A

REPORT

OF THE

TRIALS AND SUBSEQUENT PROCEEDINGS,

IN THE CAUSES OF

ROWE *v.* GRENFELL,

ROWE *v.* BRENTON AND ANOTHER,

AND

DOE (DEM. CARTHEW) *v.* BRENTON,

RELATIVE TO THE CLAIMS MADE BY THE LESSEES OF THE DUKE OF CORNWALL TO THE *COPPER MINES* WITHIN THE DUTCHY LANDS; AND INVOLVING ALSO THE QUESTION OF TITLE TO THE LANDS AND ESTATES OF THE TENANTS.

BY JOHN HALCOMB, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW.

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THE great importance of the questions at issue between the Lessees of the Duke of Cornwall on the one hand, and the Proprietors of lands and mines within the Dutchy Estates on the other, and the extensive interest which the claims of the Lessees have excited in the counties of *Cornwall* and *Devon*, — have induced me to publish the following Report, from notes which I had taken for my private use at the Assizes, and, subsequently, in the Court of *King's Bench*. On the recent argument for a New Trial in the cause of *Rowe* v. *Brenton*, I had the opportunity of comparing this Report with the notes of the learned Judge who tried the cause, and am able to say, that it is, in all respects, substantially correct. The Report of the Trial of that Cause at *Nisi Prius* was *printed* before the arguments upon the

application for a New Trial took place, in the beginning of the present month; had that not been the case, I should have suppressed the greater part of my notes upon that Cause, as having been fully discussed in the subsequent arguments, and therefore become superfluous.

The Court of King's Bench has not yet pronounced its Judgment, whether there shall, or not, be a New Trial.

J. H.

5, Chancery Lane, 25th Feb. 1826.

REPORT,

&c. &c.

DEVON SUMMER ASSIZES, 1824.

ROWE *v.* GRENFELL.

(Tried before the *Lord Chief Justice* Abbott, and a Special Jury, at *Exeter*, 19*th August*, 1824.)

Mr. Carter stated this to be an action of *Trover*, to recover the value of copper-ore.—*Plea*, the general issue,—*Not Guilty*.

Mr. Serjeant Pell.—"May it please your Lordship. Gentlemen of the Jury:—This cause is, in point of property, perhaps one of the most important causes that ever was tried. The Plaintiff, *Mr. Rowe*, is a gentleman very extensively engaged in mines in the county of *Cornwall*, and has been a most successful miner. The Defendant, *Mr. Grenfell*, is also a gentleman of the same county, a large purchaser of ores, being in partnership with a *Mr. Williams;* and, with other individuals, has rendered himself liable to this action.

"Upon what right or title *Mr. Grenfell* will rest his defence I do not at present accurately know, and therefore I shall not, in this stage of

the cause, enter into questions of historical evidence and documentary proof, that may possibly not be made use of by the other side; but if used, I shall then have to resort to similar proof.

"It is sufficient for me now to state to you the general nature of the Plaintiff's case; which is briefly this:

"In the county of *Cornwall* is a *Manor*, called the manor of *Tewington*, which some time since belonged to his *present Majesty*, being then *Duke of Cornwall*, and is situate part in the parish of St. *Austle*, and part in the parish of *Blazey*. It is one of seventeen manors which originally were granted by Parliament to the Dukes of Cornwall. The manor of *Tewington* was, however, sold in the year 1798, under the provisions of the *Land-Tax Redemption Act*. The purchaser was a gentleman well known in this part of the country, the late *Mr. Rashleigh*. In 1814, part of this manor was sold to the Plaintiff. Previously to *Mr. Rashleigh's* purchase, namely, in the year 1788, his present *Majesty*, then *Duke of Cornwall*, had granted a lease for thirty-one years, of all mines, *except tin*, which he held, to a *Mr. Daniel*, which lease terminated in 1817. In 1810, *Mr. Rashleigh* purchased the remainder of that lease. In 1809, a reversionary lease for twenty-three years, to commence after the expiration of the former lease, was granted by the Dutchy to *Messrs. Williams* and others. In a short time, *Mr. Rashleigh* acquired an interest in that lease also; so that, you will observe, he held these three sepa-

rate interests, namely, the manor, the lease, and the reversionary lease; which latter will expire in 1840.

"The Plaintiff, as I before mentioned, has been a very successful adventurer in mining concerns; never any one was found more successful; and he thus became possessed of wealth to a very—*very* considerable amount. He worked, among others, a mine called *The Great Crinnis Mine*, where, from his great experience and knowledge of mines, he suspected that he should find a vein of copper, though none had ever been found there before; in which expectation he was not disappointed, and made from that mine immense sums of money.

"The estate which the Plaintiff purchased in the manor of *Tewington* is called *Lemellan*, of which estate there are two divisions. In 1819, or 1820, Plaintiff sunk a shaft, and began a level on his estate of *Lemellan*, for the purpose of opening another mine there, which he called *Wheal Rowe*, and in which he expected to find another rich vein of copper. In this expectation also the Plaintiff was eminently successful; but no sooner was his discovery made, and he was about to reap the reward of his labours and ingenuity, than a neighbouring company of miners, called The *East Crinnis* Adventurers, supposed they had a right to obtrude themselves upon him, and to take part of the ores from *Wheal Rowe*.

"With the *East Crinnis* Company Mr. Rashleigh was connected. He is since dead, and, no

doubt, he thought himself entitled to act the part he did by virtue of the rights which he possessed.

"This Company, however, took from the Plaintiff a vast quantity of the ores raised from the mine of *Wheal Rowe*—from 200, to 250,000*l.* worth.

"The Plaintiff has, of course, advised with other gentlemen besides myself as to the proper mode of trying this question; and it is considered that *Mr. Grenfell,* as the purchaser of the ores, is liable in this form of action. He defends under the *East Crinnis* Company, being put forward by them in order to try the right. I do not know whether the other side are disposed to take any formal objections, or will come fairly at once to the question.

"In *Tewington* manor there are two classes of tenants,—*free* tenants, and *customary* tenants, both possessing *freehold* interests, but one greater than the other. *Lemellan* is a *customary* tenement.

"In the first instance, it will be sufficient for me, on the part of the Plaintiff, to prove the trespass which has been committed. The other side must have to travel through a most wide field of defence of one description or the other, in which I should only lose myself was I now to enter upon it."

The following Witnesses were then called for the Plaintiff:—

Mr. John Williams, junior, (examined by *Mr. Serjeant Wilde.*)—"The Defendant was a partner

of mine in 1821 and 1822, and until the latter part of 1823. I can give evidence, if being a partner I am obliged to do so. We are indemnified. I don't know who employs the attorney for defending this cause. I don't know that the *East Crinnis* Adventurers defend. *Mr. Oakley,* I believe, is one of those Adventurers. *Mr. John Gill,* I believe, is another. He is here. I have never seen the list of Adventurers. Twelve months ago he told me he was interested. I believe our solicitor settled that we were not to take the burthen. We do not interfere — not as *Fox, Williams, and Company,*—in defending this cause. *Mr. Oakley* and *Mr. Gill* are two of the persons who have indemnified us."

Mr. Henry Brenton, junior, (examined by *Mr. Serjeant Wilde.*)—" I am clerk to the *East Crinnis* Adventurers. I know *Mr. Rowe*'s estate of *Lemellan.* Am not certain that we worked for copper in 1821, or 1822. Have not particularly observed when we first worked. I was on the estate in 1821. In 1822 I believe I saw it. *Mr. Gill* and *Mr. Oakley* are two of the Adventurers. There is one counting-house at the east end of the mine. Some books are kept at the mines' office at *Tavistock. Mr. Gill* lives at *Tavistock.* I keep an account of copper raised. I receive reports from the captains. *Henry Brenton,* my father, is a captain of the mine. Also ——— Brenton." *(Produces ore-book.)* " Sales of the ores are entered in the ore-book, or dues-book. No mention here of the persons to whom the ores are sold. The ores raised are entered. In October,

1822, ores were raised in *Lemellan:* several tons. We do not keep an account at our counting-house of the persons to whom the ores are sold. That is kept at the mine-office at *Tavistock*. Ores are always first laid at the mouth of the shaft. Then carried to the dressing-floors. There they lie until wanted. Ores are generally sold once a month. I can't tell at what shaft the ores sold were raised. Several tributors work on the mine. *Peter Keern, Joseph Cock, George Whitter, John Bray, Alek Bray,* were tributors. I keep the setting-book. That will shew from what part of the mine the ores were raised."

(Cross-examined by Mr. Adam.)—"I don't know of my own knowledge what ores were raised at *Lemellan*. I don't know whether there are two tenements. I pass over it generally every day."

(Re-examined by Mr. Serjeant Wilde.)—"I saw some dirty stuff raised in 1822, in October. Don't know what it was. It might be *killas,* or ores."

Mr. John Williams (recalled.)

[*Produces account of ores purchased.*]

		Tons.	Cwts.	Qrs.		Per Ton.		
"20th December 1821.	1 parcel.	94	0	0	at	£9	10	6
———————	1 do.	65	4	2	at	11	0	0

"We made several other purchases."

Mr. Henry Brenton (recalled.)—"We sold ores on 17th October, 1822. Also 19th December. Some part was raised in *Lemellan*. About 180 tons were sold on 19th December. 177 tons sold on 17th October, 1822. These were all that were sold from *Lemellan*. We sold from other

places: various quantities. There is a house upon *Lemellan*. Plaintiff occupies it. I saw him there in July, 1821. The same tributors raised the ores."

Mr. John Williams (recalled.)—"On 17th October, 1822, we purchased three parcels, and one-third of a parcel from the *East Crinnis* Adventurers, at the ticketting."

——— *Bishop.*—"I am a tributor in the service of the *East Crinnis* Adventurers. I dug out ores from under *Mr. Rowe*'s land in 1821, and made shafts in his land in 1823."

Mr. Henry Brenton (recalled.)

[*Refers to his books.*]

"In summer of 1822 I do not find *Bishop*'s name. In March, 1822, I find it. He raised ores. Fifty tons were sold, 21st March, 1822. He and his partners raised it. Ores sold 20th June, 1822: six tons sold, raised by Bishop."

Mr. Williams (recalled.)—"*On 20th June,* 1822, I purchased 72 tons, 6 cwt. of the *East Crinnis* Company."

[*Wilde, being in difficulty, here called for the* Bond of Indemnity, *which was produced.*]

"Since I have received this bond of indemnity, we have given up the defence of this cause to the attorneys who now defend it."

The execution of the bond was proved by the attesting witness, and the bond put in and read. It was dated ———————, 1824, executed by *John Gill* and *Francis Oakley*, and made in favour of *Messrs. Fox*, *Mr. Grenfell* (the Defendant), *Mr.*

Williams, of *Scorrier House*, and others.—Penalty, 18,000*l.*—The bond recited, that, "Whereas at public tickettings in Cornwall, large quantities of ores from *Crinnis* mine, being all that were raised, were offered for sale, and parts were purchased by Messrs. Fox and Company for several sums, amounting to 9000*l.* and upwards. That an action was depending for recovering the value of the said ores from the Defendant; and that the defence of such action was wholly committed to the attornies of Messrs. Gill and Oakley. The condition of the bond was to indemnify Messrs. Fox and Company against the present, and all other actions which might be commenced."

Mr. —— *Kelly* (examined by *Mr. Serjeant Wilde.*)—"I have the cost-books of the *East Crinnis* mine for 1821 and 1822. They contain accounts of sales, but not of the buyers. Another book does; and one of the books shews where the ores were raised."

[It was here admitted by the Defendant's counsel, that the Plaintiff had sufficiently proved ores to have been dug from under his estate called *Lemellan*, by the *East Crinnis* Adventurers; and that the same ores were sold to *Fox, Williams, and Company* (including the Defendant), at public tickettings, or sales.]

Mr. Francis Vivian (examined by *Mr. Serjeant Wilde.*)—"I am mine-agent to the Plaintiff. Have been so since 1811. I know *Lemellan* Moor well. In 1814, Plaintiff went to live there. He lives

there now. There were no mine-works in 1814 that I recollect. In 1820, Plaintiff commenced his works. Sunk a shaft in June 1820, in what is called *Mr. Rowe*'s, or *Lemellan* Moor. After that a level was made—a 14 fathom level. Two other shafts were afterwards sunk. Up to the beginning of September we had raised from 10 to 12 tons of copper-ore. Afterwards raised more. It was taken away by the *East Crinnis* Adventurers. Not interrupted afterwards till June 1821, when we had sunk another shaft, and then they took possession of the Plaintiff's mine.

"I know *Mr. Brenton*. Have seen *Mr. Gill* among the *East Crinnis* Adventurers. They have worked the mine ever since. I went frequently on the mine. They used our levels, not the shafts. I have been down in the mine. Great quantities of ore have been taken out, up to the present time."

(Cross-examined by Mr. Adam.)—"In October or November 1821, I was down in the mine. I don't know what may have been done in it since. There was an old shaft on the mine before we began in 1820. Some tin-adventurers, called the *Forth Company*, sunk it. *Captain Hitchins* worked there for the *East Crinnis* Adventurers. There were other shafts sunk."

Mr. Serjeant Pell.—"That is my case."

The Lord Chief Justice.—"It is no case at all. You have shewn ores raised, but not that you

were entitled to them; you might as well cut my trees, and *therefore* sell them."

Mr. Serjeant Wilde submitted that he had proved the occupation both of the house and estate of *Lemellan* by the Plaintiff.—But,

The Court doubting,

Mr. Francis Vivian (was recalled, and examined by *Mr. Serjeant Wilde.*)—"*Lemellan* estate, occupied by Plaintiff, consisted of a farm of about 36 acres. Plaintiff farmed it — before he began mining. *Lemellan Moor* was cultivated with the farm. Part was in oats. A field of about 8 or 9 acres; part of the 36 acres. Plaintiff farmed it from 1814, when he purchased, up to 1822 or 1823. He occupies it now, except the part occupied by works of the *East Crinnis* Company. I paid the farmer for the property of his which Plaintiff purchased. I don't know what interest or tenure Plaintiff purchased. The land was all well fenced in."

(*Cross-examined by Mr. Adam*)—"It is well known by the name of *Nans-mellan* — not so well as *Lemellan*. There were fixtures in the house."

Mr. Serjeant Pell—"That, my Lord, is my case."

Mr. Adam.—"I submit that it is not a sufficient case to go to the Jury."

The Lord Chief Justice.—"It stands now, that the Plaintiff came into the estate in 1814, by some means; but by what interest or right, does not appear. That he farmed till 1820, and then

began mining. That other persons come and take away the ores as fast as he raises them.

"Upon this evidence, the first presumption certainly is, that the Plaintiff was seised in fee of the Estate*. But that presumption is rebutted, perhaps, by the fact that other persons come and take away the ores. Why do you not prove your title? I think it very unsafe to rest your case here. I don't at present say that I would nonsuit you. But I very much doubt whether the jury would give you a verdict. You see other people may be entitled to the mines."

Mr. Serjeant Pell.—"At present, I am not inclined to carry my case further."

On consideration, however, the following witness was called.

Thomas Oliver, Jun.—(Examined by *Mr. Carter.*)—"I am a carpenter. In 1814, and ever since, I have been employed by Plaintiff, to plant oak trees. I have cut timber on *Lemellan.*"

Mr. Serjeant Pell.—"I will not trouble the Court with further evidence. I have proved possession and full occupation of the surface. In ordinary cases, this is sufficient to prove a right to the whole produce of the land. I therefore submit, that the party intruding upon this possession must be taken to be a wrong-doer, and must prove a better right. There is nothing, I

* It appears to have escaped notice, that the Plaintiff's Counsel opened his case, stating, that *Lemellan* was a *customary tenement* of the manor of *Tewington*, and, if so, that the right of soil and minerals, *primâ facie*, was in the Lord.

apprehend, in the nature of this property, being mineral, to vary this case. For reasons, which I do not mention, it is not our wish to carry the case further."

The Lord Chief Justice.—" I tell you what is my difficulty. You come into possession of a tenement, which you occupy for certain purposes, but not for purposes of mining. And we know, that in conveyances minerals are often excepted, and particularly in the county of *Cornwall.* Now of this mineral you have never been in the enjoyment. The moment you raised it, others came and took it away. You would have stood better in my opinion if you had brought your action the *first* time you were interrupted. The other parties were all the time in possession of the *Crinnis* mine."

Mr. Serjeant Wilde.—" It is true that minerals are often reserved. But, generally speaking, if a man is in possession of the surface, no *presumption* would be raised to limit his estate. Up to the time of working his mine, Plaintiff had done every thing to clothe himself with the right."

[*The Court,* appearing to be strongly impressed against the sufficiency of the Plaintiff's case, now put it to the Defendant's counsel to elect whether they would call evidence; or go to the Jury upon the case, as it stood, for their decision, whether the Plaintiff had proved his title to the minerals?]

And, after some consultation,

Mr. Adam said,—" My Lord, I will take the

responsibility, aided by the opinions of my learned friends, of going to the Jury upon this point alone.

" Gentlemen of the Jury:—The Plaintiff says, you are to presume that he has the right, or property, in these minerals, because he is in possession of the surface; but he has not attempted to shew that he had even a conveyance of the land; —he won't produce it. The very land he purchased had shafts sunk in it for mining, before the time of his purchase. And other persons, after that time, had taken both copper and tin ores from an old shaft upon the land. Nothing is more common than that the right to the surface should be in one person, and the right to the minerals in another. And this more particularly in *Cornwall.* Here the presumption is totally done away, by our always taking the minerals as fast as the plaintiff raised them."

[Here Plaintiff's Counsel proposed terms of compromise. But *the Court* thought it not fair, after having driven Defendant's Counsel to their election. And, *Adam* objecting, the Court would not hear it, but told *Pell* he might elect, if he pleased, to be *nonsuited:* which, however, he declined, and *Mr. Adam* proceeded.]

" This action is brought against a person who had nothing to do with taking away the minerals; but who, as a purchaser, paid his money for them in open market. The Plaintiff should, and may, try his action against the proper party."

The Lord Chief Justice.—" An action of *trover* may be maintained in two respects;—1st, If the

Plaintiff was in *possession* of the article;—and, 2dly, If he can shew a *right* and *title*.

"Now as to the actual possession, there is hardly any evidence of that. Then, as to the title: the possession of land generally raises a presumption that the party is seised *in fee*. But a seisin in fee does not *imperatively* call upon you to presume a title to the minerals, because a seisin in fee may be, and very often is, in one person; and the title to the minerals in another. Of this, therefore, you are to judge by the evidence. Upon the evidence, I think a seisin in fee is not necessarily to be presumed, although the evidence is strong.

"Then the most important question arises as to the minerals. As to these, you will observe, that persons not appearing to be the former occupiers of the surface, but who are described to be *The Forth Company*, had, before the plaintiff came to the estate, sunk a shaft for tin. There was also a pit, which some other persons had worked before plaintiff came into possession. Other persons, too, had worked the mines under Plaintiff's land, and they took the metals from the Plaintiff as soon as they were raised by him.

"If the Plaintiff has made out a title to the minerals to your satisfaction, then you will find a verdict for him; but otherwise, for the Defendant."

The Jury, after consulting together for a short time, returned a

Verdict for the Defendant.

DEVON SPRING ASSIZES, 1825.

ROWE *v.* BRENTON AND ANOTHER.

(Tried before *Mr. Justice Park*, and a Special Jury, *at Exeter*, 17*th and* 18*th March*, 1825.)

Mr. Rowe stated this to be an action of *Trover*, to recover the value of copper-ore. The Damages were laid at 5000*l*. *Plea*, the general issue,—*Not Guilty*.

Mr. Serjeant Pell.—"The Defendants appear upon this record as *principals*, with reference to the transactions which are the subject of the present inquiry, but, I have reason to believe, are acting under the authority of others.

"The Plaintiff is a very considerable adventurer in mines, in which he has had the good fortune to have made extensive discoveries, and, indeed, appears to have had a peculiar tact upon the subject. In other mercantile speculations he has not been so fortunate; and his claim to-day is of the utmost importance to him: he seeks at your hands the reward of his own discoveries.

"In 1820, the Plaintiff was proprietor of an estate, called *Lemellan*, in *Cornwall*, part of the manor of *Tewington:* he was in possession for several years, and occupied his estate in the usual manner. In 1820, he found a vein of copper-ore

upon his estate, the lode being not many feet below the surface. This discovery excited the wonder, and (I am sorry to say) the cupidity of the country. In fact, the Plaintiff became possessed of a mine of incalculable value.

"After the copper raised from this mine was brought to grass—that is to say, to the surface of the land—the Defendants, acting under the authority of others, came into the Plaintiff's close, and took away the ores.

"Here, then, I might rest my case. Upon proof of these facts I should be entitled to your verdict; but I think it proper to state to you the nature of the defence which I anticipate.

"It will be said, I believe, that the Plaintiff, although the owner of this estate, has no right to this part of his property; just as if any of you had found a vein of coal, for example, on your estate, and should be told that you had no right to it!

