this patent, but "vend;" and "vend" means to "sell or expose for sale." In *Johnson's* Dictionary, "vend" is rendered "to sell, to *offer for sale*." By "Vendo," in *Ainsworth's* Dictionary, is rendered "to *offer*, or to *proffer*, to be sold" (c). So the word "vendeur," in the Dictionnaire de l'Académie, is rendered, one who *offers* to sell, as well as one who sells. Patents were formerly considered as injurious monopolies, and were therefore construed with great strictness; but now, when a more liberal and just view of the subject prevails, they are properly considered as highly advantageous to the public, by holding out an encouragement to ingenious men to disclose their inventions. The act of exposing to sale in this case is clearly within the mischief intended to be provided against by this patent, and is also, it is submitted, within the words. If this does not come within the terms of the patent, patentees will in most cases derive but little benefit from their patent. [*Patteson*, J. If "vend" means "expose to sale," why did not you use the word "vend" in your count. You should use the very words of the instrument. Why use words which you suppose to be an equivalent?] It might have been better to have used the word "vend;" but still, if the act of exposing *to sale* be

(a) 5 T. R. 245.

(b) 1 Dowl. & Ryl. 299; 5 Barn. & Alders. 657.

(c) Juvenal [illegible] "Purpura vendit Causidicum."—Sat. vii. 135.

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an infringement of the patent, the count is sustainable (a). The exposing to sale is also comprehended within the terms "use and exercise" or "use and put in practice." A great part of the advantage derived by a tradesman from any ingenious invention that he has made, arises from the reputation acquired by exposing it to sale. A person, therefore, who exposes for sale the invention, without licence, may be said to *use* it. It was intended by this patent to give the patentee the exclusive enjoyment of his invention, and a liberal construction ought to be put upon it, in order to carry the intention completely into effect. If the exposing to sale be not an infringement of the patent, the inventor cannot be said to have the right to the *exclusive enjoyment* of the invention. *Jones* v. *Pearce* (b), and a case said to have been decided in the Exchequer (c), were referred to.

PATTESON, J. (d)—In drawing declarations for the infringement of a patent, pleaders have always used the words of the patent,—either those in the granting or prohibiting part of it. I cannot doubt for a moment that there is a clear distinction between *vending* and *exposing to sale*, notwithstanding the authority of the Dictionaries referred to. The plaintiff should in his declaration use the words either of the granting or prohibiting part of the patent. This is quite a new course of pleading, to put in a word which does not occur in the patent. If the word "vend" really does mean "to expose to sale" as well as to "sell," the count should have charged the defendant with *vending*, and the act of exposing to sale might have been proved in support of it.

WILLIAMS, J.—I do not assent to the argument, that by

(a) *Vide* Com. Dig. *tit.* Parols, (A 6); Ibid. *tit.* Pleader, (C 86); 5 Mann. & Ryl. 451, *The Bishop of Exeter* v. *Gully*.

(b) Godson on Patents, Supplement, 55.

(c) Not found.

(d) Lord *Denman*, C. J. had left town for Brighton, to wait upon his Majesty with the Recorder's Report.

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grammatical construction *vending* necessarily means an exposing to sale. There seems to me to be nothing in that argument. We must abide by the grammatical construction of the words of the patent. Neither according to the English or Latin construction of the word should we be justified in saying that this count can be sustained.

COLERIDGE, J.—In the granting part of this patent, the words are "make, use, exercise, and vend," and these in the prohibiting part the words are rather different, for an obvious purpose: They are "make, use, or put in practice." Now we are to see whether this count, either referring to the granting or the prohibiting part, necessarily imports an offence. The words of the count are, that the defendant did "wrongfully and unjustly *expose to sale*" &c.; and it is said that these words necessarily import a *vending*, within the granting part of the patent. It is argued that an exposing to sale is included within the meaning of the word "*vending*;" but even upon that construction the count would be defective, inasmuch as the *evidence* instead of the words of the patent is put upon the record. It seems to me that "vending" imports the *habit of selling*, and "selling" the act of sale. The words *using and exercising*, or *using and putting in practice*, mean something very different from any thing connected with a sale. It seems to me that the act charged in this count may be a perfectly innocent act, and therefore I think that the defendant is entitled to judgment in respect of it.

Judgment for the defendant.

1839.

PEARCE v. CHESLYN.

A memorandum having a lease-stamp, by which *A.* agrees to let to *B.* certain lands mentioned in an annexed abandoned lease from *A.* to *C.*, upon the conditions, agreements, &c. contained in the same lease, and by which *A.* and *B.* bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease.

The annexed lease may be read in evidence although itself unstamped.

AVOWRY for rent. Plea: non tenuit. At the trial before *Vaughan*, J., at the last Leicester assizes, it appeared that the following instrument had been executed by the plaintiff and defendant:

Langley Priory, 10th March, 1838. Memorandum of Agreement. Whereas the within-named *John Webberley* and *Richard Cheslyn* have agreed to abandon the *annexed contract*, for the taking and letting the farm and lands &c. therein named, called the Gelsco farm and lands, within the liberty of Langley and parish of Disworth: We, *Wm. Pearce*, yeoman, and the said *R. Cheslyn*, do agree the former to take and become tenant of, and the latter to let and to farm set the therein farm of Gelsco, with the lands, messuages, tenements, &c. upon the conditions, agreements, &c. &c. contained in the same, dated 29th January, 1838, between the said *John Webberley* and *R. Cheslyn*, the said rent to be immediately paid by quarterly payments, and to be in amount 220*l.*; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to. Witness our hands."

This instrument was stamped with a lease stamp.

The annexed contract was a memorandum of an agreement, dated 29th January, 1838, for the letting by *Cheslyn* and taking by *Webberley*, of the farm and lands therein specified, from the 25th March then next ensuing, at the rent of 227*l.* 5*s.*, by equal quarterly payments, on 24th June, 29th September, 25th December, and 25th March, during the continuance of *that agreement*. This memorandum of agreement, containing words of present demise and minute stipulations, conditions, &c., and not contemplating the making of any more formal lease. This agreement, which had been abandoned by the parties, previously to the entering into the agreement of 10th March, bore no stamp.

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PEARCE v. CHESLYN.

A mortgagor having a lease-stamp, by which A. agrees to let to B. certain lands mentioned in an annexed abandoned lease from A. to C., upon the conditions, agreements, &c. contained in the same lease, and by which A. and B. bind themselves to execute a lease on such abandoned lease, is itself a valid lease. The annexed lease may be read in evidence although itself unstamped.

The defendant had entered into possession at Lady-day, 1833.

It was objected, by the defendant's counsel, that the agreement of 29th January, 1833, being unstamped, could not be given in evidence; and that the memorandum of 16th March, 1833, was an agreement for a lease and not a lease, and that consequently the tenure stated in the defendant's avowry was not established. The learned judge however overruled the objections, and directed the jury to find for the defendant, which they did accordingly.

