REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. HOR.

VOL. V.

CONTAINING THE CASES OF EASTER, TRINITY, AND MICHAELMAS TERMS IN THE 44TH AND 45TH YEARS OF GEO. III.

1804.

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JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period of these REPORTS.

Edward Lord Ellenborough, C. J.
Sir Nash Grose, Knt.
Sir Soulden Lawrence, Knt.
Sir Simon Le Blanc, Knt.

ATTORNEY-GENERAL.

The Honourable Spencer Perceval.

SOLICITOR-GENERAL.

Sir Thomas Manners Sutton, Knt.

A

TABLE

OF THE

CASES REPORTED

IN THIS FIFTH VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

In the Forty-fourth Year of the Reign of GEORGE III.

IN the last Vacation died, at his house in *George Street, Westminster,* the Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Justice of the Court of Common Pleas. He was succeeded in this Term by

JAMES MANSFIELD, Esq. one of His Majesty's Counsel learned in the Law, who was sworn into office on *Tuesday* the 24th of *April,* and was knighted. And on the 25th he was called to the degree of Serjeant at Law, and took his seat on the Bench, and gave rings with this motto, *Serus in Cœlum redeas.*

On *Saturday* the 28th of *April,* the following Gentlemen took their places within the Bar :—

As one of His Majesty's Serjeants learned in the Law,

Mr. Serjeant *Williams.*

As His Majesty's Counsel learned in the Law, [2]

Richard Hollist, of the Middle Temple, Esq.

Thomas Milles, of Lincoln's Inn, Esq.

George Wilson, of Lincoln's Inn, Esq.

James Topping, of the Inner Temple, Esq.

With a Patent of Precedence,

John Fonblanque, of the Middle Temple, Esq.

1804.

Thursday, April 19th.

Where it appeared in evidence upon an action of *indebitatus assumpsit* for toll, that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city on horses, or in carts or waggons (that is, at the rate of 1*d.* for every horse-load, and 2*d.* for every cart-load drawn by one horse, [3] and 2*d.* more for each additional horse); held, that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches instead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods.

The Mayor, &c. of CARLISLE *against* WILSON.

IN *assumpsit*, the fourth count, to which the evidence of the plaintiffs principally applied, was on an *indebitatus assumpsit* for tolls and duties, due and payable from the defendants to the plaintiffs, for the passage of coaches and carriages of the defendants, loaded with goods and merchandizes, in and through the city of *Carlisle*. Plea, *non assumpsit*. The action was brought to try the right of the corporation to take toll from the defendants as the proprietors of a stage coach passing in and out of the city with parcels, who claimed to be exempt, principally on the ground that their carriages were chiefly adapted to the conveyance of passengers, and that the taking of goods for hire was only a secondary incidental employment. At the trial before *Chambre*, J. at *Carlisle*, the plaintiffs in support of their claim to toll for horses, carts, and carriages passing with goods in and out of the city, produced in evidence an inquisition taken at *Carlisle* on the 6th of *April*, 25 *Ed.* 3. and returned into Chancery, concerning the liberties and customs belonging to the city of *Carlisle*, &c. and why the citizens had not rendered to the Crown 80*l.* per annum rent for the profits of the liberties, &c. whereby it was found that the citizens of the said city had been accustomed to have amongst their liberties and customs, (*inter alia*) "*Theolo-*" *nium intrinsecum et forinsecum vocat. Thurg-Toll* (*i. e.* "Toll Thorough) *ut parcellas firmæ civitatis illius; et quod-*" *que prædicti cives habuerunt omnes libertates et proficua* "*prædicta a tempore quo non existit memoria quousque*," &c. and then stating a wrongful obstruction in the exercise of their rights. Also a charter from the Crown of the 7th of *February*, 26 *Ed.* 3. reciting the said inquisition, and granting to the citizens (*inter alia*) the said toll, by the same description as in the inquisition. And this charter, together with all liberties, customs, privileges, franchises, immunities, jurisdictions, and grants, is ratified and confirmed to the corporation by a charter of the 13 *Car.* 1., under which the corporation has its present corporate name. Also the usage of the corporation to repair and pave all the streets of the city was proved and admitted. With respect to the collection

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collection in fact of toll, it appeared to have been the usage, as far back as living memory could trace, to pay 1*d.* for every horse-load of commercial goods for sale, either carried in or out of the city; (unless the goods were under the value of 13½*d.*, and then no more than half toll was ever paid, and sometimes nothing.) If the goods were conveyed in a cart drawn by one horse, then 2*d.* was paid; if by more than one horse, 2*d.* in addition for each horse, unless the carriers compounded for their tolls. The value of the goods in carts made no difference; but if the horse or cart merely passed through the city with the same goods, they paid but one toll. For many years back the proprietors of public *waggons* had usually compounded for their tolls; if not, 2*d.* a-horse was taken from the waggoner. Nothing was ever taken for hay, corn, household goods, &c. It further appeared that stage coaches had been used in *Carlisle* for about fifty years past: but no claim was made in respect of them for toll till about fifteen years ago, which was then resisted. That where the proprietors had forwarded goods in carts they had paid the usual toll; and they had also paid when fish and other articles had been sent into the city to be forwarded by the coaches: but this was explained to be toll paid for the bringing in of such articles by horses or carts, and not for the sending them on by the coaches. The goods for which toll was demanded in this instance were commercial goods for sale, sent by the defendants' coach. The defendants produced no evidence; and the case went to the jury with the learned Judge's observations to them, that the right to the horse and cart toll was clearly proved, and that possibly the consequence of that usage might, as to the toll in dispute, be a mere legal question upon which either party might take the opinion of the Court above: and he therefore left the case to them upon the usage; telling them that if they were satisfied that the plaintiffs were entitled to a toll on carriages carrying goods (such as had been in use) the payment of the toll could not be evaded merely by using carriages of a different construction from common carts and carriages; and that the only distinction he could point out for their attention was that the principal use of the coaches being for the carriage of passengers, for which no toll was due, and it appearing that the quantum of the toll was

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estimated by the number of horses employed in drawing the carriages, the proportion of the number of horses to them must be greater than the relative quantity of the goods which they carried would require; in consequence of which a much heavier toll in respect of the goods would fall on the coach-owners than on the owners of other carriages used

[5] chiefly for the conveyance of goods. And also that for a considerable number of years since coaches had been set up in *Carlisle*, the corporation had not asserted their claim of toll for such carriages. The jury found a verdict for the defendants. But upon the report of the case, after a rule *Nisi* granted in *Michaelmas* Term last, for setting aside the verdict and granting a new trial, the learned Judge intimated a doubt whether the evidence did not require him to have told the jury that, if they were satisfied that the right to the toll for the passage of carts and waggons was established by the written and parol evidence, it would follow as a legal consequence that the plaintiffs were entitled to the like toll for the passage of coaches carrying goods of the like description.

Park, *Holroyd*, and *Hullock*, in shewing cause against the rule, contended that the grant of toll, being in general terms, must be construed and restrained by the usage; and here it appeared by the evidence to be a grant of toll for the carriage of goods *sub modo*, that is, by horses or in carts or waggons. In the single instance that any attempt was made to extend it to coaches, the claim was resisted with effect; and this extends back through a period of fifty years. And there is no absurdity in supposing that a toll might be granted on goods carried in a particular manner, which was not meant to extend to goods carried in a different way; especially as the toll in this case varies according to the number of horses employed in the draught of the carriage, which may be reasonable enough as applied to carriages whose principal use is for the conveyance of goods, as furnishing a good

[6] criterion of the weight of the draught, and consequently apportioning the toll to the probable injury done to the streets: but as applied to coaches, the number of whose horses is adapted to the weight of passengers, for whom no toll is payable, and not to the goods, which may be trifling in weight and value, the same rate of toll must press very unequally

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unequally and unfairly. By these means the same toll may be paid for one small parcel which happens to be in a coach drawn by four horses, as for various goods to a considerable amount drawn by the same number of horses in a cart or waggon. It is not, therefore, the shape or denomination of the carriage which constitutes the difference, but the purpose to which it is principally applied.

Cockell, Serjt. *Wood*, *Topping*, and *Raine*, *contrà*, were stopped by the Court.

Lord ELLENBOROUGH, C. J.—The custom in substance, as to the present inquiry, is to pay a toll for goods conveyed in carriages, in proportion to the number of horses. What the form or denomination of the carriage may be is immaterial, whether it be cart, waggon, or coach; if it be applied to the use of drawing goods for sale, the custom attaches upon it. The reason why the toll has not been, in fact, collected from the owners of public coaches is, because, till of late years, it has not been the general custom of that part of the country to convey goods in such carriages; and therefore the collection of it might not have been worth attending to; and there is no reason to attribute the omission to any other cause. Within the memory of living persons, there were no more than four coaches kept in *Cumberland*. Bishop *Nicolson*, who wrote a history of that county, states, That about the year 1710, in travelling from *Rose Castle*, near *Carlisle*, towards *London*, with a [7] young nobleman, his pupil, they were obliged to go as far as *Stamford* before they met with a stage-coach to carry them on. As to the disproportion stated to arise from the application of the toll to carriages of this description, where the number of horses is adapted more to the carriage of passengers than of goods, that is the party's own act, of which he cannot complain. The corporation cannot discriminate the proportion adapted to each; and may therefore charge for the whole number which are actually used for the draught of the carriage in which tollable goods are conveyed; for the toll is payable in respect of the goods, and not of the coach. Upon the same principle, where a man mixes his corn with mine in my bag, I may take the whole, because I cannot distinguish to separate them again; and it was his own fault to mingle them:—so if the coach-

owners

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owners will multiply the number of their horses, because of the additional weight of passengers which they carry, together with goods, for which the toll is payable in proportion to such number, it is their own act, and the corporation have no means of ascertaining the proportion of horses used for each. Here then the right to the toll having been clearly made out, there must be a new trial.

GROSE, J.—The question is, Whether any thing were due for toll in this case? The toll is that duty which persons passing in or out of the city with goods for sale, on horseback or in carriages, are liable to pay. It is not merely for the passage of the person, but of the person with goods. The usage was for some time probably confined to goods carried on horseback; afterwards, as carts came into com-
[8] mon use, it was extended to them; and there is no reason why the toll should not be extended to coaches, since they have come into use for the purpose of conveying commercial goods; and as to these latter having been suffered to carry for some years back, without the corporation collecting from them, it was probably not worth their while to collect it in the first instance, till that mode of conveyance grew to be more frequent: but since that is the case, there is no reason why the same toll should not be collected from carriages of this description as from carts, when applied to the same purpose.

LAWRENCE, J.—The toll is payable for goods conveyed on horses and in carriages; and in order to measure the *quantum* of toll in the latter case, they reckon the number of horses used in the conveyance: and when we attend to the occasion of granting the toll, which was for the repair of the streets, such a measure seems reasonable; for if the goods were carried on horseback, that was not considered as occasioning much damage to the streets; and, therefore, the toll was only 1*d.*: but if conveyed in a cart with one horse, the damage done was considered to be double, and 2*d.* was taken; and if more horses were necessary to draw the weight, the injury was reckoned to be proportionably greater. The carrier was considered to be a competent judge of the number of horses required to draw the weight; and that mode of ascertaining the *quantum* of the toll was liable to no difficulty or dispute. It is no objection then that

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that the coach may have but one parcel of goods to convey; for it is for the carrier to consider whether it be worth his while to proceed with his load or not; but if he do, he must pay toll according to the number of horses which he uses.

*LE BLANC, J.—By the inquisition and ancient grants, it appears that toll was given to the citizens of *Carlisle* in general terms, leaving it uncertain by what the *quantum* was to be measured. This is supplied by the evidence of the usage; whence it appears that it is to be estimated by the horse-load when the goods are carried in that manner; or when conveyed in carriages, by the number of horses drawing each carriage. Formerly, it appears that the only carriages in which goods were conveyed, were carts and waggons; and it is not at all improbable that, when those were the only carriages in use, they took as many passengers in proportion to the quantity of goods as coaches do now. Yet during all that time the toll has always been claimed from the carrier, and not from the proprietors of the respective goods, in proportion to the number of horses by which the carriage was drawn: and it is more advantageous to the public that the toll should be collected in this manner; for when claimed from the carrier, he pays one entire toll for all the parcels of goods together, in proportion to the number of his horses; but if it were to be claimed from the owners of the goods, then each would have to pay toll according to the same proportion. If then the coach proceed with passengers only, without any commercial goods, no toll will be payable: but if it have such goods in it, the toll is payable according to the number of horses by which the coach is drawn. In this manner it has always been collected from carts and waggons; and altering the form or name of the carriage can never affect the claim to the toll.

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Rule absolute.

1804.

Thursday, April 19th.

No person can, by the statute of frauds, be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the consideration for the promise, as well as the promise itself; and therefore where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that *parol* evidence of the consideration was inadmissible by the [11] statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action.

WAIN and ANOTHER *against* WARLTERS.

THE plaintiffs declared, that at the time of making the promise after-mentioned, they were the indorsees and holders of a bill of exchange, dated the 14th of *February*, 1803, drawn by one *W. Gore*, upon and accepted by one *J. Hall*; whereby *Gore* requested *Hall*, seventy days after date, to pay to his (*Gore*'s) order, 56*l.* 16*s.* 6*d.*; which bill of exchange *Gore* had before then indorsed to the plaintiffs; and which sum in the bill mentioned was, at the time of making the promise by the defendant, due and unpaid: and thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one *A.* as their attorney, to sue *Gore* and *Hall* respectively, for the recovery of the said sum so due, &c. whereof the defendant, at the time of his promise, &c. had notice: and thereupon, on the 30th of *April*, 1803, at, &c. *in consideration of the premises; and that the plaintiffs*, at the instance of the defendant, *would forbear* to proceed for the recovery of the said 56*l.* 16*s.* 6*d.* he, the defendant, undertook and promised the plaintiffs to pay them, by half past four o'clock on that day, 56*l.*; and the *expenses* which had *then been incurred* by them *on the said bill.* The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto *forborne to proceed* for the recovery thereof; and that the expenses by them incurred on the said bill, at the time of making the promise by the defendant, and in respect of their having so retained the said *A.* and on account of his having, before the defendant's said promise, drawn and ingrossed certain writs, called *Special Capias*, against *Gore* and *Hall* respectively on the said bill, amounted to 20*l.* of which the defendant had notice; yet the defendant did not, at half past four o'clock on that day, &c. nor at any time before or since, pay the said sum of 56*l.* and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay; and the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs,

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plaintiffs, at the trial at *Guildhall*, produced the written engagement, signed by the defendant, which was in these words: "Messrs. *Wain* and Co. I will engage to pay you by half past four this day, fifty-six pounds and expenses on bill that amount on *Hall*. (Signed) *Jno. Warlters;* (and dated) No. 2, *Cornhill*, *April* 30th, 1803." Whereupon it was objected on the part of the defendant, that though the promise, which was to pay the debt of another, were *in writing*, as required by the statute of frauds, yet that it did not express *the consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call, in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another, without any consideration; and was therefore *nudum pactum* and void: and Lord *Ellenborough*, C. J. upon view of the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 4. which avoids any special promise to answer for the debt of another, "unless the *agreement* upon which the action shall be [12] brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c. thought that the term *agreement* imported the substance at least of the terms on which *both* parties consented to contract; and included the *consideration* moving to the promise, as well as the *promise* itself: and the *agreement* in this sense not having been reduced to writing, for want of including the *consideration* of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and, therefore, nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the *promise*, or binding part of the contract to be *in writing;* and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and *Lawes* shewed cause against the rule. The question is simply this, Whether *parol* evidence can be given of an *agreement* which the statute of frauds avoids, unless

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it be *in writing?* The words are, "That no action shall be "brought, whereby to charge the defendant, upon any "special promise, to answer for the debt, &c. of another "person, &c. unless the *agreement* upon which such action "shall be brought, or some memorandum or note thereof, "shall be *in writing*, and signed by the party to be charged "therewith," &c. Now, to every *agreement* there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say, that the parol evidence offered of the consideration, namely, the forbearance to sue *Hall*, did not go to contradict the written promise: it is enough that being part, and a material part, of the *agreement*, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper, the debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would, before the statute, have been void, as *nudum pactum* at common law; so it is not made good by the statute, without a consideration in law for entering into such an agreement; which *agreement, i. e.* the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston* v. *Marceau* (*a*), where the plaintiff had

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(*a*) 2 Black. 1249.

agreed,

agreed, in writing, with the defendant's testator to let him certain premises, at a certain rent, parol evidence, tendered to shew that the tenant had agreed to pay a further sum for ground rent to the ground-landlord, was rejected, as subversive of the statute of frauds; although it was there contended, that the evidence offered did not go to *alter* but to *explain* the agreement: so in *Gunnis* v. *Erhart* (*a*), the verbal declaration of an auctioneer at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

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Erskine and *Marryat*, in support of the rule, said, That the evidence tendered in the two cases cited, went not to explain but to contradict the written agreements. In the one case to increase the *quantum* of the rent specified; in the other, to subtract so much as the charge amounted to from the value of the estate which was offered for sale, *free from incumbrances*. But here the parol evidence went merely to shew on what occasion the written agreement had been entered into; and it is in common practice to admit parol evidence for such a purpose; it is part of the *res gestæ*, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the *promise* by the defendant to pay the debt of *Hall*. This, before the statute of frauds, might have been proved wholly by oral testimony; but since that statute, the promise can only be evidenced by writing, signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult indeed to account for the introduction of the word *agreement* into the latter part of the clause, which, in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds, in a thing done or to be done (*b*)," is more properly applicable to the other branches of the clause, namely, "an *agreement* on consideration of mar-" riage, or upon *contract*, or sale of lands, &c. or upon any "*agreement* not to be performed within the space of one " year, &c. than to any special *promise* by an executor, to " answer damages out of his own estate, or to any special

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(*a*) 1 H. Black. 289. (*b*) 1 Com. Dig. 311.

"*promise*

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"*promise* to answer for the debt, &c. of another." To such *promises* the word *agreement* can only be considered applicable, so far as it is synonymous to *engagement* or *undertaking*, in which sense it is often used in common parlance; and therefore means, in this respect, the agreement or promise to pay the debt of another. Besides, the statute does not require the *whole* agreement to be set out in form; but it is sufficient if there be a *note* or *memorandum* of it in writing; that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words therefore the *promise* is made, which, before the statute, would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute under the like circumstances: but in either case, the inducement for making such promise, which is part of the *res gestæ*, may be evidenced by parol. Thus, suppose a promise in writing to pay the *expenses* attending a certain bill drawn by another, parol evidence must necessarily be let in to shew to what bill the promise was meant to apply, and how the expenses arose, and the bill itself would be produced: and this would be evidence not to vary, but to corroborate the written promise. The 3d, 7th, and 17th sections of the Act all require the signature of the party to some note in writing, in order to charge him with the several subject-matters of those sections; but in all those cases, the party must be charged on the special written *agreement*; but here he is charged on the *promise*, of which the writing is
[16] only evidence. Yet the 4th section supposes that the party is to be charged *upon the agreement*, "unless the agreement "*upon which* such action shall be brought," &c.; which shews that *agreement* as there used, means no more than *undertaking* or *engagement*: and in this sense an *agreement*, signed by one party only, on a sale by auction was holden sufficient to charge him within the statute of frauds (*a*). [Lord *Ellenborough*, C. J. There it was deemed sufficient proof of such agreement, so as to charge the party signing it. He was estopped by his signature from protecting himself under the statute: but there the consi-

(*a*) Seton v. Slade, 7 Ves. jun. 265.

deration

deration appearing in writing.] They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word *agreement* had never before received such a construction as applicable to this branch of the clause. 1804. WAIN *against* WARLTERS.

Lord ELLENBOROUGH, C. J. after noticing the definition of the word *agreement* by Lord C. B. *Comyns*, who considered it as a thing to which there must be the assent of two or more minds; and which, he says, ought to be so certain and complete, that each party may have an action upon it: for which, in addition to the author's own authority, was cited that of *Plowden;* and better, (his Lordship observed) could not be cited. In all cases where, by long habitual construction, the words of the statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question, in the statute of frauds, has the word *agreement* ("unless the *agreement*, upon which the "action is brought, or some memorandum or note thereof, "shall be in writing," &c.) And the question is, Whether [17] that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise*, or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so, when it is considered by whom that statute is said to have been drawn, by Lord *Hale* (*a*), one of the greatest Judges who ever sat in *Westminster Hall*, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise;* but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before in-

(*a*) Lord Mansfield expressed a doubt of this in Wyndham *v.* Chetwynd, 1 Burr. 418, any otherwise perhaps than by Lord Hales's having left some loose notes behind him, which were afterwards unskilfully digested. 1 Black. 99.

valid,

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valid, merely because it was put in writing. The obligatory part is indeed the *promise;* which will account for the word *promise* being used in the first part of the clause; but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing, as well as the promise; for otherwise the consideration might be illegal, or the [18] promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise, which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other; and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration, as well as the promise, would be rendered certain. The authorities referred to by *Comyns*, *Plowd.* 5. *a.* 6. *a.* 9., to which may be added *Dyer*, 336. *b.* all shew that the word *agreement* is not satisfied unless there be a consideration; which consideration forming part of the agreement, ought therefore to have been shewn; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness, whose memory or conscience is to be refreshed, to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding, therefore, the word *agreement* in the statute, which appears to be most apt and proper to express that which the policy of the law seems to require; and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause, is to give its proper and legal meaning to every word of it.

GROSE, J.—It is said that the parol evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration

for the promise should be in writing, as well as the promise itself? Now the words of the statute are, "that no action "shall be brought whereby to charge the defendant upon "any special promise to answer for the debt, &c. of another "person, &c. unless the *agreement* upon which such action "shall be brought, or some memorandum or note thereof, "shall be in writing," &c. What is required to be in writing, therefore, is the *agreement* (not the promise, as mentioned in the first part of the clause) or some *note or memorandum of the agreement.* Now the *agreement* is that which is to shew what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing.* If it were only necessary to shew what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent; for without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement*, by which must be understood the *whole agreement*, should be in writing.

LAWRENCE, J.—From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration, I agree with my Lord and my Brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise*, unless the [20] *agreement*, or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which shews that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing.

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LE BLANC, J.—If there be any distinction between *agreement* and *promise*, I think that we must take it that *agreement* includes *the consideration* for the promise, as well as *the promise* itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the Act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless *the promise* or *agreement* upon which the action is "brought, or some note or memorandum thereof, shall be in "writing." But not having so done, I think we must adhere to the strict interpretation of the word *agreement*, which means the *consideration* for which, as well as the *promise*, by which the party binds himself.

Rule discharged.

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BAINBRIGGE *against* HOULTON and Another.

Saturday, *April* 21st. Affidavits in support of, or in answer to a rule for setting aside an award made a rule of court, under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1. there being no action previously brought, nor any cause in court, need not be entitled.

UPON shewing cause against a rule which had been obtained on the part of *Bainbrigge*, calling on *Houlton* and another to shew cause why the award which had been made in their favour, and the submission to which had been made a rule of Court under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1. (without any action brought) should not be set aside; objection was taken by *Garrow* and *East* to the affidavit of one of the arbitrators made in answer to the rule, that it was not *entitled* at all; which it ought to be after a rule *nisi* granted.

Erskine, *Balguy*, and *Clarke*, who shewed cause against the rule, contended that this was not necessary in a case like the present, where there was no action brought, and consequently no cause in Court. And

The Court, after consulting the Master, held that it was not necessary in this case that the affidavit either in support

port of, or in answer to the rule, should be entitled (*a*). And after hearing the affidavit, they

Discharged the Rule.

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(*a*) The like was ruled in another similar case in this Term. But where an attachment is applied for, for non-performance of the award, the affidavits in answer to the rule must be entitled The King *v.* ———: though those upon which the rule was obtained need not be entitled, where there was no cause previously in Court. Bevan *v.* Bevan, 3 Term Rep. 601. But where the reference arises from an order of *Nisi Prius*, there being then a cause in Court, the affidavits either for a rule to set aside the award, or for an attachment for non-performance of it, are entitled in the cause. But after the rule *nisi* granted for an attachment, the affidavits in answer to such rule must be entitled The King against ———.

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Monday, *April* 23d.

WILLIS *against* The Commissioners of Appeals in Prize Causes.

UPON a rule to shew cause why a prohibition should not go to the commissioners of appeals in prize causes, to prohibit them from proceeding further against Mr. *John Willis;* upon whom, as prize agent in a certain cause, an order had been made for the payment of interest on the proceeds of a certain prize which had come to his hands: the suggestion stated that in *June* 1798, pending hostilities between *Great Britain* and *France*, Captain *West* of His Majesty's ship *Tourterelle*, had made prize in the *West Indies* of the ship *Polly* and her cargo, as *French* property, and had carried the same into *Port Royal*, in the island of *Jamaica*, within the jurisdiction of the Vice-Admiralty Court there; in which Court she was libelled as prize, and condemnation prayed. That upon monition issued, certain claims were interposed on behalf of different sets of owners,

The Prize Court of Appeals has jurisdiction to decree that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay interest on such proceeds while in his hands to the claimant. And this Court will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceedings below that the agent was a registered agent under the stat. 33 Geo. III. c. 66.; because that Court has original jurisdiction *in rem* and its incidents, independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the Act from decreeing restitution of more than the net proceeds of the sale awarded upon condemnation; because interest made of such net proceeds in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that interest had in fact been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence.

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British subjects, some of which were allowed, and such parts of the cargo were acquitted, and restitution awarded; and the remainder of the cargo was adjudged good and lawful prize; and that the same should be forthwith sold by the agents of the captors, and the sale-money be distributed amongst the captors, &c.

From which sentence of condemnation the claimant appealed, which appeal was allowed on the usual terms. And thereupon it was further ordered by the Court, that a warrant of appraisement should issue, to value and appraise

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the several goods condemned; and upon the return of the said appraisement, that the agent for the captors *should enter into good and sufficient security to account for, and pay over the net proceeds thereof, and also the amount of the specie condemned as aforesaid, as that Court should thereafter direct in case the sentence appealed from should be reversed.* That the captors appointed *B. Waterhouse* of the island of *Jamaica*, merchant, to be their agent for and relating to the said prize: and that he had duly and within the limited time, exhibited and registered in the said Vice-Admiralty Court his letters of attorney, appointing him agent for the purposes aforesaid, according to the form of the statute. That at the return of the said appraisement, such security as aforesaid was duly entered into by two good and sufficient sureties on behalf of the captors, to answer the said appeal. That the goods condemned were, on the 20th of *September*, 1798, sold by public auction, pursuant to the statute, and netted, after payment of all expenses, 4552*l.* 1*s.* 7*d.* That an appeal was afterwards made to the commissioners, &c. who on the 29th of *June*, 1801, reversed the decree of condemnation, and retained the claim for the general cargo, and decreed the same to be restored, or the value thereof paid to the claimant for the use of the owners: and assigned the said captors to bring in the account sales of the same on oath, and the proceeds thereof within a month; which account sales and proceeds were afterwards duly brought in accordingly; and *condemned the captors in interest from the time of the sale of the said general cargo*, and in the costs of the then hearing. That on the 4th of *August* 1802, the commissioners of appeals, at the petition of the claimant, decreed a monition against *J. Willis* and *B. Waterhouse*, *as the*

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the captors' agents, to appear before the commissioners, and *shew cause why they should not pay interest upon the said proceeds*. And on the 14th of *July* 1803, *J. Willis* being monished, appeared in the said court of appeals, holden before the Right Hon. the Earl of *Rosslyn*, Sir *William Grant*, Kt., Sir *William Wynne*, Kt., Sir *William Scott*, Kt., and others, and shewed cause, as required; and although the said *J. Willis* was not any party to the said suit, appeal, and proceedings, or any of them, or in any way concerned or interested in the adjudication of the said prize, nor connected therewith, *otherwise than* as being the general partner in trade with the said *B. Waterhouse*, the agent of the captors, as aforesaid; and although the said monition was founded on no special or other suggestion on the part of the claimant, than that *J. Willis* and *B. Waterhouse* were the agents for the captors; and although *J. Willis* was not by law, nor ought to be subject to the payment of interest on such proceeds in consequence of that character; and although *J. Willis* and *B. Waterhouse*, or either of them, never were in any manner called upon prior to the determination of the said appeal, by the said court of appeal as aforesaid, to pay over the said proceeds, or any part thereof; and the same, or any part thereof, never were or was improperly withheld from the jurisdiction of that Court, or of the said Court of Vice-Admiralty, or from the party entitled to the possession thereof; and although the said general cargo, having been so condemned at *Jamaica*, became vested in the captors, upon bail being given to answer the said appeal as aforesaid, and was accordingly sold by *B. Waterhouse*, the acting agent of the captors, who having collected the proceeds of such sale after payment of the expenses, continued to hold the same as an agent or banker usually holds monies committed to his care or custody, and liable to be called for at any moment (that is to say) involved and mixed with other monies then also entrusted to him, and held in deposit or otherwise; no judicial or other order having been made or given by any court, or by the captors, for vesting or laying out the proceeds at interest, or for otherwise disposing of the same with a view to make a profit thereof; and whereas no special application, investment, or disposal of the same was ever made for the use or

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benefit of the captors, or any of them, or of *J. Willis* and *B. Waterhouse*, or either of them; and no specific profit or advantage which could be set forth or ascertained had at any time been derived therefrom; and although as soon as the decree of restitution was made known to *B. Waterhouse*, he immediately caused the said proceeds to be paid to his Majesty's proctor, who brought the same into the registry of the court of appeals on the part of the captors, and *J. Willis* never had any power, custody, control, or management over the proceeds, or any part thereof, but the same remained with *B. Waterhouse* in *Jamaica* in manner aforesaid; and although the Lords Commissioners had no jurisdiction or authority whatsoever by the laws of this realm to condemn *J. Willis* to pay interest on the said proceeds, or any proceeds of the said general cargo, nor to enforce him to pay the same: and although *J. Willis* insisted upon all the premises before the Commissioners of Appeals, and offered to verify the same, yet they refused to admit the same, and decreed interest to be paid by *J. Willis* upon the proceeds of the said general cargo from the time of the sale thereof.

The rule was obtained in the last Term, on the ground that the Act of the 33 *Geo. 3. c.* 66. (*s.* 23, 24, 28, 32.) which regulated matters of prize and prize agents, gave no authority to the prize courts in this case to decree interest to be paid by prize agents; and that no such authority was given by any other statute or law.

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Gibbs and *Steven* shewed cause against the rule. This being after the order of the Court of Appeals made, the only ground for a prohibition must be the want of jurisdiction in the Commissioners to make it. But, first, supposing that that Court had no jurisdiction over prize agents whose powers of attorney were not registered under the 51st section of the stat. 33 *Geo. 3. c.* 66., still it was a question of fact, Whether Mr. *Willis* were or were not a registered agent? which it was competent for the Court below to decide; and after sentence it must be presumed, if necessary, that the affirmative was proved; and that conclusion, if unfounded, can only be questioned in a court of appeal. All such agents are, by the 59th section, required to *account* in the Court of Admiralty before the distribution of the prize-money, and that Court

Court is to confirm or disallow the accounts upon objections stated, and "to make such further order touching the said "accounts as the said case may require." This would give jurisdiction to the court of prize on appeal to direct the allowance of interest, if it thought fit; there being no negative words to restrain the general authority before given in this respect. It is not even objected by the suggestion that the Court of Appeals had no jurisdiction to compel *Waterhouse*, the registered agent, to pay interest: but *Willis*'s case is endeavoured to be distinguished from his, as not being the agent of the captors, which nevertheless is in effect admitted by a negative pregnant; for it is alleged "that *Willis* was not party to the proceedings, or "interested in the adjudication of the prize, nor connected [27] "therewith *otherwise than* as being the general partner in "trade with *Waterhouse*;" which shews that the question made before the Court of Appeals was as to the fact of *Willis*'s agency. This was the very point decided by the Lord Chancellor in the case of the *Danish* ship *Noysomhed* (*a*). There a cargo condemned as prize by the Vice-Admiralty Court at *Tortola* was sent to *Chorley* at *Liverpool*, and sold by him for the benefit of the captors. Afterwards the Court of Appeal reversed the sentence, and decreed restoration, and that the captors should bring in an account of the proceeds, within a month; under which a monition issued against *Chorley*; who moved for a prohibition on the ground that the property was consigned to him, *not as prize agent, but as a general merchant*, and that he had since accounted for the proceeds to the consignors. But the Lord Chancellor thought that a question proper for the Court of Admiralty to decide, as incidental to the principal question of prize; and that therefore he was not authorised to grant a prohibition. They also observed that the only affidavit made in support of the suggestion was to verify the proceedings in the prize court, and therefore it was irregular to introduce any extraneous fact into the suggestion, such as that *Willis* was not a co-agent with *Waterhouse*, if that were now to be insisted on. But, 2dly, The Court of Appeals has a general jurisdiction *in rem* in matters of prize, independent of the

(*a*) 7 Ves. jun. 593.

stat.

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stat. 33 *Geo. 3.*; and may follow the prize or its proceeds into whatever hands they may get, and compel the holder to account for those proceeds; and it is to be presumed after decree, that *Willis* was proved before the Court of Appeals to have made interest of the prize-money in his hands, in whatever character it came to him; and then the [28] Court, which has jurisdiction over the principal, has jurisdiction also over all its incidents, one of which is interest; and such interest, when proved to be made, is part of the *proceeds* of the prize, and may therefore be directed to be paid over. In *Smart* v. *Wolfe* (*a*), *Buller*, J. said, that every case which he knew on the subject was a clear authority to shew that questions of prize and their consequences were solely and exclusively of the Admiralty jurisdiction. And that after the cases of *Lindo* v. *Rodney* (*b*), *Le Caux* v. *Eden* (*c*), and *Livingston* v. *M'Kenzie* (*d*), it would only be a waste of time to enter into reasons to shew that this Court has no jurisdiction over those subjects. [*Lord Ellenborough*, C. J. There is no doubt but that a prohibition will go to a Prize Court, if it clearly exceed its jurisdiction. If we do not grant prohibitions in matters of prize, it is because of the objection arising out of the subject-matter, and not in respect of the Court. The question made by the plaintiff's counsel was upon the Act of Parliament, Whether the Court of Appeals had jurisdiction to grant interest? or whether it be not restricted to the *net proceeds* in any decree for restitution against the captors or their agents, according to the provisions of the 32d section?] That section meant merely to provide a rule for estimating the value of the prize itself at the time of the sale, the net proceeds of which it directs shall be deemed and taken to be the *full* value of the prize. But that does not restrain the general authority of the Court, to which the statute was only auxiliary.

Erskine, *Park*, and *Richardson*, in support of the rule. This is the first instance of interest decreed to be paid upon prize-money, except against the captors themselves, and [29] that by way of punishment for misconduct. In *Le Caux*

(*a*) 3 Term Rep. 344.
(*b*) Dougl. 591. n. 1.
(*c*) Ib. 572.
(*d*) 3 Term Rep. 332, 3.

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v. *Eden* (*a*) the Court of Admiralty condemned the captor in *damages* as well as costs. [*Lawrence*, J. If it be admitted that that Court may condemn the captors in interest by way of damages, is it not matter of fact whether the agents have that interest in their hands which has been awarded?] Then the decree of interest should have been against the captors: but after the decree against them, condemning them in interest, a monition has issued against *Willis*, a third person, calling upon him to shew cause why he, together with *Waterhouse*, should not pay interest upon the proceeds as the captors' agents, which the captors had been before decreed to pay. But the stat. 33 *Geo.* 3., which gives jurisdiction to the Admiralty Court over the captors' agents, has provided expressly (*s.* 32.) that "in case sentence shall "be finally reversed, after sale of any ship or goods, pur- "suant to the directions in this Act contained, the *net pro-* "*ceeds* of such sale (after payment of all expenses attending "the same) *shall be deemed* and taken to be the *full value* of "such ship and goods, and that the parties appellate and "their securities *shall not be answerable* for the value *beyond* "*the amount of such net proceeds*, unless it shall appear that "such sale was fraudulent or without due care." The 28th section had before provided "that the execution of any "sentence appealed from shall not be suspended in case "the parties appellate shall give security to restore the "*ship, &c. or effects*, or the *full value* thereof, in case the "sentence should be reversed." The bail, therefore, are put in the place of the thing itself: and the Act of Parliament has declared what shall be deemed the full value of the thing, *viz.* the *net proceeds*, and that the parties shall not be answerable *beyond* such net proceeds. Admitting, therefore, that the Admiralty Court has an original jurisdiction *in rem*, yet here the statute has substituted the *net proceeds pro re*. [Lord *Ellenborough*, C. J. The Act has only said that they shall not be liable for the value of the thing itself beyond the net proceeds of the sale; but it does not say that they shall not be liable for the beneficial use or product which they make of that value while in their hands.] The form of the security is given in a note to *Brymer* v. *Atkins* (*b*),

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(*a*) Dougl. 591. n. 1. (*b*) 1 H. Black. 194.

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and it is conditioned to *restore* the ship and cargo, or the *value* thereof, in case the sentence should be reversed. Since this transaction took place, more extensive powers have been conferred by the stat. *43 Geo. 3. c.* 160. *s.* 50. of which requires agents, on registering their letters of attorney, to give security in 5000*l.* to the Court, for the due execution of their trust in all matters of prize agency; and *s.* 62, looking, as it were, to the very case of making interest of prize-money, has empowered the Judge of the Court, whose sentence is appealed from, "to assign the agents or other "persons in whose hands the proceeds of the prize may "have come, at the prayer of either party, to bring into, "and leave in the registry, the net proceeds of the sales "of such prize, &c. which shall be deposited in the Bank of "*England;* or in case the parties shall agree thereto, in "some public securities at interest," &c. Even this provision is short of what is now contended for; for it only provides for making interest in future, at the prayer of either party, from the time of appealing; whereas the Court of Appeals has assumed to give interest as from the time of the sale by a collateral and subsequent proceeding; and that too [31] without any allegation that interest had been made by the agent, decreed to pay it. The Court of Appeals was *functus officio* after the decree against the captors, unless there were some new proceeding originated against the agents, nothing of which is suggested. But interest is either something arising out of a contract of lending, or something given by way of damages for misconduct. Now, as a *contract*, the prize court could have no jurisdiction over it; and indeed no contract can be presumed between the agents of the captors and the captured, at whose prayer the monition issued. And as a punishment, the prize courts only give damages for the misconduct of the captors in making the capture, to which their agents, as such, can be no parties; neither is any misconduct imputed to them. [*Grose*, J. I consider the interest to have been given as part of the *proceeds* of the prize. Lord *Ellenborough*, C. J. We must presume that interest has been given upon the best ground; namely, upon proof that the agents made interest of the proceeds of the prize in their hands; and then it cannot be considered as given by way of *punishment.*] Then the maxim applies

applies *respondeat superior* (*a*). But the interest cannot be considered as *proceeds;* for the proceeds were before decreed to be brought into Court by the captors; which, it is alleged, has been done. Then with respect to this application coming after sentence, no objection arises on the final sentence, but on this collateral order; and therefore the application was made as soon as the grievance existed. And in *Gare* v. *Gapper* (*b*) the Court directed the plaintiff to declare in prohibition, which is still pending, in order to have the question well considered, whether, if the Ecclesiastical Court misconstrue an Act of Parliament, a prohibition will not lie even after sentence.

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Lord ELLENBOROUGH, C. J.—This prohibition is applied for, on a supposed want of jurisdiction in the Court of Appeals to decree interest to be paid by prize agents on the proceeds of a cargo, in their hands, from the time of the sale, under a prior sentence of condemnation as prize. It is clear that that Court has jurisdiction *in rem*, and may take into its possession the thing itself, or the proceeds, wherever they may be found, either in the hands of the principal captor, or agent, or of any other who has no lawful title to hold them. Here the agents have been fixed with the proceeds. It is, however, objected, that interest derived out of those proceeds cannot be decreed. It is not disputed but that interest may be decreed against the captors; but not, as it is urged, against an agent; because he is only responsible on his security for the amount of the *net proceeds* of the sale; and that even as against the captors themselves, it is only given by way of damages for misconduct, for which the agent is not answerable. To be sure, the decree of interest cannot be brought forward here as matter of *punishment* against the agent, against whom there is no substantive charge of misconduct. Neither is it brought forward as on the ground of *contract;* but simply, on the ground that the *res*, the proceeds, have got into the hands of the agents, and have there grown and accumulated, producing the interest now sought to be recovered. In many instances, it happens that one who has got the fund of another in his hands, and is proved to have made interest of it, shall be responsible in equity for

(*a*) Sadler *v.* Evans, 4 Burr. 1986. (*b*) 3 East, 480.

such

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such increase. Then it is said, that no interest appears to have been made of the proceeds by the agents. But we must give credit to the Court below for having exercised its jurisdiction soundly, and that it was sufficiently proved to it that interest had been made. And though it may be a new proceeding in these Courts to compel an agent, who has made interest of the proceeds of a prize in his hands, to render it to those to whom it is due, it is high time that it should be done. For it would be an enormous defect of justice when the captor is liable, on the reversal of a sentence of condemnation, to be called upon to render interest who has not had the proceeds in his hands in the interval, that the agent who has held them, and has derived all the benefit, should not be answerable. I am, therefore, clear upon principle, that though the parties appellate, and their sureties be only made liable under the 32d section of the Act, for the value of the prize to the extent of the net proceeds of the sale, yet that the captors are liable for interest upon such net proceeds, and so are their agents, and those into whose hands the *res*, or proceeds, have come. It does not appear here that the agents have not made interest of the money in their hands, and we must conclude that the Court of Appeals was properly satisfied that they had. The only question for us to consider, is, Whether interest is to be deemed part of the *res*, or proceeds, in the hands of an agent? which I am satisfied that it may well be.

GROSE, J.—It is admitted that the Court of Appeals had jurisdiction over the *rem*, and every thing incident to it. The law is clear, as laid down by Mr. Justice *Buller* in the case referred to of *Smart* v. *Wolffe* (*a*), that the Admiralty Court has jurisdiction not only over the question of prize, but of all its consequences: and that though it has taken a stipulation, it is not confined to proceed on that alone, but may also proceed *in rem*, according to its ancient course. Then what is the *res?* The prize, or what it produces: *interest* is part of the *res;* it is an incident to it. It is clear that the Prize Court has jurisdiction over what the Act calls the *proceeds;* and money is the proceeds, and interest is the product of money and part of the proceeds. I am glad to find

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(*a*) 3 Term Rep. 345, &c.

the

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the provision referred in the late Act of Parliament for directing the proceeds to be laid out in public securities: not that it furnishes any doubt of the power of the Court to decree interest before: but because it secures the claimant's money, as it was intended to do, against the insolvency and mismanagement of agents. But it is said that *Willis*, not being a registered agent, was not within the jurisdiction of the Court: but he had the proceeds of the prize, the money, in his hands; and that Court had jurisdiction over him, as it had over the money. Then it is urged that *interest* is treated as distinct from the *proceeds* in the suggestion: but the *proceeds* decreed by the Court to be brought in, meant the proceeds as they existed at the time of the sale of the cargo: and the *interest* is what was made afterwards, and which afterwards increased the amount of those proceeds. Then if the captor be liable to interest beyond the original proceeds, so is the agent who has received them into his hands.

LAWRENCE, J.—It is supposed that the prize court has jurisdiction over the agent only under the Prize Acts; but that is not so: for if those Acts had never been passed, that Court would have had no jurisdiction over the *res*, and the proceeds of it, into whosever hands they get. The question then is, Whether *interest* be not a part of the proceeds? [35] which I take it clearly to be. But it is said, that by the 32d section of the stat. 33 Geo. III. the parties shall not be liable in case of the reversal of a sentence of condemnation, beyond the *net value* of the proceeds *at the time of the sale* of the prize. The meaning, however, of that section was, that the captors should not be charged with the value of the prize beyond the amount of what it *then* produced. But that does not shew, that if the proceeds, of whatever given value at the time of the sale, be afterwards made productive, the parties in whose hands they are shall not be liable for that product. Then it is said further, that interest is not alleged to have been made. But in *Smart* v. *Wolffe*, upon a suggestion that the party decreed to bring in the produce had not the proceeds, Mr. Justice *Buller* said, that if such were the facts, it should have been pleaded below. So here, if the agents had not made interest of the money in their hands, they should have insisted on it below. They do not, however, even now, suggest that no interest was made by them; they only argue that

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that as *Waterhouse* only held the proceeds "as an *agent* or "*banker* usually holds monies committed to his care, and "liable to be called for at any moment, that is to say, mixed "with other monies also entrusted to him, and held in "deposit or otherwise," therefore they ought not to be liable to pay interest. It is, therefore, rather an admission that interest was made; and it does not signify how it was made if made in fact: it is an accretion to the principal proceeds. If the agents had shewn to the Court below that they had put the prize-money in a chest, and had made no interest of it, I do not say that the Court ought to have decreed them to pay it. It has not been decreed against them as a punishment for misconduct; for then there should have been a [36] substantive charge of such misconduct; neither is interest directed to be paid on the ground of any supposed contract but merely as part of the proceeds. And as to the objection, that it is not formally alleged that interest was made by the agents, we cannot say how far the practice of the prize-court may require such an allegation: it is the best judge of the regularity of its own proceedings. It is enough for us that it has jurisdiction to decree interest in this case. And there is the less reason to direct the plaintiff to declare in prohibition for the purpose of considering the question more fully, because if he be not satisfied with our opinion, he is not estopped from taking that of other courts in *Westminster Hall.*

LE BLANC, J.—It is admitted that *Willis* and *Waterhouse* are, or *Willis* alone is, subject to the ordinary jurisdiction of the prize-court, as being parties, in whose possession the *res* is. Then, in order to ground the application for a prohibition it should appear either that they are called upon for something beyond the *rem*, or that the jurisdiction of the prize-court is limited, in this respect, by the Act of Parliament. And it is contended, that even if interest were shewn to have been made by the agent, he would not be liable; because, as it is said, admitting the agent to be liable for the proceeds in his hands, the Act of Parliament has defined what those proceeds are, namely, *the net proceeds of the sale at the time.* Then taking the agent to have made interest of those net proceeds, the question is, Whether he be liable to account for it as part of such proceeds? The object of the 32d clause was, to lay down a certain rule for ascertaining the full value

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value of the prize to be reimbursed to the claimant, in case sentence of condemnation should be finally reversed, after a sale had been directed pursuant to the Act: for which purpose it provides that the *net proceeds* of such sale shall be deemed and taken to be *the full value* of the prize, and that the parties appellate and their securities *shall not be answerable for the value beyond the amount of such net proceeds.* But the evident meaning of that is, that the original value of the prize shall not be estimated beyond what it actually produced at the time of the sale, under the Act. The *proceeds*, then, are that which was then made, together with that which has been since made out of those proceeds. We cannot enter into the question, whether or not the agent has made interest of the money in his hands; but, according to what is stated, it is rather to be collected that he had; because the objection made by *Willis* is, not that no interest was, in fact, made by him and his co-agent *Waterhouse*, but that he was not by law subject to the payment of interest on the proceeds in their hands, in consequence of their character as agents; and that the property of the cargo after condemnation, was vested by law in the captors, upon bail being given to answer the appeal; and the proceeds collected by *Waterhouse*, as their acting agent, was holden by him as a banker, &c. and that there was no *special* investment of the amount for the use of the captors, and no *specific* profit which could be set forth had been derived therefrom. But the same might be said by any banker in whose hands money is deposited, and which is mixed with the general mass of his property. Then taking interest to have been made, I consider it as composing part of the *proceeds* at the time when the agent was admonished: for I consider the *proceeds* as including interest made of the net amount of the sale from the time when it is received by the agent till he is called upon to pay it. The object of the provision, stated from the stat. 43 *Geo.* 3. was not to enable the Court to direct the payment of interest, but to take the principal entirely out of the hands of the agent, and place it on security where it would necessarily produce interest; clearly looking to the event, that the agent might become insolvent before a decree of restitution could be had. Considering therefore that the agent here was liable for the *proceeds* of the prize; that those proceeds

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proceeds are composed of the original net sum for which the prize sold, together with the interest which has been made of it while remaining in the agent's hands till called for; and that the Court below had jurisdiction to decide whether or not interest should be paid by such agent; and they having decided that it shall, there is no ground for a prohibition.

Rule discharged.

Monday, April 24th.

Ex parte JOHN LANDSDOWN.

The Court will not, at the prayer of the master, grant a *habeas corpus* to bring up an apprentice impressed, he being willing to enter into the king's service.

MARRYAT moved for a writ of *habeas corpus*, to bring up the body of *John Landsdown*, an apprentice (one who was protected from being impressed by the statute 13 *Geo. 2. c.* 17.), who had been impressed and taken on board one of the king's ships. But he stated, that this application was made on behalf of the master; the apprentice himself being willing to enter into the king's service.

Lord ELLENBOROUGH, C. J.—The writ of *habeas corpus* is for the protection of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action, if his apprentice have been improperly taken from him. (*a*)

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The

(*a*) Eades *v.* Vandeput, *M.* 25 *Geo.* 3. B. R.—This was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. The only witness to charge Captain Vandeput with knowledge, was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship, he told the defendant, the captain, that he was an apprentice, and required his discharge; which was refused. The plaintiff having recovered a verdict before Buller, J, at the sittings after the last time at Guildhall,

Erskine moved for a new trial, grounded on the affidavits of Captains Vandeput and Ommaney of the navy, which stated, that, according to the custom of the navy, if an apprentice be pressed, he must send his indentures to the Admiralty, or bring evidence of them to the captain of the vessel on board of which he is taken. And here he observed, that the boy had never shewn his indentures: and that if a captain were to discharge a boy on his bare word that he was an apprentice, every boy on board his ship when he was tired of the service would make that excuse.

The

The other Judges concurred, and two of them observed, that of late years similar applications had been repeatedly refused to be granted.

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Writ denied.

The Court, however, were of opinion that the evidence was sufficient, and that the captain ought to have made inquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted, that if the indentures had been produced, the defendant would have been bound to have discharged the boy.

Rule refused.

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Wednesday, April 25th.

The KING *against* The Inhabitants of MARTLEY.

One who is resident on an estate granted to him for lives, in consideration of two guineas fine and 1*s.* rent, cannot be removed therefrom, though actually chargeable. But semble he cannot gain a settlement by 40 days' residence, as on his own estate, under the stat. 9 *Geo.* 1. the consideration being under 30*l.*

TWO justices, by an order, removed *Wm. Barton*, his wife, and children, by name, from the parish of *Doddenham* to the parish of *Martley*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case. On the 25th of *November*, 1754, the dean and chapter of *Worcester* granted to *Henry Barton* of *Doddenham*, labourer, (the grandfather of the pauper) a lease of a cottage and garden, called *Agberrow Close*, in *Doddenham*, containing by estimation about half an acre, then in his occupation, to hold to him, his heirs, and assigns, for his own life (he being then 61 years old), the life of his son *Thomas*, aged 18, and the life of his daughter *Susanna*, aged 16, at the yearly rent of 2*s.* 6*d.* Upon these premises *H. Barton* resided till his death, paying to the dean and chapter the yearly rent of 2*s.* 6*d.*; and at his death, leaving no will, he was succeeded in possession by his eldest son *W. Barton*, the pauper's father; who, on the 22d of *July* 1784, died, leaving a will, by which he devised the premises to his wife for life, remainder to *W. Barton*, the pauper. At the time of his father's death the pauper resided in another parish, and continued so resident for about two years afterwards, during which time his father's widow resided on the premises. At the end of the two years the pauper came to reside with his mother on the premises in question, and continued as part of her family till the 2d of *February* 1790, when the pauper

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having married, his mother demised the premises to him for her life, at the yearly rent of 1*l.* 11*s.* 6*d.* and went to reside elsewhere, leaving the pauper in the sole occupation of the premises. *T. Barton*, the second life named in the lease, died on the 27th of *August* 1795. On the 13th of *July* 1798, the mother of the pauper, who was the tenant for life, under the will of the pauper's father, died. The pauper having continued in possession from the death of his mother, on the 26th of *November* in the same year the dean and chapter, on the application of the pauper, and on payment by him of a fine of two guineas, granted a new lease of the premises in question, at a new rent of one shilling, to hold to the pauper, his heirs and assigns, for three new lives, which are still existing. The Sessions found, that at this time all the lives in the first lease were extinct; *H. Barton*, the original lessee, and his son *Thomas*, having died in *Worcestershire*, as above stated; and *Susanna*, the third life, having been absent from the country above 30 years, and not having been since heard of by her relations. The new lease was considered as an entire new demise, and not a renewal of the old one, or in consideration of the surrender of it. Previous to the death of the pauper's father, the pauper acquired a settlement in the parish of *Martley*; but from the time he became possessed of the premises to the present time, the pauper has constantly resided upon them, and paid not only the yearly acknowledgment of 2*s.* 6*d.* to the dean and chapter of *Worcester* during the existence of the first lease, but also the yearly rent of 1*s.* reserved under the new lease thereof. From these premises in *Doddenham*, the pauper and his family, having become chargeable to that parish, were removed to the parish of *Martley*; the new lease, of the 26th of *November*, 1798, being still in force.

[42] *Touchet* and *Peake*, in support of the order of Sessions, first observed that the old lease was at an end before the pauper's interest under the new lease commenced; for two of the lives were found to be extinct prior to 1796; and when the new lease was granted to the pauper, in 1798, the third life under the old lease had not been heard of for 30 years, and consequently by reference to the statute 19 *Car.* 2. *c.* 6., must be presumed to have died after the expiration of the first seven years, no proof being made to the contrary. Then

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no settlement could be gained under the new lease, when the pauper lived on the estate in his own right; the purchase having been made by the pauper himself for a consideration under 30*l.* in value. And though it may be said that this was a voluntary grant of the dean and chapter, and not a purchase for a pecuniary consideration; yet, according to *Rex* v. *Warburton* (*a*), the consideration need not be in money paid at the time, in order to bring the purchase within the stat. 9 *Geo.* 1. *c.* 7. *s.* 5; for there a grant of a copyhold, with 1*s.* fine, 1*s.* heriot, and 1*s.* rent, was holden to be a purchase within the statute, which could not confer a settlement. And here is a fine of two guineas, and 1*s.* rent. [Lord *Ellenborough* C. J. There would be difficulty in deciding that this was a purchase under 30*l.* within the statute: but admitting that, and presuming the third life under the first lease to be extinct, still, how can this order, removing the pauper from *his own estate*, be supported? This is an objection distinct from the question of the settlement.] In answer they observed, that this objection had not been made below. That here the pauper was actually chargeable before the order of removal, which differed it from the other cases. Where persons were heretofore removed, as *likely to become chargeable*, there could be no presumption of consent on their part. But where a man applies to a parish for relief, as here, he must be taken to consent to all things necessary to afford him that relief in the due course of law, and consequently to consent to a removal, under an order of justices, to the place of his last legal settlement, where he is properly maintainable. Then, if he consent, there is no disseisin of his freehold, which is the ground on which the illegality of a compulsive removal from a man's own estate is put by *Foster* J. in *Rex* v. *Aythrop Roding* (*b*); which, however, was not a case of freehold, but of copyhold. But there the person removed was not chargeable: and though *Foster* J. thought that that would make no difference, yet Lord *Mansfield* and *Dennison* J. seem to have been of a different opinion, particularly the former, who said that the wife could not be removed from her husband's property, "upon being *only* "*likely* to become chargeable." Then as in *Clypton* v. *Ra-*

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(*a*) 1 Term Rep. 241. (*b*) Burr. S. C. 412.

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vistock, (*a*), it was decided, that magistrates could not make an order for the relief of a pauper on the parish to which he belonged, unless he were within the parish at the time; and as one who is possessed of property within a parish where he resides, is not entitled to relief there as casual poor, but his property must first be applied to his support, it follows that, unless he were liable to be removed, he might not be able to obtain present relief for want of a purchaser of such property.

Jervis and *Puller*, *contrà*, were stopped by the Court.

[44] Lord ELLENBOROUGH C. J. If the inference of consent to the removal, derived from the mere act of applying to the parish for relief, be pushed so far, it may as well be argued that the pauper consented also to a conveyance of his property, if that be a step towards entitling himself to relief. I cannot think that what fell from Mr. Justice *Foster*, in the case of *Aythrop Rooding*, when he said, that the party's right to remain on his freehold was founded on *Magna Charta*, is to be treated lightly. He was speaking from analogy to the case of freehold; the premises there being copyhold. But he was not liable to draw comparisons rashly; and the reason of the thing applied equally to both. Here the party, whilst he resided on his own estate, was not liable to be removed.

GROSE J. was of the same opinion.

LAWRENCE J. The power of the justices to remove any person, is founded on the stat. 13 & 14 *Car.* 2. *c.* 12. which extends to "any person who shall come to settle in any tenement under the yearly value of 10*l.*;" and these words having never been deemed to relate to persons living on their own estates whether acquired by purchase or otherwise, or at whatever value, it followed, that every person residing irremovably for 40 days in the parish where his own property was, gained a settlement: that encouraged persons to make small purchases for the purpose of settling themselves in particular parishes: and it was to remedy that inconvenience that the stat. of 9 *Geo.* 1. was passed, which provides that "no per-
"son shall be deemed to acquire any *settlement* in any parish
"by virtue of any purchase of any estate or interest in such pa-
[45] "rish, whereof the consideration, &c. doth not amount to 30*l.*

(*a*) E. 11 Ann. Cas. of Set. 40.

"&c.

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" &c. *for any longer or further time than* such person *shall* " *inhabit in* (*a*) *such estate;* and shall *then* be liable to be re-" moved," &c.

LE BLANC J. The pauper was not precluded from obtaining relief, because having a settlement in another parish, he might always obtain relief by going there.

Both Orders quashed.

(*a*) Vide Dunchurch *v.* South Kilworth, Burr. S. C. 553. and Rex *v.* Houghton Le Spring, 1 East, 247.

DEAN *against* PEEL.

Wednesday, April 25th.

An action on the case for debauching and getting with child the plaintiff's daughter and servant, *per quod servitium amisit*, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the [46] time of the seduction to return to her father's house, though she afterwards did return there while within age, in consequence of the seduction, and was maintained by her father.

THIS was an action on the case, for debauching and getting with child the plaintiff's daughter. The declaration stated that the defendant wrongfully intending to injure the plaintiff, debauched and carnally knew *E. D. then being the daughter and servant of the plaintiff*, whereby she became pregnant, &c. and diseased, &c. by means whereof the said *E. D.* was rendered *unable to perform* the *necessary affairs and business* of her said father and *master;* during all which time *he was deprived of her service*, and was obliged to expend so much in nursing and taking care of her. The cause was tried before *Chambre* J. at the last assizes at *Lancaster;* when the facts appeared to be, that the daughter, who was 19 years of age when she was seduced, was then living in the house of one *Taylor*, who had before married her sister, a few doors from her father's house in *Manchester*. *Taylor* kept a public-house; and his wife having then lately died, the plaintiff's daughter acted as his house-keeper, and had the care of the bar: but no contract was made with her brother-in-law for wages, either by herself or the plaintiff her father, nor did she in fact receive any; and she might have left him when she pleased: but while her sister lay dead in the house, *Taylor* told her that she might take what money she wanted. Finding herself with child, she returned to her father's house, and afterwards lay in there at his expense: and, after her removal thither, she applied to *Taylor* for wages, who refused to pay any. The daughter, by whom the above facts were proved, added, upon her examination, that if this misfortune had not befallen her, she had determined not to return to her father's house. On this evidence

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the learned Judge nonsuited the plaintiff, on the ground that there was no service proved to the father at the time of the seduction and getting with child; and that the daughter being under age at the time (which was pressed upon him as distinguishing this from former cases) made no difference, particularly as she had no *animus revertendi* to her father's family.

Topping now moved to set aside the nonsuit, and for a new trial, on the distinction before taken. In *Postlethwaite* v. *Parkes* (*a*), where the daughter was in another service, she was of full age at the time of seduction; and this ground of objection to the action was insisted upon as well as the foreign service; and the matter was compromised. It is true, that in *Bennet* v. *Alcot* (*b*) *Buller* J. said, that what influenced the opinion of the Court in the former case, was, that the daughter was in the service of another person; but the point has never been judicially decided against the father's right to maintain the action where the daughter was under age at the time (*c*). And he referred to the two following cases, where *Wilson* J. at *Nisi prius*, had given it as his opinion, that if the daughter was *under age*, the action was maintainable for her seduction, though she were not living with the father at the time. "*Booth* v. *Charlton*, at *Lancaster* in 1789, cor. *Wilson* J. This was an action by the father against the defendant, for assaulting his daughter, and debauching and getting her with child, *per quod servitium amisit*. On evidence it appeared that the daughter, on her first criminal connection with the defendant, was above 21 years of age; but she was living still with her father. The child was born two months after she attained 22. *Wilson* J. said, that according to his memory, the distinction in these cases was, that if the daughter were under the age of 21, the action was maintainable, though she should be

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(*a*) 3 Burr. 1878. (*b*) 2 Term Rep. 168.

(*c*) In the case of Saterthwaite *v.* Duerst, E. 25 Geo. 3. B. R. upon motion in arrest of judgment, where the Court held that an action on the case would not lie unless it were laid with a *per quod servitium amisit*, it was assumed that the daughter was of full age. And Lord Mansfield C. J. in delivering the opinion of the Court (after time taken to look into the cases) said, "that it appears very extraordinary that any action should lie to a person on account of incontinence between two others, both of whom may be of full age: for it does not appear here that the daughter was not of age."

upon

upon a visit to or be living with another person, her relation. But that if she were of age, the action was maintainable only in case of her living with her father. Verdict for the plaintiff for 15*l.*" "*Johnson* v. *M'Adam*, before the same Judge at the same assizes. This was a similar action to the foregoing. The daughter, from the time of her mother's death, about a year and a half before the seduction, lived with her father, and had the care and superintendance of his family: and while she was so living with him she received an invitation from Mrs. *M'Adam*, the defendant's brother's wife, and in consequence went on a visit to her, to keep her company in the absence of her husband for three or four months; after which she returned to her father's. Her father was absent when she left home, and she went to Mrs. *M'Adam's* without his knowledge or consent; but she had the consent of her aunt, who lived in the family, and took the superintendance of it in her absence. At the time of her leaving her father's about the beginning of *July*, she was under 21, but attained that age the 2d of *September* following; and at the latter end of *September* was seduced by the defendant. Upon her return home she continued under her father's protection and maintenance, and was delivered at his house and at his expense; and the child was afterwards maintained by him. *Inter alia*, it was objected: that the action was not maintainable, the daughter being of full age and *sui juris* when the seduction happened, and not resident with her father. But *Wilson*, J. said, that where the daughter was under age, he believed the action was maintainable, though she was not part of his family when she was seduced; but where she was of age, and no part of the father's family, he thought the action not maintainable. That in *Postlethwaite* v. *Parkes* the daughter was of age, and in the service of another family. That this was a middle case, and therefore he would reserve the point. Afterwards, in summing up the evidence to the jury, he told them that the consent of the father to the visit made by his daughter must be inferred from the circumstances; and that she might still be considered as part of his family. Verdict for 500*l.* And no new trial was moved for.

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Lord ELLENBOROUGH C. J. In those cases the implied relationship of master and servant continued. But here there was no *animus revertendi:* the daughter declared on her

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her examinition that she had no intention of returning to her father's house before this misfortune; and she was actually in the service of another person. I think, therefore, that the opinion of the learned Judge who tried the cause was correct.

Per Curiam, Rule refused (*a*).

(*a*) Vide Jones *v.* Brown, Peake's N. P. Cas. 233. and 1 Esp. N. P. Cas. 217. where, in an action for an assault on the plaintiff's son and servant, a lad under age and living with his father, *per quod servitium amisit*, the plaintiff's counsel, proceeding to prove that he was employed about his father's business, Lord Kenyon, C. J., said that such evidence was unnecessary; if he lived in his father's family, and under his protection, it was sufficient to maintain the action. *Vide* what was said by the same learned and noble Judge, in Fores *v.* Wilson, Peake's N. P. Cas. 55. and *vide* Barham *v.* Dennis, Cro. Eliz. 770.

Thursday, April 26th.

BELL *against* POTTS.

Where, in case the plaintiff recovered a verdict at the trial, and had judgment in C. B. and upon a bill of exceptions returned into this Court, judgment was reversed, and the plaintiff took nothing by his writ, [50] the defendant cannot have costs.

THIS was an action on a policy of insurance in the Court of Common Pleas, where there was a verdict for the plaintiff; and a bill of exceptions was tendered at the trial, and allowed; upon which, the record being brought into this court, judgment was reversed. Whereupon the Master having taxed costs for the defendant, as if he had obtained a verdict originally, a motion was made for the Master to renew his taxation on the ground that the judgment not being for the defendant, but merely that the judgment for the plaintiff be reversed, and the plaintiff *nil capiat per breve*, no costs could be allowed to the defendant within any of the statutes granting costs. And

Gibbs, who was to have shewn cause, admitted that he could not support the defendant's right to costs within any of the cases putting a construction on the several acts of Parliament giving costs to a defendant; although in the event it appeared that the defendant ought to have had a verdict at the trial, in which case he would have been entitled to his costs, and the plaintiff would have had his costs if he had succeeded.

Wigley in support of this rule.

Per Curiam, Rule absolute.

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Roe, on the Demise of the Right Hon. THOMAS CONOLLY, *against* VERNON and VYSE.

Thursday, April 26th.

THIS was an action of ejectment, on a demise laid the 1st of *August* 1802, for the recovery of certain customary tenements in the manor of *Wakefield*, in the county of *York*, which was tried before *Rooke* J. at the last *York* assises; when a verdict was given for the plaintiff, subject to the opinion of the Court on the following case:

Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it, will not frustrate the grant: but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant. Therefore where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c, whatsoever in the manor, which "he held of the lord by copy of court-roll, in whose tenure or occupation soever the "same were, being of the yearly rent to the lord in the whole of *4l.* 10*s.* 8½*d.* and "compounded for;" held that the words "and compounded for" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "being of the yearly rent, &c. of *4l.* 10*s.* 8½*d.*" which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than the compounded only, could not qualify or impugn that restriction. Where a testator had freehold, customary, and copyhold estates: and after introductory words, as to all his worldly estate, devised two rent-charges out of all his real estate, and also two copyholds in Middlesex for lives; and subject thereto devised "all his freehold manors, lands, &c. in Yorkshire and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail-male to his first and other sons, with like remainders to other branches in the male line: and in default of such issue he devised all his "said (freehold) manors, lands," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughters: and by the residuary clause devised all other his manors, lands, &c. either freehold or copyhold (except those in the counties of York, &c. which he had before disposed of) subject to the said rent-charges, in failure of issue-male of his son and himself, to his three daughters, as tenants in common, in fee: held, that certain customary estates, which the devisor had, with freehold property in Yorkshire, did not, on failure of the male line, pass to the eldest daughter under the description of all his freehold manors, lands, &c. in that and other counties. For, supposing that the freehold of such customary estates be in the tenant, and not in the lord, they being holden not at the will of the lord as pure copyholds, but according to the custom of the manor, and the tenants being entitled to the timber and mines, and the estates being demised and demiseable in fee-simple or otherwise, yet, as they were holden by copy of court-roll, and passed by surrender and admittance, and were generally reputed and called copyholds, and the testator having distinguished in other parts of his will between copyhold and freehold, he must be presumed to have used the word freehold in its usual and popular signification, as not including these customary estates considered by himself as copyholds; and therefore such customary estates passed to the three daughters under the residuary clause. And it seems that as by such residuary clause the daughters would not take till failure of issue-male of the son and the devisor, he, the son, the heir at law, took an estate-tail by implication in the customary estates not before devised.

uncompounded;

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uncompounded; the *compounded* are liable to *a fine certain* on alienation and descent, by reason of a composition or agreement anciently made with the lord of the manor: the *uncompounded* are those for which no such agreement has been made, and are therefore liable to *a fine arbitrary;* that is, a fine not exceeding two years' improved value of the premises. *Thomas* Earl of *Strafford*, being seised in tail-male, *viz.* to him and the heirs male of the body of his father Sir *William Wentworth* deceased, (which estate is now extinct) with reversion to himself in fee, as eldest son and heir of his father, of certain customary tenements, with the appurtenances, in the manor of *Wakefield*, as well *compounded* as *uncompounded*, holden of the lord *by copy of court-roll*, by rents and services, according to the custom of the manor, and also seised of a moiety of certain other customary tenements in the manor, holden in like manner of the lord, *viz.* of certain customary tenements *compounded in fee*, and of certain customary tenements *uncompounded*, in *tail general*, (which estate tail is still subsisting) with reversion to himself in fee; and also seised in fee of certain other *customary tenements* which *he himself had lately purchased;* on the 10th of *April* 1732, according to the custom of the manor, made the following *surrender* out of court of his customary tenements with the appurtenances, to the use of his will; "All "and singular the messuages, dwelling-houses, cottages, "closes, lands, tenements, and hereditaments whatsoever, "with their and every of their appurtenances, situate, lying, "and being in *Wakefield*, *Stanley*, *Alverthorpe*, *Thornes*, "and *Sandal Magna*, or elsewhere within the said manor "of *Wakefield*, which he the said earl now holds of the "lord of the said manor of *Wakefield* by copy of court-"roll, in whose tenures or occupations soever the same now "are to be, being of the yearly rent to the lord in the whole "of 4*l.* 10*s.* 8½*d.* *and compounded for;*" which surrender was not brought into court till the year 1741, after the death of the said earl, when the same was presented according to the custom of the manor. The said rent of 4*l.* 10*s.* 8½*d.* *exceeded* the amount of the rents payable to the lord for the *compounded* customary tenements of the said *Thomas* Earl of *Strafford;* Sir *William Wentworth*, the father of *Thomas* Earl of *S.* having, on his admission in 1672 to the premises

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of which the earl was seised as aforesaid (except those lately purchased by him) paid a fine for his *compounded* customary tenements only of 3*l.* 15*s.*, being three times the amount of 1*l.* 5*s.*; the lord's rent for the same, and a fine of 80*l.* for his *uncompounded* lands. The whole of the rents paid to the lord by *William* Earl of *Strafford* hereinafter mentioned, and his successors, for all the said customary tenements, both compounded and uncompounded, amounted to 4*l.* 14*s.* 6*d.* of which sum 1*s.* 9*d.* was for the rents of the lands purchased by *Thomas* Earl of *Strafford*. *Thomas* Earl of *Strafford*, on the 22d of *June* 1732, by his will of that date, duly executed, &c. "As to the worldly estate with which it had "pleased God to bless him," in the first place devised to his wife "out of all his real estate in the counties of *York*, *Nottingham*, and *Lincoln*, an annuity of 2000*l.* in lieu of her dower or thirds at common law, which she might otherwise claim out of any part of his real estate, which he had been, or should or might be seised of at any time during their intermarriage." And after giving her for life all that his *copyhold* messuage and garden in *Twickenham*, in the county of *Middlesex*, then in his own possession, and which he had surrendered to the use of his will; and after devising out of all his real and personal estate whatsoever to his mother an annuity of 200*l.* for her life, and the little house at *Twickenham* aforesaid, in which she then lived, the same being *copyhold*, and surrendered to the use of his will, in lieu of her jointure, dower, and thirds at common law, and all other demands out of the real and personal estate of her late husband his deceased father, Sir *W. Wentworth*; the will proceeds thus: "And as to all my *freehold* manors, "messuages, lands, tenements, and hereditaments, in the "counties of *York*, *Nottingham*, *Lincoln*, *Northampton*, "*Suffolk*, *Kent*, *Surry*, and *Middlesex*, or elsewhere in "*Great Britain*, subject as to the said premises in the said "counties of *York*, *Nottingham*, and *Lincoln*, to the said "two several rent-charges of 2000*l.* per annum and 200*l.* "per annum, so hereby respectively devised to my said "wife and mother as aforesaid, in manner as before and "after mentioned, and likewise subject to all legacies, &c., "my personal estate being first to be applied for that purpose, I do give and devise all my said *freehold* premises,

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" from my decease: and also I devise my two *copyhold* mes-
" suages in *Twickenham* aforesaid, from and after the respect-
" ive deceases of my said mother and wife respectively,
" unto my only son *William* Lord *Wentworth* for life, with-
" out impeachment of waste, as to such part of the premises
" as are freehold, other than voluntary waste, by pulling
" down *Wentworth Castle*," &c.: with successive remainders in tail-male to the first and other sons of his said son *William* Lord *Wentworth*, and afterwards to the second and all other the sons of the testator; and then as follows: " And in de-
" fault of such issue male of my body, the said two several
" annuities of 2000*l.* per annum and 200*l.* per annum, in-
" stead of issuing out of my said manors and lands in the
[55] " said counties of *York*, *Lincoln*, and *Nottingham*, shall,
" in case of my brother *Peter Wentworth* and the heirs male
" of his body, be charged upon all the rest of my freehold
" manors, lands, and hereditaments whatsoever, and with
" the like powers of distress respectively as aforesaid, and
" also to be charged upon my interest in the grant from the
" Crown of some of the post fines. Provided that in case
" my said other freehold premises and post fines will not be
" of sufficient yearly value to answer the said several annui-
" ties of 2000*l.* per annum and 200*l.* per annum, that then
" such deficiency shall be made good out of my said estate
" in the said counties of *York*, *Nottingham*, and *Lincoln*,
" so devised to my brother. And in case of failure of issue
" male of me and my said son as aforesaid, then I give and
" devise all such of my said manors, lands, tenements, and
" hereditaments, situate in the several counties of *York*,
" *Lincoln*, and *Nottingham* (being parcel of the premises
" so devised to my said son as aforesaid) unto my brother
" *Peter Wentworth*, for life, without impeachment of waste
" other than voluntary," &c.; with remainder under the like restrictions to *William Wentworth*, eldest son of his said brother *Peter Wentworth* for life; then successively to the first and other sons of his said nephew *William* in tail-male; then to his nephew *George Wentworth*, second son of his said brother *Peter Wentworth* for life; then successively to the first and other sons of his said nephew *Geo. Wentworth* in tail-male; then to the third and all other the sons of his said brother *Peter Wentworth* in tail-male successively.