"The county of *Cornwall* traces its history from great antiquity; and it may be that the *Attorney-General* may be able to shew a title in some one else to these mines. It would be *hard* enough, to be sure; but, if the law is so, I am not disposed to quarrel with the law of my country.

"By a charter of *King Edward III.* in favour of his son, Edward, Duke of Cornwall, better known by the title of '*the Black Prince*,' seventeen manors in *Cornwall* were vested in the Duke. It will be said that this manor is one of them, and that the tenant has no right to the minerals.

"I am in utter ignorance of the documents, or evidence, which will be produced on the other side. When the Plaintiff sought access to the duchy records, the door was locked, and all information debarred from him. The Plaintiff, therefore, can only stand on his general right. Every thing which can be done will be done on the other side. And his majesty's attorney-general comes forward to-day, armed with every authority, against me, who am very—*very* short of assistance.

"I will shew Plaintiff's possession, and the general nature of his estate, as in any ordinary case. The mine in question is called *Wheal Rowe* mine. The Plaintiff has at all times exercised the highest species of ownership, has taken the soil, opened quarries, and cut timber; and if these acts are undisputed, then, I say, he is the perfect owner.

"The estate in which the mine is situate is called *Lemellan;* it is what is termed a *bounded* estate, which means, as referable to the whole of *Cornwall,* an estate marked out upon the surface by metes, or bounds, for purposes of mining.

"The county of *Cornwall* was first visited by foreign countries, in very ancient times, for purposes of commerce, and particularly for *tin,* from which mineral the very name of *Briton* is derived—the word *Briton* signifying *tin.*

"The *stannary* laws in Cornwall are of very great antiquity, and they apply to *tin. On wastes,* (which are the lands unenclosed,) any tinner might take his bounds, by digging up a turf, or other

bound, and claim to dig there; and he might also claim, if he pleased, to dig in any ancient enclosed lands which had been previously bounded.

"In a book which I hold in my hand, entitled, 'The Laws of *the Stannaries*,' (p. 34), *(referring to the book)*, there is a presentment of a convocation, or parliament of tinners, which shews, that '*any tinner may bound wastrel lands unbounded, and also any ancient enclosed lands which have been bounded* *.'

"The estate of *Lemellan* is a bounded estate; for many years it has been an enclosed estate. As a bounded estate, it will be urged on your attention by the other side; but the utmost that can be made of it is this, that their argument applies to *tin; not to copper!* and we shall attempt to shew to-day, that he who has a right to take *tin*, has not a right to take *copper*.

"I should like to see any document from the dutchy-office, which entitles them to take copper.

* "We present and affirm, that by common prescribed Stannary right, any tinner may bound any wastrel land within the county of Cornwall that is unbounded, or void of lawful bounds; and also any several and enclosed land that hath been anciently bounded and assured for wastrel, by delivering of toll-tin to the lord of the soil, before that the hedges were made upon it; and also such and so much of the prince's several and enclosed customary land within the ancient dutchy assessionable manors as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several dutchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the Stannaries; that is, the fifteenth dish, or part, saving in such places where a special custom hath limited another rate of toll."—*Laws of the Stannaries, page* 34.

They have access to every document, even from the Tower of London, down to the lowest place where a scrap of parchment may be found.

"You will all feel, that if success can attend the Plaintiff, it ought to do so, that he may reap the reward of his own discoveries; and I shall certainly so shape my case, as, in my judgment, is most likely to conduce to his success.

"It is high time that this question should be set at rest. There is not an individual in Cornwall,—nay more, with reference to the principles at issue in this cause, there is not an individual in this kingdom,—who is not *deeply* interested in the result of the present inquiry!"

[The learned serjeant concluded with a high eulogium upon his learned friend, *the Attorney-general*.]

The following witnesses were then called for the Plaintiff:—

Francis Vivian, (examined by Mr. Serjeant Wilde.)—"I know *Lemellan* estate. Plaintiff has been in possession since 1814. I am employed by him. He has taken the crops—cut timber. I have been employed by him to dig for minerals. Part of the estate is called *Lemellan Moor*. It was there I commenced my mining operations. Although called a moor, it is an enclosed field—not different from any other field of the farm as respects the fences. Crops had previously grown upon it. First sunk a shaft, called *Rowe*-shaft. Began in June 1820. We

got upon a lode. A lode signifies a vein of ore. Copper is always found in a lode, if found at all. We sunk three shafts. There is a house on the estate. We obtained copper from that lode in *July* 1820. We have since obtained other copper. Shortly after July I went to *London*, having left the copper-ores then lying on the surface of the land. When I returned, the first copper we had raised had disappeared. In consequence of what I had heard, I saw Defendant, *Brenton*. We have since raised other copper, which has been removed by other persons than the Defendants. On 21st November 1820, I saw the Defendant, *Captain Brenton*, on the estate, when the copper which had been subsequently raised was removing. It was removed by the Defendant, with carts. He gave instructions to the men who were removing the copper. It was removed against my consent. I was there, in charge for the Plaintiff. Some had been taken off the estate before I came. I had left about 10 tons on the ground, in the morning of the same day. About 6 or 7 tons were removed before I arrived. The rest was all removed in my presence. It had been raised by me as the servant of Plaintiff, and deposited in the place from whence the Defendants took it.

"The whole of *Lemellan* estate is enclosed. There are two closes on *Lemellan Moor*. There were remains of tin-works on the moor. There had been a shaft upon it connected with the tin-works. They had nothing at all to do with our works.

"I have lived all my life in *Cornwall.*"

(Cross-examined by the Attorney-General.)—"I have heard Plaintiff say he purchased the estate of *Mr. William Pearce.* I don't know whether *Pearce* occupied it. I knew the estate in 1811. The iron shaft was sunk in 1812 or 1813, as far as I recollect: I have heard, under the direction of *Captain John Hitchings.* I don't know whose captain he was, except from hearsay. The shaft was sunk before Plaintiff came, and was an open shaft then. *Brenton* had sunk other shafts on this, and the adjoining property. *Brenton* is captain of the *East Crinnis* Company. There is a great deal of copper got from that mine. The captain's jurisdiction extends under-ground, and over the surface. *East Crinnis* extends under part of *Lemellan Moor,*—I believe not under any other part of the estate. *East Crinnis* is about a quarter of a mile from *Great Crinnis. Great Crinnis* is also a copper-mine. The *East Crinnis* people took away, in *September* 1820, the copper that we raised in the *July* preceding. They have constantly claimed a right to do so, and have taken it away. Many actions, and several indictments, have been brought."

(Re-examined by Mr. Serjeant Wilde.)—"Shafts have been dug against Plaintiff's consent, and by force. The East Crinnis Company did not *begin* their works in *Lemellan.* No other part of the *East Crinnis* mine is in *Lemellan,* except that which has been done against Plaintiff's consent.

Thomas Oliver, junior, (examined by Mr. Carter.)

—"I am a carpenter in the Plaintiff's employ;—have been so ever since 1814. Worked for him on *Lemellan* estate. I saw trees planted on the estate, under my direction,—between 2 and 3000. I have altered gates on the estate, and pulled down buildings, stables, &c., by Plaintiff's direction. Timber has been cut down by Plaintiff's orders: a great number of trees. Whenever I wanted a tree, I cut it. Part of the timber was carried to a mine called *Wheal Regent*, then belonging, in part, to Plaintiff. It is about a mile from *Lemellan*. No one objected to, or forbade my cutting timber."

(*Cross-examined by the Attorney-General.*)—"The timber was used in repairs and fences. Was cut about the end of 1814—soon after we came to the estate. A person named *Udy* occupied before Plaintiff. Ash, oak, and elm was cut. What we did not use was sold to the proprietors of *Wheal Regent*. Plaintiff is still making alterations. They have been going on since 1814. The house is not very large. Plaintiff lives in it when he comes there."

(*Re-examined by Mr. Serjeant Pell.*)—"Ash was the largest-sized timber I cut. The oaks were not very large, perhaps 9 inches square. About 3 or 4 waggon-loads were sold. Part of the timber grew in the hedges. A row of trees stood on each side of the lane—they were ash. Part of the ash-trees grew on the highest part of the estate."

Mr. Serjeant Pell.—"My Lord, that is the

case on the part of the Plaintiff. It is agreed, that, if a verdict shall be given for the Plaintiff, the amount shall be 100*l.*

Mr. Attorney-General then addressed the Jury for the Defendant.

"May it please your Lordship—Gentlemen of the Jury—I cannot help regretting the course that has been taken by my learned friend, because, now in answer to the case which I shall lay before you on the part of the Defendant, and which in my judgment is a complete answer to his *primâ facie* case, he will have to adduce some further case, and I consequently must afterwards address you again.

"Allow me to say, that I have not availed myself, for the purposes of this case, of any advantage which I may possess from my public situation, and I should act unworthily if I did. I only know the cause as it has been put into my hands, with all the evidence prepared for me, as it will now be my duty to lay it before you.

"As contrasted with my learned friend, I labour under great disadvantages. It is now 20 years since, that I remember to have seen him in nearly the same situation, and addressing juries with the same energy and eloquence; whilst I am almost a *stranger* in this part of the country, and little acquainted with *Cornwall*.

"It is not true that the Plaintiff discovered this mine. I shall shew under his own hand-writing, his congratulations to the discoverer; and his re-

quest to have a lease of the mine. Since then, he has pushed the mine, I admit, in all directions, but without any right or title.

" My learned friend uses the term "*property;*" but this must be viewed with reference to the local situation, in the county of *Cornwall.* It is not the right to the surface, timber, or crops, that is in issue; but the only issue is, *whose property is the mine in question?* And this point is thus brought before you in the most unembarrassed form.

" It is incumbent on the Plaintiff to prove the affirmative, namely, that the mine is his property: even admitting, for argument, that a copper mine belongs to the party who discovers it, still the Plaintiff did not discover it. My learned friend uses the word " property," because he knows the weakness of his case. Remember always, that we are trying a question of right in the *county of Cornwall.*

" The plaintiff is not the freeholder of this estate. He has what was formerly called a *base* interest; a right to the surface, but the freehold is in the *Duke of Cornwall.* Why are not the title-deeds produced? because it is more *convenient* not to present them to you; they would have shewn that the plaintiff has not the interest which he wishes you to believe.

" A person named *Withiel* conveyed this estate to *Pearce,* and Pearce to the Plaintiff. *Withiel* worked this very mine under a *Set,* or *Lease:* but more of this by and bye.

" As to the history of *Cornwall:*

"At one period the whole county belonged to *the Crown.*

"*William the Conqueror* granted the county to his brother *Robert.*

"*Henry 3d* afterwards possessed it; he granted it to his brother *Richard,* the king of the Romans; from him it descended to his son *Edmund,* who died without heirs, and then it reverted to the crown.

"The Crown held it until the reign of *Edward 2d,* who gave the earldom of Cornwall and the Crown Manors to his favourite, *Pierre Gaveston.*

"*Gaveston* was afterwards banished, but came back again, and being restored to favour, a second grant was made to him. Eventually he was beheaded, and the property again reverted to the Crown.

"Early in the reign of *Edward* 3, that monarch conveyed it to his brother *John of Eltham*—he died without heirs. Then there was a grant by the crown to *Edward,* the *Black Prince,* by charter, made with the assent of the legislature of the country at that time, and always considered to have the effect of an Act of Parliament.*

"By this charter, the *Prince of Wales,* as such, always holds the dutchy of *Cornwall.* It is inalienable: does not descend to the heirs of the prince; but, when there is no Prince of Wales, reverts to the Crown. There have been many very important decisions on this charter.

"After the death of the *Black Prince,* the pro-

* It was so decided, in "*The Prince's Case,*" 8 Co. Rep. 28.

perty reverted to the Crown; there being no *Prince of Wales*, it was granted to the son of the Black Prince, and specifically included all mines

"No proof has been offered by the other side, that they were denied access to the dutchy muniments. But they had no right to it; they should have applied to the Court of *King's Bench*, who would have ordered an inspection, if they had a right. But no application was made to any party connected with this cause.

"The property in question is part of the dutchy of *Cornwall*. There is no dispute about that fact. The district in which it is, is called *Nans-Mellan* in all the old records. Whether co-extensive, or not, with Plaintiff's estate, I am not certain.

"There are 17 manors belonging to the duke of *Cornwall*, called *assessionable* manors, and in these manors were three descriptions of tenants.

"1. *Free tenants*, who were freeholders, owners of the soil; and the lord had no title, either to the soil or minerals.*

* Quære this? If they were free *tenants* of the manor (as contra-distinguished from freehold estates, properly so called, situate *within* the manor, but not held by copy of Court Roll), then their estates must have been what are termed *customary freeholds;* that is to say, estates of inheritance held by copy of Court Roll, according to the custom of the manor, *but not at the will of the lord.* In customary freeholds, however, the right to the soil and minerals (which are a part of the soil) remains in the lord, *Bishop of Winton* v. *Knight*, 1 P. Wms. 406 (cited *Bourne* v. *Taylor*, 7 East, 189), unless there be a custom of the manor to the contrary, or usage from which a grant of the minerals to the

"2d. *Conventionary tenants*, that is to say, tenants by agreement, convention, or covenant. And these, again, were divided into *freemen* and *servile*, or *natives*.

"3d. Natives of stock, pure and absolute bondsmen. At present we have nothing to do with either the first or third class, but only with the second, because *Nans-mellan* was a conventionary tenement.

"The *question* is, what estate had these conventionary tenants? They were leaseholders, generally for seven years, but sometimes for more—for fourteen or twenty-one years. They paid rent, varying in amount: were prevented from committing waste: were bound to stock the land, &c., and in all respects were leaseholders, as at the present day.*

tenant or other persons may be presumed; as in *Curtis* v. *Daniel*, 7 East, 273. And this doctrine applies equally to *all* copyhold estates, as the copyholder has no estate of *freehold*, which remains in the lord. 2 Inst. 325. Lit. S. 81. Perhaps with respect to customary freeholds, the interest which the tenant takes requires further consideration in a court of Common Law; for the case of the Bishop of *Winton* v. *Knight* was *in Chancery*, and the question of the tenant's interest decided upon an issue at *Nisi Prius*, which does not appear to have been subsequently reviewed in a superior court at law; and there certainly are authorities in the books to shew that a customary freehold is not, properly speaking, a copyhold estate, because not held *at the will of the lord*, Co. Lit. 58, and that the tenant has an *interest equivalent to a freehold*. 2 Bl. Com. 100.

* But quære, did they not hold by *copy of Court Roll?* If they did not, and that fact be established by satisfactory proof, then the estates cannot now be *copyhold*, because it is essential to the

"These manors were called *assessionable* manors because persons were accustomed to be sent down to the country to renew leases from time to time, and to assess the rents. Of their proceedings we have records down to the present time, of which I shall give some in evidence.

"The *assession rolls* are as early as 7 *Edward III.* There is a commission of *John of Eltham*, then *the owner* of the property, addressed to four persons, as commissioners, to assess the land. They were sent down to the country for that purpose, and authorized to let either to the same, or to other tenants.

"The return to this commission shews the lands to have been let for seven years, except as to the third class of tenants.

"There is a roll, relating to *Nans-mellan*, of the same date."

[Roll read; by which it appeared there was a letting to *Philip De Nans-mellan*, at a rent, and for a fine, an increase of rent, fealty, &c., and similar lettings to *John De Nans-mellan*, *Jordan De Nans-mellan*, and *Gregory De Nans-mellan*.]

"This comprises all that tenement which is

validity of a copyhold estate that it shall have been demised by copy from time immemorial; and there can have been no creation of a copyhold tenure since the reign of *King Edward I.* (Com. Abr. Title Copyhold (B) 2 Bl. Com. 91.)

And if the lord of the manor grant otherwise than by copy, a common law interest, as for a term of years *certain*, the nature of the estate, as a copyhold, is thereby for ever destroyed. *French's Case*, 4 Co. 31, a. Cro. Car. 521. 1 Roll. Abr. 498.

now called *Le-mellan;* and clearly proves that the whole was *leasehold.*

"The commission was manifestly adopted by the tenants, and must be taken to shew the right as it then existed."

[Rolls of the lettings of different tenements in the several assessional manors were also read, shewing, that the lord appointed another tenant when a tenant was not in a condition to renew; that they were called conventionary tenants; and that the conditions of the convention, as regarded the occupation of the several tenements, were similar to that of *Nans-mellan.*

Also a roll of 21 *Edward III.*, shewing a commission in the same terms as before, relating to the manor of *Tewington,* and shewing, that the best beast was reserved in nature of a *heriot,* upon some of the conventionary estates.]

"In freehold property, on death of the tenant, a *relief* is payable; in copyhold tenements a *heriot.* Indeed, every lawyer knows the nature of an estate which pays a heriot.

"In this roll," (*referring to a roll dated* 28 *Edward III.*) "under title, *Free-conventionaries, John de Nans-mellan* takes a conventionary estate in preference to another tenant, and appears, by the margin, to have been let in *by auction,* and to have taken *at a higher rent.*

"In another instance, there is a *decrease of rent;* and the reason noted in the margin, '*be-*

cause tenants had quitted the vill, the rents being too high.'

" So in roll 45 *Edward III.*, title *Nans-mellan, John Jourdan,* a *freeman,* is decreased in rent, because too high.

" There is a long series of these rolls; at least, so I shall at present take it, down to 27 *Henry VIII.*

" From these rolls it appears, that the lands were let by the lord; the rents varied; there were powers of distress and re-entry; heriots payable; the lands often left in the lord's hands; tenants bound to repair; to stock sufficiently; not to commit waste; to reside; and *forfeiture* if these acts were not done, and *if they dug tin!*

" In the reigns of *Edward VI., Philip and Mary,* and *Elizabeth,* there were no dukes of Cornwall; and then we find attempts were made to abridge the dutchy rights.

" In *King Charles*'s time, the estates were seized by Parliament. In the confusion, there was no one to take care of the dutchy rights. Alienations were made, and encroachments not authorised by law, being contrary to the charter before mentioned.

" In process of time, the tenants claimed inalienable estates. First, the words '*heirs and assigns*' were introduced; then '*heirs and assigns for ever;*' then to be granted by indenture, instead of by copy of court-roll.

" In *Charles II.*'s time, there was no Duke of Cornwall.

"The Duke has officers of the dutchy, an attorney-general, and other officers.

"In *Queen Elizabeth*'s time, she took possession of, and alienated the dutchy estates to a considerable extent.

"The copyholders, by degrees, have encroached in the like manner. They have now got to an inalienable estate; yet they have not now the *right of soil* in them; but the freehold still remains in the lord.

"Of this nature are these *conventionary* estates. If they were not *freeholds* at the time of the great charter of *Edward III.*, they cannot be so now *.

* There is an ambiguity in the use of the word *freehold*, in this and other parts of the Attorney-General's speech; whether it signifies a freehold estate *properly* so called, or a *customary freehold*. If the former be meant, the argument may be conceded; but if the latter, it will perhaps be thought right to consider further the case of the *Bishop of Winton* v. *Knight*, before the principle involved in that case and the present is fully acquiesced in. *Lord Coke* (Cop. S. 32), declares, "That in these copyholds of frank tenure the freehold resteth *in the tenant*, and not in the lord." And there are many authorities in the books, some confirming his opinion, and that these estates cannot be copyholds, because not held at the will of the lord; and others directly contradictory, all which are collected, and the subject fully discussed. (Scriven's Copyholds, chap. 15.)

The whole question at issue is, *in whom is the right of soil?* It is said, that the estates of inheritance, which have been granted to the tenants, are *encroachments;* and that it was not competent to the lord to grant such estates, because by the charter of 11 *Edward III.* the dutchy estates are rendered *inalienable*. And the argument assumes both that the Plaintiff's estate was originally, and still is, of copyhold tenure, and that in *all* copyhold tenures the freehold and right of soil remain in the lord.

"In the reign of *James I.*, when *Henry* was Prince of Wales, an investigation took place into

Admitting, therefore, the tenure of the Plaintiff's estate to be as stated, it becomes immaterial to the present question to consider what is the *quantum* of his interest, unless he can establish an estate of *customary freehold;* and such an estate shall be held to vest the right of soil in the tenant, contrary to the decision of the Court of Chancery in the *Bishop of Winton* v. *Knight.* With respect, however, to the alleged encroachment; if the Plaintiff's land was originally demised *by copy of court-roll* for a term of years, or was part of the demesnes or wastes of the manor, and the lord for the time being afterwards thought fit to grant the same land, *to be held by copy of court-roll,* in fee or for other estate of inheritance, there being a custom in the manor (as appears to be the case here) authorising the lord to grant such estates, then, perhaps, it may be successfully contended that such grants were valid, and not *encroachments,* or contrary to the charter of *Edward III.;* for the charter of *Edward III.* only declares that the manors and estates thereby granted to the Duke of Cornwall should remain *annexed to the dutchy* for ever, and not be separable from it by any subsequent grant of the Crown in favour of any other person. The words of the charter are, "*Quæ quidem omnia castra, burgh', vill', maneria, &c., prædicto ducatui, præsenti chartâ nostrâ, pro nobis et hæredibus nostris, annectimus et unimus, eidem imperpetuum remansur: ita quod ab eodem ducatu aliquo modo nullatenus separentur, nec alicui seu aliquibus aliis, quam dicti loci ducibus, per nos vel hæredes nostros donentur, seu quomodolibet concedantur.*" Which clause, although it may, and most probably would, be held to render invalid any *enfranchisement* and *sale* of the copyhold lands of the dutchy, yet seems not to operate as a restriction to prevent the Duke of Cornwall for the time being from granting out any of his copyhold lands for any estate warranted by the custom of the particular manor. And if this be the right construction of the charter, then the same law will prevail in the manors of the dutchy as in all other manors, that the lord for the time being,

Queen Elizabeth's encroachments. (*See* 8 *Coke's Reports.*—'*The Prince's Case.*')—The dutchy estates are there declared to be inalienable. That authority is decisive of this case.