At the commencement of this term,

G. T. White moved for a new trial, on the ground of misdirection. I. The first agreement, which amounted to a lease, was not receivable in evidence without a stamp. It is referred to as an annexed *contract*, and the parties to the second agreement bind themselves to execute a similar agreement to the one referred to. [*Lord Denman, C. J.* Suppose the parties had said "We bind ourselves to prepare and execute a lease in the form and containing the stipulations of the form given in the 'attorney's pocket-book,'—would it be necessary to have the 'attorney's pocket-book" stamped?] Here the instrument is referred to as "the annexed *contract*." [*Lord Denman, C. J.* That is mere matter of description.] The Stamp Act says, that no agreement shall be given in evidence, unless duly stamped. Here is an agreement perfect in itself, and referred to as such, but without a stamp, which the learned judge has nevertheless received in evidence.

II. The second instrument is not a lease, but an agreement for a lease only. It is a naked absolute agreement to execute an agreement, such as that referred to, except that the rent was to be 220*l.* instead of 227*l.* The possession was not to be taken until 25th March, and this agreement was executed on the 16th March, so that there was time sufficient to have prepared a lease similar to that of 29th

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PEARCE v. CRESLYN.

January. This case is unlike *Poole* v. *Bentley* (*a*) in this Court, and *Staniforth* v. *Fox* (*b*) and *Doe* d. *Pearson* v. *Ries* (*c*) in C. P., in which either there was an express declaration in the agreement, that it should be considered binding until one more fully prepared should be procured, or large sums of money were to be expended by the tenant upon the premises. [*Coleridge*, J. All the cases upon this subject are collected in *Roscoe's Law of Real Property* (*d*).]

The COURT deferred their judgment, in order that they might have time to look at the instruments; and on a later day in the term,

Lord DENMAN, C. J. said—The questions were, whether a particular instrument might be given in evidence without a distinct stamp upon it, and whether an agreement, which was stamped as a lease and given in evidence, was such that a distress might be made under it. It was argued that as the agreement referred to was a lease which was not stamped, such lease so referred to could not be read in evidence. We are of opinion that that argument is not well founded, as the lease was incorporated with the second agreement, which was stamped with a lease stamp. On the second point:—The original lease being incorporated in the agreement, there is no doubt that that was a sufficient lease to support the distress.

Rule refused.

(*a*) 12 East, 168.

(*b*) 7 Bingh. 590; 5 Moore & Payne, 589.

(*c*) 8 Bingh. 178; S. C. per nomen *Doe* d. *Pearson* v. *Ries*, 5 Moore & Payne, 487.

(*d*) Vol. ii. p. 522, &c.

1835.

HOLDING v. RAPHAEL, Esq. and another, Sheriff of Middlesex.

CASE for an escape. Plea: first, not guilty; secondly, that after the arrest the defendants took from *Turner*, the party arrested, a bail-bond "duly subscribed with a certain condition, according to the form of the statute in such case made and provided." Replication to the second plea, that the defendants did not take from *Turner* a bail-bond duly subscribed, &c. At the trial before *Littledale*, J. in the Outer Court, in the present term, it appeared that a capias ad respondendum had issued into Middlesex against *Turner* at the suit of the plaintiff; that *Turner* had been taken by the sheriff's officer, and allowed to go at large without giving a bail-bond; but that before the return of the writ the officer had applied to *Turner* for a bail-bond, which was in consequence given with a condition subscribed thereto. The question was, whether this condition was valid. The bond was executed by *Turner* and his sureties. The condition was as follows:

"Whereas, the above-bounden *Thomas Smedley Turner* was on &c. taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the king's writ of capias issued out of his majesty's Court of King's Bench, bearing date &c., to the said sheriff directed and delivered, against the said *T. S. Turner*, in an action of &c. at the suit of *J. Holding*. And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was on execution thereof duly delivered to the said ————: And whereas he is by the writ required to cause special bail to be put in for him in the said Court to the said action within eight days after execution thereof on him, exclusive of the day of such execution: Now the condition of this obligation is such, that if the said ———— do cause special bail to be put in for him to the said action in his majesty's said Court, as

A bail-bond is a nullity if executed without filling in blank spaces left for the name of the party to whom the copy of the writ has been delivered, and for the name of the party upon whose putting in special bail the bond is to be void.

In an action against the sheriff for an escape, the production of a bond so executed will not, therefore, support a plea justifying by reason of having taken a bail-bond with a condition subscribed according to the statute.

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HOLDING v. RIPPIN and another.

required by the said writ, that the present obligation to be void otherwise to stand fast."

For the plaintiff it was objected, that this condition was, by reason of the omission of the name of *Turner* in the two places as shown left blank, not such a condition as the statute required, and that, therefore, it did not support the defendants' plea. It was contended, contra, that the omissions might be supplied by intendment, and *Coles* v. *Hulme* (a) was cited. The learned judge, however, directed the jury to find for the plaintiff, and gave the defendants leave to move for a nonsuit in case the Court should think the condition sufficient.

Alexander moved accordingly. The two omissions do not make the condition invalid. It is quite clear upon the face of this condition that the party to whom the copy of the writ was delivered, and the party upon the putting in special bail by whom the bond was to be void was *Turner*, although the insertion of the name has accidentally been omitted; and therefore the Court will supply the omission by intendment. The writ would not have been "*duly* delivered" unless it was so delivered to *Turner*, who is the party stated to have been arrested; and as it was the duty of the sheriff to take the bond for the appearance of the party arrested, it must be presumed that it was taken in this case for the appearance of *Turner*. In *Coles* v. *Hulme*, the plaintiff declared on a bond for 7700*l*. Plea, after over, non est factum. A bond was produced, the penalty in the obligatory part of which was described as "7700," without adding "pounds" or other description of money. The condition, which contained recitals shewing that it was the intent that the defendant should enter into a bond for securing certain sums of money described therein as pounds, shillings, and pence, was for the payment of *such* sums of money so described. It was objected that the bond was void for uncertainty, because it

(a) 3 Mann. & Ryl. 86; 8 Barn. & Cresw. 568.

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did not specify any description of money; but the Court held, that the word "pounds" might be supplied in the obligatory part of the bond. Lord Tenterden, C. J. there said, "In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is, whether there is in this bond that degree of moral certainty as to the species of money in which the party intended to become bound?" Bayley, J. said, "It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed;" to which the reporters (a) add this note: "The case alluded to by the learned judge was, probably, that of Lloyd v. Lord Say and Sele, 10 Mod. 40 (b). There the name of the bargainor was omitted in the operative part of a bargain and sale; and it was supplied in K. B., it manifestly appearing from other parts of the deed, that Lord Say was the grantor; and the judgment of the Court of King's Bench was afterwards affirmed in the House of Lords." Mr. Justice Bayley proceeds, "In Waugh v. Russell (Bussell) (c), the word "hundred" was omitted in the latter part of the condition of a bond. It was held, that it might be supplied; and that in pleading, the bond might be described according to its legal effect (d), as if the word "hundred" had been inserted in it." In the condition of this bond there is clearly "such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties." In Flight v. Lord Lake (e), the memorial of an annuity deed was held sufficient, notwithstanding the omission of the word "life" in the heading—"Person for whose (life) the annuity is granted." Tindal, C. J. there said, "The only question is, whether any person applying an ordinary understanding to this memorial could

(a) 8 Barn. & Cress. 574 n.
(b) Lord Say and Seal's case, 10 Mod. 40.
(c) 1 Marshall, 214.
(d) Com. Dig. Parols (A. 6), Pleader (C. 37); 5 Mann. & Ryl. 451.
(e) 2 New Cas. 72; 2 Scott, 126.