And

And then he devises as follows: "And in default of such issue "I give and bequeath all that my capital seat called *Went-* "*worth Castle*, and all my said manors, messuages, lands, "tenements, and hereditaments in the said county of *York*, "unto my eldest daughter *Lady Ann Wentworth*, for life, "so as she and her husband (if she take any) take upon [56] "themselves, within the time after mentioned, the surname "of *Wentworth;* with remainder to (trustees) to preserve "contingent remainders; and from and after the decease "of the said Lady *Ann Wentworth*, or upon her husband, "if she take any, or her failure of taking upon them the "surname of *Wentworth*, I give and devise the said capital "seat, manors, lands, and hereditaments in the said county "of *York*, unto the first and other sons of my said eldest "daughter Lady *Ann Wentworth* in tail-male, successively, "taking upon them the surname of *Wentworth;*" with remainder under the like restrictions to his second daughter *Lady Lucy Wentworth* for her life, and to her first and other sons successively in tail-male; with remainder under the like restrictions to his third and youngest daughter *Lady Harriot Wentworth*, and her first and other sons successively in tail-male. And in default of such issue male of all his said three daughters, he devised the same premises in the said county of *York* to his own right heirs for ever. And the testator declared the said devises to his daughters and their issue male, to be upon this express condition, that his daughters, their husbands and issue male, should within three months after coming into possession of the capital messuage, manors, lands, and premises in the county of *York*, take upon themselves the surname of *Wentworth*, and reside for three months in every year at *Wentworth Castle*, and keep the same in good repair; and in default thereof by any, the premises should go to the next in remainder on the like conditions. "And as to all my said manors, lands, and here- "ditaments in the said counties of *Lincoln* and *Notting-* "*ham*, from and after my death without issue male, and "the death of my said brother *Peter Wentworth* without [57] "issue male, I give and devise the same premises unto "my three daughters, Lady *Ann*, Lady *Lucy*, and Lady "*Harriot*, and their heirs, equally to be divided among "them, share and share alike, as tenants in common, and

"not

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"not as joint tenants. And as to all other my manors, "messuages, lands, tenements, and hereditaments whatso- "ever, either freehold or copyhold, (except those in the "said counties of *York*, *Lincoln*, and *Nottingham*, which I "have already so disposed of by will) subject to the said "several rent-charges of 2000*l.* and 200*l.* per annum, and "the legacies, &c. I give and bequeath the same, in failure "of issue male of the body of my said son *William* Lord "*Wentworth*, and of my own body, to my said three daugh- "ters Lady *Ann*, Lady *Lucy*, and Lady *Harriot*, and their "heirs, equally to be divided betwixt them, as tenants in "common, and not as joint tenants." The will also contained powers to the testator's son *William* Lord *Wentworth*, and to the testator's brother *Peter Wentworth*, and his sons, when in possession, respectively to lease for 21 years, and to jointure a wife out of the premises devised to him, except *Wentworth Castle*; and for his brother *Peter W.*, when in possession, to charge 4000*l.* on the premises devised to him for his daughter *Ann*. The testator *Thomas*, Earl of *Strafford*, died in November 1739, leaving his son *William* Earl of *Strafford*, and his said three daughters, and also his nephews *William* and *George*, the only issue of his brother *Peter Wentworth*, then deceased, of whom *George* is since dead without issue. *William* Earl of *Strafford* entered upon the said customary premises, and died without issue in March 1791. Lady *Ann*, the eldest daughter of *Thomas* Earl of *Strafford*, married the Right Hon. *Wm.* [58] *Conolly*. She survived her husband, and died in February 1794, leaving the lessor of the plaintiff, her only son. The defendant *R. W. H. Vyse* is the grandson of Lady *Lucy*, the second daughter, also deceased, by her daughter *Anne*, who married General *Vyse*, and is since deceased: and the defendant *Henry Vernon* is the son of Lady *Harriot*, the third daughter of *Thomas* Earl of *Strafford*, also deceased. *Frederick Thomas*, the son of the said *William Wentworth*, in March 1791, upon the decease of *William* Earl of *Strafford*, became Earl of *Strafford*, and entered upon the said customary premises, and died without issue in August 1799, leaving *Augusta Ann Kaye*, his sister and heir at law; but never was admitted tenant to the said premises, or any of them. He also, in 1791, suffered a recovery of *Wentworth Castle*

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Castle and the other premises of freehold tenure in the county of *York*, devised to him by him *Thomas* Earl of *Strafford*. On the 11th of *February* 1802, the lessor of the plaintiff was admitted at the court baron, tenant to the said customary premises, under a writ of *mandamus*; the copy of the admittance stating, that he as heir-male of the body of Lady *Anne*, prayed to be admitted tenant, under the said will, to all the copyhold messuages, lands, &c. within the manor, of which *Thomas* Earl of *Strafford* died seised; stating also some of them to be of the nature of copyhold uncompounded for, and the residue to be of the nature of copyhold compounded for, and that the same were granted by the lord of the said manor, to the said *Thomas Conolly*, to hold to him and the heirs male of his body, according to the limitations of the said will, to be holden of the lord of the said manor by the rents, fines, suits, and services, according to the custom thereof. On the twentieth of *February* 1802, the lessor of the plaintiff, according to the custom of the said manor, suffered a recovery of the compounded part of the said customary premises to which he had been so admitted. *Wentworth Castle*, of which *Thomas* Earl of *Strafford* was seised in fee at the making his will, and at his death, is of freehold tenure, and is situate near ten miles from some part of the manor of *Wakefield*, and from that to fourteen miles from other parts. There is also an old mansion-house at *Wakefield*, of freehold tenure, belonging to the *Strafford* family, and also a close of land adjoining thereto, of three acres, also of freehold tenure, of which *Thomas* Earl of *Strafford* was so seised. The land adjoining to the mansion-house is claimed by the Duke of *Leeds*, as uncompounded. The manor of *Wakefield* was of ancient demesne of the Crown of *England;* and the said customary premises, as well as the other customary tenements within the manor, from time immemorial, have been and are demised and demiseable by copy of court-roll, by the lord or his steward, to any person willing to take the same in fee-simple or otherwise, according to the custom of the manor; being always called and reputed to be copyhold; but none of the grants or admittances state that the tenant is to hold at the will of the lord. In the reign of *James* I. about the year 1607, an information was exhibited by the Attorney-General of the duchy of *Lancaster* on behalf of his Majesty, against

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against a great many of the tenants of his Majesty's manor of *Wakefield* (982 in all) whereby they were mentioned to be copyholders of the said manor; and that the greatest part of the lands within were copyhold lands, parcel of the said manor, demised and demisable by copy of court-roll to any person or persons willing to take the same in fee-simple or fee-tail, or for term of life or lives, at the will of the lord, according to the custom of the manor, at and for fines uncer-
[60] tain at the will of the lord or his steward, to be paid to the lord upon every grant or admittance thereof: but stating that the tenants pretended that by the custom the fines were not arbitrary, but certain, *viz.* "For every admittance by "surrender or descent to any estate of inheritance in pos- "session, according to the custom of the said manor, one "year's rent and a half, according to the rent paid to "his Majesty, &c.; and half as much for every admittance "to any estate for life, lives, or years in possession or re- "version, or to any estate of inheritance in reversion, de- "pending upon some particular estates;" which the Attorney-General denied; and shewed further, that there were parcels of the wastes of the manor not demised or demiseable by copy of court-roll until of late, some part of which had been so demised, into which the defendants had unlawfully intruded, and had procured grants thereof by copy of court-roll without right or title; and made like pretence and claim for the certainty of the fines for grants and admittances of the said waste as for the aforesaid ancient copyhold tenements wherein the Attorney-General prayed the advice of the Court, &c. To which information the tenants answered, confessing that a great part of the lands within the manor were copyhold parcel of the manor demised and demiseable, by copy of court-roll of the said manor, according to the custom of the said manor, in fee-simple, fee-tail, or otherwise. And alleged that some of them held in fee-simple, and others in fee-tail, with remainders over, by copy of court-roll, according to the custom of the said manor; and insisted that the admittance-fines for the said copyhold lands were not arbitrary but certain, and had been usually assessed as the information charged that they had pretended them to be. And af-
[61] ter admitting that divers parcels of the waste had been granted by copy of court-roll, and that divers of the defend-

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ants held parcels thereof, so improved and granted by copy as aforesaid, &c. they prayed that the said parcels of waste might, by the Court, be declared to be, and thereafter to continue lawfully demised and demiseable by copy of court-roll, according to the custom of the said manor, upon such rents, &c. as theretofore were, or for such other reasonable fines as should be thought meet to the Court: and they prayed the Court to decree the fines of the ancient copyholds to be certain, according to their petition to his Majesty, as well for the confirmation of the certainty of their fines as of the said grants of the waste. Whereupon, after petition to and composition made with his Majesty for the sum of ——*l.* paid by the said copyholders, it was by the duchy court on the 27th *November*, 7 *Jac.* 1. decreed, That all the tenements, whether theretofore parcel of the said waste or no, which were then held and compounded for by the defendants, should for ever thereafter remain good and perfect copyhold tenements, demised and demiseable in fee-simple, fee-tail, for life, lives, years, or otherwise, by copy of court-roll, according to the custom of the said manor, any defect, &c. to the contrary notwithstanding. And that all and singular the said tenements, and every part thereof, should be demised and demiseable, and should be esteemed, taken, and adjudged to have been, and for ever thereafter to be demised and demiseable by copy of court-roll, according to the custom of the said manor of Wakefield, at and for such customs and services as theretofore, and at such rents as were then paid, as well for the parcels of waste as for other the copyhold tenements of the manor holden by the defendants. And further that, in future, fines certain and therein specified should be paid on admittances of every [62] copyholder to estates of inheritance in the said copyhold tenements: which decree was afterwards confirmed, and the tenements therein mentioned were enacted to be good and perfect copyhold lands and tenements, according to the true intent and meaning of the said decree, by an Act of Parliament passed in the 7th *Jac.* 1.; and whereby it is also Stat. 7 Jac. 1. enacted that all persons should hold the same to them, their heirs and assigns, for ever, by copy of court-roll or otherwise, according to the custom of the said manor, according to the purport and effect of the said decree, for such fines, rents, &c.

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&c., and with such privileges, &c. as in the said decree limited and appointed; saving to all persons (other than the King and his successors) all such estates, rights and titles as they had in the premises, as if that Act had not been made. This decree was recorded on the court-rolls of the manor of *Wakefield* on the 29th of *July*, 9th *Jac.* 1. The coal mines and the minerals under the customary tenements of the said manor, and the timber growing thereon, do not belong to the lord, but to the customary tenants of the customary tenements for the time being; who when seised of their customary tenements for any estate of inheritance, are entitled to get the coals and minerals under the same, and the timber thereon. The lessor of the plaintiff has received one-third of the rents and profits of the customary premises in dispute for one year since *November* 1801, and never took the name of *Wentworth;* and the defendants are in possession of the two other third parts of the same premises. It was agreed that this case should be turned into a special verdict at the request of either party, or of the Court. The questions for the opinion of the Court were, Whether the lessor of the plaintiff were entitled to the whole of the said customary tenements, with the appurtenances first above-mentioned, compounded and uncompounded, or to the compounded only, and to all of the said moiety of such of the customary tenements secondly above-mentioned as were compounded, and to the whole of the said customary tenements, with the appurtenances, which the said *Thomas* Earl of *Strafford* purchased as aforesaid, compounded and uncompounded, or to the compounded only, or any and which of them? If the lessor of the plaintiff were entitled, then the verdict was to stand: if he were not, then the verdict was to be entered for the defendant.

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Holroyd, for the lessor of the plaintiff, made two questions: 1st, As to the effect of the *surrender* of *Thomas* Earl of *Strafford*, of the 10th of *April* 1732, to the use of his will, whether it extended to surrender his *uncompounded*, as well as his *compounded* customary tenements? 2nd, As to the effect of his *will*, whether the customary tenements included in the surrender passed by his will to his eldest daughter Lady *Anne*, and her first and other sons in tail (under which description the lessor of the plaintiff claims) under the devise of all

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all his *freehold* manors, &c. considering such customary tenements as *customary freeholds:* or if not under that description, whether they did not pass to her and her first and other sons, *by implication*, from the whole will taken together: or whether such customary tenements, being *copyhold*, passed by the residuary devise to the testator's three daughters, the Ladies *Anne*, *Lucy*, and *Harriot* (under the two last of whom the defendants claim?) 1st, The surrender to the use of the will of *Thomas* Earl of *Strafford*, is of *all the tenements*, &c. holden of the lord of the manor of *Wakefield* by copy of court-roll, "being of the *yearly rent* to the lord *in the whole of* 4*l.* 10*s.* 8½*d. and compounded for*," which latter is a false allegation; for the rent of the old *compounded* tenements, which were holden by his father, amounted only to 1*l.* 5*s.*; and the rent of the whole, *compounded* and *uncompounded* together, amounted but to 4*l.* 14*s.* 6*d.* of which 1*s.* 9*d.* was for the rents of the lands purchased by the surrenderor himself, which were *compounded.* The amount, therefore, of the rents mentioned in the surrender does not agree with any description of property of this kind which he possessed; but it comes much nearer to the amount of *the whole* of the rents, *both compounded and uncompounded*, than to the *compounded alone;* and therefore the latter words, "*and compounded for*," are clearly inserted by mistake: it is a false allegation, inapplicable to the state of the surrenderor's property, and not intended as a description of the kind of property meant to be surrendered. Then the prior description of the tenements meant to be *surrendered*, viz. "all and singular the messuages, &c. which the said earl "now holds of the lord of the said manor of *Wakefield*, by "copy of court-roll, in whose tenures or occupations soever "the same now are," is plain and ample enough to include the *uncompounded* as well as the *compounded* tenements: and as the amount of the rents mentioned agrees very nearly with the *whole* as described in the surrender, and the trifling mistake in the computation would not of itself vitiate or narrow the surrender as for the whole, supposing the words "*and* "*compounded for*" were not added, these words may be rejected as a false allegation concerning that which was before described generally with sufficient certainty; and then the surrender will include the *uncompounded* as well as *compounded*

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pounded lands. In *Blague* v. *Gold* (*a*) a devise of a house, called "the Corner House," was holden a sufficient description to pass the house so named, though it was further stated to be in the tenure of *A.* and *B.*, when, in fact, it was in the tenure of *A* only; the adjoining house being in the tenure of *B.* So a feoffment, *by deed*, of a man's messuage *late of B. C.* in *D.* will operate, though he had, in fact, lately purchased it of *T. C. Windham* v. *Windham* (*b*). And again, in the case of *The Vicars Choral of Litchfield* v. *Ayres* (*c*), a grant of certain tithes, &c. and all other tithes appertaining to a certain rectory, was holden not to be vitiated by a false allegation that they were *all lately in the tenure of M. P.*, when only part of them were. Secondly, The customary tenements included in the surrender, passed to Lady *Anne*, under the description of all the testator's "*said* manors, messuages, lands, &c. in the county of York," &c. Supposing the word *said* to refer to the description before used, of "all his *freehold* manors," &c. that will depend on the nature of these customary estates, which were ancient demesne, and most usually *customary freeholds*. The mines and timber belong to the tenants, and not to the lord; which shews, that in the earliest times they were estates of inheritance, and not merely estates of a freehold nature only. The holdings are not *at the will of the lord*, which is the distinctive mark of copyhold, or base tenure, but *according to the custom of the manor*. The language, then, of the lord or his steward calling them *copyholds*, cannot make them so. Lord *Coke* (*Copyh. s.* 32.) speaking of common copyholders, says, "Neither was their estate hereditary in the beginning, "as appeareth by *Britton*; for if they died, their estate "was presently determined, as in case of a tenant at will at "common law. And in some points, to this present hour, "the law regardeth them no more than a mere tenant at [66] "will; for the *freehold* at the common law *resteth not in* "*them*, but in their *lords*, *unless it be in copyholds of frank* "*tenure*, *which are most usual in ancient demesne* (*d*), " &c. "These kinds of copyholders have the *frank tenure in them*,

(*a*) Cro. Car. 447 and 473. (*b*) Dy. 376. b.
(*c*) W. Jones, 435.
(*d*) This passage is quoted by the Court in giving judgment in Burrell v. Dodd, 3 Bos. & Pull. 382.

"and

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"and it is not in their lords, as in the case of copyholders in "base tenure." So in *Co. Lit.* 49. *a.* and 59. *b.* it is said that, *by custom*, a freehold and inheritance may pass by *surrender*, without livery: and *note* 6 to the former passage in Mr. *Hargrave*'s edition gives some instances, as that of *Lydford Castle* in *Devon* (*a*); and adds that in consequence of this kind of custom the estates subject to it have been called *customary freeholds*. And where an estate is granted by copy to hold, according to the custom of the manor, omitting the words *ad voluntatem domini*, it shall be intended to be a freehold. *Hughs* v. *Harrys* (*b*): and those words are the distinguishing mark of copyhold: *Hill* v. *Bolton* (*c*). And if they are omitted, the land must be taken to be freehold. *Rogers* v. *Bradley* (*d*). So by *Holt*, C. J. (*e*) "where a "custom is that all lands holden of that manor shall pass by "surrender and admittance, yet the lands may be freehold," &c. And in *Gale* v. *Noble* (*f*), it was directly adjudged that these customary estates, holden "according to the cus- "tom of the manor, and not at the will of the lord," were not copyholds, but customary freeholds; though it appeared there that the tenants had constantly taken their estates to be copyhold. The same distinction is taken in *Hussey* v. *Grills* (*g*), and *Crowther* v. *Oldfield* (*h*); which last, it appears from the report in *Lutwiche*, was a case arising out of this very manor of *Wakefield*; but there the estate which was declared to be holden by copy of court-roll, ac- [67] cording to the custom of the manor, was intended after verdict to be also holden "at the will of the lord," to entitle the party to his common claimed by the customary tenants within the manor. Then there is nothing inconsistent with these being customary freeholds in the information and decree in the time of *James* I. or the statute founded thereon. The objects of the information were two; 1st, To get rid of the certainty of the fines; 2d, To set aside certain intrusions on the waste. The information alleges that the tenements were copyholds "at the will of the lord," according to the custom of the manor. But though the answer by the tenants

(*a*) 5 Co. 84. b. (*b*) Cro. Car. 229. (*c*) 2 Lutw. 1171.
(*d*) 2 Ventr. 143. (*e*) Anonym. 11 Mod. 53. (*f*) Carth. 32.
(*g*) Amb. 301. (*h*) Salk. 364. 2 Ld. Raym. 1225. & 1 Lutw. 125.

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confesses the land to be copyhold, "according to the custom of the manor," yet, from what is stated, it appears that they were customary freehold; and the prayer of the defendants is, that the lands might be declared to be "demised and demiseable by copy of court-roll, according to the custom of the manor, upon such rents, and for such fines, &c. as before mentioned to be paid," &c.; and the decree, which confirms them to be copyholds, declares them at the same time to remain "demised and demiseable in fee-simple, &c. or otherwise by copy of court-roll, according to the custom of the manor, at the old rents;" omitting "at the will of the lord:" which shews that they were not copyholds in the legal sense, but customary freeholds. The decree, then, did not alter the old tenure, but left it as it was before. The object of the statute was merely to carry the decree into effect: and it contains, besides, a saving of the rights of all persons other than the King and his successors. The terms of admittance, stating the lands to "be holden of the lord "by copy of court-roll" generally, cannot vary the nature of the estate; for those are merely the words of the lord and his steward; nor can the reputation of their being copyholds, and being so called, alter the legal tenure. The question then is, Whether, if the tenements be customary freeholds, they passed to Lady *Anne* and her descendants, under the words of the will? A devise, or lease of all a person's lands, will pass customary copyhold as well as freehold lands; as in *Acherley* v. *Vernon* (*a*). But in *Haslewood* v. *Pope* (*b*), where there was a devise of all a man's lands in trust to pay debts, &c. and the devisor had freehold and copyhold; held the former only would pass, unless he had surrendered his copyhold to the use of his will; which shewed an intention to pass both. And *Tendril* v. *Smith* (*c*) is also express to that purpose. In the same manner, where there is a general devise of freehold lands, all freeholds will pass, whether customary or at common law. Besides which, in this case the introductory words shew that the devisor meant to pass the whole of his property; for he says. "as to the

[68]

(*a*) 9 Mod. 68. 10 Mod. 518, 529, and Comyn. Rep, 381.
(*b*) 3 P. Wms. 322.
(*c*) 2 Atk. 85. *Vide* also Goodwyn v. Goodwyn, 1 Ves. 226.

"worldly

"worldly estate," &c.; which Lord *Kenyon*, in *Doe* v. *Buckner* (*a*), said, was sufficient to shew an intent to dispose of all the devisor's property, if there were subsequent words in the will to carry that intent into execution; as in *Ibbetson* v. *Beckwith* (*b*): and the word *estate* is of itself sufficient to pass an estate of inheritance, without words of limitation (*c*): and such introductory words were also relied on in *Smith* v. *Coffin* (*d*), and *Gulliver* v. *Poyntz* (*e*). The words, "all "my freehold manors, messuages, lands," &c. are not to be narrowed, but to have their full effect from the introductory words. Here, too, the will was made within two or [69] three months after the date of the surrender; which also affords a presumption that the devisor contemplated to pass by his will the lands included in the surrender. Further: The devisor first devises the annuity to his wife and mother "out of all his real estate whatever;" and then he devises "all his freehold manors, &c. in the counties of *York*, *Not-* "*tingham*, *&c.* subject as to the said premises (which must "mean all the lands customary or otherwise) in the said "counties of *York*," &c. to the annuities before devised to his wife and mother, to his son, &c. Then, in case of failure of issue male of his son, he devises "all his said manors, "lands, &c. in the county of *York*," &c. to his brother, &c. Then in default of the male line, in the clause in question he devises *Wentworth* castle, and "all his said manors, mes- "suages, lands, tenements, &c. in the said county of *York*," unto his daughter Lady *Anne*, &c. This shews that he meant to pass all his estate that he had before subjected to the rent-charges to his wife and mother. And again, in case the devisor's other freehold premises and post fines were not sufficient to pay the annuities, while his brother *Peter* and his heirs male were in possession of the estates in *Yorkshire*, the deficiency is to be made good out of his said estates in the counties of *York*, &c. before devised to his brother: which shews that he considered he had before devised the whole of his estate in *Yorkshire* to his brother, by the same description as he afterwards devised it to Lady *Anne*. Then

(*a*) 6 Term Rep. 612.
(*b*) *Cas. Temp.* Talb. 157.
(*c*) Doe *v.* Allen, 8 Term Rep. 502.
(*d*) 2 H. Black. 444.
(*e*) 3 Wils. 143.

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nothing can be argued against the general intention to pass the customary estates under the general term of freehold lands, &c. from the particular mention of copyholds in parts of the will; for as he had before devised the copyholds in *Twickenham* to his wife and mother respectively, he necessar ly mentions those copyholds by name in the leading limit-
[70] ation to his son (which precedes the devise in question); because his son and the subsequent devisees in remainder would only take the reversionary interest in them after the life estates of the wife and mother were spent: and that accounts for the devise of "all his said freehold premises, "and also his two copyhold messuages in *Twickenham* after "the respective deceases of his mother and wife to his son," &c. It appears, therefore, that he used the term freehold ("all his freehold manors, lands," &c.) in its most general sense, as including customary as well as common law freeholds; which customary freeholds were distinguished in *Crowther* v. *Oldfield* (*a*) from copyholds properly so called. And in *Greenhill* v. *Greenhill* (*b*), where one had articled for the purchase of lands, part of which were customary lands, which were paid for, and the conveyances were to be executed at *Michaelmas*, and in *June* preceding he devised the residue of his personal estate to be laid out in land, and the land so to be purchased, together with his freehold estate, to be settled on the plaintiff, &c.; held, that the land thus contracted for, including the customary lands, passed by the will. It was said indeed there, that freehold was only named in contradistinction to personal estate. But here it is not mentioned in contradistinction to customary lands, though it may to copyhold holden at the will of the lord, of which the devisor was also possessed. [*Lawrence* J. He had no copyhold of that description in the counties of *York*, *Nottingham*, or *Lincoln*; and therefore he could not have mentioned freehold in that part of his will, in contradistinction to copyhold holden at the will of the lord.] Then as to the residuary clause, if these customary lands are not before
[71] devised, they cannot pass but by implication, until failure of issue male of himself and his son: but it is a settled rule, that if there be words in a will sufficient to pass an estate, it

(*a*) Salk. 364. (*b*) 2 Vcn. 679.

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shall not be left to pass by implication. As to the powers of leasing and jointuring, they are as necessary in the case of customary as of common law freeholds.

Walton, contrà (after premising that, in consequence of Mr. *Conolly*'s death recently, he should wave the question as to the forfeiture by his not having taken the name of *Wentworth*) made two questions; 1st, On the effect of the surrender, Whether it comprised the uncompounded lands? 2dly, On the general construction of the will, in respect of the devise of all the devisor's freehold manors, &c. and on the residuary devise to the three daughters. 1st, At the time of the surrender Lord *Strafford* was seised of three descriptions of copyholds; 1. Copyholds compounded and uncompounded (in other words, with fines certain and fines arbitrary) of which he was seised in tail male as heir of his father: 2. Of moiety copyholds, compounded and uncompounded; over the compounded he had a disposing power; of the uncompounded there was a general entail still subsisting; of these, therefore, he was seised in tail general: 3. Of copyholds, some compounded, some uncompounded, which had been purchased by himself; of which the lord's rent was not above *1s.* 8½*d.* He had, therefore, very little disposing power over the copyholds, without incurring the expense (two years' value) of barring the entail, and that too by means of making a lease for six years (*a*), which creates a forfeiture. The uncompounded lands constituted much the greater part, of which he had not the immediate disposing power, but only a distant reversion: there is, therefore, nothing improbable in supposing that he meant to pass by the surrender those only which it expresses, namely, the compounded lands. Surrenders are to be construed as strictly as deeds, and that is a bad construction which leaves out an integral part of a sentence, the plain and obvious sense of which is to control the former words of it. It is a general rule, in constructing any deed or instrument, that where there is sufficient certainty before, by way of description of the thing granted, as by giving to a close a particular name, &c.; there is a subsequent mistake, as in the tenant's name,

Construction of surrender.

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(*a*) Where there is no particular custom within a manor for barring an entail, it is said that the surrender itself to the use of the will may bar it. White *v.* Thornburgh, 2 Vern. 705. and Moore *v.* Moore, Ambl. 279.

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the number of acres, or the rent, shall not hurt the grant. But where the premises are first described generally, and afterwards a particular description is added, that shall restrain the general words. *Bro. Abr. Grants, pl.* 92. *Fitz. Abr. Release, pl.* 11. In *Doddington*'s case (*a*), it, is said, where one grants *omnia illa messuagia in tenura J. B.*, scituat. in *W.*, &c. and in truth the lands lie in *D.*, the grantee shall not have any lands out of the town to which the generality of the grant doth refer: for *illa* makes such a necessary reference, as well to the town as to the tenure of *J. B.*, that if one or the other fail, the general grant is void: for *illa* is not satisfied till the sentence be ended; and it governs all the sentence till the full stop." So where one devised to his son *H.* all his lands, &c. freehold and copyhold, in *C.* or elsewhere, in the county of *M.* ("which copy lands I have surrendered to the use of my will) "to him and his heirs," Lord Chancellor held, that the words in a parenthesis could not be rejected as superfluous; that

[73] they were to be taken as restrictive of the former words; and therefore that a part of the copyhold house in *C.* which he had purchased after the surrender to the use of his will did not pass. And this ruled a similar case of *Wilson* v. *Mount* (*b*), where the Master of the Rolls states the result of the cases referred to be, that if a *viz.* be repugnant to what has gone before, it shall be rejected; but "if it can be reconciled and made restrictive, it shall be so." As to the principal case cited *contrà* of *Swift* v. *Eyres*, it is also reported in *Cro. Car.* 548., and there the reason assigned why the last clause was not restrictive is, because what went before was not in one entire sentence, but distinct and disjoined from the other: and then the word *all* ("all which were," &c.) so disjoined, could not be a restriction, but an explanation.

Construction of the will.

Next, As to the construction of the will; it is contended, that the customary estates surrendered are customary freehold, and that they passed under the devise of "all his free- "hold manors, lands," &c. For all his said manors, &c. in the devise to Lady *Anne*, must have reference to the manors, &c. before described, which are designated as freehold manors, &c. But it is clear that they are in general considered

(*a*) 2 Rep. 33. (*b*) 3 Ves. jun. 191.

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not as freeholds, but as copyholds. They are a species of villenage tenure, holden by copy of court-roll; the name of copyhold being comparatively modern (*a*), transmissible by surrender and admittance; forfeitable if leased for above a year, or in default of suit or service. All these circumstances shew them to be of base tenure, or at best no more than a superior kind of copyholds. The tenants were more privileged when holding of the king in ancient demesne, than when holding of the inferior barons. 2 *Blac. Com.* 99, 100, gives shortly the result of the treatise on copyholds, and shews what the learned author considered these customary tenants to be, namely, only highly privileged villeins, whose tenure was absolutely copyhold, though they had an interest equivalent to a freehold. But if the tenants were freeholders, they must have a right to vote for knights of the shire: but in the election of 1755 for the county of Oxford, where a customary tenant in ancient demesne had voted for Lord *Wenman*, the House of Commons set aside his vote. In the year following a bill was brought into the House to settle the question; which did not pass. In 1758, *Blackstone*'s tract, intituled "Considerations on Copyholders," was first published, and soon after the statute 31 *Geo. 2. c.* 14. was passed, which is tantamount to a declaratory law, reprobating the pretended right of such customary tenants to vote as freeholders, and denying the exercise of it in future under a penalty. If this were a freehold tenure, it must have been abolished and reduced to free and common socage by the stat. 12 *Car. 2. c.* 24.; not being within either of the excepted cases. Land claimed as ancient demesne is always pleaded to "be parcel of the manor;" and so it was pleaded to be in *Crowther* v. *Oldfield*(*b*) in this very manor: and there the judgment having been arrested in *C. B.* for want of laying the copyhold in respect of which the common was claimed to be holden *ad voluntatem domini*, that judgment was reversed in *B. R.* the defect being cured by verdict; for, as was said, freehold could not be "parcel of the manor," as this was laid to be, though it might be holden of the manor: and that was relied on in *Burrell* v. *Dodd* (*c*). Some Judges indeed, in

[74]

(*a*) *Vide* Fitz. *Na. Brev. Writ de Recto Clauso* 25.
(*b*) 1 Lutw. 125. Salk. 364. 2 Ld. Ray. 1225.
(*c*) 3 Bos. & Pull. 381.

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the cases referred to, have considered these customary estates as freeholds, generally: but that is a mistake. Tenants in ancient demesne are of three sorts: 1. Charter tenants, who are seised as of freehold; 2. Tenants by copy of court-roll, or customary tenants; 3. Bond tenants. To the former description only can the term Freehold be in any sense
[75] applied. *Fitz. Na. Br. Writ de Recto Clauso*, 23, and the notes. And in *Doe* d. *Reay* v. *Huntingdon* (*a*) these customary tenants were lately considered as a class of copyholders. [Lord *Ellenborough*, C. J. Some of those tenants, though obliged to perform military service in attending on the border of Scotland for an uncertain time, and therefore so far favouring of military tenure by escuage uncertain, were yet, upon a question referred to the Judges, and amongst others to *Hutton* J. in the time of *James* I., considered to be copyholders.] Besides, these estates are found to have been always called and reputed copyholds by the tenants: and, as such, it is reasonable to presume that the testator considered them in common with the other tenants; and that he used the word freehold in its common and popular acceptation. And they are named copyhold in the admittance of the lessor of the plaintiff himself, and in the mandamus which he sued to admit him. They are also so called in the proceedings in the time of *James* I. And the tenants there admit that they are copyhold, though not that they are holden at the will of the lord, as suggested in the information filed by the Attorney-General: and such they are stated to be by the decree confirmed by the Act of Parliament; the saving in which relates only to strangers to the decree, and not to those who were privies to it, as the tenants were, and therefore bound by it. And the decree includes all the tenements, and not merely those taken out of the waste. Then as to the general construction of the will, introductory words can only serve to explain the intention to pass all the
[76] devisor's property, where there are subsequent words large enough to carry the whole property: but here the words of devise limit the description to freehold property. No intention can be gathered from thence to pass the customary estates, which are of the nature of copyhold. If he had

(*a*) 4 East, 288.

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meant to pass them he would have probably said so in terms, especially as he mentioned certain copyholds at *Twickenham* by name; or at least he would not have excluded such an intention by the addition of the term freehold to the other general terms of description. But further: the old customary estates would have descended to Lady *Anne* as tenant in tail under the old entail; and therefore it was nugatory to give her an estate for life. Again: The leasing power is inapplicable to customary estates, which could not be leased for above a year without creating a forfeiture; and there would be great difficulty in applying to them the charging and jointuring power; it could only be done by surrendering them to trustees. Then the residuary clause is comprehensive enough to convey all the property not before disposed of. He thereby gives to his three daughters, in default of issue male of himself and his son, "all other his "manors, messuages, lands, &c. whatsoever and where-"soever, either freehold or copyhold (except those in the "said counties of *York*, *Lincoln*, and *Nottingham*, which "I have already so disposed of," &c.) There he uses the word freehold as contradistinguished from copyhold, and uses both where he meant both. And the exception refers to the estates which he had before given in those counties, and does not necessarily imply that he had before given all his freehold and copyhold lands, &c. in those counties, for in some of them he had no copyholds; and in the greater part of the copyholds he had only a remote reversion to dispose of. No new estate was meant to be passed by the exception. It is true, that according to *Walter* v. *Drew* (*a*), [77] an eldest son may take an estate tail by implication, upon a devise over, in case he happen to die without issue; but that was in favor of the heir; and here all the daughters constituted but one heir at law of Lord *S.*, failing issue of his son; and therefore the Court would not disinherit them but by express words or necessary implication. But if the son took these copyholds in tail, they would go over, in default of his issue, to all the daughters alike: or if they took by way of executory devise, it would avail the defendants equally.

(*a*) Comyns' Rep. 372.

Holroyd,

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Holroyd, in reply, observed as to the state of the property, that whether Lord *Strafford* had a fee (as he supposed him to have in part) or only an estate tail, his having surrendered to the use of his will shewed an intention to dispose of what he had. These customary estates were distinguished as copyholds of frank tenure, from copyholds holden at the will of the lord, in the case of *Burrell* v. *Dodd* (*a*); and it was said that in the former the freehold vested in the tenant, and not in the lord. In some manors the form of the admittance to tenant-right estates is different, as in *The Duke of Somerset* v. *France and Others* (*b*), where it was to hold *ad voluntatem domini secundum consuetudinem manerii*; and there, upon the death of the admitting lord, the estate was altogether out of the tenant, though he had a right to be readmitted, paying his fine. In such manors, therefore, where the estate passes by the mere admittance of the lord, without the grant of the tenant, the freehold may remain in the lord: but not where it passes by the grant of the [78] tenant, and the admission is a mere recognition on the part of the lord. The tenant may have the freehold, though the inheritance be in the lord. And this is shewn by the form of pleading, where the tenant is said to be seised of the estate, which must be an estate of freehold: but it is also said to be parcel of the manor, insomuch as the inheritance is in the lord; though by the custom the heir has a right to claim admittance: and they are pleadable as estates descendible from ancestor to heir. Such customary estates, Lord *Hardwicke* says, in *Hussy* v. *Grills* (*c*) never were of base tenure; and Lord *Coke*, in his Copyholder, states them to be of frank tenure. And though Mr. Justice *Blackstone* considers them otherwise in his treatise, in order to shew that such tenants were not entitled to vote for knights of the shire; yet that is not supported by the cases cited, and was not necessary for the purpose of his argument; for none were entitled to vote at a county election but the freeholders, who were bound to attend the county court: and these tenants in ancient *demesne* being privileged from such attend-

(*a*) 3 Bos. & Pul. 378. (*b*) Fortesc. 41. and 1 Stra. 654.
(*c*) Ambl. 301.

ance,

ance, would not have a right of voting, though their tenure was clearly freehold.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court. After stating the case—

Upon the argument of this case two principal points were contended for on behalf of the plaintiff; the first was, That in the surrender by *Thomas* Earl of *Strafford*, on the 10th of *April* 1732, to the use of his will all his customary estates, as well those which were uncompounded as those which were compounded, were comprehended. The second point was, That by the devise of "all his freehold manors, [79] "messuages, lands, tenements, and hereditaments in the "counties of *York*, *Nottingham*, *Lincoln*, *Northampton*, *Suf-* "*folk*, *Kent*, and *Middlesex*, or elsewhere in *Great Britain*," the customary lands, the subject of this ejectment, passed.

As to the first question which has been made upon the effect of the surrender, the cases cited from *Cro. Car.* 447, *Dyer*, 376, and Sir *W. Jones*, 435, were relied on by the plaintiff's counsel, for the purpose of shewing that the surrender extended to the uncompounded as well as the compounded copyholds. But these cases appear very distinguishable from the present. The first of them, which is the case of *Blague* v. *Gould*, was a devise of a corner house in *Andover*, described as being in the tenure of *Benson* and *Hitchcock*, whereas it was in fact in the tenure of one *Benson* and one *Nott*; the devisor also having another house thereto near adjoining, in the tenure of *Hitchcock*. And it was holden that the corner house, in the tenure of *Benson* and *Nott*, passed; for that was the devise of a thing sufficiently ascertained by the words "corner house:" and there the intent was apparent that the corner house should pass in whosever tenure it might happen to be. And the same case is further reported as again argued, and finally adjudged, *Cro. Car.* 473; where it is said that the addition in *tenurâ* of *Hitchcock*, although it be not in his tenure, and be a mistake, yet it is but surplusage; and, although false, shall not vitiate the devise; because the devise was of a thing certain at first, and shall be expounded according as the intent of the parties is apparent. The case of *Wyndham* v. *Wyndham*, *Dyer*, 376, was the

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the case of a feoffment of a house, lately of RICHARD *Cotton* in *D.*; which was false, the owner being THOMAS *Cotton*. The feoffor had no other house in *D.*, and the *feoffment was holden good. And the reason, according to Ld. *Hardwicke* (*3 Atk.* 9.) was, that otherwise the devise would have been void. But in the case now before the Court, the surrender will not be void, though it should be construed not to extend to the uncompounded lands. And there is another circumstance by which the present case is distinguishable from those, *viz.* that in them the grant was of one particular thing sufficiently ascertained by some circumstance belonging to it; in which case, according to the doctrine upon this head, which is fully discussed in Lord *Hobart*, 171, 2, a circumstance mistaken and false will not frustrate the grant of particulars sufficiently once ascertained. But here the words first used are general words, not descriptive of particular things; and according to Lord *Hardwicke*, in *Gascoigne* v. *Barker*, *3 Atk.* 9, "where a man does not make a certain definitive descrip-"tion, it is very difficult for courts of justice not to construe "subsequent restrictive words as explanatory of the former." And this distinction is to be found in *Dyer*, 50, *b.*, where *Harwood*, the Attorney-General, laid it down, That "if I "release all the right which I have in *White Acre*, and "name all the land in certain which I bought of such a "man, and in truth I bought it of another; yet, because "the land is certainly named at first, the release is good, "notwithstanding the misrecital afterwards; but where it "is made general, it is otherwise." As, for instance, if it had been "all my land which I bought of such a man," having bought none of him; in that case there would have been no basis of certainty laid to have given effect by reference to the other words; and they must, on that account, have been merely inoperative and void. The same doctrine is to be found in the Year-book, *M. 2 E. 4. p.* 39, and in

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Fitz. Ab. tit. *Release*, 11. The case of the Vicars Choral of *Litchfield* v. *Eyres*, in Sir *W. Jones*, 435, was a grant of all the tithes belonging or appertaining to them as appropriators of a certain parish, "all which were lately in the "occupation of one *Margaret Peto*, widow, deceased." And there it was holden that all tithes belonging to the rectory

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tory passed, though none, or only a part, had been in the possession of *Margaret Peto*. This case, according to the report of it in *Cro. Car.* 546, and 2 *Roll. Abr.* 52, *pl.* 26, was decided on the ground, as stated in *Rolle*, " That these " words were words of suggestion or affirmation, and not " of restriction or limitation, because the sentence was per- " fect before," and the words " all which," &c. commence a new sentence, and are not a part of the first or general sentence; and, as said in the report in *Croke*, the word *all* so disjoined cannot be a restriction, but an explanation. But here there can be no question whatever but that the words " being of the yearly rent of 4*l.* 10*s.* 8½*d.* and compounded " for," are part of the general sentence: and where there is no disjoining or division in the words or sense, but the whole is one entire sentence, the one part may well restrain the other. And the cases, cited by Mr. *Walton* for the defendants, of *Gascone* v. *Barker*, 3 *Atk.* 9, and *Wilson* v. *Mount*, 3 *Ves. jun.* 191, fully shew that what is mere allegation may, if consistent, operate as a restriction. We are, therefore, upon these authorities and considerations, of opinion that the words " and compounded" operate by way of restriction in the present case, and confine the surrender, in point of effect, to that description of copyholds then belonging to the surrenderor; and that the words " yearly value of 4*l.* 10*s.* 8½*d.*," being referable to no actual amount of rents in this case, cannot qualify or impugn this restriction.

As to the second question; it appears by the case that [82] Lord *Strafford*, at the time of making his will, was seised of considerable freehold estates in the counties of *York*, *Nottingham*, *Lincoln*, *Middlesex*, and elsewhere in *Great Britain*, and that he was also seised of certain customary tenements in the manor of *Wakefield*, in the county of *York*; of some part of them in tail male, of other part in tail general, and in fee of the reversions, and of other customary lands in fee; and besides these, that he was seised of some copyholds in *Middlesex*, which were such in the strictest sense of the word. These customary lands in *Yorkshire* are by the surrender, which it is insisted comprehended them, described as being holden of the lord of the manor of *Wakefield* by copy of court-roll; and the lessor of the plaintiff himself has obtained a mandamus from this Court to admit him

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him to the lands for which this ejectment is brought, describing them as *copyhold* lands within the manor of *Wakefield*, whereof *Thomas* Earl of *Strafford* died seised. It is also stated by the case, that the manor of *Wakefield* is ancient demesne, and that the customary tenements of the manor are demised and demiseable hy copy of court-roll of the said manor; that they have always been called and reputed copyholds; but that none of the admittances state the tenants to hold at the will of the lord. It appears also by the case, that in the reign of *James* I. certain proceedings were had in the duchy court of *Lancaster*, in which the matters in dispute were, whether the fines payable to the lord were fines arbitrary or not; and whether the grants which some of the tenants had obtained of the waste were valid: and that in all these proceedings the estates of the tenants were considered as copyhold tenements demised and demiseable by copy of court-roll, according to the custom of the manor.

[83] In addition to this, it does not appear that Lord *Strafford* had any other lands in *Yorkshire* holden by copy of court-roll. Lord *Strafford* being thus circumstanced with respect to his property, the question before us is, What did he mean to pass by that part of his will in which he speaks of his freehold lands, tenements, and hereditaments? In the course of the argument it could not be contended, if Lord *Strafford* had been seised of what the counsel for the lessor of the plaintiff allow to be copyhold lands which had lain in *Yorkshire*, that the devise would have comprehended them under the denomination of freehold. And in order to get rid of the effect of that word *freehold*, which applies to his lands in *Yorkshire*, as well as to those in the other enumerated counties, it has been insisted that the premises in question are property of that description of freeholds which are called customary freehold, sand many cases and authorities have been cited to shew that customary tenants, who do not hold at the will of the lord, are not copyholders, but freeholders. But without going into the learning respecting tenants in ancient demesne, and other tenants who hold by copy of court-roll, according to the custom of the manor, though not at the will of the lord (the whole of which is collected by Mr. Justice *Blackstone* in his Considerations on Copyholders), we think, upon this occasion, as the customary lands in question are demiseable,

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demiseable by copy of court-roll, have always been called and reputed copyhold, and that such of them as the testator himself surrendered to the use of his will, were described by him expressly as holden by copy of court-roll, that he cannot be understood as having intended to pass them under the description of freehold lands. In disposing of their property, testators usually advert to the known and ordinary circumstances attending it, and adopt the appellations by which it is generally and more familiarly distinguished; and cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates, about the effect of which profound lawyers and legal antiquaries might entertain controversies. (*a*) The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves, and those estates, the titles to which are evidenced by copies of the rolls of the courts baron of different manors, is familiar even to men the least acquainted with the rules of property: but the distinction, and still more the effect of the distinction, between tenants by copy of court-roll "at the will of the lord," according "to the custom of "the manor," and tenants by copy of court-roll, simply according to such custom, as determining the one to have a freehold interest, and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property; or to be adopted by them if it did occur. If Lord *Strafford*, having made due surrenders to the use of his will, had devised all his copyhold estates in *Yorkshire*, there could be no question made but that those estates which are now contended to be freehold would have effectually passed under the above description, *i. e.* as copyhold. If the language of this will is attended to, it will be found that where the testator meant to pass or charge his estates without any regard to their quality or tenure, he has used words which, in their generality, would comprehend all, without adding others which might, by construction, operate to narrow or restrain their meaning. In the introduction to his will he speaks of his worldly estate: a most comprehensive term, extending to property of every description. To his wife he devises an

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(*a*) *Vide* Willes' Rep. 354.

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annuity out of all his real estate, in lieu of her dower or thirds at common law, which she might otherwise claim out of any part of his real estate which he had been, or should, or might be seised of during their intermarriage: words of measured extent and caution, peculiarly fitted for the purpose he had in view. To his mother he gives an annuity out of all his *real* and personal estate, in lieu of her jointure, dower, or thirds at common law, and all other demands out of the *real* and personal estate of her late husband. After which comes the devise upon which the question arises, in which the testator no longer uses expressions of a generality calculated to carry all his lands in the enumerated counties, but only those which are freehold; accompanied by a devise by name of two copyhold messuages in Twickenham; marking thereby a knowledge, on his part, that in order to pass those copyholds, at least the words he had used before were insufficient. The remaining part of the will furnishes no argument of intent to be drawn from the use of any particular expressions until we come to the residuary clause; which the counsel for the lessor of the plaintiff contends to have furnished an argument in his favour, from the circumstance of these customary lands being undevised until after failure of the issue of his son Lord *Wentworth*, and of his, Lord *Strafford*'s, own body, unless they are comprehended under the description of freehold lands; which, it is said, he never could have intended from the introduction to his will, where he professes an intent to dispose of all his worldly estate. But in answer to this it has been justly said, that there will be no intestacy if the heir at law, according to the case of *Walter* v. *Drew*, in *Comyns' Reports*, took an estate tail
[86] by implication. And it would be carrying the effect of introductory words much further than has been hitherto done, if they should be so construed; for though they have been holden to ascertain the extent of an estate in lands unquestionably devised, we are not aware of any case which has decided that such introductory words will alter the obvious and natural construction to be put on words used by a testator, which of themselves admit of no doubt, unless indeed the context should necessarily and absolutely require such sense to be put upon them; which is not the case in the present instance. But this residuary clause furnishes, from the penning

penning of it, an additional argument, that the testator's intent was confined to what were, according to common understanding, freehold lands: for after, in certain events specified in that clause, devising all his said manors, lands, and hereditaments in the counties of *Lincoln* and *Nottingham* to his three daughters *Anne*, *Lucy*, and *Harriot*, he devises all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either freehold or copyhold, (except those in the counties of *York*, *Lincoln*, and *Nottingham*, which he had before devised) to his three daughters; again marking the distinction between freehold and copyhold estates, and shewing that where he meant to pass copyhold, he felt it necessary so to describe it. Upon the whole, therefore, we are of opinion that no sufficient argument arises, either from the introductory words, or from any other part of the will, which will warrant us in annexing to the word *freehold*, as it occurs in the devise in question, any other meaning than that which, in the ordinary understanding of a common testator, it would naturally and obviously bear; and still less so in the case of a testator conusant, as this testator appears to have been, of the proper nature, quality, and denomination of the different species of property he professes to dispose of by his will. For these reasons we are of opinion that the defendants are entitled to judgment.

Postea to the Defendants.

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Doe, on the several Demises of Stevens and Pain, *against* Snelling and Others.

Friday, April 27th.

IN ejectment to recover certain premises in *Bramley* and *Wonersh*, in the county of *Surrey*, tried before Lord *Ellenborough*, C. J. at the last assizes for that county, a verdict

One devised thus: "Concerning my worldly estate, I give and bequeath to M. M. 1*s*. Also, I give and bequeath to A. M. 2*s*." (with pecuniary bequests to several others in the same form of words). "Also, I give and bequeath to G. S. my messuage and land, &c. in W. Also, I give and bequeath to the said G. S. and his wife all my lands, &c. in B.; also, all my messuages, &c. in W.; also, all my goods, chattels, &c. and personal estate, after having thereout first paid and discharged all my debts and funeral expenses: also, subject to the payment thereout all the aforesaid legacies. And I nominate the said G. S. to be sole executor; whom I charge with the payment of my debts, legacies, and funeral expenses," &c. Held, that G. S. and his wife took a fee in the real estate devised to them, by reason of the words "having thereout first paid all my debts," &c. which was a personal charge on them in respect of the realty as well as personalty, all devised in one entire sentence, together with such charge.

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verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

Sarah Dabner, late of *Wonersh*, in the county of *Surrey*, widow, deceased, being seised in fee (amongst other things) of the premises in question, by her will, dated the 27th of *July* 1785, duly executed and attested, devised as follows: "Concerning my worldly estate, I give and dispose thereof "as follows, (*viz.*) I give and bequeath unto *Michael March* "of, &c. 1*s.*: also I give and bequeath unto his wife *Ann* "*March*, 2*s.*: also I give and bequeath unto *Elizabeth Ste-* "*vens* of, &c. 50*l.*" (with other bequests in the same form of words.) "All which said sums to be respectively paid in "12 months after my decease. Also, I give and bequeath "unto *George*, *Elizabeth*, and *Sarah*, son and daughters of "the above-named *George Stevens*, 10*l.* each, to be paid "unto them when they shall respectively arrive at the age of
[88] "21 years; and if either of them die before 21, their share "to be paid to the survivor. Also, I give and bequeath "unto *George Snelling* of *Bramley*, in the said county, "cordwainer, all that my messuage or tenement, malt-house, "garden, land, and premises situate in the parish of *Wingrove*, "in the county of *Bucks*. Also, I give and bequeath unto "the said *George Snelling* and *Sarah* his wife, all that my "messuage or tenement, farm, lands, and premises, situate "in *Bramley* aforesaid: also, all that my messuage or "tenement, garden, and premises situate in *Wonersh* "aforesaid, and now in my own occupation: also, all "and singular my goods, chattels, rights, credits, ready "money, and personal estate of what nature and kind soever, "as I shall die seised and possessed of, interested in, or en- "titled unto, after having thereout first paid and discharged "all my just debts and funeral expenses: also subject to the "payment thereout all the aforesaid legacies. And I nomi- "nate, constitute, and appoint the said *George Snelling* to "be sole executor of this my last will and testament, whom "I charge with the payment of all my just debts, legacies, "and funeral expenses."

The lessors of the plaintiff are heirs in coparcenary to *Sarah Dabner* the testatrix. The defendant, *George Snelling*, is the infant son and heir at law of *George Snelling* the devisee, who survived *Sarah* his wife, and died in possession of

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of the premises in question in *February*, 1803. The other defendants are tenants in possession of the premises. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover?

Lawes for the plaintiff. There being no words of limitation or inheritance annexed to the several devises to *George Snelling*, and to him and his wife, no more than an estate for life or lives, passed by the express words of the will. But it [89] will be said that the subsequent charge on *George Snelling* to pay the debts and legacies will carry the fee. That would be so, if it were a charge on him in respect of the realty before devised to him, according to the authorities, in order to enable him, if necessary, to sell, and carry into effect the purposes of the will. But a charge for the payment of debts must always be construed with reference to the rules of law for the payment of debts, which the testator must be taken to have had in contemplation, if he have not otherwise expressed himself. Where the charge, therefore, is in general terms upon one who is named executor, and to whom especially the personal estate is immediately before bequeathed, it must be presumed that the payment was intended by the testator to be made out of that fund which the law first appropriates to the payment of debts. It was so considered by *Grose*, J. in *Denn* d. *Moor* v. *Mellor* (*a*), where a bequest of the residue of lands and goods after payment of debt, &c. was holden not to carry a fee. So it was also ruled in *Dickins* v. *Marshal* (*b*), *Canning* v. *Canning* (*a*), and *Merson* v. *Blackmore* (*d*). In the latter, the Master of the Rolls laid stress on the charge not being at all events on the realty, but only conditionally in case the personalty was not sufficient. This is distinguishable from *Doe* d. *Palmer* v. *Richards* (*e*), which was a devise of the residue of lands and goods, the testator's legacies and funeral expenses being *thereout* paid. For there, the whole was one continued devise, in one unbroken sentence; and it could not be taken to refer more to the personalty than the realty; but the word *thereout* necessarily over-rode both species of property. But here the realty is first devised in one complete sentence; and [90]

(*a*) 5 Term Rep. 564. (*b*) Cro. Eliz. 330. (*c*) Mos. 240.
(*d*) 2 Atk. 341. (*e*) 3 Term Rep. 356.

then

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then the personalty, beginning with the disjoining word *also* with which the testator had before commenced every separate bequest; and then *also* occurs again in the clause subjecting the property to the payment *thereout* of the legacies. And then *George Snelling* is by a substantive clause appointed sole executor; in which character only the charge upon him of the payment of debt attaches; which must therefore be meant out of the personalty. So in *Hopewell* v. *Ackland* (*a*), where the devise was, "*Item*, I devise my ma- "nor of *B.* to *A.* and his heirs. *Item*, I devise all my "lands, &c. to the said *A.* *Item*, I devise all my goods and "chattels, and whatever else I have not before disposed of, "to the said *A.*, he paying my debts and legacies;" and *A.* was made executor. *Trevor*, C. J. said, that "*Item* was a "usual word in a will, to introduce new distinct matter; "therefore a clause thus introduced is not influenced by, "nor to influence a precedent or subsequent sentence, unless "it be of itself imperfect and insensible without reference; "and therefore not here, where both clauses are perfect and "sensible. But by reason of the concluding sentence de- "vising what was not before disposed of, he held that *A.* "took a fee." So in *Doe* v. *Holmes* (*b*), where the devise was of "my house and furniture to *A.*, whom I make executrix, "she paying all my debts and legacies;" which was deemed to carry the fee. Lord *Kenyon* laid stress on the circumstance that the *personalty* was separately given to *A.* by the next clause in the will, viz. "I likewise leave to *A.* all the rest of "my personal estate." It is also material, in this case, that the charge is not upon the same persons who take the realty: for the charge is upon *George Snelling* alone, in the same [91] clause in which he is appointed executor; but the realty was given to *George Snelling* and his wife; and though it be there given them "after having thereout first paid the "debts," &c. yet that refers to the personal estate which is given by the same clause: and the subsequent direction that the debts, &c. shall be paid by *George Snelling* the executor, shews in what character the charge was first imposed, and out of what fund it was to be satisfied.

Bosanquet, *contrà*, was stopped by the Court.

(*a*) Salk. 239. (*b*) 8 Term Rep. 1.

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Lord ELLENBOROUGH, C. J. The question is, Whether *George Snelling* and his wife, the devisees, took the fee, or only an estate for life in the lands and premises in *Bramley* and *Wonersh?* The testatrix, after giving several pecuniary legacies, first disposes of her messuage, &c. in the parish of *Wingrove*, which she devises to *George Snelling* alone. And that may probably be contended to pass only a life estate to him, if any question should arise upon it. Then she devises to *George Snelling* and his wife the premises in *Bramley*, also the premises in *Wonersh:* those two estates, it is to be observed, are disposed of in the same continuing and entire sentence; for the words "I give and bequeath," are not repeated, and must necessarily therefore extend to the subsequent part of the sentence, in order to make it intelligible. The sentence then goes on, "also all and singular my goods, "chattels, &c. and personal estate, of what nature and kind "soever, as I shall die seised and possessed of," &c. Here again the continuity of the sentence is evinced; for having first devised the realty, and then the personalty, the word *seised* appears to have been used as applicable to the realty, and *possessed* as applicable to the personalty. And then the sentence, after disposing of both species of property, concludes thus: "After having thereout first paid and dis- "charged all my just debts and funeral expenses; also "subject to the payment thereout" (repeating again the word *thereout*) "all the aforesaid legacies." The question then is, Whether the fee be not given by necessary implication from these concluding words, which impose a charge upon the devisees of the payment of debts, legacies, and funeral expenses, which a less quantum of estate might not be sufficient to satisfy? I take the rule to have been laid down by Lord *Kenyon*, in *Doe* v. *Mellor*, and *Doe* v. *Holmes*. The question has always been, Whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events? Where debts or annuities are to be paid by the devisee at all events out of the estate in his hands, the devisee must take a fee; otherwise the charge might be greater than the estate devised, and he would be a loser. For if he only took an estate for life, the debts, &c. might be payable before the rents became due, and he might not live long enough to reimburse

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reimburse himself. But where the charge is only payable out of the rents and profits, there the devisee cannot be a loser, as he cannot be chargeable with more than he has received. The distinction therefore turns on this; Whether the charge be on the person of the devisee, or only on the property devised? Now here the estate is devised to the devisees, with a direction thereout to pay debts and funeral expenses. That brings the question to the grammatical construction of the sentence, "after having THEREOUT first "paid and discharged all my just debts and funeral ex- "penses: also subject to the payment THEREOUT all the "aforesaid legacies." The payment thereout is to be made by the devisees; and the word "thereout" means out of the
[93] property before given to the devisees. What then was the property before given? All at least which was before included in the same sentence. And in order to make it sense, we must read it as one entire sentence, beginning at the words "also, I give and bequeath unto the said *George* "*Snelling*, and *Sarah* his wife," &c. for the words "I "give and bequeath" occur only once. If then the sentence include the real as well as personal property, and the debts are to be thereout paid by the devisees, it differs this from the case of *Doe* v. *Mellor* (*a*), and that class of cases where the land is devised only after payment of debts: for there the thing itself is not given to the devisee till after those charges have been first satisfied. But where the devisee is to pay the charge out of the land, he must first take the interest in the land. This brings the case within that of *Doe* v. *Richards* (*b*); the doctrine and principle of which is right, though perhaps the words to which it was applied will hardly sustain the application, as was considered by many of the Judges on the decision of the case of *Moor* v. *Mellor* (*c*) in the House of Lords. That was a devise of lands, "his legacies and funeral expenses being thereout paid:" and those words were holden to carry the fee, being considered the same as if the devisor had said, "being by him "(the devisee) thereout paid." And if those words had been added, the application of the doctrine would unques-

(*a*) 5 Term Rep. 558, and 2 Bos. & Pull. 247.
(*b*) 3 Term Rep. 356, (*c*) 2 Bos. & Pull. 252.

tionably

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tionably have been right. The doctrine, however, has been long established. In *Merson* v. *Blackmore*, the Master of the Rolls says, that "where a gross sum is to be paid out of the "lands, to be sure it gives a fee to the devisee of those "lands." In *Doe* v. *Holmes* (*a*) the devisor gave his house and furniture to one whom he made executrix, "she paying "all his debts and legacies." Lord *Kenyon* said, that the devisee was bound to pay the debts and legacies at all events, and the charge was thrown on her in respect of the real estate. The sentence here is not framed as in *Hopewell* v. *Ackland*(*b*). There each sentence beginning "*Item, I devise*," &c. was complete and distinct in itself: and the words, "he paying "my debts and legacies," included under the last item, was more disjointed from the preceding items than in this case, where it is all coupled together, with the devise of the realty, in one sentence. Then the only remaining question is, Whether the subsequent appointment of *George Snelling* to be sole executor, and charging him with the payment of all the debts, legacies, and funeral expenses, can make any difference, the devise of the land having been before made to him and his wife with the same charges upon them? I cannot consider these words as importing that he should do more than the law would have required of him if the words had not been added. And upon the whole, I am clear that the debts, &c. were personal charges upon the devisees in respect of the property devised to them, and that they must take an estate commensurate with the charges, which they cannot be certainly ascertained of without taking a fee in the lands.

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GROSE, J. The word *thereout* imposes a duty on the devisees to pay the debts and legacies thrown on them in respect of the property out of which they were required to pay them. I doubt whether by the word *also* the testator did not mean *and*. The sentence would then read thus (after giving the estate in *Buckinghamshire* to *George Snelling* alone): "Also I give and bequeath unto the said *G. S.* "and *Sarah* his wife, all that my messuage, &c. in *Bramley*; "and (*vice* also) all that my messuage, &c. in *Wonersh*, &c. "and (*vice* also) all and singular my goods and chattels, &c.

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(*a*) 8 Term Rep. 1. (*b*) Salk. 239.

"after

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"after having thereout first paid my just debts," &c. It would then be read as one plain sentence, by which the realty and personalty would be devised, the devisees paying thereout the testator's debts, &c.; and therefore, according to cases well known, the devisees would be bound to pay the debts out of the real as well as the personal property; and both descriptions of property having been given to the husband and wife, the testator, in directing that his debts should be thereout paid, must have meant that they should pay them out of both those descriptions. As to the appointment of the husband alone to be executor, and charging him again with the payment of the debts, &c. nothing can be collected from thence to shew a different intent in the devisor. The interest was given to both husband and wife; and as the husband would take an interest in the property given to his wife, and he was probably regarded as the person who would take on himself the active duty, it was natural to impose on him the burthen of the executorship, and the payment in fact of the several charges. But it is clear that the realty was meant to be charged as well as the personalty. Then saying that the devisees took a fee in respect of such charge, is, I believe, giving effect to the real intention of the testatrix; for where an estate is given to a party without limiting it for his life, or other definite period, it is pretty generally considered, by persons not acquainted with the rules of law, that the whole interest of the testator passes; and here we do find words in the will which may carry that intention into effect consistently with law.

[96] Lawrence, J. The distinction which runs through the cases seems to be this: That if an estate in land be given after payment of debts or legacies, it is of no consequence for this purpose whether the devisee take the estate for life or in fee; for the land will be charged into whatever hands it may pass, and the purposes of the devisor will equally be answered. But where an indefinite estate is given to a person in lands, and that person is charged with the payment of debts or legacies, he must take a fee; for otherwise, if he take only for life, and pay the charges, and die soon after, he may be a loser; which the devisor could never have intended. It is the same thing if such indefinite estate be given to one, and the debts are to be paid out of the estate

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estate given to the devisee, he must there also take the fee; for otherwise the estate may not be sufficient to pay the debts. This was established in the case of *Doe* v. *Richards*, where Lord *Kenyon* relied on the words "my legacies and "funeral expenses being thereout paid," as giving a fee; assigning this reason: "for the fund which is to answer those "demands, ought to be as ample as possible." And again, in *Goodright* d. *Baker* v. *Stocker* (*a*), where one devised to his grandson *J. B.* a dwelling-house, "paying yearly out "of the said dwelling-house 15*s.* to his grand-daughter "*A. H.*;" there the words "paying yearly out of the said "dwelling-house," &c. were deemed to carry the fee, because the annuity to *A. H.* might continue longer than the life of the devisee. Then the question is, Whether the debts and legacies here be not payable out of the real estate devised to *George Snelling* and his wife? It is contended, that they are only payable out of the personal estate, upon the authority of the case of *Hopewell* v. *Ackland*. But there the several devises of the real and personal estate were distinct [97] and independent. Here the words carrying the personal estate do not constitute by themselves a perfect sentence: they require a verb; and therefore to make them intelligible they must be read altogether as one sentence, with the antecedent branch which has the verb, "also I give," &c. Therefore I agree with my brother *Grose* in thinking that *also*, at the commencement of the bequest of the personalty, means no more than *and*. Then for the meaning of the word *thereout* ("after having thereout first paid," &c. and "also subject to the payment thereout," &c.) we must look to the whole of the antecedent part of the sentence, and that refers to the real as well as the personal estate given. But it is said, that at the conclusion of the will *George Snelling* only is charged with payment of the debts and legacies: but that is only what the law would have implied, so far as respects the personalty from his character of executor; and the express mention of it cannot have the effect of altering the estate which was before given him. The real and personal estate had been before given to him and his wife by a distinct clause, charged with the payment of debts

(*a*) 5 Term Rep. 13.

and

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and legacies out of it. The husband then was made, as it were, what is called (and was not uncommon in old wills) a supervisor of the will, to see those things done which were before charged on the estate given to him and his wife. A question might indeed be raised, Whether he did not take a fee in the whole, as well in that estate which was given to him alone in another clause, as in that which was given to him and his wife jointly, if he alone were personally charged with the payment of debts and legacies in respect of every thing before given to him? but I do not give any opinion on that point; it is enough in this case to say, that he and his [98] wife took a fee in the lands in question, which were liable in his and his wife's hands for the payment of the debts and legacies.

LE BLANC, J. - According to all the determinations, the question, Whether the devisee take the fee or not in respect of charges? must depend on this, whether *he personally*, or the estate given *to him*, be charged with the payment of debts? or whether the *estate* be given *after* payment of debts? If the devisee be personally charged with the payment of debts, or if the debts be charged on the quantum of estate given to the devisee, he must take the fee; otherwise, if he only take for life, he may be a loser, or the estate may be insufficient. Here the devise of the estates in question, and also of the personalty, is all contained in the same clause; for the words "*I give and bequeath*," are not repeated before that branch of it disposing of the personalty; and then the clause concludes with charging *the devisees* with payment *thereout* of the debts and legacies. The words are, "after *having thereout* first paid," &c. Those words are stronger than the words "my legacies, &c. *being thereout* paid," which occurred in *Doe* v. *Richards* (*a*). For "after *having*," &c. means "after they shall have thereout paid," &c. namely, *G. Snelling* and his wife, to whom the property was given. The debts, &c. therefore became a personal charge upon the devisees, who were required to pay them out of the property devised to them. And what that property was can only be ascertained by referring back to the beginning of the sentence, where the testatrix uses the words "I give and bequeath," without which the sen-

(*a*) 3 Term Rep. 356.

tence

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tence cannot be perfected. The last clause is then resorted to, in order to shew that the testatrix only meant to charge *G. Snelling* the husband, in respect of the personalty, as executor. But, according to my construction, she had before specifically charged the devisees of the real property in question with the payment of debts and legacies, and they were therefore chargeable in respect of it, if the personalty had not been found sufficient. In order to make the latter part of the will consistent with the former, it must be taken as a direction to her executor to see those things done which she had before directed to be done. As well, therefore, on the authority of the cases referred to, as also on that of *Baddeley* v. *Leppingwell* (*a*), I think that the devisees took a fee. In the latter case the devise was to *S. B.*, she "paying thereout "40*s.* a year to her sister *E. B.*" This was considered as a devise of an annuity of 40*s.* a year, to be paid by the devisee to the sister for life, and that it carried the fee to the devisee, who was charged with that annuity.

Postea to the Defendants (*b*).

(*a*) 3 Burr. 1533. (*b*) Vide Goodtitle *v.* Maddern, 4 East, 496.

BARING and Others *against* The ROYAL EXCHANGE Assurance Company.

Friday, April 27th.

THIS was was an action against the underwriters on a policy of assurance for 5000*l.* on goods; being one half of the cargo, warranted American property, on board the *Rosanna*, warranted an *American* ship, from *Surinam* to *London*, *Rotterdam*, *Amsterdam*, or *Hamburgh*, with liberty to touch at *Guernsey*, or one port in the Channel. The policy was effected by the plaintiffs, as agents of *N. Sargent*, in whom the interest was averred to be, at a pre-

Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of an infraction of treaty, in not being properly documented, &c. as required by the treaty between the captors and captured, such sentence is conclusive in our courts against a warranty of neutrality of such ship and cargo in an action upon a policy of insurance against the underwriter, although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty.

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mium of ten guineas *per cent.* The declaration averred a loss by capture; and the defendants pleaded the general issue. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, the jury found a verdict for the plaintiffs for 5000*l.* subject to the opinion of the Court upon the following case:

On the seventh of *September* 1796, the *Rosanna*, an *American* ship, sailed from *Surinam* on the voyage insured, with her cargo, the property of *N. Sargent*, who was admitted to be an *American*, unless the *French* sentences of condemnation hereinafter stated preclude the plaintiffs from proving him such. On the 22d of *October* 1796 she was captured by a *French* privateer, and carried into *Rochelle*. At that place proceedings were instituted against the ship and cargo before the Tribunal of Commerce; which adjudged both to be restored to the owners. But on appeal by the Captor, the Court of Appeal reversed the former sentence, and condemned the ship and cargo. [Here was introduced the *French* sentence, which began with an exordium on the duty of neutrals to submit themselves to the maritime laws, and referring to the *French* ordinances of 1704, 1744, and 1778, and declaring that their authority was recognized by the law of the 14th of *February* 1793, and the arret of the Directory of the Executive Power of the 12th *Ventose;* after which the sentence proceeded as follows:] "Considering that the treaty between *France* and the *United States*, of the 6th *February* 1778, contains no clause contrary to the foregoing ordi-
[101] nances, and that they are of course binding on both the *Americans* and other nations; considering that *J. P.* captain of the *Rosanna*, has not produced a list of the crew, signed by the marine officers of the port of *New York*, from whence he sailed: considering that it is not possible to give credit to what he has said, That in his country there is no public officer appointed to certify the lists of crews,—since in the treaty of 1778, between *France* and the *Americans* mention is made of marine officers, to whom captains of *American* ships are bound to transmit the lists of their crews, and to fulfil such other formalities as are inserted in the 25th article of the said treaty: considering it possible to admit that the ordinance of the 26th of *July*, 1778, and the preceding ones, could not be opposed to the *Americans*, under pretence that

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that the regulations therein contained had not been recognized in the aforesaid treaty, it is at least indisputable that they ought to fulfil the obligations which this treaty prescribed to them; and that by not doing so, they subject themselves to the penalty of confiscation. Now, by the 25th article of the said treaty, it is agreed, in order to remove and to prevent, on both sides, dissensions, in case either of the two parties should be engaged in a war, that the vessels belonging to the subjects or people of the other ally must be provided with sea-letters or passports, which shall express the name, the property, and the burden, as also the name and residence of the master of the vessel, in order that it may thereby appear that she really belongs to the subjects of one of the two contracting parties; which passport must be expedited according to the model annexed to the present treaty. The terms of this model, and the formalities to be observed by those who are bound to take them, are as follows :—" The master of the ship shall transmit to the officers of marine a list, signed and attested by [102] witnesses, containing the names and surnames, places of nativity and of abode, of the persons who compose the crew of his ship, and of all those who shall embark therein, &c. (It then negatived that the captain had transmitted the list or roll of the persons who composed his crew to the marine officers of *New York*, or caused it to be attested by witnesses; which was an infringement of the treaty.) Considering that it was necessary to stipulate these formalities, because they serve to prove whether the crew is composed of friends or enemies; and that, in this point of view, so far from being contrary to the ordinances of 1704, 1744, and of 1778, they refer to and implicitly recognize them: considering that it is not sufficient for the captain of the *Rosanna* to assert his having transmitted the list of his crew to the marine officers of *New York:* that he is not obliged to have a duplicate thereof; and that his passport is sufficient to prove his neutrality, without producing a duplicate of the list in question, attested and certified by the marine officers, or by a certificate signed by them; because if the bare production of his passport were sufficient to prove his having conformed to the law, the two nations would never

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have made the putting of the list of the crew into the hands of public officers an express condition, &c.; and every clause in a treaty ought to be carried into execution: considering that the pretended list of the crew, produced by the captain and *Sargent*, is a nullity, not being signed by any person nor attested by any witnesses; and not being drawn up with any of the formalities which can give it credit or authenticity: considering that this pretended list of the crew was not transmitted to the marine officers at *New York*, [103] and that it could so little avail the captain and *Sargent* in covering the fraud, whereby they have rendered themselves culpable: because the same list certifies, that of 18 men who compose it, four were taken at *Surinam*, and seven at *London*; from whence it follows, that this crew was not found at *New York* with the approbation of the marine officers of that place; and that being composed of more than one-third enemies, contrary to the express tenor of the regulations of 1704 and 1778, the capture of the ship *Rosanna* is just and lawful: considering that upon the supposition that the captain had lost, during his voyage, part or the whole of his crew, and that he had been obliged to recruit it either at *Surinam* or *London*, he ought at least, conformably to the 10th article of the regulations of 1704, to prove, by a public act, the necessity he was under of forming a new crew; and not having done so, is acting contrary to law; and, consequently, that the capture of this ship is valid: considering, lastly, that although the captain prove that his vessel is *American*,—that her cargo belongs to *Sargent*, an *American*, and her supercargo, that is not sufficient in the eyes of the law to restore his ship; because he has not fulfilled the necessary formalities; because he has infringed on the 9th article of the ordinance of 1704, as well as the treaty in the month of *February* 1778, in not having the list of the crew drawn up with the prescribed formalities; and because the list of the crew is formed of men, more than one-third of whom are enemies to the *French* Republic." It then proceeded to reverse the sentence of the Court below; "declaring the capture of the ship *Rosanna* good and valid." From this sentence there was an appeal to the Tribunal of Cassation; by which Court the sentence

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sentence of condemnation was ultimately affirmed. It was admitted, that the above three courts were proper prize-courts. The case then set out * the 25th and 27th articles of the treaty of 1778, between *America* and *France*, and the form of the passport referred to in that treaty.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of that opinion, the verdict to stand; but if the Court should be of opinion with the defendants, then the verdict to be entered for the defendants.

Puller, for the plaintiffs, said, that this case was brought forward by the defendants, in order to review the decision in *Bird* v. *Appleton* (*a*); which he contended was directly in point with the plaintiffs. The *French* sentence of condemnation in that case, is not set out in the report, which only states generally that the decision proceeded entirely on the ground that some of the *French* ordinances had been violated: but in truth, there is the same reliance on the *French* ordinances in the present case, as there was there, mingled in both cases with references to the treaty between *America* and *France*: and there it was expressly holden that the warranty of neutrality, as an *American*, was not falsified by the sentence of the *French* Court condemning the ship for navigating without the documents required by the *French* ordinances; although, in that case as well as here, the sentence professed to decide against the neutrality of the ship for want of proper documents.

Lord ELLENBOROUGH, C. J. (stopping the argument.)—Does not this sentence of condemnation proceed specifically on the ground of *infraction of treaty* between *America* and *France*, in the ship not having those documents with which, in the judgment of the *French* Court, the *American* was bound by treaty to be provided? I do not say that they have construed the treaty rightly. On the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we are bound by that comity of nations, which has always prevailed amongst civilized states,

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(*a*) 8 Term Rep. 562.

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to give credit to their adjudication, where the same question arises here upon which a foreign Court has decided. After arguing for hours, we must come to the same conclusion at last, that the *French* Court has specifically condemned the vessel for an infraction of treaty, which negatives the warranty of neutrality. Then having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Wherever a case occurs of a condemnation by a foreign Court on the ground of *ex parte* ordinances only, without drawing inferences from them to shew an infraction of treaty between the nation of the captors and the captured, and referring the judgment of the Court to the breach of treaty, I shall be glad to hear the case argued, Whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality, or as positive laws in themselves, binding other nations *proprio vigore?*

GROSE, J.—The *French* Court have here decided upon the fact of neutrality, which they negative by their sentence.

LAWRENCE, J.—If this case could raise the question, Whether a condemnation of a neutral ship specifically for
[106] the breach of *French* ordinances could negative a warranty of her neutrality? I should wish to have it turned into a special verdict, in order to have that point decided by the dernier resort. But no such question can be raised where the *French* Court have professed to decide on an infraction of treaty, however they may refer to their own ordinances in coming to that conclusion. In *Bird* v. *Appleton*, the Court (whether properly or not I will not now inquire) did not consider the sentence of condemnation there relied on as negativing the warranty of neutrality; for we have always said, that if the foreign Court have decided expressly on the question of neutrality, we should hold ourselves bound by their decision. [After referring to *Bird* v. *Appleton*] I do not say that the sentence in that case may not have been misunderstood by us: but we certainly decided it on the ground that it was a condemnation proceeding solely on the *French* ordinances.