"In the year ——, an act of parliament passed, to enable the Duke of Cornwall to grant leases.

"The *Sutton Poole Case*, decided in the Court of *Exchequer*, is another authority in point.

"In *Henry V.*'s time, there was an application

though possessing only a life-interest in the manor, may grant estates to be held by copy of court-roll in fee, or for other estate of inheritance, according to the custom of the manor, although to enure for a longer period than the determination of his particular estate. (1 *Watk. Copyhold*, 25.) And if grants in fee, or for other estate of inheritance, have been made from time to time to the Plaintiff and his predecessors, and enjoyed without interruption, for fifty or sixty years past, that would be strong, if not conclusive evidence to prove a custom within the manor to make such grants. And it is conceived that the circumstance of entries being made by the steward or officers of the dutchy upon the court-rolls or assession-books, stating demises to have been made from seven years to seven years, when, in fact, none such were made, not only would not be admitted in evidence to countervail the custom, but would be a strong feature in the case to invalidate the authority of the ancient rolls of the manor containing similar entries. In *Taverner and Cromwell's Case*, 3 Leon. 107, it was treated as recognised law, that a continuance in grant by copy for fifty years, without interruption, establishes a custom, and fixes a copyhold interest; and, in many modern cases, usage for a less period has been held sufficient to warrant a jury in presuming a custom within a manor.

The encroachment by *Queen Elizabeth*, inquired of in *The Prince's Case*, was an absolute grant, by charter, of part of the dutchy estates to strangers, thereby severing them from the dutchy; which, it was held, she had no power to do.

to parliament respecting the dutchy lands; the *Duchess of Kingston* was then in possession of several parts of them, but was obliged to relinquish them, the lands being declared to be inalienable.

"A copyholder is entitled to the surface, but the lord to the soil, and all under it.

"By special custom, I admit, the copyholder may be entitled to mines, but then he must prove the special custom, divesting the right out of the lord, and vesting it in him.

"To this proof I challenge the other side. I will prove the direct contrary.

"My learned friend is not guarded in the statements which he makes of his case; for the discovery of copper is of very recent date, and if so, *he cannot shew a custom;** because a custom, to be worth any thing, must be from time immemorial!

"Neither can any *grant* be presumed, because by law it could not be made, the lands being inalienable.

"Who then has enjoyed these mines? The Duke of Cornwall. He is lord of the soil, and he has a right to the tin.

* But where an analogy arises from the nature of the subject-matter, one custom may be evidence to prove another, as with respect to the right of soil in fen-lands, or the profits of mines. *(Per Lord Hardwicke,* 2 *Atk.* 189.) So that evidence of a custom to take one kind of mineral, or excavate stone, &c., would be admissible to prove a right to take another kind of mineral, all being equally *part of the soil;* and therefore copper being of recent discovery, is immaterial to the question.

"In the '*Laws of the Stannaries,*' (*referring to the book,* page 34,) you find the words, '*by delivering of toll-tin to the lord of the soil;*' but my learned friend did not read these words! they did not suit his purpose.

"In *free* tenements, the freeholders take toll of tin; in *conventionary* tenements, the Duke of Cornwall takes it, because he is the lord of the soil.

"As to *copper*, I shall shew you that he is the owner as well of this as of *tin*.

"In 33 *Edward I.*, there is a grant from the crown to tinners, to dig tin. This charter is confirmed by other charters in 14 *Edward III.*, *Richard II.*, and 6 *Henry VI.*

"By one of the Laws of the Stannaries, enacted in the 11 *Charles I.*, (referring to the book, page 34), '*any tinner may bound unbounded lands, according to the ancient usage, paying usual toll to the lord of the soil;*' and this, by an act of the parliament of tinners of Cornwall, 26 George II., is confirmed to be the law of the country.

"In 27 *Henry VIII.*, it appears by the assession-rolls, that in the manor of *Helston*, being also an assessionable manor, the tenant forfeited his estate for digging tin in his conventionary tenement, contrary to the custom of the manor.

"In 35 *Henry VIII.*, a tenant was amerced for digging tin in his conventionary tenement. In 9 *Elizabeth*, there was a grant of tin in the manor of *Tewington*. In 1614, *James I.* granted

a lease of toll-tin, and of a tin-mine. In 3 *Charles I.*, and 12 *Charles II.*, there were similar grants of tin in adjoining mines.

" Tin, therefore, has been considered to be the property of the Crown, down to and through all this period.

" In the year 1718, the Duke of Cornwall granted a lease of the toll-tin and tin-mines.

" In 1719, a similar lease.

" In 1730, a similar lease.

" And in 1761, a similar lease.

" The consideration paid for these leases regularly increased, and proves, therefore, the increased value of the property.

" In 1718, the consideration was 600*l.*; in 1761, 900*l.*; and upon other leases granted in 1797 and 1810, the consideration paid was, in 1797, 4000*l.*; and in 1810, 18,500*l.*

" The estate of the Plaintiff was formerly held by one *Withiell*, who conveyed to *Pearce*, and *Pearce* to Plaintiff.

" *Withiell* took a lease from the bounder, and paid toll-tin. This is the same as if Plaintiff did it, because he claims under *Withiell*.

" All this estate is rightly stated to be *bounded*. In 1702, all *Nans-mellan* was bounded, and under that bounding is now worked. The tenant pays rent to the bounder, and the bounder to the lord of the soil. This is the case in the manor of *Tewington*, and district of *Nans-mellan*.

" Copper was not discovered at an early period

in Cornwall. The celebrated *Sir Walter Raleigh* was made lord-warden of the Stannaries in the reign of *Queen Elizabeth;* and he, bringing his activity and intelligence to bear upon this country, brought over workmen from the Continent, and discovered some little copper.

"In 1697, a lease was granted by *King William and Queen Mary*. There we begin our evidence as to the leases of copper. It was a lease to *Vincent* and *Scobell*, for 31 years; rent, one-tenth of the profits of the mines, to be paid to the crown, and to account upon oath. We shall shew their accounts.

"In 1717, another lease was granted to the widow of *Scobell* (*Vincent* being dead), on the same terms.

"From 1705 to 1729, we have a return of the profits, verified upon oath. At first, the returns were of inconsiderable extent.

"In 1748, when the last lease expired, *Sir William Leman* took a lease for 23 years and a half, on different terms; viz. for a gross sum, 1063*l.*, for the liberty of digging copper.

"In 1762, Sir William Leman being then dead, a lease was granted to *Messrs. Hussey, Daniel,* and *others*, as his executors, in consideration of their surrender of the former lease. 600*l.* was paid.

"There was a covenant in the former lease on the part of the lessee, to make compensations to the tenants.

"A right of entry being contested by some of

the tenants,* it became necessary to alter the terms in this new lease; therefore it was stipulated, that the consideration-money should be returned to the lessees, in case a suit then pending should be determined adverse to their right of entry.

"In 1786, *Mr. Daniel,* as the surviving executor, took a new lease, for which he paid 1450*l.*

"In 1810, a lease was granted to *Messrs. Williams and others,* for which they paid 1200*l.* It was to dig copper over *part* of the dutchy estate, but including the manor of *Tewington.*

"A *Mr. Pearce* was the toller, or collector of dues, for *Sir William Leman.* I shall call him, to shew that he has collected tolls, and paid them over to *Sir William Leman.*

"I shall further produce a sublease of the copper in the manor of *Tewington,* under which lease copper has been taken.

"My case, if proved, is one of impregnable strength, and I think my learned friends will never be able to answer it. I should like to see their title-deed, but they won't produce it. I am far more afraid of my learned friend's *insinuating*

* The case of *Browne* v. *Taylor,* (10 East, 189), and authorities there cited, shew, that an action of *trespass* may be maintained against the lord of a manor for entering upon copyhold lands to bore for and work mines and veins of coal, unless under a special custom. And that in the absence of any particular usage, neither the tenant without license from the lord, nor the lord without consent of the tenant, can open and work new mines. See also *Grey* v. *the Duke of Northumberland,* 13 Ves. Junr. 236, and 17 Ves. Junr. 281.

manner with you, than of the strength of his case! All that ingenuity, all that eloquence, all that persevering attention can do, to establish the Plaintiff's claim, and to destroy that of the Defendants, I know will be done by my learned friend. I know no one more able to sway the opinions of a Jury; and you have had long experience of him; for here has my learned friend stood, like a tough rock of Cornish granite, pelted, but immoveable, by all the storms that have assailed him for the last 20 years; and here, indeed, seems likely to endure to the end of time; though I hope he will ere long *move off* *.'

The following Witnesses were then called for the Defendants:—

Mr. John Bayley (examined by *Mr. Selwyn.*) —"I am keeper of the records at the record-office in the Tower. I produce the following documents:—

"15 *Henry III.*—Translation of a charter, the original being in Latin.—It is a *grant* to the Earl of Poictou and Cornwall, of the earldom, stannary, and all mines, &c., for service of five knight's piece.

"25 *Edward I.*—Minister's accounts from the Exchequer-office at Westminster. Original in Latin. Translation produced. They are accounts of the receiver and steward. Manor of *Tewington.*

* An expression certainly intended to be understood as conveying only a desire to see the learned serjeant advanced in professional rank; and, perhaps, '*moved off*' out of the way of his companions. He has since retired from the bar.

Rent, 13*s.* 7*d.* 20*s.* for fine of tin by the year. Sundry rents for pastures, mills, woods, &c. 3½*d.* for toll of tin by the year. Sundry rents for fisheries, honey, turbary, &c. Sundry fines, perquisites, and reliefs; for defaults of tenants, trespasses, suits of court, and being released from office of reeve, &c.; for a conventionary tenement, from tenant of *Nans-mellan*, for holding his lands as before; and from sundry other tenants for the same.

"28 *Edward I.*—*Inquisitio post mortem*, taken after the death of *Edmund Earl of Cornwall*, produced from the Tower, made before the escheator. Presentment of jury, That the earl held in his demesne as of fee at his death (among other manors) the *manor of Tewington*, and appeals of divers hundreds, &c., with the *issues of mines of tin*, wrecks of the sea, &c. at the service of two knight's piece. In the manor of *Tewington*, two water-mills, pasture, wood, fishery. *Toll of tin, worth* 6*s. per annum.* Free tenants, 43 *conventionary tenants, who hold* 15 *acres and a fraction at certain rents.* 11 Villeins, holding 7 acres, &c.

"1 *Edward II.*—Charter to *Pierre de Gaveston*, Earl of *Cornwall:* the king grants to him the whole county of *Cornwall*, with all castles, liberties, &c. &c. &c. Also *the Stannary*, and all mines of tin and lead, which were of *Edmund, late Earl of Cornwall*, to *hold to P. de Gaveston* and his heirs for ever, as entirely as the aforesaid late earl held the same.

"3 *Edward II.*—Another grant to *P. de Gaveston*, and *Margaret* his wife.

"5 *Edward III.*—Charter, whereby the king creates his brother, *John of Eltham*, Earl of *Cornwall.* Grant of lands, &c., and confirmation of a former grant of (inter alia) *the manor of Tewington*, with the appurtenances.

Mr. Benjamin Tucker, (examined by *Mr. Selwyn.*)—"I am clerk in the office of the Dutchy of Cornwall. I produce the following *assession rolls.*

"7 *Edward III.*, purports to be an assession roll of several manors in Cornwall. Contains a commission, and return thereon; the commission being letters missive from John, Earl of Cornwall, to divers persons."

Mr. Serjeant Pell.—"I object to this evidence. This roll seems to set forth certain rights which had run out, and the claim of the lord to let those lands again. I submit that this roll would not have been evidence, if read one year after it was made, and therefore cannot be now. It is a mere declaration by the lord's agents as to the lord's rights, and cannot be evidence for those claiming under him."

Mr. Serjeant Wilde.—"The original commission should be shewn, not this recital of it."

Mr. Justice Parke.—"I think I am bound to admit this in evidence."

[*The rolls were then proceeded with.*]

"The commission is addressed to four persons, styled our dear *bachelor*, our dear *valet*, our dear *steward*, and *John de Hockley*. The *return* states an assessment by the commissioners of all

the lands, except as to the third class of tenants, because it did not appear to the commissioners to be convenient. The manor of *Tewington* is included in the roll. There are several tenements of *Nans-mellan* under the head of *free conventionaries*, viz. *Philip de Nans-mellan*, to hold in conventionary for seven years; 11*s.* rent, whereof 2*s.* 6*d.* new increase. Fine. Suit and service, and he did fealty, &c. Also similar tenements to *John de Nans-mellan*, *Jordan de Nans-mellan*, and *Gregory de Nans-mellan*. Also in the same manor to *Nicholas Wysa*, a tenant to hold in conventionary for seven years. Also in the manor of *Tybeste*.——

Mr. Serjeant Pell.—"I object to this, as applicable to a different manor."

Mr. Attorney General.—"It is admissible; the tenures of the estates within the two manors were similar." *

Mr. Justice Parke.—"I think the evidence is admissible."

* The general rule is, that a custom in one manor or district is *not* admissible evidence to prove the existence of the same custom in another manor. But several cases appear to have decided, that if a peculiar tenure is common to two or more manors or districts, and the custom in question *is incident to the tenure*, then the existence of the incident custom in one manor is evidence of its existence in the other also. (2 Starkie on Evid. 449. 1 Phil. on Evid. 162.) Therefore evidence to shew that there were other customary tenements in the several other dutchy manors, and what was the usage with reference to working the mines under those customary tenements, seems to have been rightly admitted in this case.

[The evidence accordingly proceeded, and similar lettings of several tenements in other manors, mentioned on the same roll, were read; it appeared that some of the tenants claimed to hold, not in conventionary, but in fee.]

"11 *Edward III.*—Charter of the king to his son *Edward* the *Black Prince*, described as *Edward Earl of Chester, our first-begotten son*, created *Duke of Cornwall*, and girt with the sword, &c. We have caused all things pertaining to the said dutchy to be inserted in this charter. The Shrievalty, to which the duke is to appoint, free of the crown. The castle, borough, and honour of *Launceston*, with the park there. The castle and manor of *Trematon, &c.*† *Tewington*, with appurtenances, &c. &c. With all wrecks, &c., the *Stannary*, and *coinage of Stannary*. The *profits of the courts of Stannary and mines*, except 1000 marks granted to the Earl of Salisbury out of the coinage, until, &c. *To hold* to the said duke and his heirs, Dukes of Cornwall, for ever, *annexed and united to the said dutchy, for ever, to be inseparable, and to revert to us, or future kings of England, in case there shall be no Duke of Cornwall, and until such is born, &c.*

"21 *Edward III.—Assession roll.* Free conven-

† From the words of this charter, as set forth in *the Prince's case* (8 Co. Rep. 9), it appears as if *Tewington* was not then *a manor*. Five manors only are specified, which seems to exclude the idea of the other places therein mentioned (including Tewington) being manors. Observing this, and the non-production of ancient minutes of any other courts having been held than the courts of *assession*,—which possibly were rather *audits* than *manor-courts*,—query, whether there is a *manor* of *Tewington?*

tionaries in *Tewington. Nans-mellan. Philip de Nans-mellan* has taken what he before held; fine 20*s.*; rent, 11*s.*; and done fealty, &c.: to *John de Nans-mellan*, a similar letting.

" It appears, that one of the four tenements of *Nans-mellan* which paid 11*s.* rent, had been divided into two tenements, paying a rent of 5*s.* 6*d.* each. So that, in the whole, there were now five tenements in *Nans-mellan.*

" 38 *Edward III.* — *Assession roll.* A commission set out, and return of the increase and decrease of all fines and rents since the 30 *Edward III.* An increase of the renewal fine to *John de Nans-mellan, because others wished to take the same land, and overbade each other to that sum.* A decrease of fine in another tenement, *because all the tenants of this vill had left their tenures;* this was the tenement of *Trenewith*, in manor of *Tewington.*

" 45 *Edward III.*—*Assession roll.* Free conventionaries. *Nans-mellan. John de Nans-mellan* has taken the same tenement as before, for seven years. Fine decreased by half a mark, *because increased by envy of some others at the last assession.*

" 20 *Henry* 6.—*Assession roll.* Shews a power of *distress* incident to a letting to one of the free conventionary tenants.

" 9 *Edward IV.*—*Assession roll.*

[*This roll, appearing to be imperfect, was not admitted.*]

" 20 *Henry VII.*—*Assession roll,* Manor of *Tewington,* shews that tenants had not power to let *without license,* and shews a *heriot* reserved.

"22 *Henry VII.—Assession roll,* contains four entries as to *Nans-mellan,* each tenement containing 11 acres. (*One entry read, shews heriot reserved.*)

"20 *Henry VIII.—Assession roll.* Power to commissioners to let for twenty years, or less, four tenements or messuages in *Nans-mellan,* each containing 11 acres.

"27 *Henry VIII.—Assession roll.* Commissioners to let for seven years, or within that term.

"In all the rolls, when perfect, all the dutchy manors, including *Tewington,* are inserted.

"Manor of *Helston-in-Carrier.—Roslyn* tenement. Presentment by the homage, that *John Hayne,* a free conventionary tenant, had dug tin, (*fodiavit stannum,*) in the several lands belonging to his tenure, and had permitted others to do so, contrary to the custom of the manor, and had therefore forfeited his tenure. But the tenant was fined 44*s.*, and ordered to fill up the shafts, and not to dig, or permit others to dig there in future, on pain of forfeiture, and a fine of 50*l.* to the lord.

"And again, *John Bodulgan, Esq.*, hath taken out of the hand of the lord the king, by reason of the forfeiture of *Richard Thomas,* by this, that he cut down and sold three oaks, growing on his tenure, contrary to the custom of the manor, as is presented by the homage in this behalf.

"*Tewington manor. Free tenants.* Described as holding *by socage,* and doing suit of court from

three weeks to three weeks. *Peter Edgecumbe, Knt.*, holds 7 acres, *by socage*, with 14*d.* for a fine of tin, and suit of court.

" All free tenants are not stated to hold *by socage* except that the words *ut supra* seem to refer to the foregoing entries.

The word *tenet* is used in all the entries of the *free* tenements. The word *cepit*, is applied to the *conventionary* lettings.

" There are no other rolls or entries in the dutchy office relating to this period of time."

[It appearing in answer to questions put by Defendant's counsel to the witness, who produced the assession rolls, that after a certain period, the rolls as to the seventeen manors became divided, and that some of the rolls which had been read referred to ten manors only, an objection was taken to the evidence of the rolls on that account. The clerk stated, that fourteen hundred weight of papers had been brought from town. A selection was made of such rolls as were thought to be material; and there would have been five or six tons weight, if all the assession rolls had been brought down. This selection was also objected to. But]

The Court considered that all which was necessary and proper had been done.

Mr. John Bayley (cross examined *by Mr. Carter.)*

" All the rolls are brought down which contain *Tewington* manor; that was the object of the selection.

"There are no signatures, or any introductory or concluding words, which shew that the return was a return of the commissioners. On the rolls the commission is set out.

"Among the rolls not brought there are several of later date. About the beginning of *Charles II*'s reign the *rolls* end, and the assession *books* begin. During the protectorate there was a parliamentary survey. There are some papers called Articles and Answers. I have heard so. I don't know. There are certainly two rolls with articles and answers of the same date annexed.

"9 *Edward IV.*"—[Part of the rolls of this date were read by *Mr. Carter*'s desire, in order to ascertain the similarity or dissimilarity of entries as to the free tenants.]

"1794. 27 *September*.—Assession book. The last of the manor. Relates to the manor of *Tewington*. Entry, court held at St. Austle, by virtue of a commission under the privy seal of the Prince of Wales, before commissioners and a jury."

Mr. Serjeant Pell.—"I submit that the entries in the books of the Duke of Cornwall are not evidence against the Plaintiff.

Mr. Attorney General.—"These are rolls of the manor.* And it appears that Pearce is one of

* The principle upon which the court rolls of manors are evidence, is, that being *public* documents, to which the tenants of the manor are entitled to have access, they are presumed to be correctly kept. But from the subsequent evidence relative to the assession books, it rather appears as if they were *private* documents, kept in London, to which the tenants have not access;

the conventionary tenants, from whom Plaintiff purchased. The rolls apply to *Nans-mellan.*

Mr. Serjeant Pell.—" I claim *Nans-mellan,* as against the Duke of Cornwall, and they must first shew that I hold under the Duke. When they prove me a tenant of the manor, then I admit that the books are evidence against me."