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misapprehend what was intended.") The same observation will apply to this case. It may be added with respect to the earlier of the two omissions, that, inasmuch as the allegation that the copy of the writ was "*duly* delivered," necessarily implies that it was delivered to the party arrested, the words "to the said ——" may be rejected as surplusage.

Lord DENMAN, C. J.—We will confer with my brother *Littledale* upon the point.

On a subsequent day his lordship said, that the Court was of opinion that there should be no rule.

Rule refused (*a*).

(*a*) As to blanks in deeds see Keilwey, 162, 164, 165; *Sams* v. *Pitt*, Sir Fra. Moore, 859; *Simon* v. *Pitt*, Cro. Eliz. 432; *Pigot's* case, 11 Co. Rep. 26 b; *Martham* v. *Jems*, Yelverton, 97, 98; *Markham* v. *Gonestone*, 2 Roll. Abr. 29, pl. 7; (translated 13 Vin. Abr. 40;) *Marchham* v. *Gonaston*, Sir Fra. Moore, 547; *Zouch* v. *Clay*, 1 Ventris, 185; *Shelden* v. *Henley*, 2 Shower, 160, 161; *Lady Cook* v. *Remington*, 6 Mod. 237; *Paget* v. *Paget*, 2 Ch. Rep. 410; *Terira* v. *Evans*, cited 1 Anst. 228; *Merlens* v. *Adcock*, 4 Esp. N. P. C. 231; *Powell* v. *Duff*, 3 Camp. 181; *Weeks* v. *Maillardie*, 14 East, 568; *Oakley* v. *Davis*, 16 East, 82, 84; *England* v. *Roper*, 1 Stark. N. P. C. 304; Com. Dig. tit. Fait, (A 3); *Doe* d. *Lewis* v. *Bingham*, 4 Barn. & Ald. 672; *Cockell* v. *Gray*, 3 Brod. & Bingh. 186, 6 B. Moore, 482; *Revell* v. *Brown*, 5 Bingh. 7, 2 Moore & Payne, 12.

TARBER v. FRENCH.

A motion to set aside proceedings for irregularity, must be made within a reasonable time after the party has the means of knowledge of the irregularity.

C. J. KNOWLES had on a late day in this term obtained a rule calling upon the plaintiff to shew cause why the writ of ca. sa. issued in this case should not be set aside, on the ground that the place of abode and addition of the defendant were not indorsed upon the writ, as re-

Thus, where he is arrested on a ca. sa. without an indorsement of his abode and addition, he must move within a reasonable time after the *arrest*.

quired by the rule of Court, H. 2 & 3 *Geo.* 4. It appeared by the affidavits, that the defendants had been arrested under the writ of ca. sa. on 10th June last, but that the irregularity in the process had not been discovered until shortly before the application.

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Petersdorff, in shewing cause, objected that the application had been too long delayed.

Knowles in support of the rule. In *Blackburn* v. *Peat*(*a*) it was held, that the rule that applications to set aside proceedings must be made within a reasonable time, is construed with reference to the time when the applicant first had a *knowledge* of the irregularity. The irregularity in this case was not discovered until just before the application was made. [Lord *Denman*, C. J. He had the *means of knowledge* before. This is not a vice in the process which makes it void, but merely an irregularity.] So in *Blackburn* v. *Peat*. [Lord *Denman*, C. J. In that case the facts were very different. That was an application to set aside a *judgment* which had been irregularly signed without the knowledge of the applicant, who did not become acquainted with the fact of judgment having been so signed until just before the application. *Patteson*, J. The act of signing judgment is a thing done behind the other party's back, whereas here the defendant had full means of knowledge from the time of the arrest.] There was a case in this Court in last Trinity term, in which the Court said, that no laches should prejudice the liberty of the subject. [Lord *Denman*, C. J. That was a case in which the process was *defective*, and not a case of mere irregularity.]

Per Curiam, Rule discharged.

(*a*) 2 Dowl. P. C. 293.

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GUY *v.* HITCHCOCK and others.

Where the goods of an insolvent are sold under an execution, and the produce of the sale paid to the execution creditor after the imprisonment of the insolvent, his assignees, subsequently appointed, may recover such produce as *money had and received to their use.*

ASSUMPSIT for money had and received. Plea, non assumpsit. Trial before Lord *Denman*, C. J., at the London sittings after last term.

20 October. The defendants, who were judgment-creditors of *A.*, caused his goods to be seized in execution.

Same day. *A.* went to prison.

23 October. The goods were sold under the execution.

31 October. 69*l.*, being the produce of the sale, was paid into the defendants' hands.

A petition to be discharged under the Insolvent Debtors' Act, and executed the assignment to the provisional assignee.

16 November. The plaintiff became assignee of the estate and effects of *A.*

This action was brought upon sect. 54 of 7 Geo. 4, c. 57 (*a*), to recover the produce of the goods as money had

(*a*) Whereby it is enacted, "that in all cases where any prisoner, who shall petition the said Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, whether for a valuable consideration or otherwise, to any person shall, after the commencement of the imprisonment of such prisoner avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, shall and may be a creditor or creditors for the same under this act."

It is true by *Kelsey, Assignee of Fardred an Insolvent, v. Minter and another*, (1 New Cases, 781; 1 Scott, 616,) laying the conversion after the insolvency, the defendants pleaded a judgment recovered by them against *Fardred*, and a. fi. fa. returnable 23 January, with an averment that the seizure by the sheriff under the fi. fa. was the conversion complained of. The plaintiff replied, that the judgment was obtained on a warrant of attorney, that *Fardred's* imprisonment commenced 8th February, and that the goods were sold after the commencement of the

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and received to the plaintiff's use. Under the direction of the learned chief justice, the plaintiff had a verdict for 69*l.*, subject to leave granted to move for a nonsuit, upon a point which had been taken, that the action for money had and received did not lie.

Hoggins, early in this term, moved accordingly. The action should have been in trover, for by bringing assumpsit for money had and received, the plaintiff *confirmed* the *sale*, and, consequently, confirmed the *payment* of the money in pursuance of such sale; *Smith* v. *Hodgson* (*a*). [Lord *Denman*, C. J. He certainly affirms the sale, but it does not follow that he adopts that the defendants are entitled to the *proceeds* of that sale.] At the time of the

imprisonment. The defendants (in order to exclude the supposition that the judgment constituted a voluntary preference under sect. 32, as to which *vide ante*, vol. iii. 216,) rejoined, that the warrant of attorney had been obtained from *Forard* by compulsion and under threat of an action.

To this rejoinder the plaintiff demurred.