LE BLANC, J.—It has been long settled that foreign Courts of

of Admiralty may decide upon the construction of treaties. And if they expressly condemn a prize for a breach of treaty, that is binding on our Courts where the same question arises upon the propriety of that condemnation.

Park was to have argued for the defendants.

Postea to the defendants.

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BORDENAVE *against* GREGORY.

Monday, *April* 30th,

In an action on the case for not accepting stock agreed to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock, which he refused, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the Bank on the day when it was understood that the transfer was to be made, until the close of the transfer books, which was the latest time when the transfer could be made. Semble, that in such an action it is not necessary by the stat. 7 Geo. 2. c. 8. s. 6. for the plaintiff to shew that he transferred the stock to another at the next possible transfer day after default made by the original contractor, provided the stock were transferred before the action brought: though, if the plaintiff might have obtained more for the stock by sale on any intermediate day between the original default and the actual sale, that will go in reduction of the damages sustained by the plaintiff by such default.

THE first count of the declaration stated that the plaintiff on the 5th of May, 1803, at, &c. was possessed of 1000*l.* stock 3 per cents, the said stock, together with other capital stock of the plaintiff, then standing in his name in the books of the Bank of *England*; and the plaintiff being so possessed, afterwards sold to the defendant the said 1000*l.* stock for 69¾*l.* per cent., and then and there promised the defendant "that he (the plaintiff) would transfer the said 1000*l.* stock "to the defendant in the said books of the Bank, upon payment by the defendant of the said price for the same, "when the plaintiff should thereto be afterwards requested; "and in consideration of the premises, the defendant then "and there promised the plaintiff to accept the same stock, "and pay for the same at the rate aforesaid, when the defendant should be thereunto afterwards requested." The plaintiff then averred "that he was ready and willing, and "offered to transfer the said 1000*l.* stock to the defendant, "according to the form and effect of the said contract, upon "payment by him of the said price for the same, and then "and there requested the defendant to accept the same "stock and pay the said price," &c.; yet the defendant would not, when so requested, or at any time, accept the said 1000*l.* stock, or pay the price, &c.; but then and at all times

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omitted and refused so to do, &c.; by reason whereof the plaintiff was obliged to sell and transfer, and has sold and transferred the said 1000*l.* stock for a less price than that for which he had sold the same to the defendant, *viz.* at 64*l.* per cent, being the best price he could obtain for the same, to the

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plaintiff's damage of so much, &c. At the trial at *Guildhall* before Lord *Ellenborough* C. J. at the Sittings after *Hilary* Term last, the evidence, so far as it was material to raise the questions made, was, That the contract for the sale of the stock was made on the 5th of *May* 1803, a little before 12 o'clock at noon; but there was no proof of any direct application made to the defendant to accept the stock on that day, nor was it shewn that the plaintiff had waited till the closing of the transfer books at the Bank for the defendant to appear and accept the transfer of it. But a few days afterwards an offer was made of the stock, which was then refused to be accepted by the defendant, alleging that the contract had been made under an impression of the truth of certain public intelligence of peace, communicated to the Lord Mayor, which afterwards turned out to be a forgery; in consequence of which a resolution had been entered into by the members of the Stock Exchange, that all bargains made on that day should be rescinded (*a*). And in consequence of the defendant's refusal, the stock was afterwards sold at an inferior price on the 12th of *May*, there having been no intermediate rise of the funds between the 5th and the 12th. After a verdict for the plaintiff for the difference, two questions, which had been made at the trial, were again raised on a rule for setting aside the verdict; 1st, Whether it were not incumbent on the plaintiff, in support of the allegations in his declaration, to prove either an actual tender of the stock and offer to transfer it on the 5th of *May*, the day on which it was contracted for? or that which was an equivalent in law, namely, that the plaintiff waited till the last moment of the day when the transfer books at the Bank were closed, ready to have

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made the transfer, if any person had been present on the part of the defendant to have accepted it? 2dly, Whether, in order to entitle the plaintiff to recover, it were not necessary for him by the stat. 7 *Geo.* 2, *c.* 8. to shew an actual trans-

(*a*) *Vide* the case of Heckscher *v.* Gregory, 4 East. 608.

fer

fer to some other on the next transfer day (which was the 6th)? and whether a transfer on the 12th were sufficient, not having been made as soon as it might? With respect to this last question,

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The Court reserved it for future consideration, when it might be put in a more solemn course of investigation in the shape of a special verdict, or upon a bill of exceptions. But the majority of the Judges were inclined to consider, that the Act of Parliament did not require as a condition precedent to maintaining the action for damages for not performing a contract to purchase and accept stock, that the proprietor should, on the defendant's neglect or refusal to accept the stock, have sold it to another on or before the next transfer day after such default; but it merely says, that it shall be lawful for him to sell such stock, not saying when. And it was sufficient, they intimated, if the stock were sold and transferred at any time prior to the commencement of the action against the defendant who had so made default; especially where due diligence had been used by the proprietor, as the jury had found in this case; though, if the stock had risen in value in the intermediate time between the default of the defendant and the time when the stock was actually sold and transferred, so that the plaintiff might have obtained a higher price than that for which it was actually sold, but less than the price contracted for by the defendant, they thought it material for the consideration of the jury in assessing the damages; because the statute 7 *Geo. 2. c.* 8. *s.* 6. directs, that the party injured shall recover from the person who first contracted for the purchase of the stock "all the damage which will be sustained thereby," that is, from his default; and the damage to be sustained thereby does not necessarily mean the difference of the price on the day of the actual sale, and that for which it was contracted to be sold: for if he might have obtained more at any intermediate time, he may not be said to have thereby sustained (that is, by the default of the defendant) the damage which he incurred by waiting, but by his own default. The jury, therefore, were in each case to inquire Whether the plaintiff might not have sold sooner than he did, and thereby saved part of the loss?

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As to the first question, *Garrow* and *Gibbs*, in support of the

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the rule referred to the case of *Lancashire* v. *Killingworth*(*a*), where, in covenant for not accepting stock of the *Hudson's Bay Company*, at the Company's house, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to the *Hudson's Bay* house and accept the stock, and that the plaintiff was ready there at the day, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c. And upon demurrer the declaration was holden ill: for where the party to whom the act is to be done, does not come at the time and place appointed, the other ought to shew that he came at the last time of the day which the law has appointed for the doing of the act; and if he came there before, he ought to shew that he continued there to the last time. And that as the stock could only be transferred when the Company's [111] house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the Company in that respect, and that he came there at the proper time, and staid there till after the house was shut. Here there was no such averment, nor evidence of the fact.

Erskine and *Richardson* shewed cause against the rule, and endeavoured to distinguish this from the case cited; for there the question of a legal tender arose upon a demurrer to the declaration, and here it arises after verdict (*b*), upon an averment of a tender and refusal; which latter was there omitted. And here there was evidence to go to the jury that the defendant would not accept the stock then or at any time; for on a day subsequent, when there was a direct tender and refusal, the defendant made no objection to take the stock on the ground that it was not properly tendered to him on the day, but assigned another reason, which shewed that he considered the contract as not binding upon him at all. And to enforce the strict rule of law with respect to tenders on such occasions, would, in most instances, render redress impracticable for breaches of contract in these cases. Besides, the case cited was one of a contract to be performed at a specified time and place; which is not so here, where

(*a*) 1 Ld. Ray. 686. Com. Rep. 116. 2 Salk. 623. 3 Salk. 343. and 12 Mod. 529.

(*b*) *Vide* the Report of the case cited in Salk. 623.

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the contract, as alleged, was to be performed on request (*a*), which must be understood of a reasonable request: and here *there was evidence of a direct request after the 5th of *May*, and a refusal.

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Lord ELLENBOROUGH, C. J.—The plaintiff cannot sustain the action without shewing a tender of the stock and a refusal, or that which in law is tantamount to a tender and refusal. That must be by shewing either an actual tender and refusal, which is not pretended to have been done in this case till after the 5th of *May*; or by shewing that the plaintiff staid at the Bank to the last time of that day when a tender could have been made, which was so long as the transfer books remained open, and that he was there ready to have transferred if the defendant had been there, and would have accepted the stock. From the nature of the contract, it is evident that it was meant to be performed on the day on which it was made, for the price was calculated accordingly, and the only place where the transfer could be made was at the Bank. The plaintiff, therefore, ought to have shewn that he had done every thing as far as in him lay towards the execution of the contract, according to the case cited, by waiting till the final close of the transfer books at the Bank on that day, which would have been a sufficient substitution of the more formal evidence of an actual tender and refusal. But here there was neither a tender in fact nor in law.

The other Judges concurred in this point.

Rule absolute.

(*a*) In another case of the same kind, of Bordenave *v.* Bartlett, which came in upon a similar rule immediately after this case, the evidence appearing to be, that the stock was contracted to be transferred on a certain day, and the averment in the declaration being the same as in this case, that it was to be transferred on request, the Court said, that if the objection had been taken at the trial there must have been a nonsuit, and on that ground the rule for a new trial was made absolute.

The

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Wednesday, May 2d.

The KING *against* The Inhabitants of ELTHAM.

An order of justices removing "M. "F. wife of "P. F. a "Scotchman, "who never "gained a "settlement "in Eng- "land," and their children to the place of her last legal settlement; which order was stated on the face of it to be made on examination of the husband, and with the consent of him and his wife, was holden good.

AN order of two justices for the county of *Surry*, stated that complaint had been made to them by the churchwardens, &c. of the poor of the parish of *St. George the Martyr, Southwark*, in the said county, "that *Mary Finn*, wife of *Peter Finn*, who is a *Scotchman*, and who never gained a settlement in *England*, with their three children (naming the infants) &c. had lately come to inhabit in the said parish; not having gained a legal settlement there, &c. (in the usual form); and that upon examination of *Peter Finn*, and of the said *Mary* his wife, on oath, &c. and upon other circumstances, the said justices adjudged that the parish of *Eltham* in the county of *Kent*, was the last legal settlement of the said *Mary* and her three children," and directed the removal of the said *Mary* and her children accordingly to *Eltham*, "by the mutual consent of the said *Peter* and *Mary* his wife." Against this order there was an appeal, which was afterwards dismissed by the Sessions, without stating any case upon it. And both these orders having been removed into this Court by *certiorari*, objection was taken by

E. Morris. That the wife was removed by the order of the justices from her husband, who was still living, and probably in the very parish from whence she and the children were removed, and whose assent to their separation, even if it could be presumed in favour of the order, was invalid. *Marshall* v. *Rutton* (*a*). In *St. Michael* v. *Nunny* (*b*) the Court said, That if the husband were in the parish from whence the wife was sent, it would vitiate the order. Now that fact is to be collected in this case; for he is stated to have been examined before the magistrates, and to have given his consent to the removal. [*Lawrence*, J. How does it appear that the husband was living in the parish of *St George the Martyr?* He might have been before the magistrates without residing there. The order only states that the wife and children were come to inhabit in that parish.]

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(*a*) 8 Term Rep. 545. (*b*) 1 Stra. 544.

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Lord ELLENBOROUGH, C. J.—Independent of the last-mentioned objection, what doubt is there in the case? A Scotchman who has no settlement of his own, and is desirous to give his wife and children the benefit of hers, being unable to maintain them, consents that she should be sent to her parish, to which she herself is willing to go. Why should he not consent? This is nothing like the contract of separation declared to be illegal in *Marshall* v. *Rutton*. Servants and other persons of that description, members of the same family, who are to subsist by their labour, must frequently separate for that purpose. Here there is neither a private nor a public injury, and there is no law against it.

Per Curiam, Rule discharged, and both Orders affirmed.

Lawes and *Wetherell* were to have argued in support of the orders.

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WALLACE and Another *against* SMITH, Treasurer of the WEST INDIA DOCK Company.

Thursday, May 3d.

THIS was an action on the case, wherein the declaration stated that the Directors of the *West India Dock* Company had, by virtue of the statutes in that case made, provided certain navigable docks, with quays, and warehouses adjoining, attached to the same, upon a certain tract of land, called the *Isle of Dogs*, for the reception and discharge of ships in the *W. I.* trade. That the plaintiffs, at the times of the several grievances after mentioned, and for ten years before, had been brokers or agents employed by divers owners or consignees of baggage, presents, and stores, arriving in ships from the *W. I.*, in taking out the necessary

The stat. 39 G. 3. c. 69. s. 184, directs that the West India Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and he shall be sued for the recovery of any claim or demand upon or of any damages occasioned by the Company; and s. 185. after extending the protection of the stat. 24 Geo. 2. c. 44. for privileging justices of peace in actions brought against them as such, to the Lord Mayor and Aldermen of London acting under this Act beyond the limits of the city, directs that "no action shall be commenced against any person or persons for any thing done in pursuance or under colour of this Act, until after 14 days' notice in writing, or after tender of amends, &c.; held that the treasurer of the Company is a person within the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but qu. whether in *assumpsit*?

custom-

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custom-house documents for unshipping the said baggage, &c. on paying the duties, in clearing the same at the custom-house, and landing them, and delivering them to their respective owners, for certain reasonable reward payable to the plaintiffs as such brokers. That on the 25th of *October* 1803, divers ships had arrived in the docks from the *W. I.*, with baggage, &c. on board, the owners of which had employed the plaintiffs, as such brokers, to clear, land, and deliver the said baggage, &c. to them for a reasonable reward; yet the Company, well knowing the premises, wrongfully and injuriously caused to be taken and conveyed into their warehouses the said baggage, &c. which the plaintiffs, as such brokers, were legally authorised to do; and wrongfully
[116] and injuriously, by their servants, prevented the plaintiffs from entering into the said warehouses to clear away and deliver such baggage, &c. to the respective owners, by reason of which they were prevented from doing the same, and were deprived of their profits as brokers, &c. to their damage, &c. There were various other counts, alleging in substance the same grievance. Plea not guilty. At the trial before Lord *Ellenborough*, C. J., at the Sittings at *Guildhall*, it appeared in evidence that an order of the Court of Directors had been made on the 25th of *October* 1803, whereby, for the complete and expeditious delivery of baggage and presents from on board ships in the docks, that Court had appointed a particular person to act as broker for the Company in the entering such articles and paying the duties thereon, to the exclusion of other brokers. That under this order the plaintiffs, who had been appointed by certain consignees as their brokers for this service, had been precluded from performing it, and thereby were deprived of their brokerage. But no notice had been previously given to the defendant before the action brought. After a verdict for the plaintiffs, a rule *nisi* was obtained for setting it aside, and having a new trial, on two grounds; 1st, On the general construction of the statutes relating to the *West India Dock* Company, vesting large discretionary powers in the Company for regulating the concerns of the docks; 2dly, On the ground of want of 14 days' notice in writing to the defendant, previous to the bringing this action.

The question on the last point (the only one which was decided

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decided by the Court) arose on the stat. 39 *Geo.* 3. *c.* 69. *s.* 184. and 185. Section 184 enacts, "That all actions "and suits commenced by or on behalf of the Company "shall be commenced and prosecuted in the name of the "treasurer for the time being of the Company, as the "nominal plaintiff for and on behalf of the Company; "and that all actions and suits to be commenced by any "person or persons, &c. against the Company, or for the "recovery of any claim or demand upon, or of any damages "occasioned by the said Company, or for any other cause "or causes of action, or suit against the said Company, "shall be commenced and prosecuted against the treasurer "for the time being of the said Company, who shall be the "nominal defendant," &c. Section 185 enacts, "That "the statute 24 *Geo.* 2. *c.* 44. for rendering justices of peace "more safe in the execution of their office, and for indem- "nifying constables and others acting in obedience to their "warrants so far as it relates to rendering justices of the "peace more safe in the execution of their office, shall ex- "tend to the mayor, aldermen, and justices respectively "under the authority of this act. And no action or suit "shall be commenced against any person or persons for any "thing done in pursuance or under colour of this act, "until 14 days' notice shall be thereof given in writing, or "after sufficient satisfaction or tender thereof hath been "made to the party or parties grieved, or after three calen- "dar months next ensuing the time when the act or thing "shall have been done, for which such action, &c. shall "be so brought, &c. And the defendant in such actions, "&c. may plead the general issue, and give this act and "the special matter in evidence at the trial, &c., and that the "matter or thing for which such action, &c. shall be so "brought was done in pursuance and by the authority of this "act. And if the said matter or thing shall appear to have "been so done; or if it shall appear that such action, &c. "was brought before 14 days' notice given as aforesaid, &c. "the jury shall find for the defendant," &c.

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Garrow, *Park*, and *Wood*, shewed cause against the rule, and contended that the 185th section only extended to acts originating in the function of magistracy, either done by justices of peace themselves, or by persons acting under their

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their authority. The whole clause is to be construed together. The first part of it extends to the city magistrates, who may have certain duties to perform pointed out by antecedent clauses in the act, and to these the protection of the general statute of the 24 *Geo.* 2. *c.* 44. is extended; which protection was necessary to be given, because the statute in question enables them to act in certain cases beyond the limits of their jurisdiction, where they would not have been within the prior law. Then the subsequent part of the clause naming *person or persons* generally, which words also occur in the stat. 24 *Geo.* 2. *c.* 44. (*a*) against whom actions may be commenced for things done in pursuance or under colour of the act, must be taken to mean constables and other special officers of the Company, such as harbour-masters and dock-masters, by *s.* 78 and 80, who might be called upon to execute warrants and orders issued by the justices of the peace before mentioned: and it was necessary to make a particular provision for such special officers, other than constables who were not within the protection of the general law. If the legislature had meant to include the directors and treasurer of the Company, which latter was
[119] liable by the antecedent clause to be sued for their acts, it is more natural to suppose that they would have expressly named them, and not have left their protection to be implied from any indefinite description, which no where else occurs in the act. If the clause be not confined to acts of magistracy, many grievances and spoliations committed by the Company's servants on goods in their transit through the docks to the *West Indies* must pass without remedy; for they could not frequently be known till after three calendar months, when the limitation of time would run upon them, and no action could be brought against the Company or their servants. [Lord *Ellenborough* C. J. I do not see how acts of spoliation can be said to be done "in pursuance or colour "of the act." Injuries may happen by the negligence of servants in the act of loading goods on board outward bound

(*a*) By stat. 24 *Geo.* 2. *c.* 44. *s.* 6. "no action shall be brought against "any constable, headborough, or other officer, or against any person or "persons acting by his order and in his aid, for any thing done in obe-"dience to any warrant, &c. until demand made," &c.

ships,

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ships, which might not be discovered till after their arrival in the *West Indies;* and before notice could be sent home, the time would be out for bringing an action. The mere naming of the treasurer as defendant, cannot bring the case within the 185th clause; for then no action, even on a contract made with the Company, in which the treasurer must be sued, could be brought without giving the notice there required, and within three months; which would be so manifestly absurd and unjust, that the Legislature could not have intended such a provision.

Erskine, *Gibbs*, and *Giles* in support of the rule. By making the treasurer of the Company the nominal defendant in the action, the plaintiffs admit that the act of the directors, of which they complain (and to which personally the defendant as treasurer was no party) was an act done "in "pursuance," or at least "under colour of the act;" for [120] otherwise there was no authority given to sue the treasurer for the acts of the Company; and therefore the 14 days' notice ought to have been given under the 185th section. It is enough that the act complained of was done "under "colour" of the statute; an expression which is used disjunctively with things done "in pursuance of" it, and was meant to include such acts as were not strictly justified by the statute; for there the defendant would not want to tender amends, which it was the object of the statute in requiring the notice to be given to enable him to do. It meant to hold out this opportunity of protecting themselves to the officers of the Company, who had *bonâ fide* meant to do the act complained of in their official characters under the powers of the statute, however mistaken they might turn out to be in their construction of it, to correct an error which the magnitude and complexity of the trust might subject them to. Here it was clear that the order of the directors, out of which the grievance complained of arose, was an act done in their official capacities; and the defendant being a person sued for a thing done in pursuance or under colour of the act, was therefore entitled to the notice required by *s.* 185: for *s.* 184 makes the Company a person, for the purpose of suing and being sued, by substituting the treasurer in lieu of the Company as the nominal party in all actions by or against it. The 185th section contains two distinct

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distinct provisions, which cannot be blended without manifest contradiction. By the first, the mayor, aldermen, and justices acting under that act, are entitled to the protection of the stat. 24 *Geo.* 2. *c.* 44; which requires one calendar month's notice to be given to a justice of peace before any action brought against him for any thing done *ex officio*. And then the clause goes on to enact, That no action shall
[121] be commenced against any person for any thing done in pursuance or under colour of the act, until 14 days' notice, &c. and under the former statute, the action may be brought within six calendar months after the act done; but in the latter statute it is limited to three. But if this clause had been meant to be confined to constables and others acting under the immediate directions of the magistrates, it would not have limited different periods.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court.

On looking at the 184th and 185th sections of the stat. 39 *Geo.* 3. *c.* 69. we think that notice ought to have been given to the treasurer of the Company, against whom the action is brought, who, by *s.* 184, is substituted in the place of the Company, for the purpose of suing in all actions instituted by them, or of being sued for the recovery of any claim or demand upon or of any damages occasioned by the Company. The first part of the 185th section extends the provisions of the stat. 24 *Geo.* 2. *c.* 44. to the lord mayor, aldermen, and justices acting under the authority of this act. It does not merely give them, what they had before, the benefit of the stat. of *Geo.* 2.; but as by the act in question they had duties cast upon them to perform out of the limits of the city of *London*, it must be understood as applying to those cases: and it is to be observed, that that provision does not extend to constables. The clause then proceeds to regard another class of persons. "Any person or persons" are very general and indefinite words; and the question is, Whether the Company are to have the benefit of them, sued as they are, and must be, in the person of their
[122] treasurer, and not in their own names? Is the treasurer a person within the meaning of the act? To say that he is not, would be to narrow the act, without any sufficient reason.

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reason. He is *ens legis* for the purpose of being sued, &c. The clause does not say that "no action shall be commenced "against any person or persons for any thing done by him "or them, in pursuance or under colour of the act;" for then it might be said, that the grievance complained of was not done by the defendant, but by the Company. The question then is, "Was this a thing done by any person or "persons in pursuance or under colour of this act?" The notice certainly applies to all actions of trespass and tort. Whether it extend to assumpsit I should doubt, according to the case of *Irving* v. *Wilson* (*a*); where a revenue officer having seized goods as forfeited which were not liable to seizure, and having taken money of the owner to release them, an action for money had and received was brought, to recover it back again; to which objection was taken, that the officer had not had a month's notice before the bringing of the action under the stat. 23 *Geo. 3. c.* 70. *s.* 30. But the action was holden to be well brought, notwithstanding the want of such notice. And my brother *Grose* considered that the statute extended only to actions of trespass or tort, because the requiring of notice was to give the officer an opportunity of tendering amends; but that it did not extend to an action of assumpsit. There will be no repugnancy in the construction which we now put upon the act. For, taking the former part of the 185th clause to extend only to the lord mayor, aldermen, and justices, they will have all the privileges given them by the former statute; and other persons mentioned in the subsequent part will have their privileges [123] under this act only. It has been argued, that this construction will deprive persons of their remedy whose ground of complaint is not discovered so as to be communicated to them till after three calendar months, when it will be too late to give notice. That argument certainly prevails to a considerable extent; but if the Legislature have not provided for that, we cannot make a law for them, nor controul a provision which in itself is clear and plain; because we cannot obviate all the difficulties which may arise out of it. If great inconvenience be likely to happen, that may form a ground of application elsewhere. Here the clause expressly directs, "That no action shall be commenced

(*a*) 4 Term Rep. 485.

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"against any person for any thing done, in pursuance, "or under colour of this act, until fourteen days' notice "shall be thereof given." And the plaintiffs themselves have, by their own action and declaration, so far put a construction upon the thing done as having been done under colour of the act, that they have made the treasurer defendant in a case, where the only grievance complained of is imputed to the Company.

Rule absolute (*a*).

(*a*) The defendant's counsel immediately agreed to wave their advantage, and refer the individual injury complained of to arbitration.

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Friday, *May* 4th.

POTTER and Another *against* BROWN.

Where the plaintiff gave the defendant, in a foreign country, where both were resident, a bill of exchange drawn by the defendant *upon a person* in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state; held that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in England.

THE plaintiffs declared as payees of a bill of exchange drawn by the defendant at *Baltimore* in *America*, on the 2d of *September* 1801, directed to *Anthony Mangin* of *London*, whereby the defendant requested *A. Mangin* sixty days after sight to pay to the plaintiffs, or order, 1200*l.* sterling for value received; which bill was delivered by the defendant to the plaintiffs. The plaintiffs then averred, that the bill was on the 23d of *December* 1801 presented by them for acceptance to *A. Mangin*, who refused to accept the same; and thereupon they caused it to be protested for non-acceptance, according to the custom of merchants; by reason whereof the defendant became liable to pay the said sum upon request; and being so liable he promised to pay it. The declaration also contained the common money-counts: to which latter the defendant pleaded the general issue. And as to the first count he pleaded, that by a certain act of the Congress of the *United States* of *America*, of the 2d of *December* 1799, entitled, "An Act to establish an "uniform system of bankruptcy throughout the *United* "*States*," it was enacted, that after the 1st of *June* 1800, if any merchant or other person residing within the U. S. actually using the trade of merchandise, &c. by buying and selling, &c. should do certain acts (enumerating them) every such person should be deemed a bankrupt, provided the petition

for

for the commission of bankrupt should be preferred within six months after the act of bankruptcy committed. And it was further enacted, that the judge of the District Court where the debtor then resided, or usually resided, at the time of committing the act of bankruptcy, upon petition of any one or more creditors, &c. should have power to appoint commissioners of the said bankrupt, upon affidavit of the petitioning creditor's debt, and giving bond to the bankrupt conditioned to prove it, &c.; which commissioners should have power, after they had declared the party a bankrupt, to take into their possession all his estates real and personal, &c. in law, equity, &c. till assignees should be appointed; and should give due notice of the bankruptcy, and appoint a place for the creditors to meet and choose assignees; at which meeting the commissioners should admit the creditors to prove their debts; and when any creditor should reside at a distance, should allow the debt of such creditor to be proved, by oath or affirmation made before some competent authority and duly certified; and should admit any person, duly authorized by letter of attorney from such creditor to vote in the choice of the assignees; and should assign all the bankrupt's estate and effects, with all muniments, &c. to the assignees, &c. It then contained provisions for the surrender and examination of the bankrupt, who was required to execute, in due form, such assignment of his estate and effects as should be directed by the commissioners, to vest the same in the assignees, their heirs, executors, &c. in trust for the use of all and every the creditors who should prove their debts, &c. That in case any such bankrupt should afterwards be arrested, or impleaded, for or on account of any of the said debts, he might appear without bail, and plead the general issue, and give that act and the special matter in evidence: and the certificate of such bankrupt conforming, and the allownace thereof according to the directions of that act, should be allowed to be sufficient evidence, *primâ facie*, of the party's being a bankrupt within the meaning of that act, and of the commission, &c.; and a verdict should thereupon pass for the defendant, unless the plaintiff should prove that the certificate was obtained unfairly, and by fraud. It then set forth various regulations against fraud;

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and enacted, that "every such bankrupt should be discharged from all debts by him due, or owing at the time he became bankrupt; and all which were or might have been proved under the said commission." And it was further enacted, that every person who should have, *bonâ fide*, given credit to, or taken securities, payable at future days, from persons who were, or should become bankrupts, not due at the time such persons becoming bankrupts, should be admitted to prove their debts and contracts, as if they were payable presently. The defendant then averred, that on the 22d of *February* 1802, while that act was in force, he was a merchant residing at *Baltimore*, within the United States of *America*, and actually using there the trade of merchandise by buying and selling, and that he so residing and exercising trade, &c. became indebted to one *W. E.* in 1000 dollars, &c.; and that after the cause of action in the 1st count mentioned accrued to the plaintiffs (the said debt to *W. E.* being then due) the defendant became a bankrupt within the meaning of the said act. And so the plea proceeded to state the issuing of the commission of bankrupt against him on the petition of *W. E.* in the manner prescribed by the act: that the commissioners possessed themselves of all the defendant's estate and effects, and issued the notice required to the bankrupt to surrender himself, and to the creditors to come in and prove their debts; that the defendant did surrender and conform himself to the act; that he was declared a bankrupt after the 1st of *June* 1800, and before the suing out of the commission; that
[127] the creditors were by due notice required to prove their debts, and to assent or dissent from his certificate; that his certificate was afterwards signed by full two-thirds of the creditors in number and value, for the purpose of his being discharged from his debts in pursuance of the act; and that that certificate was duly allowed by the judge of the district. The defendant then averred, that after the making of the contract after-mentioned, in pursuance of which the bill of exchange in the first count mentioned was drawn, and also before, at, and after the time of the defendant's drawing that bill, and receiving the consideration after mentioned for the same, the plaintiffs were merchants carrying on trade in copartnership as well in the *United States of America*, to wit,

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wit, at *Baltimore* aforesaid, as in *England*, and having a house of trade in the *U. S.*, to wit, at *Baltimore* aforesaid, where one of the plaintiffs (*W. Page*) then resided; and they so carrying on trade, and having a house of trade in the *U. S.*, and one of them so residing there as aforesaid, they, before the defendant became a bankrupt, *viz.* on 2d *September* 1801, at *Baltimore* in the said *U. S.*, contracted with the defendant to purchase of him such bill of exchange as in that count is mentioned, and then and there delivered to him in payment, and as a consideration for the same, divers promissory notes then and there in the said *U. S.* made by one *R. D.*; and thereupon, before the defendant became a bankrupt, *viz.* on 2d *September* 1801, at *Baltimore* in the said *U. S.*, in pursuance of the last-mentioned contract, and in consideration of the aforesaid promissory notes so to him delivered as aforesaid, the defendant made and drew the said bill of exchange in the first count mentioned, and delivered the same to the plaintiffs; and "that "the said debt by the first count attempted to be recovered "did not, nor did any part thereof accrue in this realm or [128] "elsewhere than in the said *U. S.* in any other or different "manner than this;" that the said bill of exchange being drawn in the *U. S.* as aforesaid, was drawn upon a person in this realm, and was presented for acceptance in this realm, and was refused acceptance in this realm, *viz.* at *London*, &c. And the defendant further averred, that the said bill was presented for and refused acceptance, as in the said count mentioned, and the said sum in the said bill mentioned became and was due and owing as aforesaid before the date or suing forth of the commission against the defendant, and before he became bankrupt as aforesaid; and that after the same sum so became due, and after the date and suing forth of the commission, and while the same was in prosecution, and before the commencement of this action, *viz.* on the 3d of *March* 1801, at *Baltimore* in the said *U. S.*, the plaintiffs proved under the said commission as creditors of the defendant, taking the benefit of the said commission, the contents of the said bill of exchange, as a debt to them, and then due, and owing from the defendant, they then and there being as such creditors entitled to prove the same as aforesaid, and

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to take the benefit of the said commission as aforesaid, to wit, at, &c. concluding with a verification. To this there was a general demurrer and joinder.

T. Carr, in support of the demurrer. A certificate obtained by a bankrupt abroad under a commission issued by authority of the law of that country, cannot be pleaded in bar to an action here for a cause of action arising in this country: for the law of a foreign state cannot bind the subjects of this country, nor abrogate a contract arising here. If indeed the cause of action must be taken to have arisen [129] in *America*, where the defendant obtained his certificate, the case cannot be distinguished from *Ballantine* v. *Golding* (*a*), the doctrine of which has been lately recognized in *Smith* v. *Buchanan* (*b*): but if it arose here, the last-mentioned case is an authority in point that the foreign certificate is no bar; and the same principle is established by the case of *Folliott* v. *Ogden* (*c*). Now, 1st, The immediate cause of action arose in this country; for the cause of action is the *assumpsit* raised by law upon the legal liability of the defendant to pay the amount of the bill drawn by him, in consequence of the dishonour of the bill, which was in *England*. This is a right of action collateral to the bill itself, and did not exist in *America* before the non-acceptance of the bill, but arose on the dishonour of the bill; for which the drawer is suable immediately, without waiting for the time the bill had to run. *Bright* v. *Purrier* (*d*), *Milford* v. *Mayor* (*e*), and *Ballingalls* v. *Gloster* (*f*). 2dly, This, being a simple contract debt, follows the person of the creditor, and not of the debtor. But, 3dly, Supposing the right of action to be founded on the bill, yet that being a negotiable instrument in its nature, and, as it were, a visible chose in action, and being addressed for acceptance to a person in *England*, it may be said to have transferred the original debt in a peculiar manner from *America* to *England*, as if the contract had been originally made here: it was a contract by the drawer to pay the holder a sum of money in this country. Then the promise and the breach of it may both be said to have

(*a*) Co. Bankt. L. 515. (*b*) 1 East, 6. (*c*) 1 H. Black, 123.
(*d*) London Sittings after Trin. Term, 1765, Bull. N. P. 269.
(*e*) Doug. 54. (*f*) 3 Esp. 1.

have happened here, and out of the jurisdiction of the *U. S.* In *Burrows* v. *Jemino* (*a*) the acceptance (on which the plaintiff was sued here) was at *Leghorn*, in which country *he had obtained his discharge: and in *Ballantine* v. *Golding* (*b*) the bill was drawn in *Ireland*, and payable by the defendant who resided there, where the discharge was. But in *Robinson* v. *Bland* (*c*) where a bill of exchange was drawn by Sir *J. Bland* at *Paris* upon himself in *England* (which bill being drawn for money won at play was on that ground holden to be void) Lord *Mansfield* said, "The law "of the place can never be the rule where the transaction "is entered into with an express view to the law of another "country. Here the payment is to be made in *England;* "it is an *English* security, and so intended by the parties." And the other Judges spoke to the same effect. The same rule will apply to this case: the plaintiff looked to *English* security, and required his debt to be made payable here. (The Court having expressed a clear opinion against him on this point, the other points were not urged).

Jervis contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J.—The rule was well laid down by Lord *Mansfield* in *Ballantine* v. *Golding*, that what is a discharge of a debt in the country where it was contracted, is a discharge of it every where. And that principle was recognised in *Hunter* v. *Potts* (*d*). Now this debt arose out of a contract in *America*. The debt was incurred there, for which the bill was given. The bill was drawn in *America* upon a person in *England:* but not having been accepted, the parties stood on their original rights, upon a contract made in *America*, for which a security was there agreed to be taken, upon the faith indeed that it would be accepted and paid in *England;* but of which there has been no performance: no *English* act has been done to alter the situation of the parties: even the notice of the non-performance, which is one of the circumstances on which the implied *assumpsit* is founded, must have been given in *America*, where the parties are stated to have resided when the bill was given, and when the bankruptcy happened, and

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(*a*) 2 Stra. 733.

(*b*) M. 24 Geo. 3. B. R. Co. Bankt. L. 347. 1st edit.

(*c*) 2 Burr. 1077.

(*d*) 4 Term Rep. 182.

nothing

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nothing appearing to shew that they ever changed their residence. Then if the bankruptcy and certificate would have been a discharge of the debt in *America*, which it clearly would, it must, by the comity of the law of nations, recognized in the cases I have mentioned, be the same here. It is in every day's experience to recognize the laws of foreign countries as binding on personal property; as in the sale of ships condemned as prize by the sentences of foreign courts; the succession to personal property by will or intestacy of the subjects of foreign countries. We always import together with their persons the existing relations of foreigners as between themselves, according to the laws of their respective countries; except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle, and laid up amongst our ackowledged rules of jurisprudence, it is needless to discuss it any further.

LAWRENCE, J.—The question is Whether the facts on which the plaintiff raises the implied promise did not occur in *America?* Now when the plaintiff agreed to take the bill in question, drawn by the defendant in *America* upon a person in *England*, the promise was in effect this, to pay the money in *America* if it were not paid here. Then the bill having been refused acceptance here, the implied promise to
[132] pay the money arose in *America*, and consequently the defendant's certificate is a bar to the demand.

The other Judges concurring,

Judgment for the Defendant.

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DOE, on the Demise of JANE SHEWEN, Widow, *against* WROOT and Others.

Friday, May 4th.

Till admittance of the surrenderee of a copyhold upon mortgage, the surrenderor continues the legal tenant, and he cannot devise the equity of redemption, even after the surrender made, without a new surrender to the use of his will; but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgage.

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IN ejectment for a moiety of several copyhold estates in *Sutton St. Mary*, *Sutton St. Nicholas*, and *Sutton St. James*, copyhold of the manor of *Sutton Holland*, and in *Gedney*, copyhold of the manor of *Gedney Pawlett*, all in the county of *Lincoln*, a verdict was found for the plaintiff at *Lincoln Lent* assizes 1803, before *Graham* B., subject to the opinion of this Court on the following case:

At a general court baron, holden for the manor of *Sutton Holland*, on the 22d of *May* 1766, *Anthony Jones*, Esq. was admitted as only brother and heir of *Richard Jones*, Esq. deceased, tenant to five messuages and 101 A. 3 R. 9 P. of land, lying in the three *Suttons*, holden of the said manor by copy of court-roll, to hold to the said *A. Jones*, his heirs and assigns, for ever, according to the custom of the said manor. At a special court baron holden for the said manor on the 10th of *February* 1767, *A. Jones* duly surrendered the said messuages and lands to the use of *T. Alderson*, Esq., his heirs and assigns, conditioned to be void on repayment of the principal mortgage sum of 1000*l.*; with interest, on the 16th of *June* then next. Afterwards, at the same court, *A. Jones* surrendered the said messuages, lands, &c. to the use of his will. *T. Alderson* was never admitted on the above conditional surrender; but *A. Jones* continued in possession of the said estates and receipt of the rents and profits until his death, and died intestate, leaving *Jane Jones* his sister and heir, who was, at a court holden for the manor on the 4th of *October* 1770, duly admitted to the said estates, to hold to her and her heirs, &c. On the 2d of *October* 1770, *T. Alderson* duly acknowledged satisfaction on the above conditional surrender, which acknowledgment was enrolled at the said court on the 23d of *May* 1771. On the 10th of *October* 1770, *Jane Jones* duly surrendered all her said messuages, lands, &c. to the use of *J. F.*, *S. B.*, and *R. F.*, executors of *W. Langley*, and their heirs, &c. upon condition to be void on repayment to them of 4000*l.*, with interest, on the 10th of *April* following; which surrender was duly presented on the 23d of *May* 1771; and at a court baron,

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baron, holden on the 23d *May* 1771, *Jane Jones* surrendered all her said messuages, lands, &c. to the use of her will. *Langley*'s executors were never admitted on the above conditional surrender; but *Jane Jones* continued in possession of the said estates and receipt of the rents and profits until her death, and she died intestate, leaving *Gryffyd Price*, Esq. her heir: who, at a court holden on the 31st of *May* 1787, was accordingly admitted tenant, to hold to him, his heirs, &c. *Gryffyd Price*, by a codicil to his will duly executed, and dated the 17th of *April* 1787, charged the above copyholds with an annuity of 200*l.* to his wife for life, and subject thereto, he devised all the said real estates so descended, and the trust and equity of redemption of such parts thereof as were then in mortgage, or wherein he stood seised of an equitable estate only, of what
[134] tenure or nature soever the same might consist, unto his cousin *John Llewellyn* in fee; and afterwards died, leaving the said *John Llewellyn* and *Jane Shewen*, the lessor of the plaintiff, his cousins and heirs at law. At a manor court holden on the 27th of *June* 1788, *John Llewellyn* was admitted under the said codicil of *Gryffyd Price* to the above messuages and lands, to hold to him, his heirs and assigns. At a manor court holden on the 19th of *May* 1796, was enrolled an acknowledgment of satisfaction, dated the 9th of *April* 1796, from *R. F.*, the surviving executor of *W. Langley*, and from *W. Langley* his son and residuary legatee, on the above surrender, made the 10th of *October* 1770. In the 28th *Geo.* 3. an act passed for dividing and enclosing the commons of *Long Sutton*, comprising the three *Suttons*; and the commissioners, by their award, dated 9th of *January* 1790, allotted to *John Llewellyn*, in respect to the above five copyhold messuages, and in lieu of the rights of common, 78 A. 3 R. 19 P. of land in *Sutton St. Mary*. The act contains the usual clause that the commissioners are not to determine on titles. At a general court baron, holden for the manor of *Gedney Pawlett*, on the 1st of *October* 1739, *Jane*, the wife of the Rev. *A. Jones*, clerk, was admitted as daughter and heir of *Jane Griffith*, widow, deceased, to ten acres of land in *Gedney*, to hold to her, her heirs, &c. And at the same court was presented a surrender made by *A. Jones* and *Jane* his wife, on the 27th of *July* then last, of the said ten acres in

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in *Gedney*, to the use of them for their lives and the life of the survivor; remainder to the heirs of their two bodies, remainder to the right heirs of *A. Jones*. And *A. Jones* and *Jane* his wife were thereupon admitted tenants on the above surrender to the said land. On their deaths the land descended to *Richard Jones*, their eldest son; and on his death, without issue, to his only brother *Anthony Jones*; and on her death, without issue, to his only sister *Jane Jones*; and [135] on his death, without issue, to *Gryffyd Price*, Esq. her heir at law. But neither *Richard*, *Anthony*, or *Jane Jones*, or *Gryffyd Price*, were ever admitted thereto. By an indenture dated 10th of *October* 1770, between the above-named *T. Alderson* of the first part, the said *Jane Jones* spinster of the second part, and *J. F.*, *S. B.*, and *R. F.*, (executors of *W. Langley*) of the third part; reciting the mortgage for 1000*l.* from *A. Jones* to *T. Alderson*, dated 15th and 16th of *January* 1767, of the freehold estates of *A. Jones* in *Sutton St. Mary*, *Sutton*, and *Gedney* aforesaid, and which indenture of the 10th of *October* 1770 was an assignment and confirmation of the said mortgage, and made for securing 4000*l.* and interest to *J. F.*, *S. B.*, and *R. F.*, and wherein is a covenant from *Jane Jones*, that for the better securing the payment of the said 4000*l.* and interest, she would immediately surrender all the copyhold premises before-mentioned to the use of *J. F.*, &c., their heirs and assigns, redeemable on repayment of the 4000*l.* and interest; but no surrender was made by *Jane Jones* in pursuance of this covenant. At a court holden for the manor of *Gedney Pawlett*, on the 31st of *March* 1796, *John Llewellyn* was admitted under the said codicil of *Gryffyd Price* to the said 10 acres of land in *Gedney*, to hold to him in fee: and on the 30th of *April* 1796, in consideration, &c. he surrendered all the said copyhold messuages and lands in *Long Sutton*, &c. as well the old estates as the new allotments, and also the said land in *Gedney* in different parcels, to the present defendants, who have been duly admitted thereto, and are now in possession thereof. The question for the opinion of the Court was, Whether the lessor of the plaintiff were entitled to recover one moiety of the copyhold estates in *Long Sutton*, otherwise *Sutton St. Mary*, *Sutton St. Nicholas*, *Sutton St. James*, and *Gedney*, or either of them, as one of the [136] heirs

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heirs at law of *Gryffyd Price*, the same not having been surrendered by the said *Gryffyd Price* to the use of his will? or, Whether the said *Gryffyd Price*'s interest therein was not an equitable estate only, and as such passed by his will without such surrender?

Balguy, for the lessor of the plaintiff, contended that *Gryffyd Price* had a legal and not an equitable estate only in the copyholds in question; and he not having surrendered to the use of his will, the estates could not pass to his devisee. Where one is in legal seisin as tenant of copyhold lands, and, by what is called a will, appoints those lands to the use of another, he must surrender to the use of his will. In *Coke's Copyh. s.* 39, it is said, "a surrender (where by a "subsequent admittance the grant is to receive its perfection "and confirmation) is rather a manifesting of the grantor's in- "tention than of passing away any interest in the possession; "for till admittance the lord taketh notice of the grantor as his "tenant, and he shall receive the profits of the land to his "own use, and shall discharge all services due to the lord:" but "he cannot pass away the land to any other, or subject "it to any other incumbrance than it was subject to at the "time of the surrender. Neither in the grantee is any man- "ner of interest invested before admittance; for if he enter, "he is a trespasser, &c.; and if he surrender to the use of "another, this surrender is merely void, and by no matter *ex* "*post facto* can be confirmed." And he also referred to *Perry* v. *Whitehead* (*a*), *Kenebel* v. *Scrafton* (*b*), and to the following MS. case: "*Floyd* v. *Aldridge and Willis*, 20th *Nov.* "1777. In 1772, the testator mortgaged the copyhold in "fee, and surrendered to the mortgagee; but the latter was "not admitted. The money was not paid at the time. The "testator made his will in 1774, and devised the estate, with- "out a surrender, to the use of his will; and died in 1775. "The devisee brought this bill to redeem, making the heir a "party. Sir *T. Sewell*, Master of the Rolls, dismissed the "bill, saying, that the plaintiff had no interest in the copyhold "in practice or otherwise. If the mortgagee have not the "legal estate, there is no equity of redemption. The legal "estate remains in the surrenderor till admittance of the sur-

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(*a*) 6 Ves. jun. 544. (*b*) 8 Ves. jun. 30.

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" renderee. After the first surrender, before admittance, he " is tenant to the lord, and may therefore surrender to the use " of his will. A second cannot prejudice a first surrender. " When the first surrenderee comes in, he will be admitted. " A mortgagee is seldom admitted: the mortgage is discharged " by an entry on the court-rolls. All remains in the mort- " gagor; no fine, no change of tenant, &c. As he might have " made a surrender to the use of his will without prejudice " to the mortgagee, he ought to have done it; and the estate " cannot pass at law; and equity will not assist a volunteer " against the heir."

The Court asked the defendant's counsel where the difficulty was? For till admittance the legal estate continues in the surrenderor, and descends to his heir, if it be not devised, and a surrender made to the use of the will.

Reader, *contrà*, admitted that till admittance of the surrenderee the legal estate remains in the surrenderor, so as to subject him to all the services due to the lord: but he meant to have argued, that he had not any beneficial alienable estate in him after the surrender, and could not make any new disposition of the land without satisfaction of the surrender being first entered on the court-roll of the manor; and the admittance of the surrenderee at any time afterwards would certainly relate back to the time of the surrender. Therefore, as to all but the lord the surrenderor seems to have only such equitable right as he had reserved to himself by the terms of the surrender; and therefore the equity of redemption might pass by the will without a surrender to the use of it: which surrender, pending the former unsatisfied surrender, seems to be useless. Or taking him to have the legal estate, yet holding it merely as a trustee, it would descend to his heir as a bare trust; which could not be set up against the *cestuy que trust*, who claimed under the will. He admitted, however, the application of the cases of *Kenebel* v. *Scrafton*, and *Floyd* v. *Aldridge*, against his argument.

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Lord Ellenborough, C. J.—We can only look to the legal estate, and that is clearly not in the devisees, but in the heir at law of the surrenderor; and if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law. For as to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestuy que trust*, that

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that has been long repudiated, ever since a case which was argued in the Exchequer Chamber some years ago (*a*).

Per Curiam. Postea to the Plaintiff (*b*).

(*a*) I presume the case alluded to by his Lordship was Weakly on the demise of Yea, Bart. *v.* Rogers, where Sir William Yea had agreed about seven years before, with the defendant to grant him, in consideration of a certain sum which was paid, a lease for his own and his son's life; and the defendant, on the faith of that agreement, had entered into possession, and built a house on the premises. After which Sir Wm. [139] (not having executed any lease) gave the defendant six months' notice to quit, considering him as tenant from year to year, and brought this ejectment. The case was argued in this Court in Trinity Term, 29 Geo. 3.; when the Court, after taking time to consider, (and as it was understood) not being agreed in opinion, directed the case to be argued before all the Judges in the Exchequer Chamber; which argument took place in Michaelmas Term, 30 Geo. 3. when a second argument was awarded; but the case was never brought before the Judges again. [*Vide* 7 Term Rep. 51.] But, as I collected at the time, Lord Loughborough, C. J. Gould, Ashhurst, and Buller, Js., were of opinion that the defendant's equitable title might be set up as a defence to the ejectment. Lord Kenyon, C. J. Eyre, C. B., and Heath, J. were decidedly of a different opinion: and with these it is probable that the other Judges coincided; though I have no authority for saying so; and no public opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled. *Vide* Doe *v.* Sybourne, 7 Term Rep. 2., Goodtitle *v.* Jones, in Error, *ib.* 47., Doe *v.* Wharton, 8 Term Rep. 2., and Roe *v.* Reade, *ib.* 122, 3. See also, on the same subject, Doe *v.* Pegge, 1 Term Rep. 758, Doe *v.* Staple, 2 Term Rep. 684., and Roe *v.* Lowe, 1 H. Black. 446.

(*b*) But where the mortgagee is admitted, the equity of redemption may be devised by the mortgagor, without having surrendered to the use of his will. King *v.* King, 3 P. Wms. 358.

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BONNER *against* CHARLTON.

Friday, May 4th.

Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred to by a rule of *nisi prius*, he cannot award a greater sum than that for

which the verdict was taken; and if he do, no *assumpsit* by implication will arise to pay even to the extent of the verdict so taken.

IN assumpsit, the declaration stated, that on the 14th of *August* 1782, certain differences were depending between the plaintiff and defendant, and that at the assizes at *Newcastle* a cause between them was to have been then tried; but by an order of *Nisi Prius* it was ordered by the consent of the parties that there should be a verdict for the plaintiff for 30*l.* damages and 40*s.* costs, subject to the award of *J. A.*, *J. H.*, and *W. T.*, to whom all matters in difference between the parties were referred, so that they should make their award in writing on or before the 10th of *November* then next, and that the costs of the cause should abide the event of the award, &c., and that that order should be made a rule of Court. It then stated the mutual promises to perform the award, and then averred an award made by the arbitrators named on the 6th of *November*, adjudging that there was due from the defendant to the plaintiff 70*l.* which they directed to be paid on the 1st of *January* 1803, and that the costs of the arbitration should be equally borne, and that the defendant should pay to the plaintiff the farther sum of 5*l.* 5*s.* a moiety of such costs, and that the plaintiff should thereupon discharge the costs of the arbitration: of which the defendant had notice. That the order of *Nisi Prius* was afterwards made a rule of Court, and the costs were taxed at 73*l.* By reason of all which premises the defendant became liable to pay to the plaintiff the said sums of 70*l.* and 73*l.*, according to the form and effect of the award, and the submission, promise, and undertaking of the defendant; and then stated the breach in non-payment of those sums. There were also the common counts for money paid, &c. The defendant paid into court the 5*l.* 5*s.*, the moiety of the costs of the award, and to the rest pleaded *non assumpsit*. And at the trial at the last summer assizes at *Newcastle*, before *Thomson*, B., a verdict was found for the plaintiff for 143*l.*, made up of the sum of 70*l.* awarded to be paid, and the sum of 73*l.*, the taxed costs mentioned in the pleadings of this cause, subject to the opinion of the Court on the following case:

The order of *Nisi Prius*, mentioned in the pleadings, was

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as follows: "It is ordered by the consent of the said parties "and their attornies, that there be a verdict in this cause for "the plaintiff 30*l.* damages, and 40*s.* costs, subject to the "award and determination of *J. A.*, *J. H.*, and *W. T.*, to "whom all matters in difference between the parties are re-
[141] "ferred, so that they, or any two of them, make and publish "their award in writing on or before the 10th of *November* "next, and that the costs of the cause shall abide the event "of the award, and the costs of the arbitration be in the "discretion of the arbitrators, who may direct by, and to "whom, and in what manner the same shall be paid; and "that a verdict shall be entered for such sum only (if any "thing) as the said arbitrators, or any two of them, shall "find to be due from the defendant to the plaintiff." And if nothing be due, then that a verdict should be entered for the defendant, &c. Proceeding in the common form, and concluding that the order should be made a rule of Court, &c. The arbitrators afterwards made their award on the 6th of *November* 1802, within the time limited; in which, after reciting the order of *Nisi Prius*, and considering the proofs, they adjudged that there was due from the defendant to the plaintiff 70*l.*, and awarded the defendant to pay the same to the plaintiff on the 1st of *January* then next, &c. at a certain place named; and further, that the costs of the arbitration should be borne by the parties equally, and that the defendant should pay the plaintiff the further sum of 5*l.* 5*s.*, being a moiety of such costs, and thereupon the plaintiff should pay all the costs of the arbitration; and that on payment of that sum, together with the said sum of 70*l.* and the costs, the parties should execute mutual releases. The costs of the cause were afterwards taxed by the Master of this court in the sum of 73*l.* The defendant, on the 6th of *November*, had notice of the award, and the plaintiff attended at the time and place appointed for the purpose of receiving the damages and costs awarded to him; but the defendant never paid or tendered the damages or costs, except the said sum of 5*l.* 5*s.* paid into court as aforesaid. The
[142] plaintiff's counsel insisted at the trial that the said payment into court by the defendant of the five guineas, admitted the order of *Nisi Prius* and award to be the same as set forth in the declaration. On the 12th of *February* 1803, payment of the

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the sums of 70*l.* and 73*l.* mentioned in the award and the Master's *allocatur*, were demanded of the defendant, which did not pay; and the plaintiff discharged the whole costs of the arbitration, being ten guineas. There was no proof of any promise otherwise than as aforesaid. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover any and what sum?

Richardson was to have argued for the plaintiff, and *T. Carr* for the defendant; but on the opening of the case,

The Court expressed a decided opinion, that the arbitrator had no authority to award greater damages than what the verdict of the jury had been taken for at the trial. The only power given to an arbitrator in such case, being to reduce, but not to enhance the damages. And in answer to an observation by the plaintiff's counsel, that at least the plaintiff might take his judgment for the 30*l.* given by the jury, inasmuch as the award was good up to that extent, though bad for the excess; the Court said, that could not be done in a case where the award was of an entire sum, though it might when distinct things were awarded, some of which were good, and others not. That if damages were laid in the declaration at 100*l.*, and the jury gave 200*l.*, it would be error on the record, and a court of error could not cut down the verdict to 100*l.*

The hardship of the case being further pressed, the Judges gave their opinions *seriatim*.

Lord ELLENBOROUGH, C. J.—The verdict was taken at the trial for 30*l.* subject to the award of an arbitrator: he had therefore a limited jurisdiction, within that amount, to assess the damages which, upon investigation, he should find that the plaintiff had sustained: but he had no authority to exceed that amount. The damages found by the jury may in this respect be compared to the damages laid in the declaration; they operated as a limit to the discretion of the arbitrator, in the like manner as the jury are limited by those laid in the declaration. If the jury find more than are laid, and the plaintiff do not remit the excess upon the record, the Court have no authority to do so, and the verdict will be erroneous. Here we have nothing to guide our discretion in cutting down the sum awarded. If we could ask the arbitrator whether the sum of 30*l.* were right, he might [143]

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might very consistently answer in the negative, and tell us, that either the 70*l.* was in fact due, or none, or less than 30*l.* That would depend on his judgment on the several items of the account. Therefore all that we can see is, that the arbitrator has formed a wrong judgment: we have no means of correcting it: we may quash his award altogether, but we cannot mend it. If, instead of bringing on the question in this shape, the facts had been laid before the Court by affidavit in a summary way, we might have formed our judgment upon the matter, and aided the plaintiff as far as we were warranted in doing: but I understand an attempt of this sort has already been made without success.

GROSE, J.—I remember the application made some terms ago in this matter. The object there was to enter judgment for the 70*l.* which we thought we had no authority to direct when the jury had only given 30*l.* The plaintiff then was not satisfied with 30*l.*

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LAWRENCE, J.—If the arbitrator had awarded two distinct sums of 30*l.*, we might have allowed the plaintiff to take judgment for the one sum which was legal, and not for the other, which exceeded his authority. But we cannot tell whether the arbitrator did not take into his consideration matters which were not submitted to him; and that if he had not so done, whether he would not have reduced the damages even below 30*l.* How then can we say that the plaintiff should have judgment for 30*l.* without knowing on what ground the excess was given? What the Court refused on the former application was to give the plaintiff the whole sum awarded. If it had been shewn that the arbitrator, at all events, thought the plaintiff entitled to the 30*l.*, we might have granted the application to that extent.

LE BLANC, J.—This action is founded upon an implied assumpsit for 70*l.* and the costs. Now I cannot think that under the rule of reference, the verdict having taken for 30*l.* only, that the law will raise an implied assumpsit to pay as much more as the arbitrator shall think proper to award. The true meaning of the rule of reference is, that the parties consent that the arbitrator shall mould the verdict which has been taken; and that the verdict so moulded by him shall be taken to be the verdict which the jury should have

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have found. For this purpose the verdict is always taken at the highest sum for which it is supposed that the damages can in any event be awarded, generally indeed for the amount of the damages laid in the declaration: but it never is understood by the parties to such consent-rule, that the arbitrator is at liberty to award damages to any extent he pleases. The law, therefore, will not raise an *assumpsit* to pay any larger sum than what the arbitrator had authority to award; and he having awarded one entire sum, beyond his authority, no *assumpsit* can be raised to pay that or any smaller sum.

Lord ELLENBOROUGH, C. J. declared his further concurrence on the last-mentioned ground.

Postea to the defendant.

Monday, May 7th.

SOMERVILLE *against* WHITE.

The Court will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed: and though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, [146] relates back to the first day of it; and therefore execution issued thereon after such writ of error allowed and served, was set aside for irregularity.

A RULE *nisi* was obtained for setting aside the execution, and returning the money which had been levied under it, for irregularity; the execution having been sued out pending a writ of error, and after notice of the allowance. After a sham plea, and issue joined, and interlocutory judgment and a writ of inquiry executed, the defendant, four days before final judgment entered up, sued out a writ of error on the 9th of *February*, returnable on the 11th, and served notice of the allowance: the plaintiff, notwithstanding, after entering up final judgment on the 15th, sued out execution thereon.

Garrow shewed cause, insisting that it appeared upon the very face of the proceedings that the writ of error was sued merely for delay; it having issued four days before final judgment entered. That this was a more convincing proof of it than an unguarded acknowledgment of the party himself in conversation; which was admitted to be a sufficient reason for suing out execution pending a writ of error.

Gibbs and *Comyn*, *contrà*, cited *Jaques* v. *Nixon* (*a*), where final judgment was not signed till after the writ of error sued out, and the allowance of it served; and there *Buller*, J. recognized the practice of suing out a writ of error before

(*a*) 1 Term Rep. 279.

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judgment signed; which he said happened in almost all cases; for otherwise execution would issue instantly. And that if a writ of error be sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sue out execution, the Court would set that execution aside: and so it was done in that case.

The Court referred to *Warwick* v. *Figg* (*a*) where, under similar circumstances, it was contended that the writ of error, which was returnable before final judgment, was spent when the judgment was entered up, and execution issued, and therefore was no *supersedeas* to the execution. But it was ruled otherwise; because the judgment, when entered, related back to the first day of the Term, and therefore the writ of error was a *supersedeas* to it: and the Court therefore set aside the execution. And they added that they could not infer that any delay was intended merely from a view of the proceedings, without an acknowledgment by the party that the writ of error was sued out merely for delay. That the precaution of suing out the writ of error before final judgment signed, was sometimes necessary; for where the judgment was for a large sum, a plaintiff would sometimes sue out execution immediately
[147] afterwards, without waiting to have his costs taxed, and before a writ of error could be sued out to stay him, if it were not sued out before.

Rule absolute.

Monday, May 7th.

NADIN *against* BATTIE and WARDLE.

If one of two defendants, taken on a joint *ca. sa.* be discharged under an Insolvent Debtors' Act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff.

THE defendants were arrested on a joint *ca. sa.*; after which *Wardle* was discharged under an Insolvent Debtors' Act, the plaintiff not opposing such discharge. Whereupon *Littledale* now moved to discharge the other defendant *Battie*, and cited *Clark* v. *Clement* and *English* (*b*), and other cases there referred to, to shew that if a plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards take any of the others. And

(*a*) Qto. Barnes, 196. (*b*) Term Rep. 425.

though

though he observed the discharge in this case might be said to be by the act of the law, and not, as in that case, by the plaintiff's own act, yet the plaintiff so far adopted it, that if he had chosen to pay the sixpences, he might have prevented the discharge.

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Lord ELLENBOROUGH, C. J.—The discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent, against the fact, as to operate as a discharge of the other.

Per Curiam. Rule refused.

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APPLETON *against* BINKS.

Tuesday, *May* 8th.

One who covenants for himself, his heirs, &c. and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person.

THE plaintiff declared in covenant upon articles of agreement between him, on the one part; and the defendant, by the name and description of *T. Binks*, of, &c. (for and on the part and behalf of the Right Hon. Lord Viscount *Rokeby*) of the other part, with a profert *in curiam* of the articles sealed with the seal of the defendant; whereby the plaintiff, in consideration of 6000*l.* paid by Lord *Rokeby*, covenanted with the defendant, his heirs and assigns, that he (the plaintiff) his heirs, &c. would, at the cost of Lord *Rokeby*, his heirs, &c. on or before the 13th of *May* 1803, by such conveyances as Lord *R.* should require, convey to Lord *R.* &c. in fee, certain premises in the county of *York*, &c., with such warranty, &c. as Lord *Rokeby* should require, &c. In consideration whereof the defendant for himself, his heirs, executors, &c. on the part and behalf of the said Lord Viscount *Rokeby*, did thereby covenant with the plaintiff that Lord Viscount *Rokeby*, his heirs, &c. should pay to the plaintiff the said 6000*l.* the purchase-money at the time of sealing and executing of the conveyances aforesaid; with a proviso, that if Lord *Rokeby*'s counsel should not approve of the plaintiff's title to the premises, or if Lord *Rokeby* should die before the said 13th of *May* next, the agreement should be void. The plaintiff then averred his seisin in fee of the premises, and that his title was approved

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by Lord *Rokeby*'s counsel, and that Lord *Rokeby* was still living; and that the plaintiff was willing to execute proper conveyances to Lord *R.* his heirs, &c. at their costs, &c. of all which premises Lord *R.*, after making of the said articles, had notice; and though the plaintiff, after making the ar-

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ticles, and before the 13th of *May* next ensuing, &c. gave notice to Lord *R.* and the defendant, that the plaintiff and his wife were ready and willing to convey to Lord *R.* his heirs, &c. yet Lord *R.* has not paid to the plaintiff the said 6000*l.* purchase-money, but has refused, &c.; nor did Lord *R.* require any conveyance, &c. but declined so to do: contrary to the effect of the articles, and the covenant of the defendant, &c.: whereby the defendant has broken his covenant, &c. to the damage of the plaintiff, &c. To this there was a general demurrer and joinder.

W. Jackson, in support of the demurrer, proposed to argue, 1st, That a deed could not be made by an agent, as such; or, 2dly, That if it could, covenant did not lie against him, upon articles describing him to be merely agent for another. But

The Court said that it was impossible to contend that where one covenants for another, he is not to be bound by it; the covenant being in his own name "for himself, his heirs," &c. There was nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to *Rome*. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants for himself, not in the name of his principal, and puts his own seal to it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity.

Judgment for the plaintiff (*a*).

Hullock was to have argued for the plaintiff.

(*a*) *Vide* Frontin *v.* Small, 1 Stra. 705. 2 Ld. Ray. 1418. Macbeath *v.* Haldimand, 1 Term Rep. 172.; and Unwin *v.* Wolesley, ib. 674. *Vide* also White *v.* Cuyler, 6 Term Rep. 176., and Wilkes *v*, Back, 2 East, 142.

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Tuesday, May 8th.

HENSHALL *against* ROBERTS and Others, in Error.

A count upon an account stated with the plaintiff's executrix, &c. (not saying as executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiffs in their representative capacity; and under such a count proof might be given of an account stated with them in their individual characters. *Qu.* Whether if it had been laid to be on an account stated with the plaintiffs themselves, though named as executrix, &c. it could be so joined as the cause of action would still appear to have arisen in the time of the executrix &c., though the money, when recovered, would be assets?

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Henshall was attached to answer *Sarah Roberts* and others, executrix and executors of the last will and testament of *William Roberts* deceased; which *W. R.* was executor, &c. of *W. Danson*, of a plea of trespass on the case, &c. For that whereas the defendant *Henshall* in the lifetime of *Danson* was indebted to *Danson* in 500*l.* for goods sold and delivered by *Danson* in his lifetime to the defendant *Henshall* at his request, he the defendant, in consideration thereof, promised *Danson* in his lifetime to pay him, &c. There were various other counts upon promises made by the defendant to *Danson* in his lifetime. Another set of counts was upon promises to the plaintiffs below, the executors of the executor; the first of which stated, that whereas the defendant *Henshall*, afterwards and in the lifetime of *Danson* and of *W. Roberts* respectively, was indebted to *Danson* in other 500*l.* for goods sold and delivered by *Danson* in his lifetime to the defendant, at his request; and being so indebted, the defendant in consideration thereof afterwards, and after the decease of *Danson* and *W. Roberts* respectively, promised the said *Sarah*, &c. (the plaintiffs below) executrix and executors as aforesaid, to pay to them the said sum when requested. The declaration also contained the two following counts: "And whereas the defendant *Henshall* afterwards, "&c. accounted with the said *Sarah*, &c. (the plaintiffs below) "executrix and executors as aforesaid, concerning divers "other sums to the said *Sarah*, &c. (plaintiffs below) exe- "cutrix and executors as aforesaid, from the defendant, be- "fore that time due and owing, and then in arrear and unpaid; "and upon that account the defendant was found in arrear and "indebted to the said *Sarah*, &c. executrix and executors as "aforesaid in the further sum, &c. the defendant afterwards, "&c. promised the said *Sarah*, &c. executrix and executors "as aforesaid, to pay them, &c. when requested. And whereas "the defendant *Henshall* was indebted to the said *Sarah*, &c. "executrix and executors as aforesaid, in the further sum of "500*l.* for certain interest before that time due and owing from "the defendant to the said *Sarah*, &c. executrix and execu- "tors

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"tors as aforesaid, for and on account of the said *Sarah*, &c. "executrix and executors as aforesaid, at the instance of the "defendant, having forborne and given day of payment to "the defendant of divers sums due and owing to the said *W.* "*Danson* in his lifetime, and at the time of his death by the "defendant then due and owing to them the said *Sarah*, &c. "executrix and executors as aforesaid, the defendant, in "consideration thereof, promised the said *Sarah*, &c. exe- "cutrix and executors as aforesaid, to pay them, &c.: yet "the defendant not regarding his said several promises, &c. "but intending to defraud the said *W. Danson* in his life- "time, and the said *Wm. Roberts* after the death of *Danson* "in his lifetime, who survived *Danson*, and was *Danson*'s "executor, and also the said *Sarah*, &c. executrix and exe- "cutors as aforesaid, since the decease of *Danson*, and *W.* "*Roberts*, hath not paid, &c.; and therefore the said *Sarah*, "&c. bring their suit, &c.; and the said *Sarah*, &c., bring "into court here the letters testamentary of *Danson*, whereby "it appears that *W. Roberts* was the executor of *Danson*, "&c.; and also the letters testamentary of *W. Roberts*; "whereby it appears that the said *Sarah*, &c. are executrix "and executors of *Wm. Roberts*," &c.

After judgment by *nil dicit* and a writ of enquiry to assess damages, and final judgment in the Court of Common Pleas in Trinity Term last, a writ of error was brought in this Court; and amongst other common errors it was as-

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signed for error, that in some of the counts the plaintiffs have declared upon promises made to *W. Danson* deceased, in his lifetime, and upon certain other promises made to the plaintiffs as executrix and executors as aforesaid; and also upon promises made to the plaintiffs upon a cause of action accruing to them in their own right, *viz.* for interest due from the defendant to the plaintiffs for and on account of the plaintiffs having forborne and given day of payment to the defendant for divers sums, &c. Joinder in error.

Jervis, for the plaintiff in error, insisted on the misjoinder of the count upon the account stated with the plaintiffs below in their own right, in the same declaration with counts upon promises to their testator, which could only be recovered in their representative character; because the same judgment could not be given on the two different descriptions

tions of counts. *Jennings* v. *Newman* (*a*) and *Rogers* v. *Cook* (*b*). And where the action is upon promises made to the executors upon a cause of action arising in their time, they are liable to costs if they fail: and the naming themselves executors is not material. *Nicholas* v. *Killegrew* (*c*) and *Wallis* v. *Lewis* (*d*). The very form of the count, upon an account stated with the executors, seems to imply a cause of action in their own time; though it has been usual to add such a count in actions by or against executors; and in *Secar* v. *Atkinson* (*e*) it was holden to be no misjoinder with counts on promises made by the intestate. But there the plaintiff declared that he had accounted with the defendant as administratrix; and here the account is only alleged to have been stated with the plaintiffs below, "executrix and "executors," not saying "as executrix," &c.; which is no allegation that the debt arose to them in their representative character. *Brigden* v. *Parkes* (*f*). But at any rate the last [153] count for interest on forbearance by the plaintiffs below, must be founded on a cause of action arising in their own time, which therefore clearly cannot be joinder with the other counts. It is not sufficient that the principal was due to the testator in his lifetime; for if a new security be taken by the executor, as a promissory note, he cannot declare on that jointly with other promises to the testator. *Betts* v. *Mitchell* (*g*). *A fortiori* then he cannot recover interest accruing in his own time with any other count on promises to him merely as executor. It is true, that *Buller* J. in *King* v. *Thorn* (*h*), and in *Cockerill* v. *Kynaston* (*i*), says, that the only question in such cases is, Whether the sum, when recovered, will be assets of the testator? but that rule was doubted in *Bollard* v. *Spencer* (*k*); and though adverted to again in *Ord* v. *Fenwicke* (*l*), yet there the promise was laid to be made to the plaintiff "as executrix."

Bosanquet, *contrà*, observed, that by necessary implication where the parties to whom the promise was alleged to be

(*a*) 4 Term Rep. 347.
(*b*) 1 Salk. 10.
(*c*) 1 Ld. Ray. 436.
(*d*) Ib. 1215.
(*e*) 1 H. Black. 102.
(*f*) 2 Bos. & Pull. 424.
(*g*) 10 Mod. 316.
(*h*) 1 Term Rep. 489.
(*i*) 4 Term Rep. 281.
(*k*) 7 Term Rep. 358.
(*l*) 3 East, 110.

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made, named themselves "executrix and executors," it must be taken to have been made to them in their representative capacity, and meant the same as if it had been said "as exe- "cutrix," &c.; more especially when it is said "executrix, "&c. as aforesaid;" which refers to the antecedent counts, in which it is admitted that they sued in their representative characters. [Lord *Ellenborough*, C. J. We cannot import any thing from the other counts: we must look to this upon the account stated, and see whether it can be joined with the rest.] In the very beginning of the declaration it is stated, that the defendant was attached to answer the plaintiffs, executrix and executors, &c.; and in the conclusion they make a profert of the letters testamentary; which shews that they sued as such.

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Lord ELLENBOROUGH, C. J.—That leaves the question as before. It is the same as if it were said, "*A. B.*, &c. be- "ing executor," &c. it is not an allegation of their suing as such; and we can supply nothing by intendment. If it had been alleged that they sued as executrix, &c. that would have been enough to have raised the other question, Whether a count, upon promises on an account stated with one as executor, can be joined with other counts on promises with the testator? upon which there are authorities both ways. The cases in favour of the proposition are *Bull* v. *Palmer* (*a*) and *Mason* v. *Jackson* (*b*), together with the opinion of Mr. Justice *Buller* in the cases cited, that wherever the sum recovered by the executor on promises to himself would be assets in his hands, there the count may be joined with counts on promises made to the testator. But there are many authorities the other way; and I think you will hardly find the point tenable. However, if you wish to have time to look into the first point, to see if the question can be raised on this record, the Court will give you leave to mention it again, if you think it will admit of argument. At present,

Per Curiam, Judgment *nisi*, &c. for the Plaintiff in Error.

And *Bosanquet*, a few days afterwards, said that he could not get rid of the preliminary objection.

(*a*) 2 Lev. 165. (*b*) 3 Lev. 60.

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Wednesday, May 9th.

BOLTON *against* GLADSTONE.

A sentence of a foreign court of prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such court upon which it has professed to decide. Therefore, where a Danish ship, warranted neutral, was captured by a French ship of war (Denmark being at peace with France) and the court in which she was libelled as prize, professing to consider that the built of the vessel was unknown, that she was [156] sold to a neutral subject only since the declaration of war, that the bill of sale does not mention her place of built or her original owner, that the mate and third officer were naturalized Danes only since the declaration of war, and that the greater part of the crew were subjects of hostile powers, condemned the ship as good and lawful prize; such condemnation is conclusive against the warranty of neutrality in an action on the policy against the underwriter, and no evidence could be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of France containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appear to have regulated their judgment in the conclusion they had drawn.