Mr. Justice Parke.—" I think the evidence is admissible. The Plaintiff's land appears to have been part of the dutchy lands; and if Plaintiff claims *enfranchisement,* then he must shew it, as that is an affirmative."

[*The commission* was then put in, being a separate document from the book of assession; and under the authority of which the commissioners held their court.]

" 1794.—Assession book. Entry. *Tewington* manor. Under the head of conventionary tenements. *Nans-mellan.* Tenants, *John Pearce, Edward Carthew, Edward Carthew and John Pearce* in shares, and *Thomas Caerlyon,* several tenements *to hold as aforesaid.*

" 1752.—Assession book. Conventionary tenements let '*to hold as aforesaid.*'

and it is not distinctly stated, that they are transcripts from the original rolls, or minutes; but it is rather to be inferred, perhaps, that entries are made of continued lettings from seven years to seven years, for the sake of uniformity in the books; when in fact no such lettings take place. Query, how is this? The original rolls are stated to remain in the steward's hands, and seem not to have been produced upon this trial; nor was there any comparison to ascertain the agreement or disagreement between the court rolls and books of assession, relative to the same period.

"1663 *to* 1724.—Assession book. In 1663, conventionary tenements let to hold from feast of St. Michael for seven years. 8*s*. rent. Fine, 9*s*.; and to do suit at court from three weeks to three weeks. To be *reeve*, &c. when elected. To pay heriot on death. To sustain the houses, edifices, &c. of his tenure, and so to leave the same. There are subsequent entries, '*to hold, ut suprà.*'

"*Nans-mellan* entries are, *John Rous*, in his own proper right, for twenty-two parts in forty-two parts divided. *John Bunny*, on surrender of *Philip Bennett*, on death of *Jane B.* his mother, and *John Bunny*, in his own proper right, for twenty parts of the aforesaid forty-two parts, took one messuage and twelve acres of land, English; half an acre of land, Cornish, late of *John Porth*, which *John Rous*, in his proper right, for twenty-two parts, in forty-two parts divided,—*Jane Bennett*, widow, and *John Bunny*, after the death of *Simon*, his father, for twenty parts," &c. &c.

Mr. Benjamin Tucker (cross-examined *by Mr. Serjeant Wilde.*)—"I am clerk in the dutchy office. Have no particular office there. I have access to the books. Copies of the court rolls are sent up from the country to the office. They contain admissions of the tenants. They are now in London. The assession books I consider to be the original court rolls. The steward keeps the original papers from which the books are made up. They are not on parchment: sometimes only minutes or extracts. I have never seen any

admissions relative to *Nans-mellan*. I was not desired to search for them, or to bring them here. I have been in the dutchy office for four years. I receive the papers from the steward annually. I did last year: I believe all.

"These rolls are kept by the deputy auditor in *London, Mr. Abbott*. I have seen the papers which the steward sends.

"The court rolls are surrenders from one tenant to another. I extract them every year. They are to hold to tenant and his heirs for ever. There is a conveyance, when there is a change of tenants."

(*Re-examined by the Attorney General.*) — "The documents which the steward sends up are kept in the dutchy office. They are copies of surrenders. We put them by. They are sent to us for safe custody. I think we have none before 1660, the period of the Restoration. We take a note from them of the surrenders and alienations of the lands. Sometimes mark them in the assession book in pencil, for the purpose of seeing that an acknowledgment is paid, which is done at the next assession. I have attended two assessions, the last, and one other."

Mr. —— *Abbott* (examined by *Mr. Selwyn.*) —"The assession book is made up in the country by the deputy steward. The commissioners bring it home, and deposit it in the office.

"The court rolls are annually returned. I don't know how often the courts are held. The

rolls are returned at the *audits*. They are sometimes compared with the assession books, to see what changes have happened from seven years to seven years. Fines are due on surrenders. The commissioners ascertain from the court rolls what changes have taken place.

"The books are made up by the stewards in the country, and brought to the commissioners at the assession. They make the alterations, as you see, in red ink, in the book."

(Cross-examined by Mr. Serjeant Pell.) — "There is a new take by each tenant at the assession. I can't say they all attend, but all are called to take their estates. They are conventionary tenants, from seven years to seven years."

[*An entry read of a new take.*]

"*Tewington* manor was sold in 1798. The last roll is in 1794.

"*Mr. Buckton*, Plaintiff's attorney, applied at the dutchy office to inspect rolls, &c., and was, of course, refused. *Mr. Carthew* also applied, and was refused. Plaintiff has been making many applications for the last two years."

[*Witness was desired to refer to the assession books of* 1794.]

"1794.—Assession book. After *Nans-mellan*. No. 20. Tenement taken *to hold as aforesaid*.

"I don't know that I have brought all the documents which Plaintiff required. (A *subpœna duces tecum*, was served on me and *Mr. Tucker*.) It would have obliged me to bring all the office. I brought all which I thought material. I have all

the surrenders and admissions from 1660 to the present time: they are in London. *Mr. Tucker* (the witness) was also named in the subpœna. He, more particularly, has reference to these documents. *Tucker* is a nephew of Mr. Tucker of *Trematon Castle*, who (I believe) is a dutchy lessee. I don't know that he has an interest in this cause."

Edward Coode, Esq. (examined by *Mr.* ———.) —"I have been steward of the manor of *Tewington* from 1801 to 1823, when the lord died. The manor of *Tewington* was sold, in 1798, for redemption of the land-tax. I know the tenement called *Nans-mellan;* it is the name in my books; the same estate now occupied by Plaintiff. I have never attended the assession courts."

(Cross-examined by Mr. Carter.)—"*Mr. Carpenter* is an officer of the dutchy, and steward of some of the manors. *Mr. Rashleigh* was steward of *Tewington* manor before he purchased it; some years before; from 1782 to 1790, I believe. The widow of a conventionary tenant has a life estate in the whole tenement. It goes to the eldest son or eldest daughter by inheritance, or to second, third, or other sons. There is a custom to demise for an indefinite term of years, and without license."

(Examined by the Court.)—"*Nans-mellan* is the same as the Plaintiff's estate."

Mr. Charles Coode (examined by *Mr.* ——.)— "I was steward to some of the assessionable manors for 20 years. The presentments are made up at the annual courts. Copies of them are transmitted to the auditor. The originals

remain in the hands of the steward. At the expiration of seven years, the steward makes out two assessional books, with such alterations as have taken place in the seven years. At the assession the tenants are called over; and, where no alteration has taken place, each tenant pays 6*d*. When an alteration has taken place, then, I believe, 1*s*. is paid for each admission. It is paid to the office, not to me. The manor courts meet annually at Michaelmas. I keep the original minutes of presentments, and send copies to the dutchy office. I keep the originals afterwards, as steward. The admissions are made out on stamps, and given to the parties."

Mr. Justice Park.—"The customs of manors may be proved by the steward, without producing surrenders, or other specific documents."

Mr. John Bayley produced the following documents;—

"33 *Edward I.*—Charter. For the tinners of Cornwall. Working tinners to be free of pleas, &c., except before the warden of the Stannaries. Leave given to dig tin, and turves necessary for burning tin in the wastes and moors, and to divert water for the purpose of washing tin. The warden to hold pleas between tinners.

"6 *Henry VI.*—Charter reciting and confirming former charters. It is merely a repetition and confirmation.

"12 *James I.* (1614.)—*Grant* of tin and tin-mines to *Peter Lawyer*, by indenture between the Prince of Wales and the grantee."—Enrolment read.

Mr. Serjeant Pell.—"I object to this being received in evidence, unless it is first proved that the original deed was lost."

Mr. Attorney General.—"The case of *Humble* v. *Hunt*, Holt's N. P. Cases, p. 601, is an authority in point. This deed is of such antiquity that we need not prove its loss. There are also several cases in which enrolments of the deputations of gamekeepers by clerks of the peace have been admitted as evidence, without proving the loss of the deputations, because they are ancient documents."

Mr. Benjamin Tucker being recalled, proved that search had been made in the dutchy office for the counterpart of the lease in question, but that it could not be found.

Mr Justice Park.—"I shall admit this evidence upon the authority of the case cited, and because, at this distance of time, it must be presumed that the lease itself cannot be found; and I think the dutchy office was the proper place of custody for the counterpart."

The following leases, &c., relative to tin, were then given in evidence:—

"5 *George I.* 1718. *4th December.*—Lease. *George Prince of Wales* to *Rebecca Vincent*, widow and executrix of *Henry Vincent*, in consideration of 600*l.* paid as a *fine*, and of rents, covenants, &c., agreed to be paid and performed. Demise of one moiety of toll, and toll-tin within the manors of *Helston*, *Tewington*, and a moiety of the manor of *Tewernale*. Also moiety of toll-tin in several other

manors. Also moiety of tin, and tin mines found, and to be found, within the enclosed lands of said manors. Power to lessee to enter lands and dig for tin. And covenant by the lessee to dig and fill up shafts, &c., according to the custom of tin works in *Cornwall*, and to render an account annually of all tin raised.

" 1719. 10*th March*. — Lease to *Nicholas Vincent* (counterpart), in consideration of surrender of lease of moiety of tin and toll-tin, of 600*l*. paid as a fine, and 30*l*. as interest of the same paid to *Rebecca Vincent*, and of arrears of rent paid by lessee. *Demise* to *Nicholas Vincent*, his executors, administrators, and assigns, of *all toll-tin* which shall arise, &c., within manor of *Tewington*, and other manors. And *all tin mines* found, or to be found, within the enclosed lands of said manors. *To hold* to *Nicholas Vincent*, for 99 years, if *Rebecca Wilson*, said *Nicholas Vincent*, and *Edward Bacon*, or either of them, should so long live. *Rent*, 35*l*. 14*s*.

" 1730. —A re-grant of the same property, in consideration of the surrender of the former lease.

" 1738, 8*th May*.—Enrolment of lease. The *Prince of Wales* to *James Donithorn* and *Isaac Donithorn*, in consideration of surrender of former leases, and of 300*l*. paid as a fine. Demise of all *toll* and *toll-tin*, &c., as before, in same manors, for 99 years, determinable with lives.

" 1761, 1 *George III*.—Letters patent. Fine, 900*l*. Demise to *Isaac Donithorn* of all toll, or

farm of tin, or tin-toll, in the manors of *Helston, Tewington,* &c., and all tin mines found, or to be found, in enclosed lands.

"1797. 14*th August.*—Lease. The *Prince of Wales* to the *Honourable Richard Walpole, William Curtis,* and *Thomas Wood,* trustees of the estates of ——— *Donithorn,* who was administrator of his father. Consideration, surrender of former lease, and 4000*l.* as a fine, and of rent reserved. Demise of *all toll, farm of tin,* or *tin-toll,* arising *in all dutchy lands in Cornwall,* and *tin mines* found, or to be found, in enclosed lands. To hold for 99 years, determinable with lives of *James Donithorn,* aged 54, *Isaac Donithorn,* aged 27, and *William Curtis,* aged 15 years.

"1810. 15*th August.*—Lease. *Prince of Wales* to *Edward Smith,* of ——— Castle, in the county of ———, in consideration of surrender of lease of 1797, and 18,500*l.* paid as a fine; viz. 12,500*l.* paid to *Donithorn*'s trustees, and 6000*l.* to the Prince;—of all *farm of tin,* or *tin-toll,* in all the dutchy lands in Cornwall."

Mr. Attorney General.—"The foregoing leases related only to the tin: the following have reference to copper:—

"1697. 10*th July.*—Enrolment of lease. *William III.* to *Henry Vincent* and *Francis Schobell,* of all those mines and minerals in the lordships, manors, precincts, or territories within the dutchy, opened, or to be opened, and full power and leave to dig and open soil of all lands within the dutchy.

"(*Except* all royal mines, and mines of tin, and all other minerals in the dutchy now granted to any persons by the crown, and all tolls and other dues by custom due to us or to our farmers.)

"*To hold* to the lessees, their executors, administrators, and assigns, for 31 years, rendering yearly one-tenth of the annual profits of the mines and minerals, to be accounted for annually upon oath.

"*Covenant* by lessees not to enter on tenants' lands without permission of the tenants.

"1717. 3*d March.*—Lease. *George Prince of Wales* to *Rebecca Vincent* (executrix of *Henry Vincent*) and *Francis Schobell*, in consideration of surrender of former lease.

"Of all mines and minerals in dutchy lands.

"(*Except* all royal mines, and tin mines, and all existing leases). For 31 years. *Rent, one-tenth*, to be verified upon oath." Enrolment read. Counterpart could not be found.

Mr. Tucker. — "I produce the receiver's accounts of monies paid by the lessees under the foregoing leases for several years.

"1705. — Receiver's account. Entry. *Henry Vincent* and others, farmers of mines and metals within the dutchy.

"1718.—Affidavit of *Rebecca Vincent* of clear profits, over and above disbursements, amounting to 300*l.* and upwards

"1718.—Receiver's account. Entry. Mines and minerals. *Rebecca Vincent* and *Francis Schobel.*—52*l.* 9*s.* 1*d.* money received."

[The further reading of these accounts was not proceeded with, the Defendant's counsel appearing to acquiesce in the fact that monies were so paid.]

"1742. 3*d July*.—Enrolment of lease. *Frederick Prince of Wales* to *William Leman*, of Truro, Esq., in consideration of 1063*l*. 7*s*. 2*d*. paid.

"Demise of all those mines and minerals whatsoever, found, or to be found, in any places whatsoever in all lands of the dutchy of *Cornwall*, in the several counties of *Cornwall* and *Devon*. (*Except* all royal mines, and tin mines, and former grants, and all tolls, &c.) *To hold* for 23½ years, from 3*d March*, 1748, at rent of 11*l*. 4*s*. per annum. *Covenant* to make satisfaction to tenants for entering into their lands before entering thereon. And, in case suit should be prosecuted against lessee for the purpose of trying his right of entry, then that lessee should not settle with the tenant without consent of the dutchy officers.

"1763. 13*th June*.—Enrolment of lease to *Hussey* and others. Recites lease of 3d July, 1742, and that said *William Leman* was deceased. Surrender of said lease by *Hussey* (as one of *Leman*'s executors). Fine paid, 600*l*. '*Which said fine is to remain in the hands of our receiver until the suit now depending in our Court of Exchequer*, touching our right to said mines and minerals, is determined*;' and to be returned, or held, according to the

* It is believed no record or trace of the proceedings in this suit has been discovered.

decision of that suit. Demise of all mines and minerals whatsoever in dutchy lands. (Except as before.) For 31 years, from 4th December, 1762. Covenant by lessee not to compromise with tenants.

"1788. 2*d February*.—Counterpart lease. The *Prince of Wales* to *Thomas Daniel*, as surviving executor and trustee of *William Leman*.

"Surrender of former lease.

"Fine, 1,440*l*.

"Demise to *Thomas Daniel*, his executors, administrators, and assigns, of all mines and minerals whatsoever in the dutchy lands in *Cornwall* (except as before), for 31 years, from 4 December, 1786."

Mr. Tucker (cross-examined by *Mr. Serjeant Wilde*.)—"I am not aware of any other enrolments besides these books in the dutchy office; they are enrolled before the auditor."

The Court then adjourned until to-morrow morning.

Saturday, 18*th March*, 1825.

The reading of the documentary evidence was continued as follows:—

"1810, 11 *January*.—Lease. The *Prince of Wales* to *John Williams*, the younger, *Michael Williams*, and *Edward Williams*, all of Scorrier House, and *Edward Smith*. Consideration, 1,200*l*. Fine, and rent, and covenants. *Demise* of all and all manner of mines and minerals which shall be had, raised, dug up, or found in any lands or

places whatsoever within the several lordships, manors, precincts, or territories, being part of the possessions of the dutchy of *Cornwall,* in the county of *Cornwall,* with liberty to break up soil and ground, and to drive any adits and levels, sink shafts, and make buildings for dressing ores, making reasonable satisfaction to tenants and occupiers; and to turn and use any waters and watercourses, and do all other things," &c.

[*No more of this lease was read.*]

"50 *Edward III.*—Charter granted to *Richard,* the son of the *Black Prince,* after his father's death, creating him *Prince of Wales, Duke of Cornwall,* and *Earl of Chester.*

"Grant to him of two-thirds of the dutchy estates, mines, stannaries, and coinage of *Cornwall* and *Devon,* and profits of courts, &c. (one-third being reserved as the dower of the widow of the Black Prince)."

[The *assession rolls* of the reigns of *Elizabeth* and *James I.,* down to the commencement of the assession books, were produced and looked at, to shew that they relate to the manor of *Tewington,* and that they notice *free* and *conventionary* tenants.

The rolls of 19 *Elizabeth,* 15 *James I.,* and 2 *Charles I.* (which is the last roll), all admitted to be in the same form.]

"19 *Elizabeth.—Assession roll.* Entry: Manor of *Trematon.* Title, Conventionary Tenants. *John Bawdon,* by grant of the commissioners, on the forfeiture of *Richard Treville,* for certain causes

after specified, took one messuage and twenty-six acres for seven years. Rent, 8*s*. Fine, 6*l*. Payable in first six years, and on the seventh year he shall be quit. To be *reeve*, &c., when elected; to attend court, &c. Best beast as heriot, and fealty.

"Condition of grant, *according to the custom*, is, that the former taking of *Treville* was special, viz. that he should repair, reside, &c., on pain of forfeiture, as appears by assession roll. The forfeiture alleged was an assignment by tenant.

"Increase of fine, 3*l*."

Mr. Richard Thomas (examined by the *Attorney General*.)—"I am a surveyor: have made a survey and plan of Plaintiff's estate. There was a mine called *Sandy Cocks*, a stream work. There is another, called *Tin-field*."

[*Plans put in.*]

John Organ (examined by *Mr.* ———.)—"I am a tin-bounder. I know *Nans-mellan*. Have renewed bounds of it, 36 years ago, including the whole estate. Worked at a mine in *Nans-mellan* 50 years ago. Tin works. Mine not worked since. The duke's toller was *John Polkinghorn*. The bounds were received by *Squire Carlyon* and *Squire Tremayne;* one half to each. Bounds are paid, part to the prince, as the lord, half to the lord, and half to the bounder. *John Polkinghorn* was the toller. He received for the lord. His master was *John Donithorn*. He took up the toll-tin all through the country. The rest of the toll-tin was paid to *Carlyon* and *Tremayne*, who were the bounders."

[*Mr. Attorney General* here reminded the Court, that *Mr. Carlyon* was one of the conventionary tenants of *Nans-mellan.*]

"I afterwards worked for nine or ten years at *Nans-mellan.* I helped to divide the tin between these people. I knew *Mr. Withiel.* He lived upon the land, now Plaintiff's estate, at that time, before the mining works began, and afterwards for a long time.

"I know *Sandy Cocks* and *Tin-field.* I worked then in all the stream myself: it was higher up than *Lemellan Moor,* but in the same bounds and set."

(Cross-examined by Mr. Serjeant Wilde.) — "The part I bounded was occupied by *Withiel.* I did not bound any land in *Nans-mellan* but what *Withiel* occupied. *Lemellan* is the part I then bounded, and no other part."

(Re-examined by Mr. Attorney General.)—"The tin-bounds did not include the Moor."

(Again cross-examined, by Mr. Carter.)—"I know *Trenoäth.* I bounded part. I don't know whether *Mr. Lambe* occupies it: it is in *Tewington* manor. Part of the mine is called *Wheal Fat Works;* it is within bounds, but not in *Lemellan* bounds. *Trenoäth* bounds run into it. *Fat Works* is all bounded. I bounded them for different people."

(Again examined by the Attorney General.) — "*Trenoäth* is a mile and a half from *Lemellan.*"

Joseph Geach (examined by the *Attorney General.*) —"I am a bounder. Know *Lemellan* bounds.

Have renewed them often, for the last 30 years. Tin was got there. I knew *Polkinghorn:* he was the prince's toller: he received dues. Bounders, in general, do not work in bounds, but set it to other people. When tin is raised, notice is given to the bounder. Those who have claims then attend, and it is divided according to the shares. There are often divers shares belonging to divers gentlemen. Toll is paid according to the bargain made with the person who takes the set. The lord gets a portion of the toll. A 14th or 15th dish goes to the lord. Generally an eighth is divided between the bounder and the lord.

"*Withiel* lived at *Lemellan:* it was before my time.

"In 1821, by *Mr. Rashleigh*'s authority, I granted a set, to a *Mr. Gill,* of tin-bounds in *Lemellan.*"

[*Mr. Rashleigh*'s authority to witness, dated in 1821, to grant the set, was produced.]

"Sets are generally granted by word of mouth.* If the set be large, then a witness is generally called in."