The argument and judgment were confined to the sufficiency of the replication; and the Court held, that the sale by the sheriff after the imprisonment, was a wrongful conversion by the *defendants*, on the ground that "where a thing is done by the procurement of another, the procurer is as much liable as the agent." The report also (correctly) states, that the Court said, "Besides, the replication here alleges that the sale took place by the authority of the defendants." No other authority, however, appeared in any part of the pleadings, except such authority as might be implied from the act of the defendants, in delivering the writ to the sheriff. An objection taken to the replication, that the conversion confessed in the plea was confined to a seizure *before* the imprisonment, was not noticed in the judgment.

This decision appears to connect the execution creditor with the *tortious* acts of the sheriff, and to make him liable where the person or goods of a mere stranger are taken by mistake. No writ of error was however brought, as the defendants had in fact been present and had authorized the sale, so that if they had succeeded in a Court of Error, they would have been liable to a new action. Besides which, though no objection was taken to the plea, it was doubted whether the apparent repugnancy in pleading to a declaration upon a conversion *after* the insolvency, — that the conversion in the declaration mentioned was a seizure *before* the insolvency, — was cured by pleading over.

(*a*) 4 T. R. 211.

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sale there was no assignee. [*Patteson, J.* The assignment has *relation* to the imprisonment. If so, then the money was the money of the assignees. In the case to which you refer the action was for goods sold and delivered, and not for money had and received, as here; which makes all the difference.]

Per Curiam. Rule refused.

The KING *v.* The Marchioness of DOWNSHIRE.

A public footway leading from A. to the gate of a church-yard, and communicating through that gate, by a public path through the church-yard, with the church, may be described in an indictment as a footway leading from A. towards and unto the church.

So, although part of the path across the church-yard is ancient and part has been recently dedicated to the public.

So, although the path, instead of leading directly from the gate to the church, forms an acute angle in one part of it.

INDICTMENT found at the Worcester quarter sessions, and removed by certiorari, for stopping up a common and public footpath in the parish of Ombersley, "leading from the turnpike road from the said parish of Ombersley to the parish of Holt, in the said county, *towards and unto the parish church* of the parish of Ombersley." Plea, not guilty.

At the trial, before *Williams, J.*, at the Worcestershire Summer assizes, 1834, it appeared that there had been a footpath leading from the turnpike road to the church-yard, —that a gate led from the path into the church-yard,—that from the gate a gravel path had formerly led almost in a direct line to the old parish church, but that a new church having only a few years before been erected in a different part of the church-yard, a new gravel path, leading out of and continuing the old gravel path, but forming an acute angle with it, was made to the door of the new church. The defendant had stopped up that portion of the footway which led from the turnpike road to the church-yard.

It was contended by the defendant's counsel that the road indicted was improperly described as leading "towards and unto the parish church of the parish of Ombersley." The learned judge was, however, of opinion that the road was properly described, and directed the jury to find a verdict of

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guilty, but gave the defendant leave to move to enter a verdict of *not guilty*, upon the objection. The jury having found a verdict of guilty, *Jervis*, in the following term, obtained a rule nisi to set that verdict aside, and to enter a verdict of *not guilty*.

Talfourd, Serjt., *Godson*, and *W. J. Alexander*, shewed cause. This path is properly described as a road "towards and unto the parish church," for such, to all intents and purposes, it is. Supposing the path to end at the gate leading into the *church-yard*, (which may be regarded as the garden or curtilage of the church,) these would be a sufficient compliance with the rule, that the termini of an indicted road, if stated at all, shall be correctly described. The object of that rule is, that the defendant may not be misled by an inaccurate description, and it seems impossible that the defendant could be misled by a description of a road leading to the church-yard, as a road leading "*towards* and unto the church." But in fact the path was continued unto the church, and it is no answer, that in a particular part of the path it takes a turn, forming an acute angle with the preceding part of it. In either view of the case the description is sufficient. In *Simpson* v. *Lewthwaite* (*a*), where, to trespass for breaking and entering the plaintiff's closes, the defendant pleaded that he was seised in fee of land *next adjoining to one of the said closes* in which &c., and then claimed in respect of the *said* land, a way *from the said land unto, into, through, over, and along the said closes* in which &c., and unto and into a certain common king's highway; and at the trial the defendant proved a prescriptive right of way from his land into and over the land of *third* persons, and *thence* into and over the plaintiff's closes, and thence into a common highway, it was held that the plea was sufficiently proved; and this, though it appeared that part of the defendant's land did adjoin one of the plaintiff's closes, and that by permission of the latter the

(*a*) 3 Barnw. & Adol. 226.

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defendant had sometimes used a gate from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to refer. [*Patteson*, J., *Rex* v. *Great Canfield* (*a*) was relied on upon the motion.] In that case the road, for the non-repair of a portion of which the defendants were indicted, was described as leading from *Great Dunmow* to the village of *Little Canfield*, and from thence to the village of *High Roothings*. It appeared that there was a direct road from *Dunmow* to *Little Canfield*, but the road which led to High Roothings (and which was the road indicted) turned off from the road leading from Dunmow to Little Canfield, a quarter of a mile short of Little Canfield, so that to follow the road as laid in the indictment, a person must, in going to Little Canfield, pass by the road leading to High Roothings, and having gone to Little Canfield, return a quarter of a mile back again to get into the road indicted. Lord *Ellenborough* there held, that as the description given to the road imported that there was a direct communication from *Great Dunmow* to *High Roothings*, through *Little Canfield*, there was a fatal variance. That description could not, indeed, without a most violent construction, have been held sufficient. The present case bears no resemblance to that. In *Rouse* v. *Bardin* (*b*) it was held, that in trespass, a plea of justification, stating that a public highway led from another highway (leading from A. to B.) in, through, over, and along the *locus in quo*, to a certain other highway (leading from C. to D.) was well supported by evidence proving that the way in question led from the *terminus a quo* (viz. the way leading from A. to B.) over the *locus in quo*, to a different way called E., and along that way into the way leading from C. to D. (the *terminus ad quem*.) In that case lord *Loughborough* differed from the other judges; but the decision was recognised in *Simpson* v. *Dendraine*. In *Allen* v. *Ormond* (*c*) it was held, that the *terminus ad quem* being laid to be a public highway, is proved by evidence of

(*a*) 6 Esp. N. P. C. 136. (*c*) 8 East, 4.

(*b*) 1 H. Bla. 351.

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a public *footway*, though such description of the terminus might have been had on *special demurrer* as not being sufficiently certain. In *Clerke* v. *Cheney* (*a*), which was trespass for breaking the plaintiff's close, the defendant justified by reason of a way from his house, through the *locus in quo* usque *altam viam in parochiâ D. vocat. London* Road, and issue was joined upon the way, and found for the plaintiff. It was moved in arrest of judgment, that there was no issue joined for the uncertainty of the *terminus ad quem*. "*Sed non allocatur*, for in regard it is found that he had a way over the place where it is not material to the justification pleaded it lieth, it being after verdict, when the right of the case is tried." The defendants will probably rely upon *Rex* v. *Great Canfield*, and *Wright* v. *Rattray* (*b*). The former case has already been distinguished, and the latter case cannot apply, for that was a claim of a prescriptive way which was merely described as leading over the defendant's close "*unto*" D. (the *terminus ad quem*): and the Court doubted whether, if the claim had been for a prescriptive right of way over the defendant's close *towards* D., it might not have been sufficient. Here the road is described as leading "*towards and unto*," which cannot mean the same thing as "*unto*" alone.