THIS was an action against an underwriter upon a policy of insurance effected by the Plaintiff as agent, residing in *Great Britain*, upon the ship *Oxholme* and her cargo, both warranted *Danish*, at and from the island of *St. Thomas* to the coast of *Africa*, during her stay and trade there, and at and from thence to *Surinam*, with leave to call at *Bermuda* outward bound, with leave to exchange goods and slaves with any vessels. The plaintiff in his declaration averred the interest in ship and cargo to be in *James Hazzell*, *James Murphy*, and *R. D. Jennings*, who, during the time of the insurance and loss, were and still are *Danish* subjects, and that the ship and cargo were *Danish;* and that during the voyage insured, the ship and cargo were hostilely seized, taken, and carried away upon the high seas by persons unknown. Plea the general issue. At the trial at *Guildhall* a special verdict was found, in substance as follows:

The plaintiff was the agent residing in *Great Britain*, and on account of *J. Hazzell*, *J. Murphy* and *Jennings*, caused to be made the policy in question, which was subscribed by the defendant, upon the ship *Oxholme* and goods. The cargo was loaded on board the ship at the island of *Saint Thomas* for the voyage insured; and the ship *Oxholme* warranted in the policy to be a *Danish* ship at the time of lading of the goods on board, and of the making of the policy, and until the capture and loss after-mentioned, was a *Danish* ship, and the property of the said *J. Hazzell*, *J. Murphy* and *R. D. Jennings;* and that the said cargo were also *Danish* property, of the said *J. Hazzell*, &c. and the said *J. H. J.*, and *R. D. J.* were, during all the time aforesaid, subjects of the King of *Denmark*, residing and domiciliated

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at the *Danish* island of *St. Thomas*, and interested in the said ship and cargo to the amount of the sum insured. The ship when she sailed, and during her whole voyage, until and at the time of the capture, had on board, together with all other papers and documents usually carried by *Danish* ships, to shew that she was a *Danish* ship, the papers following, *viz.* a *Latin* pass, a *Mediterranean* pass, a bill of sale, a muster-roll, a measure brief, a certificate of property, and every other document generally carried by *Danish* ships. The first and second mate, and other officers, and the crew of the ship during the voyage, were *Danes* and *Swedes*, except one man on board at the time of the capture, who alone was a subject of any nation in a state of hostility to *France*. At the time of making the policy, until and at the time of the capture, there was open war between *Great Britain* and *France*. The ship with her cargo on board sailed from *St. Thomas*, and in the course of the voyage insured was captured by two *French* frigates, and carried into the *French* island of *Senegal*, where proceedings were instituted before the tribunal for determining questions of prize; when they proceeded, upon the grounds stated in the following sentence, to condemn the ship and cargo as good and lawful prize, and ordered them to be sold; and thereby they became wholly lost to the assured. The sentence of condemnation was as follows: " Liberty—Equality. I *Emlec Blanchot*, " Commandant and Administrator of *Senegal*, &c. assisted " by Citizen *S. M.* chief of the civil courts of marine in this " Island, *P. A.* and *P. B.* merchant, and *J. F. C.* registrar
[157] " of this Colony, having seen the verbal process of the cap- " ture of the ship *Oxholme* carrying *Danish* colours, Captain " *J. Fowle*, seized the 30th of *Germinal* last by the frigate " of the Republic *Regenerée*, commanded by Citizen *Wil-* " *liamets*, captain of a vessel; having examined and com- " pared all the instruments and papers relating to the said " ship *Oxholme*, particularly two muster-rolls, one in the " *Danish* language, dated 15th *November* 1797, and the " other in the *English* language, dated 17th *November* " 1797; the bill of sale of the aforesaid ship, dated 24th " *May* 1796, signed *J. H. J. Plewsher*; considering that " the vessel, of what built unknown, was sold to a subject " of a neutral power only since the declaration of the pre-

" sent

" sent war, and that the bill of sale makes no mention either " of her place of built or of her original owner; that the " mate and the third officer were naturalized *Danes* only " since the declaration of the present war; and the greater " part of the white men of the crew are subjects of hostile " powers; I decree the said vessel the *Oxholme* to be good " and lawful prize, conformably to the 10th, 11th, and 12th " articles of the regulations concerning prizes of the 21st of " *October* 1744, which are thus worded: ' Every vessel of " enemy's built, or which shall have been owned by an " enemy, shall not be deemed to be neutral or belonging to " an ally, if there be not found on board some authentic " instruments, certified by public officers who may ascertain " the date of them, which prove that the sale or transfer " thereof was made to some one of the subjects of allied or " neutral powers before the declaration of the war,' &c.— " ' No respect shall be paid to passports granted by neutral " or allied powers to the owners or masters of vessels who " are subjects of hostile states, if they were not naturalized " before the declaration of the present war.' ' All foreign " vessels shall be lawful prizes on board of which there shall [158] " be a supercargo, merchant, clerk, or marine officer of any " of his Majesty's enemies, or of which the crew shall con- " sist of more than in the proportion of one-third of seamen " who are subjects of hostile states.' Accordingly, I decree " the said vessel the *Oxholme* to be sold in the usual form, " and the proceeds to be delivered to whom of right they " belong. Done at the government house of the *French* " island of *Senegal*, the 15th day of the month of *Prairial*, " of the 6th year of the *French* Republic, one and indivisible. " Signed *Paul Benis*, *Marca Malivon Blanchot*, *Charbonier* " Registrar. But whether," &c.

Jennings for the plaintiff contended, 1st, That the sentence of the prize court appeared upon the face of it to be grounded upon *French* ordinances; which not being binding upon other nations who had not expressly stipulated by treaty to be bound by them, could not contravene the warranty of neutrality. 2dly, That the conclusion drawn in the sentence was not warranted by the premises, which, on the contrary, rather tended to prove the warranty of neutrality; and, 3dly, That the sentence of a foreign court of admiralty

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ralty was only binding *in rem*, so as to alter the property in the thing itself condemned as prize; but did not conclude the question of neutrality arising in any other court of competent jurisdiction. He argued at length upon these topics, and cited many cases. But it is unnecessary to repeat arguments and authorities which have been so frequently and ably discussed of late, and particularly by all the Judges in the case of *Lothian* v. *Henderson*, in the House of Lords, reported at length in 3 *Bos.* and *Pull.* 499.

[159] *Cassels*, for the defendant, contended, 1st, That a warranty must be construed strictly; and that where a ship was warranted neutral, she must be documented and navigated in such a manner as to entitle her to all the privileges of neutrality wherever that question comes into discussion. 2dly, That where a neutral ship is condemned by a foreign court of competent jurisdiction, whatever is decided by the sentence of that court is conclusive in any other court here, where the same point comes in issue: and that although the point be not in terms decided, and the words of the sentence be ambiguous, yet if it can be fairly collected what the foreign court meant or professed to decide, it is equally conclusive. 3dly, That a general adjudication of good and lawful prize falsifies the warranty of neutrality. 4thly, That a sentence of condemnation, formal or informal, just or unjust, with or without reasons, if founded in any part of it on the ground of the ship's being considered as enemy's property, is conclusive against a warranty of neutrality. He admitted that some of the cases had gone further, and had laid down, 5thly, That although there be in the sentence a general adjudication of good and lawful prize, as the concluding or decretal part of it; yet, that if the reasons leading to the conclusion were therein stated, and those reasons did not either distinctly or by fair inference falsify the warranty of neutrality, the Court would not examine their validity, and receive other evidence *dehors* the sentence upon the point of neutrality. But he contended that the reasons stated did, fairly considered, falsify the warranty in this case. And further he admitted, 6thly, That where a ship has been condemned by a *French* court of admiralty, and as reasons for that condemnation *French* ordinances are stated to have

[160] been broken, the Court here have been considered at liberty to

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to examine whether those ordinances were or were not conformable to the law of nations. But he contended that these ordinances were conformable to that law. He argued at length upon these several topics, and observed on some of the cases. *Curia adv. vult.*

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court.

Since the judgment of the House of Lords, in *Lothian* v. *Henderson*, it may now be assumed as the settled doctrine of a court of *English* law, That all sentences of foreign courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially. In this case, the question, How far the alleged neutrality of the ship *Oxholme*, described in the policy of insurance as a *Danish* ship, was, under the circumstances maintained, or falsified? is a question, to the decision of which the *French* prize court at *Senegal* was undoubtedly competent. And if that Court before which proceedings for the condemnation of this vessel as prize were instituted has, in the professed and actual exercise of the functions of a prize court, decided thereupon, such decision must have the effect of concluding the question. It remains, therefore, only to ascertain, by a reference to the terms of the sentence itself, whether it have so decided. In the first place, the Court, in every part of the sentence, considers the case depending before it as a case of litigated neutrality. It states the *Oxholme* to have carried *Danish* colours, and so far to have been ostensibly a *Danish* [161] vessel. After mentioning the written documents belonging to the ship found on board, it suggests, as drawing its neutrality into suspicion, that its built was unknown: and further, that it was sold to a subject of a neutral power only since the declaration of the present war; and that the bill of sale made no mention of her place of built, or of her original owner. It then exhibits the quality and description of the officers and crew, as affording similar matter of suspicion, as affecting her neutrality; *viz.* "that the master and the "third officer were *naturalized Danes* only since the declara- "tion of the *present* war;" and "that the greater part of "the

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"the white men of the crew were subjects of *hostile* powers." It then proceeds to decree the *Oxholme* to be good and lawful prize conformably to certain regulations of *France* in the year 1744 concerning prizes; by which it is declared that vessels of enemy's built should not be deemed neutral: that the passports granted by neutral or allied powers should not be respected, if granted to masters of vessels subjects of hostile states, and not naturalized before the declaration of war; and that vessels should be lawful prizes on board of which certain specified officers, being enemies, should be found, or of which the crew should consist of more than one third of seamen subjects of hostile states. Looking, therefore, at the whole of the sentence, including the ordinance to which it professes to conform, it is impossible not to see that the *French* prize court canvassed and decided upon the probability of the ship's actually being, or the fitness of its being presumptively deemed enemy's property, or at least not neutral, in respect of certain
[162] established *indicia* on that head, collected together in the ordinance referred to. And having, in respect of such circumstances so stated and detailed, decreed the vessel to be good prize, it appears to us that we should do a violence to the fair meaning and import of the whole of the context if we should hold the Court to have so decided and decreed upon any other ground than this, *viz.* that the fact, which is the subject of the warranty, was in their judgment substantially untrue. And having so decided, we are bound, upon the principles before stated, to give a conclusive effect to such their judgment, and to hold the warranty of "*Danish* ship" to be thereby fully disproved, and the plaintiff thereby also of course barred from recovering upon the policy in which such warranty is contained.

Judgment for the defendant.

DOE,

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DOE, on the Demise of CHARLES WHITE, *against* SIMPSON and Another.

Wednesday, May 9th.

THIS was an ejectment for certain premises in the parish of *St. Matthew*, *Bethnal Green*, in *Middlesex*, brought by the first remainder-man in tail under the will of one *Charles White*, against the defendant, who claimed as assignee of one *Hopkins*, under a lease granted in *August* 1786, by the executrixes of *Henry Hyatt*, the surviving trustee, under the will of *Charles White*, dated *July* 1754, and properly executed and attested; whereby the said devisor having first devised unto the said *Henry Hyatt* all his messuages, lands, &c. whatsoever, in the parish of *Wilsdon* for life, with divers remainders over for life, remainder to *Charles White* in tail; and having given directions for the renewal of a certain church lease, &c.; proceeds as follows:

"I give and devise unto the said Mr. *H. Hyatt*, my cousin *Fitz Ferrand*, and Mr. *Syddall*, and the survivor of them, and the executors and administrators of such survivor, all those my messuages, lands, &c. whatsoever in *London*, *Kensington*, and in the parish of *St. Matthew*, *Bethnal Green*, *Middlesex*, together with all arrears of rent due from the tenants of the said estates, and the bond and judgment I have from my tenant *John Sugar*, for arrears due; in trust, that they, out of the rents and profits of the said estates and arrears due, shall pay one annuity of 50*l.* to my sister Mrs. *Holme* for her life, by half-yearly payments,

Under a devise of lands, arrears of rent [163] and a bond and judgment to trustees and the survivor and the executors, &c. of such survivor, in trust, out of the rents and profits of the said estates and arrears, &c. to pay certain annuities for lives, and a sum in gross; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to C. W. in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble; held, that the purposes of the trust being all answered, by the death of the annuitants and the raising of the money for legacies, the remainder-man in tail (the life estate being spent) took the legal estate in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them by implication; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it is sufficient to answer the purposes of the trust to give the trustees by implication an estate for the lives of the annuitants, with a term of years in remainder sufficient for the purpose of raising the gross sum charged out of the rents and profits. And this construction is further confirmed in this particular case by the bequests to the trustees of the arrears and the bond and judgment, as well as of the rents and profits; for otherwise the interest in the bond, &c. would go to different representatives than the estate if the trustees took a fee: and the leasing power was only to be executed as the occasions of the trust required. And there was also a personal remuneration to the trustees of 10*l.* a year for their trouble, which was not extended to their heirs.

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ments, from the time of my decease; and also to pay one other annuity of 50*l.* to my sister Mrs. *Dickenson*, for her life, by half-yearly payments, for her sole and separate use, &c. And from and after payment of the said annuities, then in trust out of the said rest and residue of the said rents and profits, to pay to my brother *Thomas White*, and my nephew, his son, *Charles White*, and *Peter Holme*, and the survivor of them, and the executors, &c. of such survivor, the sum of 800*l.* to be by them paid and applied to the sole use and benefit of the said children of my said brother *William*, in such manner and proportion, and to and for such uses, &c. as they shall think best. And from and after payment of the said annuities, and the said sum of 800*l.* I give and devise my said estates in *London* and *Middlesex* last-mentioned, to my brother *William* for life, remainder to his eldest son *William* for life, remainder to his second son *Samuel* for life, remainder to his third son *Charles* for life, remainder to his youngest son *John* for life, remainder to my brother *Thomas White* for life, and after his decease to his son, my nephew, *Charles White* (the lessor of the plaintiff), and his heirs male; and for want of such issue to my right heirs for ever. And I do hereby give and grant unto the said Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, and the survivor of them, and the executors and administrators of such survivor, full power and authority to grant any building lease and leases, or any other lease and leases, as often as there shall be occasion, of the said estates so devised to them in trust as aforesaid, or any part thereof, for any number of years; so as such lease and leases so to be granted, be made for the most or best rent that can be had or got for the same, without any fine or income. And I hereby direct, that so long as the said Mr. *Ferrand* and Mr. *Syddall* shall act in the said trust, they shall be paid or allowed every year the sum of 10*l.* a-piece for their trouble. But it is my will and mind that they the said Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, shall be only accountable for their own several acts," &c. The will contained other bequests not material to be stated. The devisor died in *July* 1754.

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At the trial before Lord *Ellenborough*, C. J. at the Sittings at *Westminster*, after *Michaelmas* Term last, it clearly appeared

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appeared that the lease under which the defendant claimed was void under the power granted to the trustees, the best rent not having been reserved; and the *jury found a verdict for the lessor of the plaintiff on that ground. But objection was taken at the trial (which was reserved to the defendant's counsel, with liberty to move to enter a nonsuit if the Court should sustain the objection) that the legal title was not in the lessor of the plaintiff, the first remainder-man in tail under the will; but (all the trustees being dead) in the heir of *H. Hyatt*, who survived the other trustees, and died in *November* 1774. It appeared, however, that of the two annuitants mentioned in the will, Mrs. *Holme* died in the lifetime of the devisor, and Mrs. *Dickenson* after him in the year 1762; and the last tenant for life died in 1803, immediately prior to the bringing this ejectment. Also the sum of 800*l.* mentioned in the will had been raised and applied as long ago as *January*, 1771, when all the purposes of the trust were satisfied. Lord *Ellenborough*, C. J. was of opinion at the trial, that the trustees did not take the legal estate for any longer time than the lives of the annuitants, and until the gross sum of 800*l.* was raised, and the purposes of the trust satisfied: but if that were otherwise, yet after all the purposes of the trust were at an end, he said he would direct the jury to presume a reconveyance, if necessary, to the persons that were beneficially entitled under the will. But if it was afterwards objected by the defendant's counsel, that the power of leasing was intended by the testator to be given to the trustees during the continuance of the successive particular estates carved out of the inheritance; and that the exercise of such a power necessarily required a seisin in fee of the trustees to support it. And thereupon the verdict was entered for the plaintiff, with liberty to the defendants to move to set it aside and enter a nonsuit, if the Court should be of opinion that the objection to the title of the lessor of the plaintiff were well founded. A rule *nisi* having been accordingly obtained in *Hilary* Term last for that purpose,

Wood (who was with *Erskine* and *Garrow*) shewed cause against the rule, and contended that the trustees took only a chattel interest under the will for the payment of the annuities during the lives of the annuitants, and for raising

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the sum of 800*l.* for the legatees; and when those purposes were answered, which they were so far back as 1771, the legal estate was limited over to the several takers for life, remainder to the lessor of the plaintiff in tail, in whom it is now vested in possession. A devise to trustees and their executors and administrators, for the payment of debts and legacies, has been often holden to give them only a chattel interest, and when the purposes are answered the legal estate goes over. As in *Co. Lit.* 42. *a.* "If a man "devise his lands to his executors, for payment of debts, and "until his debts be paid, they have but a chattel and an in-"terest uncertain in the land until his debts be paid:" "and "being a chattel, it shall go to the executor or executors "for the payment of his debts." And so it was resolved in Sir *W. Cordell*'s case (*a*), and in *Hilchins* v. *Hilchins* (*b*). The devise to the trustees being also for the payment of the annuities for life, will not vary the question; for the trustees will take no greater estate than is sufficient to answer the purposes of the trust. In *Barnardiston and others* v. *Carter*, in Dom. Proc. (*c*) under a devise to executors for payment of debts and legacies, it was decreed that they had but a chattel interest: and, by the report in *Brown*, it appears that one of the legacies was a rent charge (*d*) for the lives of two persons and the survivor. In other cases where the devise has been to trustees and their heirs in trust for payment of debts, legacies, and annuities, they have been holden to take no greater estate than such as was commensurate with the purposes of the trust: after which the limitations over took effect as legal limitations; as in *Lord Say* and *Sele* v. *Lady Jones* (*e*). That was a devise to trustees and their heirs in trust, to pay legacies, and annuities, and to pay the surplus to a *feme covert* for life to her separate use; and after her death the trustees to stand seised to the use of the heirs of her body in tail general, subject to the payment of the several annuities; remainder

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(*a*) Cited in 8 Rep. 96. and Cro. Eliz. 316. (*b*) 2 Vern. 403.

(*c*) 1 P. Wms. 509, 519. 2 Bro. P. C. 1.

(*d*) This rent charge was given "after such time as his said debts and "legacies should be discharged;" and no question was made on this ground.

(*e*) 3 Bro. P. C. 458. 8 Vin. Abr. 262.

over.

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over. And Lord Chancellor *King* held, that the use was executed in the trustees and their heirs, during the life of the *feme covert*, and after her death it was executed in the persons entitled to take charged with the annuities. [*Lawrence*, J.—I have heard Lord *Kenyon* say, that that was a single case, standing on its own grounds (*a*).] The same principle was established in *Shapland* v. *Smith* (*b*), and in *Silvester* v. *Wilson* (*c*), that under a devise to trustees to receive and pay out of the rents and profits, annuities for lives, they shall have no greater estate than is sufficient for the purposes of the trusts created. Then it is argued from the power of leasing given to the trustees, that the testator meant to give them a fee: but that is not the necessary inference from the [168] words of the devise. The power of leasing was meant to be confined to the duration of the interest the devisor had before given to the trustees, and commensurate only with the purposes of the trust; and a power to any extent may be granted to one, without giving him the fee, or without giving him an interest commensurate with the lease which he may grant. Besides, the jury were instructed at the trial, that even if the legal estate continued in the trustees, after the purposes of the trust were satisfied, yet the jury might presume a reconveyance of it by the trustees to the remainder-man in tail, after those purposes were answered. And here a sufficient length of time has elapsed to warrant such a presumption; the last annuitant having died above 40 years ago, and the last of the legacies having been paid off in *January* 1771. In a case where much less time had elapsed, Lord *Kenyon* said, he would direct a jury to presume a surrender of a satisfied term (*d*).

Gibbs (*Park* and *Rose* were with him) *contrà*, contended that the devise to the trustees to pay annuities for lives, and a gross sum out of the lands devised, gave them the fee, for otherwise the estate might not be sufficient to answer the charge. *Cordell*'s case (*e*) was only a devise to executors to pay debts; a mere power to raise money: and the

(*a*) *Vide* Harton *v.* Harton, 7 Term Rep. 654.

(*b*) 1 Bro. Ch. Rep. 74. (*c*) 2 Term Rep. 444.

(*d*) *Vide* Doe *v.* Staple, 2 Term Rep. 696, and Goodtitle *v.* Jones, 7 Term Rep. 49.

(*e*) Cited 8 Rep. 96, and Cro. Eliz. 316.

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grounds on which *Barnardiston* v. *Carter* was decided in the House of Lords, cannot be collected from the report. But in *Jenkins* v. *Jenkins* (*a*) wheer an annuity was devised to one for life, to be paid out of certain lands by the executor to whom those lands were afterwards devised, the Court had no doubt that the executor took an estate at least during the life of the annuitant; and they were inclined to think he took the fee: but that was not necessary to be decided, as the annuitant was still living. But, at any rate, the leasing power given to the trustees shews an intention to pass the fee to them; for it is clear that the duration of the lease could not depend upon the payment of the legacies. And as no such power of leasing is given to the tenants for life, or in tail, the devisor must have intended that the trustees should retain the power of leasing during the continuance of those estates at least. The calling it a power will not prevent the implication of a fee to the trustees, if the exercise of the power require them to take such an estate. As to the presumption of a reconveyance by the trustees, supposing them to take the fee, that was a fact for the jury, which they have not found.

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Cur. adv. vult.

Lord Ellenborough, C. J. now delivered judgment.

This was a motion for a new trial (or that a nonsuit should be entered) on the ground that the legal estate in the premises, for which the ejectment was brought, was not in the lessor of the plaintiff, but in the heir of the surviving trustee, under the will of one *Charles White*, made in the year 1752; and that consequently the ejectment should have been brought on the demise of such heir of the surviving trustee. The question arises on the will of the said *Charles White*, made the 1st day of *December*, 1752, (which his Lordship stated). The lease under which the defendant claimed has been found by the jury to be void, as not having been made pursuant to the leasing power contained in the will; but it was contended, by the counsel for the defendants, that the ejectment was ill brought in the name of the lessor of the plaintiff, *Charles White*, the first remainder-man in tail, for the reason before stated, *viz.* that the legal estate was not in him. The validity of which

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(*a*) Willes, 650, where the cases are collected.

objection

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objection depends upon the question, Whether the original trustees took, by necessary implication arising from the whole of the will (as the defendant's counsel contended they did) an estate in fee, or, as the plaintiff's counsel contended, a *chattel interest*, or estate for such limited period only as will be sufficient to carry into execution the trusts of the will, *i. e.* for the purpose of securing the payment of the two annuities of 50*l.* each, and the gross sum of 800*l.*?—and Whether, after those trusts were satisfied, the several limitations for life and in tail took effect as legal limitations? The case principally relied upon by the defendant's counsel, in support of the proposition, that the trustees took an estate in fee, was the case of *Jenkins* v. *Jenkins*, Lord C. J. *Willes's Rep.* 650. In that case the testator, *John Jenkins*, being seised in fee, by his will gave one *Mary Harper* 5*l.* a-year, to be paid her *out of the premises* in question, by his executor, 'as long as she should live; and to be paid quarterly; and the Court founded its opinion on this ground, *viz.* "That as the annuity was to be paid by the executor, and "to be paid out of the estate, the intent of the devisor "could not take place, unless the executor had at least such "an estate in the lands devised as would last as long as the "annuity was payable:"—and Lord Ch. J. *Willes* adds, "Whether he has an estate for the life of the annuitant [171] "only, or in fee, we need not determine in this action; be- "cause the annuitant is alive: but we are rather inclined "to think that he took an estate in fee; because there is no "one case where a devisee, by virtue of the word *paying*, "has been adjudged to have a larger estate than for his "own life, in which it has not also been adjudged that he "took an estate in fee." But in the present case, nothing turns on the import of the word *paying*; nor was the payment directed by the will to be made by the trustees out of the estates devised, so as to be a personal charge on them, but out of the rents and profits only; which words, in a multitude of cases, have been holden not to give more than an estate for life, as the devisee cannot be a loser in respect of such a charge. Of the several cases cited by Mr. *Wood*, two of them, which have the most immediate bearing on this question, *viz.* *Shapland* v. *Smith*, 1 *Bro. Ch. Rep.* 75; and *Sylvester* v. *Wilson*, 2 *T. R.* 444, appear to establish, that if an estate for life be left to trustees and their heirs in trust,

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trust, to pay the *profits* or an annuity out of *them* to another for life; and, after the death of the annuitant, or person entitled to the profits, if the estate be given to or to the use of another, in such case the trustees take only an estate for the life of the *cestuique* trust or the annuitant, and the remainder over is executed by the statute; and the authorities referred to, *viz. Co. Lit.* 42, *a.* and Sir *W. Cordell*'s case, 8 *Co.* 96, establish the proposition, That if an estate be devised to executors generally, for payment of debts, they will take only a chattel interest; from whence it appears to be a fair inference, that where the purposes of a trust can be answered by a less estate than a fee-simple, that a greater [172] interest than is sufficient to answer such purpose shall not pass to them; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute. I have not met with any case in which the trustees have been holden to take any other interest than either a chattel, an estate for life, or in fee; but I see no reason why they may not, in order to answer the purposes of the trust, take an estate by implication, for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising, out of the rents and profits, the sum of 800*l.* directed to be paid out of the same. Such an estate might certainly be limited by express terms in a deed or will; and the circumstance of the bequest to the trustees, and the personal representatives of the survivor of them, of the bond and judgment given to the testator by a tenant for arrears due (and which is certainly a matter merely of a personal nature) goes strongly in confirmation of this construction; for if the trustees were meant to take a fee, then the legal estate in the land devised, and the interest in this bond and judgment, would go to different classes of representatives of the same surviving trustees; which apparent inconsistency is avoided, if the trustees take the same description of interest (*i. e.* a chattel interest in the land) as they respectively must do in the bond and judgment. It has also been argued, on the part of the defendant, that from the terms and object of the leasing power, a necessary inference arises, that the testator meant to give his trustees an estate in fee. It does not, however, appear to me that the leasing power fairly affords any such inference. The testator gives them *power* and authority to grant "building or

or other leases, as often as there should be occasion, of the said estates so devised to them, *in trust as aforesaid;*" hereby evidently connecting the execution of the power with the particular trust estates before created, and exhibiting an intention that the leasing power should be merely commensurate therewith and auxiliary thereto. The testator also seems to have contemplated the period of the trust; and of course the trouble attending the execution of it, as not being likely to endure beyond the lives of *Ferrand* and *Syddall*, two of the trustees; for he directs, that "so long as the said "Mr. *Ferrand* and Mr. *Syddall* shall act in the said trust, "they shall be paid, or allowed *every year* the sum of 10*l.* "a-piece for their trouble." To the other trustee, *Hyatt*, to whom he had devised an estate for life, for his own benefit in another estate in the beginning of his will, he of course thinks it unnecessary to make this allowance. A yearly allowance made to trustees so long as they should act, is not very consistent with an intention in the testator to impose that trouble upon the heirs of the same trustees, without any recompence made to *them* for their trouble, and that for ever. The argument, on the part of the defendants, is, That unless the leasing power continue in the trustees, down to that period of time when some person should take an estate under the will, in respect of which he might be enabled to grant building leases, that the buildings might fall into utter ruin and decay; and that if the trustees should take this power only during the lives of the two annuitants, and for the time during which the 800*l.* may be raised, that the estate could not be benefited by the granting such leases during the continuance of the several successive estates for life, nor even during the continuance of the estates limited in tail; for tenants in tail are only enabled to make leases under the stat. 32 *H.* 8. *c.* 28.; and that for the avoiding of this inconvenience, the estate devised to the trustees must be construed to be an estate in fee. Admitting, however, that if the several devisees for life should survive the period during which the trust for the lives of the annuitants, and for raising the sum of 800*l.* may continue, the inconvenience suggested, *viz.* of the suspension of the leasing power for a limited time, and to a certain degree, might exist, at least till the remainder-man in tail, by suffering a recovery, should acquire to himself a power of

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of making such leases,—still, if the inconvenience should subsist to a still greater degree than it is likely to do, it would not warrant us in putting a construction upon the will, in order to avoid it, which the terms of the will do not fairly and naturally in themselves bear: and it appears to me, that if we should construe the leasing power as continuing beyond the duration expressly assigned to the trusts above-mentioned, that we should do a violence to the fair obvious meaning of the terms in which that power is couched. Upon the whole, therefore, we are of opinion, that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder, for the purpose of raising the sum of 800*l.*; and that after those trusts were (as they appear in evidence to have been) satisfied, the several limitations for life and in tail took effect as legal limitations; and of course that the lessor of the plaintiff, the remainder-man in tail, had such a legal estate in the premises, at the time of bringing his ejectment, as will enable him to make the demise laid in this declaration.

Rule discharged.

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Saturday, *April* 12th.

DIXON and Others, Assignees of BATTIER and Son, Bankrupts, *against* BALDWEN and Another.

Where A. and B., traders living in London, were, in the course of ordering goods of the defendants, cotton manufacturers at Manchester, to be sent to M. and Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. and B. at Hamburgh; and on the 31st of March A. and B. sent orders to the defendants for certain goods to be sent to M. and Co. at Hull, to be shipped for Hamburgh as usual; held, that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of M. and Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. But it was competent for A. and B., who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree *bonâ fide*, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*; and held, that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up *bonâ fide*, and not from any motive of voluntary and undue preference to the defendants, though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them *in transitu*.

IN trover for 18 bales of cotton twist, it appeared at the trial before Lord *Ellenborough*, C. J. at the last Sittings

at

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at *Guildhall*, that the goods in question had been furnished by the defendants, cotton-dealers at *Manchester*, to the order of the *Battiers*, traders living in *London*, whose course of dealing it was to send orders to the defendants for goods of this description to be forwarded to *Metcalfe* and Co. at *Hull*, for the purpose of being shipped to the correspondents of the *Battiers* at *Hamburgh*, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at *Hull*, the *Metcalfes* received orders from the *Battiers* when and to whom to ship the goods at *Hamburgh*. This course of dealing had subsisted between these parties from *January* 1800; and as the *Battiers* received orders from abroad for cotton twist, they gave orders from time to time to the defendants to send the goods to *Metcalfe* and Co. at *Hull*, to be shipped for *Hamburgh* as usual. Of this import was the order for some of the goods in question, which was sent by the *Battiers* to the defendants in a letter dated 31st of *March* 1803, in which the goods were directed to be "packed in bales, marked *G. S.* "(and a certain mark) for order, and to be forwarded to [176] "Messrs. *Metcalfe* and Sons, to be shipped for *Hamburgh* as "usual;" and another order for the remainder of the goods in question, dated 11th of *May* 1803, was couched in similar terms. The goods were accordingly sent by the defendants to the *Metcalfes* at *Hull*, marked and made up in the manner directed. In the beginning of *July* following the *Battiers* stopped payment, of which the defendants being immediately apprised, one of them proceeded to *Hull*, and stopped the goods in the hands of the *Metcalfes* on the 7th of *July;* and some time after, in the same month, took possession of them, upon giving the *Metcalfes* an indemnity. Four of the bales had been actually shipped on board a vessel about to proceed to *Hamburgh;* but they were afterwards relanded upon the application of the defendants, and were returned to them with the rest which had remained in the warehouse of the *Metcalfes* from the time of their arrival at *Hull*. One of the *Metcalfes*, who was examined as a witness, stated that at the time of the stoppage of the goods, they held them for Messrs. *Battier*, and at their disposal; that they accounted with the *Battiers* for the charges of the goods. And the witness described his business to be merely an expediter, agreeable

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agreeable to the directions of the *Battiers;* a stage and mere instrument between buyer and seller. That he had no authority to sell the goods, and frequently shipped them without seeing them. That the bales in question were to remain at his warehouse for the orders of *Battier* and Son; and he had no other authority than to forward them. That at the time the goods were stopped, he was waiting for the orders of the *Battiers;* that he had shipped the four bales, expecting to receive such orders, and relanded them, because none had arrived. That if the goods had been demanded by the *Battiers* before shipping, he should have delivered them up to them. At the time when the defendants gave notice to the *Metcalfes* to stop the goods, they also applied to the *Battiers* to order them to be delivered up. The *Battiers* in the mean time called a meeting of their creditors in *London*, and a case was laid before counsel concerning their right to restore the goods to the defendants; the result of which meeting and opinion was stated in a letter of the 29th of *July* from the *Battiers* to the defendants, in which they inform them, "That yesterday a meeting was held of "our several creditors resident in *London*, when they "unanimously resolved that it would be most for the inter- "est of the concerned that the affairs should be put in trust, "and that the property should be divided from time to time "amongst the creditors. The opinion obtained from coun- "sel, and which we are happy to say agreed with our "wishes, was likewise submitted to their consideration; and "it appeared generally the opinion, that the twist (*a*) in "*Hull* should be given up." There was also another letter of the 7th of *September* from the *Battiers* to the defendants, inclosing a statement of their affairs; in which they observe that the defendants' "claim is stated according to what we "conceive it to be, after deduction of the goods stopped at "*Hull*." The *Battiers* committed no act of bankruptcy till the 26th of *September* 1803, on which act of bankruptcy a commission issued on the 1st of *October*. The assignees afterwards demanded the goods; which the defendants refused to deliver up. Two questions were made at the trial, 1st, Whether the defendants had a right to stop the

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(*a*) The goods in question.

goods,

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goods, as *in transitu*, at the time they took possession of them: or if they had not, 2dly, Whether the *Battiers were in a condition to rescind the contract; and if so, whether they had done any act amounting to a rescinding of the contract before their bankruptcy? On the first question Lord *Ellenborough* inclined against the right of stopping *in transitu* under the circumstances of the case: and upon the other ground, his Lordship left the question to the jury, Whether or not the consent of the *Battiers* to the rescinding of the contract and returning the goods, given before the act of bankruptcy, were given *bonâ fide*, and without any intention of a voluntary and undue preference? which he inclined to think it was; it being after legal advice taken and upon a conference with their creditors at a public meeting: and the jury found a verdict for the defendants. A rule *nisi* was obtained on a former day for setting aside the verdict and having a new trial, on the grounds that the *transit* of the goods was at an end at the time when they were stopped by the defendants; and that nothing afterwards happened which could amount to a rescinding of the contract on the part of the creditors, or of the bankrupts; whose ability to rescind it without the concurrence of the creditors was under the circumstances denied.

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Garrow, *Topping*, and *Wood*, shewed cause against the rule. 1st, The defendants were entitled to stop the goods *in transitu* in the hands of the *Metcalfes*, who were middlemen between the vendors and vendees. *Hull* was not the ultimate place of their destination; but they were ordered to be sent there for the declared purpose of being shipped to *Hamburgh*. The ultimate place of destination then, as between these parties, was *Hamburgh*, and the goods were still *in transitu* till they got there into the hands of the correspondents of the *Battiers*. The *Metcalfes* were not the exclusive acknowledged agents of the bankrupts, but were middlemen. They described themselves as expediters, and a mere stage. Their duty was analogous to that of a wharfinger in whose hands, as in those of a mere carrier, goods may be stopped. *Stokes* v. *La Riviere* (*a*), and *Hunter* and another, assignees

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(*a*) Sittings after Michaelmas 1784, at Guildhall, before Lord Mansfield, C. J. This case was cited from the argument of counsel in Ellis *v.* Hunt,

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assignees of *Blanchard* and *Lewis* v. *Beal* (*a*), carried the right of stopping *in transitu* further than this case. In the latter the goods had been sent to the inn in the place where the bankrupts lived, who had given orders to the bookkeeper to send them down to the quay, in order to have them shipped to be carried to *Boston;* and they were accordingly sent; but being too late for the ship, were sent back again to the inn, where they were ordered by the bankrupts' servant to be kept a few days longer till another ship was ready. In that case a new direction had been given to the goods by the bankrupts, and yet the vendor's right to stop *in transitu* was holden still to continue, and did prevail. But here *Hamburgh* was the known ultimate place of destination in the first instance. The right of stopping *in transitu* is now become a legal and not a mere equitable right, as it was perhaps at first considered. It was so considered by Lord *Loughborough* in delivering the judgment of the Court of Exchequer Chamber in *Mason* v. *Lickbarrow* (*b*), who refers to Lord *Hardwicke*'s opinion in *Snee* v. *Prescott* (*c*).

[180] [*Grose*, J.—If you refer further back to the case of *Wiseman* v. *Vandeput* (*d*), you will find that the right of stopping *in transitu* was originally put upon a ground of equity, which has since grown into law.] It was expressly stated to be a legal right, and not merely founded on principles of equity, by Lord *Mansfield* in the case of the assignees of *Burghalt* v. *Howard* (*e*), and by the Court of *C. B.* in *Oppenheim* v. *Russell* (*f*). [Lord *Ellenborough*, C. J.—It must have been considered as a legal right in *Bohtlingk* v. *Inglis*, 3 *East*, 381., for there the consignors maintained trover against the assignees of the consignee upon a mere demand

Hunt, 3 Term Rep. 466.; but Lord Ellenborough, C. J. observed that there was a more correct note of the case given by Mr. Justice Lawrence in delivering the judgment of the Court in Bohtlingk *v.* Inglis, 3 East, 397.

(*a*) Sittings after Trin. 1785, at Guildhall, *cor.* Lord Mansfield, C. J. cited in 3 Term 366.

(*b*) 1 H. Black. 364, &c. and cases there cited.

(*c*) 1 Atk. 245.

(*d*) In 1690, 2 Vern. 203.

(*e*) At Guildhall Sittings after Hilary 32 G. 2., cited in 1 H. Black. 365, 6.

(*f*) 3 Bos. & Pull. 42.

and

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and refusal of the goods by the captain before they were delivered.] The right, then, being founded in justice and the common law, ought to be extended as far as it may, consistent with the principle on which it is founded, that is, till the goods arrive at their ultimate place of destination, and have been taken possession of by or on the behalf of the vendee or consignee. In *Hodgson* v. *Loy* (*a*), even part payment was deemed not to take away the right of stopping *in transitu;* and the right being founded in honesty, courts have always leant in support of it. This was a case of dealing for the export trade: and all the cases which have been decided against the exercise of the right, have been cases of inland dealings. The goods were sent to the *Metcalfes* at *Hull*, merely as a stage on their way to *Hamburgh*. In *Hunt* and others, assignees of *Bennet* and *Heaven* v. *Ward* (*b*), a delivery of the goods to a packer, even by the order of the [181] vendee, did not conclude the right of the vendor to stop them *in transitu;* the packer being considered as a middleman. In *Leeds* v. *Wright* (*c*), where goods sent from *Manchester* on account of a house in *Paris*, were considered as no longer *in transitu* after they were in the hands of the packer in *London*, the vendee's agent also lived in *London*, and had an authority to dispose of the goods where he pleased, and might have made *London* the place of their ultimate destination. It was therefore not merely a constructive but an actual delivery. And in *Scott* v. *Pettit* (*d*) the like determination was made, on the ground that the consignee had no other warehouse than that of his packer, where all goods consigned to him were lodged, and which was therefore their ultimate place of destination.

On the second ground they contended, that it was competent for the vendees, the *Battiers*, at any time before their bankruptcy, to renounce the goods, unless it were done with a fraudulent view to give the vendors an undue preference over the rest of the creditors. This was settled in *Alderson*

(*a*) 7 Term Rep. 440.

(*b*) Which came on upon a motion for a new trial in this court a few years before the case of Ellis *v.* Hunt, in 1789, cited in 3 Term Rep. 467.

(*c*) 3 Bos. & Pull. 320. (*d*) *Ib.* 469.

v. *Temple*

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v. *Temple* (*a*). But the letters negative such a conclusion. For the goods were directed to be restored after legal advice taken, and with the general approbation of the meeting of the creditors convened upon the bankrupt's affairs in *London*. Till the act of bankruptcy, the trader, though failing, has the legal right to dispose of his property, unless it be done with a fraudulent view of preference. The question then always is, *Quo animo* the act was done? If the restitution were made *bonâ fide*, as it appears here, by the consent of all interested whose opinions could then be taken, that makes an end of the question. The meeting of the
[182] creditors was on the 25th of *July* 1803, when the question was canvassed and counsel's opinion taken; which being favourable to the defendants, the bankrupts wrote on the 29th of *July* to the defendants to inform them that it was considered as the general opinion that the goods should be given up to them. Without this assurance the defendants might have resorted to legal process; for the bankruptcy was not till the 26th of *September*. And if the goods had been delivered up in *July* on a threat of legal process, no doubt the delivery would have been legal. *Thompson* v. *Freeman* (*b*). For even a demand for security will justify the creditor so obtaining it. *Smith* v. *Payne* (*c*). On the question of undue preference they also referred to *Cock* v. *Goodfellow* (*d*), *Small* v. *Oudley* (*e*), *Harman* v. *Fisher* (*f*), and *Hartshorn* v. *Slodden* (*g*); and concluded that at all events it was a question for the jury *quo animo* the goods were returned, which they had decided in affirmance of the act of restitution.

Erskine and *Gibbs*, in support of the rule (*h*) contended, 1st, That as between the buyers and sellers of the goods, who were the *Battiers* on the one hand, and the defendants on the other, the goods had reached the place of their desti-

(*a*) 4 Burr. 2239.
(*b*) 1 Term Rep. 155.
(*c*) 6 Term Rep. 152.
(*d*) 10 Mod. 489.
(*e*) 2 P. Wms. 427.
(*f*) Cowp. 117.
(*g*) 2 Bos. & Pull. 582.

(*h*) I was not in court when the case was argued by the plaintiff's counsel: but what follows is selected from the arguments urged when the rule *nisi* was obtained, and from the relation of Gentlemen who were present when it was finally heard and determined.

nation,

nation, and were no longer liable to be stopped *in transitu* after they had come to the hands of *Metcalfe* and Son at *Hull*. Their ulterior destination from *Hull* depended altogether upon the orders of the *Battiers*, who might have disposed of them as they thought proper; and the *Metcalfes* held the goods altogether at the disposal of the *Battiers*, and were waiting their orders when the stoppage took place. This case, therefore, comes within the same principle as those mentioned where the *transitus* was deemed to be at an end. And if it were not so, then there would be two sets of persons who would have the right of stopping the goods *in transitu* in their progress from *Hull* to *Hamburgh*, namely, the original vendors, and the *Battiers*, who would become vendors with respect to their own correspondents abroad; but it has never yet been considered that the right of stopping goods *in transitu* can be exercised by two different sets of persons at the same time. 2dly, They contended that the bankrupts had no authority to rescind the contract after having declared their insolvency, and called a meeting of their creditors: but even if they had had such a power, they had not in fact rescinded the contract; but only informed the defendants of what they supposed the creditors meant to do: and that the stoppage of the goods by the defendants was not in consequence of the letter of the bankrupts on the 29th of *July;* but had taken place long before, upon an indemnity given by the defendants to the *Metcalfes*, and founded on an assumption of their right as vendors to stop them, as still *in transitu*.

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Lord ELLENBOROUGH, C. J.—There are two questions in this case; the first, Whether a right to stop as *in transitu* existed in the defendants, the sellers of these goods, on the 7th of *July*, when they were stopped in the hands of *Metcalfe* at *Hull?* the second, Whether, supposing such right not to have existed in them at the time of such stopping, the consent to their retaining these goods, which was afterwards given by the *Battiers*, were, under all the circumstances, a valid and effectual consent? or whether it be impeachable, on the ground of its being a voluntary preference in contemplation of their then impending and probable bankruptcy? on which ground alone it has been sought to be impeached, both at the trial and upon the rule now pending.

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The strongest cases cited by the defendants' counsel in favour of their right to stop *in transitu*, are the cases of *Hunter* v. *Beale*, cited in *Ellis* v. *Hunt*, 3 *T. R.* 467., and *Stokes* v. *La Riviere*, cited in *Bohtlingk* v. *Inglis*, 3 *East*, 381. As to the first of these cases, *Hunter* v. *Beale*, in which it is said that the goods must come to the corporal touch of the vendees, in order to oust the right of stopping *in transitu*, it is a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question, Whether the party to whose touch it actually comes, be an agent so far representing the principal, as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of the principal, in a mere course of *transit* towards him? In *Hunter* v. *Beale*, Sittings after *Trin.* 1785, before Lord *Mansfield*, I cannot but consider the *transit* as having been once completely at an end in the direct course of the goods to the vendee, *i. e.* when they had arrived at the innkeeper's, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him, in their way to *Boston;* being in a new direction prescribed and communicated by himself. And if the *transit* be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination. As to the case of *Stokes* v. *La Riviere* and *Lawley*, the goods were claimed in suit by the plaintiff the seller, from the defendants, to whom the goods were delivered to be forwarded to their (that is, defendants') correspondents Messrs. *Duhems* of *Lisle:* the *Duhems* were therefore the consignees, and *Lisle* the ultimate place of destination. Upon the insolvency of the *Duhems*, *La Riviere* and *Lawley*, the defendants, withdrew the goods from the hands of *Bine*, *Overman*, and Co. of *Ostend*, to whom they had sent them in a course of conveyance towards and for the *Duhems* at *Lisle*. *La Riviere* and Co. insisted, as against the plaintiffs, that upon the delivery of the goods to them for the *Duhems* the property was vested in the *Duhems*, in whose right (but for

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for their own benefit in account with the *Duhems)* they claimed to detain the goods. This however, in respect of the *Duhems*, on whose right the defendants stood, was clearly a case of transit not finished at the time of the claim made. The case of *Hodgson* v. *Loy* was also a clear case of transit uncompleted; for the butter, purchased in *Cumberland*, was proceeding through different stages of county conveyance to *E. Ward*, the purchaser in *London;* but before it reached the place of its destination, it was stopped: and the only very material question in that case was, Whether a part payment by the purchaser took the case out of the common rule, and ousted the seller's otherwise unquestionable right to stop *in transitus?* The late cases which have been cited, of *Leeds and another* v. *Wright* (*a*), and *Scott and others, assignees*, v. *Pettit* (*b*), are authorities to the same effect. In the former the *transitus* was holden to be at an end when the goods had reached the defendant, who was [186] the packer of one *Morseron*, a general agent of *Le Grand* and Co. at *Paris*, and who had a general power of disposal, in respect to them, and might have sent the goods either to his principals at *Paris*, or to *Holland*, *Germany*, or such other market as he should think best. And the latter case, similar in many circumstances to the former, was decided on the same ground, *viz.* That the *transitus* of goods is only not at an end upon their reaching the packer, where they remain with him for the purpose of being forwarded on to some ulterior appointed place of destination. But here, as in those cases, the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary. As to the second question, I continue to think, as I thought at the trial, that the bankrupts were competent to rescind, and had in fact rescinded, the contract for sale of these goods. The circumstances of deliberation, consent of creditors, advice of counsel, and the publicity which attended the whole of the measure, exempted it from being properly considered as a fraudulent preference in contemplation of bankruptcy. That

(*a*) 3 Bos. & Pul. 320. (*b*) *Ib.* 469.

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the *Battiers* must have considered themselves in a state of insolvency and impending bankruptcy at the time cannot be doubted; but until an act of bankruptcy, the *jus disponendi* over goods remains by law with the trader, unless he exercise it by way of a voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at least under an idea of the right being probably adverse to the claim of the bankrupts and their creditors; and
[187] voluntary favour towards the defendants did not operate as any inducement with the bankrupts to recede from their rights on this occasion. The question, Whether, under all the circumstances, they acted *bonâ fide* in giving up the goods, or from a motive of voluntary and undue preference to the defendants? was left to the jury, who by their verdict have affirmed that the bankrupts acted *bonâ fide*, and have negatived any voluntary preference.

GROSE, J. was of opinion, on the first point, that the right to stop *in transitu* was not at an end when the defendants took possession of the goods. But if it were, he thought on the second point, that the question had been properly left to the jury, who had found that this was not a voluntary preference.

LAWRENCE, J. agreed with Lord *Ellenborough* on the first point, that the goods had before their stoppage by the defendants arrived at their ultimate place of destination as between these parties, and consequently that they had no right to stop them as *in transitu*. But on the second point, that the letter of the 29th of *July* was no recognition on the part of the bankrupts of the act of the defendants in stopping the goods, nor an agreement to rescind the contract. On the contrary, it imported that they did not choose to do any thing without the approbation of the creditors at large. The object of that letter was to give the defendants information that the creditors in *London* had met, and that the creditors who attended that meeting seemed disposed to give up the goods; but not taking upon themselves (the *Battiers*) the disposition of them, but referring every thing to the creditors. And there was no assent of the creditors to the stoppage by the defendants.

[188] LE BLANC, J. agreed that the transit of the goods was at an

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an end before they were stopped by the defendants. As between the buyer and seller they were arrived at the place of their destination when they got to the possession of the *Metcalfes* at *Hull;* for till the *Metcalfes* received directions from the *Battiers*, they did not know where to send the goods. The warehouse of the *Metcalfes* at *Hull* must therefore be considered as the warehouse of the *Battiers*. With respect to the case of *Hunter* v. *Beale*, he observed that the merchants there (the vendees) having given the goods a different direction after they got to the inn, and before they were stopped, he should have thought that the transit was at an end. Upon the second point, Whether the goods were *bonâ fide* delivered up to the defendants? he thought it a point of considerable difficulty on the evidence as it appeared before the Court. The letter of the 29th of *July* referred to some antecedent correspondents, and also to some legal opinion which had been taken; such prior letter might have contained a proposal or demand by the defendants to the *Battiers* to give up the goods; and if so, their answer might be evidence of their agreeing to renounce them; but the evidence was very slight. If that letter meant merely to declare the sense of the greater part of the creditors in *London*, it would be going too far to say that it amounted to an absolute assent to the defendant's taking back the goods. The evidence, however, though slight, was fit for the consideration of the jury; and they have found for the defendants.

Rule discharged.

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EVANS *against* THOMSON.

Friday, *May* 4th.

Where parties by indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time shall be made a rule of Court, and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the stat. 9 & 10 W. 3, c. 15.

THE parties, by their respective bonds of submission, dated 20th of *August* 1803, bound themselves to submit certain matters in difference to the arbitration of *A.* and *B.;*

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and if they did not make their award on or before the 21st of *September* then next, then to the umpirage of *C.* so as he made his umpirage on or before the 24th of *September* 1803. By a memorandum on the bonds, dated 21st of *September*, it was thereby agreed between the said parties, that the said arbitrators making their award should be extended from that day unto the 24th of *September* aforesaid, and for making the umpirage to the 1st of *October:* and by another indorsement on the bonds, signed by the parties on the 28th of *September*, the time for making the umpirage was further extended to the 6th of *October*, which indorsement was stamped with an agreement stamp. By an umpirage made on the 5th of *October*, *Thomson* was directed to pay 986*l.* 11*s.* 2*d.* to *Evans*, by two instalments; one on the 4th of *November* last, the other on the 6th of *January* 1804. In the bonds of submission it was provided, that the bonds and submission thereby made, should be made a rule of Court, pursuant to the statute, if either of the parties should require the same, and the Court should so please. But when the time for making the award was agreed to be enlarged by the indorsement on the bonds before mentioned, it was not added that that should be made a rule of Court. By a rule of Court made on *Saturday* next after the octave of *St. Martin* in *Michaelmas* Term last, reciting the bonds of submission, and
[190] that the submission was agreed to be made a rule of Court, and that the parties had afterwards, by the said indorsements, agreed to enlarge the time in the manner before mentioned, it was ordered that such the presents and submission made in manner aforesaid, be made a rule of Court. The umpirage having been made within the enlarged time, and the defendant not having performed what he was therein directed to do, an attachment was moved for against him; whereupon a rule was obtained, calling on the plaintiff to shew cause why the last mentioned rule of *Michaelmas* term for making the submission, &c. for such enlarged time a rule of Court, should not be amended by confining such rule to the submission made by the bond and condition therein recited, and excluding the two subsequent indorsements of the 21st and 28th of *September* for enlarging the time, &c.

This rule was obtained on the authority of *Jenkins* v. *Law* (*a*),

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Law (*a*), where it was determined, that an agreement to enlarge the time for making an award must contain a new consent that it shall be made a rule of Court, otherwise no award made within such enlarged time can be enforced by attachment.

Wood and *Wetherell* shewed cause against the rule, and denied the authority of the above-mentioned case, which they said passed without observation; and that it was plainly the intention of parties to an arbitration, who agreed by an indorsement upon the submission bonds to enlarge the time for making the award, to include all the terms of the original submission, one of which was, that it should be made a rule of Court. That without reference to the contents of the submission bonds, such indorsement was not intelligible; and if reference were necessarily made to any part of the contents, it must in reason be made to the whole of them.

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Erskine and *Marryat*, in support of the rule, insisted on the authority of the case of *Jenkins* v. *Law*, which was grounded on the act of 9 and 10 *W. 3. c.* 15; which enables litigant parties "to agree that their submission of their suit "to the award, &c. shall be made a rule of Court, and to "insert such agreement in their submission, or the condi- "tion of the bond or promise whereby they oblige them- "selves respectively to submit to the award, &c.; which "agreement being so made, and inserted in their submis- "sion or promise, or condition of their respective bonds, "shall on affidavit, &c., be entered of record in such Court, "and a rule thereupon made, &c., pursuant to such sub- "mission," &c. and then it provides that the party neglecting to obey the award, shall be subject to all the penalties of contemning a rule of Court. To give the Court jurisdiction, therefore, the agreement to make the submission to arbitration a rule of Court must, by the express words of the act, be inserted in the condition of the bond or promise. It was so inserted in the bond: but that by the lapse of time became *functus officio;* and then the agreement was made, which does not express that the agreement shall be made a rule of Court, but merely that the time shall be enlarged. That agreement is distinct from the bond, and

(*a*) 8 Term Rep. 87.

cannot

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cannot be incorporated into it; for no action would now lie on the bond (*a*), but it must be brought on the agreement; and the instruments are so far distinct, though on the same piece of paper, that they required, and actually have, different stamps. It was certainly competent to the parties to agree to enlarge the time, without agreeing to have their submission again made a rule of Court. Then having mentioned the one and not the other, there is no reason for extending their agreement by implication.

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Lord ELLENBOROUGH, C. J. said it was a case of considerable consequence, affecting the practice of all the Courts, upon the construction of a very beneficial act of parliament; and therefore, before the Court gave their final opinion, they would consult with the other Judges: though, as at present advised, it appeared to him that the *memoranda* endorsed on the submission-bond for enlarging the time, did, by necessary construction, virtually incorporate all the conditions in the bond to which they had reference. That they must be taken to do so to a certain extent was apparent; for in themselves the *memoranda* did not even specify the names of the arbitrators or umpire, nor the subject-matter of the reference; and if any part were adopted, he could not see what line could be drawn, and why the whole must not be adopted. *Cur. adv. vult.*

His Lordship now delivered the opinion of the Court.

This matter came on before the Court in the beginning of this term, upon a rule to shew cause why a rule made in last *Michaelmas* term should not be amended by confining such rule to the submission made by the bond and condition therein recited, and excluding the two subsequent memorandums or indorsements, bearing date the 21st and 28th of *September* last, &c. By the condition of the arbitration-bond the arbitrators were to make their award on or before the 21st of *September* last, and the umpire to make his umpirage on or before the 24th of the same month. On the 21st of *September* the parties agreed that the time for the arbitrators making their award should be enlarged to the 24th of *September*. And on the 28th of *September* they

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(*a*) Brown *v.* Goodman, E. 29 G. 3, B. R. cited in Littler *v.* Holland, 3 Term Rep. 592.

agreed

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agreed that the time for the umpirage should be extended to the 1st of *October*. The umpirage was made within the time to which, by this agreement, the authority of the umpire was extended, and the agreement to enlarge was made a rule of Court. It was objected on the part of the defendant; that the award of the umpire was not capable in this case of being enforced as a rule of Court, on the authority of the case of *Jenkins* v. *Law*, 8 *Term Rep.* 87.; the agreement to enlarge the time of making the award containing no express consent that such agreement should be made a rule of Court. But, upon considering that case, in which the objection appears to have been given way to without any argument on the part of the counsel who had obtained the rule for an attachment, and on which account the matter was probably not brought under the immediate view and attention of the Court; and upon conferring, with a view to an uniformity of practice on this subject, with most of the Judges of the other Courts of *Westminster Hall*, we are of opinion that the case referred to cannot be supported; and that the agreement to enlarge the time for making the award must be understood as by reference, virtually incorporating in itself all the antecedent agreements between the parties relative to that subject, as if the same had been formally set forth and repeated therein, and of course incorporating, amongst the rest, the agreement contained in the condition of the bond, that the submission to arbitration should be made a rule of Court; and that, with reference to the enlarged time, instead of the time originally specified in the condition of the bond.

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Rule discharged. And
Rule for attachment absolute.

SANDBY

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Friday, *May* 11th.

SANDBY, Clerk, *against* MILLER.

The London Court of Requests have jurisdiction, by the stat. 39 & 40 *Geo.* 3. *c.* 104, over a contract for retention of tithes by the tenant, the value of which was under 5*l.*; and therefore if the vicar sue for the same, and recover less than 5*l.* upon a count *in assumpsit* for a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of London, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the 12th section of the act.

THE plaintiff brought *assumpsit* to recover the value of tithes due to him, as vicar of *St. Giles, Camberwell*, from the defendant, who occupied certain tenements within the vicarage, and for which he had for two years before paid a composition at so much an acre: but latterly the number of acres being in dispute, the defendant refused to pay the sum demanded by the vicar, who thereupon brought this action at the Sittings at *Westminster*, before Lord *Ellenborough*, C. J., when he recovered a verdict for 7*s.* 6*d.* upon a count for a *quantum valebant* (*a*); which, together with 2*l.* 14*s.* 3*d.* paid into court, constituted the original amount of the plaintiff's demand as appeared by an account delivered by him to the defendant before the action brought, and also by a bill of particulars obtained afterwards. It appeared that the plaintiff did not reside within the jurisdiction of the Court of Requests in the City of *London*; but that the defendant, though he resided at times at his house at *Peckham Rye*, in *Surry*, yet also kept a shop and carried on trade within the city. The defendant, in the last term, upon an affidavit that he was a freeman and inhabitant within the city of *London* at the time when the action was brought, and that he was served with the writ within the city, obtained a rule *nisi* for leave to enter a suggestion on the roll under the stat. 39 & 40 *Geo.* 3. *c.* 104. (local acts) "for extending the powers of the Court of Requests in the "city of *London*;" that the original cause of action did not exceed 5*l.* and that the same was recoverable in the said Court of Requests. The 12th section of the act enacts, "That if any action or suit shall be commenced in any other "Court than the said Court of Requests for any debt not "exceeding 5*l.* and recoverable by virtue of the recited acts "(3 *Jac.* 1. *c.* 15. and 14 *Geo.* 2. *c.* 10.) and of this act "or any of them in the said Court af Requests, in every "such case the plaintiff in such action or suit shall not, by "reason of a verdict for him, or otherwise, have or be en-

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(*a*) The first count of the declaration was on a composition for tithe.

"titled

" titled to any costs whatsoever." The 12th section provides, " That this act, or any thing herein contained, shall " not extend to any debt where any title of freehold, &c. " shall come in question, or to any debt by specialty, &c. " nor to any other debt that shall arise by reason of any " cause concerning testament or matrimony, or any thing " concerning or properly belonging to the ecclesiastical " court, albeit the same respectively shall not exceed " 5*l.*" &c.

Wigley shewed cause, and relied principally on the ground that this, being a demand in respect of tithe, came within the exception of the 11th section, as " a thing concerning or " properly belonging to the ecclesiastical court," and therefore not within the jurisdiction of the Court of Requests. It is enough under these words that the subject matter of the action is one that concerns, or properly belongs to, the ecclesiastical court; it is not necessary that the suit or action should specifically, and in form, be brought for the thing. Now here the action is in substance for the single value of the tithe, the jurisdiction of which properly belongs [196] to that court. The verdict was taken upon a count upon an implied *assumpsit* for the value of the tithe, estimated indeed by the rate of the former composition, which was then in dispute; considering it as an agreement by the vicar to let the defendant have the tithe, without specifying at what value. The title to the tithe and freehold might have come in question in such an action; which would be enough to oust the jurisdiction of the Court of Requests, according to *Woolley* v. *Cloutman* (*a*), though the action there was on an implied *assumpsit* for use and occupation.

Marryat, in support of the rule, said, that it was clear from the bill of particulars, that the original demand was under 5*l.*, and that jurisdiction was given to the *London* Court of Requests over all causes not particularly excepted. That the title to the freehold could not have come in question; for unless a contract had been proved, the value of the tithe could not have been recovered in *assumpsit*. Then the action cannot be said to have been brought for any thing which concerned or properly belonged to the ecclesiastical

(*a*) Dougl. 244.

court;

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court; for the plaintiff could not have sued there on this contract. *Cur. adv. vult.*

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court. This was a motion for leave to enter a suggestion on the roll to exclude the plaintiff (who had obtained a verdict in an action in this court, establishing on his part an original demand of less than 5*l.*, and reduced by a tender to 7*s.* 6*d.*) from his costs, under stat. 39 & 40 *Geo.* 3. c. 104, on the ground of the defendant's being resident and liable to be summoned within the jurisdiction of the Court of Requests for the city of *London*; and that the original debt sued for did not exceed the sum of 5*l.* The count in *assumpsit* upon which the question arises, was upon a *quantum valebant*, for the value of tithes due to the plaintiff, as vicar of *St. Giles, Camberwell*, from certain tenements in the occupation of the defendant, and alleged to have been taken and retained by and at the request of the defendant. The plaintiff resisted the motion for leave to enter this suggestion, upon the ground of the following proviso, contained in the 11th section of the act; *viz.* "That this act should not extend to any debt that should arise by reason of any cause concerning testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court; albeit the same shall not exceed 5*l.*;" conceiving that the subject matter of this action was "a thing concerning or properly belonging to the ecclesiastical court." But we are of opinion that the subject of this action, being the recovery upon a promise of an equivalent for tithes retained, is not a thing which can properly be said in its nature to concern the ecclesiastical court itself, in respect of the general rights, functions, or subjects of jurisdiction of that court, nor a thing which can be said properly to belong to it; being neither more nor less than a civil contract collateral to the right of tithes (which the count assumes to be admitted) suable properly and peculiarly in a court of law, and which has no further connection with the ecclesiastical court than as the general object of suit, *viz.* "tithes," is in certain cases a matter properly cognizable in that court, as it also is in other cases properly cognizable in the courts of law: it cannot therefore be said so far "properly to belong to the ecclesiastical court" as to oust the jurisdiction of the *London* Court of Requests in sums not exceeding 5*l.* within the meaning

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meaning of that proviso; and particularly in a case, as here, where no right to tithes comes in question. We are therefore of opinion, that as the action in this case should have been brought in the Court of Requests, the defendant is entitled to make his rule absolute for entering this suggestion upon the roll.

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SANDBY *against* MILLER.

SEAWARD *against* WILLOCK.

Friday, May 11th.

THIS was an action against the defendant, an auctioneer, employed by the assignees of *Thomas Southcomb*, a bankrupt, in the sale of an estate of the bankrupt by auction, to recover 130*l.*, the deposit money paid by the plaintiff, who was the highest bidder at such auction, with interest and costs. The defendant at the time of the sale entered into the following undertaking in writing, at the foot of the conditions of sale: "If the title is not satisfactory, the deposit, interest, and costs to be returned by *John Willock*." The declaration contained a special count upon this undertaking, and the common counts for money paid, had, and received, and on an account stated; to which there was a plea of the general issue. The cause was tried at *Exeter* summer assizes 1803, before Lord *Alvanley*, C. J., when a verdict was found for the plaintiff with damages 200*l.*, subject to the opinion of the Court on the following case:

On the 23d of *March* 1753, *Lewis Southcomb*, clerk, being seised in fee of the remainder of the estate in question after the determination of the life-estate of *George Portbury*, in his will of this date duly executed and attested, devised as follows: "To my son *John* I leave the entire guardianship of *Thomas*, the son of my son *Thomas Southcomb*, and also of my grand-daughter *Elizabeth* his sister. To him the said *Thomas* (*a*) I do give my estate of *Holcomb Burnel* (being the estate in question) during his natural life, as soon as it shall fall (*b*); but to his trustee in his behalf shall be committed the profits of the said estate until he

Under a devise "to A. "for life, and "after him to "his eldest "or any other "son after "him for life, "and after "them to as "many of his "descendants "issue male "as shall be "heirs of his "or their "bodies, "down to "the 10th "generation "during their "natural "lives;" held, that A. took no more than a life estate; for here is no general intent to [199] create an estate tail, as contradistinguished from the particular intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in *esse*, which the law will not allow.

(*a*) *i. e.* his grandson Thomas.

(*b*) *i. e.* upon the death of *Geo. Portbury*.

shall

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shall arrive at the age of 21 years; and after him I do give it to his eldest or any other son after him, during his natural life; and after them to as many of his descendants issue male as shall be heirs of HIS or THEIR bodies, down to the tenth generation during their natural lives." The devisor died at the end of 1753, or beginning of 1754, leaving his grandson, the devisee, his heir at law. *George Portbury*, the tenant for life, died in 1763; and upon his death the devisee *Thomas Southcomb* entered into the possession of the estate, and continued in such possession until his bankruptcy, as hereinafter mentioned. On the 28th of *November* 1798, a commission of bankrupt issued against the said *Thomas Southcomb*, who was a trader, was indebted to the petitioning creditor in a sum sufficient to support the commission, and had committed an act of bankruptcy; in consequence of which he was duly declared a bankrupt; and on the 6th of *November* 1802, a bargain and sale of his real estate was duly made to *Jackson* and *Chamber*, who had been duly chosen assignees of his estate and effects. On the 9th of *November* 1802, the defendant, by the direction of the assignees, put the estate up to sale by auction; and by the conditions the purchaser was to pay down a deposit of 10*l. per cent.* and the residue on or before *Lady-Day* 1803, on having a good title: the conveyance to be at his own ex-
[200] pense. The plaintiff was the highest bidder, and paid the deposit; but on the abstract being delivered, in which it did not appear that the bankrupt was the heir at law of *Lewis Southcomb*, nor was any document stated to prove the death of *Geo. Portbury*, which it was insisted on by the assignees, must, from the length of time in which he had been shewn to be in existence, be presumed, refused to complete the purchase; alleging that a good title could not be made; and insisted upon a return of the deposit, &c. on that ground. The bankrupt who, as is before stated, was the heir at law of *Lewis Southcomb*, has no children, and is willing to join the assignees in any act that shall be thought necessary to make a good title and conveyance; but neither of these circumstances was atated in the abstract, or communicated to the plaintiff or his attorney until a fortnight before the assizes. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If the Court should

should be of opinion that he was, the verdict was to stand; if not, the verdict was to be entered for the defendant.

Courtenay, for the plaintiff, after premising that in the decision of this question the Court would look to no other facts than what were contained in the abstract of the title delivered to the plaintiff by the vendor, or such at least as were made known to the plaintiff before the action brought, stated the question arising on the words of the will to be, Whether the devisee *Thomas Southcomb*, since become bankrupt, took an estate for life or in tail? (If in tail, he admitted that the bargain and sale of the commissioners would pass a title to the assignees: but not if for life; for the bargain would only operate to pass that estate which the bankrupt lawfully might, and not that which could only be perfected by operating as a forfeiture of his estate) (*a*). It is clear, that the testator only meant that *Thomas Southcomb* should take an estate for life. But it will be argued, that as the general intent of the testator was, that all the male descendants of *T. S.* should take, down to the tenth generation, that can only be effectuated by giving an estate in tail made to the first taker: but this would be doing violence to the words as well as to the intent of the will; for the estate is given after him, not to his issue, but to his eldest and any other son; which is a word of purchase and not of limitation: and when the testator has expressly declared that such eldest or other son of *T. S.* should only take for life, it would be a forced construction to imply from thence a general intent that even the first taker should have a greater estate. The only words of limitation afterwards used, *viz.* his descendants issue male as shall be heirs of his or their bodies, from whence any intention to create an estate tail can be implied, must refer to the eldest or other son of *T. S.* And the general intent may be effectuated as far as by law it may, by giving an estate for life to the first taker, with successive remainders in tail to his eldest and other sons as purchasers. And he referred to *Archer*'s case (*b*), *Wyld*'s case (*c*), *Ginger* v. *White* (*d*), *Goodtitle* v. *Woodhull* (*e*), and *Somerville* v. *Lethbridge* (*f*); the last of which came nearest to the present case, to shew that *T. S.* took only an estate for life.

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(*a*) *Vide* 4 Leon. 124. (*b*) 1 Rep. 66. (*c*) 6 Rep. 16, b.
(*d*) Willes' Rep. 348. (*e*) *Ib.* 592. (*f*) 6 Term Rep. 213.

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Gaselee, contrà, said that this was now only a question of costs; as it was clear that the bankrupt being heir at law of the testator, a good title might be made, and that equity would compel a specific performance; and, that as by the terms of sale the conveyance was to be made at the expence of the purchaser, no action lay to recover the deposit money till tender of such conveyance to the vendor, and his refusal or inability to execute it: though the vendee might have his remedy in damages for not having the title made to him in due time. [Lord *Ellenborough* C. J.—If the title shewn be not satisfactory, it certainly was not necessary for the vendee to do a nugatory act in preparing a conveyance; and the parties could not mean the latent title of the vendor, but the apparent title which he exhibited, and upon which only the vendee was required to act.] Then the only question is, Whether the vendor had a good title? and that will depend on whether the bankrupt took an estate tail under the will: for if he were only tenant for life, the conveyance by bargain and sale was certainly not sufficient to enable the assignees to convey in pursuance of the agreement. If indeed there had been no bankruptcy, and the bargain and sale had been made by the bankrupt himself, that would have been a forfeiture of his life estate, and let in his remainder in fee before the existence of the next taker; but such a conveyance by the commissioners to the assignees, to which the bankrupt was no party, certainly could not operate as such a forfeiture of his estate. The bankrupt however took an estate tail. Most of the cases cited were prior to *Robinson* v. *Robinson* (*a*); where, under a devise to *Lancelot Hicks* for life, and no longer, he taking the name of *Robinson*, and after his decease to such son as he shall have taking the name of *Robinson*; and for default of such issue, then over in fee; *Lancelot Hicks* was holden to take an estate tail by implication, notwithstanding the estate for life, before
[203] expressly given to him, in order to effectuate the manifest general intent of the testator, that the estate should not go over till failure of the issue male of *L. H.* In *Somerville* v. *Lethbridge* (*b*), the limitations were not for lives, but for terms of 99 years, determinable on lives; there therefore

(*a*) 1 Burr. 3, and 2 Ves. 225. (*b*) 6 Term Rep. 213.

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could be no question of an estate tail. It is material to consider that this was a reversion to be disposed of; and if it were to be considered that the first taker took only an estate for life, if he died in the lifetime of *G. Portbury*, the devises over would have failed; for "after him," in the first place, must mean after the bankrupt: "I do give it to his (meaning the bankrupt's) eldest son, or any other son after him" (must mean any other son of the bankrupt after the eldest son.) "And after them," must refer to all the antecedent lives named, *viz.* the bankrupt, his eldest son, or any other son; "to as many of his (*i. e.* the bankrupt's) descendants' issue male as shall be heirs of his (the bankrupt's) or their (any of his descendants') bodies, down to the tenth generation during their natural lives." The general intent therefore was, that all the descendants, issue male, of the bankrupt should inherit in succession down to the tenth generation (which must mean from the father, and is only another expression for perpetuity); though the particular intention was to give them only estates for lives: the only way therefore in which the general intent can legally be effected, is by giving the bankrupt an estate tail; for if he only took an estate for life, and the words "issue male as shall be heirs of his or their bodies," are to be referred to the issue male of the eldest son; then if the eldest son took an estate of inheritance as a purchaser after the bankrupt's death, which descended to his issue, the other sons of the bankrupt, who could only take, if at all, next after such eldest son (after him) would be excluded.

Courtenay in reply said, that the defendant's construction rejected the words "or their bodies" (his or their bodies) which referred to the eldest and other sons; and read the words "his body." And it also rejected all the words limiting the estates for the lives of the several takers. That if the general intent were to keep the estate as long in the family as by law it might, that would better be effected by giving the bankrupt an estate for life only, with estates tail to his eldest and other sons in suceession, than by giving him an estate tail, which he could immediately defeat.

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The Court said, that there could be no doubt that the particular intent was only to give the bankrupt an estate for life; and that there could be no difficulty in the construction

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of the words, unless they were to be extended by the supposed general intent to give him a greater estate. They would therefore look into the cases with that view. And now

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court.

On the argument of this case it has been contended, on the part of the plaintiff, that the bankrupt, *Thomas Southcomb*, did not take an estate tail, but only an estate for life, under the will of his grandfather *Lewis Southcomb*, clerk, stated in the case. The clause of the will on which the question arises, is shortly and in substance as follows: "To him the "said *Thomas*, son of my son *Thomas Southcomb*, I do give "my estate of *Holcomb Burnel* (the estate in question) "during his natural life, as soon as it shall fall; and after "him I do give it to his eldest or any other son after him, "during his natural life; and after them, to as many of his "descendants issue male as shall be heirs of his or their
[205] "bodies, down to the 10th generation, during their natural "lives." In order to give *Thomas Southcomb*, the devisee, an estate tail under this devise, the counsel for the defendant has contended, that the general intent of the testator requires such construction, which must therefore be adopted, though contrary to the particular intent, which is to give only an estate for life. And that such was the general intent of the testator, he argues from this: That the testator has given the estate to the eldest or any other son of his grandson; and after them, to as many of his descendants issue male as shall be heirs of his or their bodies; thereby meaning that all the sons and their issue should take in succession; whereas if *Thomas Southcomb*, the first taker, shall take only an estate for life, all his sons, except one, and the issue of all such sons would be excluded. But I do not find any such general intent apparent on this will: on the contrary, the testator has expressly guarded against any implication of such intention, by adding a limitation for life to every subsequent estate. His meaning clearly was to give estates for life only to his grandson, and after him to his sons, and after them to their sons down to the 10th generation; for he has added the words, "during his or their natural lives" to each limitation. But this he could not do by law, inasmuch as the law will not allow

allow of a successive limitation of estates for life to persons unborn. Can we then make another will for the testator giving to his devisees different estates than those he meant to give to them, because the estates he intended cannot by the rules of law take effect? This I conceive would be assuming a power which does not belong to us, of turning a legal devise into an executory trust. This devise may be read two different ways, according as the expression " his " descendants" be referred to the descendants of him, *Thomas Southcomb*, the first taker; or to the descendants of his eldest or other son. Reading it in the way most advantageous to the defendant's arguments, it would run thus: " To *Thomas Southcomb* for life, and after him to his eldest " or any other son for life, and after them to as many of his " (*Thomas Southcomb*'s) descendants issue male as shall be " heirs of his (*Thomas Southcomb*'s) or their (his eldest or " other son's) bodies down to the 10th generation, for life." And so reading it, we find no words shewing a general intent to give an estate-tail in contradiction to the express estates for life, so precisely given to each description of persons who are to take under the will. In *Robinson* v. *Robinson*, 1 *Burr.* 38, the devise was to *Launcelot Hicks* for life, and no longer; and after his decease to such son as he shall have; and for default of such issue, then to the testator's cousin in fee. And the Court held, that *Launcelot Hicks*, by necessary implication, to effectuate the manifest general intent of the testator, must be construed to take an estate in tail male. There an estate to the heirs male of the body of *Launcelot Hicks* is implied, though an estate for life only be given to him; because the testator's cousin, *W. Robinson*, the devisee over, was not to take till failure of such heirs male. And there, observe, no limitation is added to the estates given to the son or the issue. So in *Doe* v. *Applin*, 4 *T. R.* 82, the devise was to *Wm. Dymock* for life, and after his decease, to and amongst his issue, and in default of issue, to be divided between the testator's nephew and his niece, and their heirs for ever. There the intent of the testator was manifest that his estate should not go over to his nephew and niece while there was issue of *Wm. Dymock*. In *Doe* d. *Bean* v. *Halley*, 8 *T. R.* 5, the devise was to the testator's nephew *Michael Halley* for life, and after his decease to the

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eldest son of his said nephew *Michael Halley* and the heirs of such eldest son; and in default of issue male of his said nephew to *S. Bean*. The Court, in order to effectuate the testator's general intent, determined that *Michael Halley* took an estate for life, remainder to his eldest son in tail, remainder to the father in tail, in order to let in all his issue male; the estate not being given over but in default of issue male of the said *Michael Halley*. And there the Court so construed the will as to give *Michael Halley* an estate for life only, with remainder in tail to his eldest son, remainder in tail to the father. In all these cases expressions were used denoting an intention that the lands should continue in the descendants of the first taker as long as there were any, without specifying or marking what estates such descendants should take. But in this case the devisor has not used general terms, from whence an intent to give a descendible estate to the issue of the first devisee may be collected; but has, in express terms, narrowed the estates which the issue were to take to estates for life; and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent to create, as I have said, a succession of estates for life not warranted by any law. We do not, therefore, feel ourselves warranted by any rules of construction to say, that under this devise *Thomas Southcomb*, the bankrupt, took any greater estate than for his life; and as it is stated, that previous to the time fixed by the contract for the payment of the money and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt

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was heir at law of the testator, but the title of the assignees appears to have been delivered in on the supposition of the bankrupt being tenant in tail, we think that the defendant has failed in making good the agreement on his part; and that thereupon a right of action at law has accrued to the plaintiff. How far the title since communicated may in another course of proceeding, in another place, render the present proceeding abortive; and whether the plaintiff may not be ultimately compelled to fulfil his agreement, is not for us in this action to decide. We are, therefore, of opinion that the *postea* must be delivered to the plaintiff.