[*Mr. Rashleigh*'s authority recited that he was authorised by *Mr. Tremayne* and *Mr. Carlyon,* as respected their interests.]

"*Mr. Rashleigh* was then the lord."

Mr. William Pearce (examined by *Mr.* ——.)—"I know *Lemellan.* My father had a mortgage of it about 40 years ago: it came to me afterwards

* *Quære,* is this the fact?

as his heir and executor. I conveyed it to *Mr. Wood* about 1812."

Mr. Coode, (examined by *Mr.* ———.)—"I produce court roll of 1814.

"Entry.—Manor of *Tewington. William Pearce,* heir of *John Pearce,* late customary tenant. Surrender of *Nans-mellan.* Parcel of customary lands of said manor. Fine paid by *Wood* to *Pearce.* Admission of *Benjamin Wood,* to hold to him and his heirs for ever, according to the custom of the manor, at the ancient rents, &c.

"There has been no subsequent conveyance by *Wood,* so that the legal estate is now vested in him."

(Examined by the Court.)—"I was appointed steward in 1801. My rolls begin in 1803. I have *Mr. Charles Rashleigh*'s entries, beginning 1781: he was then steward, during the minority of the *Prince of Wales,* the now *king:* he was steward to the crown. He bought the manor in 1798, under the land-tax redemption act."

Mr. William Pearce (examination continued.)—"I remember the *Tin-pot Field* mine for forty-seven years. I remember *Sandy Cocks* mine. The *Tin-field* mine was in *Lemellan. Polkinghorne* received the duke's part of the tolls for *Nans-mellan.*

"*Sandy Cocks* was not all in the enclosed lands of *Nans-mellan.* When it was first worked it was out of *Lemellan.* After it had been worked for some years it extended into *Lemellan* Moor.

"*Polkinghorn* received toll of the *Sandy Cocks* Adventurers. The hedge on *Lemellan* Moor was

torn down by them. The hedge divided *Lemellan* Moor from *Merthyn* Moor and the *Common* Moor. They worked through the hedge. My father had the hedge built up again. He paid one *Polsoo*, the occupier of *Lemellan* under him as his tenant, for doing it, by the yard, and the Adventurers of *Sandy Cocks* repaid him. It was a stone hedge. By the Adventurers, I mean the people who worked the set.

"I knew *Withiel:* he occupied *Lemellan* about forty years ago. I don't know how long he occupied, but for many years.

(Cross-examined by *Mr. Serjeant Wilde*).—"*Sandy Cocks* was a *stream* work for tin; that is, work on the surface, not *shaft work*, which we call a mine. *Withiel* is dead."

——— *Polsoo* was called; but the Plaintiff's counsel admitted that his evidence should be taken to be the same as of the last witness.

The following document was then put in and read:

"27*th November*, 1798.—Certificate of *the Surveyor-General*, that he had contracted with *Mr. Rashleigh* to sell to him the manor of *Tewington*, part of the ancient lands of the dutchy, and all rents, &c.: and also lands at *St. Austle*, &c. part of said manor: with the exception of all mines, &c., leased in 1792 to *Rashleigh*, for 99 years, determinable with lives."

The conveyance to *Mr. Rashleigh* was then put in, and partly read.

"Except and always reserved to the *Prince of Wales*, and his successors, &c., all mines and minerals within and under the said manor, lands, &c., with power of entry to the grantor, his lessees, &c.

Hannah Withiel (examined by *Mr. Selwyn*).—"I am the widow of *William Withiel*. He formerly occupied *Lemellan*. I remember the mine in the Tin-pit field. It was worked whilst my husband occupied *Lemellan*. He had part of the work of the mine for five or six years. I don't know *Polkinghorn*. I have heard of him. My husband was a conventionary tenant for fourteen years. He paid his proportion of the dues—the Prince's dues.

Mr. Francis Paynter (examined by *Mr. Manning*).—Produced the following documents, which were put in, and partly read:

"*October* 29, 1768.—Lease, *Hussey* and others to ——— *Ferrers*."

[*Mr. Attorney-General.*—"*Mr. Hussey* was lessee of the copper ores, under the Duke of Cornwall. He was a trustee under *Sir William Leman*'s will. This is a sub-lease, under which copper was worked, and the dues paid.]

"The lease contains a grant of free liberty to dig for copper-ore, lead-ore, and all other minerals, except tin, on *St. Austle Down*, &c., as far as the dutchy lands extend.

"*March* 1793.—*Sir William Leman* to *John Benallick*. Grant of liberty to dig for copper-ore,

lead-ore, &c., (as in the former lease) on *St. Austle Down*, in *Tewington* manor.

"1 *June*, 1793.—The same parties, similar grant over other lands, but not in *Tewington* manor."

——— *Berryman* (examined by *Mr. Manning*) produced the following documents, which were put in, and partly read: being received in evidence under a protest by Plaintiff's counsel, that they were not admissible. The objection was, that the deeds related to lands in other manors than *Tewington*.

"1786 *to* 1810.—Several leases during this period, granted of copper and lead-ores, by *Sir William Leman*, to divers lessees of other lands within the assessionable manors.

"1 *September*, 1786.—Lease to *John James* of *Wheal Batson* mine, in *St. Agnes*, manor of *Tywarnehaile*, being one of the assessionable manors.

"1 *September*, 1788.—Lease, to *William Robinson*. Manor of *Helston-in-Carrier*.

"20 *December*, 1794.—Lease, to *Wilson* and *Rogers*. Manor of *Relaton*."

Mr. Frances Paynter (re-examined by *Mr. Manning*).—"I have searched among the papers of *Sir William Leman* for the lease of which the inrolment was read yesterday, but was not able to find it.

(Cross-examined by *Mr. Serj. Wilde*).—"I have not observed that any of the leases put in relate to the private freehold estate of *Sir William Leman*."

Mr. Stephen Pearce (examined by *Mr.* ———— ————).—"I was acquainted with *Sir William Leman*. I received his rents of copper mines, as toller, upwards of forty years. I received large sums, many thousands, as dues of copper and lead, of mines let to under-tenants. They were the same as were leased to *Sir William* by the Crown.

"My father received for *Sir William* large sums for copper dues, for many years. I have his books here. In *Tewington* manor he received copper dues. I paid charges for *Sir William*.

"In forty years I received many thousand pounds, frequently 2 or 3000*l.* a year, sometimes more.

(Cross-examined by *Mr. Serjeant Wilde.*)—"I can tell all the mines from which I received the dues. In *Tewington* manor I received dues from two copper mines, namely, *Wheal Change* and *Tewington* mine.

"I am not certain that *Wheal Change* is in *Tewington* manor: I have heard so. I have received dues from Captain *James Gilbert* of *Tewington* mine. It is also called *Gewan* mine. I have not received dues from any other mine in *Tewington* manor.

"In *July* 1805 I received twice for the same mine, *Wheal Gewan,* in all 2*l.* 7*s.* 1*d.*

"In *November* 1800 I received for *Gewan,* 2*l.* 9*s.* 1*d.*; in all 5*l.* 4*s.* 1*d.* including *Wheal Change.*

"*Gewan* mine is near the down, in enclosed

land; it is not on the down. I believe *Captain Gilbert* had the set: it was enclosed before I was born.

"I don't know whether there are other copper mines in the manor. There is a copper mine called *Pembroke* mine, in *Tewington* manor it has not existed many years. I have known it for five or six years. I don't know whether it is in *Tewington* manor or not.

[Here the lease of *March* 1, 1793, granted by *Sir William Leman* to *John Benallick*, was again referred to: the land was therein described as '*all that part of the common or down called St. Austle Down.*']

(Examined by the *Court.*)—"Part of *St. Austle Down* is enclosed, and the other part is open common. *Gewan* mine is in *St. Austle Down;* part in the enclosed land, and part in the common.

(Re-examined by the *Attorney-General.*)—"I have received dues from mines, both in enclosed and unenclosed lands. I was never disturbed in collecting them.

Mr. Thomas Stevens (examined by *Mr.* ———). —"I worked *Wheal Change* mine formerly. About forty-five years ago the lode was first cut; it was copper ore. I believe it is in *Tewington,* nearly in the centre of the manor. The lord's dues were paid to *Sir William Leman.* I afterwards took a set of *Gewan* mine. That mine and *Wheal Change* were consolidated together, and worked by one set of Adventurers. After the Adventurers ceased

working, I took a set of *Gewan* mine, by itself, of *Mr. Pearce*, the last witness. I paid the dues to him. *Gewan* is in *Tewington* manor; it is about half-way between *Charlestown* and *St. Austle*. I always understood it to be in *Tewington* manor. *Gewan* mine was in enclosed land before I had it. There is a close called *Great Gewan*, but not any mine; it adjoins the mine. My mine was called *Gewan Pool*.

Mr. Samuel Hichens (examined by *Mr.*———). —"I am employed by the Adventurers in *East Crinnis* mine. I assisted in sinking a shaft in western part of Plaintiff's moor in 1814; it was called *Lemellan* moor; it was not all enclosed; there were gaps in the hedges. After shaft was sunk, we drove a level; worked it for about a year. We got copper before Plaintiff came to live there. *Captain Brenton* and *Captain John Hitchens* were our captains. I don't know whether dues were paid to the toller for the copper; it was not dressed there. Plaintiff came to *Brenton* when we were putting down the shaft; no copper was found then. I remember his coming after copper was found: he asked *Brenton* what success they had met with? it was by the iron shaft. *Brenton* said things were very gloomy at present. Plaintiff said he wished it was better, and that he should wish to live neighbourly. We found copper in the same shaft as the tin; we were trying for copper, and got about two or three tons. Plaintiff inquired if we had got any copper? I left, after having worked

about a year, but returned subsequently, and worked for five or six years: others worked in my absence.

(Cross-examined by *Mr. Serjeant Wilde*).—"In 1814 I worked in *Lemellan*. I know nothing of the bounds. The copper was not removed at that time. I never removed any. I returned to work, after an absence of about six months, in 1815, I believe; then worked nearly two years; afterwards left it a second time: was then absent for some time; can't tell how long. I returned again, but can't say exactly when. Don't know how long I worked when I returned; I believe about twelve months.

"Captains *Hichens* and *Brenton* were the captains when I worked the first and second times. I can't say whether 1820 was the last time I left. I have left about two years, I believe. After the ores were removed which Plaintiff raised, I went to work for the third time: the second time I went was before the ores were removed. There was copper sampled from *Lemellan* to my knowledge. I suspect more than a sample was taken away. I never took any. I worked tribute-work. I received tribute for copper-work in *East Crinnis* mine; but I can't say whether raised in *Lemellan* Moor: the iron shaft was in *Lemellan* Moor. We were then working for copper, not for tin. The shaft was altogether put down for copper, as I believe: the agents of the mine told me so. What we rose was considered too small a quantity to dress: it was left there.

(Re-examined by the *Attorney-General.*)—"*East Crinnis* mine is near *Lemellan.*"

(Again cross-examined by *Mr. Serjeant Wilde.*)—"The first time I worked I was never paid for copper. We got tin at *Porth* mine, near the sea, under the same Adventurers, the same agents: we got no copper there. We did not take the iron shaft from *Lemellan,* and carry it to where we worked for tin. I believe it is on the spot now. *Merthyn* lies *south* of *East Crinnis.* I know *Sandy-Cocks* stream; it ran between *Merthyn* and *Lemellan;* I have heard so; it is now grown over. I know the spot; I know *Pembroke* mine; I believe it was put to work for copper. I was never on the mine."

(Re-examined by the *Attorney-General.*)—"They get plenty of copper at *East Crinnis.* I can't say whether we went under *Lemellan* Moor. We worked in that direction, towards the iron shaft."

Mr. ——— *Carlyon* (examined by the *Attorney-General*).—"I am the owner of *Pembroke* mine; it is not dutchy land; the place is called *Merthyn.*"

Mr. Coleridge.—"My Lord, I appear as counsel for *Mr. Carlyon,* in order to protect him from answering questions affecting his estate, if any such should be put."

Mr. Attorney-General.—"I object to *Mr. Coleridge*'s interference: it is an unheard-of practice that a witness should appear by counsel."

Mr. Coleridge.—"I am informed that *Mr.*

Carlyon has twice before appeared by counsel,—on one occasion by *Mr. Serjeant Lens*, when *Mr. Justice Holroyd* permitted it."

Mr. Justice Parke.—" I will not hear of it. The witness must make his objection to me, when any improper question is put. I never will allow a witness to appear by counsel, unless upon some higher authority than that of any single judge, as it would lead to inextricable confusion."

Mr. Coleridge.—" It was my intention merely to explain *Mr. Carlyon*'s situation to the Court, and then leave him in your Lordship's hands. *Mr. Carlyon* has been served with a *subpœna duces tecum* to produce his title-deeds."

[*Mr. Coleridge* then went across to the witness, and, sitting near him, advised him as to what questions he should object to answer.]

Mr. —— *Carlyon* (examination continued).—" I suppose *Merthyn* is within the ambit of *Tewington* manor." (Addressing the *Court.*)—"My Lord, there have been two Chancery suits upon this subject." (Examination continued.)—" My estate was conveyed to me in 1792 or 1793, by *Mr. Samuel Hicks.* That estate was called *Merthyn;* I don't know any other estate so called. *Pembroke* mine has been at work about ten or twelve years; I can't say exactly how long. I have been in litigation about that mine. I conceive it not to be in the dutchy land."

[Witness here objected to a question, inquiring, " *Whether he had paid or bought up*

certain nominal rents of his estate?" and the Court disallowed the question, as affecting his property. The *Attorney-General* then asked, "*Whether Witness's property was conveyed to him by any other deed than surrender and admission?*" This question also was objected to; and the Court ruled that it need not be answered.]

Mr. —— *Trelease* (examined by *Mr.* ———). —"I know *Great St. George* mine, in the manor of *Tywarn*, one of the assessionable manors. My father was agent for that mine, I recollect, from 1791 to 1817, when he died. The works were for both tin and copper. Dues were paid to *Sir William Leman*. I became agent to the mine in 1802. Dues were paid to *Stephen Pearce* for *Sir William*, until the dues were sold by *Sir William* to the *St. George* Adventurers, in the year 1810 or 1811, I believe. The mine is still working. Dues are still paid to *Mr. Carpenter*. I think leases were granted by *Mr. Carpenter* to *Mr. Williams* and myself. *Mr. Williams* was purser of the mine after those leases were granted. Many dues have since been paid. The mine was sold in *June* last. I don't know of my own knowledge to whom dues were paid."

Mr. Charles Coode, jun. (examined by the *Attorney-General.*)—"If a conventionary tenant does not appear, when called to renew his estate at three successive sessions, then it is offered to any other tenant to take, and is granted out by the lord to such other tenant, as for a *nan cepit*

by the original tenant; that is the custom. I have known it acted upon in one instance; in only one."

(Cross-examined by *Mr. Serjeant Pell.*)—" I have not the manor roll."

Mr. Serjeant Pell.—" I object to this evidence."

Mr. Attorney-General.—" I will strike it out as to the particular instance, and examine as to the custom generally."

(Examination continued).—" *Non cepit* is entered against the name of the tenant who makes default, and is continued for three sessions, that is to say, for twenty-one years: if no appearance at the end of that time, then it is let to another tenant.

" This is the custom of several of the assessional manors, of which I have been steward for twenty years."

The following evidence was then given for the Plaintiff, in reply:—

Mr. George Simmons (examined by *Mr. Carter*) produced the following document:—

" 4*th Nov.*, 1814.—Deed of Covenant.—It purports that *Mr. Benjamin Wood* was a trustee for the Plaintiff in the purchase of *Lemellan* estate."

Mr. Attorney-General.—" I admit it."

Mr. Nicholas Lescourt (examined by *Mr. Carter*).—" I know *Lemellan* estate well.. There is a road runs *north* and *south*, at the side of the estate. *Mr. Carthew*'s land, I believe, is on the

other side. I have worked for five years there for one —— *Willington.* I knew the property twenty-nine years ago. Many trees were then cut on *Carthew*'s property; were sold in lots, perhaps twelve or thirteen small lots."

[The deed of 4*th Nov.*, 1814, was here referred to, and partly read; it recited *Withiel*'s agreement to sell to Plaintiff a *conventionary tenement* for 1,400*l.*, of which part paid to *Pearce*, and surrender agreed to be made to *Wood* for the use of the Plaintiff. Plaintiff was a party to the deed.]

(Cross-examined by the *Attorney-General.*)—"The trees were on the side of the road. They were cut twenty-nine years ago, in the time of one ——— *Willington.* He was tenant of the *Mount* estate, which is now *Mr. Carthew*'s."

(Re-examined by *Mr. Carter.*)—"Four trees were cut in *Long-Hill.*"

Mr. Attorney-General.—"I object to this evidence. It is of the same nature as the Plaintiff's evidence *in chief*, and therefore ought to have been then given."

Mr. Serjeant Pell.—"The evidence in chief was confined to the Plaintiff's estate. This is a different estate and owner, as to which Defendant has given evidence for the purpose of shewing its tenure. My evidence, therefore, is strictly in reply."

Mr. Justice Parke.—"I am of opinion, that the evidence is admissible, in order to shew that

tenants of conventionary tenements exercised acts of ownership."

Mr. Edward Carthew (examined by *Mr. Carter*).. —" I am owner of other parts of *Nansmellan*."

(Examined on the *voir-dire* by the *Attorney-General.*)—" I am concerned in litigation respecting my estate. I am not engaged to pay any part of these expenses. I never have paid any former expenses. I have always refused."

(Examination continued by *Mr. Carter.*)—" Trees on my estate were sold by my order, and for my use. I received the money, twenty-nine years ago. I have sold none since. A ground at the upper part of my tenement is called ——. *Forth* and *Sandy Cocks* were the names of the stream-works. They were formerly carried on by Tin Adventurers. They passed through my property. I received dues from the Adventurers, payable to me as owner of the tenement. I never was an Adventurer."

(Cross-examined by the *Attorney-General.*)—(Witness, referring to his memorandum book of dues received,)

" On 20th Feb. 1788, of John Carthew.....£20 5 0
— 16th July, 1789, — John Emmett (for tin dues) 19 9 9

There are sundry others.

" The *Porth* works were never mine. They were at one end of the moor. *Sandy Cocks* work was at the other end. It adjoins *Lemellan* Moor. The stream-works injured my land. They worked for several years; ten years.

" I received in all about 100*l.* or 200*l.* for dues.

I can't say whether 200*l.* I have no recollection of the exact amount.

" The works were carried on about 1788, before the sale to *Rashleigh*. I believe they were not worked after sale to him.

" I don't know what proportion I received for dues. Different persons paid when I was young. I never collected the dues myself; never attended the toller.

" I was owner of *Mount:* part is leasehold. The stream did not run through *Mount*, only through *Nansmellan*. I hold property in which *Lord Mount-Edgecumbe* is also interested. I was not a tin-bounder, not that I know of. I don't know that the estate was bounded. I never paid for bounds, nor had any thing to do with bounders. I received dues, as bounder, in *Nansmellan*.

(Re-examined by *Mr. Carter*). — " All my estate is called *Mount*, and *Nansmellan* is part."

Mr. Thomas Trevithick (examined by *Mr.*——). —" I was employed to work for the *Porth* stream-workers about 1782. I began in *Mr. Rogers*'s land and *Mr. Carlyon*'s, towards the sea, and worked up from the sea; came on to *Carthew*'s land. I was the dresser. It was my duty to set out the dishes or tolls. I kept *Carthew*'s tin in one chest, and the *Prince*'s tin in another chest. It was part of *Merthyn*. *Merthyn* is bounded. *Mr. Carthew*'s estate was not bounded. The *Prince*'s dues came from *Mr. Hex*'s land, at the south side of the moor, the bounded land. *Car-*

thew's land was at the other side of the moor. I set out 1-18th for the *Prince;* none for the bounder. *Mr. Carthew* took his toll in cash. *Carthew* got as much as the *Prince*. *Polkinghorne* was the *Prince*'s toller.

(Cross-examined by the *Attorney-General.*)—"No share was set out for *Carthew*. Nothing taken in kind but the *Prince*'s tin. I am speaking of about 17 or 18 years ago. *Lemellan* was not bounded then, that I know of. *Mount* belongs to *Mr. Carthew;* to no other person, that I know of. *Sandy Cocks* works lay to the east, and the *Porth* works to the west. *Mount* was out at rent. *William Willington* lived on it."

This closed the evidence on both sides.

Mr. Attorney-General then addressed the Jury upon the Plaintiff's evidence, in reply, as follows:

"May it please your Lordship, Gentlemen of the Jury.—The prediction with which I opened this case has been verified; and that regret which I anticipated I now seriously feel at being obliged to address you again.

"I congratulate you, however, that you are now nearly arrived at the end of your journey, though there are still three stages more to be travelled. Mine, however, I promise you, will be a very short one; my learned friend's, I hope, a very short one; his Lordship's, as may be, long or short. It has been, indeed, a dreary journey; almost as dreary as the moors of *Cornwall.*

"In my address to you yesterday, I was guilty of some inaccuracy, in stating myself to be *a stranger* in this county; an expression used by me only as contrasted with the situation of my learned friend, and which I should be sorry to have misunderstood as implying any forgetfulness on my part of the obligations due from me to those who have, in four successive Parliaments, done me the honour to return me as the representative of one of your ancient boroughs. This explanation I have felt to be due to myself.