Jervis, *Whately*, and *Talbot* contrà. It is not necessary, in an indictment for obstructing a public highway, to state any *termini*, but if they be set out, they must be described with accuracy. It is said to be sufficient that this path leads to the church-yard, but there is no difference in law between a church-yard and any other close which might have intervened between the path and the church. The gate of the church-yard should have been assigned as the *terminus ad quem*. The obstruction was no doubt shown to be between the turnpike road and the church-yard gate; but under the loose, uncertain description in this indictment, it was equally competent to the prosecutor to prove an ob-

(*a*) 1 Ventris, 13. (*b*) 1 East, 377.

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struction between the church-yard gate and the church door. The prosecutor has treated the whole path from the turnpike road to the church door as identical, whereas it is composed of distinct parts, running in different directions, and of which one was an ancient path, and the other a path but very lately dedicated to the public. *Rouse* v. *Bardin*, *Jackson* v. *Skillito* (a), and *Simpson* v. *Lawthwaite*, when duly considered, appear only to establish this,—that where the *termini* of a way are set out, all the intervening closes need not be stated; a principle which does not apply to the present case. *Wright* v. *Rattray*, on the other hand, seems directly applicable. In that case it was held, that a claim of a prescriptive right of way from A. over the defendant's close to D. is not supported by proof of a prescriptive right of way from A. over the defendant's close to D., it appearing that a close called C., intermediate between the defendant's close and D., was formerly occupied by the owner of A., and by him sold to a third party, without any reservation of the right of way. In the argument in that case the following language of *Dodderidge*, J., in *Slomah* v. *West* (b), is quoted: "If a man have a right of way from his house to the church, and the close next to his house, over which the way leads, is his own, he cannot prescribe that he has a right of way *from* his *house* to the church, because he cannot prescribe for a right of way over his own land." And this position is referred to with approbation by Lord *Kenyon*, C. J., in his judgment. The case put is the converse of this case, in which, according to one of the prosecutor's arguments, a right of way from the turnpike road to the church-yard gate is claimed as a right of way to the church. If the description be considered to be of a path leading up to the church, it is improperly described as one entire path. In this view *Rex* v. *Great Canfield* seems precisely to resemble this case. Here, as there, a person going along the alleged way has, upon passing the point of

(a) Cited in *Wright* v. *Rattray*, 1 East, 381.

(b) Palm. 387; 2 Roll. R. 397.

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junction between the old gravel path in the church-yard and the new, in some degree to return in the direction whence he came. The new path forming, as it does, an acute angle with the old gravel path, cannot be treated as part of the same path. Considerable stress has been laid in the argument contrà, on the use of the word "towards," but in fact the use of that expression, coupled with the use of the word "unto," strengthens the argument for the defendant. In *Lempriere* v. *Humphrey*(a), which was an action of *quare clausum fregit*, the description of the *locus in quo*, as abutting "*towards*" other closes, was recognised as being a sufficiently certain description, if not objected to upon special demurrer, or made the subject of an application for a judge's order for a more certain description of the close. "Towards" and "unto" must therefore be recognized as having different meanings; and as the prosecutor here introduces both, he must be taken to mean to give evidence in support of each.

Lord DENMAN, C. J.—It appears to me that there was no misdescription in this case. The way is described as a certain common and public footpath, leading from the Ombersley and Holt turnpike road "towards and unto the parish church of the parish of Ombersley." It appears that there was a public footpath (which is the path obstructed) from the turnpike road to the gate of the church-yard, and that from such gate there ran a gravel path leading through the church-yard to the new church, which had lately been erected. It is true that at a certain point in this path an acute angle is found, but that cannot make it the less a path to the church. *Rex* v. *Great Canfield* is the only case which appears to give any foundation to the arguments for the defendant, and that case is essentially different from the present. There, a road leading from A. to B. was improperly described as a road leading from A. to C., and from thence to B.; it appearing that C. lay out of the direct

(a) *Ante*, iv. 658.

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road, and that a portion of the way to it, from either A. or B., was by one and the same short road leading out of the high road from A. to B., so that, in order to get from A. to C., and from thence to B., a quarter of a mile of road must be both passed and repassed. Here, there is no occasion to pass any part of the path twice.

It makes no difference, as regards the present question, that a part of the path is new and the remainder ancient. If the whole path had been described as an *immemorial* path, the description would have been false; but that not being so, no difficulty can arise from one part being public by ancient user, and the other by modern dedication.

PATTESON, J.—I am also of opinion that there is no misdescription in this case. At first I was struck with the argument, that the part of the gravel path up to the point where it makes the turn is old, and the remainder is new; but it seems to me quite immaterial at what particular time each part was dedicated to the public, as it is merely described as "a certain common and public footpath." This case is very different from *Rex v. Great Canfield*. The path in this case makes an angle backwards, but you do not go over any part of it twice.

COLERIDGE, J.—I am also of the same opinion. If this path had been laid out as an ancient immemorial common or public footpath, I should have felt the difficulty of one of the arguments pressed upon us. But that is not so.

If this be a public highway for the inhabitants of the part of the parish from which it leads to the parish church, although by a circuitous course, it is sufficiently described as leading "towards and unto the parish church."

WILLIAMS, J.—I think that the evidence fully sustained the allegation. The objection seemed to me to come to this, that the allegation, that the path led "towards and unto the parish church," could only be sustained by shewing

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a path leading in an almost direct line up to the church. The fact of there being an acute angle in the path does not make it the less a path leading "towards and unto the parish church." No part of the same line is to be retraced.

Rule discharged.

PARRY *v.* ROBERTS (*a*).

A. receives from *B.* a sum of money to be delivered by him to *C.*, but does not so deliver it or return it to *A.*—Money had and received lies against *A.*

And when the receipt of the money is proved by the admission of *B.*, who at the same time states that he *lost it through negligence*, the jury may find a verdict for the money had and received upon the first part of the admission.

ASSUMPSIT for money lent, money paid, money had and received, and on an account stated. At the trial, at the Flintshire spring assizes, before *Bolland*, B., it appeared that the action was brought to recover the sum of £24, being money delivered by the plaintiff to the defendant to be carried by him to Liverpool, and to be there paid over to *John*, but not so paid to him. The evidence consisted of an admission by the defendant that he had received the money for the purpose above stated; that he had taken it with him to Liverpool; that with the money in his pocket he went into a tho[illegible] there, and lost the money. Upon this the defendant's counsel contended that the plaintiff should be nonsuited, for that the cause of action was such as should have been made the subject of a special count. The learned judge, however, thought that the plaintiff was entitled to recover upon the count for money had and received, and directed a verdict to be found accordingly, but gave the defendant leave to move to enter a nonsuit. In the following term *Miller* obtained a rule nisi for a nonsuit.