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Friday, *May* 11th.

AN information in nature of a *quo warranto* was exhibited against the defendant for exercising the office of mayor of *Liverpool* in the county of *Lancaster;* to which he pleaded that King *Charles* I., by his charter of the second year of his reign, reciting that the town of *Liverpool* was an ancient town, and that the mayor, bailiffs, and burgesses of the town from time immemorial had enjoyed divers liberties, &c. by prescription, charters, and custom, granted that the burgesses and their successors should be incorporated by the name of the mayor, bailiffs, and burgesses of the town of *Liverpool*, &c.; and the king further granted to the said mayor, bailiffs, and burgesses, that there should be one of the burgesses, in form thereinafter mentioned to be chosen, who should be called Mayor; and that there should be two of the said burgesses, in form thereinafter mentioned to be chosen who should be called Bailiffs; and that the mayor, bailiffs, and burgesses for the time being, or the greater part of them (of whom the said mayor and one of the bailiffs for the time being should be two) should have power to make by-laws. And the king nominated Lord *Strange* to be the first mayor, to continue till the Feast of *St. Luke* then next following, and until some other burgess to that office should be elected and sworn according to the provisions after expressed; and the king also nominated *R. Tarleton* and *J. Southern* to be the two first bailiffs to continue in the same offices unto the said Feast, and until two other of the burgesses to that office should be in due manner chosen and preferred according to the provisions after expressed, if the said *R. T.* and *J. S.* should so long live, unless in the mean time from that office they, or either of them, should, for reasonable cause, be amoved. And the king further granted to the said mayor, bailiffs, and burgesses, that the mayor, bailiffs, and burgesses aforesaid for the time being, or the greater part of them, from time to time should have power

A charter granted to the mayor, bailiffs, and burgesses, or the greater part of them, to choose one of themselves to be mayor; but the same charter appointed the first mayor to continue for a year, and until some other burgess should be [209] elected and sworn, and the two first bailiffs to continue until two other burgesses should be elected and sworn; and it also directed the new mayor to be sworn in before the last mayor, his predecessor, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the last bailiffs and the burgesses present. These latter provisions explain the first, and shew that the mayor must be chosen out of the burgesses at large, and not out of the bailiffs; and this avoids any question as to the validity of a swearing in of an officer before himself by his name of office.

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yearly upon the Feast of *St. Luke*, to choose and nominate one of themselves who should be mayor for one whole year then next following, and that after nomination and before admission to that office, he should take a corporal oath before the last mayor, his predecessor, and the bailiffs for the time being, and the burgesses, or so many of them as should be then present, to execute his office rightly, &c.; and if during the year the mayor should die or be amoved, the aforesaid bailiffs and burgesses, or the greater part of them for the time being, one other of themselves into the office of mayor might choose, &c. for the residue of the year, having first taken a corporal oath in form aforesaid. The king further granted that the said mayor, bailiffs, and burgesses, yearly, on the Feast of *St. Luke*, should choose and name two of themselves who should be bailiffs for the year ensuing, and that after such election, and before admission to that office, they should take a corporal oath before the mayor and *last* bailiff (*a*) for the time being, and the burgesses, or so many of them as should be then present, to execute that office justly, &c. for one year next ensuing, unless in the mean time, for reasonable cause, by the mayor and burgesses of the said town, or the greater part of them, they or either of them should be amoved. And in case of the death or amotion of the bailiffs, or either of them, within the year, it should be lawful for the said mayor and burgesses for the time being, or the greater part of them, one other or two others of themselves bailiff or bailiffs to choose, &c. The plea then stated the acceptance of that charter; and set forth another charter, granted in the 7 *Will. 3*; which ratified the former charter: and, in order to do away doubts which had arisen by an unauthorised acceptance (without surrender of the former) of another charter in the 29 *Car. 2.* by which material changes in the government of the town had been introduced, the charter of King *William* gave the corpora-

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(*a*) The original charter had here the word *bailiff* in the singular number; and some argument was at first attempted to be drawn from this by the defendant's counsel, in favour of the supposition that the case might have been contemplated of an election of one of the bailiffs to be mayor: but this was waved on an intimation by the Court, that the word was probably put in the singular by mistake, as otherwise the word *last* (last bailiff) as applied to bailiff in the singular number, was insensible.

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tion a common council of 41 of the burgesses, of which 41, one should be called mayor, and two should be called bailiffs of the town. The charter then named *T. Johnson* to be the first and modern mayor, to continue in office until the Feast of *St. Luke*, and until some other of the burgesses to that office should be duly appointed and sworn, according to the provisions of the charter of 2 *Car.* 1., and nominated *R. Norris* and *L. Hewston* to be the two first and modern bailiffs, to continue until the Feast of *St. Luke*, and until some other two of the burgesses should be elected and sworn, according to the charter of *Car.* 1. The king further granted that the mayor, bailiffs, and burgesses for the time being, or any twenty-five of them assembled (of whom the mayor and one of the bailiffs for the time being to be two) should be a common council to execute all things, &c. And that if any the mayor, recorder, common clerk, or some or any of the bailiffs of the common council should die, or from his office be amoved, depart, or refuse to stand, another fit person into his office, &c. should be elected and sworn in manner as accustomed before the charter of the 29th *Car.* 2. The plea then stated the acceptance of the charter of King *William*, and averred that the election of mayor, recorder, common clerk, bailiffs, &c. was before the charter of *Car.* 2, used and accustomed to be had in the manner and by the persons prescribed by the charter of *Charles* 1. The plea then stated, that on the Feast of *St. Luke* 18th *October*, 43 *G. 3*, *J. Bold*, being then mayor, and the defendant and *J. Brooks* then being bailiffs, assembled together with the burgesses, at the *Exchange* in the town, for the purpose of electing a mayor and bailiffs; and that at the said assembly he, the defendant (so being one of the bailiffs) and also a member of the common council was then and there, by the said mayor, bailiffs, and burgesses so assembled for the purpose aforesaid, and in due manner elected to be mayor for the year ensuing, and thereupon did then and there, and before he took upon himself to exercise the said office of mayor, and before any election had been made of bailiffs for the year next ensuing, take his corporal oath before *J. Bold* the then last mayor, his predecessor, and before the said *J. Brooks* and himself, the defendant, being the bailiffs for the time being, and before divers burgesses then and there also present

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sent at the said assembly, rightly to execute the said office of mayor, &c., and thereupon the defendant was then and there duly sworn and admitted into the said office of mayor, &c.; and so the defendant justified the user of the office. To this plea there was a general demurrer and joinder.

J. Clarke, in support of the demurrer, contended that the defendant, who at the time of his election was one of the bailiffs, was ineligible to the office of mayor on three grounds: 1. On the words of the charters. 2. By reason of the duties cast on him as bailiff, which, until discharged, disabled him from being mayor. 3. Because, according to the terms of the charters, he could not properly be sworn in. 1st, The corporation consists of one mayor, two bailiffs, and an indefinite number of burgesses. The charter of *Car.* 1. grants to the mayor, bailiffs, and burgesses, that one of the burgesses shall be chosen mayor. The word *burgesses*, though in itself a general term, is there used in contradistinction to *mayor* and *bailiffs*. The first mayor was appointed until some other burgess should be elected and sworn; and the two first bailiffs were appointed until two other burgesses should be chosen. If the question arose merely on these words, there could be no doubt: but the subsequent words will be relied on touching the election of the mayor, where power is given to the mayor, bailiffs, and
[213] burgesses, or the greater part of them, to choose yearly one of themselves to be mayor; which relative, *themselves*, will be contended to include all the antecedent parts of the corporation, mayor, bailiffs, and burgesses. But this construction will not agree with what follows; and to make the word *themselves* consistent with the other parts of the charter, it must be restrained to the last immediate antecedent, namely, *burgesses;* for the mayor elect is to take the oath of office before the last mayor his predecessor, and the bailiffs for the time being. Of necessity, therefore, those before whom the newly elected officer is to be sworn, must be excluded from the persons eligible; and unless this be the construction, the old mayor would be as eligible to the same office again as the old bailiffs, which is excluded by the express terms of the charter, providing that the new mayor shall be sworn before the last mayor, his predecessor; for a man cannot be the predecessor to himself; neither can he

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at one and the same moment represent the last and the present mayor in a scene where the two are required to be present. It is a settled rule in the exposition of deeds, that all the parts of an instrument shall be so construed as to stand with each other, if possible. *Shep. Touch. c.* 5, *p.* 84, *pl.* 4, 5. And this construction is fortified by the subsequent charter of *Will.* 3. which directs the mayor to continue in office until some other of the burgesses should be "duly "appointed and sworn according to the charter of *Car.* 1." 2dly, The bailiffs have certain duties to perform on the day of election of mayor, which render them respectively incompetent to be elected to that office. It is to be observed, that the defendant was elected mayor before any other election of new bailiffs took place; so that he was still in office as bailiff at the time of his election to be mayor. The new mayor is [214] to be elected by the mayor, bailiffs, and burgesses; so that the attendance of the bailiffs, as an integral part, was necessary to form an elective assembly, and to the perfection of the election: and every definite integral part must attend by a majority at least of its number. *Reg.* v. *Lock*, *M.* 6 *Ann.* (*a*) *Rex* v. *Bellringer* (*b*), *R.* v. *Miller* (*c*), and *R.* v. *Morris* (*d*). But when one of the bailiffs was chosen mayor, there ceased to be a majority of the bailiffs existing, so that no other corporate assembly could be holden to fill up the vacancy; and therefore the Court will not put a construction on the charter which would tend to a dissolution of the corporation. 3dly, The new mayor is to be sworn in before his predecessor in office, and the bailiffs for the time being; but as the defendant would continue bailiff till he was sworn in, he must necessarily be sworn in before himself, which is incongruous and absurd. He cannot act in the double capacity of the person sworn in, and one of the persons before whom he is to be sworn in. That question incidentally arose in *Rex* v. *Malden* (*e*); but it was not necessary to determine it, as the Court thought, that at all events the swearing in under the stat. 11 *Geo.* 1. *c.* 4, must be before the presiding officer; and the defendant, who had been elected to the

(*a*) 6 Vin. Abr. 269.
(*b*) 4 Term Rep. 810.
(*c*) 6 Term Rep. 268.
(*d*) 4 East, 17.
(*e*) 4 Burr. 2130.

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office of bailiff of *Malden* at a corporate assembly at which he himself presided, having been sworn in before the three next in place and office to himself, such swearing in was holden bad under the statute. This is not an objection of form merely, but of substance, growing out of the words
[215] of the charter itself. The object of requiring the oath of office to be taken before certain persons is, that they may attest the solemnity of the pledge. An affidavit sworn by a commissioner before himself would not be received for defect of the attestation that the oath had been properly administered and taken. [*Lawrence* J.—Does the charter in this respect mean more than that the oath shall be taken before the same assembly by whom the election is made? The same objection, if pushed to the extreme, might be said to apply to the election even of a burgess; because the oath is to be taken not only before the last mayor and bailiffs for the time being, but also before the burgesses who attend, of which description the party himself would be one]. He then referred to *R.* v. *Tucker* (*a*), where the word burgesses, out of whom the mayor of *Weymouth* was to be chosen, received a limited construction, as excluding aldermen, though they were in a general sense burgesses.

Lambe for the defendant. First, as to the supposed ineligibility of a bailiff to be elected mayor, from the words of the charter, the material clause is that which directly professes to regulate the election of mayor, and that expressly directs the mayor, bailiffs, and burgesses, or the greater part of them, to choose one of themselves to be mayor; which, in the grammatical and legal construction of the whole clause taken together, must refer to the mayor, bailiffs, and burgesses. The relative must refer to the whole antecedent sentence, and not to the last member of it. The choice is to be made by the collective branches of the corporation, or "the greater part of them," out of themselves. The word
[216] *them* cannot refer merely to burgesses, because an election by the burgesses alone, without the attendance of the mayor and bailiffs, would certainly not be good: then the word *themselves* cannot be taken in a more *limited* sense than the word *them* which precedes it. In *R.* v. *Morris* (*b*), where the election of mayor was to be made by a majority of the several

(*a*) 4 Bro. Parl. Cas. 455. (*b*) 4 East, 17—26.

several integral definite parts of the corporation and other burgesses and inhabitants for the time being, Lord *Ellenborough* said, that no grammatical construction would admit that the words *for the time being*, should refer merely to *inhabitants* as the antecedent last named: they must certainly refer to all the constituent parts of the corporation before named. Then the clause is relied on, appointing the first mayor to hold over until some other burgess shall be appointed. But that expression does not occur in any other part of the charter. And after the 1st appointment of officers, all succeeding bailiffs would necessarily be burgesses, and would not cease to be such by becoming bailiffs; and none but the first named officers were to hold over till their successors were appointed. The natural course of coming into office would be first as a burgess, then as a bailiff, and then as mayor. To say that a bailiff is ineligible to be mayor, is to require a retrograde motion. The case of *R.* v. *Tucker* (*a*) is very distinguishable; for there the direction was that the mayor and aldermen should name, not one of themselves, but four of the burgesses and inhabitants, out of which number the whole body were to choose a mayor. So that *burgesses* was there put in contradistinction to the *mayor and aldermen*. 2dly, As to the incompatibility of the offices of mayor and bailiff, that objection only applies where the same person holds the two offices at the same time; but here the defendant ceased to be bailiff at the instant [217] he became mayor. And he continued bailiff until his appointment as mayor was perfected by swearing in. Therefore the swearing in was before the several integral parts of the corporation, supposing it to be necessary that both the bailiffs should attend, which is not certain; for in the clause for making by-laws, one of the most essential powers of the corporation, the attendance of one bailiff only is required. And the oath of the new bailiffs is required to be taken before the "last *bailiff*" (*b*); which shews that the charter contemplated that one of the bailiffs might be elected mayor. 3dly, As to the swearing in, considering the nature of these promissory oaths of office, which are not like judicial oaths punishable for the breach of them by an indictment for

(*a*) 4 Bro. Parl. Cas. 455. (*b*) *Vide* note (*a*) p. 210.

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perjury, being merely binding on the conscience of the officer, there is no incongruity in his taking it (as it is called) before himself. The Judges of the superior courts take the oath of office before themselves and each other; so of other officers. The word *before*, means no more than in the presence of, and does not imply that the oath is administered by those before whom it is to be taken to the officer taking it; but he takes it in their presence. However, if there were any objection on that ground, it may easily be obviated by first choosing one of the old bailiffs to be the new mayor, who continues bailiff till sworn in, and then choosing the two new bailiffs, who may immediately be sworn in before the old mayor and old bailiffs, and then the new mayor will be sworn in before the last mayor, as the charter requires, and the new bailiffs, who will then be in office.

[218] *J. Clarke*, in reply. It is admitted that the second mayor, that is, the first elected mayor, must have been a burgess; then that gave a rule for all future elections. The only clause relied on by the defendants is that the election of mayor is to be made by the mayor, bailiffs, and burgesses, out of themselves, which by the defendant's construction must include the mayor as well as the bailiffs, if it include either: but it cannot include the mayor; because the new mayor is to take the oath of office before "the last mayor, his predecessor;" then the predecessor must necessarily be excluded. Therefore the word *themselves*, as it cannot include all those before-named, can only refer to *burgesses*, which is the last antecedent. And the exclusion of the bailiffs will make all the different parts of the charter harmonize, and avoid that inverted mode of election and swearing in, which is the only expedient offered for avoiding incongruity, and such as could not have been contemplated by the framers of the charter. The oath too is to be taken before the last mayor and the bailiffs for the time being. The word *last* is there applied to the mayor, because the person to be sworn in is the new mayor: and for the same reason the new bailiffs are to be sworn in before the mayor and the last bailiffs. There is no instance before this of a bailiff having been elected mayor.

Lord ELLENBOROUGH, C. J., after the argument, said that the Court would look more particularly into the charters before

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before they delivered their opinion: though it appeared to him very difficult to sustain the defendant's election by the expedient which had been suggested. And now his Lordship delivered the judgment of the Court. (After stating the mode of election of the mayor and bailiffs as prescribed by the charter of *Car.* 1, and the manner in which the defendant was in fact elected mayor).

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It appears to us reasonable to adopt that construction of the charter which is most agreeable to the natural order and course of proceedings observed in such elections, and which will prevent all difficulties, rather than that which, unless some degree of management and contrivance is resorted to, would make it impossible to elect other officers: and particularly where the charter, as here, expressly directs that the first mayor should continue till some other burgess should be elected into that office, and the first bailiffs in like manner should continue till two other of the burgesses should be chosen to that office: thereby importing an exclusion of the same mayor and burgesses from being again immediately elected into the same offices at least. If the new mayor and bailiffs be elected from the burgesses only, exclusive of the old mayor and bailiffs (and the mode prescribed by the charter of swearing in the mayor *coram predecessore*, clearly shews that the word *burgesses* must be narrowed in construction to some extent, and so as to exclude the preceding mayor at least) it will then be immaterial which description of officers is sworn in first; for till the new mayor is sworn in, his predecessor will continue in office, at least for the whole of that day: and till the new bailiffs are sworn in, their predecessors also will be in office. So that if the mayor be sworn in last, he will be sworn before his predecessor and the bailiffs: and though such bailiffs be the new ones, it will nevertheless satisfy the terms of the charter: and though the bailiffs are sworn in first, they will be sworn before the old mayor (which will satisfy the words of the charter) and their predecessors, the last bailiffs. This construction would also prevent any question as to the validity of a swearing in of the mayor before himself, supposing the words of the charter, instead of requiring, as it has done, a swearing in before the whole assembly, one of whom of course must be the person to be sworn, had limited the swearing to be before a part of the

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the assembly, as for instance, the mayor and bailiffs. We are of opinion, therefore, that this construction is the proper one to be put upon the terms of this charter, and that of course the election stated in the defendant's plea not being conformable thereto, was not well made; and therefore that there must in this case be judgment of ouster against the defendant.

Judgment of Ouster.

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Saturday, May 12th.

The KING *against* DE MANNEVILLE.

The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an Englishwoman, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension.

AT the beginning of this Term a writ of *habeas corpus* was obtained, directed to the defendant, to bring up the body of an infant of eight months old, the defendant's daughter, upon an affidavit from the mother and her friends that the defendant, who was a Frenchman, had married the mother of the child, an Englishwoman, by whom he had this only child. That she not long after their marriage had separated herself from him, on account, as she alleged, of ill treatment, and kept the child whom she was nursing with her. That on the night of the 10th of *April* last the defendant found means, by force and stratagem, to get into the house where she was, and had forcibly taken the child then at the breast, and carried it away almost naked in an open carriage in inclement weather with a view, as the mother apprehended, of taking it out of the kingdom. However, when this part of the affidavit was afterwards more particularly referred to, it appeared that the only ground for such apprehension of the mother was, that the defendant had threatened to carry away the mother to a distance from her friends, and afterwards had threatened to take away the child from her, and she was apprehensive that he meant to carry it to some remote part of the kingdom, or to *France*.

Topping now (after the return read, and the child being ready to be produced in Court when called for) said, that he had affidavits in answer which he would wave reading, if not necessary to prevent widening the breach between the parents. But he contended, that the father was by law entitled

titled to the custody of his child? and that the only ground upon which the Court had granted the writ, namely, on the supposition that the father had threatened, or had otherwise given reason to believe that he meant to send the child out of the kingdom, was removed upon referring more accurately to the terms in which that part of the mother's affidavit was sworn. And he referred to the case of Mr. *Lytton*, which came before this Court on an application for a *habeas corpus* in 1781, by the mother to bring up the body of a child who had been placed at school, from whence it had been taken by the father. In that case there had been articles of separation, by which the father had bound himself to let the mother have access to the child. And there Lord *Mansfield* said, that the Court could not at any age take a child from the father. But that as he had constrained himself by the articles to let the mother have access to the child, if he chose to take the child home, he must provide for the access of the mother to it there.

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The KING *against* DE MANNEVILLE.

Lord ELLENBOROUGH, C. J. observed, that as the ground of removal out of the kingdom was done away, it lay on those who applied for the writ to shew that the father was not entitled to the custody of the child.

Erskine, *Garrow*, and *Gibbs*, then suggested that the father was now an alien enemy, and therefore the apprehension of the mother that he might carry the child out of the kingdom was not unreasonable, especially as he was liable himself to be sent out of the kingdom, under the Alien Act, at a moment's warning. That the child being born of [223] an English mother here, was entitled to the protection of the laws, and ought not to be exposed to the smallest risk of being removed. That it is of very tender age, and considering that its removal from the mother deprived it of its accustomed proper nutriment, was an additional reason for restoring it to her possession, particularly when the father had obtained possession of it by force and stratagem, and in a manner so dangerous to it.

Lord ELLENBOROUGH, C. J. (stopping *Topping*, who wished to have his affidavits upon the merits read). We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the Court will

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The KING *against* DE MANNEVILLE.

protect the child. But there is no pretence that the child has been injured for want of nurture or in any other respect. Then he having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him.

LAWRENCE, J.—Since Mr. *Lytton*'s case, there was another of the same sort upon an application of Sir *W. Murray*, to obtain possession of a child of five years old, which the mother kept from him. Lord *Kenyon* had no doubt that the father was entitled to have the custody of the infant, unless the Court saw reason to believe that he intended to abuse his right by sacrificing the child, which was suggested to be his motive for getting possession of it. In that case Sir *W. Murray* had been divorced from the mother,

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and there was not, as it was alleged, any reason to think the child his, though born before the divorce. But the Court did not think that a sufficient ground to deny him the custody of it.

Per Curiam, Let the child be remanded to the custody of the father (*a*).

Hil. 38 *Geo.* 3. *Friday*, *Feb.* 9th, 1798. If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother.

(*a*) REX *against* MOSELEY.

Mingay moved for a writ of *habeas corpus* to the defendant, to bring up the body of a bastard child of five years old, which a young woman had had by the defendant; and he cited *Rex* v. *Soper*, 5 Term Rep. 278, as in point; where it was holden that the putative father had no right to the custody of the child.

Lord KENYON, C. J.—Take a rule. Where the father has the custody of the child fairly, I do not know that this Court would take it away from him; though I do not mean to impeach the propriety of the case cited. But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before. Rule granted.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

In the Forty-fourth Year of the Reign of GEORGE III.

OSBORNE and AMPHLETT *against* HARPER.

Saturday, June 2d.

THE plaintiffs brought assumpsit for money paid, money lent and advanced, &c. in order to recover a sum of 1156*l.* paid by them to one *J. Spooner*, in consequence of a judgment obtained by *Spooner* in a joint action against the plaintiffs and the defendant. At the trial before *Rooke*, *J.* at the last *Warwick* assizes, the record of the former action was proved, whereby it appeared that it was an action brought by *Spooner* on certain bills of exchange drawn in his favour by *Harper* and Co., (*i. e.* the defendant and the present plaintiffs in this action,) to which action non assumpsit was pleaded; and the defendant *Harper* further pleaded his bankruptcy, against whom the plaintiff *Spooner* entered a *noli prosequi*, and proceeded against the present plaintiffs, and recovered judgment, and sued out execution against them for 1156*l.* It further appeared by the evidence of the attorney for the defendants in that action, that the bills of exchange on which the recovery was had were drawn in the year 1802, by *Harper* the defendant, in the names of *Harper* and Co., and that on that trial *Harper* himself, being called as a witness, had sworn that the

A., *B.*, & *C.*, having dissolved partnership, *C.*, after such dissolution, drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution, upon [226] which *D.* brought his action against all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a *noli prosequi* as to him and recovered judgment against *A.* and *B.*, which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their *joint* credit: held that the sum *so paid* in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.*

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partnership between him and the present plaintiffs commenced in 1795, and in *October*, 1796, was entirely dissolved, since which time there had been no partnership dealings between them; nor, as appeared by other evidence, between the present plaintiffs. That the question in the former cause was, Whether *Spooner* had any knowledge of the dissolution of the partnership before the bills were given? and the fact of such knowledge not appearing to the jury, they found a verdict for *Spooner* against the present plaintiffs. The attorney further proved that he had discharged the whole demand *at the request of the present plaintiffs*. Upon this evidence it was contended at the trial that the plaintiffs could not maintain a *joint* action against the defendant, but each ought to have brought a separate action for his moiety of the damages paid. The learned Judge, however, over-ruled the objection, and directed a verdict for the plaintiff, with liberty to the defendant to move to set aside the verdict and enter a nonsuit if the Court should be of a different opinion. A rule *nisi* was obtained for that purpose in the last term, against which

Wood, *Clarke*, and *Reader* now shewed cause, and contended that the plaintiffs might well maintain this *joint* action against
[227] their former partner, for whom they had paid this money in consequence of his own act and default after the dissolution of their former partnership; 1st, because the plaintiffs were sued in the former action *as partners*, and the money was recovered against them upon a *joint* judgment, under which each was liable to have had the whole damages levied upon him; and therefore whatever was paid by either was paid *for both*. 2dly, At all events, as the money was paid by the attorney *at the request of the present plaintiffs*, it must be considered as advanced on their *joint* credit, and therefore constituted a *joint* fund. And they cited *Thompson*'s case (*a*), *Ward and Others* v. *Brampston*(*b*), and *Graham and Others* v. *Robertson*(*c*); and answered the case of *Brand and Herbert* v. *Boulcott*(*d*), (which was suggested *è contrà*) by observing, that it was there expressly stated that the two assignees of a bankrupt, who had joined in bringing the action against a third assignee for his proportion of a solicitor's bill who had been employed as such by the three, had *each* (*i. e.* of the two plaintiffs) *paid half the bill*;

(*a*) Noy, 130.
(*b*) 3 Lev. 362.
(*c*) 2 Term Rep. 282.
(*d*) 3 Bos. & Pull. 235.

that,

that, therefore, was taken to be a payment by each of the plaintiffs of a certain sum out of his own separate funds, and not out of or in respect of any *joint* fund or credit, and consequently they could not join in the action.

Vaughan, Serjt., in support of the rule, relied upon the cases of *Graham and Others* v. *Robertson*, and *Brand and Herbert* v. *Boulcott*, before cited, as in point for the defendant. In the former, the plaintiffs, together with *A.* and *B.* being owners of one privateer and the defendant of another, a prize was taken, condemned, and shared by agreement between the owners of the two ships; and sentence of condemnation having been afterwards reversed, restitution with costs was awarded, which was paid solely by the plaintiffs; their co-partners, *A.* and *B.*, having in the mean time become bankrupts. And it was holden that the plaintiffs could not maintain the action against the defendant for a moiety of the sum so paid; for either it was a partnership transaction, when *A.* and *B.* ought to have been joined; or otherwise it stood as a separate payment by each individual, and each should have brought a separate action for what he actually advanced. So here the partnership having been put an end to, there was no joint fund belonging to the plaintiffs out of which the damages could have been paid, but what was paid by each towards them must have been taken out of his own pocket. If after payment of the damages one of the plaintiffs had died, the remedy would not have survived to the other as in the case of partners.

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The Court expressed great doubt upon the question when it was discussed at the bar, and suggested several difficulties for the attention of the plaintiffs' counsel in the course of their argument; but that which weighed most strongly with them was that it did not appear in point of fact that the damages in the former action had been paid out of any *joint* stock or fund, without which they considered that a *joint* action for repayment of the sum advanced by the plaintiffs for the use of the defendant could not be supported. For without a *joint fund* out of which the payment was to be made there could be no *joint payment*.

Lord ELLENBOROUGH, C. J. at last observed upon the evidence given by the attorney for the plaintiffs, "that he had discharged the whole demand at the request of the present plaintiffs:"

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plaintiffs:" which, he said, seemed to convey the idea that the plaintiffs had borrowed the money *jointly* of their attorney for the purpose of paying the damages, and then it might be considered as a *joint* payment by them, out of which a *joint* cause of action would accrue. But if each of the plaintiffs contributed his share of the money put into the attorney's hands for the purpose of satisfying the damages, that would not constitute a joint demand against the defendant, but each must sue separately for his particular advance.

The Court therefore finally directed that the plaintiffs' attorney should make an affidavit, stating particularly in what manner the money paid by him had been obtained; whether he had paid it out of his own pocket upon the *joint* credit of the plaintiffs, making them *jointly* liable to him for the whole; or whether each of the plaintiffs had in the first instance contributed so much of their own money, with which he had afterwards made the payment. And they observed that it was necessary to have the fact stated with more precision than it appeared upon the report, as the case would furnish a material precedent in future.

On a subsequent day in the term the affidavit required was produced, stating that the plaintiffs' attorney had advanced 500*l.* on the *joint credit* of the plaintiffs, and had borrowed the remainder upon their *joint note*, with which he had discharged the execution.

Lord ELLENBOROUGH, C. J. then said, that that created a *joint* fund for the discharge of the execution, and consequently the plaintiffs were entitled to maintain a *joint* action for the repayment of the money so advanced.

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Per Curiam, Rule discharged.

Monday, June 4th.

FITCH *against* SUTTON.

Acceptance of a less cannot be a satisfaction in law of a greater sum then due: nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability.

THIS was an action of indebitatus assumpsit for goods sold and delivered. Plea, non assumpsit. At the trial before *Heath*, J. at the last *Chelmsford* assizes it was proved that the defendant was, prior to his insolvency, indebted to the plaintiff in 50*l.* for goods sold and delivered. That in consequence of his insolvency the defendant compounded with all his creditors,

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ditors, and paid them 7*s.* in the pound, and at the time of such payment to the plaintiff promised him to pay him the residue of his debt when he should be of ability so to do; which he was proved to have been before the action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, and dated the 29th of *March* 1802, for a composition of 7*s.* in the pound for his debt of 50*l.*, which he acknowledged to be in full of all claims and demands from the beginning of the world to that day: which receipt it was insisted was either a discharge of the promise, or otherwise that the promise itself was void, as having been made in fraud of the other creditors. But the plaintiff's counsel contended that the acceptance by a creditor of a less sum in satisfaction of a greater was no discharge of the debt, unless it were by deed; and they relied on the case of *Heathcote* v. *Crookshanks* (*a*). The learned Judge, however, not having the case before him, directed the jury to find for the defendant, and saved the point for the plaintiff, if the authority should be found to support him. A rule *nisi* was accordingly obtained by *Shepherd* Serjt. for setting aside the verdict, and having a new trial; against which

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Best Serjt. now shewed cause, and admitting that accord without satisfaction was no defence to an antecedent demand, endeavoured to distinguish this from the case of *Heathcote* v. *Crookshanks*, because there the composition agreed to be taken at one time by the creditor was afterwards refused to be accepted by him; it was accord without satisfaction; and the plea there only stated a tender and refusal: whereas here the composition was actually accepted by the plaintiff in satisfaction of his whole demand. But if that were otherwise, the plaintiff ought not to have declared upon the old cause of action for goods sold and delivered, which was done away by the receipt given in consideration of the composition received and the new promise; but he should have declared specially upon such new agreement, which was conditional for the payment of the residue when the defendant should be of ability. And he cited *Knight* v. *Cox* (*b*), where the creditor having accepted a composition and signed a release to the defendant, who in consideration thereof promised to pay

(*a*) 2 Term Rep. 24.

(*b*) Before *Pemberton* C. J. in *Sussex*, 1682, Bull. N. P. 153.

him

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him the entire debt; it was holden to be a good defence on non assumpsit for the original cause of action, which was for goods sold and delivered, and that the plaintiff ought to have declared specially upon the special promise.

Lord ELLENBOROUGH, C. J.—In the last mentioned case
[232] the original contract was extinguished by the release: but it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend that acceptance of 17*l.* 10*s.* is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquishment of the residue: something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane* (*a*), that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument, in *Heathcote* v. *Crookshanks*, to have been denied to be law; and in confirmation of that Mr. Justice *Buller* afterwards referred to a case, (stated to be that of *Hardcastle* v. *Howard*, *H.* 26 *Geo.* 3.) yet I cannot find any case of that sort, and none has been now referred to: on the contrary, the decision in *Cumber* v. *Wane* is directly supported by the authority of *Pinnell*'s case (*b*), which never appears to have been questioned.

The other Judges concurred; and *Lawrence* J. referred to *Co. Lit.* 212. *b.* and to *Adams* v. *Tapling* (*c*), as confirmatory of the same doctrine: in the former of which it is laid down, that "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance *under his seal* in full satisfaction of the whole, it is sufficient, by reason *the deed* amounteth to an acquittance of the
233] whole. If the obligor or lessor pay a lesser sum either *before* the day or at *another place* than is limited by the condition, *and* the obligee or feoffee *receiveth it*, this is a good satisfaction."

Rule absolute.

(*a*) 1 Stra. 426. (*b*) 5 Rep. 117. (*c*) 4 Mod. 88.

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MILTON *against* GREEN and JENNER.

Monday, June 4th.

TRESPASS for breaking and entering the stable and close of the plaintiff within the manor of *Grench*, otherwise *Grange*, in the parish of *Gillingham*, in the county of *Kent*, and taking the plaintiff's goods there, and detaining the same until he paid 15*l.* 10*s.* The action was brought in order to try whether the manor of *Grench* lay within and was part of the jurisdiction of the *Cinque Ports*, (that is, a member of *Hastings* in *Sussex*), or, within that part of the parish of *Gillingham* which lies within the body at large in the county of *Kent*. If the former, as the plaintiff contended, then he was not liable to be ballotted for a militia-man for the county at large. At the trial of this cause before *Hotham* B. at the last assizes for the county of *Kent*, the following facts were admitted; that the residence of the plaintiff and the premises mentioned in the declaration, where the distress was taken, are situated *within the manor of* Grench *in the parish of* Gillingham; and that previous to the taking of the distress the plaintiff was convicted by Mr. *Elliot*, a deputy lieutenant and justice of the peace acting for the county of *Kent*, of having neglected and refused to be duly sworn and enrolled, or to find a fit substitute in the *West Kent* militia; *he having been ballotted from the list of the inhabitants of the parish of* Gillingham. That *the defendants were* at the date of the warrant and at the time of the seizure of the goods, *borsholders of the lower half hundred of* Chatham *and* Gillingham, duly appointed and sworn. The warrant was as follows: "*Kent*, to wit.—*To the constables of* "*the lower half hundred of* Chatham *and* Gillingham *in the* "*said county*, and *to the borsholders there.*—Whereas at a sub- "division meeting of his Majesty's deputy lieutenants and jus- "tices of the peace for the said county, holden at *R.* &c. on the "8th *July* last, *Samuel Milton of the parish of* Gillingham *in* "*the said county* was chosen by lot to serve in the *West Kent* "regiment of militia; and whereas it appears unto me, one, "&c. upon oath, &c. that the said *S. M.* hath been duly sum- "moned to appear at a subdivision meeting, &c. to be duly "sworn

Where goods were taken by constables under a warrant of distress granted by a justice of peace for the county of *Kent*, directed "to the constables of the lower half hundred of *C.* and *G. in the county of* Kent," which warrant recited that the plaintiff (whose goods were distrained) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county,

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and having refused to serve, &c. was convicted in a certain penalty, for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the cinque ports, and not within the county

of *Kent*, the constables are not within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and may be sued in trespass without the magistrate's being made a defendant.

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" sworn and inrolled, or to provide a fit substitute, &c., and " hath neglected and refused so to do, whereby he hath incur- " red the penalty of 15*l.*; These are therefore to require you " to demand of the said *S. M.* the sum of 15*l.* by him incurred " as aforesaid, and on neglect, &c. of payment to levy the same " by distress," &c. Dated 20th *August* 1803, and signed *T. Elliot*. That the defendants entered and made the distress by virtue of the warrant, and that the plaintiff redeemed his goods for 15*l.* 10*s.* There were also read various extracts from the minute books of the justices and deputy lieutenants for the subdivision of *Chatham*, discharging and excusing different persons from the militia for the county of *Kent*, who at the time of the ballots were resident within that part of the parish of *Gillingham* contended to be within the liberties of the *Cinque Ports*. And the plaintiff's counsel alleged that he [235] meant to prove that the part of the parish where the plaintiff lived was not within the lower half hundred of *Chatham* and *Gillingham*, but within that part of the parish of *Gillingham* lying within the manor of *Grench*, within the liberties of the *Cinque Ports* (whose militia is raised distinct from the adjoining counties). But it was objected on the part of the defendants, that they having acted only as subordinate ministerial officers under the magistrate's warrant, the magistrate ought to have been made a party defendant to the action under the stat. 24 *Geo. 2. c. 44. s. 6.* And upon that objection the plaintiff was nonsuited.

Best Serjt., *Pitcairn*, and *Reynolds*, shewed cause against a rule for setting aside the nonsuit. If the constables acted in obedience to the warrant of the magistrate, he ought to have been joined in the action, and the officers were entitled to an acquittal under the statute for want of such joinder, notwithstanding any defect of jurisdiction in the magistrate granting such warrant. Now here it appears that the magistrate has taken upon him to determine that the plaintiff by residing in the parish of *Gillingham* was liable to serve as a militia-man for the county of *Kent*. The fact of the plaintiff's residence within the parish was within the jurisdiction of the magistrate to determine, and if part of that parish be without and part within his jurisdiction, it was for the magistrate to decide whether the plaintiff inhabited within that part over which he had jurisdiction, and by granting the warrant of distress against the plaintiff he assumed to have jurisdiction over that part of the parish where

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where the plaintiff resided. [Lord *Ellenborough* C. J.—The constables must justify themselves under the warrant of distress, and nothing appears in that to direct the distress to be taken where it *was, within the manor of *Grench*. The warrant is directed "to the constables, &c. of the lower half hundred of *Chatham* and *Gillingham in the county of* Kent." If the part of the parish of *Gillingham* in which the distress was taken do not lie within the limits of the county of *Kent*, but in another distinct jurisdiction, the warrant will no more justify the officers in going there to execute it than if they had gone into the county of *Suffolk*. The *Cinque Ports* are, as to the authority of justices of the peace, as much a distinct jurisdiction from the county of *Kent* as if they were denominated a distinct county. The warrant does not specify that the plaintiff resided within the manor of *Grench*, assuming that to be within the jurisdiction of the magistrate, or direct the defendants to go there. There is no excess of jurisdiction assumed on the face of the warrant. It must be taken to be applicable to such parts only of the parish of *Gillingham* as lie *within the county of Kent*, and those were within the magistrate's jurisdiction. *Lawrence* J.—If the constables had returned to the warrant of distress that the plaintiff had no goods within the county of *Kent* lying within the magistrate's jurisdiction, and that fact were true, they could not have been indicted for disobedience to the warrant.] In order to make the constables executing a warrant liable, the excess of jurisdiction must be apparent: now here the boundaries of the two jurisdictions are in dispute, and the limits unknown to the officers, who cannot be expected to decide the doubt at their own peril. If there be a warrant to an officer to seize *stolen goods*, and he seize goods which turn out not to have been stolen; still, if he acted *bonâ fide*, he is within the protection of the statute. *Price* v. *Messenger* (*a*). So in *Hill* v. *Bateman* (*b*), though the justice exceeded his jurisdiction in committing one *instanter* for an offence under the game laws, who had goods whereon a distress might have been levied, yet the constable making the arrest was protected. This is not like *Blatcher* v. *Kemp* (*c*), where a constable of one hundred took upon him to execute a warrant out of his own hundred, directed to the constable of another hundred by name, "and to all other

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(*a*) 2 Bos. & Pull. 158. (*b*) 1 Stra. 710.

(*c*) *Maidstone* Sum. Ass. 1782. cor. Lord *Mansfield*, 1 H. Blac. 15. *n.*

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peace officers in the county of *Kent*;" which latter direction was construed to mean each *within his own jurisdiction*, according to *Rex* v. *Chandler* (*a*): nor like *Money* v. *Leach* (*b*), where the constable arresting a person under a general warrant, illegal on the face of it, was holden not to be within the protection of the statute. The warrant here is to distrain the goods of "*Samuel Milton* of the parish of *Gillingham* in the county of *Kent*:" and it does not appear that there was any other *Samuel Milton* living in that parish than the plaintiff whose goods were distrained. Non constat even that that part of the parish of *Gillingham* which lies within the manor of *Grench* is not within the magistrate's jurisdiction: but this question cannot be *tried* without making the magistrate himself a defendant.

Shepherd Serjt. and *Garrow* contrà were stopped by the Court.

Lord ELLENBOROUGH, C. J.—If the magistrate had directed the constable to execute his warrant within the manor of *Grange*, no doubt the constable would have been protected, though it should turn out that the manor of *Grange* is not within the jurisdiction of the magistrate. But the objection
[238] is not to the warrant, which is proper enough on the face of it, but that the defendants have chosen to execute it out of the jurisdiction of the magistrate granting it. The warrant is only directed to be executed *within the county of* Kent, and for the purpose of this argument we must assume that it was executed *out* of the county. The defendants have not therefore acted in obedience to the warrant, without which they are not within the protection of the statute. If the fact ultimately turn out to be otherwise, it will be time enough to take the objection.

GROSE, J.—The question is, Whether the plaintiff should not be permitted to shew that the defendants did the act complained of out of the jurisdiction of the magistrate who granted the warrant? The plaintiff does not accuse the magistrate of having ordered the constables to do an illegal act, but he accuses the constables of having so done without the magistrate's authority.

LAWRENCE, J.—The question is precisely that which my brother *Grose* has stated, Whether the plaintiff, after the production of the magistrate's warrant by the defendants, should not have been permitted to go on further, and to have shewn

(*a*) 1 Ld. Ray. 545. (*b*) 1 Blac. 555.

that

that the defendants had not acted in obedience to that warrant, by taking the goods out of the jurisdiction of the county magistrate by whom it was granted? The plaintiff had been balloted for the militia as a parishioner of *Gillingham*, part of which parish is confessedly within the county of *Kent*. But the plaintiff lives in the other part of the parish, contended to be within the manor of *Grench*, which manor is said to be within the jurisdiction of the *Cinque Ports*, and not within the limits of the county magistrates: whereas the warrant is directed to the defendants to be executed *within the county of* Kent. Surely then the plaintiff was at liberty to shew the extent of the manor of *Grench*, and that he resided within that manor, and out of the jurisdiction of the county magistrate.

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LE BLANC, J.—The complaint is that the plaintiff has been prevented from shewing the whole facts of the case upon which the question arises. He has not been permitted to give evidence that the place where the goods were taken lies without the jurisdiction of the county magistrate, whose warrant is confined to be executed within the county; and consequently that the constables exceeded their authority in executing the warrant in that place. The warrant has "*Kent*" in the beginning of it, and is directed "To the constables of the lower half hundred of *Chatham* and *Gillingham*, *in the said county*, and to the borsholders *there*." If then it were executed in any other part of the lower half hundred of *C.* and *G.* than that which lies *within the county of* Kent, it will be no protection to them.

Rule absolute.

The KING *against* the Inhabitants of CHIPPING-NORTON.

Wednesday, June 6th.

TWO justices removed *Sarah* the wife of *W. Townshend* and their children, by name, from the parish of *Chipping-Norton* to the hamlet of *Over-Norton*, both in the county of *Oxford:* and on appeal the Sessions stated specially that *William Townshend*, whose wife and children were removed, being legally settled in the hamlet of *Over-Norton*, went, about

Where a corporation by a verbal agree- [240] ment with the pauper leased to him the tolls of a market for

above 10*l.* a-year: held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll; but if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was.

eight

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eight years ago, to live at *Chipping-Norton*, where he rented a house at 8*l.* 10*s.* per. ann. The corporation of *Chipping-Norton* is possessed of the fairs and markets within the borough, and of the toll for all cattle *actually sold at the same*. *W. Townshend*, at a court leet, took the said toll by a verbal agreement of the corporation at 12*l.* a-year, and continued to collect it under that agreement for two years, when it was agreed that he should have it for 10 guineas: under which last agreement he continued to collect it for several years more. Whereupon the Sessions were of opinion that *W. Townshend* gained a settlement *by virtue of renting a tenement of upwards of* 10*l. a-year;* and discharged the order; subject to the opinion of this Court.

Gibbs, *Abbott*, and *Peckwell*, in support of the order of Sessions, contended that the pauper, by taking the market tolls at above 10*l.* a-year, took a tenement within the statute, by which and residence in the same parish for 40 days, he gained a settlement. An *incorporeal* tenement is a tenement within the statute: Lord *Kenyon* in *Rex* v. *Piddletrenthide* (*a*), said it had been often so decided; and so said Lord *Ellenborough*, in *R.* v. *Hollington* (*b*). And in the former case it was holden that renting a rabbit warren would gain a settlement, though the soil did not pass. A free warren, he also said, would give a settlement, and that a præcipe would lie for it. And *Buller* J. in *R.* v. *Old Alresford* (*c*), thought the same of a free fishery. So tithes are a tenement (*d*). Market tolls are freehold; and can only be devised according to the requisites of the statute of frauds. The word *tenements*, says Lord *Coke* (*e*), includes not only all corporate inheritances which are or may be holden, but also "all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercise-able within the same, though they lie not in tenure: therefore these may, without question, be intailed, as rents, estovers, commons, or other profits whatsoever granted out of land; or uses, offices, dignities, which concern lands, or certain places, &c. because all these savour of the realty." A *quod permittat* lay for tolls at common law (*f*). And so does

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(*a*) 3 Term Rep. 775.
(*b*) 3 East, 114.
(*c*) 1 Term Rep. 361.
(*d*) *R.* v. *Skingle*, 1 Stra. 100.
(*e*) Co. Lit. 19. b. 20.
(*f*) *Vide* Fitz. Na. Brev. *Quod Permittat.*

an

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an assize (*a*) for tolls of a market. So a woman may be endowed of tolls (*b*) and stallage. The origin of toll in a market was probably connected with the right of the soil, though long since dissevered. If it had been merely to testify the contracts of sale made there, it could never have been considered as a privilege to be exempt from it, such as tenants in ancient demesne claim. The renting of tolls has been so much considered as the taking of a tenement within the stat. 13 & 14 *Car.* 2., that by *s.* 56. of the general Turnpike Act, 13 *Geo.* 3. *c.* 84., it is expressly provided that no toll-gate keeper shall gain a settlement by renting the tolls.

Mackaness (and with him were *Erskine* and *Lockart*) contended that this was a mere personal contract with the pauper, giving him liberty to collect the tolls from the vendors of cattle, and not a tenement within the words of the statute, [242] or within the principle of any of the adjudged cases; but more like the cases of *R.* v. *Hammersmith* (*c*), *R.* v. *Dodderhill* (*d*), and *R.* v. *Mellor* (*e*). And he referred to *Woddeson*'s Lectures, and was pursuing this course of argument, when another objection was started, that the pauper had no title to the tolls, even supposing that such a taking could confer a settlement; for that a corporation could only demise under *seal*, and here the tolls were stated to have been taken by a *verbal* agreement.

Lord ELLENBOROUGH, C. J. thereupon said, that as no interest passed to the pauper by such parol demise, the question could not be raised. It was a mere licence to him to collect the tolls, the right to which still remained in the corporation; though it might be a ground on which to apply to a court of equity. The Court, he added, had gone far enough from the words of the statute in noticing an incorporeal tenement as one the taking of which could confer a settlement; but if, beyond that, they were to hold that an equitable interest in an incorporeal tenement under a parol demise from a corporation, which could only demise by deed, could confer a settlement, there would be no saying where to stop. His Lordship, however, added, that if this last

(*a*) Webb's case, 8 Rep. 46. *b*.
(*b*) Co. Lit. 32. *a*.
(*c*) 8 Term Rep. 450. *n*.
(*d*) Ibid. 449.
(*e*) 2 East, 189.

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difficulty could be gotten rid of by any alteration in the statement of the case, he thought that the other point, as to the taking of the tolls being a taking of a tenement within the construction which had been put upon the statute, might be disposed of in favour of the settlement, upon the authority of Lord *Coke*, in his comment upon the statute of *Westminster*, 2., and on *Webb*'s case, 8 *Rep.*, and on the opinion of Lord *Kenyon*, in the case referred to, that a taking of an incorporeal tenement will confer a settlement.

The Court therefore directed an inquiry to be made whether any interest in the tolls had passed from the corporation under their seal to the pauper, or any person under whom he might claim: and in the mean time they made an order *nisi* for quashing the order of Sessions, if no such fact existed. And after inquiry made, it being reported to the Court on a subsequent day that no other instrument had been executed except a bond given by the pauper to the corporation with sureties for the rent, the Court said that could convey nothing *from* the corporation: and the rule stood for quashing the order of Sessions.

Order of Sessions quashed.

The KING *against* STEVENS and AGNEW.

Wednesday, June 6th.

AN information was filed by the Attorney-General against the defendants, framed on the stat. *33 Geo. 3. c. 52. s.* 62. (*a*), for receiving bribes from certain natives in *India*, whilst the defendants held certain offices in the service of the *East-India* Company, which set forth that *J. Stevens*, being a *British* subject, on *the* 1st of *January* 1794, and for a long time thence next ensuing, to wit, *until* the 29th of *November* 1795, held and exercised the office of supervisor of the province of *Malabar* in the *East Indies*, under the *East-India* Company, and *during all that time* resided in the *East Indies:* and that the defendant *Agnew*, being a *British* subject, on the said 1st of *January* 1794, and for a long time thence next ensuing, to wit, *until* the 29th of *November* 1795, held and exercised the office of commercial

Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or [245] repugnancy. But except in certain cases where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation. And if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be, in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. Therefore, where, in an indictment on the stat. 33 *Geo.* 3. *c.* 52. *s.* 62., prohibiting *officers* of the *East India* Company *residing in* India, from receiving presents, the information charged that the defendants, being *British* subjects, on the 1st of *January* 1794, and from thence for a long time, to wit, *until* the 29th of *November* 1795, held certain offices under the Company, and *during all that time resided* in the *East Indies;* and that *whilst* they held the said offices *as aforesaid*, and *whilst* they resided in the *East Indies as aforesaid*, to wit, *on the* 29*th of* November 1795, they received certain presents; held that the context shewed that the word *until* was to be taken *inclusive* of the 29*th* of *November* 1795. But that if it had been incapable of receiving an inclusive construction, the words under the first videlicet, "*until the* 29*th of* November, 1795," could not have been rejected as surplusage: for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, *though laid under a videlicet*, and however inconsistent with an *allegation* subsequent.

(*a*) It is thereby enacted, "That the demanding or receiving any sum "of money or other valuable thing as a gift or present, or under colour "thereof, whether it be for the use of the party receiving the same, or "for or pretending to be for the use of the said Company, or of any other "person whatsoever, by any *British* subject *holding or exercising any* "*office* or employment under his Majesty or the said United Company *in* "*the* East Indies, shall be deemed extortion and a misdemeanor at law," &c.

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resident at *Calicut* in the *East Indies*, under the said United Company, and *during all that time* resided in the *East Indies*. And that the defendant *Stevens*, so being a *British* subject as aforesaid, *whilst he held and exercised the said office* of supervisor of the province of *Malabar* in the *East Indies* aforesaid, under the said United Company as *aforesaid*, and *whilst he resided* in the *East Indies as aforesaid;* and the defendant *Agnew*, so being a *British* subject as aforesaid, *whilst he held and exercised the said office* of commercial resident at *Calicut* in the *East Indies*, under the said United Company *as aforesaid*, and *whilst he resided* in the *East Indies as aforesaid*, did, within six years before the filing of this information, to wit, on the 29th of *November* 1795, in the *East Indies* aforesaid, receive of and from a certain person in the *East Indies* aforesaid, called the Samoory, otherwise the Zamorin Rajah, 100,000 rupees, being of the value of 12,500*l.*, as a gift and present, against the form of the statute, &c.; whereby, and by force of the statute, they the defendants committed extortion, and, by force of the said statute, forfeited to the king the said sum of 12,500*l.*, being the value of the said R. 100,000 so received by them as aforesaid.

In *Easter* term last a motion was made in arrest of judgment for want of a sufficient averment in the information that the defendants were *British* subjects *residing in* India, *and holding employments there* under the Crown or the *East-India* Company *at the time of the offence committed* in receiving the presents. And it was contended, 1st, that every information must contain an averment of the time of any material fact alleged in it. 2dly, That if time be alleged to any material fact which is inconsistent with other facts, and times alleged
[246] in the information, which makes the information repugnant to itself, it is void. 2 *Hawk. ch.* 25. *s.* 77. That here the residence and service of the defendants in *India* is laid to have continued *until* the 29th of *November* 1795, which word *until* was exclusive of that day, and the receipt of the presents by them is alleged to have been *on* the said 29th of *November*, and consequently after their residence *in India* and service under the Company there had ceased, when they were no longer within the prohibition of the act of the 33 *Geo.* 3. *c.* 52. *s.* 62. And *Rex* v. *Gamlingay* (*a*) was cited, where the word *unto*, in an indictment describing a road as leading *unto* such a place, was holden to be exclusive of that

(*a*) 3 Term Rep. 513.

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place. And the word *until* was argued to have the same meaning as to *time* which *unto* had as to *place*.

The Attorney-General, Erskine, Garrow, Adam, Wood, and *Abbott* shewed cause against the rule; and admitting that it was essential to the completion of the offence created by the act of Parliament, and to the validity of the charge in the information, that the defendants should appear to have been *British* subjects resident in *India*, and holding their employments stated at the time of the offence committed, and that a certain day should be stated for the commission of it, they contended that these facts did appear with sufficient certainty on the day when the offence is alleged to have been committed. For first, the word *until* is in itself ambiguous, and is used indifferently either inclusively or exclusively, according to the subject-matter or context, and that, not only in common parlance, (of which they gave many familiar examples,) but in legal language, and by good writers. 5 *Com. Dig. Temps*, 498. *Dies Juridici C.* 2, 3. says, that "*Easter* term anciently began *Oct. Paschæ*, &c. but afterwards the beginning was deferred *till Quinden. Paschæ*, &c. when it now begins." [247] An adjournment *until* such a day is necessarily inclusive of that day. The stat. 51 *H.* 3. *st.* 3. concerning general days in a writ of dower, directs that if the writ do come in *Octavis Michaelis*, day shall be given *in crastino animarum*, which is translated *until crastino animarum*, &c. The form of a commitment of a felon to the assizes is, "*until* the next gaol delivery (*a*)." In proceedings for murder the indictment charges the stroke on a certain day, and that from that day the deceased languished and languishing did live *until* another day, on which day he died, &c. (*b*): the words in Latin were, *languebat usque ad decimum nonum diem mensis Decembris anno* 28, *quo quidem decimo nono die*, &c. *obiit*, &c. (*c*). And the sentence of the law is to be hanged *until* he be dead. In all these instances *until* must be taken inclusively. Nothing is more frequent in writers than to add the word *inclusive* or *exclusive* after the word *until*; which shews that it is capable of either meaning; and yet if it were necessarily *exclusive*, the addition of inclusive after it

(*a*) 1 Burn's Just. tit. Commitment, pl. 2. at the end.

(*b*) *Carney's* case, O. B. *Sept.* Sess. 1803. *Wall's* case, O. B. *Jan.* 1802. *Earl Ferrer's* case, 10 St. Tr. 481.

(*c*) *Haydon's* case, 4 Rep. 41.

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would be manifestly repugnant and absurd. If then it may be used inclusively without any addition to it, and must necessarily be taken to be so used if the word *inclusive* be added to it, the same meaning may as clearly be manifested from the context, if the subject-matter to which it is applied necessarily require it to be so understood in order to make the whole intelligible and consistent. Now here the context is equivalent to the addition of the word *inclusive;* for the offence is al-
[248] leged to have been committed *whilst the defendants held and exercised the said offices*, under the Company *as aforesaid*, and *whilst they resided in the* East Indies *as aforesaid*, to wit, *on the 29th of* November, 1795, it having been before alleged that they resided in the *E. I.*, and held their offices *until* the 29th of the same *Nov.* That shews that the word *until* is used there inclusively of the 29th of *Nov.*, 1795, if the very nature of the charge did not, as it necessarily must, require that interpretation to make it available. Supposing therefore that *until* might in its original signification have been as much exclusive as applied to time, as *unto* has been determined to be as to place, yet usage which gives the *jus et norma loquendi* has now warranted the use of it either way. As in *Pugh* v. *The Duke of Leeds* (*a*), the word *from*, though in strictness exclusive, was yet holden to be either exclusive or inclusive according to the context and subject-matter; and that the Court would give it that construction in an instrument as would best effectuate the apparent intention of the parties. And here it cannot be doubted but that *until* was used inclusively by the drawer of this information. In questions of settlement nothing is more common than hirings *from* Michaelmas in one year, *to* or *until* Michaelmas in the next; and these have been always construed to include one of the *Michaelmas* days, so as to complete the hiring for a year (*b*). The word *to* (*c*) is used sometimes inclusively, as in the form prefixed to the statutes at the beginning of a sessions of parliament, after prorogation; the style is "at a parliament began and holden at *West-*
[249] *minster* the 12th of *July*, &c. and from thence continued by several prorogations *to* the 20th of *November*, &c." This de-

(*a*) Cowp. 714.

(*b*) *R.* v. *Syderstone cum Bermer*, *E.* 17 *Geo.* 3. Cald. 19.: and 3 Burn's Just. tit. Poor, Sett. by Service; and *R.* v. *Navestock*, Burr. S. C. 719.

(*c*) *Vide* note, post, p. 256.

scribes

scribes a sessions opened *on* the 20th of *November*. In *R.* v. *Horne*(*a*), Lord C. J. *De Grey*, referring to Lord *Coke's* definition of certainty, says, that the last sort, namely, "a certainty to a certain intent in every particular," is rejected in all cases, as partaking of too much subtilty. None of the instances of impossible, uncertain, or repugnant allegations of time in indictments, which are referred to in the margin of *Hawkins*, apply to this case. That of *Moor*, 555. was an allegation of a murder committed on the 31st of *June*, which was an impossible day. In *Rast. Entr.* 263. the indictment laid the felony on a day not then come. Another reference is to the year-book, 2 *H.* 7. 7. *pl.* 22. where an indictment for felony charged that two several persons on two several days stole the goods: all these were no doubt defectively charged. The only other reference to this branch is to 2 *Hawk. c.* 23. *s.* 88., where a mortal stroke being alleged to be given on the 10th, and the death on the 20th of *December*, an allegation in the conclusion, that the defendant murdered the deceased on the 10th, would of course be clearly repugnant to the allegation of the death on the 20th. But *Hawkins*, in *s.* 89. states it to have been holden, "that an allegation of the day *primâ facie* somewhat uncertain *may be holden by the apparent sense of the whole*," of which he proceeds to give an instance. But supposing the word *until* to be necessarily *exclusive*, yet the words "*until* the 29th of *November* 1795" being laid under a *viz.* may be rejected as surplusage, the allegation being inconsistent with what follows, namely, that the defendants did on the 29th of *November*, 1795, and whilst they [250] resided in *India* and held their employments, receive the presents. Then, rejecting those words, the information will read thus; "that *J. S.* being a *British* subject, on the 1st of *January*, 1794, and for a long time thence next ensuing, held and exercised the office, &c.; and that whilst he held and exercised the office, &c.; and whilst he resided in the *East Indies*, &c. as aforesaid, to wit, on the 29th of *November*, 1795, he received the presents," &c. In *Johnson* v. *Meers* (*b*), it was resolved that where matter comes after a *scilicet* which is repugnant to what went before, it shall be rejected: and so it was done in *Jones* v. *Williams* (*c*). [Lord *Ellenborough* C. J.—Here the repugnancy is not to *antecedent* but to *subsequent* matter.]

(*a*) Cowp. 682. (*b*) 12 Mod. 579. (*c*) Hardr. 3.

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There can be no difference in principle whether the repugnant matter be before or after the *scilicet*, for the whole indictment must be construed together.

Dallas, *Gibbs*, and *Torkington*, in support of the rule, contended, 1st, that *until* according to its natural and legal import was a word of *exclusion*. It is the same in respect of *time* as *unto* is in respect of *place*; and both mean *to*. And they mentioned various instances in common parlance where those words must be taken in an exclusive sense. The form of the indictment in murder proves nothing to the contrary: for the deceased may languish to the last moment of one day, and die on the next, which would verify the allegation there used. *Rex* v. *Gamlingay* (*a*) is in point, that the synonymous word *unto* is *exclusive* of place. And in *Nichols* v. *Ramsden* (*b*) it was holden, even in the case of a civil action, that *until* was exclusive as to time; for there a release of all trespasses *usque ad* the 24th of *April* was deemed not to include that day. And it was admitted on all hands that in pleading the word *usque* was generally *exclusive*; and the majority of the Court said, that in a release of all demands *till* the 26th of *April*, a bond dated that day is not released: and so it was resolved in *Newman* v. *Beaumond* (*c*). Then a single instance of a wrong translation of the word *in* (*in* crastino animarum) rendered *until* instead of *upon*, in the stat. 51 *H.* 3. *st.* 3. will not vary the legal understanding of the word. 2ndly, Cases on contracts, such as settlement cases, do not apply; for they are to be construed according to the apparent intention of the parties, to be collected from the subject-matter of the contract; and in *R.* v. *Navestock* (*d*) Lord *Mansfield*, in order to construe the word *till* as inclusive of *Michaelmas* day, resorted to the custom of the country. So *Pugh* v. *The Duke of Leeds* turned on the construction of a contract, and the intention of the parties. But in an indictment nothing can be taken by intendment or implication, but every material fact must be positively alleged with a certain time and place. 3dly, Supposing the word *until* to be so far equivocal as to be capable in a criminal charge of receiving an inclusive interpretation according to the subject-matter; yet if nothing appear to give it such a precise meaning, it must be construed exclusively according to

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(*a*) 3 Term Rep. 513.
(*b*) 2 Mod. 280.
(*c*) Owen, 50.
(*d*) Burr. S. C. 719.

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its natural and legal import: and here nothing of that sort appears; for the subject-matter is, that the defendants were in office in *India* from the 1st of *January* 1794 *until* the 29th of *November* 1795; and nothing can be collected from thence, even if it were a contract of hiring and service from the one period to the other, to shew that *until* was inclusive of the last-mentioned day. No presumption can be made either way, as in cases of settlement, where if the hiring be general or equivocal, the legal presumption is that it was for a year. Then the subsequent allegation, that the offence was committed while the defendants were in office and resident in *India*, is an independent allegation, not connected by any word of reference to the preceding time alleged, as by the word *so* resident, or during *the* SAID *time* while, &c.; for the words *as aforesaid* refer only to the fact of holding the offices under the *East India* Company. It is therefore no explanation of what goes before, but a contradictory allegation of time; which cannot avail unless the former be rejected. But, 4thly, the words, "*until* the 29th of *November* 1795," being in themselves sensible and apposite in the place where they are used, cannot be rejected as surplusage merely because they are under a *videlicet*. In *Stukeley* v. *Butler* (*a*) Lord C. J. *Hobart* speaking of the use of a *videlicet* says, that it "is *clausula ancillaris*, a kind of handmaid to another clause, and to deliver her mind and not her own; and therefore it is a kind of *interpreter*. Her natural and proper use is to particularise that that is *before* general, &c., or to explain that that is doubtful or obscure. First, it must not be contrary to the premises, &c. Next, it must neither increase nor diminish; for it is not in the nature of it to give of itself. But on the other side I grant, that a *viz.* may work a restriction where the *former* words were not express and special, but so indifferent that they may receive such a restriction without apparent injury," &c. So in *Skinner* v. *Andrews* (*b*), it was agreed in argument that a *videlicet* which is repugnant to the *preceding* matter is merely void; but where it is not repugnant to the preceding matter, but well agrees with it, there it is a direct affirmation, and shall be taken positively, as in the case last mentioned: and of this opinion was the Court. If then it be not repugnant to *preceding* matter, which it cannot be pretended here to be, it cannot be

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(*a*) Hob. 172. (*b*) 1 Saund. 169, 170.

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rejected as surplusage. And *Hawkins* so considers it in the place before cited (*a*); for there an instance is given of an appeal considered to be insufficient, because of repugnancy of the time when a defendant is charged to have abetted to the murder, *viz.* at the day of the death, and not of the stroke, which was laid at an antecedent day; and yet the date which gave rise to such repugnancy was laid under a *viz.* And so the rule is laid down in *Hayman* v. *Rogers* (*b*), that where that which comes under a *scilicet* is consistent with what went *before*, it is always looked on as an *averment;* but if it be inconsistent, it is rejected. Then, 5thly, if the word *until* be in itself a word of exclusion, and be not explained by any word of reference from other parts of the information to have been used inclusively of the 29th of *November* 1795, and if that date being sensible cannot, though laid under a *viz.*, be rejected on account of its repugnancy to any *subsequent* matter; then it will appear that the defendants only continued resident in *India* and in office up to a period exclusive of the 29th of *November* 1795, and the subsequent allegation that the offence was committed *while* they were in office and resident in *India*, *viz.* on the 29th of *November* 1795, is repugnant to what went before, and cannot be taken in contradiction to the former averment, that they only continued resident there in office till that day; and consequently the information is bad for repugnancy and uncertainty.

[254] After the *Attorney-General* was heard shortly in reply, the Court said they would look into the cases cited. And on this day.

Lord ELLENBOROUGH, C. J. delivered judgment.

The defect which has been pointed out on this record is supposed to consist in a repugnancy, in alleging the offence which the defendants are charged to have committed on a particular day, "*whilst* they resided in the *East Indies*, and held their respective offices under the *East India* Company," (circumstances essential to the legal existence of such offence); which particular day does not fall within the period of time during which they had been before alleged to have resided and holden their offices, but without and beyond that period. It has been contended, on the part of the Crown, that this repugnancy, if it exist at all, may be cured by rejecting as surplusage the words under

(*a*) 2 Hawk. ch. 23. s. 89. (*b*) 1 Stra. 232.

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the *scilicet*, which contain that specification of time out of which the alleged incongruity afterwards arises, namely, the words, "*until the 29th day of* November *in the year of our Lord* 1795." This defect, if it be one, cannot, as appears to me, be satisfactorily obviated in the manner suggested; for I do not find any authority in the law which warrants us in rejecting any material allegation in an indictment or information which is sensible and consistent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected, as it is clear that the allegation of the *29th of* November 1795, stated as the day of committing the offence, could not in this case be rejected without leaving the information wholly destitute of the necessary allegation of a particular day on which the offence was committed. If the *subsequent* repugnant matter could be rejected at all, (which in this case it cannot for the reason before given,) it might be so in favour of the *precedent* matter, according to what is said by Lord *Holt* in *Wyatt* v. *Aland*, *Salk.* 325., "that where matter is nonsense by being contradictory and repugnant to somewhat *precedent*, there the *precedent* matter, which is sense, shall not be defeated by the repugnancy which *follows*; but that which is contradictory shall be rejected." But here the matter required to be rejected is *precedent* matter, and is also in the place where it occurs sensible and liable to no objection whatever. But it is said that there is no necessary repugnancy between the several allegations made on this record upon the subject of time, and that by construing the word *until*, which occurs under the *scilicet*, (and upon which this question turns,) as a word *inclusive* of the day to which it is adjoined and applied, and not *exclusive* of it, that the ground of the objection will be removed and the difficulty no longer exist. On the other side, however, it is contended, on the authority of *Nichols* v. *Ramsden*, 2 *Mod.* 280., and *Owen*, 50., that in legal proceedings the word *until* must have an *exclusive* sense; and it has been argued, from the analogy it bears to the word *unto* (which word generally bears the same relation to *place*, which *until* does to *time*,) that the case of *The King* v. *Gamblingay*, 3 *Term Rep.* 313., is to be considered as an authority to the same effect. These words, however, have

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have obtained, in ordinary use, an equivocal sense at least, of which many instances were given at the bar; and I will mention two others. In Sir *Matthew Hale's History* of the Common Law*, p. 165., he says, "thus much shall serve for the several periods or growth of the common law *until* the time of "*Edward* the 1st *inclusively*." An instance which proves that *until* ex vi termini does not imply *exclusion:* for if it did, the words above stated "*until* and *inclusively*" would involve a contradiction in terms; but that it may, from its context, receive an *inclusive* sense. And in *Ayliffe's Parergon*, p. 152. it is said, "The whole course or mode of judicial proceedings is divided into three parts: the first lasts from the "date of the citation TO the joining of the issue, or contestation of the cause *exclusively;* the second continues TO a "conclusion in the cause *inclusively;* and the third endures "from a conclusion in the cause to the time of pronouncing "a definitive sentence *inclusively*:" which *last instance* shews that the word *to* may be used either in an inclusive or exclusive sense (*a*); and *both of them* prove that where exactness is wanted, and ambiguity is to be avoided, some words are necessary to mark and define the precise meaning of the words *to* and *until*, whether applied to time or other subject, and that without them the reader may be often uncertain in

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which sense they are to be understood. If the word *until* occurred in a contract, and the context or subject-matter evidently shewed that it was meant in an *inclusive* sense, there can be no doubt but that the Court, in furtherance of such intention, would so construe it. This the cases of *The King* v. *Navestock*, *Burr. S. C.* 719., *Rex* v. *Siderstone cum Bermer*, *Cald.* 19., and *King* v. *Skiplam*, 4 *T. R.* 490., fully shew. And in

(*a*) There is a recent instance of the use of the words *to* and *from*, one or other of which must have been meant inclusively by the Legislature in the stat. 40 *Geo.* 3. *c.* 50, which enacts "that persons entering any "forest, &c. in the night, *i. e.* between the hours of eight at night and "six in the morning, *from* the 1st of October *to* the 1st of *February*, "or between the hoursof ten at night and four in the morning *from* the "1st of February to the 1st of *October* in every year, having any gun, "&c. to kill game," &c. shall be deemed rogues and vagabonds within the stat. 17 *Geo.* 2. *c.* 5. Now unless either the word *to* or the word *from* be understood inclusively, the offences provided against might be committed with impunity *on* the 1st of *October* and the 1st of *February*, which could not have been the intention of the Legislature.

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the case of *Wyatt* v. *Aland*, *Salk.* 325., which was a penal action for usury by a common informer, and governed of course by the same rules of construction which apply to indictments. Lord *Holt* said, "*that where a matter is capable of different meanings*, that shall be taken which will *support the declaration or agreement*, and not the other which would defeat it:" in which *Powell*, J. who differed on another point of the case, appears to have agreed: and the Court gave judgment in that case upon a construction founded on the principle so laid down by Lord *Holt*. The matter must be *capable* of different meanings, for the Court cannot, in order to support the proceeding in which the particular term occurs, arbitrarily give it a meaning against which the use, habits, and understanding of mankind would plainly revolt. But if it *be clearly capable* of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party framing the criminal charge must be understood to have used it, if he intended that his charge should be consistent with itself. And this at least we may suppose him to have intended. But in this case the meaning does not wholly rest upon what must have been the intention of the person who filed this information, but upon the context: for the sense in which the framer of this information actually uses the word UNTIL in the first clause of it is explained by the next clause, wherein he says that "*whilst the defendant held the said office*" as "AFORESAID;" that is, "as he, the framer of the information, *had before stated*," namely, (as he explains himself,) *on the 29th of* November 1795. Or it may be put thus; "That *on the 29th of* November 1795, *whilst* he so held the said office *as before stated*," which of course expresses that the framer of the information understood himself to have already stated that the defendant did hold the office on that day, and which could only have been so stated by him in respect of his having used the word *until* in an *inclusive sense*. In effect, by means of the word *aforesaid*, the word UNTIL, used in the foregoing sentence, is drawn down and incorporated in the subsequent one, where the whole of the words taken together impose by context on that word an *inclusive* sense. Suppose, for the purpose of illustration, that instead of the words, "*as aforesaid*," we should substitute that part of the foregoing sentence

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tence to which those words relate; the sentence will then stand thus; "And the said Attorney-General further saith, that "the "said *James Stevens* being a *British* subject, whilst he held "and exercised the office of supervisor of the province of "*Malabar*, on the 1st day of *January* 1794, and for the space "of time next ensuing that day *until the 29th day of* No- "vember, *on the 29th day of* November did receive," &c. Or supposing it to be read thus: "That the said *James Stevens*, "being a *British* subject, *on the 29th day of* November, 1795, "*whilst* he held and exercised the office of supervisor of the "province of *Malabar* for the time next ensuing the first day "of *January* 1794, *until the 29th day of* November 1795, did "receive," &c. Now in either of these ways of reading it, the sense in which the word *until* is used will be found to be
[259] clearly *inclusive*; for unless it be so, the defendant could not, as before alleged, receive the present during the antecedently alleged time of holding his office. And that this is no forced or strained construction will appear from this, *viz.* that if the receipt had been alleged to have taken place on some specified day between the 1st of *January* and the 29th of *November*, the allegation "*whilst* he held the office of supervisor," &c. would have been superfluous; inasmuch as it would have necessarily resulted from a mere comparison of dates that the receipt was *whilst he held his office*. Just as in an appeal of murder, it is sufficient, where the stroke is laid on one day, and the death on another, to allege the death to have happened on some one day *which is within a year and a day of the stroke*, without expressly averring that the party died within that particular period of time from the stroke. And as the words "*whilst he held*," &c. are now used where the day of the receipt may be with reference thereto ambiguous, they can only be used with propriety as determining the 29th of *November* to be *inclusive*; because the words, "*whilst* he held and exercised the said office," unconnected with any particular day, would of themselves be insufficient; as the receipt could not be alleged generally to have taken place at a time between two days. As applied however to the day on which the receipt is here stated to have taken place, they are not superfluous, but operate materially in marking that such day is to be considered as *inclusive*, and for which purpose alone they can be useful or effective. Every indictment

indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsisteney or repugnancy: and except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments or other pleadings a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by any thing to explain or define them. If the sense be clear, nice exceptions ought not to be regarded: in respect of which Lord *Hale* (*a*) says, that "more offenders escape by the over-easy "ear given to exceptions in indictments than by their own "innocence, and many heinous and crying offences escape "by these unseemly niceties, to the reproach of the law, to "the shame of the government, and to the encouragement of "villainy and the dishonour of God." Upon the whole, it appears to us that the word "*until*" is capable in this case of receiving an *inclusive* meaning: and that not only the presumed intention of consistency on the part of the framer of the information requires that the word should be thus understood, but that the context immediately connected with the words "*whilst*" and "*as aforesaid*" warrant us in adopting this meaning of it. And which meaning so adopted by us removes the whole ground of the repugnancy supposed to exist in this information.