"The case which I have laid before you has been strengthened by the Plaintiff's evidence in reply; and the weakness of his case in answer confirms the strength of mine.

"I have proved to you, most satisfactorily, that down to the reign of *Henry VIII.* or *Queen Elizabeth*"—

[*Mr. Serjeant Pell* here interposed to confine the *Attorney-General*'s observations to the Plaintiff's evidence in reply.]

"The question for your consideration, in the first instance, is, what was the *tenure* of the Plaintiff's estate?

"If it was a *base* tenure, it was either *leasehold* or *copyhold;* and the lord would be entitled to the mines, unless the other side can make out the affirmative, that they are, by *custom,* entitled to take the mines of *copper.*

"You must, I think, be satisfied, from the evidence, that this is not an estate of *freehold. Copyholders* frequently enjoy an estate of *inherit-*

ance, and widows have their *freebench*; but that is not a *freehold* estate, not though it descends from father to son.

"It is an important rule, applicable not only to this case, but also to all the dutchy estates in *Cornwall*, that they are *inalienable*. And if, in *Edward III.*'s time, this estate was *copyhold*, no act but that of the Legislature can have altered it.

"The forms of surrenders and admissions, in these manors, are encroachments;* the estates pass by enrolment.

"But I may admit, for argument, that it was competent to the Plaintiff to prove a title to these ores *by custom*. Still the usage must be proved by him, not by me; and he must shew that he has taken the ores of *this particular description*. The mines of *tin* were originally vested in the king: I have proved it; they acquiesce in it.

"The Plaintiff has resorted to a miserable fragment of evidence to-day, as to *Merthyn*. Says it is part of the dutchy lands, and that no dues were paid. No proof has been given that this is in *Nansmellan*, or that it is not a freehold of *Mr. Carlyon*. *Mr. Carlyon* contends that he has a *freehold* there; but that has been a matter of

* If this be so, it seems further to shew that *Tewington* is *not* a manor; for surrenders and admissions are *necessary* forms of conveyance of copyhold estates. Besides, although the admissions to estates of inheritance may be incroachments, and therefore voidable by future Dukes of Cornwall, yet I apprehend they would be good, *by estoppel*, against the present duke, and those claiming under him, as he cannot dispute his own grant.

contest; and no inference can be drawn from the non-payment of dues there, of recent date, and always the subject of contest. The question of *locality*, as to *Merthyn*, is now contested; and no inference, therefore, can be drawn from that estate.

"As to the only remaining estate, the *Mount* estate, *Mr. Carthew* says, that part of this estate is in *Nansmellan*. I admit it; but the whole is not; and so says *Mr. Carthew*. He contends that he has a freehold there, and admits that he is not a bounder. The absolute owner of the soil stands in the place of the duke, and takes the same dues. Where the duke is lord, any person may come in and bound; and, whilst the bounds last, he gets a toll, in conjunction with the lord.

"I entered into evidence as to the tin, in order to shew the consistency of my case. The duke is *lord of the soil*, and as such he takes the *tin:* but the point for your attention is as to the *copper*.

"Now the Plaintiff has given you no evidence as to the *copper*. That ore, at least in this country, is comparatively of modern introduction. It was not known before the time of *Queen Elizabeth;* consequently, no custom respecting it can be proved; there has been no attempt to prove a custom. The cross-examinations, indeed, were pressed, and, I expected, as foundations upon which to raise other evidence of a custom. I heard my learned friend speak of *one hundred and twenty-nine witnesses!* but they have dwindled down to two or three. Had I known how *destitute*,

how *meagre,* my friend's case was, I certainly should not have produced all the evidence which I have laid before you.

" I could not, however, consider myself as combating with a shadow, when contending with *Serjeant Pell*—

> ————Nil majus generatur ipso;
> Nec viget quicquam simile, aut secundum!

(Then turning to *Mr. Serjeant Wilde*)—

> *Proximos* illi tamen occupavit
> *Pallas* honores!*

Mr. Serjeant Pell (in reply).—" May it please your Lordship—Gentlemen of the Jury:—I cannot but congratulate my learned friend, the *Attorney-General,* on the opportunity which has been afforded him of setting himself right with his *worthy constituents* at *Ashburton.* Yesterday, he was *a stranger in this part of the country,* and I suppose thought he should be taken to have been *in earnest;* but twenty-four hours have since elapsed, and we come now a little nearer to that tremendous crisis, a dissolution of Parliament. Not that I mean to impute any thing like a fear of *losing his seat* to my learned friend."

Mr. Attorney-General.—" Indeed, I hope not."

Mr. Serjeant Pell.—" No; my friend is quite secure, quite *safe* in the borough of *Ashburton!*"

The Captain of the Sheriff's javelin-men (much either in anger or liquor, and shaking his fist at

* Hor. Carm. lib. i. ode 12.

Mr. Serjeant Pell)—"Yes, *he is;* and I am a *host* for him!"—*(Great laughter.)*

Mr. Serjeant Pell.—"At least, if I have my *Pallas*, I am happy to see the *Attorney-General* has his.

"But to the case. I say the *onus* of proof in this case lies upon my learned friend. It is so in all cases where a person is proved to be in the possession of an estate, and so occupies it as to render it to be presumed that he is entitled to take the ores in question. That, I submit, is proved in the present instance.

"I shall have many objections to offer, in order to shew that those deductions are not to be made which the *Attorney-General* has made from his evidence.

"Look at the acts of ownership exercised upon these estates. The owner can assign the estate without the lord's leave. On his death, his eldest son takes by heirship; or his widow the whole of the estate; or the eldest daughter takes, exclusively of the other sisters, contrary to the general law of the land.

"Light grounds alone are not to take away from such an occupier rights so important as those which are now in question.

"The *Attorney-General* has drawn your notice to the copyhold tenures of this manor. He has shewn you that a copyholder is a mere *villein!*—a *base* tenant! Gentlemen, there is none *lower*, except only a *West Indian slave.* And if the *Attorney-General* is right, then every copyholder

of these manors may now return to the base, degenerate situation in which he formerly stood.

"The argument of the other side is, *once* a base copyholder, *always* a base copyholder—that encroachments are nothing—that no acts of ownership can alter his estate. This argument I totally deny.

"The *Attorney-General* has said, that I would produce no title-deeds; but my client's title-deeds are, or ought to be, in the office of the dutchy court."

Mr. Attorney-General (interrupting)—"They are in *Mr. Coode*'s possession, and have been produced by us as far as there are any."

Mr. Serjeant Pell.—"A modern conveyance will shew but little as to rights or bounds. If the Plaintiff's estate be within the manor of *Tewington*, where should his title appear so well as upon the Court-rolls? But the other side has been producing Assession-books and rolls, which they choose to term the rolls of the manor! But it is only necessary to turn to the evidence to see that these are, in fact, only minutes, and that the rolls are in the dutchy office.

"The *material* rolls have all been left behind; and the Plaintiff has been most unfairly dealt with, because he has been shut out from the dutchy office, which it has been urged is a *public* office, and where he ought to have had access to inspect his title.

"*Mr. Abbott* has not done himself credit by his testimony. He admits that he has been served with a subpœna. At first he was unintel-

ligible; then he gave an answer which I did not like; then admits that he has brought *some* rolls, but not those which we required, and selected by an officer connected with interested parties. If this is to be endured, then all are at the mercy of the *Duke of Cornwall.* There is nothing wrong, that I know, from the fountain; but some of the subordinate streams may not be so pure.

"Some important documents certainly are in *London,* but which ought to have been here.

"The question of rights in other manors cannot affect this.

"My friend said he should shew *heriots* taken. I don't mean to speak with confidence, but I believe, in copyhold manors, *heriots* apply both to free copyholds and those which are not so. In *Blackstone's Commentaries* (vol. ii. p. 97), is the following passage:—'*Heriots, which I think are agreed to be a Danish custom, are a render of the best beast, or other good (as the custom may be) to the lord, on the death of the tenant. These are incident to both species of copyhold.*' Meaning, as the preceding words in the text shew, copyholds of inheritance, and for life also. The reservation of a heriot does not, therefore, shew that the estate is not of a freehold nature. That proposition I submit.

"There is nothing to shew that the Plaintiff's estate was part of the lands of the dutchy in ancient times.

"It is very improbable that there should have been any encroachments in *Elizabeth*'s time;

both herself and her ministers were too vigilant.

" The law will presume every thing, even an Act of Parliament, in support of such rights as those of my client, enjoyed for so long a period of time.

" *Mr. Coode*'s evidence shews, that these were inheritable estates. The Defendant has attempted to shew a custom to take from seven years to seven years, and 6*d.* paid to the lord; but there is no proof that sixpences ever were paid.

" I can't discover what it is meant to be contended is the right of the *Duke of Cornwall.* Does he mean to claim all mines and minerals in every tenement in the Assessional Manors? If so, it includes free tenants as well as free conventionary tenants.

" Unless acts are found accompanying grants, the grants prove little or nothing. Now the first instance of a sub-lease which included copper, I believe, is in 1797. The first lease of copper was in 1697. *Mr. Vincent* was the first lessee of copper; and all subsequent leases of that mineral, I believe, will be found to be on surrender of prior leases by *Vincent.* But there is no instance of profit taken under them, I believe, until *Sir William Leman*'s time, in 1742. You remember the blundering manner in which they attempted to prove, late last evening, their receiver's accounts. Yet this very point was so launched by my learned friend, as was calculated to frighten me, if in a cause of this nature I was likely to be frightened.

"One of the leases, I think to *Sir William Leman*, is most preposterous in one of its conditions, that which forbids the lessee to compromise differences with the tenants; such differences, whether the tenants will or no, are to be decided, not in a court of law or equity, but by the officers of the dutchy!

"The next lease provides for the case of a tenant bringing an action against the lessee; and if the lessee succeeds, then he covenants not to compound, or make it up with the tenant. What is this but threatening the tenant that the lessee shall go on to the utmost extent of the law?

"This is always the character of encroachments. First, a little encroachment; then acts of aggression; then claims of rights, which the *Duke of Cornwall* never, in earlier times, dreamt of possessing.

"We come next to the lease in 1763, to *Hussey*, executor of *Sir William Leman;* and there is this most extraordinary clause in it: it shews a contest in 1763 in the Court of *Exchequer*, and 600*l.* were therefore to be held in the *receiver*'s hands, until the rights of the crown to lease the minerals in question should be determined.

"How then was this suit determined? Had it been in favour of the crown, this hall, large as it is, would hardly have been large enough to have contained the voice of my learned friend, proclaiming to you that fact. No doubt, then, it was determined against the crown.

"The 600*l.* is not in the receiver's accounts;

it would have cut a figure in these twopenny-halfpenny accounts! and what has become of it ought to have been shewn.

"These are cardinal points in the cause; and I must take care that they are not lost sight of.

"The clause in the lease of 1763 was, no doubt, a surprise to the other side, or it would have been mentioned in the outset.

"The leases, you will observe, were granted when the right was in contention; and there has been no proof of any perception of profits under them.

"I have now gone through, I believe, all the documentary evidence.

"In this cause there are tremendous interests at stake. Yet observe, I pray you, the prices paid for "*all these mines in Cornwall!*"

"Gentlemen, these proceedings are not instituted by the crown. No; the crown is far too liberal. But I must deal with its representatives, *Mr. Carpenter*, and *Mr. Tucker*, of *Trematon Castle*. They are armed with all the authority of the crown; though I admit they have not its best prerogative, *mercy*.

"For *toll-tin*, the duke's unquestioned right, I beg it may be marked, is to be paid the sum of 18,000*l.*! whilst for *copper*, through the whole of the dutchy, not only in the assessionable manors, but throughout all the country, 1,200*l.* only is paid! And this we find in evidence. I only wish that I was an officer of the dutchy, to take leases valuable as these, if this right can be established.

" The consideration plainly proves that the officers of the dutchy did not imagine they had such right; and the lessees paying so little, shews that they did not expect to succeed in establishing it.

" As to the manor of *Tewington*, my evidence has been confined to it. There are three descriptions of tenants in the manor; and of the tenement of *Lemellan*, 20 acres now belong to the Plaintiff, and 22 acres to *Mr. Carthew*. Besides these, there is the estate called *Merthyn*.

" In *Tewington* there is a copper mine called *Gewan*, also the copper mine in question, called *Wheal Rowe*, and the copper mine called *Pembroke*. These are the three copper mines.

" *Gewan* being on the waste, the lord's own land, there can be no doubt as to his title there. The lease to *Benallack* is indorsed '*Set for copper, &c. on St. Austle Down, part of the dutchy estate.*' In the earlier lease, in 1768, it is called '*Gewan Pool, in the open down;*' there is no question, therefore, as to this mine.

" There was a conveyance of the land of *St. Austle Down* to Plaintiff.

" The strongest part of the case is as to *Merthyn*. I waited to see if they would touch on *Pembroke* mine; it is situate upon *Merthyn*, which is mentioned in the Assession-roll immediately after *Nansmellan*, in the same manor, and under the same tenure of free conventionary tenants. Why then has not *Mr. Carlyon* been called upon to give up the mine? Why have they

not shewn dues received? *Mr. Carlyon* comes into court, fully anticipating he may one day have a similar contest, and he protects himself by Counsel. He is put into the box, and two or three questions only are asked. He says he believes part of *Merthyn* is in the dutchy land. He says he knows where the copper is raised, and he conceives it is in the dutchy land. He *conceives!* Why, we have the proof absolute: here it is on the roll. He says he bought the land where the mine is from *Hex;* and his admission, on *Hex*'s surrender, was proved.

"*Mr. Carthew* has proved, as to his estate, that he received dues of the tin,—not as an Adventurer, not as a bounder, but as owner of the land. This estate is proved never to have been bounded; and the lessee of the dutchy has never taken toll in respect of the lord's interest.

"With respect to the iron shaft. As to the bounded part of the estate of the Plaintiff in *Lemellan,* no doubt can be raised to the duke's right to tin. *Hitchens* has come to bolster up the case for the lessees, attempting to prove that they worked in the iron shaft for copper only; whereas it is clear, from *Vivian*'s evidence, that they worked for tin, and that Plaintiff was, in fact, the discoverer of the copper lode which has since been worked to so great advantage. The casual bit of copper found by the lessees was too inconsiderable to be smelted, and their works were subsequently abandoned.

"I don't recollect that any authority has been

shewn, by which *Mr. Brenton* was entitled to come and take away the copper.

"I take my main stand on this,—that the Plaintiff has exercised the acts of ownership described, and *Mr. Carthew* has done the same on his adjoining estate, all which are acts of forfeiture if the estate be of *copyhold* tenure, and therefore are evidence to shew a *freehold* inheritance. Besides which, the defendant having never taken dues of copper from mines adjoining and held under the same alleged tenure, is a fact strongly corroborative of the Plaintiff's interest, and met only by long rolls of assession, by no court rolls, by alleged rights not proved, and by forbidding us to inspect our title.

"Inasmuch as different manors have different customs, I conceive what is done in one manor is not evidence to prove customs in another manor. Here it is proved that the customs are different: one tenant to be bailiff, another a beadle; one to forfeit for assigning without leave, and so on.

"As to the argument that a custom cannot be proved because copper is of modern introduction, the same reasoning has frequently been urged before; in one instance, in a case of tithes, where a *modus* was set up for an article of modern introduction, I think for hops; and in another instance, where a *guinea* payment was established as a modus, guineas being a modern coin, and every thing was presumed in favour of it.

"So also with respect to the rights of voting in boroughs.

"No evidence whatever has been offered that the mines in the other manors were in conventionary tenements.

"The Plaintiff is contending against those who have given only 1200*l.* for these immense rights!"

Mr. Justice Park then summed up the case to the jury:—

"The Plaintiff brings this action of *trover* for copper ores taken off his premises, and the Defendant says that he is *not guilty*.

"The question is more a question of *fact* than of *law*.

"The Plaintiff launched his case so as in ordinary cases to have proved him a tenant in fee; and he rightly rests his case upon his alleged legal title in fee; for had the evidence of his witnesses been unanswered, he would, in law, have been clearly entitled to recover, because a title in fee to the surface gives a right to all above it, to the heaven; and to all below it, to the bowels of the earth. If, indeed, mines of *gold* or *silver* had been found on a man's estate, I am inclined to think they would not belong to him; but, however, it is not necessary to decide that. I don't know whether it ever has been decided.*

* By statute 1 *William and Mary*, ch. 30, all gold and silver found in mines of this kingdom are directed to be disposed of at *the mint* within the Tower of London, and at no other place:

think, do not mean mines of tin only, as controlled by the word *stannary*.

" I agree in the observation, that if there had been no usage under grants, the grants have very little weight.

" The next documents produced are the minister's accounts, dated in 25 *Edward I.*, and which shew various returns by the steward of monies paid by him, as received of tenants of manors, for tolls, fines, &c. &c.

" Next we have the *inquisitio post mortem*, 28 *Edward I.*, on the death of the *Duke of Cornwall*, shewing that he was seised in fee of the issues of mines of tin, and of several manors, &c., including the manor of *Tewington:* in this document, too, '*conventionary tenants*' are spoken of, which, *ex vi termini*, certainly means tenants by *convention* or *agreement*.

" Following this, is the charter of 1 *Edward II.*, granted certainly to a very unworthy person, as we learn from history. It grants *all mines of tin and lead*, and in other parts speaks of *mines*, generally, to have and to hold as fully and amply as the late *Edmund, Earl of Cornwall*.

" There is afterwards a *re-grant* to the same person and his wife, of (amongst other things) '*all mines of tin and lead.*'

And a charter of 5 *Edward III.*, shewing a grant to *John of Eltham*, his brother, of (*inter alia*) the manor of *Tewington*.

" We come then to the first of the *Assession Rolls*, in 7 *Edward III.*

" The objections which have been made to the

admissibility of this evidence, I think were valid; but if so, that may be mooted hereafter.

"The object in using these rolls, has been to shew that the *Dukes of Cornwall* exercised certain powers over the tenants of their manor of *Tewington*, and other manors.

"The commission I should not probably have been disposed to have received if it had stood alone; but it stands recited upon the roll. By it, power is given to the commissioners to let to the tenants, by convention, whether by indenture or otherwise; and for a term of years, or for life, or otherwise. Then follows the return made by the commissioners, which seems to shew rather that the tenants were *leaseholders* than any thing else.

"Next in order is the charter of 11 *Edward III.*, creating his son, the Black Prince, *Duke of Cornwall.* This charter purports to be granted '*by the advice of the Council, &c., assembled in Parliament, convened at Westminster:*' it grants the stannary, and coinage of stannary; but the word '*mines*' does not appear in this charter to be included, though the profits of the Courts of the stannary and mines are included.

"We have then the assession rolls, 21 *Edward III.*—38 *Edward III.*—45 *Edward III.*, and 20 *Henry VI.* [extracts from which his Lordship read.] By these rolls, services are shewn to be performed, which, it is said, are inconsistent with the character of *free tenants:* and so it appears to me; as I have never heard of such services being due from free tenants.

"Undoubtedly the word '*heriot*' is generally applied to copyhold estates: I never heard it applied to *freeholds*. I don't know that reliance is absolutely to be placed upon it — but it is a circumstance to be taken into consideration."

[His Lordship then read extracts from the rolls 20 *Henry VII.*, 20 *Henry VIII.*, and 27 *Henry VIII.*]

"The forfeiture of the tenant's estate for digging tin, shewn by this last roll, is certainly inconsistent with the idea of a *freehold* right in the tenant; the forfeiture by cutting oaks is also inconsistent; and you are to consider whether these instances do not consist down to the present time, and form a strong body of evidence for the defendant to get over.

"As to the objection, that more rolls have not been brought, I think there has been great negligence. The clerk having been desired to bring the rolls relating to a particular manor, has no right to make a selection. I don't think that we are to presume, or that it is proved, that there were other rolls which have not been brought down."

[His Lordship next read the extracts relied upon, from the *assession books*, dated in 1794, 1752, and 1663; and *Mr. Tucker*'s and *Mr. Abbotts*'s *evidence* respecting the manner in which the books were made up, &c.]

"With regard to the entries, '*to hold to the tenants and their heirs for ever*,' you are to deal with this as you can; it certainly conveys an

estate in fee; and respects the same lands which formerly were entered, '*to hold from seven years to seven years.*'"

[By desire of the *Attorney-General* two presentments of the Jury were here read, from the assession rolls, in order to shew that the word "*tenet*" was used as applying to *free* tenements, and the word "*capit*" as applying to *conventionary* tenements, which it appeared his Lordship had not upon his notes.]

"The distinction suggested between the words '*tenet*' and '*capit*' is a very critical one. I should not have noticed it, had not my attention been drawn to it, — and it does not appear to me to be material."