J. Jervis now shewed cause.

Miller, in support of his rule. The ground of action is the defendant's *negligence* in losing the money. No debt arose by the defendant's undertaking to carry the money to Liverpool and pay it to the plaintiff's creditor there. The defendant's

(*a*) This case was decided in the Easter

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admission amounted in law to this, "through my negligence you have sustained damage, I will give you compensation." This compensation is unliquidated damage; although it is true that the amount of money lost would be the measure of the amount of damages. Such compensation cannot be recovered under a count for money had and received; *Lightfoot* v. *Creed* (*a*), *Harvey* v. *Archbold* (*b*). This is in fact the case of a bailment without reward; and the only proper issue therefore is, whether the defendant was guilty of gross negligence,—which could not be tried in the present form of action.

Lord DENMAN, C. J.—The defendant is clearly prima facie liable. He admits that he received money from the plaintiff to be applied in a particular manner, and that it was not so applied. The defendant's answer is, that the money was lost, so that he can only be liable for negligence. If he is to take advantage of his own wrong in this way, he should at least prove the facts distinctly.

LITTLEDALE, J.—There is some difficulty in the case, but under all the circumstances I think the verdict ought not to be disturbed. The money was delivered to the defendant for a particular purpose. If it had appeared that the defendant had applied it to his own use, then money had and received would lie. If the defendant had really lost the money through negligence, then money had and received would not lie. But this is not proved. It is merely alleged by the defendant, by way of excuse, that he lost the money; and this account the jury were not bound to believe. If the account were not believed, then money had and received would lie.

PATTESON, J.—There should be no new trial. The money was delivered for a particular purpose: Suppose the money to have remained in the defendant's hands; that

(*a*) 8 Taunt. 268. (*b*) 5 Dowl. & Ryl. 500; 3 Barn. & Cresw. 626.

the plaintiff asked the defendant whether he had applied it in the manner intended; that the defendant answered "no," and that the plaintiff had then demanded a return of the money: if the defendant had refused to do so, then the plaintiff could have maintained this form of action. Instead of saying that he has the money and will not return it, the defendant in this case says, "I have negligently lost it." The money having been placed in the defendant's hands, it does not lie in his mouth to say it is no longer in his hands, he having negligently lost it in a brothel.

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COLERIDGE, J.—The fallacy of Mr. *Miller's* argument is, that he puts the unavailing defence attempted to be made out by the defendant upon the plaintiff, as part of his case. It is true that the whole admission must go together to the jury, but not simply as forming the plaintiff's case. The plaintiff had made a good case, when he had given evidence of money placed in the defendant's hands for a specific purpose, and not so applied; the defendant offered evidence to explain that non-application into a negligent loss; the jury may or may not have believed that; but if they did, it does not seem to me to follow that it was an answered, and destroyed, the good case of the plaintiff.

Rule discharged (a).

(a) So in detinue, it is no answer to the charge of a continuing detention,—the adhuc detinet,—that the defendant had wrongfully parted with the custody of the goods. T. 27 *Hen.* 8, fol. 13, pl. 36; and although it was found by verdict that the chattels were destroyed, the judgment upon an issue of non detinet was, to recover the chattels themselves, M. 17 *H.* 8, fol. 15, pl. 1. But it was afterwards held,—or rather agreed by the Court,—that the judgment in such a case should be for the value only, M. 3 *Hen.* 6, fo. 19, pl. 31; S. P. per *Newton* and *Paston* obiter, T. 21 *Hen.* 6, fo. 36, pl. 2.

1838.

PARTINGTON v. WOODCOCK (a).

A., assignee of insolvent debtor, who, with the permission of *B.*, his assignee, remains in possession, and demises for years to *C.*, may recover the rent from *C.*, notwithstanding a notice from *B.* to *C.* requiring the reserved rent to be paid to him, as such assignee.

Semble also, that under a demise by *A.*, mortgagor in possession, to *B.*, *A.* may recover the reserved rent from *B.*, notwithstanding a notice from *C.*, the mortgagee, requiring *B.* to pay the rent to him, *C.* (c).

DEBT for rent due March, 1834, upon a demise of premises for seventy years, made by the plaintiff to the defendant, in September, 1830. Plea: that before the making of the demise, to wit, in June, 1818, the plaintiff was a prisoner in the custody of the marshal, within the meaning of the act (b) for the relief of insolvent debtors, and petitioned the Insolvent Debtors' Court to be discharged, and was discharged by the Court; that by force of the statute all the estate &c. of the plaintiff in the premises mentioned in the declaration became vested in one *Ewbank*, as assignee thereof duly appointed by the said Court upon the trusts and for the purposes mentioned in the statute; that after the plaintiff had been duly discharged, according to the provisions of the statute, and after the making of the demise in the declaration mentioned, the plaintiff, having, with the permission of the Court, been permitted and duly authorized by *Ewbank*, as such assignee, and by one *Shaw*, who afterwards had been appointed and substituted by the said Court, in the place and stead of *Ewbank*, as such assignee, to remain in the possession and management of the premises in the declaration mentioned; and the plaintiff having, by the permission of the said Court, been also authorized and permitted by *Shaw*, as such assignee as aforesaid, to make the said demise to the defendant, and before the said rent, or any part thereof, in the declaration mentioned, became due and payable, and before the commencement of the suit, to wit, on 23d May, 1831, the defendant received from *Shaw*, as such assignee, a notice and requisition that he, the defendant, should thenceforth pay to *Shaw*, as such assignee, the rent, and every part thereof that might and

(a) This case was decided in Easter term last.

(c) Overruling, in effect, *Pope* v. *Biggs*, 4 Bligh. & Ryl. 193; 9 Barn. & Cresw. 245; as to the decision in which case see the notes to 4 Bligh. & Ryl. 197, 198. And see 2 Roscoe, on Actions relating to Real Property, 645; *Cooper* v. *Blandy*, 4 Moore & Scott, 468.

would then or thereafter accrue and become due and payable from the defendant, for and in respect of the demised premises, and under and by virtue of the said demise; and also that in default thereof legal proceedings would be instituted by *Shaw*, as such assignee, against the defendant, for the recovery of the same; that such notice and requisition had not been revoked, altered, or countermanded: *Ratione cujus*, the defendant became and was and still is liable and compellable, from time to time, to pay to the assignee of the estate and effects of the plaintiff for the time being, as well the rent in the declaration mentioned, as all other the rent so reserved as aforesaid, by the said demise, for and in respect of the premises, as the same becomes and is due and payable, the reversion expectant on the determination of the demise not being now vested in the plaintiff, and the right and title of the plaintiff to sue for and receive the rent so reserved by the demise being by reason of the said notice wholly ended and determined. Verification &c.

Special demurrer (*a*), and joinder.