Rule discharged.

(*a*) 2 Hale's P. C. 193.

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POSTAN *against* STANWAY, Executrix.

Where in assumpsit the defendant pleaded the general issue and the statute of limitations to the whole sum demanded, and as to part of it that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial which the plaintiff was entitled to on the issues found for him; *aliter* where all the *issues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry.

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LORD ELLENBOROUGH, C. J. delivered the opinion of the Court in this case, after time taken to consider of it.

This was a rule obtained by the defendant, calling on the plaintiff to shew cause why the Master should not be directed to review his taxation, and to tax for the defendant her costs of the issue found for her. It was an action of assumpsit, to which the defendant pleaded, 1st, the general issue to the whole; 2d, the statute of limitation to the whole; 3d, as to so much of the promises and undertakings in the declaration mentioned as relate to 15*l.* 15*s.* part of the several sums therein mentioned, that such promises as to the said 15*l.* 15*s.*, part, &c. were made by her testator and one *Hassels* jointly, and which said *Hassels* survived the testator.

The replication joined issue on the two first pleas; and to the last plea replied that the promises as to the said 15*l.* 15*s.* were made by the testator solely, and not by him and *Hassels* jointly, and issue thereon. On the trial a verdict was found for the plaintiff on the two first issues, and for the defendant on the last issue; so that on the record the plaintiff has a judgment to recover the damages found for him by the jury with costs. The question made in this case does not turn on the stat. 4 *Ann. c.* 16. *s.* 4 & 5. which allows double pleas, but which does not give to a defendant any right to costs other than he had before: it must therefore be considered in the same manner as if there had not been any double plea; but as if to a declaration in assumpsit the defendant had pleaded specially as to part of the plaintiff's demand, and the general issue as to the residue; and the issue as to part had been found for the defendant, and the general issue as to the residue had been found for the plaintiff. As in the common case where the defendant pleads non-assumpsit as to all but a particular sum, 5*l.* for instance, and as to that sum a tender, and issue on the tender: and on the trial the tender is found for the defendant, but that the sum tendered was not sufficient; by which the plaintiff has a verdict on the general issue, and judgment

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for his damages and costs. In such case, which is a common one, the Master informs us that there is not an instance of the costs of the issue on the plea of tender ever having been taxed for the defendant. The stat. of *Gloucester*, 6 *Ed.* 1. c. 1. gives the plaintiff costs in all cases where the party is to recover damages. The stat. 23 *H.* 8. *c.* 15. gives the defendant costs in certain actions where the plaintiff after appearance of the defendant is nonsuited, or *verdict pass by lawful trial* against the plaintiff. And the stat. 4 *Jac.* 1. *c.* 3. gives the defendant judgment to recover his costs in any action whatever wherein the plaintiff or demandant might have costs (in case judgment should be given for him), in case of the plaintiff being nonsuited, or *verdict* passing by any lawful trial against him. Many cases have occurred in which the question has been made both in this court and the Common Pleas, whether a defendant were entitled to any costs where, there being several counts in a declaration, the plaintiff has obtained a verdict upon one only: and it has been uniformly holden, that in such case costs shall not be taxed for the defendant on such counts as may have been found for him; not only in cases where the substantial cause of action is the same in all the counts, only varied by the manner of stating it; such are *Bridges* v. *Raymond*, 2 *Black.* 800. *Norris* v. *Waldron*, 2 *Black.* 1199: [These were in *C.B.* In *B.R.* the practice is the same, with this difference only, that in *C.B.* they tax costs for the plaintiff on the whole declaration, as well on the counts on which he succeeds as on the counts found for defendant; but here the costs are taxed for the plaintiff on such counts only on which he obtains a verdict, and no costs are taxed on the other counts found for defendant:] But also in another class of cases which comes nearer to the present case; *viz.* where to different counts of a declaration there have been different pleas, and issues on those pleas; and one or more found for the plaintiff, and the others for the defendant; in such case it has also been determined that the defendant shall not have costs taxed on the issues found for him. In *Lloyd* v. *Day* in *C. B.*, *Barnes*, *qto.* 149. to two counts for different trespasses in different places, the defendant pleaded several justifications; and on trial all the issues were found for the defendant, except an issue on not guilty to a new assignment made by the plaintiff, which was found for the plaintiff; and on argument the Court held that the plaintiff was entitled to 1*d.* damages

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and 1*d.* costs, the jury having found a verdict for him with 1*d.* damages; and that the defendant was not entitled to any costs. Another case is mentioned in *Buller's Ni. Pri.* 335. of *Mich.* 4 *Geo.* 3. in *C. B.* In trespass the defendant pleaded three different justifications to three different counts, and on issue joined had a verdict for him on two, and against him on the third: on motion, this was holden not to be a case within the stat. 4 & 5 *Ann. c.* 16. and that the plaintiff was entitled to costs on the whole declaration. In *Sir J. Astley* [264] v. *Young*, 2 *Burr.* 1232. the declaration consisted of two counts; the defendant demurred to one, and obtained judgment thereon; and pleaded to the other: and on trial of the issue the verdict was for the plaintiff. This was a case of single pleas at common law. The Court were all, except Mr. Just. *Foster*, who was absent, unanimous that in the present case the plaintiff was entitled to costs upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff, having prevailed upon one of his counts, had a right to have his costs upon that count, without any deduction on account of the defendant's having gotten judgment upon his demurrer to the other count. *Butcher* v. *Green*, (1st edit. *Dougl.* 652. *B. R. E.* 21 *Geo.* 3.) was an action on the case, in which the declaration contained one count in trover, and another for words: plea not guilty to the first count, and a justification to the second count: verdict for the plaintiff on the count in trover, and for the defendant on the other count. The Court held that the defendant should not have costs taxed on the issue found for him. *Buller* J. said, the practice of the Court is uniform not to allow the defendant costs in cases of this sort. From these authorities the practice appears to have been settled in both courts, that wherever a plaintiff succeeds on a trial in any part of his demand divided into different counts in his declaration; whether the defendant have pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded; yet he has never been allowed costs on that part of the plaintiff's demand which has been found against the plaintiff. And the same rule has prevailed where a defendant has succeeded on a demurrer as to part of the plaintiff's demand. And it seems difficult to make a distinction in favour of the defendant, between a case where the plaintiff himself severs his demand

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by dividing it into two counts in his declaration, and where the defendant severs it by his plea, as he has done in the present case. The cases relied on by the defendant are three late cases; *Day* v. *Hanks*, 3 *T. R.* 654. 30 *Geo.* 3. *Burrows* v. *Rolls*, *C. B.* 32 *Geo.* 3. and *Griffiths* v. *Davis*, 8 *T. R.* 466. which are distinguishable from the present case in this respect, that in them *the only issue joined was found for the defendant*, and there was *no issue* or trial *on which the plaintiff succeeded.* For in those cases the defendant had pleaded to part only of the plaintiff's demand, and let judgment go by default as to the residue; and the only issue joined, and on which the parties went to trial, was found for the defendant; the plaintiff having succeeded only on the inquiry of damages, and the defendant on the trial of the issue. On this distinction the courts seem to have founded themselves in relieving the defendant from what appeared to them a hardship, which by the practice of both courts he was subject to in cases falling within the former decisions. But as the present case falls within the former authorities which have been long established, there having been *separate issues joined and tried on different parts of the plaintiff's demand*, on one of which he has obtained a verdict, and does not fall within the last class of cases I have mentioned, the defendant not having admitted any part of the plaintiff's demand by letting judgment go by default, but by denying the whole, having compelled him to join issue, and go to trial on that issue as to part; we are of opinion that the settled practice hitherto observed must prevail in this case, and that the defendant is not entitled to have any costs taxed for her. The consequence is that

The Rule must be discharged.

Espinasse shewed cause against the rule; and
Wigley supported it.

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A. declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award provided it were made during their lives. And *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum.

THE plaintiff declared in covenant, that by indenture under seal dated 7th of *December*, 1793, between the plaintiff of the first part, the defendant *Frances*, by her then name of *Frances Brown* spinster, administratrix of *John Brown*, of the second part, and *W. R.* of the third part, the plaintiff and the said *Frances* agreed to leave to *W. R.* to collect certain debts of the late partnership between the plaintiff and the defendants' intestate, and to settle all differences, by leaving to *W. R.* the adjustment and final settlement of such accounts: they therefore conveyed all the debts and effects of the partnership to *W. R.* the arbitrator. And the plaintiff and the said *Frances* covenanted with each other that they would well and truly obey, *abide* and perform the award of *W. R.* in the premises, provided the award should be made during the natural *lives* of the plaintiff and the said *Frances*. The plaintiff then stated, that though he had performed his part of the indenture, yet *protesting* that the defendant *Frances before her intermarriage did not observe* and perform, &c., and that the defendants since their intermarriage have not observed, performed or fulfilled any thing in the said indenture contained on the part of the said *Frances*; he averred, that *after the making of the said indenture and the intermarriage of the defendants*, and during the joint lives of him, the plaintiff, and the said *Frances*, *viz.* on the 22d of *July*, 1803, *W. R.* duly *made his award* concerning the premises, and awarded the said *Frances* to pay to the plaintiff a certain sum on the 10th of *August*, then next; of all which premises the defendants had notice, &c. The plaintiff then alleged, as a breach, that the defendants did not on the said 10th of *August*, and after making the award, pay the sum awarded; contrary to the said indenture and the

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After verdict on *non est factum* pleaded; held that upon this declaration it must be taken that *B. intermarried* after the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because *the marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award.*

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covenant of the said *Frances;* and so the plaintiff says, that the defendants have not, nor hath either of them kept with him the covenant of the said *Frances*, although requested, &c. To this the defendants pleaded *non est factum;* and after verdict for the plaintiff it was moved in arrest of judgment, that the marriage of the defendant *Frances* after entering into the covenant to submit to arbitration, and before any award made, was a revocation of the arbitrator's authority, and consequently there could be no breach of an award which he had no authority to make.

Topping and *Scarlett* shewed cause against the rule, and distinguished between the submission of a feme to arbitration by *parol* and by *deed; Bro.* tit. *Arbitrement*, 45. *b. pl.* 35; that however her subsequent marriage before any award made might be a revocation of the former, it was not of the latter. The anonymous case in Sir *W. Jones' Rep.* 388., which is the only direct authority in support of the revocation, was probably a submission by *parol.* And though the case of *Samin* v. *Norton et Uxor*, which was a submission by bond, may seem to be against that distinction, as reported by *Keble* in his 2d vol. (*a*), yet it appears from the report in the 3d vol. (*b*) of a subsequent date, that the Court conceived that the plea of intermarriage before the award made was no answer to the action on the bond; and finally the defendants agreed to enter into a new bond. But even admitting the [268] marriage to be a revocation of the arbitrator's authority, though conferred by deed, yet *Vynior*'s case (*c*) is an authority in point to shew that such a revocation by the party's own act is no discharge of her express covenant to *abide* the award; but her having thereby incapacitated herself from *abiding* the award is a breach of such covenant, for which she is liable in this action, her husband being joined for the sake of conformity. [In answer to a doubt started by the Court whether the breach were properly alleged to meet the last view of the case, and whether the breach should not have been specifically assigned that the defendant *Frances* did not *abide* the award, by intermarrying with the other defendant, and thereby incapacitating herself from performing it;] they answered, that though such a breach were not formally assigned, and the declaration might possibly have been bad on special demur-

(*a*) 2 Keb. 865. 877. (*b*) 3 Keb. 9.
(*c*) 8 Rep. 81. *b.*, and *vide* 4 Rep. 61. *b.*

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rer, yet upon the whole of the count it did sufficiently appear that the defendant *Frances* had not *abided* the award, but had rendered herself incapable of abiding it; and the action is on the deed, and not on the award.

Park and *Richardson*, contra, relied on *White* v. *Gifford and others*, 1 *Roll. Abr.* 331. tit. *Authoritie*, E. *pl.* 4. as another authority in addition to the case in *W. Jones*, 388. to shew that marriage is a revocation of a prior submission to arbitration by a feme; and said that there was nothing in either of the books to warrant the distinction set up. Then taking that point *pro concesso*, it cannot in reason be a breach of a covenant, to *abide* an *award*, not to pay a sum of money directed
[269] by an award which the arbitrator had no authority to make; and the non-payment of the money is the only breach assigned. Supposing the fact of marriage before any award made could be deemed a breach of such a covenant, yet it ought to have been specifically assigned as a breach, so that issue might have been taken upon it: but it is not alleged as a *fact*, but merely stated collaterally by way of introduction. If meant to have been insisted on as a revocation of the authority, it should have been pleaded as such, in the same manner as the revocation of the authority was pleaded in *Vynior*'s case, in order to shew in what manner the defendant had not *abided* by the award. As it now appears, *non constat* that the marriage may not have been with the consent of the plaintiff, and then it would be no breach. [*Lawrence* J.—The only matter put in issue was whether this were the deed of the defendant. If the defendants had meant to insist that the marriage was no breach of the covenant, because had with the consent of the plaintiff, it was open to them to have pleaded such consent. There is nothing in the form of the declaration to have shut them out of such a plea. Lord *Ellenborough* C. J.—There is a sufficient statement to shew the fact of marriage before the award made, and that is *primâ facie* a breach of the covenant to *abide* the award; because by that act the defendant *Frances* disabled the arbitrator from making any award. Then if the defendants would insist on any matter to shew that the marriage was not a breach, it must come from them.] Though marriage operate in law as a countermand to the arbitrator's authority from his inability to bind a feme covert without her husband by his award; yet the act of marriage, being lawful, is not in itself a breach

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a breach of the covenant; for then such a covenant would operate in restraint of marriage generally, extending *as it does to an award made at any time during the lives of the parties, which operation the law will not admit of. *Lowe* v. *Peers*(*a*).

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[*Lawrence*, J. observed, that this argument would go the length of saying that a woman who covenants when single may always break her covenant with impunity by marrying.]

Lord ELLENBOROUGH, C. J.—If this had come on upon a special demurrer as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring, for here the breach of covenant arising out of the facts shewn by the declaration is the fact of the defendant's intermarriage before any award made, by which the defendant *Frances* incapacitated the arbitrator from making any award to bind her, and thereby broke her covenant to *abide* the award of the arbitrator. But the plaintiff not relying on this, proceeds to shew by way of breach that the defendant *Frances* did not pay the money awarded after such intermarriage. But notwithstanding the plaintiff has stated his real *gravamen* informally, yet if upon the whole it appear that the defendant *Frances* has committed a breach of covenant, the judgment cannot be arrested. Now here the plaintiff, protesting that the defendant *Frances* did not *before* her intermarriage observe her part of the indenture, avers, that *after the making of the indenture, and the intermarriage of the defendants*, the arbitrator made his award. That is a sufficient allegation of the fact of the marriage being before the award, which constitutes a breach of the covenant, to warrant us in giving judgment for the plaintiff on that ground. And this upon the principle, which we had occasion to consider very fully in a late case (*b*); that however defective the pleadings, and however imperfect the prayer of judgment on either side may be, we are bound *ex officio* to give such a judgment as upon the whole record the law requires us to do.

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GROSE, J.—We cannot arrest the judgment, if upon the whole record it appears that the defendant has committed a breach of the covenant declared on.

LAWRENCE, J.—The foundation of the motion to arrest the judgment is, that it appears that the defendant *Frances* intermarried with the other defendant before the award made,

(*a*) 4 Burr. 2225. (*b*) *Le Bret* v. *Papillon*, 4 East, 502.

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which it is insisted amounts to a revocation of the arbitrator's authority; but the marriage itself is a breach of the covenant to abide the award; and if the fact relied on so far appear as to lay a foundation for the motion, that breach must also appear on the face of the declaration. It is therefore inconsistent in the defendants to say that we cannot take notice of the marriage before the award made, which is the ground of the objection to the declaration in arrest of judgment.

LE BLANC, J. declared himself of the same opinion.

Rule discharged.

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Thursday, June 7th.

DOWLAND *against* SLADE and Wife.

The demandant in a writ of right must allege in his count that his ancestor was seised *of right* as well as that he was seised in his demesne as of fee. *Qu.* Whether if one through whom title is derived be improperly stated to be *heir* to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as *heir* to her brother be fatal.

AT the court of the manor and forest manor of *Gillingham* in the county of *Dorset*, holden on the 2d of *May*, 40 *Geo.* 3., *Thomas Dowland* prosecuted his writ of right close against *William Slade* and *Elizabeth* his wife, as follows:

"*George* the Third, &c. To Sir *T. Sykes*, Bart. lord of the manor of *Gillingham* in *Dorsetshire*, or his steward of the same manor, greeting—We command you, that without delay and according to the custom of the manor aforesaid, you do full right to *Thomas Dowland* concerning 18 acres of land, &c. with the appurtenances, in the tithing of *Bourton* in the manor aforesaid, which *William Slade* and *Elizabeth* his wife deforce him of, that we hear no more complaint for want of right. Witness ourself," &c. And thereupon the said *Thomas Dowland* makes his protestation to prosecute the same writ in the said Court, in the form and nature of a writ of right patent at the common law according to the custom of the manor aforesaid; and finds pledges to prosecute, &c. The record then set forth the command to the bailiff of the manor to summon the defendants on a given day; at which day "*Thomas Dowland* (by his attorney) demands against the said *W. S.* and *E.* 18 acres of land, &c. in the tything of *Bourton* in the manor of *Gillingham*, in the county of *Dorset*, and within the jurisdiction of this Court; and whereof he says that *Thomas Gamlyn* was *seised in his demesne as of fee*, according to the custom of the manor aforesaid, in the time of peace, in the time of the Lord *George* the Second, late King of *G. B.*, &c. and within 60 years

years now last past, by taking the esplees thereof to the value, &c. and died thereof seised, leaving one *Elizabeth* his wife him surviving, and *from* the said *Thomas Gamlyn* the right to the said tenements with the appurtenances descended and came to one *William Gamlyn* as *brother and heir* of the said *Thomas Gamlyn*, subject to the estate of free bench of the said *Elizabeth* therein, according to the custom of the manor aforesaid; and *from* the same *William Gamlyn*, the right, &c. subject, &c. *descended* and came to one *Hannah Dowland*, as *eldest cousin and heir* of the said *Wm. Gamlyn*, according to the custom, &c. viz. *as eldest daughter and heir of Hannah Ball*, who was *the only sister and heir of one other Thomas Gamlyn*, who was *the father as well of the said first mentioned* Thomas Gamlyn *as of the said* Wm. Gamlyn, which said *Elizabeth Gamlyn* died in the lifetime of the said *Hannah Dowland;* and *from* the said *Hannah Dowland* the right, &c. descended and came to one *Thomas Dowland* the son and heir of the said *Hannah Dowland*, and from the said *Thomas Dowland*, the son of the said *Hannah Dowland*, the right, &c. descended and came to the said *Thomas Dowland*, the now demandant, as son and heir of the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*; and that this is right he the said *Thomas Dowland*, the now demandant, offers," &c. To this the defendants demurred generally, and judgment was given for the demandant in the manor and forest Court, to recover his seisin of the tenements, &c.

The defendants thereupon prosecuted a writ of false judgment returnable in the Court of Common Pleas; and the sheriff in his return stated, that he had recorded the plaint in question, and then set out the whole of the proceedings at length, including those before mentioned; on which the following causes of false judgment were assigned; 1. That no [274] seisin of *right* of the premises is in the count alleged and averred in *Thomas Gamlyn*, who is therein alleged to have been last seised, and from whom the demandant deduces his title; and that the right is in that count alleged to have descended to the several persons therein named in succession from the said *Thomas Gamlyn*, who for aught appears had no *right;* and that the title is attempted to be deduced to the demandant from an ancestor who is not alleged to have any right, but for aught appears might have been seised *of wrong*, and the *right* have been in those who were seised of and held the

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same premises since the death of the said *Thomas Gamlyn*; and that the root of the demandant's title is defectively and erroneously alleged. 2. That supposing the said *Thomas Gamlyn*, the person last seised, to have had any right, no right is deduced from him to the demandant, inasmuch as the said *Hannah Dowland* is in the said count alleged to be the *heir* of the said *William Gamlyn*; and the right to the premises to have descended to her as *the heir of Hannah Ball*, which *Hannah Ball* must therefore have *died before the said Wm. Gamlyn*, or the said *Hannah Dowland* could not have been *heir to the said William Gamlyn*, or the right have descended from the said *William Gamlyn immediately* to the said *Hannah Dowland*, and yet the said *Hannah Ball* is in the said count stated to have been the *sister and heir of Thomas Gamlyn the father*, who must therefore have *died in the life-time* of *Hannah Ball*, and to which said *Thomas Gamlyn* the father, *William Gamlyn* the *son*, who survived *Hannah Ball*, must have been *heir*, and to which said *Thomas Gamlyn* the father *Hannah Ball* never could have been *heir*, if it be true, as there alleged, that *Hannah Dowland* was *heir* to *William*
[275] *Gamlyn* at the time of his death, and that the right descended immediately from him to her. There was also a third cause of false judgment stated, (but this was not insisted on upon the argument in this Court,) *viz.* that no custom of the manor is alleged whereby it appears that eldest daughters and eldest female cousins are entitled to be *heirs* alone and exclusively of their younger sisters. The Court of Common Pleas for the second cause above alleged reversed the judgment of the Court below: upon which judgment of reversal a writ of error was brought in this Court, and the common error assigned.

This case was argued in last *Easter* term by

Abbott for the plaintiff in error, (the original demandant.) As to the first error assigned, that *Thomas Gamlyn*, the ancestor from whom the demandant derives title, is only stated to have been "*seised in his demesne as of* fee," without adding, "*and of right*;" these words are not necessary (though it was admitted that they are to be found in all the precedents of writs of right) (*a*);

(*a*) The words *et de jure* are omitted in one precedent only, which is in *Rastal*, tit. *False Judgment*, *pl.* 9. (the precedent which was followed in this case); but this was admitted to be a mistake; for, on searching the roll, those words were found to be inserted.

for

for it is not necessary to allege any matter in pleading which cannot be traversed, and need not be proved; and the tenant cannot admit the *seisin*, and traverse the *right* to the *seisin*: and a wrongful *seisin* is sufficient to sustain a writ of right. Nor is it necessary to allege matter of law; and whether the *seisin* be of right or of wrong is a question of law and not of fact. Whatever the practice may have been, the necessity of it must be tried by referring to principles. In case for disturbance of a common way or other appurtenant to land, [276] it is usual to say that the plaintiff was *lawfully* possessed of the land; yet that is not necessary. Indictments for murder always say, that the deceased was "in the peace of God and of our Lord the King," and yet that is not necessary to be alleged (*a*). The books which treat of the writ of right only say, that it is founded on a *seisin in fee-simple* of a man or his ancestors; they do not say a *lawful* or *rightful* seisin. *Co. Lit.* 158. It can only bind between the parties. It is called a writ of *right*, not because it is founded only on the right, but because it is adapted to the recovery of it when all other possessory remedies fail. *Lit. s.* 514. says, that if the demy mark be not tendered, "the grand assize ought to be charged only to enquire of the *mere right*, and not of the *possession*," &c. The words, "which he claims as his right and inheritance," are not in any of the precedents of the writs in *Fitzherbert's Nat. Brev.*, or the Register, when directed to lords of manors, but only in the writs in *C. B.; quia dominus remisit curiam.* The statute of limitations, 32 *H.* 8. *c.* 2. speaks only of *seisin* or *possession*, not of *lawful* seisin. And *Lit. s.* 478. shews, that a wrongful *seisin* originating in a disseisin is sufficient to sustain a writ of right; as "if a man be disseised by an infant who aliens in fee, and the alienee dieth seised, and his heir entereth, the disseisor being within age, it is in the election of the disseisor to have a writ of *dum fuit infra ætatem*, or a *writ of right*, against the heir of the alienee." And this is confirmed by Lord *Coke's Comment. Co. Lit.* 278. *b.* The subject is resumed in *s.* 481; and in *s.* 482 another instance is put of a recovery upon a seisin acquired by wrong: "if he in the remainder had entered upon the tenant for life and disseised him, and after the tenant enter upon him, and after the tenant [277]

(*a*) Hydon's case, 4 Rep. 41. *b.*

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for life by such recovery lose by default and die, he in remainder may well have a writ of right against him which recovers, because the mise shall be joined only upon the mere right, &c., yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life." Upon which Lord *Coke*, (*Co. Lit.* 280. *b.*) observes, "Here a disseisin gotten by wrong, and defeated by the entry of him that right hath, is sufficient to maintain a writ of right against the recoveror in this case." The case put by *Littleton* may be the very case here. For suppose *Thomas Gamlyn* the ancestor, on whose seisin the demandant counts to have had a remainder expectant on an estate for life, and to have entered on the tenant for life, and thereby acquired a wrongful seisin, and to have been afterwards ousted by him, and then have died; and then the tenant for life to have died; the count could not properly have been otherwise framed than it is. And if the count may be good in any supposable case, no advantage can be taken of it on demurrer or on error. One who has a wrongful seisin may yet have more right than another. To shew that the tenant cannot admit the seisin and traverse the right, he cited *M.* 27 *Ed.* 3. *fo.* 85. *pl.* 26. and *Fitzh. Abr. Droit. pl.* 20. S. C., where *Thorpe*, C. J. said, that the tenant ought to have denied the *seisin*, and not to have acknowledged it; for when he acknowledged that, he acknowledged the right to it *per degrees*. The issue in this form of proceeding is only on the right comparatively; for the issue is that the demandant has *more* mere *right* than the tenant. And on this issue the tenant is to begin, unless he tender the demy mark, in order to put the demandant to prove
[278] the seisin in the reign alleged in his count. There is a record in *Booth's Real Action* (*a*), of the form of the issue on a tender of the demy mark; and there the grand assize are directed to enquire whether the demandant were *seised* of the tenement *in dominico suo ut de feodo* (not saying *et de jure*) *tempore dicti domini regis Henrici octavi* (*b*). He then referred to various precedents *in formedon & juris utrum*, the one the writ of right of tenants in tail, *H.* 18 *Ed.* 4. 23. *pl.* 6., and *Bro. Abr. Droit de Recto, pl.* 33.: the other, the ecclesiastical writ of right, *Fitzh. Nat. Brev.* 50. G. (*p.* 116. *ed.* 1755.) where the allegation is only of the *seisin in fee*, and not

(*a*) P. 102., and vide p. 98, and 1 Reeves' Hist. of Law, 429.

(*b*) See also another similar precedent in Lit. s. 514.

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of the *right*. 1. In formedon, *Rastal*, tit. *Formedon in Remainder, pl. 3. Co. Entr. Formedon in Descender, pl. 5.* The donees in tail are only said to have been seised in *dominico suo*, &c. without the words *de jure;* though their heir is stated to be seised *de jure*. There are separate counts also against four vouchees in the same form. In *ibid. pl. 10.* the feoffees to uses are not said to be seised *de jure:* but the heir in tail who entered is said to be so seised. In *Co. Entr. Formedon in Remainder, pl. 14.* neither the donor nor the feoffees to uses before the statute, nor the *cestuy que use* after the statute, are said to be seised *de jure*. Former proceedings are there set out, which have not those words; and the tenant pleads without them as to some persons, though as to others, the words *de jure* are introduced. There is a like precedent, *ib. pl. 15.* and *ib. pl. 16.* in *Reverter*. In *pl. 18.* in *Reverter*, the donor is not stated to be seised *de jure*, though the seisin of the donee is so alleged. In *Rastal's Entr. Formedon, pl. 5.* the donee is first said to have been seised *in dominico suo ut de feodo* only, and then to have died seised, &c. *feodo et jure*. In *pl. 6.* the seisin of the donor is alleged without the words *de jure;* [279] that of the donee with them. In ib. *Formedon in descender, pl. 8.* the donee is seised *in dominico suo ut de feodo talliato;* but the heir is seised, &c. *de feodo et jure*. In *pl. 9.* both the donee and heir are said to be seised only *in dominico suo ut de feodo talliato*. In *Resceit. in Formedon, pl. 5.* the donor is seised *in dom. suo ut de feodo*, the donee *in dom. suo ut de feodo talliato*. 2d, In *Juris utrum* the issue is, Whether the demandant have more to hold in *frankalmoigne*, or the tenant as his lay fee; and the demandant always counts on some seisin of his predecessors or of his own. In *Co. Entr. Juris utrum, pl. 1.* the count is of a *seisin in fee in right of the chantry:* the tenant pleads a gift in tail, and several descents; but neither the seisin of the donor or donee or heir in tail is said to be *de jure*. In *pl. 2.* the demandant alleges seisin in *dom. suo ut de feodo et de jure hospitalis*. In *pl. 5.* it is *in dom. suo ut de feodo et jure ecclesiæ*. In *pl. 4.* it is *in dom. suo ut de feodo et jure, in jure ecclesiæ:* but the verdict only finds the seisin *in dom. suo ut de feodo, in jure ecclesiæ*. In *pl. 5.* the count is the same as in *pl. 4.* In *Rastal's Entr. Juris utrum, pl. 2.* it is *in dom. suo ut de feodo et jure in jure ecclesiæ*. *Pl. 3.* states the seisin *ut de jure in jure ecclesiæ*. *Pl. 4. in dom. suo ut de feodo et jure ecclesiæ*. But the tenant pleads a seisin in fee,

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fee, without saying *de jure*. *Pl.* 5. states the seisin *ut de feodo et jure hospitalis; pl.* 6, 7, and 8, *ut de feodo in jure Cantariæ*. The entries, therefore, *in Juris utrum* are in both ways, which shews that the variation is not material. As to the second ground of error, on the repugnance of calling *Hannah Ball* the *heir* of her brother *Thomas Gamlyn* the elder, when it appears that he had a son, *Wm. Gamlyn* who survived him; if the word *heir* be rejected, the descent will be well pleaded. But it will be urged that all allegations of title in a writ of right are material and must be proved, and that as both the allegation that the right descended from *Wm. Gamlyn* to *Hannah Dowland*, and the allegation that *Hannah Ball*, as heir to whom *Hannah Dowland* claims, was the *heir* of her brother *Thomas Gamlyn* the father of the said *William Gamlyn*, cannot by possibility be proved, the count is bad for the repugnancy in stating the title. The objection, however supposes the word *heir* to denote necessarily a person in whom an estate actually vested by descent; but it does not: and if it did, it not being necessary to state in terms who was the *heir* of *Thomas Gamlyn* the elder, that word may be rejected as surplusage. It is a general rule in pleading so to construe words as to make all the parts consistent if possible. The word *heir* is often used in pleading to denote the person through whom a succession or descent is derived, and in whom, if living at a certain period, the estate would have vested, but did not vest. *Co. Entr. Quare Impedit, pl.* 1. *Winch's Entr.* 510. *Formedon in Remainder, ibid. Quare Impedit.* 865. 911. *Co. Entr.* 181. *Droit, pl.* 1. tit. *Formedon, pl.* 18. *Hearne's Pleader, Formedon in Reverter*, 501, *b.*, and *Winch's Entr.* 506. In the two last precedents if the count could have been avoided by shewing that the brother of the donor was not his *heir* as alleged in the count, it would have been sufficient to have pleaded that the donees were the daughters of the donor; but in both cases the plea goes on to shew a recovery suffered; and in the latter it even appears that one of the daughters died without issue before the recovery, by which her moiety vested in her sister in fee. In the present case, however, it was sufficient to have shewn that

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Hannah Ball was the sister of *Thomas Gamlyn* the elder, without saying that she was his *heir:* for it could not have been presumed that he had any other sons than those mentioned in the pleadings, or that he had any brother. The general current

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rent of authorities omits the word *heir* in such cases. *Co. Ent. Eject. pl.* 6. *fo.* 196. *Quare Impedit, pl.* 12. *fo.* 494. The word *heir* is a term of law; and the repugnance arises from attributing to *Hannah Ball* a character *in law* which did not belong to her, not from attributing to her any relationship or degree of kindred inconsistent with what was before attributed to her, nor in introducing any *fact* to shew that a good title could not have been derived through the relationship attributed before. Whether from the several relationships stated she were *heir* or not to her brother was a mere legal consequence, upon which no issue could have been taken; and it may therefore be rejected as a nugatory allegation of a matter of law, contrary to the facts stated, which are sufficient to entitle the demandant to recover. *French* v. *Wiltshire*, *Andr.* 67. *Com. Dig. Pleader*, *C.* 28, 29. 1 *Ventr.* 119. 1 *Lutw.* 25.

Dampier for the defendants in error, the tenants: 1st, The seisin should have been stated as *de feodo et jure*. In a proceeding not much in use the form of the precedents without one exception (for the precedent in *Rastal*, tit. *False Judgment*, *pl.* 9. is found to be defectively stated in the book, upon reference to the roll itself) is entitled to great weight. Of these there are eleven precedents in *Liber Intrationum* (*a*); one in the notes to *Fitz. Nat. Brev.* (*b*), which are by Lord *Hale;* one in *Cro. Car.* 310.; five in *Coke's Entr.* (*c*); and seventeen in *Rastal's Entries* (*d*): in all of which the seisin [282] is stated to be *de feodo et de jure*. The precedents in *Formedon* and *Juris utrum* do not apply: neither the tenant in tail in the one, nor the parson in the other, have the *whole* estate in the land in them, which is derived from the donor in tail in the one, and the gift in *frankalmoigne* in the other. The donation or gift, the root and origin of the claim, must be shewn, and it is not sufficient merely to shew a seisin of the estate displaced and turned to a right. The issue is not on the right. In *Formedon* the issue is *non dedit*. A *formedon* may be founded on a devise. In most of the precedents in *formedon* the seisin of the donor is not stated, but merely the gift; except where, as in one precedent in *Coke's Entr.*, the *whole* estate is claimed in *formedon in reverter* But the

(*a*) 1. *b.*, 2. *a.* & *b.*, 22. 1. *b.*, 107. 130. *b.*, 150. *b.*, 151. *b.*, 95. *b.*

(*b*) P. 1. n. *a.* 1. (*c*) 181. *a.*

(*d*) 241. *b. pl.* 1. 2, 3, 5., 244. *b, pl.* 2, 3, 4, 5., 246. *a. pl.* 2, &c. 3, 4, 5., 224. *a. pl.* 1. 2., 130. *b. pl.* 1., 343. *b. pl.* 8, 9, &c., 273. *a. pl.* 8.

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great majority of the precedents in *formedon* state the seisin of the estate tail to be *de feodo et de jure*. Of seventeen precedents in *Coke's Entries*, fourteen are *de jure;* of seven in *Winch* all are *de jure;* of nineteen in *Liber Intrat.*, eighteen are *de jure;* and of thirty-two in *Rastal*, thirty are *de jure;* and in one of the remaining two the person last seised in remainder, whose estate is displaced, is stated to be seised *de jure;* and frequently the first taker has only an estate for life when the seisin *de feodo et de jure* cannot be stated. The three instances in *Coke's Entries* where *de jure* is omitted are of estates given to uses before the statute, when the estate-tail being given to the feoffees to uses, and they not having the usufruct but only the legal estate, might be the reason why the seisin was not stated *de jure*. As to the two passages cited from *Littleton*, it may be true that one who has no right may be estopped from setting up the wrongful seisin of the other, who has a better right against him: but it does not follow that the count is not to be in the general form. It may be considered in law as a rightful seisin as against a wrong-doer who has no right. This objection, however, does not rest merely on the precedents: but is founded in substance, on considering the nature and object of a writ of right, the issue joined in it, and the effects of it. A writ of right is to recover the *whole* estate in the land, and to put the demandant in possession, in full seisin, notwithstanding any inferior intervening rights, which the tenant or those under whom he claims may have acquired by length of possession. It is not therefore unreasonable that the forms of such a proceeding should be strictly observed. The right to lands is divided into the *jus possessionis* and the *jus proprietatis*. The former of which is sometimes used to denote such a right as may be enforced by a possessory real action; but as applied to a writ of right, the *jus possessionis* is immediately consequent upon the recovery of the *jus proprietatis*, and the Court enforces it by the writ of seisin upon its being found by the grand assise which of the parties has the *majus jus*. The object therefore is to acquire both, but the point of inquiry is as to the *right*. It is what the demandant in all the precedents asserts and claims, and what the tenant denies in terms; it is what the mise is joined upon, what the grand assize is charged with, and what the judgment decides. It would be strange then if the demandant need not claim the land as his *right* and inheritance in the writ, or that the seisin by virtue of which he claims to recover

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recover *the right* need not be alleged to be a seisin *of right*, or that he should recover a seisin **of right* which is not alleged to be such; or that that which, for aught appears on the record, was not a seisin *of right* in the ancestor should become a *right* in the heir, and by this recovery be converted into a seisin of right. The form of the writ of right is given in 1 *Reeves' Hist. of Law*, 399 of the count in p. 427, 8., as it is in *Bracton*, and of the plea in p. 475, 6, &c. From thence it appears that the demandant could not have the *jus proprietatis* unless his ancestor were seised of the *right* as well as had the possession: the seisin of the *right* is therefore a substantial allegation. If the words *de jure* could ever have been omitted with propriety, it might be expected to be in the case of copyholds, where the nature of the tenure vests the estate in the lord, though the tenants by custom have acquired a permanent interest and seisin. Yet where a petition in the nature of a writ of right for a copyhold is sued, the nature of the remedy which requires the seisin to be stated as *of right*, overcomes the difficulty; and the seisin is stated to be "*in dominico suo ut de feodo et de jure ad voluntatem domini, secundum consuetudinem manerii*," *&c.* (*a*).

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On the second objection, (after premising that the court of ancient demesne where the demurrer was filed was not a court of record, which appeared by the writ of false judgment in *C. B.*, and by 4 *Inst.* 269.; and therefore neither the stats. 27 *Eliz. c.* 5. nor the 4 *Ann. c.* 16. extend to it; so that it was competent to take any objection to the count which might in a court of record be made on special demurrer:) he contended, that in all actions by an heir, he must shew *how* he is *heir* (*b*), and *à fortiori* in a writ of right (*c*): and if so, he must set out his descent formally, and in such a way as to be capable of proof; or it may be specially demurred to. And Mr. *Reeves* (*d*), in his history, &c. cites *Bracton*, 375. to shew that if any one were omitted in the descent, or if there were any error in the person or the name of any one mentioned in the descent, the action abates. Now here it is not disputed that *Hannah Ball*, through whom the demandant makes title, is improperly stated to be the *heir* of *Thomas Gamlyn* the elder, which could not be, as he was

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(*a*) Co. Entr. 206. *b. pl.* 10. *Rastal's* Entr. 130. *b.*

(*b*) 1 Salk. 355, and Hob. 333.

(*c*) 1 Reeves' Hist. of Law, 431, 2., and Bract. 374., there cited.

(*d*) Reeves' Hist. of Law, p. 432.

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her brother, and he had a son who, it appears from another part of the count, survived him. If this be stated as matter of fact, it is incapable of proof; if as matter of law, it is erroneously stated. In *Polybank* v. *Hawkins* (*a*), where the husband of tenant in fee declared in covenant on a seisin of himself *in his demesne as of freehold in right of his wife*, it was holden bad on special demurrer; for that he ought to have stated that *he and his wife in right of his wife were seised in their demesne as of fee;* though the objection there was more critical than in the present case. None of the precedents referred to *è contrà* were tried upon special demurrer. He concluded with referring on this point to the authority of the Court of *C. B.*, who had decided upon the validity of this objection.

Abbott in reply, on the latter point, observed as to the case of *Polybank* v. *Hawkins*, that the error there was in stating the *seisin*, which was the root of the title. On the first point he said, that the mise was not joined on the positive right, but whether the demandant or the tenant had *the better right*, and the verdict and judgment follows the mise. That the judgment only concludes the two parties on the record, for
[286] it is either that the demandant shall *hold the land against the tenant*, or that the tenant shall hold it *quit of the claim of the demandant.* [Upon a question put, whether the tenant might not take the mise on the *seisin* only,] he answered, that that was only done, as he could find, upon tender of the demy mark, to enquire of the seisin of the demandant's ancestor in the time of the king alleged. But that there was one precedent in *Coke's Entries* (*b*) which runs thus: "*Et præd. J. C., &c., per A. B. att. suum veniunt et defend. pro præd. R. K. et etiam* (which by reference to the roll appears to be a misprint for *seisinam*) *præd. W. R. de quo,*" &c. and prays in aid, &c.

Lord ELLENBOROUGH, C. J. in this term delivered judgment.

This was a writ of error brought upon a judgment in the Court of *C. P.* on a writ of false judgment returnable in that court, complaining that false judgment had been given in the court of the manor and forest of *Gillingham*, in a plea of land between these parties. The sheriff, in his return to the writ of false judgment, states, that he had recorded the plaint, and sets out the proceedings in a writ of right close, and the count founded thereon; and by which *T. Dowland* by his attorney de-

(*a*) Dougl. 323. (*b*) 181. *a. pl.* 4.

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manded against *William Slade and Elizabeth his wife*, the defendants in error, certain lands situate in the manor of *Gillingham*, in the county of *Dorset*, and within the jurisdiction of that court, and whereof he said, that *Thomas Gamlyn was seised in his demesne as of fee*, according to the custom of the manor aforesaid: and then derives title by descent from *T. Gamlyn* as follows, *viz.* that from the said *T. Gamlyn* the right to these tenements descended and came to one *William Gamlyn*, [287] as brother and heir of the said *Thomas*, (subject to the estate of free-bench therein according to the custom of the manor of *Elizabeth, the wife of the said Thomas*); and that from the said *W. Gamlyn* the right to those tenements descended and came to one *Hannah Dowland, as eldest cousin and heir of the said W. Gamlyn*, that is to say, as *eldest daughter and heir of* Hannah Ball, *who was the only sister and heir of one other T. Gamlyn*, who was the father as well of the first mentioned *T. Gamlyn* as of the said *W. Gamlyn;* (which said *E. Gamlyn* died in the lifetime of the said *H. Dowland;*) and from the said *H. Dowland* the right to the said tenements with the appurtenances descended and came to one *T. Dowland*, and from him to the now demandant.

Upon this record two objections have been made to the judgment which has been given in the court baron of the forest manor of *Gillingham* for the demandant. The first is, that it is not alleged that *T. Gamlyn*, from whom the demandant deduces his title, was seised "in his demesne as of fee AND RIGHT;" but only "in his demesne as of fee," of the lands in question. The second objection is, that in deducing the title from *T. Gamlyn*, the demandant claims through *H. Dowland*, who is stated to be the heir of *W. Gamlyn*, and that the right descended to her, as heir of *H. Ball*, who is stated to have been the heir of one *T. Gamlyn*, the father of *W. Gamlyn;* which could not be; for if *H. Dowland* was the heir of *W. Gamlyn*, *H. Ball*, (through whom she claims, and *who* is stated to be the *heir* of *T. Gamlyn* the father) must have died before *W. Gamlyn*, in which case *he*, and not *H. Ball*, must have been *the heir* of *T. Gamlyn* his father. On this writ of false judgment the Court of Common Pleas reversed the judgment [288] of the court of the forest manor, being clearly of opinion that this *last objection* was fatal: and though they did not decide on the first objection, they inclined to think that fatal also; as all the

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the precedents with the exception of one only contained the above allegation. On this judgment a writ of error having been brought, it has here been argued that the judgment of the Court of Common Pleas is erroneous, for that the allegation, that the ancestor from whom the demandant claims was seised AS OF RIGHT, is but matter of form, which may be inserted in the count or not; for that a writ of right may be maintained on a wrongful seisin, as by an *infant disseisor* against his own alienee; that the seisin cannot be admitted and the right denied. And though the issue be in this proceeding *formally* on the *right*, yet the tenant, generally speaking, is to begin, and shew that he has *more mere* right than the demandant; and though it was admitted that all the precedents of counts in writs of right allege the seisin *de jure*, and that upon further investigation there is not even that single exception, which, when the case was argued in the Common Pleas, was supposed to exist; the entry in *Rastal* by an examination of the roll having been since found incorrect; yet, from analogy to counts in *formedon* and *juris utrum* which are proceedings in the nature of writs of right, where the allegation *de jure* is frequently omitted; it was insisted, that the averment that the seisin was *de jure* is but *a form*, not necessary to be observed. And as to the last objection, it has been said, that the count need not have alleged that *H. Ball* was *the heir* of *T. Gamlyn*, and that word may therefore be rejected, or understood only, as a word of pedigree, and as denoting a descent mediately through, and not directly and immediately from, that particular ancestor: or if not, that as a good title is stated in fact, the party shall not be prejudiced from a mistake in a legal conclusion from this fact. But notwithstanding the ingenuity and learning with which this case has been argued, we are of opinion that the judgment of the Court of C. P. must be affirmed; which Court, it may be reasonably concluded, from what was said by the Chief Justice in delivering his opinion, would have decided against the plaintiff in error on both points, had it not been supposed that there existed one exception to the universality of alleging the seisin of the ancestor of the demandant to be *of right*: and as it is now found that there is no such exception, it would be too much to conclude that an allegation, which has not been found in any case to have been omitted, may or may not be used *ad libitum* in a proceeding, the object of which is to decide in favour

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vour of that party, *whose right* to the lands in dispute is greatest. The reference to the 478th sect. of *Littleton*, from whence it appears, that *an infant disseisor may recover in a writ of right against his alienee*, does not shew that the form of the count must not be as the defendant insists; for as between such parties, the disseisor has *the greater right;* and his seisin, though acquired by wrong, will establish a right against one who can only claim under the demandant, whose alienation on account of his nonage will not be binding. And the analogy from counts on writs of *formedon* and *juris utrum* does not hold, for in them the *mere right* to the lands is not put in issue, as in writs of right properly so called; for in *formedon* the general issue is *non dedit*, that is, the *entail*, not the *mere right*, is traversed: and *in juris utrum* the general issue for the tenant is, that *it is his lay fee, and* not *the alms of the church;* (vid. *Booth's Real Actions*, p. 222. and *Co. Ent.* 400.) But this matter [290] does not rest merely upon reasoning; for *Bracton*, in the chapter referred to by Mr. *Reeves* in the passage cited at the bar, and in whose time actions of this sort were common, and who must have been well acquainted with what was necessary to be alleged in counts on writs of right, lays it down expressly, that the count must allege that the seisin was *de jure:* the passage is to be found in *p. 372. b.*, where the author having stated the form of the count in a writ of right, in which the ancestor is averred to have been seised "*in domi-*" *nico suo ut de feodo et jure;*" proceeds thus to comment on the count: "*Non enim sufficit simpliciter proponere* in-" tentionem *suam* (by which word the count is meant,) *sic* " *dicendo, peto tantam terram ut* 'jus meum,' *nisi sic illam* " *fundaverit, quod doceat ad ipsum* jus *pertinere, et* per quam " viam, *et per* quos gradus jus *ad* ipsum debeat descendere. " *Item cum agat per breve de recto ad utrumque jus conse-*" *quendum (ss) tam jus possessionis quam proprietatis de* " *seisinâ talis antecessoris, non sufficit si dicat, quod talis ante-*" *cessor suus fuit seisitus in dominico suo ut de libero tene-*" *mento tantum,* 'vel in dominico suo ut de feodo tantum,' " *nisi doceat quod in dominico suo ut de feodo, quod sub se con-*" *tinet liberum tenementum, et totum jus possessorium, nisi* " *dicat et adjiciat* et jure, *quod sub se continet* jus proprietatis." And afterwards in page 273 *b.* he adds, "*Si autem in nar-*

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"*ratione faciendâ* aliquis *articulorum prædictorum* omittatur, "*et narratio a petente advocetur, ita quod error revocari non* "*possit; et petens clameum suum pro se, et hæredibus suis* "*amittet in perpetuum.*" The same doctrine may be found adopted in *Fleta*, book the 6th, c. 16. *de Narrationibus*, transcribed apparently from *Bracton*. Upon these authorities we are of opinion, that for the first objection the count in this case is bad; that the judgment of the court baron was false; and that the judgment of the Court of Common Pleas must be affirmed. And this makes it unnecessary to say any thing as to the second objection, or to examine the many authorities from the entries, which the industry and ingenuity of the counsel have brought together on that point.

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Judgment affirmed.

Thursday, June 7.

REUBEL *against* PRESTON.

The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form.

THE defendant was arrested upon a bill of *Middlesex* issued the 28th of *May*, *returnable* "*on* Monday *next after the morrow of the* Holy Trinity," instead of the usual return *on* Monday *next after* 8 *days of the* Holy Trinity (*a*).

Nolan obtained a rule for setting aside the proceedings for irregularity, on account of this departure from the settled form of returns; against which

Marryat shewed cause, contending that the writ was equally obligatory on the sheriff where there was a day certain named in the writ for his making his return in term time, in whatever manner it was computed. But

Lord ELLENBOROUGH, C. J. said, there was no reason for departing from the settled form which had been always adopted in describing the return-days of the term in writs, though by computation the sheriff might know as well on what day to make his return. If the regular known forms were departed from in one instance, a thousand whimsical returns might be framed, and great confusion introduced.

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Per Curiam, Rule absolute.

Marryat then prayed leave to amend, which was granted.

(*a*) *Vide* the Table of Terms and Returns, Tidd's Appendix, ch. 2. N.

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Friday, *June* 8th.

WHITE *against* JONES, Marshal of *K. B.*, &c.

THE plaintiff declared in case against the defendant for an escape, and stated that whereas one *S. Mendel* and *J. O.* were indebted to the plaintiff in 400*l.*, the plaintiff for recovery thereof prosecuted out of *B. R.* a special *capias ad respondendum* against them, marked for bail, &c. under which *S. M.* was arrested, and for want of bail was afterwards committed to the custody of the Marshal, charged with the said action: and then proceeded to charge the Marshal for voluntarily permitting the said *S. M.* to go at large without the licence of the plaintiff, to his damage, &c. Pleas, 1st, Not guilty. 2ndly, *Actio non*, &c. because after the commitment of the said *S. M.* to the defendant's custody a rule of court was made, ordering the said *S. M.* to be *discharged* out of the custody of the Marshal *as to the said action*, by virtue of which rule the defendant discharged the said *S. M.*, &c. and upon which issue was taken. 3dly, *Actio non*, &c. because after the commitment of the said *S. M.* to the custody of the defendant a certain rule of court was made, &c. (and then the plea set out the tenor of the rule, which was intitled "*White* v. *Mendel*," (omitting the other defendant's name), and stated that bail having been put in and justified for the defendant, and allowed, the defendant should be discharged *as to this action.*) By virtue of which rule the defendant as Marshal afterwards discharged the said *S. M.* And then the defendant averred *that the said* S. M. *was not at the making of the said rule, or at any other time in his custody in any action whatsoever, except the said action in the declaration mentioned*, and that *the person mentioned in the said rule by the name of* Mendel *is the same person, &c.;* which discharge of the said *S. M.* is the same escape as that now complained of, &c. Replication, that the bail mentioned in the rule in the last plea set forth to have been put in and justified, were put in for the said *S. M.*, and justified *as in an action brought by the plaintiff against the said* S. M. *only, and not in the said action so brought against the said* S. M. *and the said J. O.*, as by the record

B. being in custody at the suit of *A.* in a joint action against *B.* and *C. B.* justifies bail in an action intitled by mistake *A.* against *B.* only, and a rule so entitled is served on the marshal of *B. R.* who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*; held that the marshal was liable in an [293] action for an escape.

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of the recognizance of such bail, &c. appears. And further, that after the making of such rule, and *before* the defendant *discharged* the said *S. M.* out of his custody, *the defendant had notice of the said premises.* To this there was a general demurrer and joinder.

Wood in support of the demurrer. This was a mere irregularity in the justification of bail, which was intitled "*White* against *Mendel and another*," instead of mentioning the other defendant's name. But whether bail were put in or not, or irregularly put in, it will make no difference as to the Marshal, who is at any rate bound to obey the rule of the court, and cannot be liable as for an escape in so doing.

Lord ELLENBOROUGH C. J.—It is an unfortunate mistake, but we cannot help the Marshal. The rule was [294] to discharge the defendant out of custody in one cause, intitled "*White* against *Mendel*," and the Marshal has discharged him in another cause, a joint action of *White* against *Mendel* and *J. O.*, for which he had no authority. I will assume that *Mendel* was only charged in the Marshal's custody in one cause at the suit of *White*; but then the rule was nugatory, being intitled in a cause of "*White* against *Mendel*," and the defendant not being charged in his custody in any such cause. The rule therefore did not justify him in discharging his prisoner in an action to which it did not apply.

The other Judges concurring,

Judgment for the Plaintiff.

Marryat was to have argued for the plaintiff.

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EDGCOMBE *against* RODD and Others.

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TO trespass for an assault and false imprisonment, the defendants pleaded, 1st, not guilty; 2ndly, that the assault and imprisonment were by virtue of a warrant under the hands and seals of the defendants, three justices of the peace for the county of *Cornwall*, granted by them against the plaintiff upon a complaint made to them as such justices by *C.M.* of a certain misdemeanor by the said *C.M.* alleged to have been theretofore committed by the plaintiff against the stat. 1 *W.* & *M.* (*c.* 18. *s.* 18. the Toleration Act): whereupon the plaintiff for default of such sureties as are in that statute expressed was committed to the prison of *Bodmin* in the said county till the next quarter sessions, &c. And afterwards and *before* the said quarter sessions, &c. it was agreed between the plaintiff and *C.M. with the consent of the defendants*, that *C.M.* should not further prosecute the plaintiff for the said alleged offence, and should consent to his discharge at the then next ensuing quarter sessions, &c. *in full satisfaction and discharge* of the said assault and imprisonment. And then the defendants averred, that at the then next ensuing quarter sessions, &c. (*a*), *C. M.* did not further prosecute the plaintiff for the alleged offence, and *then and there consented to the plaintiff's discharge;* and the plaintiff was by order of the same court discharged accordingly. And the plaintiff then and there *accepted* C.M.'*s not further prosecuting him* for the said alleged offence, and *his consent to the plaintiff's discharge, and the plaintiff's discharge thereon,* in full *satisfaction and discharge* of the assault

The Toleration Act, 1 *W.* & *M. c.* 18. provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation [295] under that Act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the Crown.

To an action against magistrates for trespass and false imprisonment they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it, to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent of the committing magistrates* (the now defendants) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment;* held this was no legal satisfaction, for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act.

(*a*) One of the defendants was stated as one of the justices before whom the sessions was holden.

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and imprisonment of the plaintiff. There was a third plea only differing from the last in omitting to state the *agreement* before the next quarter sessions after the commitment between the parties, *with the consent of the justices* to drop the prosecution; but only stating that at the next quarter sessions after the commitment, the said *C. M.* did not further prosecute the plaintiff for the alleged offence, but consented to his discharge: and that the plaintiff was then and there *discharged by order of the same Court in full satisfaction and discharge of the said trespasses, &c. which same premises the plaintiff then* [296] *and there accepted in full satisfaction and discharge of the several trespasses*, &c. To these special pleas there were demurrers, stating, with the common causes, these special causes, that they did not shew with what misdemeanor the plaintiff was charged by the said complaint, nor whether the complaint were in writing, or upon the oath of *C.M.* or any other person; nor for what misdemeanor the plaintiff was committed.

Burrough, for the plaintiff, said that, without entering into the special causes of demurrer, the pleas were avoided by the stat. 1 *W. & M. c.* 18. *s.* 18. whereby any person, guilty of the offence with which the plaintiff was charged before the defendants, "upon proof thereof before any justice of peace "by two witnesses shall find two sureties to be bound by re- "cognizance in 50*l.* and in default of such sureties shall be "committed to prison, there to remain till the next quarter "sessions; and upon conviction of the said offence at the said "sessions, shall be liable to the *penalty of 20l. to the use of* "*the crown.*" It was not therefore in the power of the prosecutor and the magistrates combined together, after the latter had committed the plaintiff to custody for trial for this offence, in default of the sureties required by the statute, to agree to his discharge, as that tended to deprive the crown of its security for the payment of the penalty, in case the plaintiff had been convicted. The first of the special pleas is founded upon an accord and satisfaction; but nothing can be pleaded as a satisfaction which is not a legal one, and this is not so for the reason mentioned. But further the consent of the magistrates to the plaintiff's discharge was of no consequence; for having once committed him, they had no longer any control over the prosecution. It was still in the power of the prosecutor to go on with the prosecution, though [297] against the consent of the magistrates. The defence is not put upon

upon the ground that the prosecutor and the magistrates had been guilty of a joint trespass against the plaintiff, and that the latter had accepted satisfaction from one of them on account of such trespass, which might have been pleaded as accord and satisfaction. Neither is it to be compared to the discretionary power sometimes exercised by this Court upon application for an information, which in the exercise of their lawful discretion to grant or refuse it, they will sometimes, to prevent oppression, make it part of the terms of granting it, that the party applying shall not bring any action for the same injury, or shall dismiss his action if brought. For this Court have a legal control over proceedings instituted by their authority, and may stay the further prosecution of them if they see just cause for it. But justices of peace have no such discretionary power vested in them by law. Then the second special plea stands on the same foot; it is entire, and the *satisfaction* which is part of it, cannot be struck out. (This was admitted *è contrà*). If it could, the special causes of demurrer would apply.

Dampier contrà. There is nothing illegal in parties compromising a *misdemeanor*. In *Johnson* v. *Ogilby* (*a*), Lord Chancellor doubted whether an agreement, the object of which was to get rid of a criminal prosecution for a fraud, could be enforced in equity: but it being answered at the bar that this was different from the case of compounding a felony; and that where the indictment was for a fraud, and the party injured agreed to accept satisfaction, as in conscience he ought; this was lawful, and the fraud was cognizable and relievable as well in equity as at law. Wherefore the objection was no further insisted on. [Lord *Ellenborough*, C. J.—Is it not illegal to compound a prosecution for perjury? The case of *Collins* v. *Blantern* (*b*) proceeded on that ground; where a bond given to secure an agreement for that purpose was holden to be void.] That was as a *bribe* to stifle the prosecution which admits of a different consideration. If these defendants had done any thing illegal, or had acted from corrupt motives in stopping the prosecution, they could not have set up the agreement as a defence. And as to the right of the Crown being defeated, no forfeiture could vest in the Crown before conviction, and till conviction every person is to be presumed innocent. But whatever right might have vested in the Crown, no-

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(*a*) 3 P. Wms. 279. (*b*) 2 Wils. 341—9.

thing

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thing which the magistrates did could defeat it; but it was still competent to the Crown to have proceeded for the penalty. [Lord *Ellenborough*, C. J.—Has not the law required for the preservation of the public peace and the protection of persons conforming to the Toleration Act, that those who are charged before the magistrates on satisfactory evidence of a breach of that law should find sureties, or be imprisoned till the next sessions?] Here the plaintiff was imprisoned *till* the next sessions: and therefore the public had the security required. But it does not follow, though there might be just ground for the commitment, that there was sufficient to convict the accused: as two witnesses are required to justify the commitment, it seems to follow that the offence must be established at the trial by the same number, and one of the witnesses might have died in the interval. So matter of defence may be brought forward to warrant an acquittal on the merits. The agreement was that *Marshal* would not prosecute the plaintiff at the sessions; that was a benefit as far as it went to the plaintiff, though another might prosecute: and any consideration, however slight, is sufficient to uphold an agreement. *Comber* v. *Wane* (*a*) (which has been doubted (*b*),) is the only case which says, it must be a *reasonable* satisfaction: But the true rule is laid down in *Andrew* v. *Boughey* (*c*), where one declared upon an agreement for the delivery of 400lbs. of good wax, and a breach by delivery of 373lbs. of bad wax; to which the defendant pleaded that 20lbs. of wax had been given and accepted in satisfaction: and this was holden to be a good bar; for though it were not of one hundredth part of the value of the plaintiff's loss, yet *by his own accord and agreement*, and his *acceptance* of the wax, this injury was dispensed with. Here *Marshal*, having in the first instance submitted his complaint to the defendants, would not have acted properly in compromising the prosecution without their consent; such consent therefore was a consideration moving from them. And when the party injured and the accused were satisfied that the prosecution should drop with the consent of the magistrates, there was no more illegality in such a transaction than when the same thing is done by the consent of this Court, which is in common experience in cases of personal misdemeanors. [*Lawrence* J. asked what

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(*a*) 1 Stra. 426. (*b*) Sed vide *Fitch* v. *Sutton*, ante, 230. (*c*) Dy. 75. *a*.

act

act the *magistrates* had done which was to be taken as a satisfaction to the plaintiff for the injury received? For their *consent* that *Marshal* should not prosecute was a mere nullity.] It is not necessary that the satisfaction should move from the party whose trespass is satisfied: a man's friends may bargain for him; and if the party injured accept any thing in satisfaction of the trespass from a stranger, it is sufficient. [*Lawrence* J.—It was holden in *Grymes* v. *Blofield* (*a*), in an action of debt on an obligation for 20*l.* that a surrender of a copyhold by *J. S.* (a stranger) to the use of the plaintiff in satisfaction of the 20*l.* which the plaintiff *accepted*, was no good plea.] That case is mentioned in 1 *Com. Dig.* 107. as having been ruled by *two* justices; seemingly therefore with *doubt*. [*Lawrence* J.—No doubt is suggested either in the Digest or in the Report. And the case which came on twice in court was sanctioned altogether by the opinions of *three* of the Judges, the fourth not being present on either occasion.] At any rate it is an anomalous case. And it might have been a mere *voluntary* interposition of the stranger; for it is not said that he surrendered the copyhold at the request of the obligor.

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Burrough in reply. The consent of the justices to the plaintiff's discharge was a mere nullity; for after they had committed him for want of sureties for trial, they were *functi officio*. The statute of *William* having given the penalty to the Crown is decisive of this case: and it is not necessary to consider what difference it would have made if the whole penalty had been given to the prosecutor. If the plaintiff would have been convicted, if the prosecution had not been abandoned, then public justice has been defeated, and the Crown deprived of the penalty in consequence of this agreement: if, on the other hand, the plaintiff would have been acquitted, then there has been no consideration for his agreement to forbear his remedy. In either

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(*a*) Cro. Eliz. 541. This case is reported amongst the cases of *Hil.* 39 *Eliz.* but it is noted at the beginning of the case as of *Trin.* 36 *Eliz.*, and it is said in the report to have been *afterwards* in *Easter Term*, 31 *Eliz.* (which must be a mistake in the print) adjudged for the *plaintiff*. But in Rol. Abr. 471. this account is given of it: "If the condition of an obligation be to pay 20*l.* at a certain day, and a *stranger* surrender a copyhold to the use of the obligee in satisfaction of the 20*l.* which the obligee accepts; this is *a good satisfaction and discharge of the obligation*. *Trin.* 39 *Eliz. B. R. inter Grymes* and *Blofield*."

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case the plea is bad, as founded either on an illegal agreement or on a *nudum pactum*. The case of *Collins* v. *Blantern* (*a*) went on the ground that the compromise of the prosecution was illegal. There is no ground for saying that two witnesses were required in order to convict; and if the death of witnesses was the reason for dropping the prosecution, it should have been so stated, and the plea should have taken another form.

Lord ELLENBOROUGH C. J.—The pleas are bad at any rate; whether on the ground stated in the case of *Grymes* v. *Blofield*, which has been mentioned, that the satisfaction, if any, proceeded solely from a stranger, for so *Marshal* must be taken to be as to these defendants; or upon the ground which has been principally relied on at the bar, that this was an illegal agreement, and no consideration for it could arise to the plaintiff out of the acts of the defendants. The Toleration Act, in order to protect religious congregations in the exercise of their worship, has annexed a penalty of 20*l.* on persons guilty of disturbing them; and, in order to secure the public in the interval between the commission of the offence and the trial of the offender, it has required the magistrate before whom the complaint is lodged, to take security from the offender, or in default of giving such security to commit him to the next sessions. Then, instead of abiding the time of his delivery, when he should be discharged in due course after trial, in case he established his innocence, he stipulates with the prosecutor and the committing magistrates that the
[302] prosecution should be dropped, and that he shall be discharged for want of prosecution. Such an agreement has a tendency to produce impunity for the commission of the offence which the Legislature meant to prevent; it stops the means of the Crown to recover the penalty of 20*l.* in case the plaintiff had been prosecuted and found guilty. In *Collins* v. *Blantern* an agreement to put an end to a prosecution for a misdemeanor was considered to be illegal, as impeding the course of public justice. And this produced the same mischief.

GROSE J.—The facts stated cannot amount to a *legal* satisfaction of the trespass in this case; for the agreement stipulating for the plaintiff's discharge for want of prosecution, was illegal and void. Put the case that the plaintiff was guilty; then public justice has been defeated, and the agreement was illegal.

(*a*) 2 Wils. 341.

But

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But if he were innocent; then he would have been entitled by law to his discharge; and the defendants having only consented to that which by law he was entitled to have, have made him no *satisfaction*.

LAWRENCE, J.—I hold these pleas to be bad on the ground of there being no *satisfaction* shewn in them. If the plaintiff were guilty, the prosecution ought to have been proceeded on, and the defendants can claim no benefit from any thing they may have done to prevent it. The justice of the country has been defeated. But if the plaintiff were not guilty, what *benefit* can he be said to have received from the defendants in satisfaction of the wrong he has received? The justices having committed him to custody, as it now appears without any ground for it, they only agreed that they would not add injury to injury by consenting that the prosecutor should not go on with an unfounded prosecution. But what satisfaction is there in that for the injury already received? Then if the case in *Cro. Eliz.* be law, the pleas are bad on another ground, that satisfaction from a stranger is no satisfaction in law. Lord C. B. *Comyns* does not appear to doubt the case by his manner of stating it; for having first stated instances of accord and satisfaction which are good pleas, he next states those that are not good; amongst which latter the case in question is classed; and he himself expresses no dissatisfaction with it.

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LE BLANC, J.—The pleas cannot be supported on the grounds stated. The satisfaction, if any, moved altogether from *Marshal* the prosecutor. The justices, by merely consenting to *Marshal's* dropping the prosecution, did nothing for the benefit of the plaintiff. This it must be remembered was a prosecution for a *public misdemeanor*, and not for any private injury to the prosecutor. If then the plaintiff had been rightly committed by the magistrates, they should have taken no part in any bargaining whether the prosecution were to go on or not. If the plaintiff had acted illegally in what he had done, there could be no legal consideration for such an agreement in their consenting to stop the prosecution. And if he had not acted illegally, then their consenting to *Marshal's* dropping an illegal prosecution, to which their consent was not necessary, would be no consideration to the plaintiff for giving up any right of action he might have against the defendants for the part they had before taken in the transaction.

Judgment for the plaintiff.

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Friday, June 8th.

The KING *against* OSMER.

An indictment for an assault, false imprisonment and rescue, stated that the Judges of *the Court* of Record *of the town and county*, &c. of *P.* issued their writ, directed to *T. B.*, one of *the serjeants at mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented the arrest: held such indictment bad; it not [305] appearing that *T. B.* was *an officer of the court*: and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it.

THE second count of the indictment stated, that the mayor and senior bailiff of the town and county of the town of *Poole*, the judges of the weekly court of record of the said town and county by their writ issued out of the said court, dated 14th *July* 43 *G.* 3. directed to *W. C.* and *T. Brown*, *serjeants at mace of the said town and county*, did command them to take *B. Willis* if he should be found in their bailiwick, and keep him safely, &c. so that they might have his body before the mayor, &c. on, &c. to answer *J. S.* in a plea of trespass on the case, which same writ, on, &c. at, &c. within the jurisdiction of the said court, was delivered to the said *T. Brown*, *one of the serjeants at mace of the said town and county*, to be executed in due form of law: by virtue of which said writ the said *T. B.* afterwards, &c. on, &c. at, &c. at the town and county aforesaid, and *within the jurisdiction of the court* aforesaid, was proceeding to arrest the said *B. W.* according to the exigency of the said writ. And that the defendant with others unknown, afterwards, &c. in the town and county aforesaid, and within the jurisdiction of the said court, in and upon the said *T. B.* then and there being one of the serjeants at mace aforesaid, and *in the due execution of his said office*, did make an *assault*, and did also *imprison* him, &c.; and that the defendant and the said others unknown, with force and arms, &c. did violently prevent the said *T. B.* from arresting the said *B. W.*, as by the same writ he was commanded, &c. After verdict for the crown, it was moved to arrest the judgment, 1st, because it did not appear that the writ set forth in the indictment was one under which *Willis* could legally have been arrested. For by the stat. 12 *G.* 1. *c.* 29. extended to inferior courts by stat. 19 *G.* 3. *c.* 70., where the cause of action shall not amount to 10*l.* the plaintiff shall not arrest the body of the defendant, but merely serve him personally within the jurisdiction with a copy of the process; and where the cause of action

shall

shall amount to 10*l.* or upwards, an affidavit of the debt shall be made, "and the sum specified in such affidavit *shall be indorsed on the back of the writ*, for which sum so indorsed the officer to whom the writ shall be directed shall take bail," &c. And "if no such affidavit *and indorsement* shall be made, the plaintiff shall not proceed to arrest the body of the defendant," but shall proceed as before directed in cases where the cause of action is under 10*l.* 2dly, It was objected, that it did not appear that *Brown* was a legal officer of the *court* out of which the writ issued, or that he had authority to execute it. He is only alleged to be "serjeant at mace *of the said town and county*."

Jekyll and *A. Moore* now shewed cause, and in answer to the first objection cited *Whiskard* v. *Wilder* (*a*), where upon demurrer to a declaration on a bail bond, because it did not set forth that the debt was sworn to by the plaintiff and the sum sworn to marked on the writ, and so no authority appeared to *arrest* the defendant; it was holden not to be necessary; and that the stat. 12 *Geo.* 1. was merely directory to the sheriff, who is answerable for the omission if he proceed to arrest upon such a writ: but that the process was not thereby avoided, and the rest was still good. Besides, this part of the count is merely inducement to the obstruction, [306] which is the gist of the charge. As in *R.* v. *Wright* (*b*), where in an indictment for suffering two persons to escape who were committed by justices of peace for a forcible entry, against the stat. 8 *H.* 6. it was objected, that the indictment did not set forth the manner of the commitment, nor even allege generally that it was *debito aut legitimo modo:* yet it was holden well enough, being but inducement to the offence. But at any rate, it being afterwards stated in this indictment that *Brown* was proceeding to arrest *Willis* "*according to the exigeney of the writ*," and that the assault was made upon him "*in the due execution of his said office*," it must be intended that he had a lawful writ to authorize an arrest; according to *Hart*'s case (*c*), where because in an indictment for a rescue it was stated that *by virtue of a plaint* before such a sheriff the party was *lawfully arrested*, it was intended that the officer had a good warrant. As to the 2d objection, that the officer is not sufficiently described to be an officer *of the court;* he is stated to be the serjeant at mace of the *town and*

(*a*) 1 Burr. 330. (*b*) 1 Ventr. 169. (*c*) Cro. Jac. 473.

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county, which must be co-extensive with the jurisdiction of the court, described to be "the weekly court of record *of the said town and county*," as in *Long*'s case (*a*). And it is afterwards stated that *Brown* was proceeding to arrest *Willis within the jurisdiction of the court*, and that he was assaulted *in the due execution of his office*. The *serjeant at mace* of the *town and county* must *ex vi termini* be taken to be the proper officer to execute the process of the court of record *of the said town and county*: admitting that according to

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Grant v. *Bagge* (*b*), one who is not the proper officer of a court cannot justify an arrest under a writ directed to him for that purpose. [Lord *Ellenborough* C. J.—If *Brown* had been stated to be the serjeant at mace *of the court*, there might have been more ground for intending that he was the proper officer of the court to execute its process; but we can intend nothing to this purpose from the allegation that he was the "serjeant at mace *of the town and county*." I do not see how this objection can be answered. *Lawrence* J.—A serjeant at mace *ex vi termini* means no more than one who carries a mace for somebody; but for whom does not appear in this case.] It is incident to every court to appoint its own officer to execute its process, unless some special officer be appointed by the common law, or the peculiar constitution of the particular court. 1 *Rol. Abr.* 526. F. *pl.* 1. And any act designating an individual to execute its process is an appointment. And it will not be intended that the Court at *Poole* did not know their proper officer. In *Rastal's Entr.* 167. there is a precedent of a writ issued *ministro curiæ*, but not stated *ibidem*, nor that he had the execution of process. [Lord *Ellenborough* C. J.—*Ministro curiæ* implies that he was the officer of the court at the time.] At all events sufficient appears on the face of the count to sustain the judgment as for a common *assault*, or at least for an imprisonment, which latter is not justified, however illegal the arrest may appear to be. As in *Pallant* v. *Roll* (*c*), where in trespass for hunting, laid upon the stat. 4 & 5 *W. & M.* against the defendant as a *dissolute* person, &c.; though the plaintiff failed in proving the special circumstances under the statute, yet held he might recover as for a common trespass.

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Lord ELLENBOROUGH C.J.—Though the jury in finding the defendant guilty generally upon the second count must necessa-

(*a*) 5 Term Rep. 121. (*b*) 3 East, 128.
(*c*) 2 Blac. Rep. 900.

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rily have included the assault; yet finding as they do the whole count, we must take it that they found the assault committed under the circumstances charged in that count. Which brings the case back to the objection which I before stated to be decisive, that *Brown* is not stated to be an officer *of the court*, and consequently no authority is shewn for his making the arrest. Process ought always to be directed to a proper known officer; otherwise, if it may be directed to any stranger, it might be resisted for want of knowledge that the party is an officer of the court. Then taking the whole count together, the jury in effect find that there was an assault and imprisonment, but committed under circumstances which justified the defendant. For if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose; and nothing further appears in this case to have been done.

The other Judges agreed.

Judgment arrested.

Gibbs, *Lens* Serjt. *Dampier*, and *Jervis*, were to have supported the rule.

The KING *against* The Inhabitants of KEYNSHAM.

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Saturday, *June* 9th.

THE pauper *Thomas Moss*, being legally settled by birth at *Keynsham*, in the month of *October* 1791, was bound apprentice for 7 years to *Joseph Cromwell*, who resided at *Bath*. The sum of five guineas was agreed to be paid by the father to the master as a premium, and was the sum inserted in the indenture. But the only sum which appeared to have been paid was the sum of four guineas, which was paid at the time of dating and executing the indenture. The Sessions, on appeal, considering the indenture as void under the stat. 8 *Ann. c.* 9. confirmed the original order of justices, by which the pauper, his wife and child, had been removed from the parish of *Westwood* in the

Where a sum agreed to be given with an apprentice was 5 guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9. held well, though in fact only 4 guineas were paid; for the *full sum received, given, paid, agreed, or contracted for*, as required by the Act, was inserted, and the duty paid for it, and the stamp used was of the same description and the duty appropriated to the same fund as if 4 guineas only had been inserted and paid for, supposing that would have sufficed.

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county of *Wilts* to the parish of *Keynsham* in the county of *Somerset*. It was admitted on the argument of the case, that the duty had been paid on the sum *contracted for*.