[The evidence of *Mr. Edward Coode* was then read by his Lordship.]

"It is a strong fact in favour of the Plaintiff, that a conventionary tenant, so far from having an estate at the will of the lord, has something very much like a permanent hereditary possession — his widow takes a life estate, and his heir by *inheritance for ever!* It is very singular, and I cannot explain it. The words, '*according to the custom of the manor*,' perhaps control the words of inheritance, '*heirs for ever.*'"

[His Lordship next read parts of the charters 33 *Edward I.* and 6 *Henry VI.*, without comment.

On his being about to read from the grant, 12 *James I.*, *Mr. Serjeant Pell*

objected, and said, "that it ought to be struck out from his Lordship's notes, because no part of it was read for the Plaintiff," and it was struck out accordingly: but *note*, the Defendant's counsel were at the time otherwise engaged, and appeared not to be aware what was done.

Extracts from the seven several leases, from that of 4 *December*, 1718, down to the lease of 15 *August*, 1810, inclusive, in the order they were produced in evidence, were then read.]

"Up to this time, you will observe, we have no evidence as to the copper — all these documents having reference to *tin* only. We now go to the *copper*."

[Extracts from the leases of 10 *July*, 1697, and 3 *March*, 1717, were then read.]

"As to the accounting upon oath, no accounts on oath appear to have been made. None are in proof."

[Extracts from the lease of 3 *July*, 1742, were next read.]

"With respect to this covenant, I conceive, that in ordinary cases of manors, the lords cannot enter, without leave of the tenant, to dig for mines; as in a case which I remember in the Court of King's Bench, where a nobleman dug for coals under his tenant's estate, and the tenant recovered large damages.

"Here a large claim is made of a right to enter on the tenant's land."

[Note of the lease 13 *June*, 1763, was next read.]

"The remark made by the Defendant's counsel respecting the return of the consideration-money expressed in this lease, and that no explanation has been offered as to the result of the suit then pending in the Court of Exchequer, is perhaps answered by the *Attorney-General*'s observation that the lease was surrendered, and followed by a new lease to the same parties, at an increased consideration."

The lease of 11 *January*, 1810, was next read, without comment.

In observation upon the charter 50 *Edward III.*, his Lordship remarked, "that he believed the word '*mines*' was not included in it," which was assented to by the counsel on both sides.*

The assession roll 19 *Elizabeth*, and afterwards the evidence of Messrs. *Thomas*, *Organ*, *Geach*, and *Pearce*, and the admission of *Mr. Wood* in 1814, were read by the learned Judge, without comment.

On reading the conveyance to *Mr. Rashleigh*, and the exception it contains of all mines and minerals in the said manors, &c., his Lordship remarked, "I cannot conceive how, in the face of this document (*Mr. Rashleigh* not having purchased the mines, which are expressly reserved to the Prince, and *Rashleigh* being the immediate lord of the Plaintiff), the Plaintiff can claim a right to copper mines."

* But note, that it is; vide page 60.

The learned Judge then read his notes of all the rest of the evidence, with the following observations, namely :—

On the evidence of *Mr. Hitchens*, — " I think it seems pretty clear that *Pembroke* was a copper mine, and in *Tewington* manor, being in *Merthyn*."

On *Mr. Carlyon*'s evidence, — " He is most probably interested in the result of this cause; therefore his evidence must be received with that limitation."

And on the testimony of *Mr. Carthew*, — " He may also be considered as in some degree interested in this event; but I think no reason has appeared that we should doubt his testimony."

In the course of reading this evidence, *Mr. Serjeant Pell*, addressing the Judge, said, " With respect to your Lordship's observation, that the Plaintiff cannot claim rights which *Mr. Rashleigh* had not, — it is right I should mention that the Plaintiff does not claim under *Mr. Rashleigh*. Your Lordship will observe, that the surrender from *Withiel* to *Pearce* was in *May* 1774, and *Mr. Rashleigh* did not acquire his interest until 1798. In *May* 1814, *Pearce*'s heir-at-law, and *Withiel*, surrendered to *Wood*, in trust for the Plaintiff. So that we take the same interest which *Pearce* had *before Mr. Rashleigh* purchased."

Mr. Justice Park. — " I cannot believe that the *Prince* could have reserved to himself (by the reservation in the deed of conveyance to *Rashleigh*) what was before in other persons. I was

about to have left it more loosely in the Plaintiff's favour — but now I shall read the indenture, or declaration of trust."

[The deed was accordingly read.]

Mr. Serjeant Pell requested that a note might be taken of his objection, which was done.

Mr. Justice Park (to the Jury). — "The points for your attention are these:—

"The Plaintiff claims originally as an absolute *freeholder:* and if he is such, generally speaking, he would be entitled to the ores in question, and to your verdict for the sum agreed upon, £100.

"But the question now is, whether, — considering the county in which the estate is situate, the rights vested in the *Duke of Cornwall,* and the documents in question, — these rolls can be superseded by the evidence given on the part of the plaintiff?

"If you are of opinion that he has made out his title to this property to your satisfaction, you will give him your verdict, — if otherwise, to the Defendant.

"It is a question of great importance to the Plaintiff, on the one hand, and to the *Dukes of Cornwall* on the other."

The Jury withdrew, — and afterwards returned a

Verdict for the Defendant.

COURT OF KING'S BENCH.

EASTER TERM, 1825.

ROWE *v.* BRENTON AND ANOTHER.

Mr. Serjeant Pell moved the Court for a rule to shew cause why a new trial of this action should not be had, on the following grounds:— 1. That evidence had been given on the part of the Defendants which was not admissible in a case of this description, and between these parties; 2. That the verdict was against the weight of evidence; and 3. That the Judge had misdirected the Jury.

The learned counsel stated the general nature of the case, and of the evidence on both sides, observing, that the defence attempted to be set up was, that the Plaintiff's estate was a conventionary tenement of the manor of *Tewington, held from seven years to seven years*, and that under such holding the Plaintiff had no right to the minerals in question.

With respect to the *Assession rolls* and *Assession books*, he objected that they ought not to have been admitted in evidence, because they were not original documents, but made up in *London*, on receipt of the rolls from the country, and because they were improperly selected by parties interested; that they were mere private docu-

ments of the manor, drawn up in the absence of the tenant, not signed or sealed, or having any other authority of that description; and, with reference to their contents, he observed that they were in direct contradiction to the Court rolls of the manor, which conveyed an estate in fee, although an estate from seven years to seven years appeared upon the assession books: that the rent of 11*s.*, reserved upon the tenement of *Nans-mellan*, was unvarying from the earliest roll down to the last entry in the books; and that there was no proof of any *payment* of *rent*, in respect of this or any other tenement in any of the assessional manors, although in one or two instances there had been a variation of the *fine* upon new letting; and that the nature of the Plaintiff's estate appeared from *Mr. Coode*'s evidence of the custom of the manor with respect to the conventionary tenants. It was also urged, that the rolls and books shewed that the customs were different in the different manors, as in some it appeared that the tenants could not demise without leave of the lord, though in *Tewington* manor there was proof that they could; and in other manors, cutting timber was a forfeiture, though here there was proof of its being cut; wherefore the evidence to shew that the manor of *Tewington* was held under the same circumstances as the other manors, failed.

Mr. Justice Bayley.—"But there may be a similarity of *tenure* over many manors, yet sub-

case respecting the cutting of *rushes*, in *Wilson*'s Reports?" *

The Lord Chief Justice.—"Was there no special pleading?"

Mr. Serjeant Pell.—"None, my Lord: it was an action of *trover*. Upon my pressing my objection to the learned Judge, his Lordship answered me by urging that there was an exception of all mines and minerals in the conveyance of *Tewington* manor, sold by the duke to *Mr. Rashleigh;* and that *Mr. Rashleigh* being the lord of the manor at the time when *Mr. Wood* was admitted in trust for Plaintiff, he, *Mr. Rashleigh*, had no power to admit *Wood* to mines and minerals, because they were not his. I answered, that we claimed under a title granted by the duke *prior* to his conveyance to *Mr. Rashleigh;* but *Mr. Justice Park* said, he could not suppose that his Majesty would have reserved to himself, in his conveyance to *Mr. Rashleigh*, any mines and minerals which were before in any other person."

Mr. Justice Bayley.—"If the holding was of mines and minerals *before* the conveyance to *Rashleigh*, then the holding under the *dominus pro tempore* would equally include mines and minerals, notwithstanding the reservation in that conveyance."

Mr. Serjeant Pell.—"These are my grounds of application."

* Rackham *v.* Jessup, 3 Wils. 332.

Mr. Justice Bayley.—"Was the admission of *Pearce* in the same words as Plaintiff's admission, viz. 'to him and his heirs, according to the custom, without saying *at the will of the lord?*'"

Mr. Serjeant Pell.—"It was."

Mr. Justice Littledale.—"Was there any mention of services? or was there evidence of any conventionary tenant having, or exercising, a right to dig stones or other substrata?"

Mr. Serjeant Pell.—"No such evidence was given."

Rule to shew cause granted.

COURT OF KING'S BENCH.

HILARY TERM, 1826.—4. FEB.

ROWE *v.* BRENTON AND ANOTHER.

(On the argument for a new trial.)

Mr. Justice Bayley read the evidence from *Mr. Justice Park*'s notes; and his Lordship's certificate that he did not recollect having misdirected the Jury, in the manner stated; and that he was satisfied with the verdict.

The grounds upon which the application for a new trial was made were also read.

Argument for the Defendants.

Mr. Attorney-General. — "My Lords:—The first point which we have to consider is the admissibility of the evidence; but I will previously say a few words as to the Plaintiff's right to maintain this action. Your Lordships will observe that there is scarcely any evidence of his title, to have called upon us to give proof of ours."

Mr. Justice Bayley.—"But I take the rule to be, that if a man is a wrong-doer, although that may give him a title to what he digs out of the land, as against strangers, yet, as against the

owner of the land, he must shew his right to dig."

Mr. Attorney-General.—"But here the Defendants were in the exercise of a long-existing right. This mine was under the Plaintiff's land: he had before dug shafts in the land; and it must be remembered, this transaction took place in the county of *Cornwall:* the Plaintiff has shewn no title to the soil; and upon the evidence, the strict *legal* right may be said to be in *Wood*, the trustee for the Plaintiff."

Mr. Justice Bayley.—"There is a case in *Wilson*'s Reports* about cutting rushes upon a common."

Mr. Attorney-General.—"But if there be a lord, and he takes away the produce so obtained, can the wrong-doer enforce his claim against the lord?"

Mr. Justice Bayley.—"The possession of the land is sufficient against a wrong-doer."

Mr. Attorney-General.—"But we say possession of the land is not possession of the mine: we say we are not to be considered as mere wrong-doers. The Plaintiff is the wrong-doer: if your Lordships think we are the wrong-doers, I admit the principle."

[*The Court* appeared to be against the *Attorney-General*'s argument.]

Mr. Attorney-General.—"We of course have

* Rackham *v.* Jessup, 3 Wils. 332.

not relied on this objection: we say a title to these mines is proved to be in the *Duke of Cornwall*, and that the Defendants are his lessees.

"The tenements in this manor were originally let for terms of years: they were mere leasehold interests, and any larger interests cannot subsequently be acquired, for this property is inalienable, except by act of parliament, as was settled by the Prince's case and the *Sutton-pool* case. We proved leases of *tin* granted for a period of two or three hundred years.

"*Copper* ore is of recent discovery—about the reign of *Queen Elizabeth;* since which time we also shew that leases of the copper have been granted by the *Duke of Cornwall*, and that copper was received under those leases: indeed, the sums of money paid as considerations for the leases shew that the dues were taken.

"The assession rolls are objected to as inadmissible on three grounds:—1. because they are not the court rolls of the manor; 2. because the original commission was not produced; and, 3. because they were read with reference to other manors than *Tewington*. Now it appears that commissioners were appointed from the year 1200 and upwards, down to the present time, who have gone down to *Cornwall*, made a progress through the assessional manors, and let the lands, &c.: and minutes of their proceedings were made out and preserved among the dutchy records. Originally they were assession rolls:

shortly after the *Restoration*, books were substituted. The commissioners go into the county every seven years: they have two books: one they bring away, the other is left in the country. The steward takes the admissions in the intervals between the sessions, and alters the book accordingly, which the commissioners find when they next come down: and those tenants who retake their estates pay a sixpence, and if another takes he pays one shilling.

"These books are the original rolls of the manor — there are no others; and the presentments at the Court are mere minutes from which the rolls, or books, are made up.

"Having stated this, I will beg to hand to your Lordships one of these books.

[One of the assession books was handed to the Court.]

"I come now to the *second* ground of objection, viz. the non-production of the original commission: for this, however, there is no foundation, because the commission is recited in the rolls, and appears to have been acted upon, which, therefore, is sufficient evidence; it having been proved that search had been made for the commission, and that it could not be found.

"With respect to the *third* objection, — that so much of the rolls as related to other manors was not evidence with reference to the manor of *Tewington*, — we distinctly shewed, that all the manors were held under the same lord: and that the tenures of the several tenements were all the

same: the truth, however, was, that much more of these rolls was read than we desired, because *Mr. Serjeant Pell* insisted on our reading on."

Mr. Erskine.—"Really that was not the case."

Mr. Justice Bayley.—"What need had you of evidence as to what passed in any other manor than *Tewington?*"

Mr. Attorney-General.—"My Lord,—I conceive we had none. Looking then to the Plaintiff's title, your Lordships see that he shewed no title to the *soil,* which appears always to have been in the *Duke of Cornwall,* as lord of the manor.

"And, with respect to the admissibility of the *enrolments,* as evidence of the leases described in them,—we proved having searched for the counterparts of these leases, and that they could not be found: there were covenants in the leases, making them void if not enrolled in six months; and the usage of the dutchy office, which is a public office, was proved to be to enrol the leases. The case of *Humble* v. *Hunt,* cited at the trial, is a direct authority in point."

Mr. Justice Bayley.—"Have you looked in *Douglas*'s Rep. p. 56? You will find that the dutchy officer's minutes would have been evidence."

7th FEB. 1826.

Mr. Attorney-General.—"It only remains for me to observe upon the objection that the ver-

dict was against the weight of evidence. And here I must request your Lordships' attention to the evidence which we gave of the leases, both of tin and copper, and the receipt of the dues; —

[Which evidence was reviewed at considerable length.]

upon which I must say, it appears to me that the whole weight of evidence was with the Defendants: there was certainly some little confusion with respect to a mine called *Pembroke* mine, but which mine, it is to be observed, is in litigation.

"The objection which was taken by *Mr. Serjeant Pell*, on moving for this rule,—that the Defendant's title or authority to take these ores was not proved at the trial,—ought not to have been made; for certainly no such objection was taken at the assizes: it was not mentioned to us, but was taken as admitted on both sides."

Mr. Erskine.—"It was objected to by *Mr. Serjeant Pell*, in his address to the Jury, and was noticed by the Judge in his summing up, as not being necessary to be proved."

The Lord Chief Justice.—"I suppose in *Mr. Serjeant Pell*'s address *in reply*, when the other side had no opportunity of supplying the proof!"

Mr. Erskine.—"Yes, my Lord."

Mr. Selwyn.—"My Lords:—I am on the same side with the *Attorney-General*.

"As to the first point,—several of the ancient documents confirm the court rolls, at least those

documents cannot be impeached; for they come from other custody than the dutchy office, namely, the charters from the *Tower*, and the minister's or receiver's accounts from the *Exchequer*.

"There are several authorities in the books to shew that the great antiquity of the rolls rendered them admissible; and I refer particularly to *Denn* v. *Spray* (1 Term Rep. 466), and *Bullen* v. *Michel* (2 *Price*'s Rep. 399: 4 *Dowe*'s Rep. 297).

"With respect to the second objection to these court rolls,—that the evidence which they furnished as to other manors was not admissible,—I refer to *The Duke of Somerset* v. *Frank* (*Fortescue*'s Reports, 41)."

Mr. Justice Bayley.—"And another authority to the same point will be found in 2 *Atkyns*'s Reports, 189."

Mr. Selwyn.—"The evidence as to the customs in the other manors was used only to explain the nature of the estates of the *conventionary* tenants, which existed in all the manors.

"The next ground of objection to this verdict is, that the enrolments of the leases were not admissible in evidence: but the place from which the enrolment-book comes gives it its authority. There is besides a *covenant* in the leases that the same shall be void if not enrolled within a given time; and the lessor covenants that the lease, or the enrolment thereof, shall be valid.

"With regard to the last objection,—that the

verdict was against the weight of evidence,—your Lordships will consider the manner in which the Plaintiff shaped his case. He only shewed acts of ownership *upon the surface*;—that he mowed the grass, reaped the corn, and cut timber. If the Defendants had not gone into their title, then perhaps the Plaintiff might have had some ground for calling upon the Jury to presume the estate to be his *freehold*; but after the Defendants had shewn their title, considering that this was in *Cornwall*, he could not have expected that any such presumption should be made.

"These customary tenements were originally mere leaseholds: I suppose the Plaintiff will call upon your Lordships to presume that, contemporaneous with the assession rolls, there were admissions to the tenant and *his heirs* — and that, in fact, they have always been *customary freeholders*. Upon this point, however, I am also ready to meet them; and will shew that the Plaintiff is not a customary freeholder, but a *privileged villein*.

"In *Littleton*'s, *section* 81—[*which was read*]—a distinction is expressly taken between a freehold *interest* of inheritance and a freehold *tenure*. A party may have an estate of inheritance, and yet not a freehold tenure.

"In *Mr. Justice Blackstone*'s Treatise on Copyhold Tenures, p. 129, (the excellence of which treatise has always been acknowledged,) the same doctrine is established; and the author refers evidently to these manors in *Cornwall*.

"The cases of *Gale and Noble* (*Carthew*'s Reports, 432) — *Stephenson* v. *Hill* (3 *Burr.* Rep. 1273) — *Burrell* v. *Dodd* (3 *Bos.* and *Pull.* Rep. 378) — and *Doe* dem. *Reay* v. *Huntington* (4 *East*, 289) — all positively shew a distinction between a freehold in point of *interest*, and a freehold in point of *tenure*.

"It is important to observe that the Plaintiff did not originally put his case as he now wishes to shape it, — manifesting, therefore, that he then relied upon a different title from that which he now seeks to establish."

Mr. Justice Bayley. — "You have not referred to the case of *The Bishop of Winchester* v. *Knight*, 1 *P. William*'s Rep. 406 — which is a very important authority in support of your side of the question."

Mr. Robert Baily. — "The *Duke of Cornwall* is the lord of *all* the assessional manors: — which circumstance is to be remembered with reference to the question of the admissibility in evidence of the Court rolls of the other manors, as applicable to the manor of *Tewington*.

"Of the enrolments of the leases, it is said that the enrolment is the act of the lord; but it must have been the act of the tenant also."

Mr. Justice Bayley. — "The covenant is, that the tenant should enrol; therefore he must be taken to have brought the lease for enrolment."

Mr. Baily. — "It is also said, that these rolls should have been signed, or the original commissions produced. But these are evidences of

proceedings in the manor courts; and your Lordships will not now inquire into the jurisdiction of the commissioners, or require evidence of their authority. The rolls, from their antiquity, prove themselves: and search has been made for the commissions, but they are not to be found.

"I think your Lordships will be of opinion that there has not been any misdirection of the learned Judge who tried this cause: and if substantial justice has been done, you will not now set aside this verdict, even though the Jury were misdirected, as is said by the other side.

"The case of *Doe* dem. *Cook* v. *Danvers* (7 *East*, 299), is another authority in point. Here the Plaintiff claims a *customary freehold*, but if so, what right had he to these minerals when severed from the soil?

"See also, *Sir William Jones*'s Reports, 243.—A customary freeholder cannot pass his estate, but by surrender and admission. The Plaintiff had no title to these ores, and therefore, on his own shewing, is not entitled to have had the verdict found for him."

Mr. Tucker, on the same side, referred to the evidence with respect to the taking of the copper dues from the several copper mines within the manor, as sufficiently proving the lord's title to all mines of copper which might be discovered in the manor, whether in the wastes or in the old enclosures.

Argument for the Plaintiff.

Mr. Erskine. — " I have to request your Lordships' indulgence on the present occasion, when, in consequence of *Mr. Serjeant Pell*'s retirement from the bar since the trial of this cause, and the inability of *Mr. Serjeant Wilde* to attend here today, I find myself called upon to lead a cause of this great importance, in which I have hitherto acted but a subordinate part.

" The question at issue is, whether these conventionary tenants, who have taken estates of inheritance from the lord, and have bought and sold their estates as such, are entitled to retain them, or are only to hold for seven years? for to this extent the argument on the other side goes: they say that the estates are inalienable; and therefore, if originally *leaseholders*, the tenants cannot now have a greater legal interest.

" With respect to the observation, that the Plaintiff is not entitled to a favourable consideration, I answer, that he was fighting this battle in the dark, being denied access to the records of of the dutchy, and to all evidence of his own title: it was therefore all that he could do to shew a *primâ facie* case, so as to throw the necessity on the other side of adducing their title.