F. Kelly, in support of the demurrer. The plea, supposing it to be good in point of *form*, is substantially a plea of *nil habuit in tenementis* (*b*). The defendant admits that

(*a*) The causes shewn were, that the plea is double, in that it indirectly denies that the plaintiff had any thing in the premises during the period in respect whereof the rent is claimed, and also affirms an eviction by *Shaw*; that it is argumentative, in that it indirectly and argumentatively denies that the plaintiff demised, that the plaintiff had any thing in the premises during &c., and indirectly &c. alleges an eviction by *Shaw*; and also that it does not specifically deny any fact alleged in the declaration, or plead in confession and avoidance; and also, that the plea attempts to deny the title of the plaintiff, whereas the defendant is estopped to deny the same, it appearing by the declaration that the defendant enjoyed the same by virtue of the demise by the plaintiff during the duration mentioned.

(*b*) In *debt* or *covenant* upon a lease, (not being by deed indented,) nil habuit in tenementis, although it admits a demise in fact, is a good plea, (*Syllivan* v. *Stradling*, 2 Wils. 208, 217); and though it is a bad plea in bar to an avowry, it is so because *before* the pass-

1825.

BARRINGTON v. WOODCOCK.

had holden under the demise by the plaintiff, but attempted to deny that the plaintiff had any thing in the premises. [*Coleridge*, J. Is not *nil habuit in tenementis* a good answer when the demise is not by indenture? In a note to *Pippa* v. *Mayle* (a), by Mr. Serjt. *Williams*, it is said, that in an action for rent upon a demise not stated to be by indenture, *nil habuit in tenementis* is *primâ facie* a good plea, because no estoppel appears upon the record.] Whether the action be debt on a demise by deed, or assumpsit for use and occupation, the tenant is equally estopped from denying his landlord's title at the time of the demise. In the former case there is a strict estoppel upon the record; in the latter, the case is not one of strict estoppel, but it is *in the nature* of an estoppel, for the tenant is prevented by the rules of law from disputing the lessor's title. *Walton* v. *Waugate* (b), *Doe* d. *Bristow* v. *Pegge* (c). [*Lord Denman*, C. J. That has been even ruled, with respect to the case of the tenant setting up the title of the mortgagee of his lessor, by *Pope* v. *Biggs* (d). [*Littledale*, J. referred to *Moss* v. *Gallimore* (e). Lord *Denman*, C. J. That case is distinguishable; as there, at the time of the demise, the mortgagor had a good title, the mortgage being *subsequent* to the demise.] In *Balls* v. *Westwood* (f) it was held, that in an action for use and occupation, where the defendant has come in under the plaintiff, he cannot shew that the plaintiff's title has expired, unless he solemnly renounced the

estoppel by accepting possession, which continues while that possession continues, with *Doe* d. *Bullen* v. *Mills*, *ante*, vol. ii. 39; *Fleming* v. *Gooding*, 10 Bingh. 549; 4 Moore & Scott, 455.

(a) 1 Wms. Saund. 320, (b).

(b) 6 T. R. 60. As to the distinction between estoppel by indenture, which continues as long as the indenture is in force, and

(c) 1 T. R. 758.

(d) 2 Mann. & Ryl. 9

(e) 4 Mann. & Ryl. 239; 9 Barn. & Cress. 245.

(f) 4 Dougl. 232.

(g) 2 Campb. 11.

plaintiff's title at the time, and commenced a fresh holding under another person) *Curtis* v. *Spitty* (a).

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Wightman, contrà, said, that he did not mean to contend that nil habuit in tenementis would be a good plea, and argued that the plea in question was not, in fact, such a plea. [*Littledale*, J. You admit a demise by the plaintiff, but shew a title in another party, and state that the demise was by his permission. Lord *Denman*, C. J. If he authorized the plaintiff to demise, did he not authorize him also to receive the rent?]

F. Kelly. It is no answer for the defendant to shew a title in another party, and state that the demise was by his permission. [Lord *Denman*, C. J. It is not stated that the party permitting was to have the power of putting an end to the tenancy by notice.] It does not appear that the tenant had any notice (b) that the plaintiff demised only by the

(a) 1 New Cases, 15; 3 C. 1 Scott, 737.

(b) But where it appears upon the face of the instrument of demise, (although the demise be by deed indented,) that the lessor had not an original power of demising, it would seem that an estoppel does not arise. Thus where *A.*, having only an equitable estate in a copyhold, demised for 98 years, by an indenture in which was recited a licence from the lord to demise, granted not to *A.* but to *B.*, it was held that the assignee of *A.* could not sue as assignee of the reversion, upon the covenants in the indenture of demise, although previously to the execution of the assignment *A.* had acquired the legal estate in the copyhold in fee simple; *Whitton* v. *Peacock*, 2 New Cases, 411.

Though the grounds on which the Court of C. P. certified to the Master of the Rolls, in *Whitton* v. *Peacock*, that the action of covenant would not lie, do not, of course, appear, it is conceived that there could be no estoppel in a case where the recitals rendered it necessary to connect *A.*, the lessor, not only with *B.*, the licensee, but also with the licensing lord,—whose title being an *actual* legal title, could not be connected with, and thus support, the estate of *A.*, which was *by estoppel*.

The argument in *Whitton* v. *Peacock* proceeded upon a different ground,—viz. that the assignee of a reversion gained by estoppel, is not such an assignee as is enabled to sue by 32 H. 8, c. 34,—even where, prior to the assignment, the lease *by estoppel* has been turned into a

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permission of the assignee. The demise is by the plaintiff alone, and it is no answer to say that a party who had a superior title has since given notice to the tenant to pay the rent to him. [*Littledale*, J. The permission to remain in possession and management of the premises and to make the demise is only stated in a *parenthesis(a)*.] If it was intended to say that the plaintiff demised only as the agent of the assignee, that should have been distinctly stated.

Wightman contra. The plea is intended merely as a denial of the right of the plaintiff to recover the rent claimed in the declaration. The argument which it is proposed to offer in support of the plea, is founded entirely on the analogy between this case and that of a demise by a mortgagor. The analogy between the two cases is strict. If the plea had stated, that before the making of the demise mentioned in the declaration, to wit, in January, 1818, the plaintiff mortgaged the premises to *Shaw*, and that after the making of such demise,—the plaintiff having been authorized and permitted by *Shaw*, as mortgagee, to

lease *in interest* by the intermediate acquisition of the legal estate; a position which seems to be at variance with the received doctrine as to estoppel and privity. It is true that a plaintiff in covenant may declare upon his own demise by a quod cum dimisisset, without shewing title, and that a declaration by an *assignee* must shew the title of the lessor, because where the *lessee* sues, it is immaterial whether his reversion be for years, for life, in tail, or in fee, whereas a party who sues as assignee must show himself to be *such* an assignee as the quality of the reversion requires; which cannot be done without disclosing the estate of the lessor. Where the declaration alleges that

A. being seised in fee demised to *B.* for years, and assigned the reversion, which would be prima facie a good plea to say that *A.* at the time of the demise was not seised, or had no such reversion (and an issue taken thereon would be found for the defendant and bar the action, the plaintiff, instead of accepting such an issue, might reply that the lease was by indenture, and conclude by relying on the estoppel. If the indenture were stated in the *declaration*, the plea would be bad on demurrer, per 1 Wms. Saund. 325, n. (4).