Casberd, in support of the orders, insisted that the indenture was void under the 35th and 39th sections of the stat. 8 *Ann. c.* 9.; for the provisions of the statute were not satisfied merely by inserting in the indenture the sum *contracted* for; but the sum *actually paid* should have been stated, and the stamp proportioned accordingly. The several words used in the act, namely, "sum or sums *received*, or in any wise directly or indirectly, *given*, *paid*, *agreed*, or *contracted for* with any apprentice," were inserted for the purpose of embracing every possible case, and were to be considered distributively, with reference to the particular nature of the transaction at the time of executing the indenture. Thus if the contract at that time were as far as regarded the premium *executory*, it was necessary to insert in
[310] the indenture the sum which was *agreed* or *contracted for*: and to that contingency those words in the act were meant to apply: but if the premium were actually *paid* at the time of executing the indenture, then *the sum paid* should be the sum stated; to meet which latter event the words *received*, *given*, and *paid*, were included in the statute. To put a different construction on the act would be to give an option to the master to insert either the sum agreed for or the sum paid; and in cases the reverse of the present, where the sum contracted for might be less than the sum actually paid, an evasion of the duty imposed by that act, in consequence of such a supposed direction, might be practised. If this construction were just, it was no answer to the objection that a larger sum than that paid was in this case inserted in the indenture. Both the 35th and 39th sections require that the sum should be *truly* inserted: and if a different, though a larger, sum were mentioned, it could not be contended that the words of the statute were complied with. In *Farr* v. *Price* (*a*), the Court held that a stamp of greater value than that required invalidated a promissory note, though it were applicable to the same kind of instrument; and the same reasoning applies to this case, in which it may as well be urged that the letter of the statute of *Anne* should be strictly observed, and that no other than the precise sum paid should be stated in the indenture.

(*a*) 1 East, 55.

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Jekyll, contrà, was stopped by the Court.

GROSE, J. (*a*)—In construing the act of parliament, we must attend to the intention of the Legislature, which *was to raise a revenue by the payment of certain duties upon indentures of apprenticeship, &c. and to take care that the public were not defrauded of the fair duty. For this purpose the act requires (*s.* 35.) "that the *full sum* of money *received*, or "in anywise directly or indirectly given, paid, agreed, or con- "tracted for" with the apprentice, "shall be *truly inserted* in "words at length" in the indenture, &c. under a certain penalty; and then the subsequent clause (*s.* 39.) avoids the indenture "if the sum received, given, paid, secured, or contracted "for" be not so truly inserted. Now by requiring the *full sum* to be inserted, it meant that *not less* than the sum upon which the duty was really payable should be inserted: and here not only the *full sum*, but in truth *more* than the sum for which the duty was payable has been inserted, and the duty paid upon such larger sum. There has therefore been no fraud upon the public, but the whole which the act required, and even more, has been complied with: and therefore there is no ground for the objection.

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LAWRENCE, J.—Even supposing that the exact sum which the master had contracted for and was entitled to receive with the apprentice were required by the act to be inserted, still the objection would not hold in this case. For it appears that five guineas, which is the sum inserted in the indenture, was the sum *contracted* for; and though the master has in fact only received four guineas, yet I know no reason why he may not recover the remainder in an action. The objection would have been more plausible if four guineas only had been inserted in the indenture, and the duty paid upon that. Taking it however that the four guineas only, which have been in fact received by the master, were all he was to have, still the words of the act have been complied with, requiring the *full sum* paid to be inserted; for here the *full sum* paid and more has been inserted, and the duty paid upon it. The case of *Farr* v. *Price* does not apply; because there the stamp used was one appropriated to notes of a higher denomination. The stamp duties raised by different acts on different instruments are appropriated to the payment of the interest of different funds;

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(*a*) Lord *Ellenborough*, C. J. was absent at *Guildhall*.

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and if the proper stamp appropriated to the specific interest were not made use of, though an equal or higher stamp, intended for a different instrument, were used, the interest of the fund might turn out deficient for which the duty was imposed. In that case the stamp used was not the stamp required by the act of parliament for a note of that amount. But no such objection arises here: the duty imposed, whether more or less in the particular instance, is all applicable to one fund, and the same description of stamps is required.

LE BLANC, J.—If the act is to be construed according to the intention of the Legislature, it is clear that such intention has been complied with in this case: and if we look to the the words of the act, they will be equally satisfied by what has been done. The intention of the Legislature was to raise a stamp duty in proportion to the sum paid with the apprentice. For which purpose they have required, by *s.* 35, that the *full sum* received or in anywise given, paid, agreed or contracted for, shall be inserted, and by *s.* 39, the indenture is avoided in which shall not be inserted the full sum received, or given, paid, secured, or contracted for, "or whereon the duties payable by this act shall not be duly paid, &c. according to the "tenor and true meaning of this act." Now the *full sum*, [313] according to the tenor and true meaning of the act, has been inserted; and the *proper stamp* appropriated to this description of instruments has been used; which differs this from the case cited.

Orders quashed (*a*).

(*a*) Vide *Taylor* v. *Hague*, 2 East, 414. S. P.

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FLEMING, qui tam, *against* BAILEY.

Monday, June 11th.

THE declaration, which was framed on the stat. 39 *Geo.* 3. *c.* 79., stated that the defendant was *indebted* to the plaintiff in 60*l.*, and then contained three counts, in each of which the plaintiff went for a penalty of 20*l.* under the statute for printing a certain paper meant to be published and dispersed, and omitting the printer's name and place of abode, as required by *s.* 27. After verdict for the plaintiff,

The stat. 39 *G.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts at *Westminster*, and any penalty not exceeding 20*l.*

Lawes on a former day moved, in arrest of judgment, that no action lay by a common informer to recover penalties not exceeding 20*l.* under this statute; for by *s.* 35. "it is enacted "that any pecuniary penalty imposed by this act exceeding "the sum of 20*l.* may be sued for and recovered by any per- "son who will sue for the same in any court of record at "*Westminster*, &c. and any pecuniary penalty imposed by "this act and not exceeding the sum of 20*l.*, and for the re- "covery whereof no provision is hereinbefore contained, *shall* "*and may* be recovered before any justice of peace," &c.

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Birch shewed cause against the rule, and relied on the whole of the 35th clause taken together, as shewing that the intention of the Legislature was that penalties of 20*l.* might be recovered in the superior courts; for though it first of all says that any penalty *exceeding* 20*l.* may be so recovered, yet it goes on to say, in *which* action it *shall* be *sufficient* to "declare or allege that the defendant is indebted to the "plaintiff *in the sum of* 20*l.* *(being the sum demanded by such* "action,) &c." That shewed that the word *exceeding* had crept into the act by mistake. But giving it its full effect, at least it would not apply to cases where, as here, the plaintiff went for more than one penalty of 20*l.* [But *the Court* expressing a decided opinion against such a construction of the act,] he contended that the jurisdiction of the superior courts could not be ousted without express words, or by necessary implication; and here no such words or necessity existed. For the 35th section saying, that any penalty *not exceeding* the sum of 20*l.* *shall and may* be recovered before any jus-

shall and may be recovered before any justice of peace: but it also gives in the same clause a form of declaration for recovering 20*l.* in the courts of *Westminster*. Yet held that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank* as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.*

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tice of peace, &c. are not words of exclusion of any other jurisdiction, but only give an option to the informer, especially as they are explained by the rest of the clause. And he referred to *Hill* v. *Dechair* (*a*), *Shipman* v. *Henbest* (*b*), and *Rex* v. *Moreley* (*c*); in which latter, though the 6th sect. of the Conventicle Act, 22 *Car.* 2. *c.* 1. says, "that *no other court whatsoever* shall meddle with any causes of appeal upon this act, but they shall be *finally* determined in the quarter sessions *only*;" yet the Court held that the *certiorari* was not taken away, there being no *negative* words to oust the jurisdiction of this Court. The case of *Cates* [315] q. t. *v. Knight* (*d*), which went further than any other to oust this Court of jurisdiction by implication only, proceeded on the ground that there was a clause giving the justices of peace a power to mitigate penalties of the amount there sued for, over which they had before had express jurisdiction given to them; and that such clause would be rendered nugatory if those penalties could be sued for in the superior courts: but here there is no such clause; and no other necessity for controlling the general rule. The stat. 33 *H.* 8. *c.* 12. *s.* 1. says, that all murders within the King's palaces *shall be* enquired of within the same before the Lord Steward, &c. And the stat. 31 *Eliz. c.* 5. *s.* 7. says, that all suits upon any statute for using any unlawful game, &c. *shall be* sued out at the quarter sessions or assizes, &c.: yet the jurisdiction of this Court is holden not to be excluded by those words. 2 *Hawk. c.* 26. *s.* 26—30. [*Lawrence* J.—A common informer cannot sue at *common law*; therefore you must shew some clause in the act giving him a power to sue in this particular case.] Sect. 36. enacts, "that *all* pecu- "niary penalties imposed by this act shall, when recovered "*either by action in any court*, or in a summary way before "any justices, be applied, *one moiety to the plaintiff in any* "*such action*, or the informer before any justice, the other "moiety to the King." [*Lawrence* J.—That only applies to the penalty *when recovered*, but does not give the informer the original power to sue for it.]

Lord ELLENBOROUGH, C. J.—A common informer can have no right to sue for any penalty, but where power is given to him

(*a*) Sty. 381. (*b*) 4 Term Rep. 109. (*c*) 2 Burr. 1040.
(*d*) 3 Term Rep. 442.

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for that purpose by the statute. Now the statute in question only says that a common informer may * sue in any court of record for any pecuniary penalty imposed by the act *exceeding* 20*l.* The penalty given for this offence, each of which must be taken by itself, and cannot be reckoned accumulatively, does not exceed 20*l.*; and therefore it is not within the provisions of the 35th clause, which give an action. And the sense of that clause requires that the form of the declaration there afterwards given should be read the same as if the sum to be recovered were left in blank; for how otherwise can the penalty of 100*l.* given by the 15th section be recovered?

Per Curiam, Judgment arrested.

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MULLOY *against* BACKER.

Tuesday, June 12th.

IN assumpsit, tried before Lord *Ellenborough*, C. J. at the sittings after last *Hilary* term at *Guildhall*, a verdict was found for the plaintiff for 250*l.*, subject to the opinion of this Court on the following case. In *February* 1803, and before the commencement of the present war with *Holland*, the plaintiff who was the master of a merchant ship called the *Doonhaag*, then lying at the *Dutch* settlement of *Demarara*, agreed with the defendant there to convey him, his family, servants, and luggage, permitting him to have the exclusive use of the cabin, from thence to *Flushing*, for the sum of 2400 guilders, which are equal to *l.* sterling. In the month of *April* following the ship under the command of the plaintiff, with the defendant, his family, servants and luggage on board, sailed from *Demarara* destined for *Flushing*, and on her arrival at the entrance of the *British* Channel on the 4th of *July* was captured by his Majesty's armed brig the *Rambler*, and carried into *Plymouth* as a *Dutch* ship, war having been previously declared by his Majesty against the *Batavian* republic. The defendant, his family and servants were set at liberty at *Plymouth*,

The plaintiff contracted to carry the defendant, his family, and luggage from *Demarara* to *Flushing*, and in the course of the voyage, within 4 days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought [317] into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship, but the defendant and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage money upon an implied *assumpsit pro ratâ itineris* if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for *non constat* but that the ship might be condemned and the freight decreed to the captors.

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mouth, and their luggage restored to them; but several pipes of wine which the defendant had on board were and still are detained by the captors. The vessel and her cargo have been libelled in the Court of Admiralty for condemnation, but no decision as to the vessel (*a*) which has been claimed in that court by a *British* subject as his property hath yet taken place: so much however of the cargo as was the property of *British* subjects has been restored, and the remainder of the cargo has been condemned as lawful prize. The vessel, at the time when she was so captured, had been 65 days on her voyage from *Demarara* towards *Flushing*, and by the usual course of navigation she would have completed her voyage to *Flushing* in four days more. The question for the opinion of the Court was, whether the plaintiff were entitled to recover any and what sum? If the Court should be of opinion that he was so entitled, the verdict for the plaintiff was to stand, or to be altered to such sum as the Court should think fit. If the Court should think that the plaintiff was not entitled to recover any thing, the verdict was to be entered for the defendant.

Richardson, for the plaintiff, contended that he was entitled
[318] to recover *pro ratâ itineris*, according to the principles established in *Luke* v. *Lyde* (*b*); for here the defendant accepted his own liberation and his luggage at *Plymouth*, and did not require the plaintiff to carry him on to the end of his voyage. This was equivalent to the receipt of the goods by the freighter at *Bideford* in that case. "If," says Lord *Mansfield* in that case, "the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion *pro ratâ* of the former part of the voyage." This case is indeed stronger than that, for there there was no real benefit rendered to the defendant by the partial performance of the contract; but on the contrary he was prejudiced by it: for the freight from *Bideford*, where the goods were accepted, to *Lisbon* to which they were destined, was greater than from *Newfoundland*, from whence they were originally shipped. Whereas here the defendant has been actually benefited by the partial performance of so much of the voyage, having been conveyed 65

(*a*) It was admitted that since the recovery in this action the vessel had been restored to a *British* claimant.

(*b*) 2 Burr. 882.

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days forward to the place of his destination, and within a very few days' sail of it: and the completion of the voyage was prevented by the capture without any default of the master. If it be said that the passengers could not do otherwise than accept their liberty, and that this distinguishes the case from *Luke* v. *Lyde*, where the freighter had an option to accept his goods or not at *Bideford*; still it may be answered that the defendant might have signified his disagreement to accept a partial performance of the contract, by requiring the plaintiff to carry him on to *Flushing* in another ship. In that case the plaintiff had abandoned the ship to the underwriters, and had thereby prevented himself from carrying the goods in the same ship; but he was holden to have the option of carrying [319] them on in another vessel, and thereby earning the whole freight, if the defendant had not agreed to accept them at *Bideford*, and pay only *pro ratâ*. At any rate the acceptance of the luggage would be evidence of the defendant's assent to pay a *quantum meruit pro ratâ*, taking that to be the only evidence of assent which the circumstances of the case give rise to. The case of *Luke* v. *Lyde* came on upon an implied assumpsit, and is not contradicted by *Cook* v. *Jennings* (*a*), where the plaintiff declared on the charter-party, and was holden to be precluded by his precise agreement from recovering as for a partial performance, though accepted by the defendant.

Giles, *contrà*, contended, 1st, that the defendant was not liable to pay the sum demanded; 2dly, that the plaintiff had not any title to demand it. 1. The contract was entire to convey the defendant from *Demarara* to *Flushing* for a certain sum, and it cannot be severed, according to *Cook* v. *Jennings*. [*Lawrence* J.—That may depend upon the law of *Holland*; for it was a contract made in a *Dutch* colony, and to be perfected in *Holland*; and therefore whether the plaintiff can recover *pro ratâ* as for a partial performance of it, must depend upon the law of *Holland* in that respect.] It does not appear what the law of *Holland* is in this respect; and therefore it is sufficient to shew that by the law of this country, by which the plaintiff seeks to recover, he is not entitled upon the facts stated. *Bright* v. *Cowper* (*b*) agrees with *Cook* v. *Jennings*, that he cannot recover on the contract itself for a partial performance; and *Cutter* v. *Powell* (*c*) shews that he

(*a*) 7 Term Rep. 384. (*b*) 1 Brownl. 21. (*c*) 6 Term Rep. 320.

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can neither recover on the contract, nor on a *quantum meruit*. The question then is, whether this case comes within the exception of freight, which may be recovered on an implied assumpsit *pro ratâ*, if the goods be accepted before they arrive at their destined place? The only principle on which the case of *Luke* v. *Lyde* (*a*) can be maintained, is that of an implied contract arising out of a benefit conferred by one party, and received by the other; though it is difficult to reconcile the decision in that case with that principle; for there the defendant received no benefit but a detriment from having his goods carried to *Bideford*. [Lord *Ellenborough* C. J.—The case of *Luke* v. *Lyde* seems to have proceeded upon an implied contract arising *out of the marine law*.] There was however a consideration in that case; for the master might have refused to deliver the goods at *Bideford*, and might have insisted on performing his contract and earning his whole freight by forwarding the goods to *Lisbon*; and his waiving that right, and giving them up to the owner, who chose to have them at *Bideford*, and taking only freight *pro ratâ*, was a consideration for the promise. [Lord *Ellenborough* C. J.—*Lyde* in that case accepted the goods from the *recaptors*, and not from the master; so that the master had no lien on the goods at the time.] If the goods were not considered as given up by the master in that case, there could be no consideration at all for the implied assumpsit: but the case turned on the assumption of the master's right and power to have carried them on to the port of delivery. And that consideration furnishes on the second ground of objection a material distinction between that case and this. For here the plaintiff's *ship* was brought into
[321] *Plymouth* as a *prize*, and he himself as a *prisoner of war*. The defendant was not liberated nor his luggage restored to him by the plaintiff, but by the captors. There was therefore no consideration moving from the plaintiff which could be the foundation of an implied assumpsit. The cargo has been actually condemned, and at the time when this action was tried proceedings were pending in the Admiralty court for the condemnation of the ship, in which event the freight would be due, if at all, to the *captors*; though in these cases it has been most usual to decree the restoration of the luggage of passengers to them without freight. But in strictness

(*a*) 2 Burr. 882.

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the luggage is as much prize as the bulk of the cargo. And at any rate there can be no lien on the *person* for the passage money, but only on the *luggage*. All the benefit the defendant has received, which is his own and family's liberation and their luggage, was after they were brought into this country as *prisoners*, and from other hands than the plaintiff's. *Passage money* as well as *freight* must follow the title to the ship. [*Lawrence* J.—Foreign writers consider passage money the same as freight. Lord *Ellenborough* C. J.—Except for the purpose of *lien* it seems the same thing.]

Richardson began to reply upon the first point of the argument: but *The Court* suggested that the difficulty which pressed most on the plaintiff was that he was at any rate premature in commencing this action, *pending* the proceedings in the Admiralty Court to condemn the ship as prize, when *non constat* at the time that the ship would be restored, or that the freight might not be decreed to the captors. To this he answered, that the pendency of the suit there, which might involve the same question, was only matter pleadable in abatement. That by the liberation in fact of the passengers and their luggage all right of the captors was waived, [322] and the parties were restored to their original relative situation, from whence it appeared that the defendant had in fact received a certain partial benefit from the plaintiff, for which the law would raise an implied *assumpsit* on a *quantum meruit*. That it did not even appear that the defendant was an enemy, or amenable to the law of prize.

Lord ELLENBOROUGH, C. J.—If this were the case of a contract to be decided only according to the law of *England*, without adverting to any rule drawn from the marine law, it would be the case of a contract undertaken but not performed, and consequently the plaintiff could not be entitled to recover his wages or hire as for a partial performance of it *pro ratâ*. But according to the case of *Luke* v. *Lyde* the marine law has been imported as it were into this species of contract, and a right to recover wages or freight *pro ratâ* has been introduced. There it seems an implied contract was raised, if not on the ground of *beneficial* service performed for the defendant, at least on the ground of *labour* performed in his service by the plaintiff, for which none other but he was entitled to recover. But this is a very different case; for here by the capture

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other rights have intervened and interfere with those of the master; and pending the discussion of those rights in a court, which has not only competent but exclusive jurisdiction over the question of prize, and which has power to deal with the freight as it thinks proper, this action was brought, which assumes the right to the freight to be in the plaintiff. It is enough therefore to say that the action is at least premature.

[323] Pending the suit in the Admiralty no person had a right to restore the passenger's luggage, which in strictness is as much subject to the question of prize as the ship and cargo: and the mere restoration of it *de facto* by an unauthorized hand cannot affect the right of the captors pending the suit. This distinguishes the case materially from that of *Luke* v. *Lyde:* but when a case like that shall occur, in deference to the authority of those who decided it, we should most likely adopt the same rule.

GROSE J.—It is clear there can be no recovery on any express contract stated; for there has been no performance of it. Then can we imply a contract to pay the money from any thing which is stated? Now considering the case in the light to which our attention has for some time been confined, it is impossible to state a ground for the plaintiff's recovery. For by the facts stated it appears that the ship is now libelled as prize in the Court of Admiralty, and for aught appears is in a course of condemnation: and if that Court decreed that the earnings of the ship belonged to another, how could this plaintiff be entitled to recover them? The action therefore was prematurely brought.

LAWRENCE J.—This action was at any rate brought too soon pending the proceedings in the Admiralty Court, where it is admitted that freight may be directed to be paid to the captors when goods are restored to the claimants: and if passage money stand on the same footing, the plaintiff, whose ship has been taken as prize, and who in case of condemnation may lose all claim to freight for goods, cannot now claim a compensation for the defendant's passage.

[324] LE BLANC J.—It is not necessary to give any opinion upon the case of *Luke* v. *Lyde;* for as this case now stands, the plaintiff cannot at any rate recover in this action. Supposing this were a case for the freight of goods only, which have been stopped in the course of their voyage and carried to another place, then

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then by assimilating it to the case of *Luke* v. *Lyde* the plaintiff contends that he is entitled to recover *pro ratâ* for the freight, not on the ground of the original contract, but by reference to the marine law, on which the Courts have shaped a course to recover for a benefit to the defendant which made part of the original contract. That was the footing on which the case of *Luke* v. *Lyde* was put; that though the master could not recover on the original contract which was not performed; yet that he might recover upon an implied *assumpsit* for a benefit already conferred on the defendant; which in that case was implied from the acceptance of the goods by the defendant at the port into which they were carried. But here no benefit can be implied to the defendant from the plaintiff. For the plaintiff is a prisoner of war, and incapable of performing his contract; and every thing connected with his ship and the benefit to be derived from it is transferred to another by the capture, or at least it may be so, which cannot be known pending the suit in the Court of Admiralty. Therefore till restitution be awarded I cannot conceive how any cause of action can arise to the plaintiff. If the ship had been condemned there it is clear that the plaintiff could not have recovered.

It was thereupon agreed that a

Nonsuit should be entered.

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Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the *tolls*, and the other not; though the voyage happen to finish on the unexempted line where the tolls become due and are received, yet the Canal Company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the *tolls* should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls* quà *tolls* altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before.

THE defendants appealed to the quarter sessions at *Preston* in *Lancashire* against a rate made in *December* last for the relief of the poor of the township of *Habergham Eaves* in that county, whereby they were rated for a warehouse and land occupied with it 9*s.* 6*d.* and for the *rates, tolls, and duties*

arising

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arising from the navigation to the said Company within the said township of *Habergham Eaves*, 40*l.*, being a rate made upon the sum of 1352*l.* 12*s.* 4*d.* On hearing the appeal the Sessions confirmed the rate, subject to the opinion of this Court as to the last charge, to which the appellants confined their objections, on a case stating in substance,

That the rate was duly allowed and published. That by stat. 10 *Geo.* 3. the incorporated Company of Proprietors of the Canal Navigation from *Leeds* to *Liverpool* were enabled to make a navigable canal from *Leeds* to *Liverpool*, and to take *a certain sum per mile* for the tonnage and wharfage of goods navigated thereon, and so in proportion for any greater or less quantity than a ton; which rates were to be paid to such persons at such places near the canal, in such manner, and under such regulations, as the Company should appoint. It was also enacted "that the said *tolls, rates and duties* should "at all times thereafter *be exempt from the payment of any* [326] "*taxes, rates, assessments, or impositions whatsoever*, any law "or statute to the contrary notwithstanding, *other than such* "*taxes, rates, and assessments as the land which should be used* "*for the purpose of the said navigation would have been subject* "*to if this act had not been made.*"

By another act of the 23 *Geo.* 3. incorporating the said canal navigation with the river *Douglas* navigation, which had been made navigable under the authority of an act passed in the 6 *Geo.* 1., and then purchased of the proprietors of the said river navigation by the *Leeds* and *Liverpool* Canal Company, it is enacted, "that the several navigations, cuts, or "canals, and every part thereof, and the said tolls, rates, and "duties to be taken upon the same, or any part thereof, under "the authority of this or either of the aforesaid acts, should "at all times be *exempt from the payment of any taxes, rates,* "*assessments, or impositions whatsoever, other than and except* "*such taxes, rates, and assessments as the land which had been* "*or should be used for the purposes of such navigations, cuts,* "*or canals were or would have been subject to if this act had* "*not been made:* and that such navigations, cuts, or canals, "should not be subject or liable to the payment of any taxes, "rates, or assessments, save and except such taxes, rates, "and assessments as had been and then were usually charged "and assessed thereon, any law or statute to the contrary not-

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"withstanding. But nothing in this clause to exempt any "quay, wharf, warehouse, or other house, from the payment "of any taxes, rates, or assessments. And it is enacted, that "the clause in the said act 10 *Geo.* 3. exempting the tolls, rates, "and duties arising from the said canal from assessments should "be repealed." The said canal navigation was completed under these acts and another act of the 30 *Geo.* 3. from *Leeds* to *Wanless Banks*, a distance of 47 miles 6 furlongs: when it being found desirable to make a deviation in the then parliamentary line, by another act of the 34 *Geo.* 3. the Company were empowered to make a deviation and cut from the former line from *Wanless Banks* through several townships therein mentioned, and amongst others *Habergham Eaves*, to communicate with the *Douglas* navigation at *Wigan*, and the Company were authorized to take for tonnage and wharfage of goods, &c. navigated thereon, a *certain sum per mile*, and so in proportion for a greater or less quantity than a ton; to be paid to such persons, at such places, &c. (as before) as the Company should direct. And that every fraction of a mile should, in ascertaining the rates, be deemed a whole mile. And it incorporates all clauses, powers, authorities, provisoes, and exemptions, &c. contained in the acts of the 10th *Geo.* 3., not repealed by the acts of the 23d and 30th *Geo.* 3. or by this act; and also incorporates all clauses, &c. in the act of the 23d *Geo.* 3. relating to the *Leeds* and *Liverpool* canal not repealed by the act of the 30 *G.* 3. or by this act; and also all clauses, exemptions, &c. in the act of the 30 *G.* 3. relating to the *Leeds* and *Liverpool* canal, not repealed by this act, *except* so much of the said acts as enables the said Company to deviate the line of the said canal from *Leeds* to *Liverpool*, *and to exempt the tolls, rates, and duties therefrom arising from the payment of any taxes, rates, assessments, or impositions whatsoever*, &c. Under the powers of the stat. 34 *G.* 3. so much of the said canal navigation has been completed in the varied line of deviation as extends from *Wanless Banks* aforesaid through a number of townships (and amongst others *Habergham Eaves*) to a place called *Henfield Common*, in the township of *Clayton le Moors*, being a distance of 14 miles and 7 furlongs. In the township of *Habergham Eaves* the Company have erected a warehouse, where goods from all parts of the canal are landed, having passed as well upon the canal made under the authority of the acts of the 10th, the 23d, and 30th *G.* 3. as the deviation made

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made under the authority of the stat. 34 *G.* 3.; and the tonnage of such goods so landed there amounted, from the 1st of *Jan.* to the 31st of *Dec.* 1803, to 1352*l.* 12*s.* 4*d.* of which 240*l.* 17*s.* 4*d.* is the proportion arising from the navigation of that part of the new line of canal made by virtue of the act of the 34 *G.* 3. That part of the canal which lies in *Habergham Eaves* has cost in making and completing 46,548*l.* 19*s.* 0*d.*; and the average annual expenditure of the Company for repairs, damages, taxes, wages, and expenses relating to that part of the canal made by virtue of the stat. 34 *G.* 3. and the part communicating therewith at *Wanless Banks*, made under the authority of the said acts of the 10th, 23d, and 30th *G.* 3., and the proportion of the average annual expenditure of the Company for the committees and salaries and expenses of the concern at large, belonging to the above mentioned parts of the canal, amounting to 362*l.*: but no deduction was made in respect of such last mentioned sum from the amount of the tolls, rates, and duties upon which the rate was made. Notes or bills of lading are delivered by the masters, &c. at various places upon the line of the canal appointed by the Company, one of which is *Habergham Eaves*; and such notes are transmitted by the warehouse-keeper there to the chief office of the Company in *Bradford*, where a particular of each person's tonnage and rates is made out, and which is afterwards collected by the Company's agents from such persons at their places of abode, wherever they may be, or is paid at the chief office of
[329] the Company at *Bradford*; but no part of the canal passes through the township of *Bradford*. The Company are not carriers upon the canal, nor the owners of any vessels employed thereon. The Sessions being of opinion that the appellants were rateable for the relief of the poor of *Habergham Eaves* for all the tolls arising upon goods discharged within *Habergham Eaves*, although carried as well upon the canal made by virtue of the acts of the 10th, 23d, and 30th *G.* 3. in the original line, as upon the deviation made under the authority of the stat. 34 *G.* 3., and that, without making any deduction from the amount thereof in respect of the sum of 360*l.* for repairs, wages, and other outgoings, confirmed the rate.

Scarlett and *Becket*, in support of the order of Sessions, contended, first, that the *tolls* were not exempted from being rated; but only the *quantum* of the rate was limited by the clause of exemption

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exemption to what the *land* used for the navigation would otherwise have been subject to. And they referred to *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*a*), to shew that a clause of exemption of this kind did not limit the quantum of the rate to what it was at the time of passing the act; but that the quantum would vary with the improvement of the land. [*Lawrence* J.—The meaning of the clause of exemption clearly is that the *land*, quà *land*, shall not be exempted, but that the *tolls* shall be exempted.] Then, 2dly, The exemption does not apply to any part of the tolls which arise within the new and unexempted line of canal. It has been determined that tolls are only rateable where they become due; and they do not become due, nor have any existence *as tolls*, until the completion of the voyage for which the goods are contracted to be carried. Till then the subject-matter of the exemption cannot be said to exist. These tolls, therefore, not arising and becoming due till the goods arrived at a place beyond the line of exemption, the exemption does not attach upon them. And they cited *Rex* v. *Aire and Calder Navigation* (*b*), and *Rex* v. *Page* (*c*), and *Rex* v. *The Staffordshire and Worcester Canal Navigation* (*d*), as in point; particularly the latter, where the Company were entitled to take so much per ton *per mile*, as in this case, and where they did *in fact* collect the tolls at intermediate parishes in the course of the voyage, and yet it was holden that the tolls were only rateable in the several parishes *where they became due*, which was *where the respective voyages finished*.

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Topping and *Wood*, *contrà*, were stopped by the Court.

Lord ELLENBOROUGH, C. J.—I agree with the principle of those cases, that the toll is only due and can only be taxable, if at all, at the place where the voyage ends for which the goods were contracted to be carried, and that it is not to be portioned out amongst the several parishes through which the goods may intermediately pass: but where the legislature have expressly exempted a particular line of navigation from being rateable in respect of the tolls, along which line the goods have been carried in respect of which in part the toll is calculated, there is nothing which should prevent us from giving effect to this exemption by saying that where the

(*a*) 2 Term Rep. 660—4.
(*b*) Ibid.
(*c*) 4 Term Rep. 543.
(*d*) 8 Term Rep. 340.

toll

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toll is received, it may be taxed for that proportion of it accruing along the line which is taxable, but that it shall *not be taxed for that proportion which accrued along the line which is exempted. Now here a rate has been made taxing the tolls altogether, without distinguishing between the different parts which are exempted or not exempted: that cannot be supported. We cannot apportion it; those who make the rate should apportion it. The rate, as it is, cannot be supported. The word *exempt* may be taken to mean *precluded from being chargeable.* The meaning of the clause of exemption was, that the land or space occupied by the canal should be liable to be taxed as it was before, that is, as *the land* was before: but the *tolls* were not rated before, for they had no existence; and therefore are exempted.

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GROSE J.—In order to tell whether the tolls are rateable or not, it must be seen from whence they arose. One line of the navigation is exempted from being rated in respect of its tolls, and another not. Then such proportion of the tolls as have accrued along the exempted line is not liable to be rated, let it be due or received where it will; otherwise the exemption which the Legislature have holden out to the company would be a mere trick, and may become nugatory.

LAWRENCE J.—As to the exemption itself, the object of the clause was to take care that when the Company were engaging in a hazardous undertaking which was considered to be beneficial to the public, they should not be liable to any other taxes than those which the land they made use of in their undertaking was before liable to. Now the *land* was not before liable to be rated for *toll;* and therefore the proprietors shall not be liable now to a rate *on tolls* in respect of it when converted into a canal. But this does not go to exempt the land from paying what it did before. Upon the other point I fully accede to what has been said. The toll must be apportioned *pro ratâ itineris* for so much of it as accrued on the unexempted line, and that proportion only is liable to be rated where it becomes due.

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LE BLANC J.—I am of the same opinion. We cannot adopt any other construction without totally defeating the object of the Legislature in giving the exemption. And this may be done without difficulty. The land will be rated in the same manner as it was before the act. The tolls will be rated where they become

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become due; but in calculating the *quantum* of toll which is the subject of the rate, allowance must be made for so much of the toll as accrued in respect of the line exempted. For instance, if two-thirds of the line are exempted, then tolls which have come along the whole line to *Habergham Eaves*, will only be liable to be rated in the proportion of one third. So if the goods have been carried 15 miles, 5 miles of which are not exempt, they must be rated only for those 5 miles; and so in proportion. It will be easy therefore in all cases to calculate the proportion of tolls which are rateable, according to the number of miles which the goods have been carried along the exempted and unexempted lines of the canal.

Rate on the tolls quashed.

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The KING *against* The Inhabitants of DENBIGH.

Wednesday, *June* 13th.

TWO justices removed *Robert Hughes*, his wife and children, by name, from the parish of *Denbigh* to the parish of *Heullan*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case.

The paupers being legally settled in *Denbigh*, on the 14th of *May* 1802, *Robert Hughes* agreed with the toll-taker in *Heullan* to go and receive the tolls in the turnpike house in *Heullan*, as the servant and for the use of the toll-taker; for which he (the pauper) was to be paid 3*s*. 6*d*. per week. The pauper went there accordingly; and in about a fortnight afterwards, while he was at the turnpike-gate house, took from one *Evans* a field in *Heullan* at the rent of 12*l*. a-year, and gave him 6*d*. earnest. The pauper continued in possession of that field for two or three months, and resided day and night during that time with one of his children at the turnpike-gate house. In the course of two or three months after the pauper had taken the said field, *Evans* coming by the turnpike-gate told the pauper that he was uneasy on account of the rent, and asked the pauper to give him some security, to which the pauper answered that he could not give him any security, but had no objection to give up the field, and he did then give it up accordingly. The pauper took the field for the purpose of getting hay and grass to keep his mare, but he never reaped any

One may gain a settlement by renting a tenement of above 10*l*. a-year in the parish where he *resided*, though such residence were *in a turnpike-house*, as servant to the collector for whom he received the tolls; for the general turnpike Act 13 *Geo*. 3. *c*. 84. *s*. 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement, *i. e.* by such taking of the toll-house or renting the tolls.

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any benefit from the field, nor did he turn his mare into it because the hay was growing. The pauper continued at the turnpike-gate house for 12 months after he had given up the field, receiving for part of that time 4*s.* 6*d.* and latterly 5*s.* per week from the taker of the turnpike-gate as aforesaid. The pauper's wife and three of his children lived during that time in a house in *Denbigh*, for which the pauper paid 3*l.* 3*s.* per annum: but they sometimes slept with him at the turnpike. The turnpike-gate house is the property of the commissioners of the turnpike-road, but is always set with the tolls to the toll-taker, and was so set while the pauper lived there and received the tolls there for such toll-taker as aforesaid.

The Sessions was of opinion that the pauper had *bonâ fide* holden lands to the value of 10*l.* a-year in the parish of *Heullan* for above 40 days, and lived during such holding at the said turnpike-gate house, as before stated; but reversed the order of removal in this case on the ground of the act of 13 *Geo.* 3. *c.* 84. *s.* 56. which enacts, "That no gate-keeper of "any turnpike-road, or person renting the tolls thereof, "and residing in any toll-house belonging to the said trust, "shall be removable from such toll-house, &c. unless he shall "become actually chargeable to the parish, &c. in which such "toll-house is situate. And that no such gate-keeper, or per- "son renting such tolls, and residing in such toll-house, as "aforesaid, shall *thereby* gain a settlement in any parish or "place whatsoever; and that no tolls to be taken at any gate "erected or to be erected by the trustees of any turnpike-road, "nor any toll-house erected or to be erected for the purpose "of collecting the same, nor any person in respect of such "tolls or toll-house, shall be rated or assessed towards the "payment of any poor's rate or any other public or parochial "levy whatsoever."

Const and *Scarlett*, in support of the order of Sessions, ob-

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served that the Legislature, by providing that no *gate-keeper* or renter of tolls *residing in any toll-house* should *thereby* gain a settlement, meant not only that the *renting of the tolls* should not gain him a settlement, but that the *residence in the toll-house* should not be contributable to a settlement: now here it would be contributable to a settlement by giving him a residence in the parish, if that would suffice.

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The Court however thought the case too clear for further argument; and Lord *Ellenborough*, C. J. said, the act only says that a gate-keeper shall not *thereby* gain a settlement, that is, by keeping the gate or *renting the tolls* and residing in the toll-house. But that does not prevent him from gaining a settlement *aliundè* in the same parish where the gate-house is situated. This man did not gain a settlement by renting the tolls or by keeping the gate, but by renting a close in the parish worth above 10*l.* a-year for more than 40 days, and residing in the same parish. He did not even rent the rolls: he was no more than a mere servant to collect the tolls for another.

Per Curiam. Order of Sessions quashed.

Erskine, *Topping*, and *Benyon*, were to have argued against the order of Sessions.

The KING *against* The Inhabitants of WAKEFIELD.

Wednesday, June 13th.

The Sessions having decided in favour [336] of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth, and the only evidence to oppose this being that of the pauper's own *birth* in *B.*, this Court confirmed the order of Sessions on a case reserved.

TWO justices removed *Mary the wife of George Fielding*, and *her five children*, by name, from the township of *Alverthorpe*, *with Thornes* to the township of *Wakefield*, both townships being within the parish of *Wakefield*, in the county of *York*, and maintaining their own poor separately. On appeal the Sessions confirmed the order of removal, subject to the opinion of this Court on the following case. The respondents in support of the order of removal proved that the appellants had at various times during forty years past relieved *G. Fielding*, the father of *G. Fielding*, the husband of the pauper *Mary*, and different members of his family, some by being taken into the appellant's workhouse and some in other ways during the time that they resided in the township of *Stanley*, and had provided coffins for and defrayed the expenses of the funerals of some of the family. It was also proved that *G. Fielding*, who is now 38 years old, the husband of the pauper *Mary*, and father of the other paupers, was born and has always lived in the township of *Alverthorpe with Thornes*. The above was the only evidence given in support of or against the order of removal.

Gibbs and *Wood* in support of the order of Sessions. The giving relief to a pauper's family, while resident *out of the township* so relieving, is good evidence of a settlement there,

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especially for so long a time as 40 years. This shews that the relief was not given to them as *casual poor;* for that the paupers could only have been entitled to in the parish in which they lived at the time. Then admitting that the birth of *G. Fielding*, the husband of the pauper *Mary*, in *Alverthorpe* was, if it had stood alone, *primâ facie* evidence of a settlement there; yet it was the province of the Sessions to decide upon the weight of evidence, and their conclusion must decide the settlement.

[337] *Topping* and *Lambe*, contrà. The principal question was as to the settlement of *G. Fielding* the husband of the pauper *Mary*, and the father of the other paupers. A derivative settlement is only to be resorted to upon failure of any evidence of the party's own settlement. Here the place of birth was *primâ facie* evidence of the husband's settlement, and could not be gotten rid of by mere presumptive evidence of his father's settlement at an antecedent time. If indeed the husband himself had been proved to have received relief while residing out of his township, it would have rebutted the presumption of settlement from the place of his birth; though the fact of receiving relief from the parish where a party resides is not even *primâ facie* evidence of settlement, according to *R.* v. *Chadderton* (*a*). It is not stated here when the relief was given to the father's family; it should have appeared at least that it was given before the pauper's husband was an adult, and was emancipated from his father's family.

Lord ELLENBOROUGH C. J.—The relief was given by the township of *Wakefield* to the *father* of the pauper's husband and to different members of *his* family, which must mean the family of the pauper's husband's father: and this while they were residing in another township. This was *evidence* of the father of the pauper's husband's settlement in *Wakefield* at that time: and this is stated to have been done at different times during the last 40 years; the particular periods are not material; for no other settlement has been established since: and all

[338] things are presumed to continue in the same state unless something be shewn to the contrary. Then the only evidence set up against this is that of the birth of the pauper's husband in *Alverthorpe*, which is no more than *primâ facie* evidence of a settlement there. Then if there were evidence on both sides, the Sessions were to decide on it.

(*a*) 2 East 27.

GROSE,

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The KING *against* The Inhabitants of WAKEFIELD.

GROSE, J.—There was *primâ facie* evidence on both sides, on the weight of which the Sessions were to determine.

LAWRENCE, J.—I am of the same opinion. The father was relieved 40 years ago by the township of *Wakefield*, which must have been before the birth of the pauper's husband who is now only 38 years old.

LE BLANC, J.—The least that can be said is, that there was evidence on both sides: but the place of birth is the weakest evidence of settlement.

Orders confirmed.

WALTERS *against* FRYTHALL.

Friday, June 15th,

An application to make the plaintiff, who resided abroad, give security for the costs refused after notice of trial given, as the defendant [339] might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs incurred.

A. MOORE moved again for a rule (which had been mentioned the day before) calling on the plaintiff to shew cause why he should not give security for the costs in case he was nonsuited, or the defendant obtained a verdict; on the ground that the plaintiff was living in *Jersey*, and that the action was brought at the instigation of his wife's friends, (she living apart from her husband,) without his knowledge or consent. In this case issue was joined and notice of trial given. And he referred to *Barker* v. *Hargreaves* (*a*), where a similar rule was granted after notice of trial given, though objection was taken that the application should have been made sooner.

The Court however said that the better rule, and such as was most consonant to the practice, was that the application should be made as soon as the defendant reasonably could do it after knowledge of the fact of the plaintiff's residence abroad; that otherwise if he waited so long till after notice of trial given and costs incurred, the granting of such a rule would be in effect to compel the plaintiff's attorney to give the security required. Therefore, because the defendant might have come earlier,

Rule refused.

(*a*) 6 Term Rep. 597.

1804.

The KING *against* PATCHETT.

Saturday, June 16th.

By the Vagrant Act, 17 *G.* 2. *c.* 5. after a rogue and vagabond has been committed to the Sessions, and they, adjudging him to be *a rogue and vagabond* order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service, pursuant to the statutes*, &c. held that the whole forms one sentence, and such order being defective in the latter part for want of adjudicating whether the party were to serve his Majesty *by sea or land* as discriminated in the statute, the conviction shall be quashed; though the former part of the sentence, adjudging the *rogue and vagabond* to be *whipped*, be valid.

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A Conviction of the defendant under the act of the 39 & 40 *Geo.* 3. *c.* 50. for extending the provisions of the Vagrant Act 17 *Geo.* 2. *c.* 5. being returned by *certiorari* into this Court; the information stated that one *J. G.* informed *P. S.* clerk, one of the justices of the peace for the county of *Leicester*, that the defendant and another person were found in a plantation in the lordship of *Prestwould* in the said county in the night, &c. having nets, engines, and other instruments for the purpose and with the intent to destroy game, &c. contrary to the form of the statute. Then after stating the summons of the defendant, his appearance and pleading not guilty, and the proof of the offence by one witness, the record proceeded, "and thereupon the defendant on, &c. before the "justice, &c. on oath, &c. is *convicted, and he is hereby* "*deemed to be a rogue and vagabond* within the meaning of "the statute 39 & 40 *Geo.* 3. In witness, &c." There was also returned an order of the Quarter Sessions of the same county, holden the 10th of *January*, 44 *Geo.* 3., stating that the defendant was brought before that Court in the custody of the keeper of the house of correction, when it appeared to the Court that the defendant was charged, &c. (as before mentioned). And stating further, that it appeared to the said Court by the warrant of commitment under the hand and seal of the said *P. S.* clerk, so being such justice as aforesaid, dated 1st *November* 1803, that the defendant was by the said justice committed as a rogue and vagabond to the keeper of the said house of correction, &c. there to remain until the next Sessions, &c. or until he should be discharged by due course of law: whereupon the defendant being under such commitment before this court, being the next, &c. the said Court doth proceed to examine the circumstances of the case. (Then after stating the examination of the witness proving the offence, and that the defendant when called on made no defence) The Court therefore considered and adjudged that the defendant was and is *a rogue and vagabond*, and that he should be detained and kept in the house of correction, &c. to hard labour for six months, and that during such imprisonment

imprisonment he should be once publicly whipped, &c. and at the expiration of such imprisonment the defendant, being above the age of 12 years, was further ordered to be sent and *employed *in his Majesty's service pursuant to* the statutes in such case made.

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Balguy objected to the conviction; 1st, *the Sessions* have adjudged the defendant to be *a rogue and vagabond*, and yet in addition to the imprisonment have ordered him to be *whipped;* whereas by the Vagrant Act 17 *Geo. 2. c. 5. the Sessions* have only authority to order one whom they adjudge to be *an incorrigible rogue* to be *whipped.* That act describes three classes of offenders: 1. Idle and disorderly persons; 2. Rogues and vagabonds; 3. Incorrigible rogues. Over the two first classes a single magistrate has jurisdiction to act, and may punish them: but cognizance of the latter is referred to the Sessions. In regard to *rogues and vagabonds*, a single magistrate may by s. 7. either order them to be publicly whipped and passed to their parish, or to be sent to the house of correction until the next Sessions, or for any less time. If committed to the Sessions, and that court "shall, "on examination of the circumstances of the case, adjudge "such person a *rogue and vagabond*, or *an incorrigible rogue;* "they may, if they think convenient, order *such rogue or va-* "*gabond* to be kept in the house of correction to hard labour "for any further time not exceeding six months." (Here ends the further punishment of *a rogue and vagabond.*) "And "*such incorrigible rogue* for any further time not exceeding "two years nor less than six months from the time of making "such order of Sessions; and during the time of *such per-* "*son's confinement*" (this must relate to the last antecedent, *viz.* such *incorrigible rogue*'s confinement) "to be corrected "*by whipping* in such manner, time, and place, &c. as they "shall think fit. And *such person* may afterwards be sent "away by such pass, *mutatis mutandis*, as aforesaid. And if [342] "*such person* being a male is above the age of 12 years, the "Sessions may at any time before he is discharged from the "house of correction send him to be employed in his Majes- "ty's service, either *by sea or land* if they shall see proper."

The Court suggested a difficulty in adopting this construction; for if the words "*such person*" which occur in the latter part of the clause are to be referred to an *incorrigible rogue*

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rogue only, there will be no provision made for the passing of a *rogue and vagabond* by the Sessions after his imprisonment, which the evident intention and policy of the act requires, in order to prevent vagrancy. Upon this ground the Court inclined to think that *such person* referred as well to a *rogue and vagabond* as to an *incorrigible rogue*, and consequently that the Sessions had power to order both descriptions of offenders to be *whipped* and to be *passed* after the expiration of their imprisonment.

Balguy said in answer, that the adjudication of one to be an *incorrigible rogue* of course comprehended him under the description of rogue and vagabond, being a higher description of offender of the same sort; and therefore any single magistrate out of Sessions had the power of passing him to his parish after the expiration of his imprisonment. [Lord *Ellenborough* C. J.—That is not so clear; for the power of a magistrate out of Sessions to pass a rogue and vagabond seems connected with the punishment of whipping or confinement which has been inflicted under *his own order;* for the 7th section says, "And *after such whipping or confine-*
"*ment*, *such* justice or justices may and are hereby empow-
[343] "ered, if they think fit, by a pass under hand and seal in the "manner and form hereafter directed, to cause *such persons* "to be conveyed," &c. It does not appear to refer to any independent order to pass.] Secondly, the Sessions have only adjudged the defendant *to be employed in his Majesty's service* after the expiration of his imprisonment, and they have not discriminated whether such service is to be *by sea* or *land*, as mentioned in the act. This is part of the adjudication, and ought to be done at the same Sessions by which the rest of the sentence is pronounced. But even if this part of the punishment may be adjudged at any subsequent Sessions during the imprisonment, still it can only be done once, and here it has been already done, but done defectively; and therefore the error cannot be rectified at any future Sessions.

Vaughan Serjt., *contrà*, (being called upon to answer this last objection) relied on the words of the statute, "that the "justices at their Sessions may and are hereby empowered "*at any time before he is discharged from the house of cor-*
"*rection* to send him to be employed in his Majesty's ser-
"vice, either by sea or land, if they shall judge proper."

This

This was a discretionary power given and meant to be exercised or not according to circumstances, such as good behaviour during confinement, probability of amendment, or the like. But if it were not so, here is a sufficient adjudication of the Sessions that *he should be employed in his Majesty's service pursuant to the statutes*, that is, either by sea or land, as the crown or its officers should think proper, or the subject be best adapted for. There is no necessity for limiting the discretion or convenience of the crown in this respect. At any rate, supposing this part of the adjudication defective, it will not vitiate the rest which is good.

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Lord ELLENBOROUGH, C. J.—The judgment is entire, and cannot be split. A particular jurisdiction is given to the Sessions; whenever they begin to act upon it and to make their order, they must make an effective order. *Quâcunque viâ datâ* this is wrong, whether this direction to employ the offender in his Majesty's service is to be made part of the sentence or not: if it were not to be part of the sentence, the Sessions have done wrong in making it so; if it were, they have not done it effectually, by not having ascertained in which service, whether at sea or by land, the defendant was to be employed. The statute certainly meant that the justices should exercise their discretion in this respect, as well as in determining whether he should he employed at all or not in the service. Upon this ground we think the conviction cannot be sustained. As to the other point, we do not think the objection well founded: for upon reading the clause we think that the words "*such person*" refer to "*any offender* against the act" described at the beginning of the clause, who shall be committed to the Sessions. That is evidently the meaning in the first place where those words occur in the clause; where it says that when "*any offender* against this act shall be committed, &c. "to the Sessions, and the justices at such Sessions shall, on "examination, &c. adjudge *such person* a rogue or vagabond, "or an incorrigible rogue," &c.

On the second objection therefore

Per Curiam, Conviction quashed.

1804.

Thursday, June 7th.

GOULD *against* GAPPER, Clerk (*a*).

Where the Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below.

IN prohibition the plaintiff declared, that whereas the trial of the bounds of parishes and of prescriptions and customs has immemorially been by the common law, and not by the ecclesiastical law; and that during the year 1797 and the two following years the plaintiff had occupied lands which were lately parts of a tract of waste land called *King's Sedgemoor* in the county of *Somerset*, and which had been lately inclosed, allotted and divided under an act of the 31 *G.* 3.; and which lands so occupied by the plaintiff until the allotting and dividing, &c. were not within the parish of *High Ham* in the said county, or the titheable places thereof, but was extra-parochial. And that there is a saving in that act of the rights of the crown. And that within the parish of *High Ham* there has been immemorially a *modus* of 2*d.* an acre for all meadow land, in lieu of tithe of hay and agistment, and of 1½*d.* for every milch cow depastured in such land, in lieu of tithe of milk and agistment, and of 1*d.* for every heifer depastured on the same, in lieu of agistment tithe; yet the defendant, rector of the parish of *High Ham*, to aggrieve the plaintiff, and disinherit the crown, and to bring the cognizance of a plea which belongs to the crown to another sort of trial in the Consistorial Court of the Archdeaconry of *Wells*, exhibited his libel in the said court against the plaintiff, alleging that in the year 1797, and the two following years, the defendant was rector of *High Ham* and the proprietor of the tithes, and that the plaintiff during that time occupied the said meadow lands in the said
[346] parish, and mowed and received the hay therefrom, and depastured unprofitable cattle there, and ploughed the said other lands there and sowed them with corn, for which tithe was due to the defendant. That the plaintiff pleaded in his defence to the libel the matters above suggested, and offered to prove the same by evidence. That the defendant by way of personal answer denied that the said lands were extra-parochial, because the proprietors of lands in the adjoining parishes, of which *High Ham* was one, claimed rights of common on *King's*

(*a*) Vide the report of this case on the motion for the prohibition. 3 East, 472.

Sedgemoor

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Sedgemoor, as appurtenant to their respective tenements, and that *King's Sedgemoor* was parcel of the said several parishes adjoining, though the precise bounds of each were not certainly known. And further the defendant alleged, that *King's Sedgemoor* was not mentioned in the said act as extra-parochial, but that the same was therein stated to be in, near, or adjoining to the several parishes mentioned, of which *High Ham* was one; and that the commissioners under the said act allotted *King's Sedgemoor* amongst the several parishes mentioned, which had rights of common thereon; and that they allotted part of *King's Sedgemoor*, adjoining to the old inclosures of *High Ham*, to the said parish for the rights of common appurtenant to certain tenements in *High Ham*, and other part of *King's Sedgemoor* they allotted to *Low Ham*, alleged to be a hamlet of *High Ham*. That the defendant by his said answer further alleged, that by an act of the 37 *Geo.* 3. the parcels of meadow and land in question in the occupation of the plaintiff were allotted in respect of some of the rights of common appurtenant to some of the tenements in the parish of *High Ham* and hamlet of *Low Ham*, and were parcels of the allotments made under the last-mentioned acts; and that the same were within the bounds of the parish of *High Ham*. And the defendant further alleged, that by the said act secondly above- [347] mentioned it was enacted, that all the lands which should be allotted by virtue thereof should be held under and subject to the same charges, tenures, customs, suits, services, and incumbrances as the tenements in respect of which such allotments were made would have been subject to if such act had not passed. And the defendant further submitted by his answer, that under the stat. 2 & 3 *Ed.* 6. the rector of *High Ham* was entitled to the tithe of increase of cattle depastured in the said tract of pasture land prior to the passing of the first mentioned act; and that the defendant denied the *modus*. Yet notwithstanding the matters alleged, the defendant had caused the plaintiff to be convicted of the premises, and the plaintiff had been condemned by the spiritual court in a large sum to be paid to the defendant in lieu of tithe, &c.; and the defendant still prosecutes his suit in the Ecclesiastical Court, &c. To this the defendant demurred generally, and the plaintiff joined in demurrer.

Dampier, in support of the demurrer, contended, 1st, that it

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it was too late to call for a prohibition *after* sentence on the ground that the Ecclesiastical Court had tried the boundary of the parish, or the existence of a *modus*. For though these are questions properly triable by a jury, and the plaintiff might before sentence have come here and stopped the trial in the Ecclesiastical Court, yet as that court has *jurisdiction* of such questions incidentally, (for the question of parochial boundary may arise in every cause of subtraction of tithe), and the objection goes only to the defect of *trial*, the plaintiff, after submitting to the trial there, and taking his chance of a decision in his favour, cannot object to it. *Full* v. *Hutchins* (*a*), *Argyle* v. *Hunt* (*b*), *Bannister* v. *Hunt* (*c*), *Blaquiere* v. *Hawkins* (*d*), *Symes* v. *Symes* (*e*), *Buggin* v. *Bennet* (*f*), *Offley* v. *Whitehall* (*g*), *and* 2 *R. A.* 209. *pl.* 2. All the cases shew, that where the Ecclesiastical Court has *original* jurisdiction of the cause (as here it must be admitted to have had), and nothing appears upon the face of the *libel* to oust it, prohibition does not lie after sentence merely for defect of trial. This distinguishes the present case from *Vanacre* v. *Spleen* (*h*), where the objection appeared on the face of the libel; as it also did in *Paxton* v. *Knight* (*i*), where the party had libelled upon a prescription over which the Ecclesiastical Court had no jurisdiction. The authority of that case, however, is opposed to the case in 1 *Ld. Ray.* 435. And in *Dutens* v. *Robson* (*k*), though the party libelled upon a *modus*, yet that being admitted, a prohibition was denied. And by *Argyle* v. *Hunt* (*l*), the party applying for a prohibition shall not, after sentence at least, allege matter dehors the libel to shew that the court below had not jurisdiction. But, secondly, supposing prohibition will in any case lie after sentence in a matter originally within the jurisdiction of the Ecclesiastical Court, the question will be, whether the construction of acts of Parliament belong in all cases to the temporal courts exclusively; so that if the Ecclesiastical or Admiralty Courts construe them otherwise than the temporal courts would have done, prohibition shall go even after sentence; or whether those courts have not jurisdiction to construe acts incidentally coming under their cognizance in matters within their jurisdiction, whose decision thereon, however er-

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(*a*) Cowp. 422. (*b*) 1 Stra. 187. (*c*) 10 Mod. 12.
(*d*) Dougl. 378. octavo edition. (*e*) 2 Burr. 813.
(*f*) 4 Burr. 2035. (*g*) Bunb. 17. (*h*) Carth. 33.
(*i*) 1 Burr. 314. (*k*) 1 H. Blac. 100. (*l*) 1 Stra. 187.

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roneous, can only be rectified on appeal. It may be admitted, that wherever the rule of the ecclesiastical law is directly different from that of the common law, and must necessarily lead to a different result, the latter is entitled to the preference; and prohibition may go even after sentence; as where the Ecclesiastical Court requires proof by two witnesses of matters proveable by one at common law: though prohibitions even in this case have been denied (*a*). Or where the question arises on the meaning of the words "*next of kin*," 2 *Rol. Abr.* 303. *pl.* 28.: or on the extent of the word *month*, in matters not spiritual. In these cases the construction of the respective courts must necessarily be different. So prohibition will go at any time if an inferior court misconstrue an act regulating its own jurisdiction. 12 *Rep.* 42. And this was the ground of the doctrine laid down in *Brymer* v. *Atkins* (*b*). There the prize Court had put a construction on the stat. 16 *Geo. 3. c. 5. s.* 14. which the Court of *C. B.* considered that the Prize Court had authority to do, and did not prohibit it. And yet if the construction put by inferior courts on acts of Parliament be not binding any further than as it coincides with the judgment of the courts at *Westminster*, it is in effect to deny their jurisdiction; for an erroneous judgment upon a matter within the jurisdiction of a court can only be rectified on appeal. But if the matter were *coram non judice*, the Prize Court could have had no authority to put any construction on the statute, and it must have been prohibited in the first instance. The Spiritual Court may have jurisdiction of matters coming incidentally in question there where it would not have had original jurisdiction over such matters. *Reg.* 57. *b.* 58. So it may judge of a statute. 2 *Rol. Abr.* 307. *pl.* 16. *Pen*'s case, *M.* 8 *Jac. ib.* 308. *pl.* 22. *Lucy* v. *Lucy*, *H.* 14 *Car.* There a parson sued for tithes in the Spiritual Court against one who pleaded a lease for years made to him by the parson; to which the latter replied that he was in such a year absent from his benefice above 80 days, by which his lease became void. And held that no prohibition lay on this plea, although grounded on the stat. 13 *Eliz.* and though it was objected that the judges of the Spiritual Court should not have the exposition of a statute. Dr. *Sutton*'s case (*c*), and *Scad-*

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(*a*) Robert's case, 2 Cro. 269. Sid. 161. 2 Rol. Abr. 299. pl. 10.

(*b*) 1 H. Blac. 164. 187, 8. (*c*) Latch. 228. Cro. Car. 65

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ding's case (*a*), are to the same effect. [Lord *Ellenborough* C.J.—It will not, I apprehend, be contended that the Ecclesiastical Court has not jurisdiction to construe statutes incidentally coming in question before them, but only that if it construe them wrongly a prohibition shall go. The resolution of the Judges in the reign of *Jac.* 1. does not go further than this.] All the authorities have been lately considered in the cases of *Brymer* v. *Atkins*, and *Home* v. *Lord Camden* (*b*). What was said by Lord *Loughborough* in the latter, "that the exposition of the statute law appertains to the King's Courts of Record, and ought to be discussed and determined in those courts," must be understood with reference to what was said by his Lordship in *Brymer* v. *Atkins* (*c*), where he states that the misconstruction by a Prize Court of an act of
[351] Parliament by which its jurisdiction was regulated would be a good ground of prohibition, on an ancient and essential maxim of the common law, "that all courts of special jurisdiction created by Act of Parliament must be limited in the exercise of that jurisdiction by such construction as the courts of common law may give to the statutes, because if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law." In the case of *Home* v. *Lord Camden*, where the judgment of *B. R.* denying a prohibition to the Prize Court of Appeals was ultimately sustained by the House of Lords, the reasons given by *Ashhurst* (*d*) and *Buller*, Justices (*e*), and particularly by the latter, are decisive against the prohibition. The former said, "It is admitted that the Courts of Admiralty have *exclusive* jurisdiction over all questions of prize; and *if so*, they must have the same jurisdiction over all matters that arise incidentally, *either in construing acts of Parliament* or proclamations, in order to form their opinion on the principal question." *Buller* J. said, that "if it were competent to us to decide whether or not the Court of Appeals had misconstrued the act, I should desire further time to look into the authorities. But I think it is not now competent to the Court to examine that question," &c. He afterwards

(*a*) Yelv. 134.

(*b*) The first report of this case is in 1 H. Blac. 476, where the Court of C. P. gave judgment for the plaintiff in prohibition; the next in 4 Term Rep. 382., where that decision was reversed by *B. R.*; and again in 2 H. Blac. 533., where the judgment of *B. R.* was affirmed in *Dom. Proc.*

(*c*) 1 H. Blac. 187, 8. (*d*) 4 Term Rep. 395. (*e*) *Ib.* 396, 7. 400.

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states it "as a clear rule, that *after* sentence the courts of common law never grant a prohibition, unless the want of jurisdiction appear on the face of the libel:" for which he refers to *Full* v. *Hutchins* (*a*). Then after referring to the dictum in 2 *Rol. Abr.* 306. *pl.* 10. that if the Ecclesiastical Court *adjudge otherwise* (upon a condition in a lease) *than is warranted by the common law, a prohibition will be granted;* which he denies to be law; he proceeds to touch upon the merits of the decision in the court below: and his opinion is the stronger, because he seems to have differed from the Court of Appeals in their construction of the act. The dictum in *Rolle* and some few ancient cases have certainly gone great lengths: but they are attributable to a jealousy of the Ecclesiastical Courts which at one time prevailed in the courts of common law, and justify the observation of Ld. C. J. *Vaughan* (*b*), "that this Court had in some of the cases bordered on things spiritual." And the inclination of Lord C. J. *Eyre*'s opinion to the same purpose may be collected from the manner of his stating the question in *Home* v. *Ld. Camden* (*c*). The strength of the argument on the other side rests on the inconvenience there pointed out by Lord C. J. *Eyre*, namely, the possibility of two different rules prevailing on the same law, one in the courts of *Westminster*, the other in courts of peculiar jurisdiction, where the tribunals in the ultimate resort are not the same. But this inconvenience exists in other cases, and is not therefore a conclusive objection. As where the courts of equity and the spiritual courts have a concurrent jurisdiction in matters of tithe and matters of legacy. Or, as where the Courts of Admiralty and of common law have concurrent jurisdiction in the case of mariners' wages, where the contract is made at sea and is not under seal, and in bonds of hypothecation which are under seal. So the Plantation Courts of Chancery in matters arising there, and the Court of Chancery here, where the parties live in *England*, have concurrent jurisdiction (*d*), though the ultimate appeal from the one is to the King in council and not to the House of Lords, as in the case of the other. The same took place formerly on contracts of marriage, before the jurisdiction of the Spiritual Court was taken away by the stat. 26 *G.* 2. *c.* 33. *s.* 13.: and other instances are enumerated in *Bac. Abr. Prohib.*, L. 5. None of these con-

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(*a*) Cowp. 422.
(*b*) 2 Ventr. 10.
(*c*) 2 H. Black. 535.
(*d*) Salk. 404.

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current jurisdictions could exist if the possibility of conflicting decisions were an objection. And such objection is also inconsistent with the law as now settled in *Full* v. *Hutchins* (*a*), that a party is too late who comes after sentence for a prohibition where the defect in the court christian is in the *trial* and not in the *jurisdiction*. So where two libels are exhibited against two inhabitants of a parish for tithe, and they set up a *modus* over the whole parish, if one submit to the trial in the court christian, and the other obtain a prohibition before trial and try at common law, the one case may be ultimately decided before the delegates, and the other by the House of Lords, who may decide differently. But this inconvenience cannot alter the law. [Lord *Ellenborough*, C. J. and *Le Blanc* J. observed, that there the inconvenience would arise from the party's own fault, who did not apply in time for a prohibition.] In *Hill* v. *Good* (*b*) Lord C. J. *Vaughan* takes a distinction, which is confirmed in *Wenmouth* v. *Collins* (*c*), between statutes which give a new jurisdiction to the temporal courts, and those which are directory to the jurisdiction which before had cognizance of the subject. In the latter case the Court will not prohibit the Ecclesiastical Court from proceeding, though the construction of the statute may come in question. Now here the acts in question do not alter the jurisdiction; they confirm to all the same rights they had before. The *Sedgemoor* act states the moor to be near the parishes, and makes the allotments parts of the parishes where the tenements in respect of which they were made
[354] are situated; and it saves the right of the King. The *High Ham* act makes the part thereby inclosed subject to the same charges it was before. The stat. 2 & 3 *Ed.* 6. *c.* 13. *s.* 3. makes the tithe of increase of cattle on any lands of which the parish is not known payable to the rector of the parish where the owner of the cattle resided. Neither of these statutes gives the temporal courts any new jurisdiction, nor alters or affects any jurisdiction which the Ecclesiastical Court had before: but the directions are general, and must be taken with reference to the court which had jurisdiction of the subject-matter before. At any rate, however, before prohibition is granted it ought certainly to appear, which it does not, that the Ecclesiastical Court necessarily decided this case on the construction of the statutes: after sen-

(*a*) Cowp. 422. (*b*) Vaugh. 304. (*c*) 2 Ld. Ray. 850.

tence

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tence the plaintiff cannot complain of the defect of trial of the *modus* or boundary. The ground of its decision might be that *Sedgemoor* was not extra-parochial, and in that case the King had no right. This would not be construing the act, but deciding on a fact. The sum given may have been for the tithes of increase of cattle under the stat. 2 & 3 *Edw.* 6. which creates such a charge, and the stat. 37 *Geo.* 3. which maintains it, even supposing the parish to which the moor appertains to be uncertain. It is not alleged by the Ecclesiastical Court that these lands were extra-parochial before the act, and were only brought within the parish by its operation, in which case it might be said that the saving of the King's right (if it were not previously granted away) ought to operate.

Burrough, contrà. The statute in question cannot be said to be directory to the Ecclesiastical Court, wherein no mention is made of that jurisdiction, but which merely contains general provisions, which must of course be taken to apply to [355] the courts of common law. Neither can it be said that the Ecclesiastical Court has not proceeded to adjudge tithe to the rector upon the construction of the *Sedgemoor* Act, as bringing the allotments within the parish; for the place, which was before alleged to be extra-parochial, is denied to be so by the rector in his answer, *because* the inhabitants of the parish of *High Ham* claimed rights of common on *King's Sedgemoor*, which was parcel of the several parishes adjoining, and that *the act* did not mention it to be extra-parochial, and that the allotments *under the act* were made in respect of such rights of common *appurtenant to the tenements in the parish*, &c.; and that the act of the 37 *Geo.* 3. subjected the allotments to the same *charges*, &c. as the tenements in respect of which they were made; evidently putting the whole case upon the acts as having virtually made those allotments parts of the parish, and subject to the same burdens as the old inclosures. Now the only object of the *Sedgemoor* Act was the division of the moor between the lords of manors and the commoners claiming rights thereon before the statute, and nothing is said respecting the right to tithe, which is therefore left as it was before. No *parochial* rights were ever before exercised on the moor, nor does the act state it to be within the boundaries of any parish, but *lying near* or *adjoining*; though by way of distinction the several parts are allotted to particular parishes.

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Then the clause in the *High Ham* Act, 37 *Geo.* 3. directing the allotments to be subject to the same "*charges*" as the old tenements in respect of which they were made, merely relates to private charges, &c. on the estate, such as dower, mortgages, &c. according to *Moncaster* v. *Watson* (*a*), and does not relate to tithe ; the rectors of the several parishes being no parties to the act, but merely the lords and commoners; and the accompanying words, such as uses, estates, trusts, &c. explain the meaning of the word *charges*. [*Lawrence*, J.—A similar clause in the case of the *Stonehouse Bridge* Act lately (*b*) received the same construction.] Then the last clause but one saves to the lords of the manors all their privileges, except such for which compensation was made, and which were intended to be barred by the act, namely, common of pasture. And the last clause saves all the King's right and title with the same exception. Now if any person were before entitled to the tithe of the allotments which were extra-parochial, it must have been the King. It is clear therefore that the Ecclesiastical Court in giving the rector the tithe of such allotments has misconstrued the acts, the interpretation of which belongs exclusively to the courts of *Westminster*, and therefore the misconstruction of them is a good ground of prohibition after sentence : the sentence itself is the *gravamen;* for till then it could not be known that the court below would misconstrue the acts. The current of authorities from the time of *James* the First to that of the doubt expressed by *Buller*, J. in *Lord Camden* v. *Home*, in Error, (*c*), (which doubt was not warranted by the authorities then mentioned, and upon further investigation would probably have been removed from the mind of the learned Judge), shews that where the Ecclesiastical Court

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(*a*) 3 Burr. 1375.

(*b*) *H.* 44 *Geo.* 3. *B. R.* That was a case sent up from the Court of Quarter Sessions in *Devonshire*, upon a question concerning the validity of a poor rate. The stat. 7 *Geo.* 3. for building *Stonehouse Bridge*, by *s.* 19. exempted it from "the land tax or any other public or parochial "rate or tax whatsoever ;" and by *s.* 20. provided that certain persons and their heirs should stand seised of the tolls of the bridge "to the same "uses, trusts, and estates, and subject to the same wills, settlements, "limitations, remainders, *charges*, tenures, rents, and incumbrances" as the ferry was in lieu of which the bridge was erected. And held that the word *charges* only extended to *private* charges on the estate.

(*c*) 4 Term Rep. 396, 7.

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acts contrary to the rules of the common law in any matter of common law cognizance, such as the construction of Acts of Parliament, the courts of *Westminster* will prohibit it. This was the express decision of the Court in the case cited by the same Judge from 2 *R. Ab.* 306. *pl.* 10. and it is confirmed by other authorities. Where indeed the objection is only to the *trial*, it is the fault of the party if he do not apply before sentence; and *non constat* but that the Court below may have decided wrong on the fact, and not on the law; but where the sentence is the grievance, he can never come too late. The doctrine referred to as laid down by Lord *Loughborough* in *Home* v. *Lord Camden* (*a*), "that the exposition of the statute law appertains to the king's courts of record, and ought to be discussed and determined in those courts," is not new, but is confirmed by the whole court in *Howe* v. *Nappier* (*b*). That was a suit in the Admiralty for seamen's wages, there being an agreement under seal; on which a prohibition went. Lord *Mansfield* there said, "a prohibition is *ex debito justitiæ* if the Court of Admiralty proceed contrary to Act of Parliament." The true question in these cases is, Whether the court below are proceeding against the common law? If the sentence itself stated that the Court had decided against a prescription set up in a suit for subtraction of tithe on the ground that it was not proved by more than one witness, this Court would interfere by prohibition even after sentence. In *Wheeler*'s case (*c*), the Ecclesiastical Court had jurisdiction over the subject-matter, namely, the working upon holidays, yet as it had misconstrued the stat. 5 *E.* 6. disregarding the exception of works of necessity, such as carrying hay, prohibition went. Admitting that the church had authority to appoint holidays, and to punish the breakers thereof; the Court said that the feast of St. John Baptist was a holiday *by Act of Parliament; and therefore it did belong unto the judges of the law* whether the same were broken by doing such work on that day. So where the Judge of the Prerogative Court had on granting administration to one *Slawney* (*d*), taken bond of him with the conditions usual there, but beyond what was required by the stat. 21 *H.* 8. *c.* 5.; on prohibition prayed against proceedings there on that bond this court was clear that the Prerogative Court could not impose any other condition than

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(*a*) 1 H. Blac. 476.
(*b*) 4 Burr. 1950.
(*c*) Godb. 218.
(*d*) Hob. 83.

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the statute required; "for they must take their bond according to the law; and when it is sued, the meaning and exposition of the statute, and of the condition of the obligation both are *to be judged by the courts of common law.* Again in Sir *W. Juxon* v. Lord *Byron* (*a*), where the Ecclesiastical Court had incidentally put a construction upon a private act of Parliament, in which this Court agreed, and therefore denied a prohibition; Lord *Hale* and the whole Court agreed, "that the Spiritual Court, though they may try matters cognizable at common law which fall in incidentally where the principle is ecclesiastical, yet they shall be prohibited if they proceed in the trial of such incident temporal matter *otherwise than the common law would.*" In *Carter* v. *Crawley* (*b*) prohibition went because the Spiritual Court had misconstrued the words of the statute of distributions. And in *Berkley* v. *Morrice* (*c*), where the Admiralty Court were prohibited for refusing to receive a plea of the statute of limitations, in a suit for an account between the captain and owner of a merchant ship, this Court said, that it was a good cause of prohibition if they did receive the plea, and did not give sentence thereupon *as the common law requires.* Prohibition also went in *Pierce* v. *Hopper* (*d*) upon the misconstruction of the Pilot Act, 3 *G.* 1. *c.* 13. There is no case over which the Ecclesiastical Court have clearer jurisdiction than in matters of probate; and yet where they had revoked a probate because the executor had become bankrupt, this Court in *Adriel Mill*'s case (*e*) granted prohibition *after sentence and appeal.* So it was done in *Rebowe* v. *Bickerton* (*f*). In *Buggin* v. *Bennett* (*g*) prohibition was denied, not because it was applied for *after sentence* in the Admiralty, but because the suit being for seamen's wages, it did not expressly appear that the contract was by deed on land: but it was admitted that if that had been shewn, prohibition would have gone even after sentence: and yet the objection would not have appeared on the face of the libel. The same observation will apply to other cases. In *Driver* v. *Colegate* there cited (*h*), the *modus* set up being admitted, and the spiritual jurisdiction continuing over the original cause of suit, there was no necessity for a prohibition; but no consent will

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(*a*) 2 Lev. 64. (*b*) T. Ray. 496. (*c*) 1 Hardr. 502.
(*d*) 1 Stra. 249. (*e*) Skin. 299. (*f*) Bunb. 81.
(*g*) 4 Burr. 2035. (*h*) Ib. 2040.

give

give them jurisdiction where the law does not: and if the want of it appear in any of the proceedings, prohibition lies. The true rule is laid down in *Shotter* v. *Friend* (*a*) that where the Spiritual Court have cognizance of the principal, they shall have cognizance of the incidents and accessaries; but if the incident be a matter merely temporal, they must proceed there according to the course of the common law, and not *secundum jus ecclesiasticum*. And by the report in *Salkeld* it is not too late to come for a prohibition after sentence; *for the sentence in that case is the grievance.* And this agrees with *Porson* v. *Scott* (*b*). He also referred on this head to the answers of the Judges on the great controversy in 1604, 2 *Inst.* 613, 614. *answer to object.* 20.; to Lord C. J. *Vaughan*'s judgment in *Hill* v. *Good* (*c*); and to that of Lord C. J. *Eyre* in *Lord Camden* v. *Home* (*d*) in *Dom. Proc.* Secondly, he contended that the Ecclesiastical Court had no jurisdiction to determine on the boundaries of parishes; that they had done so in this case, and therefore might be prohibited after sentence as well as before. For which he cited *Keilw.* 110 *b.* 13 *Rep.* 17. 2 *Inst.* 599. 1 *Bulstr.* 159. *Foster* v. *Hide*, 1 *Rol. Rep.* 332. 17 *Vin. Abr.* 581. *Prohibition* L. 1. *Phillips* v. *Stacke*, *Noy*, 147. *Frezewell*'s case, 2 *Rol. Abr.* 319. *Hains* v. *Jescot*, *Comb.* 356. *Butler* v. *Yateman*, 1 *Sid.* 89. 5 *Bac. Abr. Prohibition*, 663. H. 18 *Vin. Abr.* 28., *and* 1 *Gibs. Codex*, *tit.* 9. *c.* 13. *fo.* 239.