" The Defendant, besides, has no claim to the indulgence or favour of this Court, as having chosen to take the law into his own hands, and having come with force, and a strong party of his

people, to take away these ores, when he ought to have brought an action for recovering them.

"The question, however, upon which this cause must turn, is that which has been opened by *Mr. Selwyn*, viz. what estate does a *customary freeholder* take?

"By our *admission*, we take an estate of inheritance to be held '*according to the custom of the manor*,' but not '*at the will of the lord*.' This, therefore, is a customary freehold, — and it has never yet been decided whether the customary freeholder takes the right of soil.

"In the case of *Burrell* v. *Dodd*, the decision was upon a different point. And so in *Doe* dem. *Danvers* v. *Cook*, which decided only that a customary freehold might pass by will under the description of a *copyhold* estate: which we do not deny.

"With respect to *Mr. Justice Blackstone*'s Treatise on Copyholds, entitled as it is to all the encomium that has been bestowed upon it, it is yet to be remembered for what purpose it was written; which was, merely to shew that customary freeholders were not pure freeholders, and, as such, entitled to vote at elections for members of parliament.

"The author cites passages from *Bracton* (ch. 28, § 5) — *Fleta* — *Britton* (ch. 6, § 165) — *Lord Coke* on Copyholds (32, p. 58);

[All which were read by *Mr. Erskine*.]

and he observes, that the word *freehold*, in common parlance, sometimes signifies the duration

of *interest*, and sometimes the nature of the *tenure*. 'Where' (he adds) 'I use the words *frank-tenure*, I am to be understood only as speaking as to the duration of the estate.'

"What, then, is the distinction between the common copyholder and the customary freeholder? The common copyholder held *at the will of the lord;* if he committed waste, or did other acts injurious to the reversion, he forfeited his estate. And the reason, according to *Lord Coke*, is, because he determined the will of the lord. But when an estate of inheritance was granted, that, not being an estate determinable at the will of the lord, was not subjected to forfeiture by the commission of waste; but the tenant took an estate in all respects similar, and entitled to the same privileges, as in other estates of inheritance, subject only to the customs of the manor. And it lies upon the other side, therefore, to shew a custom within the manor, by which they may limit, or abridge, the larger interest which has been granted unconditionally by the lord.

"This proposition is supported by the case of *Gale* v. *Noble*, already referred to, — which was a trial at bar; and to which *Lord Ellenborough* has referred in the case of *Brown* v. *Rawlins* (7 *East*, 428).

"It was in consequence of the duration of their interests that copyholders of inheritance did not forfeit their estates. And in other estates, not being of copyhold tenure, before the statutes of *Marlebridge* and *Gloucester*, tenants *for life* were

not impeachable for waste; neither were tenants *for years;* because the lessor might have restrained them, if he had so intended, by the letting. And with respect to leasehold estates held for terms of years renewable, — as it is said the estates of the conventionary tenants in the assessionable manors were, — possibly these tenants, at the time those statutes passed, although *nominally* lessees, yet might have already acquired a substantial estate of inheritance, and if so, they are not within the statutes, but are unimpeachable for waste, as at common law."

Mr. Justice Bayley. — "The reason why a tenant for life, without impeachment of waste, may cut down timber is, that he has a *property* in it."

Mr. Erskine. — "True, my Lord. And this brings it to the simple question, whether a customary freeholder can be impeached for waste without a custom in the manor vesting a right to the minerals in the lord? If he cannot, then it is necessary to consider the question of the admissibility of the assession rolls, which I have hitherto put out of the question.

"As to this evidence, it is to be observed, that the rolls contain no charge of any agent against himself; neither is there any perception of profits, or other extrinsic evidence in support of the entries in the books.

"Court rolls, in former cases, have only been used to prove *customs*, but not to prove *facts;* and to prove customs, reputation would be suf-

ficient, though it would not in proof of facts; and there is no case to shew that such documents have ever been admitted to prove any thing but matters of reputation.

"In the cases cited by the other side, none of the grounds on which the Court rolls were there admitted apply here: and in many cases, such evidence has been admitted because there was no interest in the party making it which would be affected by it: whereas, in this case, the evidence is altogether in support of the interests of those who produce it.

"It is necessary to look at the *principle* on which Court rolls are admitted in evidence; it is because they are public documents, to which all the tenants of the manor have access, and which, therefore, cannot be supposed to be falsified: but here all the documents are kept in London, and all access to them by the tenants is denied. The entries, also, in the assession rolls and books, are directly at variance with the admissions; which have, in fact, been granted by the steward of the manor from 1660 down to the present time; and therefore the question is, which is to be relied upon?

"Upon the question of the admissibility of these rolls to shew what was done, or was the custom in other manors, I would observe, that in the cases cited, the evidence as to the customs of the manors was admitted because there was no evidence of the tenure, or peculiarity incident to it, in the particular manor; whereas here we have

evidence of the tenure, and that by positive compact with the lord.

"And with respect to the argument on the other side, that these estates were inalienable,—even admitting that to be so, still, I apprehend the grant to the Plaintiff, though it might possibly be avoided by the next *Duke of Cornwall*, yet cannot be impeached by the grantor, and those who claim under him.

"As to the verdict being against the weight of evidence, I should contend, that there was evidence of a grant to us which would confer a right to these mines."

Mr. Justice Bayley.—"There are estates very common in *Ireland* something like this; leases for years—renewable for ever.

"Is there any thing to shew that the tenants here take estates so large as those of customary freeholders, or as the tenant-right estates in the north of England?"

Mr. Erskine.—"I apprehend there was.—Your Lordships will find, as to the taking the dues of *tin*, that in all ancient bounds, although in freeholds, the *Duke of Cornwall* was entitled to the dues; but in modern bounds, even in copyholds of inheritance, the owner of the tenement takes them, as was proved in *Mr. Carthew*'s case, whose tenement is part of the same conventionary estate as the Plaintiff's: this evidence all had reference to tin.

"As to the enrolment of the leases being evidence, I would observe, there was no patent officer appointed for the specific purpose of en-

rolment; and the evidence only shewed that search had been made for the counterpart, but none for the lease itself.

"With respect to the dues of *copper*, there was no proof of any having been taken under any conventionary tenement. There was no attempt to prove *Gewan* to be a conventionary tenement. We expressly proved it to be on the down, or waste. And as to the copper which was taken in the iron-shaft on Plaintiff's land, the proof was very slight; and the copper taken by the parties who had the tin bounds; the Plaintiff's estate being originally bounded for tin. There was, however, evidence to shew that *Wheal Pembroke* copper mine was in a conventionary tenement, called *Merthyn;* but there the dues were received by the owner of the tenement, and not by the *Duke of Cornwall* or his lessees.

"The ores in question, after being raised by the Plaintiff on his own land, were taken away by the Defendant; but the Plaintiff having reduced them into possession, the Defendant ought to have shewn his title, derived from the lessees of the dutchy. No such proof, however, was given; and the objection was taken by *Serjeant Pell*, in his address to the Jury in reply; and commented upon by the Judge, who held that such proof was not necessary.

"Another misdirection, also, of the learned Judge occurred, with respect to the reservation in the conveyance to *Mr. Rashleigh*, his Lordship observing, that *Mr. Rashleigh* could not have granted the mines by the grant to and admission

of *Mr. Wood*, the Plaintiff's trustee; because, being excepted out of the conveyance to him, he had them not to grant; whereas, your Lordships will see that we claimed under a grant prior to the conveyance to *Mr. Rashleigh*, by which, as we say, the minerals were conveyed by the lord to the tenant, and were afterwards surrendered by him into the hands of *Mr. Rashleigh*, who regranted them to *Wood*.

"Upon all these grounds, therefore, I submit the Plaintiff is entitled to a new trial." *

Mr. Carter supported the same arguments which had been urged by *Mr. Erskine*, and particularly pressed the inadmissibility of the assession rolls in evidence, as not being public documents,—not entitled "*assensu omnium tenentium*,"—not charging stewards with receipts of money,—not being returns upon the oaths of any homage or jury,—not signed by any tenants, steward, or auditor; and the commissions being mere letters from a high personage to his stewards, whose returns do not shew any of those circumstances which the law recognises as sufficient to make them evidence.

He contended, also, that although the estates might not be severed from the dutchy, yet this was not a severance or alienation, but a grant, warranted by the custom of the manor.

* I cannot conclude this report of Mr. Erskine's speech without expressing my conviction, that I have not been able to do justice to one of the ablest and best-delivered arguments I have ever heard in the Court of King's Bench.

And he further noticed, that the sites of *Gewan* and *Wheal Change* were both included in the conveyance to *Rashleigh*, but the minerals reserved to the duke; wherefore the copper taken there was, without dispute, the property of the dutchy.

8th FEBRUARY.

Mr. Serjeant Wilde. — "Having been unavoidably absent during the former part of this argument, I will endeavour not to go over the same points, but shall request your Lordships' attention principally to the questions of the admissibility of the court rolls, and their effect; and in arguing this, it seems material to consider the relation of the parties, on which, perhaps, the objections to the admissibility are founded.

"The omission of the words 'to hold at the will of the lord,' in the admission granted to *Mr. Wood*, is a material test by which to try the nature of the tenant's interest. There have indeed been cases deciding that tenants may hold at the will of the lord without these words, but with such cases we have nothing to do; neither is it necessary to cite authorities to shew that the omission of these words gives a customary freehold, where the estate is granted to hold to the tenant and his heirs according to the custom of the manor: the case of *Crouther* v. *Oldfield* (*Salk.* Rep. 365), and 1 *Wms. Saund.* 348, establish that.

"Now, assuming the Plaintiff's estate to be a customary freehold, then consider what is

the interest of a customary freeholder: and here it is material to notice the origin of these estates.

"In customary freeholds the owners were originally *free* tenants, but afterwards ousted by the hand of power, and re-admitted to *base* interests. From *Bracton* down to *Blackstone*'s treatise, it is universally so treated."

Mr. Justice Bayley.—"But you don't mean to say they were tenants *in free socage?* I always understood them to be tenants holding by *base* services."

Mr. Justice Littledale.—"What do you mean by *the hand of power?* Do you mean the change introduced by the *Norman* Conquest?"

Mr. Serjeant Wilde.—"Certainly. After the *Norman* Conquest the tenants held by base services. The copyholder, holding at the will of the lord, became a mere tenant at will, having of course a very limited right; and what he claims beyond that which is peculiar to every tenant at will, he must claim as allowed by the will of the lord, evidenced by the custom of the manor. And in such case his proof being to vary an interest which the law has defined, and to establish an exception to a general rule, he cannot (for example) make use of his right to commit *one* species of waste by custom, in order to establish some *further* exception.

"But a customary freeholder has all the incidents of the estate to which he is admitted, limited by the custom of the manor. He is

admitted to an estate of inheritance, and where custom is silent, he takes all the incidents to such tenure. What those incidents are, I have no means of proving, but by shewing what are the usual incidents of estates of inheritance. But the *onus* of proof is now reversed; and if the lord seeks to narrow this estate, and explain away the effect of his own admission, he must give evidence to shew the modification by the customs of the particular manor: and unless he can do this, the tenant of an estate of inheritance is, *primâ facie*, entitled to the whole estate in the land."

Mr. Justice Bayley.—"I think you pass over those cases which say, that though the tenant has a freehold in point of *interest*, yet, in respect of the *tenure*, the freehold and right of soil are in the lord; particularly the *Bishop of Winton* v. *Knight* (1 *P. Wms.* Rep.)."

Mr. Serjeant Wilde.—"The case of *Gale and Noble*, in *Carthew*'s Reports, is contradictory to that, and never was over-ruled; and the *Bishop of Winton* v. *Knight* is not satisfactory, as being only an issue tried at *Nisi Prius*."

Mr. Justice Bayley.—"But recognised as law by the Court of Chancery."

The Lord Chief Justice.—"In *Gale and Noble* there was no discussion as to the nature of the rights or interest of a customary freeholder, but it seems to have been taken for granted throughout that case, that if he was not a copyholder the lord had no right to enter for a forfeiture;

and it being decided that he was no copyholder, the lord could not enter."

Mr. Serjeant Wilde.—"That exactly squares with my position: and now I come to the point—how is it sought to cut down this tenant's interests? The answer is—by the court rolls! But it is one of the many remarkable features of this case, that we could not get one of the court rolls, although we served all the officers with *subpœnas* for the purpose. A selection was made by the officer of what documents *he* thought material; but *Mr. Abbott* proves that there are rolls, which he has left in the office, from 1660 down to the present time; and it appears that there are regular admissions from that time to hold to the tenant and his heirs, which, I say, is of itself evidence of a custom from time of legal memory.

"This is a contest by a tenant of the manor with his lord; and your Lordships will perceive that the assession books are not in conformity with the *actual* surrenders and admissions. None of these were produced: *Mr. Abbott*'s evidence shews that he chose to leave them all in town.

[The evidence was here referred to.]

"As against the lord, I submit that his own grant is good, clear of all question of inalienability, and although it may possibly be void as against his successor.

"The latter rolls, I think, are clearly inadmissible: they cannot be used for their antiquity, and are contradicted by the facts which have actually taken place.

"The old rolls are signed by no one, and only recite commissions to which there are no returns."

The Lord Chief Justice.—"I think they purport to be enrolments of commissions, and what was done under them."

Mr. Serjeant Wilde.—"In the case of *Marriage* v. *Lawrence* (3 *Barn.* and *Ald.* Rep. 142), certain public books were produced by the corporation of *Malden* as evidence of their rights, but it was held they were only *private entries*. The principle, I think, applies to the present case, for there is nothing of a public nature in these entries: they are mere private matters between the lord and his tenants; and the party making them had a direct interest in so doing, in order to abridge the rights of his tenants. I cannot imagine a stronger interest; and observe—the rolls are now used for this very purpose. They are, besides, not the *best* evidence; and the absence of court rolls ought to have been proved before they were admitted.

"But what do these rolls prove? If they prove any thing, then this is only the first of a long series of causes; for every tenant under the dutchy will now be told,—as they learnt from the *Attorney-General* at *Exeter*,—that they are only tenants from seven years to seven years, and they hold at the mercy of the crown! This is the *effect* of the argument on the other side, though it is thought right to put forward their claim with as *modest* an appearance as possible

in the outset, lest they should startle both the Court and every other person by the boldness and magnitude of their claim. It is not the minerals only, but the very estates themselves which they are claiming: and claimed by whom? not indeed by the crown—but by its lessees: and if the claim can be supported, then a private individual, who bought this manor at a moderate price, will become possessed of all these valuable estates; and the lessees, who purchased the dues of copper at a very trifling sum—a few hundred pounds—will have acquired a property worth fifty or a hundred times the value of the dues of tin, which were bought for 18,000*l.*!

"How, my Lords, are these tenants admitted to their estates? These books, according to the evidence, purport to be made out from the surrenders and admissions; but what right, then, have the dutchy officers to alter the whole terms and effect of the *actual* admissions? At least, these books ought to state *the truth!*"

Mr. Justice Bayley.—"Let me see the assession book of 1794."

Mr. Justice Littledale.—"I wish to see one of the early books."

[The books were handed up.]

Mr. Serjeant Wilde.—"It is impossible to disguise the difficulty of explaining, consistently with the Plaintiff's title, the words purporting that the repairs shall be perfected by the tenant, which are in his admission. But we challenge the other side to prove any one

instance of such repairs ever having been done by any *conventionary* tenant.

"How happened it that *Mr. Carthew* took the dues of the unbounded part of his tenement, whilst the duke took the dues of the bounded part? This is strong proof against the present claim. *Mr. Caërlyon*, also, has taken the copper dues as to *Pembroke* mine, which is in his tenement."

The Lord Chief Justice.—"Did it appear that *Carthew*'s tenement was a customary tenement?"

Mr. Serjeant Wilde.—"Yes: it is part of *Nansmellan*, the same tenement as Plaintiff's."

The Lord Chief Justice.—"Was no proof given of any rents received under these tenures?"

Mr. Serjeant Wilde.—"None."

Mr. Justice Bayley.—"Is it not so *Mr. Selwyn*, that you grant out estates of one description, namely, to a man and his heirs, and yet you enter in your book a taking of another description, namely, from seven years to seven years, at a rent, of which rent you shew no receipts?"

Mr. Selwyn.—"It is so, my Lord."

Mr. Serjeant Wilde.—"There is another material objection to this verdict. Your Lordships will not be surprised that we, under all our difficulties, were not disposed to admit any thing which was not proved, and particularly not the authority under which the Defendants acted; for we wished especially to see the lessees' title and their authority, and yet none such was proved. It is attempted now to be said,

that it was waived by us at the trial, but which certainly was not the fact: for *Mr. Serjeant Pell* noticed the objection at the time, and was answered by the learned Judge, who told the Jury that no such proof was necessary, because the Plaintiff had not proved his title, which we submit was a misdirection."

The Lord Chief Justice.—"Was there any evidence as to the limits of the *East Crinnis* mine?"

Mr. Serjeant Wilde.—"None: the *East Crinnis* mine adjoins *Nans-mellan;* it had not been worked under *Nans-mellan;* this was the first opening of the mine in that tenement.

"The only question left to the Jury was founded on the assumption, not only that the court rolls were admissible as evidence, but that they were *proof,* and could not be counter-vailed by the actual admissions of modern date. And the verdict has found that the tenants have no estates of inheritance, but only for seven years; for that is the effect of it.

"Another misdirection of the learned Judge respected the reservation in the conveyance to *Rashleigh.* I pressed my objection that we, who claimed by a title anterior to that conveyance, could not be prejudiced by the exception contained in it. But I was unfortunate in my argument, for the Judge answered me by saying, that the crown having reserved the minerals out of the grant to *Mr. Rashleigh,* he could not suppose that his Majesty would have reserved to himself

what was already vested in other persons: and he should therefore now leave it stronger to the Jury than he was before about to have done.

"Under all these circumstances, and particularly from our unprepared state, justice requires that we should have a new trial; and if any doubt arises, that it will be construed favourably for us."

The Lord Chief Justice.—"The Court will consider of this case: it has been very well argued on both sides."

Cur. adv. vult.

COURT OF KING'S BENCH.

MICHAELMAS TERM, 1825.

DOE, DEM. CARTHEW, AND OTHERS, *v.* BRENTON.

THIS was an action of *ejectment*, brought by *Mr. Carthew*, as owner of part of *Lemellan* estate (held by the same tenure as the residue of that estate possessed by *Mr. Rowe*), against the Defendant, to recover possession of about ten acres of land, which the Defendant had taken possession of, and occupied, for the purpose of working mines under it, — claiming a right to do so, as captain of the *East Crinnis* Company, and by authority derived from the lessees of the dutchy.

The Plaintiff claimed by his ejectment certain *mines*, *lands*, and *buildings*. The Defendant entered into the usual *consent-rule* to defend for the mines and buildings, "*together with a right of entry on the lands to work the mines.*" Upon which the Defendant signed *judgment* for the lands, by default, and sued out a *writ of possession*. The execution of this writ the Defendant resisted, and applied to the *Lord Chief Justice* in the vacation, who made an order to restrain the execution of the writ until the fourth day of the *present* Term. And the *Attorney-General* afterwards obtained a *rule* to shew cause why the judgment and writ of

possession should not be qualified by the terms of the consent-rule; being, in effect, that the Defendant should keep possession of the land so far as was necessary for the purpose of working the mines.

Mr. Erskine and *Mr. Carter*, now shewed cause, on behalf of *Mr. Carthew*, against making this rule absolute; contending that the Defendant had no right to take forcible possession of the land, and occupy it for the purposes of mining within it; and that, if he had such right, he ought to be put to his action at law to enforce it: that *Mr. Carthew* considered himself to be entitled to the mines: but if not, he stood in the same situation as all other copyholders; and even the lord of the manor, if entitled to the mines, could not enter upon the land, in order to dig them, without first making an agreement with the owner, or tenant of the land, for his compensation, as had been expressly decided. (See the *Bishop of Winton* v. *Knight*, and other authorities, cited in *Rowe* v. *Brenton*.)

[The counsel for the Defendant were stopped by the Court.]

The Lord Chief Justice. — "I do not regard the form of the consent-rule; and am very clearly of opinion that you have no right, in this way, to obtain possession of the land. *Mr. Carthew* has not resorted to the proper remedy—he should not have brought *ejectment*, but *trespass*.

"The position is rightly laid down, that the

owner of mines entering upon the land of another, for the purpose of working the mines under it, must first make an agreement with the owner, or tenant of the land. But that does not affect the present question, which is only as to the proper form of action for the injury alleged to have been sustained."

Mr. Justice Holroyd. — "I am clearly of the same opinion. The Defendant does not claim the land, but only a right of entry and user of it, for the purposes of mining: and if he has been guilty of *excess* and *improper user* of the land, you have your remedy by an action of *trespass*, but you cannot recover the right of user by *ejectment*."

Rule made absolute.

THE END.

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James Smith