(a) *Vide* 1 Wms. Saund. 117 a, (4); *ante*, iv. 274, judgment of *Taunton*, J. in *Bowman* v. *Taylor*.

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remain in the possession and management of the premises, and permitted by him, as such mortgagee, to make the said demise of the premises to the defendant,—and before any part of the said rent mentioned in the declaration became due and payable, and before the commencement of the suit, to wit, on &c., the defendant received from *Shaw*, as such mortgagee, a certain notice and requisition,—and so on, following the form of the plea,—there can be no doubt that according to *Pope* v. *Biggs* the plea would have been an answer to the plaintiff's demand. *Bayley*, J. there says, "I have no doubt that in point of law a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may render the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rent by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by *giving notice of the mortgage to the tenant, may thereby make him his tenant and entitle himself to receive the rents.*" [*Patteson*, J. I never could understand how the notice of the mortgagee could make the lessee tenant to him at the reserved rent. If the tenant, in consequence of such notice, pays him the rent, I can understand that the relation of landlord and tenant has been created. *Littledale*, J. If the tenant refuses to pay, can the mortgagee bring any thing else than *ejectment*?] It is submitted that he may bring an action for *use and occupation*, and the covenant for rent in the deed may be looked to for the purpose of measuring the amount of damages. [Lord *Denman*, C. J. The mortgagee might go and say to the tenant, "I am entitled under this mortgage, and will turn you out, or bring ejectment, unless you pay me rent;" and if the tenant in consequence paid rent, the mortgagee would be thenceforward entitled to recover for use and occupation. *Patteson*, J. I can easily understand *that*. It would be the creation of a new tenancy. Lord *Denman*, C. J. It is clear that the judgment in *Pope* v. *Biggs*

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assumes an eviction or attornment (*a*).] All that appeared was, that the mortgagees had given a notice to the tenants, stating that the interest was in arrear; that they were thereby required to pay the amount of such interest in part of the rent and similar sums out of future rents, until further notice; and that in default of such payment, they, the mortgagees, would pursue such remedies as were allowed by law for recovering the same. No eviction or attornment, nor any thing from which an eviction or attornment might be inferred, is stated. Suppose the words in the parenthesis to be out of the plea, then it is clearly good. *Carr and others, Assignees,* v. *Burdus* (*b*). [*Patteson, J.* Throughout the plea, the demise by the plaintiff is treated as a subsisting demise, and the rent claimed is the rent reserved by that demise. It seems to me impossible, when the demise is made by the insolvent in his own tenancy after his insolvency, for the assignee to come and claim rent, unless he puts an end to the demise and creates a new tenancy. This plea, or a similar plea in the case of a mortgagee, cannot be good without making the assignee or mortgagee in some way, in effect, party to a deed which he did not execute.] The plea states enough to shew that the assignee is entitled to the profits of the estate. That part of the plea which claims the rent as due under and by virtue of the demise mentioned in the declaration, being matter of little meaning, may be rejected as surplusage. [*Littledale, J.* I do not see how you are to reject those words.] The plea would have been sufficient without them, and the insertion of them does not vitiate it.

If the Court cannot hold the plea good, it is prayed that they will allow the defendant to amend.

Lord DENMAN, C. J.—You had better amend. You must amend very shortly,—and upon payment of costs.

Et per Curiam.—Leave to amend on payment of costs (*c*).

(*a*) 4 Mann. & R. 197 (*b*); 200.

(*b*) 1 Crompt. Mees. & Rosc. 443, 782; 5 Tyrwh. 309.

(*c*) And see *ante*, 514, (*a*); *Doe* v. *Huddart*, 2 C. M. & R. 316, 4 Dowl. P. C. 437.

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PANTER and others *v.* SEAMAN (*a*).

A rule nisi to revive a judgment against the executors of a deceased defendant, must be served on all the executors who have proved the will.

Where a rule is served by leaving a copy with a servant, an inquiry should be subsequently made of the servant whether the master has received the copy.

IN 1816 judgment had been entered up against the defendant, who died, leaving four executors. The will was proved by two of them, namely, *Street* and *Branen*—the former a merchant, in partnership with Mr. *Gilbert*, the latter a solicitor, residing in Gray's Inn. A rule nisi was obtained for a sci. fa. to revive the judgment. In the course of this term *Manning* moved to make the rule absolute, upon an affidavit made by a clerk of the plaintiffs' attorney, which stated as follows:—That on the 30th May last he served *Street*, who, the deponent had been informed and believed, was one of the executors of the defendant, with a true copy of the rule, by delivering to and leaving such true copy with Mr. *Gilbert*, the partner of the said *Thomas Street*, at the house or office of the firm of Messrs. *Street* and *Gilbert*, in Bryhant Court, Philpot Lane, in the city of London, and that at the time of such service he showed to the said Mr. *Gilbert* the said original rule. That on the 30th May last he served on *George Branen*, who, deponent believed, was another of the executors of the defendant, another true copy of the rule, by putting the same through a hole in the door of the chambers of the said *Geo. Branen*, in Gray's Inn Square, and that he called on the 1st of June then next following, for the purpose of re-serving the rule, but that the chambers of the said *Geo. Branen* were closed, and that on the 2d of June he called again at the chambers of the said *G. Branen*, but that the chambers were closed; that afterwards, on the 2d of June, he served a copy of the rule on *E. H.*, the laundress of the said *G. Branen*, at his said chambers, when the said *E. H.* informed the deponent that the said *G. Branen* would duly receive the said copy of the rule, and that he did, at the time of such service, show to the said *E. H.* the original rule.

(*a*) This and the next case were decided in Trinity term last.

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Manning, in support of the motion. The service on *Branen* is, under the circumstances, sufficient. [*Littledale*, J. You should have called the next day.] The service on *Street's* clerk is good, and service on *one* executor is sufficient. [*Littledale*, J. You ought to serve a copy on *each* of them; they are not like partners.]

By the COURT, Rule refused.

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An execution creditor served with the sheriff's rule under the Interpleader Act, is not bound to appear where there are no goods liable to his execution. Where therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance.

THE plaintiff issued a fi. fa. into Kent. The sheriff's officer informed the plaintiff's attorney that the defendant's goods had been seized under a prior writ. The plaintiff did not withdraw his writ, or give notice that he withdrew his claim. A third party having claimed the goods, the sheriff obtained a rule under the Interpleader Act.

Busby, for the plaintiff. The rule ought to be discharged with costs. Under the circumstances, the sheriff had no right to bring the plaintiff before the Court.

Clarkson, for the sheriff. The sheriff was bound to serve the rule on all parties who had issued writs which remained in his office. If the plaintiff did not intend to make a claim, he need not have appeared.

Lord DENMAN, C. J. There was no occasion at all for the plaintiff to appear if he intended to relinquish. He is certainly not entitled to costs.

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(a) And see *Johnson* v. *Brasier*, ante, iii. 654.

END OF MICHAELMAS TERM.

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London: C. Roworth and Sons, Printers, Bell Yard, Temple Bar.