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Dampier in reply, said, that the last objection as to the question of boundary went to the defect of *trial* only, and not of *jurisdiction*; and therefore unless that distinction were wholly done away, which was recognized in several of the later cases, the objection ought to have been made before sentence; and if the trial in the Ecclesiastical Court were submitted to, it was no ground for prohibition. In *Frezewell*'s case, 2 *Rol. Abr.* 319. *pl.* 2. which is the strongest authority the other way, being *after* trial, *non constat* but that the defect of jurisdiction might have appeared on the face of the libel: and it is besides suggested that the king's right came in question, where the maxim of *nullum tempus occurrit regi* would apply. And it also

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(*a*) Carth. 142. and Salk. 547. (*b*) Sayer, 176.

(*c*) Vaugh. 304. and vide *Harrison* v. *Burwell*, *ib.* 220. and 2 Ventr. 15—20,

(*d*) 2 H. Blac. 533.

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seems to have been questioned by Lord *Holt* in *Hains* v. *Jescot* (*a*). As to the principal ground of objection, the supposed misconstruction of the acts of Parliament, he admitted that there was a contrariety of authorities, but contended that in principle the misconstruction of an act, respecting a subject-matter over which the Ecclesiastical Court had either an immediate or incidental jurisdiction, was only ground of appeal, and not of prohibition, according to the opinion of *Ashhurst* and *Buller* Justices, in Lord *Camden* v. *Home*, where the former decisions were reviewed. That the authorities to the contrary were chiefly *dicta*, or else were cases where the objection after sentence appeared either on the face of the libel, or arose on the construction of acts of Parliament giving limited jurisdiction to the courts below, within which they were to be restrained; or where the different rules of the temporal and spiritual courts touching the subject-matter necessarily led to a different result. But here it did not even distinctly appear that the Ecclesiastical Court had founded its sentence on the construction of the acts of Parliament, much less that any difference of the law of that court, as applied to the subject-matter, must necessarily have led to a different construction than what would have prevailed in the temporal courts.

Cur. adv. vult.

Lord ELLENBOROUGH C.J. now delivered judgment.

This comes before the Court on a demurrer to a declaration in prohibition. The plaintiff applied to this Court for a prohibition to prohibit the Consistorial Court of the Archdeacon
[362] of *Wells* from further proceeding in a suit there instituted by the defendant *Gapper* against him for tithes of land in *High Ham*; and he grounded his claim to the writ of prohibition on this that the Ecclesiastical Court had decided in favour of the rector's claim to tithe, by construing the acts made for dividing, allotting, and inclosing *Sedgemoor*, as making a part of that moor to be within the parish of *High Ham*, which before was extra-parochial, and that in so doing the Ecclesiastical Court had misconstrued the acts of Parliament. On shewing cause against the rule for a prohibition in *Easter Term* 1803, it appeared to the Court a proper subject for a further and more solemn discussion, and the parties were therefore directed to declare in prohibition.

(*a*) Comb. 356.

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The objections to granting a prohibition in this case are, 1st, That it is too late after sentence. 2. That misconstruction of a statute is matter of appeal, and not of prohibition. In support of the first objection it is said, that if the defect of the original jurisdiction do not appear on the face of the libel, but the objection to the proceeding of the Ecclesiastical Court arises out of some matter incidentally occurring, it comes too late after sentence. And further, that in this case it does not appear necessarily that the Ecclesiastical Court decided on the construction of the Inclosure Acts, but might have proceeded on other grounds to try the boundaries of the parish: and that after the party's submission to have that question tried by the Spiritual Court, he shall not, when it has been decided against him, apply for a prohibition. And in support of these positions 2 *Roll. Abr.* 290. *pl.* 2. *Offley* v. *Whitehall*, *Bunb.* 17. *Argyle* v. *Hunt*, 1 *Str.* 187., the case of *Market Bosworth*, in Ld. *Raym.* 435., and *Full* v. *Hutchins*, *Cowp.* 422. were relied on. But as to this first objection, we cannot suppose that the Ecclesiastical Court proceeded on any other grounds than the construction of the Inclosure Acts; because, in answer to the plea of the plaintiff, in prohibition, that the place in respect of which the tithe was claimed, was "extra-parochial," the defendant has no otherwise denied that allegation, than by argumentatively contending that because the owners of the lands in the several parishes adjoining *Sedgemoor* were in respect thereof entitled to common of pasture on that moor, therefore *Sedgemoor* was part of such several adjoining parishes (although the boundaries of each parish were not certainly known); and also by stating the st. 31 *G.* 3. which is the act for draining and dividing the moor; the allotment of the commissioners; and the st. 37 *G.* 3. which is an act for dividing and allotting, *inter alia*, so much of *Sedgemoor* as had been allotted to the parish of *High Ham* in respect of rights of common claimed by the owners of land in that parish. So that it is certain that the Ecclesiastical Court had no ground whatever submitted to them whereupon to exercise their judgment, or from which they could conclude that the places in respect whereof the tithe is claimed were certain and defined parts of the parish of *High Ham* but these two acts of Parliament, and the construction and effect belonging to the same. The authorities cited certainly do not establish, that in no case a prohibition shall be granted after sentence, unless a want

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want of jurisdiction appear on the face of the libel; for in the case of *Full* v. *Hutchins*, which was most relied on, a distinction which applies expressly to this case is taken between *prohibitions granted for the sake of trial*, which are not granted after sentence, and prohibitions, which not being granted before sentence to stay trial, because matters triable at the common law have incidentally arisen, will, nevertheless, be granted if the Ecclesiastical Court proceed to try such matters contrary to the principles and course of the common law: and, as an instance of the Court's so prohibiting, Ld. *Mansfield* mentions *the construction of an act of Parliament*. In such cases no prohibition can go before sentence; for till sentence be given the courts of common law have no reason to suppose that the Ecclesiastical Court will determine wrong; which, however, if it should do, it is not too late to come then, that is, *after* sentence, for a prohibition; for *the sentence* is in such case the *gravamen;* and so it was expressly stated to be by *Holt* C. J. and the Court in *Shotter* v. *Friend*, *Salk.* 547.

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This brings us to the next point, Whether the statutes of the 31 & 37 *G. 3.* have been, in the present instance, misconstrued? and if misconstrued, then that question which is the subject of the second objection arises, namely, Whether such misconstruction be a ground for *prohibition*, or merely of *appeal?* As to the actual misconstruction of these statutes, it will not be necessary to say any thing; for the counsel for the defendant has not even argued that the effect of them was to make the allotments part of the parish of *High Ham*.

The last question, therefore, which is certainly a considerable one, alone remains to be discussed. If this were a question which came now for the first time to be considered, we might incline perhaps to think it should be deemed matter of *appeal* rather than of *prohibition*, according to the opinion of Mr. J. *Buller* in *Home* v. *Ld. Camden*, 4 *Term Rep.* 397, where he says, "if the court below have juris-
[365] "diction over the subject, though they mistake in their "judgment, it is no ground for prohibition, but only matter "of appeal." But, considering the current of authorities from the earliest times down to the period when that case came before the Court (the authority of which, as to that point, received, it will be recollected, no confirmation in the House of Lords; the point itself not being necessary to be decided in order to the determination of the case then in judgment):

and

and remembering also, that in that very case (reported in 1 *H. Bl.* 515.), as also in *Brymer* v. *Atkins*, 1 *H. Bl.* 164 & 188., Ld. *Loughborough* and the other Judges of the Court of C. B. clearly considered the misconstruction of an act of Parliament as ground of prohibition; adverting, I say, to these authorities and circumstances, we cannot feel ourselves warranted in holding, that the grounds of granting prohibitions are so narrow and limited as to be confined solely to cases of excess of jurisdiction. Mr. J. *Blackstone*, in the third volume of his *Commentaries*, *c.* 7., speaking of the writ of prohibition, says, that "it may be directed to the courts christian, the University "Court, &c. where they concern themselves with any matter "not within their jurisdiction: *or if, in handling matters clearly* "*within their cognizance*, they transgress the bounds prescribed to them by the laws of *England;* as where they require "two witnesses to prove the payment of a legacy; in such "cases also a prohibition will be awarded. For as the act of "signing a release or actual payment is not properly a spiritual question, but only allowed to be decided in those courts, "because incident or accessary to some original question, "clearly within their jurisdiction, it ought therefore, when the "two laws differ, to be decided not according to the spiritual, [366] "but the temporal law; else the same question might be determined different ways, according to the court in which the "suit is depending; *an impropriety which no wise government* "*can or ought to endure; and which is therefore a ground for* "*prohibition.*" This opinion of Sir *William Blackstone* seems to be the fair result drawn from a great variety of cases in which prohibitions have been granted, and where the Ecclesiastical Court had most undoubtedly cognizance, but had determined matters of the common law, incidentally arising, in a manner different from that in which the courts of common law would have decided the same points. And that such are proper grounds of prohibition has been also allowed by the most considerable Judges who have at different periods sat in *Westminster Hall.* It will be sufficient shortly to mention some of them. In 2 *Roll. Abr.* 301. *pl.* 11. it is stated that if a woman, after a divorce *à mensâ et thoro*, sue in the Ecclesiastical Court for a legacy given to her, and the release of the Baron be pleaded and disallowed, a prohibition shall be granted. In *Bastard* v. *Studley*, 2 *Lev.* 209., a legacy was left to *A.* and *B.*; *A.* died, and the executor of *A.* sued in the Spiritual Court for *A*'s share; there being no survivorship in such

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case by the law ecclesiastical; whereupon *B.* sued a prohibition: and, upon argument, it was adjudged that the prohibition should stand. And Ld. C. B. *Comyns* in his *Dig.*, tit. *Prohib.*, *G.* 23. introduces this case, by stating as a rule of law the conclusion which results from it, *viz.* that *prohibition shall go* "*if* "*a suit in the Spiritual Court be determined contrary to the right* "*at common law.*" In 1 *Roll. Rep.* 12. in a suit for tithe, an award was pleaded, and prohibition moved for, as this was a
[367] matter triable at law; but denied. And the court said, if the Spiritual Court have cognizance of the principal, they shall have it of the incident, though triable at common law. But Ld. *Coke* added, *if the Spiritual Court should decide otherwise on such award than it ought by common law*, that then a prohibition should be granted; which was allowed by *Doddridge*. In Sir *W. Juxon* v. Ld. *Byron*, 2 *Lev.* 64., in a suit for tithes by mortgagor in possession, the mortgagee came in *pro interesse suo*, and the Ecclesiastical Court decided against him; and prohibition was denied, because they had done right. But *Hale* and the whole Court agreed, "that though the Spiritual "Court *may* try matters cognizable at the common law which "fall in incidentally, where the principal is ecclesiastical; yet "they shall be prohibited if they proceed in the trial of such "incident temporal matter otherwise than the common law "would." The authority of this case is recognized by Lord *Mansfield* in *Full* v. *Hutchins*. And in *Shotter* v. *Friend*, *C.* 142. where payment of a legacy was offered to be proved by *one* witness and disallowed; after sentence, prohibition was awarded on this ground, that where the Spiritual Court determine any incident temporal matter they must do it according to the course of the common law; and if they do not, a prohibition will go; as if they require the revocation of a nuncupative will to be proved by *two* witnesses; or hold that tithes are not well set out without notice to the parson. All these, it is to be observed, are cases of things within the jurisdiction of the Spiritual Court, and might be the subject of appeal. And authorities may be found equally strong as to the courts of *Westminster Hall* interfering by prohibition where statutes have been expounded otherwise than the courts of common law would expound them. As to which I will first refer to
[368] the answers of all the Judges to the complaint exhibited by Archbishop *Bancroft* in the reign of *J.* 1., one of which was; "that the Judges, under colour of authority to interpret sta-"tutes in favour of their prohibitions, made causes ecclesiastical

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" to be of temporal cognizance. To which the answer was, As " for the Judges expounding of statutes that concern the eccle- " siastical government or proceedings, it belongeth to the tem- " poral Judges." 2 *Inst.* 614. *Wheeler*'s case, in *Godb.* 218., was a question on a statute within the jurisdiction of the Ecclesiastical Court, for the offence was by the stat. 5 *E.* 6. *c.* 3. *s.* 3. punishable in that court, and the truth and validity of the defence was a matter for them to determine (ss), whether the carrying the hay was a work of necessity within the meaning of the 6th sect. of that Act of Parliament; and if that Court decided improperly thereupon it was fit matter for an appeal; yet a prohibition was granted, " because it was for the Judges to say whether a holiday created by Act of Parliament were broken or not." Upon this case Mr. J. *Buller*, in *Home* v. Ld. *Camden*, has observed, that the Judges must have considered this as a case without the jurisdiction of the Ecclesiastical Court, as being excepted out of the Act of Parliament. But it seems rather that the ground of the determination was, that the Ecclesiastical Court held that to be a breach of the statute, which the courts of common law would not have holden to be a breach: and as the offence was created by the statute, they would prohibit it in case it were misconstrued. Not that the Spiritual Court had not jurisdiction to construe it, but that the mischiefs of misconstruction were to be prevented by prohibition. In 2 *R. A.* 303. *pl.* 27. prohibition was granted to the delegates, to prevent their granting administration to one [369] nearer of blood by their law, but not so near by ours: and this reason was assigned for it, because this being ordained by statute ought to be interpreted according to our law; and, as the book says, prohibition was granted *to try the law*. Upon which Mr. J. *Buller* has observed, that no prohibition can be granted for the purpose of *trying the law*; but this observation seems well answered at the bar; for the book can only be understood to mean and refer to that trial of the law which constantly takes place when the plaintiff is directed to declare in prohibition, in order that the law upon the matter in dispute may be thoroughly discussed and settled. This case was in *M.* term, 21 *J.* 1.; and a similar point was determined in another case, *H.* 22 *J.* 1. *ib. pl.* 28. In the same book also, fol. 302. pl. 19. it appears that prohibition was granted to the Spiritual Court in a proceeding on the stat. 2 *E.* 6. *c.* 13. *s.* 2. for not setting out

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out tithes; because that Court held it not a sufficient setting out, the parson not being present; it being sufficient by our law, although the parson be absent: which case was relied on in that of *Shotter* v. *Friend*, already mentioned. In *Berkley* v. *Morris*, *Hardr.* 502. in a proceeding in the Admiralty for an account of a merchant ship taken as prize, a plea of the statute of limitations was refused; and the Court of Exchequer, *Hale* being the Chief Baron, held that the plea ought to have been received, for that the statute was pleadable in the Admiralty; and if it were not received, that the rejecting it was a good cause of prohibition; *and likewise if they received it, and did not give sentence thereupon as the common law requires.* In *Carter* v. *Crawley*, Sir *T. Ray.* 496. the question was, if the representatives of
[370] a deceased aunt of an intestate were entitled to a share of his personal estate under the statute of distributions, jointly with a living aunt of the intestate? And there (p. 497.) Lord *North* said, "whatever is determined at common law to be the true meaning of that act must be a rule to the Ecclesiastical Courts; for the courts of common law are entrusted with the exposition of acts of Parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the King's courts to be the true meaning of the act. And though there were, according to *Freeman*'s *Rep.* 297. a difference of opinion, yet that was as to the construction of the statute of distributions, and not as to the abovementioned position of Ld. *North*, for the purpose of which this case is now cited. And in the case of *Pearse* v. *Hubbard*, *Str.* 249. it was a matter for the Admiralty Court of *Cinque Ports* to determine, whether the party under the true construction of the Act of Parliament, 3 *G.* 1. were liable to the penalty for navigating a ship, not being a member of the *Trinity House:* it was the proper forum specially appointed by the statute to try and decide on the offence, if the offender were found within the jurisdiction of the same; and if they gave an erroneous judgment, it might be corrected on appeal: yet the Court interposed by prohibition: and Ld. C. J. *Pratt* there considers not only a want of jurisdiction as a ground of prohibition, but also the circumstance of a court proceeding by the rules of the civil law deciding otherwise than the courts of common law would upon the same subject. For he says, "admitting the case to be within the intent of the act, yet "surely in the case of a freehold we ought to be satisfied of "that

"that removal, *i. e.* of the justice of that removal, by their "shewing a power to make by-laws and every other step "necessary to make a lawful *removal; and for want of *this* "as well as for want of *jurisdiction*, I think no consultation "should go." The subject-matter of all these cases, both as they involved the determination of questions of a temporal nature, and the construction of statutes, was clearly within the jurisdiction of the several courts prohibited. They are cases in which the judgment given below might have been corrected on appeal: and some of them are cases where the common law courts have taken upon themselves the construction of acts of Parliament made respecting subjects peculiarly relating to the inferior courts so prohibited, and have yet even in such cases granted prohibitions when such inferior courts misconstrued those acts of Parliament. And the distinctions attempted in the argument for the defendant fail in shewing that the question now under consideration does not fall within the authority of those determinations in which prohibitions have been granted; for the cases cited shew that prohibitions have been granted in questions within the jurisdiction of such inferior courts, not merely where the rules of the two jurisdictions necessarily clash with each other, or in cases of construction of *statutes* regulating their jurisdictions; but that the courts of common law have *in all cases*, in which matter of a temporal nature has incidentally arisen, granted prohibitions to courts acting by the rules of the civil law, where such courts have decided on such temporal matters in a manner different from that in which the courts of common law would decide upon the same: and that this has been the doctrine of the Judges, not only in the time of Lord *Coke*, when a considerable degree of jealousy subsisted between the courts of *Westminster Hall* and those of ecclesiastical jurisdiction, but in the times of Lord *Hale*, Lord *Holt*, Lord C. J. *Pratt*, and as lately as in the time of Lord *Mansfield*, who in the case of *Full* v. *Hutchins* particularly instanced the misconstruction of an act of Parliament as a ground for prohibition, even *after* sentence; the reasons of which are so strongly marked by Sir *Wm. Blackstone* in the passage already cited from his Commentaries. And to use by adaptation to this subject a part of the words of Ld. C. J. *Vaughan*, in *Hill* v. *Good*, *p.* 304., and whose authority has been quoted to shew that the common law has encroached

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croached on matters spiritual, it may be said, "though if the "granting prohibitions to the spiritual courts were *res integra* "now, we might not see reason to grant them in any case, "the matter being wholly of ecclesiastical conuzance;" yet "as many prohibitions have been granted to the Spiritual "Courts in cases upon the construction of different statutes, "and after so many parliaments wherein no complaint has been "made, or certainly no redress given, it cannot be expected "we should against so many judicial precedents take upon "us to alter the law so long practised." For these reasons we are of opinion that the prohibition should stand.

Friday, June 15th.

The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *Geo.* 1. *c.* 4. *s.* 6. unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose.

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The KING *against* CORRY.

THIS Indictment framed on the stat. 11 *Geo.* 1. *c.* 4. *s.* 6. against the defendant, as bailiff of the borough of *Ivelchester*, for absenting himself from a corporate meeting for the election of a new bailiff for that borough, stated that *Ivelchester* in the county of *Somerset* is an ancient borough, and incorporated by charter of the 3d and 4th of *Philip* and *Mary*, by the name of the bailiff and burgesses of the borough of *Ivelchester*, which directs that there should be one bailiff to be chosen of the burgesses in form thereinafter specified. That the charter named *John Philips Burgess*, an inhabitant of the borough, to be the first bailiff, to continue in office till the feast of *St. Michael the archangel*, and until another inhabitant or burgess should be made ruler and sworn to that office according to the ordinances, &c. after specified. And granted further, that there should be twelve burgesses to be called the chief burgesses and counsellors of the same town for all matters touching the government of the same: and that they the chief twelve burgesses should be from time to time aiding and assisting the bailiff for the time being in all matters touching the said borough. *That the said capital burgesses and counsellors* of the borough *for the time being, or the greater part of them*, from time to time should have power *yearly and every year in September*, viz. on the *Monday* next before the *feast of* St. Michael the Archangel, *to choose and nominate one of themselves who should be bailiff of the borough* for one whole year then next ensuing; and that he after his election and before his admission should take the oath of office on the *Monday* then next following his election as aforesaid, *before the bailiff being his last*

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last predecessor, if he should be alive and present, in the presence of the other chief burgesses for the time being; *and if the said bailiff his predecessor should be then dead or absent,* then before the chief burgesses for the time being, or the greater part of them. The indictment then stated, that the defendant, late of the parish of *Ivelchester* in the borough of *Ivelchester* aforesaid, in the said county of *Somerset*, on the 25th of *Sept.*, the 43 *G.* 3. was and from thence until and upon the *Monday* next before the feast of *St. Michael the Archangel*, in the 43d year aforesaid, and afterwards *was bailiff of the said borough;* and that on *Monday* next before the feast of *St. Michael the Archangel*, in the 43d year aforesaid, certain of the then capital burgesses of the borough assembled together at the *Guildhall* of and within the said borough, the same being the usual and proper place for that purpose, *in order to choose one of themselves to be bailiff* for the ensuing year; and *it was then and there the duty of the defendant as such bailiff as aforesaid to attend and be present at such election;* nevertheless the defendant not regarding his duty in that behalf, nor the statute, &c. upon the said *Monday* next before the feast of *St. Michael the Archangel*, in the 43d year aforesaid, the same so being the charter-day for such election as aforesaid, *unlawfully and voluntarily did absent himself from the said assembly so holden for the purpose of such election of a bailiff of the borough, and from such or any other election of the said officer*, contrary to the form of the statute, &c. in contempt, &c.

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After verdict it was moved in arrest of judgment, 1st. that the stat. 11 *G.* 1. *c.* 4., on which the indictment was framed extends only to such chief officers of boroughs whose presence is necessary to an election, and that it does not appear from the constitution of this borough, as set forth in the indictment, that the presence of the defendant as bailiff and chief officer of the corporation was nesessary to the holding of a corporate assembly for the election of his successor. 2dly, That there is no venue laid to the offence charged.

Gibbs, *Lens* Serjt. *Dampier*, and *Pell*, shewed cause against the rule. 1st. The law creates a duty in all the members of a corporation to attend corporate meetings, and more particularly in the chief officer, whose duty it is to preside. And therefore it was said in *Reg.* v. *The Bailiffs of Ipswich*(*a*), that

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(*a*) 2 Ld. Ray. 1237.

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nothing could be done at a corporate assembly without the presence of the bailiffs, being the heads of the corporation; and that, though no special provision were made for it in that charter; for that the *quorum* clause was no more than the law would imply (*a*). Then the statute 11 *G.* 2. is only confirmatory of the general law, and assumes rather than creates the necessity of the chief officer's attendance, though only for the purpose of presiding at a corporate meeting for the election of his successor; for without him the corporation cannot be said to be complete, and consequently no corporate act can be done. With this view the 6th clause is framed in the disjunctive, "that "if any mayor, bailiff, or other chief officer shall *voluntarily ab-* "*sent* himself, *or* knowingly and designedly prevent or hinder "the election of any other chief officer, &c. he shall suffer six "months' imprisonment," &c. The object of the statute was to insure the annual election of the chief officer of every corporation, which it was in the power of the then chief officer to frustrate or delay, either by wholly absenting himself on the charter or prescriptive day of election, by which no corporate assembly could be holden; or if present in the first instance, by irregular conduct in the mode of election, or by dissolving the assembly before the business was concluded. Therefore his voluntary absence was made a substantive offence, as well as his designedly hindering the election, which latter might be committed by him when present; and the former may be com-
[376] mitted, though he were not included in the *quorum* clause of election. The provision in the charter for the new bailiff's taking the oath of office before the chief burgesses in the absence of the last bailiff was not intended to dispense with his attendance, but to provide a substitute for it, and render the election valid, notwithstanding such his absence, which would otherwise have been invalid. The swearing in is also on a day subsequent to the election, and therefore no inference can be drawn from that provision to shew that his presence might be dispenssd with at the election. And though the election clause does not mention the bailiff by name; yet being always a *capital burgess*, he was considered as sufficiently designated under that general description, in which character he would have voted. But the necessity of his attendance as chief officer is for the purpose of *presiding*, which duty in his absence

(*a*) Sed vide 3 Mod. 13.

must

must be performed by another. And here it being expressly alleged that it was his duty to have attended, if it were not so, he ought to have shewn it at the trial as matter of defence. *Dormer*'s case, 2 *Leon.* 5. 2dly, As to the want of venue, absence is a negative act, and therefore needs no venue; as in an indictment on the stat. 1 *Eliz. c.* 2. for absenting from church, 1 *Hawk. c.* 10. *s.* 5. But if a venue were necessary in this case, it is sufficiently laid, for the place is mentioned where the election ought to have been made, namely, "*at the* Guildhall *of and within the said borough;*" and it is alleged that it was then and *there* the defendant's duty to have attended and been present, and that he absented himself therefrom.

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Burrough in support of the rule. 1st. The corporation is alleged to consist of a bailiff and twelve capital burgesses, which latter are to be *aiding and assisting* to the bailiff. Therefore where the charter afterwards directs the election of the bailiff to be made by "the said capital burgesses *and counsellors*," that must mean exclusive of the bailiff for the time being; though if it were otherwise, his interference in the election would only be in his character of capital burgess, and not as bailiff, and so not within the statute. The object of the statute was not to enforce the attendance of chief officers of corporations where it was not before required, and where it would be nugatory, but as the act itself expresses it, "to prevent the inconveniences arising from want of such elections being made upon the days appointed;" which inconveniences arose "by *the contrivance or default of the person who ought to hold the court or preside* in the assembly where such elections were to be made:" for remedy whereof it enacts, "that if in any borough, &c. no election shall be made of the chief officer upon the day appointed by charter or usage, or such election being made shall afterwards become void, whether such omission or avoidance shall happen *through the default of the officer who ought to hold the court or preside, &c.* or by any accident, the corporation shall not be dissolved or disabled from electing such officer for the future." And then it goes on to provide that on a future day "*the members or persons having right to vote at or to do any other act necessary to be done in order to such election*" shall forthwith proceed to the election. The whole purview of the

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shews that the 6th clause which punishes the chief officer voluntarily absenting himself, or designedly hindering the election on the charter or usage day, was only intended to apply to such chief officers whose absence or hindrance could frustrate the election, to whom only the mischief to be remedied,

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and the nature of the remedy, could apply. And it was necessary that the clause should be framed in the disjunctive, because the mischief might arise as well from the absence of such an officer as from his misconduct when present. Then the allegation that it was the defendant's duty as *bailiff* to attend the election is a mere inference of law not warranted by the premises. 2dly, As to the want of venue; this is not such a negative act to which no certain place can be assigned; for the defendant's attendance, if necessary, was a local duty, and his absence from the proper place in order to bring him within the words of the act, must have been *voluntary*, and is so alleged to have been. The offence then was not only capable of having a venue assigned, but could not properly be described without one. Then it is not sufficient that a place be named in an indictment unless it be named by way of venue; whereas the only mention of the borough of *Ivelchester* is either as an addition to the defendant or as descriptive of the place where the *Guildhall* was, which in itself is no venue.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. delivered judgment.

This is an indictment against the defendant as bailiff of *Ivelchester*, charging him with having, in breach of his duty, *unlawfully and voluntarily absented himself* from an assembly or meeting of the twelve capital burgesses of that borough, holden on *Monday* next before the feast of *St. Michael* last past at the *Guildhall* of and within that borough, pursuant to the charter of *P. & M.*, for the election of a bailiff on that day, *against the form of the statute, i. e.* of the 11 *G.* I. *c.* 4. *s.* 6. Upon a motion in arrest of judgment two objec-

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tions have been taken to the indictment; 1st. That it does not appear to have been *the necessary duty of the defendant* (who is admitted to have been in virtue of his office of bailiff, *chief officer* of the borough), to have been *present at the meeting of the capital burgesses* holden *for the election of his successor*. 2dly, That there is no *venue* laid in the indictment, from which a jury may come for the trial of the several facts alleged

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alleged in the indictment, and upon which issue is joined upon the plea of not guilty. As to the first of these objections; it does not appear *by the charter* stated to have been the duty of the defendant, *as bailiff*, to be present at the election of his successor. It is an election which the charter only requires to be made by the *capital burgesses*, who are twelve in number, or the greater part of them, without making any mention whatever of *the bailiff* with a reference to that election. And though the bailiff when elected be directed to be sworn upon the *Monday* following before *his predecessor*, "if *he should be alive* and *present*," yet so little is the presence of the bailiff essentially necessary even on that occasion, that the charter directs that "if the bailiff the predecessor *should be then dead or absent*," the new bailiff should be sworn in "*before the chief burgesses of the borough for the time being or the major part of them.*" The presence of the *bailiff*, *as such*, not being (as it clearly is not) required by the letter of the charter, it remains to be considered whether it be required either by the common law, or by the stat. of the 11 *G.* 1. *c.* 4. That it is required by the general rule of the common law, independent of any charter of the particular borough, was contended on the part of the prosecutor on the authority of the *Queen against the Bailiffs of Ipswich*, 2d *Lord Raymond* 1237; where it is laid down by the Court, "that as in all *corporate acts* the act of the majority is the "act of the whole, so the *bailiffs being the head of the cor-* [380] "*poration*, nothing can be done *without their presence;* and "this is so, though no special provision be made for it by "the charter." But this must be understood of general corporate acts required to be done by the *whole* body corporately assembled, and which of course are not well done, if the chief officer, being an integral part of such body, be wanting. But this rule does not apply to cases where acts are required or authorized to be done, as here, by any one integral member or branch of the corporation, acting separately and apart from the rest. Is it then (which is the only remaining question upon this first head of objection) required by the stat. 11 *G.* 1. *c.* 4? By adverting to the preamble it appears that the *mischief meant to be obviated* was the mischief arising from the not doing acts required by charter or usage to be done at *certain times in order to or for* 11 *Geo.* 1. *c.* 4.

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the completing of the election of mayor, bailiffs, or other chief officers. And by the 6th section of the act it is for that purpose enacted, " that if any mayor, bailiff, or bailiffs, or other " chief officer or officers of any city, borough, or town cor- " porate shall *voluntarily absent himself or themselves from,* " *or knowingly and designedly prevent or hinder the election* " *of any other mayor, bailiff, or other chief officer* of the same " city, borough, or town corporate, upon the day or within " the time appointed by charter or ancient usage for such " election," the person so offending is, upon conviction, to suffer *six months' imprisonment*, and to be disabled from *holding any office* belonging to that corporation. The *voluntary absence* from *the election of a chief officer*, which is thus severely punished by six months' imprisonment and the

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corporate incapacity above stated, must, in fair construction of the statute, be such an absence whereby the mischief complained of in the preamble, *viz.* " of preventing the completion of the election of a chief officer," and for the remedy and prevention whereof the act is professedly made, may possibly be occasioned. It must be absence, at least, where presence was antecedently a duty. But that cannot be predicated of the absence on this occasion, with a reference to any of the duties of the *bailiff, as such*, which are either enjoined by this charter, or to be collected from any principles of the common law. Unless, therefore, this 6th section can be considered as of itself creating a substantive necessity in all cases for the presence of the chief officer of the corporation, *as such*, at the election of his successor, where his presence was not required before the statute (which appears to us a proposition not capable of being maintained); the *voluntary absence* charged in this indictment of a chief officer who had no occasion, *as such*, to be present, and whose absence had no effect whatsoever towards preventing or hindering the election of his successor, is not that *voluntary absence* of a *chief officer* which this act meant to remedy or prevent by the penal provisions of the 6th section. As the indictment appears to us therefore to be bad upon this first ground of objection, it renders it unnecessary to enter into the validity of the second objection, on the ground of which the judgment is sought to be arrested.

Judgment arrested.

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The KING *against* The Inhabitants of PUCKLECHURCH.

Saturday, June 16th.

Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, it is a *weekly* hiring only. Therefore where the contract was for the servant *to live* with his master, the latter finding him board and lodging, and *paying* him 2*s.* 6*d.* per week, no settlement could be gained by service for more than a year under such contract.

TWO justices removed *Thomas Pritchard*, his wife and daughter, by name, from the parish of *Pucklechurch to* the parish of *Westerleigh*, both in the county of *Gloucester*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case. The pauper *T. Pritchard* being settled in *Westerleigh* about ten years ago hired himself to *T. King*, of *Pucklechurch* for eight weeks ending at *Midsummer*, at 5*s.* per week: at which time he hired himself again to the same master, at 4*s.* per week till the *Michaelmas* following. At *Michaelmas* he entered into a new agreement with his master to live, the master finding him board and lodging, and paying him 2*s.* 6*d.* per week: but no time was fixed or talked of by the master or servant for the duration of the contract. When the summer season arrived, the pauper said to his master, "I must have more now, I believe, master:" The master said, "How much more?" and his wages were increased, and so as the winter or summer succeeded his wages were accordingly reduced or increased. At the time when the alteration of wages took place there was no conversation as to leaving the service or dissolving the contract. The alterations of wages took place at the beginning of the week. He entered and left his service on the same day of the week, being *Sunday*. There was a general settlement at the time he left the service with respect to wages, and some dispute; but he could not remember what it was. The pauper was more than once absent from his master's service two or three days at a time to see his friends with his master's consent. He served in the whole 5 years and a quarter, and received money on account of wages at different times, sometimes a guinea, and sometimes more: but there was no complete settlement of wages till he and his master parted. But at the time he was not paid so much as he thought he was entitled to: but whether on account of absence or not he did not know.

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Abbot and *Hall*, in support of the orders of Sessions, relied on the last agreement of the servant *to live* with his master, without any limitation of time; which the law therefore deemed to be a hiring for a year; and which was not varied by the circumstance that the wages were to be *paid* weekly; as in *R.*

v. *Seton*

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v. *Seton and Beer* (*a*), and *R.* v. *Hampreston*(*b*). And they argued that this was different from the cases of *R.* v. *Bradninch* (*c*), where the contract of hiring was by the week, and *R.* v. *Clare* (*d*), where it was by the month; and from *R.* v. *Newton Toney* (*e*), and *R.* v. *Hanbury* (*f*), where the hiring was *at so much a week*, which was considered as the same thing; and in the latter case, either party might part at a week's notice. That admitting the intention of the parties as to the generality or duration of the hiring to be ambiguous, the fact of the pauper's having continued in the service above a year [384] was a circumstance which might be taken to explain the original intent; as in *R.* v. *Longwhatton* (*g*), where service for above a year as a domestic servant, there being no evidence of the contract, was deemed sufficient to raise a presumption of a general hiring. And here the master agreed to find board and lodging for the pauper as a domestic servant. Then the mere alteration of wages in the middle of the year, the service continuing the same, will not prevent the gaining of a settlement; as in *R.* v. *Alton* (*h*).

Gibbs and *Taunton contrà* were stopped by the Court.

Lord ELLENBOROUGH, C. J.—If nothing be said as to the term of the service but that the servant shall have weekly pay, it must *primâ facie* be understood that the parties intended a weekly hiring and service. But circumstances may shew a different intent. Then are there such circumstances in this case, from which we can fairly collect that the parties intended a hiring for a year? In the first instance the hiring was for a specific term of eight weeks; the second hiring was also for a definite time short of a year. No time was mentioned at the third hiring, but it was a hiring at *weekly* wages. Then it falls within the cases of *Dedham*, of *Bradninch*, of *Newton Toney*, and others of the same class; where a hiring at weekly wages has been holden to be a weekly hiring. And if it wanted any additional circumstance the conduct of the parties themselves afterwards shews that they so considered it; for the servant left his master at the end of the week in the middle of a year. If an indefinite hiring were stated on a record, and nothing shewn

(*a*) 2 Const. 200. (*b*) 5 Term Rep. 205. (*c*) Burr. S. C. 662.
(*d*) *Ib.* 819. (*e*) 2 Term Rep. 453. (*f*) 2 East, 423.
(*g*) 5 Term Rep. 447. (*h*) E. 24 *Geo.* 3. 2 Const. 382.

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to control it, it will be deemed a hiring for a year: but that is in the absence of any circumstance from whence a different intent is to be collected: and here weekly wages being reserved, and nothing else added to shew an intention to extend the contract further, it will induce the conclusion in law of a weekly hiring and service intended by the parties. There is a current of authorities to this point.

GROSE J.—A reservation of weekly wages will make a weekly hiring, if nothing appear to the contrary. And here the circumstances do not furnish any other inference. In the first and second hirings certain definite times were mentioned, where it was meant to extend the contract beyond a weekly hiring: but at the third hiring there was nothing said, from whence the intended duration of it was to be collected, but the reservation of weekly wages. It appears also that the wages varied from time to time at the different seasons of the year. That cannot furnish the inference of an implied hiring for a year; for then the wages must have continued the same as they were at first settled. The third hiring, therefore, was not a general hiring, but a hiring from week to week.

LAWRENCE J.—I thought the law had been perfectly settled since the case of *Newton Toney*; for the rule was there laid down, that if there were any thing in the contract of hiring to shew that it was intended to be for a year, the reservation of weekly wages would not control it: but if the payment of weekly wages were the only circumstance from which the duration of the contract was to be collected, it must be taken to be only a weekly hiring. Then what is this but a weekly hiring by that rule? The point having been before precisely determined, this case ought not to have been brought up. [386]

LE BLANC J—Neither the first nor the second hiring can be pretended to give a settlement. Then as to the third, it is clearly a hiring for weekly wages, and there is nothing to denote that it was for a year except that no time was mentioned, from whence it is contended that in contemplation of law it must be taken to be a yearly hiring. But it has been holden that a reservation of weekly wages, without more, is only a weekly hiring. But if there were any doubt of that, there is another circumstance confirmatory of that construction; for the servant in the middle of the year required an advance of

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of wages, which the master acceded to without any question; a circumstance which was scarcely probable to have happened if the parties had considered that they had contracted for a year. These circumstances therefore rebut any implication of law, that this was a yearly hiring.

Lord ELLENBOROUGH, C. J.—then added, that he hoped it would be understood in future, that where nothing was said in the contract about time, but a reservation of weekly wages, it was only a weekly hiring.

Order of Sessions quashed.

Monday, *June* 18th.

The KING *against* the Sheriff of BERKS.

Where a writ of *fi. fa.* expires in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it.

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THE sheriff was ruled on *Saturday* the 12th of *May* last, two days before the end of *Easter* term, to return a writ of *fieri facias;* but no return was made till the first day of this term; on which day an attachment was obtained against him for not returning it. *Gibbs* thereupon moved to set aside the attachment, on the ground that the rule having expired in the *vacation*, the sheriff had until the first day of this term to return it, and was not bound to make his return within the six days given him by the rule. *Garrow* and *T. Carr* relied on the rule of Court, *Mich. 32 Geo. 3.* (*a*), to shew that the sheriff ought to have returned the writ within the six days; which rule directs that all writs shall be returned by the sheriff on the day on which the rule for returning the same expires.

The Court, however, on inspection of the rule, were of opinion that it could only apply to writs returnable in term; because it says, at the conclusion of it, that "in default "thereof the plaintiff shall be at liberty to move for an attachment *on the next day*," which can only be moved in term time.

The Master afterwards put into the hands of the Court an anonymous case in *Tr. 30 Geo. 3.* taken by the late Master *Benton*, which was read as follows:

"Where a rule to return a writ is served only three days be-

(*a*) 4 Term Rep. 496.

"fore

" fore the end of a return, the sheriff has until the first day " of the next term and all that day to file the return."

Per Curiam, Rule absolute for setting aside the attachment (*a*).

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(*a*) Upon inquiry it appears that many such writs are filed in vacation with the *Custos Brevium*. But the sheriff of *London* and *Middlesex* in particular seldom returns them until the first day of the following term.

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M'CARTHY, CORNER, and HENDERSON, *against* ABEL.

Tuesday, June 19th.

THIS was an action on a policy of insurance on *freight* of the ship *Thomas*, upon a voyage at and from *Riga* to *Chatham*, *London*, *Portsmouth*, or *Plymouth*. At the trial before Lord *Ellenborough* C. J. at the sittings at *Guildhall* after last *Trinity* term a verdict was found for the plaintiffs for 200*l.*, subject to the opinion of the Court on the following case.

On the 19th of *November* 1800, the defendant underwrote the policy to the plaintiffs for 200*l.* at 10 guineas per cent. premium, and at the time of the loss occasioned by the embargo in the declaration and after mentioned, the plaintiffs were interested in the freight of the ship on the voyage beyond the amount insured. The plaintiffs, being owners of the ship *Thomas*, chartered her on the 9th of *September* 1800 to Messrs. *Thorntons* and *Smalley* of *London*, merchants, to proceed from *London* to *Riga*, there to load from the factors of Messrs. *Thorntons* and *Smalley* a cargo of masts, &c. with which she was to return to the river *Thames*, *Chatham*, *Portsmouth*, or *Plymouth*, as might be ordered at *Riga*; and freight was to be paid accordingly, in certain proportions for the several articles named (restraints of princes and rulers during the said voyage excepted). Half of the freight was to be paid on delivery of the cargo, and the remainder in three months following. Fifty-five running days were allowed for loading at *Riga*, and delivering at her port of discharge, and ten days on demurrage, over and above the said laying days, at 5*l.* per day. The *Thomas* sailed in ballast

Upon a hostile embargo in a foreign port the owner, who had separately insured ship and freight, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight: held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters

thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment.

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from *London* in *September* 1800, in pursuance of the said charter-party, and arrived at *Riga* in the *October* following. On her arrival there, she was supplied by Messrs. *Cumming* and Co., to whom it was agreed that the captain should apply for the purpose, with a cargo, the whole of which had been delivered to the captain, and nearly the whole thereof had been actually taken on board, and the ship ordered to *Plymouth*, when on the 7th of *November* 1800 an embargo was laid by the *Russian* government on all *British* ships then in the port of *Riga*. Under that embargo the *Thomas* was detained from the time just mentioned until *May* 1801; during which period the master and crew were kept as prisoners in *Russia*. Upon laying the embargo the ship was taken possession of by the *Russian* government, her sails were taken away, and the cargo re-landed. The plaintiffs, upon receiving intelligence thereof on the 1st of *January* 1801, *abandoned their interest in the freight* to the underwriters thereon, and demanded payment of a total loss. And on *the same day* (*a*) the plaintiffs *abandoned the ship to the underwriters on ship*. Upon the 30th of *May* 1801 the *Thomas* was restored by the *Russian* government, and the master and crew were released, and the cargo, which had been before shipped and afterwards re-landed, was again put on board, and the ship afterwards proceeded therewith for *Plymouth*, where she arrived in *August* following. The cargo was delivered to the agents of the freighters, and the freight earned by the ship in the said voyage amounted to 2242*l.* 6*s.* 10*d.* An indenture of three
[390] parts was made on the 26th of *February* 1801 between the plaintiffs of the first part, *Thompson* and *Anderson* of the second part, and the several underwriters of the third part; which after reciting (in substance) that *Thompson* and *Anderson*, and the said other persons parties thereto of the third part, had insured the ship *Thomas* upon her said voyage, at and from *Riga* to her port of discharge in *England*; that the ship had been and then was detained under the said embargo at *Riga*; and that the plaintiffs being sole owners of the *Thomas* had given, according to the law and usage of merchants, due notice of abandonment thereof, and had called upon the several

(*a*) To a question by the Court in the course of the argument, to which set of underwriters the abandonment was first made, it was answered that the abandonment was made to both at the same time.

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underwriters for the amount of their respective subscriptions, which they had respectively agreed to pay on having the ship assigned to *Thompson* and *Anderson* upon the trusts thereinafter mentioned; purported to be an assignment or transfer by the plaintiffs of the ship *Thomas*, and all the interest, property, claim, and demand of the plaintiffs of, in, to, or out of the said ship and her appurtenances to *Thompson* and *Anderson*, upon the trusts therein mentioned. The said indenture was executed by the plaintiff *M'Carthy*, (but not by the other plaintiffs,) by *Thompson* and *Anderson*, and by the several other persons parties thereto of the third part. In *July*, 1801, *R. Corner*, one of the plaintiffs, as master of the ship, drew a bill at *Riga* for 718*l.* 3*s.* 6*d.* upon Mr. *Halliday* the agent of the underwriters on the ship, for the purpose of paying for masts, sails, cables, repairs, and other charges on the body of the ship: this bill was duly paid Mr. *Halliday* in *London*. And on the 30th of *Sept.* 1801 Capt. *Corner*, as master of the ship, received at *Plymouth* of the agents of the freighters 500*l.*, part of the freight, to enable him to pay seamen's wages and the charges of delivering the cargo; and the last mentioned sum of money was duly applied to those purposes. The underwriters upon the ship claimed the freight, [391] and the sum of 1742*l.* 6*s.* 10*d.* the balance of such freight, after deducting the 500*l.*, has been paid by the freighters of the ship to the agent for the underwriters, under an indemnity from them against any claims which might be made thereto either by the plaintiffs or by the underwriters on the freight. The agent for the underwriters on ship gave a receipt, dated the 7th of *Dec.* 1801, for the said 1742*l.* 6*s.* 10*d.* as for freight of the said cargo. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were, the verdict to stand; otherwise a nonsuit to be entered.

This case was first argued in *Hilary* term last by *Hullock* for the plaintiffs and *Giles* for the defendant, and again in this term by *Park* for the plaintiffs and *Erskine* for the defendant. The Court having directed the second argument to be confined to the consideration of the effect of an abandonment of a ship upon the right to the accruing freight, it is sufficient to state the substance of the arguments on that point which was recently under consideration in the case of *Thompson* v. *Rowcroft* (*a*).

For the plaintiffs it was argued, that the law of *England*, re-

(*a*) 4 East 34.

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cognizing ship and freight as two distinct objects of insurance, consequently recognizes them as distinct subjects of abandonment; and therefore as a simple insurance of *ship*, without more, does not cover *freight*, so an abandonment of the former must be always understood with an implied reservation of the latter, otherwise the underwriter on ship would gain that for which he had confessedly paid no equivalent. The laws of [392] *France* and some other countries differ from our own in this respect, considering freight as a mere accessary of and inseparably attached to the ship. 2 *Valin.* 58. *Pothier, c.* 1. *s.* 2. *par.* 36. 2 *Emerigon* 221. The freight there being reckoned as part of the value of the ship, the underwriter on ship is in truth an underwriter on freight also. In this case, whether the act of the *Russian* government amounted to an embargo or an hostile seizure (*a*), it was sufficient at the time to warrant the plaintiffs in abandoning both ship and freight to the respective underwriters: and if the action had been brought for a total loss immediately after such abandonment there could have been no defence to it. The circumstance then of the freight having been since earned and received cannot as between these parties destroy the right of action which then accrued. At most it is only so much salvage for the benefit of the underwriters on freight which they are entitled to recover from the freighters. Insurance is always considered as a contract of indemnity (*b*). The underwriter on ship engages to indemnify the owner against the loss of the body of the ship by certain perils, he taking the benefit of salvage of the materials remaining, if any. The underwriter on freight engages to indemnify him from any loss of the expected profits of the ship derived from the carriage of goods, &c. for the particular voyage, he also taking the benefit of salvage of freight, if any be earned after an abandonment; though from the nature of the contract salvage of this sort seldom accrues, where the ship itself or the voyage is so far endan- [393] gered as to warrant an abandonment. The abandonment then to either underwriter can only be co-extensive with the interest which he insured: and the insurer of ship, knowing that he did not protect the freight, must be taken to have accepted the

(*a*) In *Beale* v. *Thompson*, 4 East 546. it was considered in the nature of an embargo, and not of a capture.

(*b*) *Goss* v. *Withers*, 2 Burr. 698. and *Hamilton* v. *Mendez*, ib. 1210.

abandonment

abandonment with an implied reservation of the right of the owner to freight, if earned in the voyage insured. He takes the ship subject to all the existing contracts which bound the owner in respect of it at the time of the abandonment. And it was decided in *Beale* v. *Thompson* (*a*) that the hostile embargo in *Russia* did not put an end to the prior contracts made for that voyage. Then the insurer cannot be in a better situation after an abandonment than the insured from whom he derives title, who before he abandoned had contracted with the underwriter on freight in a manner to secure to him eventually the benefit of salvage by the marine law. [*Le Blanc*, J.—Is it then contended that the contract of insurance runs with the ship? Lord *Ellenborough*, C. J.—Was it ever heard of that a contract should run with a chattel? Put the case of a man purchasing a waggon as it is going on the road laden with goods, he is not bound to carry the goods to their journey's end, though the carrier, the vendor, who contracted so to do, will be liable on his contract.] The obligation in this case arises from the anomalous nature of the contract and the permitting of two distinct subjects of insurance in respect of the same subject-matter, on which the several rights of abandonment and salvage are consequential. The underwriter on ship, if standing at all in the situation of a purchaser, is at least a purchaser with notice; but in truth he only purchases a right of salvage after an abandonment of the subject-matter of his insurance; as the underwriter on freight is the purchaser of a right of salvage of the freight abandoned to him. The abandonment of [394] the ship only confers on the insurer of it a qualified ownership during the voyage insured, an ownership *sub modo* according to the marine law, which recognizes the separate interests of the owner in ship and freight, and the consequent separate interests of the underwriters on each, in case of an abandonment. The cases of *Thompson* v. *Rowcroft* (*b*), and *Leatham* v. *Terry* (*c*), went upon the particular terms of the contract of abandonment, and not on the general question.

For the defendant it was insisted, that an abandonment to the underwriter on ship vests in him the complete property of it with all its consequences. The immediate subject of the policy is the body or substance of the ship which he insures against actual loss or deterioration by certain perils; but the

(*a*) 4 East, 546. (*b*) 4 East, 34. (*c*) 3 Bos. & Pull. 479.

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insurance being upon a certain voyage, and the indemnity having been extended to another sort of loss, namely, of the *voyage* insured, in which case, though the substance of the ship be safe, the owner has a right to abandon, it must be followed up with all its consequences, one of which is the benefit of salvage, by which all the interest in and title to the ship is from the moment of the abandonment accepted transferred to the underwriter, he paying to the owner the full value at which the property was insured. The underwriter on ship is not bound to take cognizance of any contract for freight or for insurance of it, to which he is no party. For it would be absurd to say that after he had purchased the whole property assigned to him for its full value, he could not do what he pleased with his own. If the owner stood his own insurer of
[395] the freight there could be no doubt but that a general abandonment of the ship, without specially reserving the freight, would convey all his interest to the underwriter; and the latter would not be bound to accept a qualified abandonment. But even if such underwriter had notice of the existing contracts of affreightment and iusurance, it could not alter his situation; for the right to accruing freight being in respect of the property in the ship and the carriage of the goods to their ultimate place of destination, it must follow such property prior to and till the arrival of the goods. It is with good reason therefore that the laws of *France* and other countries consider freight as so inseparable in its very nature from the property in the ship, that they do not admit them to be separately insured, and this case shews the inconsistency of the contrary practice. But still no collateral contract of the owner with the insurer on freight can abridge the right of property transferred to the underwriter on ship by the abandonment of it to him: and the owner, who has by his own act in making such abandonment divested himself of the title to freight, and put it out of the power of the insurer on freight to avail himself of the benefit of salvage reserved to him in the event by his contract, can have no right to recover upon the freight policy under pretence of an abandonment, without benefit of salvage. From the moment of the abandonment accepted by the underwriter on ship all the expenses of repair and risk of the ship are transferred to him, and therefore he must in justice be entitled to derive all the benefit of it; for the benefit of salvage would be merely nominal if, notwithstanding an abandonment to him and his paying the full value of the ship as for

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for a total loss, he were still obliged to pursue the voyage insured at his own risk and expense for the benefit of the *insured. The benefit of salvage means every thing which remains of the ship at the time of the abandonment, without further claim of the insured. It is sufficiently hard upon the underwriter on ship to be compelled to pay the whole value of the insurance upon the supposition of a total loss of the voyage, when it turns out that the voyage was not lost; but it is quite inconsistent with the abandonment, which is the voluntary choice of the assured, to deny the eventual usufruct of the property so abandoned. If after abandonment, as for the loss of the voyage, the assured may still retain the vessel for the performance of all the contracts which he had previously entered into in respect of the ship, this reservation might extend to several voyages; and even the same voyage may be protracted for two or three years from length of way or casualties as sometimes happens with *East India* ships during which time the repairs of the ship might equal her first cost: and thus the assured after receiving the full value of the ship, and deriving interest from the money, and getting rid of all further expense, would still be receiving the earnings of the ship, in lieu of the underwriter who had paid the value of it and borne all the expenses.

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In reply it was observed, that some of the charges of prosecuting the voyage, such as sailors' wages and provisions, would be borne by the underwriters on freight, and not by those on the ship, according to *Robertson* v. *Ewer* (*a*), and other cases there cited. And as to other charges it was for the underwriters on ship to consider whether it were worth their while under all the circumstances to prosecute the voyage insured after an abandonment.

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Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered judgment. The novelty of the question in this case, the value of the property, and the extent to which some of the principles laid down in the argument seemed to lead, made the Court desirous of every information on the different points which might arise between the several parties interested before we came to our decision; and therefore we wished for the second argument on the effect of an abandonment of the ship on the accruing freight. If the question which arises upon this case

(*a*) 1 Term Rep. 127.

be

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be stripped of all extraneous circumstances and considerations, it appears to us to resolve itself into this single point, *viz.* Whether the freight have been in this case lost, or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been fully and entirely earned and received by or on the behalf of the plaintiffs the assured: and if so, no loss can be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But if it have or can be considered as having been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was *the act of the assured themselves*, with which therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us therefore that *quâcunque viâ datâ*, that is, whether there has been no loss at all of freight, or being

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such, it has been a loss only occasioned by the act of the plaintiffs themselves, that they are not entitled to recover; and that therefore a nonsuit must in that case be entered.

Judgment of nonsuit.

Tuesday, June 19th.

BARING and Others *against* CHRISTIE.

THIS was an action of insurance on goods on board the ship *Mount Vernon*, warranted an *American* ship, upon a voyage at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. It was averred in the declaration, that Messrs. *Willings* and *Francis*, for whom the plaintiffs were agents, were the persons interested in the goods insured, and that the ship and cargo were in the course of the voyage insured taken as prize by persons unknown. At the trial at *Guildhall* a special verdict was found, stating in substance, that the defendant subscribed the policy in question, and that the parties named were interested in the goods insured. That on the 2nd of *June*

The 25th article of the treaty of *Feb.* 1778, between *France* and *America* which requires the vessels of the two allies, in case either is at war, to be furnished with a passport expressing (*inter alia*) *the place of habitation* of the commander of the vessel, is not complied with by a passport granting leave "to *G. D.* commander of the ship called the *M. V. of the town of P.*, of the burthen of, "&c.; such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured by the French, and condemned as prize.

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1796 the said ship sailed with her cargo from *Philadelphia* in the United States of *America* for *Cowes* in the *Isle of Wight*, and for such other port or place after her arrival at *Cowes* as the plaintiffs should direct. That the ship previous to her sailing from *Philadelphia* cleared out from thence for *Hamburgh*, and at the time of her sailing until and at the time of her capture had on board the following documents, 1. a certificate of clearance, with a manifest of her cargo annexed thereto, *viz.* "Port of *Philadelphia*. "These are to certify all whom it doth concern, that *George G.* "*Dominick*, master or commander of the ship called the *Mount* "*Vernon*, burthen 424$\frac{2}{95}$ tons mounted with guns, navi- "gated with men, United States built, and bound for [399] "*Hamburgh*, hath here taken on board cargo, as per manifest "annexed, and hath here entered and cleared his said vessel "according to law. And these are further to certify, that it "appears by the original register now produced to us that the "abovementioned ship was registered at *Philadelphia* the 2d of "*May* 1796. Given under our hands and seals of office at "the custom-house, this 30th of *May*, *J. Graff*, deputy col- "lector, *W. Tilton*, D. &c." That the said manifest of the cargo was entitled, "Manifest of the cargo of the ship *Mount Vernon*, *G. G. Dominick* master, bound for *Cowes* and *Hamburgh* in *Europe*." 2. The following sea-letter or passport, *viz.* (The special verdict here set forth a fac-simile of the document in the form of a triplicate pass, having three columns, the first in the *French*, the second in the *English*, and the third in the *Dutch* language. What follows is a translation of the *French*, which was the only part relied on in the argument as most favourable to the construction contended for on the part of the plaintiffs.)

(FRENCH PASS.)

(*Translated from the* French.)

"GEORGE WASHINGTON, President of the United States of *America*.

"To all who shall see these presents. Be it known, that leave and permission has been granted *to* G. G. Dominick, *master or commander of the ship called the* Mount Vernon, *of the town of Philadelphia* (*a*), *of the burthen of* 424$\frac{2}{95}$ *tons, or there-* [400]

(*a*) In the *American* and *Dutch* columns it was thus expressed: "leave and permission are hereby given to *George Dominick*, master or commander of the ship called the *Mount Vernon*, of the burthen of 424$\frac{2}{95}$ tons or thereabouts, *lying at present in the port of Philadelphia*, bound for *Hamburgh*."

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abouts, being at present in the port of *Philadelphia* and bound for *Hamburgh*, loaded with sundries, per manifest: that after this ship has been visited and before his departure he shall make oath before the officers authorised for this purpose, that the said ship belongs to one or more citizen or citizens of the United States of *America*, the act whereof shall be placed at the foot of these presents. And in like manner that he will keep and cause to be kept by his crew the maritime ordinances and regulations, and enter a list signed and confirmed by witnesses, containing the names and surnames, the place of birth, and residence, of the persons composing the crew of his ship, and of all those who shall embark therein, whom he shall not receive on board without the knowledge and permission of the officers thereto authorising. And in every port or harbour where he shall enter with his ship he shall shew the present permission to the officers authorized thereto, and shall make a faithful report to them of what has passed during his voyage, and he shall carry the colours, arms, and ensigns of the United States during his said voyage. In testimony whereof we have signed these presents, and have caused the seal of the United States to be thereto affixed, and to be countersigned by *A. E.* deputy collector at *Philadelphia*, the 30th of *May* 1796."

The special verdict then set forth certain facts relative to the ownership of the *Mount Vernon*, and her register and certificate of registry, and other documents, the regularity of which as applied to the voyage insured were questioned in the argument. But it is unnecessary to state these and other facts, upon which no opinion was given by the Court. It is sufficient in order to raise the only point upon which the judgment ultimately turned, to state the finding of the jury, that the documents stated were the clearance, register, certificate of registry, manifest, and *passport* relating to and on board of the said ship for the voyage on which she sailed from *Philadelphia* on the 2d of *June* 1796. That before the making of the policy the plaintiffs had determined that the ship after touching at *Cowes* should proceed from thence to *London*, and there finish her voyage, which was not known to the master at the time she sailed from *Philadelphia*; who then intended after touching at *Cowes* to proceed to *Hamburgh* and there finish the voyage. That the ship was built within the United States of *America* in the beginning of the year 1796: and when she sailed from *Philadelphia*, until, and at the

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time of the capture after mentioned, was the sole property of one *Duncanson*, who was born a *British* subject, but was domiciled, and resided and carried on trade in the United States of *America* from *August* 1794 till after the 11th of *August* 1796; but was not entitled by the laws of the United States to be naturalized and become a citizen of the United States at the time the insurance in question was effected, nor when the ship sailed on the voyage insured, or was captured, nor until the 11th of *October* 1796, on which last-mentioned day he was naturalized and became a citizen of the United States. That on the 9th of *June* 1796 the ship, while proceeding on her voyage from *Philadelphia* to *Cowes*, was with her cargo captured as prize by a *French* cruizer, and was afterwards taken into the port of *St. John* in the *Spanish* island of *Porto Rico;* and while she remained there she and her cargo were proceeded against by the captors in the *French* provisional tribunal of prizes in *St. Domingo*. The special verdict then set out the sentence of condemnation of [402] that court (upon which also much argument turned); and then set forth the 12th, 23d, 25th, and 27th articles of the treaty of 1778 between *America* and *France;* by the 25th article of which "it is agreed (*a*) that in case either of the parties "thereto should be engaged in war, the ships and vessels be- "longing to the subjects or people of the other ally must be "furnished with sea-letters or passports, expressing the name, "property, and bulk of the ship, as also the name *and place* "*of habitation of the master or commander of the said ship*, "that it may appear thereby that the ship really and truly "belongs to the subjects of one of the parties; which pass- "port shall be made out and granted according to the form "annexed to this treaty," &c. The special verdict concluded by setting forth two acts of the United States, one imposing a duty on the tonnage of ships, and another regulating the registering of ships; the object of which was to discriminate ships of the United States and owned by *American* citizens from those of foreign countries or owned by foreigners. The application of these acts, which also furnished much matter for argument, became in the event unnecessary to be considered.

(*a*) This is taken from the *American* copy, which, so far as respects the point in judgment, corresponded with the *French* copy. In other respects there were variations, which furnished ground of argument on other parts of the case not material to be stated.

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The case was argued at great length and with much ability, upon a variety of grounds, by *Puller* for the plaintiffs in error in *Hilary* term last, and by *R. Carr* for the defendant in *Easter* term following. But as judgment was ultimately given upon an objection to the want of a *description in the passport of the place of habitation of the master of the ship, which rendered it unnecessary for the Court to give any opinion upon the other points made at the bar, it is needless to detail the arguments. After time taken to advise upon the case the judgment of the Court was now delivered by

Lord ELLENBOROUGH, C. J.—This case comes before the Court on a writ of error from the Court of Common Pleas, upon a special verdict found upon the trial of the cause before Lord *Alvanley*, to whose directions on that trial a bill of exceptions was tendered. And on the argument here several considerable questions have been raised, and discussed with great learning and ability on the one side and on the other: and if it were necessary for us to determine the several points which have been raised, as to whether the ship did or did not sail on the voyage insured; whether the ship were or were not an *American* ship, by reason of the Tonnage Act of the United States of that country; whether the passport, supposing its form unobjectionable, were a sufficient document, owing to some vice in the mode of obtaining it; whether the evidence given of the ship's condemnation were properly received; and whether such sentence, if properly received, be conclusive against the ship being *American;* it would be proper to state the record more at length than can be now required; as we think the objection which has been made to the form of the *passport* is an answer to the claim of the plaintiffs in error. It will therefore be sufficient very shortly to state so much of the special verdict as applies to that point only.

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This action is on a policy of insurance, dated the 18th of *June* 1796, on goods on board a ship called the *Mount Vernon*, an *American* ship, at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. And the special verdict, after finding the making the policy, the subscription of the plaintiffs in error, the interest as averred, the sailing of the ship, and other matters not material to the ground of our decision, finds that by the *25th article of the treaty* between *France* and *America*, which treaty was dated the 6th of *February* 1778, it was provided, "that

" that in case either of the parties should be engaged in war, " the ships and vessels belonging to the people of the other " ally must be furnished with sea-letters or passports express- " ing the name, property, and bulk of the ship, *as also the* " name AND PLACE OF HABITATION OF THE MASTER OR " COMMANDER of the said ship, that it may appear thereby " that the ship really and truly belongs to the subjects of one " of the parties; which pass shall be made out and granted " *according to the form annexed to the treaty.*" And the special verdict further finds *the form of the passport*, which the ship had on board at the time of the capture, which was in the *French*, *English*, and *Dutch* languages, in which there is no mention made of the place of habitation of the master unless it be in that part of the pass, which was in *French*, and ran in this form: " To all who shall see these presents, be it " known, that leave and permission has been granted to *Geo.* " *G. Dominick*, master or commander of the *ship called* the " Mount Vernon, *of the town of* Philadelphia, *of the burthen* " *of* 424$\frac{27}{95}$ *tons* or thereabouts, being at present in the port " of *Philadelphia*, and bound for *Hamburgh*, loaded with " sundries," &c. &c. not necessary to state. Now as the description of the ship in the said policy clearly contains a warranty that she was an *American* ship, which induces a necessity of her being documented, as *American* ships are required [405] to be by the treaties subsisting between that state and *France;* and as the special verdict has not found what *the form of the passport* was which was annexed to the treaty, we were desirous, if it could have been ascertained, to have had it made a part of the special verdict; as by that we might have been enabled to have decided more satisfactorily to the persons interested in this insurance as to *the form of the passport* than we can as the case now stands: and if we had thought it sufficient, then upon the other points which have been made in argument. But as this matter has not been added, we need only say, whether *the passport* found on board the ship be or be not conformable to the requisites prescribed by the 25th article of the treaty; that is, whether *the town of* Philadelphia can by any fair construction be referred to *Dominick*, *the master of the ship*, or whether it do not according to the rules of sound construction relate, not *to him*, but *to the ship:* and, if it do, the consequence is that the ship had not *such a passport* as is required by this article of the treaty. And giving every weight

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to the arguments used in support of the passport, we do not think that we can, without doing great violence to the plain and obvious import of its language, so construe it, and say that the passport is that which the treaty requires. The rule of law as well as of grammar is that "ad proximum antecedentem *fiat relatio, nisi impediatur sententia;*" for which, if authorities were wanting, *Jenkins Centuries*, 180, *Dyer*, 46. *b.* and 5 *Co.* 68. Lord *Cheyney*'s case, may be referred to. In this passport "*the ship called the* Mount Vernon" is unquestionably the last antecedent; and though it has been said that *the port*, and not *the town*, of *Philadelphia* is the proper description of a *ship*, yet as a *port* may be within a *town*, there is no inconsistency in describing a ship as of the town within which the port lies; there is nothing in the matter which necessarily prevents its reference to the *ship*, and applies it to the *master*. But the proper reference does not in this case depend merely on this rule; for the words "*of the burthen of* 424 *tons*," which is a continuance of the same sentence, and is a further description of the same thing, can refer only to the *ship:* and of this opinion Lord *Alvanley* appears clearly to have been in the case of *Baring* v. *Clagget*, 3 *Bos. & Pul.* 212.; only that it was unnecessary in that case to decide upon the ground of this construction of the passport, inasmuch as that case stated that the ship had on board this passport, "*together with the usual documents taken out by* American *vessels;*" under the terms of which general admission Lord *Alvanley* thought the Court at liberty to presume that she had on board a *sea-letter* expressing the name and *place of abode of the master*, conformably to the treaty. In deciding merely on this point, all other questions between the parties remain open for future decision, if the plaintiffs in error, in an action to be brought against any other underwriter, shall be able to shew that the passport used in this case is that which *American* ships ought to be provided with; either by giving evidence that it is according to the form annexed to the treaty, or that which has been adopted by some subsequent treaty. As the case now stands, our opinion is, that the judgment of the Court of Common Pleas given for the defendant must be affirmed.

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Judgment affirmed.

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BLOXAM Knt. and Others, Assignees of WARD, a Bankrupt, *against* HUBBARD.

Tuesday, June 29th.

IN trover, brought to recover two third parts(*a*) of the ship *Fishburn* tried before Lord *Ellenborough* C. J. at the sittings after *Hilary* term 1804, at *Guildhall*, a verdict was found for the plaintiffs for 2326*l.* 6*s.* 8*d.* subject to the opinion of this Court upon the following case:

Thomas Ward the bankrupt, being the original and sole registured owner of the ship *Fishburn* belonging to the port of *Newcastle-upon-Tyne*, cleared the said ship outwards for the *Baltic* in *April* 1800, where she was detained for a considerable time by the embargo of the Emperor of *Russia*. On *Nov.* 9, 1801, *Ward* by regular bill of sale assigned the whole ship *Fishburn, then at sea*, in consideration of 4000*l.* to the defendant, who then resided in *London*. The grand bill of sale of the whole ship was also delivered to the defendant. On *Dec.* 2, 1801, *Ward* committed an act of bankruptcy, upon which a

1. An order of the Lord Chancellor made under the stat. 5 *G.* 2. *c.* 30. upon the petition of creditors for removing one of several assignees of a bankrupt's estate not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate.

2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other assignees who sue can only recover their proportional parts.

3. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal.

4. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt.

5. Under the ship register acts 7 & 8 *W.* 3. *c.* 22. *s.* 21. and 26 *G.* 3. *c.* 60. *s.* 3, 4, 5. 16., and 34 *G.* 3. *c.* 68. *s.* 15, 16, in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry, (which officers are *directed* to make an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs,) and it is not sufficient for the vendee to register such ship *de novo* in another port where he resided, though he removed the ship thither, and she never returned to her original port after the sale.

(*a*) One third part was recovered by *Heath*, in a former action of *Heath* v. *Hubbard*, 4 East, 110.

commission

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commission afterwards issued against him, and he was duly declared a bankrupt. On *Jan.* 2, 1802, the defendant registered the said *ship *de novo in the port of* London, and the original certificate granted to *Ward*, which purported on the face of it to be of the ship *Fishburn* belonging to the port of *Newcastle-upon-Tyne*, was delivered up and cancelled. On *Feb.* 19, 1802, the defendant sold the whole of the said ship by public auction to *Brown* and others for 3630*l.*, (the net proceeds being 3489*l.* 10*s.* 3*d.*), and by bill of sale of *April* 5, 1802, assigned her to them who afterwards sent her to sea, where she was lost on *Feb.* 20, 1803. The *Fishburn* never returned to the port of *Newcastle-upon-Tyne* since she cleared outwards from that port for the *Baltic* in *April* 1800; but the embargo being taken off she arrived at *Plymouth:* but before the execution of the bill of sale by *Ward* to the defendant she sailed again, and was absent at the time of the execution thereof. She afterwards returned to the port of *London*, and immediately thereupon the defendant obtained a new register. No transfer of property in the same ship, or any part thereof, appears in any document of the Custom-house of *Newcastle-upon-Tyne* either to the plaintiffs or to the defendant; and no indorsement of transfer was ever made to the plaintiffs on the certificate of the ship's registry; nor have the plaintiffs taken out a new register; and no demand was proved on the trial to have been made of the ship upon the defendants. The plaintiffs, together with one *J. G. Johnston*, (who did not join in the present action,) were appointed assignees of the estate and effects of *Ward* under the above-mentioned commission, by an assignment dated the 13th of *April*, 1802. On the 22nd of *January*, 1803, the Lord Chancellor by his order removed *J. G. Johnston* from being an assignee; which order reciting that a petition had been presented to the Lord Chancellor by the plaintiffs, being three of the creditors, and three of the assignees, stating that the said *J. G. Johnston* on the 7th of *December*, 1801, being prior to the date of the said commission, received from the bankrupt, whilst he was a prisoner for debt in the King's Bench prison, and after he had committed one or more act or acts of bankruptcy, certain bills of exchange, which bills *J. G. Johnston*, contrary to his undertaking to that effect, had refused to deliver up for the benefit of the estate of *Ward*, and that *J. G. Johnston* had departed these

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these kingdoms and was gone to *Petersburgh* in *Russia*; and praying (*inter alia*) that *J. G. Johnston* might be discharged from being one of the assignees of *Ward's* estate, concluded as follows: "Now upon hearing the said petition "read, and what was alleged by the counsel for the petitioners, I do order that the said *J. G. Johnston* be forthwith "removed from being assignee of the said bankrupt's estate "and effects; and let him and his partners be restrained from "receiving any dividend upon their debt proved under the "commission against the said *Thomas Ward* until my further "order. *Eldon* C." No re-assignment, release, or other instrument hath been executed by *J. G. Johnston* to the plaintiffs, nor any new assignment by the commissioners in consequence of the said order. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action? If the Court should be of opinion that they were so entitled, then the verdict to stand, and judgment to be entered as the Court should direct: otherwise a nonsuit to be entered.

Hall for the plaintiffs, after observing that this was the case of a trader, who having before his bankruptcy disposed of a ship at sea to the defendant, had neglected to perform the requisite acts for conveying the property to him according to the provisions of the Register acts, for want of which it became vested in the assignees of the bankrupt, stated three objections which he expected to be made to the recovery of such assignees. 1st, That *J. G. Johnston*, one of the original assignees of the bankrupt's estates, ought to have been joined in the action, the legal estate still remaining in him until a new assignment from the old to the new assignees, notwithstanding the Lord Chancellor's order to remove him. But the effect of that order was to divest the legal estate out of *Johnston*, and vest it in the three other assignees, the plaintiffs. The bankrupt laws enable the commissioners to convey the bankrupt's property to assignees, who are joint trustees for the creditors. On the death of one of the assignees it survives to the others, and the order in question has caused the legal death of *Johnston*. The Lord Chancellor has a general and entire jurisdiction over these matters. The stat. 5 *G.* 2. *c.* 30. *s.* 30. only directs that in case of the removal of any assignee and the appointment of another by the creditors, the old assignee shall assign over to the new assignee: but that does not appear to be necessary where

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no new assignee is appointed. And *s.* 31. directs that where it shall be found necessary to vacate the first assignment and to make a new one, "the Lord Chancellor, upon petition of any creditors, may make such order therein as he shall think just and reasonable." "And in case a new assignment shall be ordered to be made as aforesaid, such debts, effects, and estate of such bankrupt shall be thereby effectually and legally vested in such new assignees." It is not necessarily required to make such order for a new assignment (*a*). And indeed where the deposed assignee is abroad the Lord Chancellor's order on him to assign would be nugatory: and if the remaining assignees could not make title without him, the bankrupt laws could not be carried into execution. In the case *Ex parte Bainbridge* (*b*), on the death of the last surviving assignee, leaving an infant heir at law, the Lord Chancellor made an order on the commissioners to execute a new assignment to two new assignees chosen. The joining in the action the deposed assignee would be to annul in effect the Lord Chancellor's order, which not only discharges him, but restrains him from receiving any part of the bankrupt's estate. But if he were joined he would be empowered to receive what was recovered in the action. The Lord Chancellor has a similar power in other cases; as by stat. 36 *G.* 3. *c.* 90. *s.* 1. where any trustees in whose names stock stands are absent out of the jurisdiction, or not amenable to process, or become bankrupt, &c. he may order the remaining trustees to convey, and in other cases may by his order divest the legal estate out of some, and vest it in others. [*Le Blanc*, J. There is an express authority given by the act in that case to accomplish the object.] At any rate this objection, if valid, would only go to one-fourth of the property, and the plaintiffs, the three other assignees, would be entitled to recover the other three-fourths, there being no plea in abatement, and this being an action of tort; according to *Addison* v. *Overend* (*c*),

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(*a*) A precedent was referred to in *Co. Bank L.* 2 vol. 108. entitled "Assignment by one assignee to himself and a new assignee; the former assignee having absconded and become bankrupt." But upon inspection it appears that the commissioners were parties to the new assignment.

(*b*) 6 *Ves.* 451.

(*c*) 6 *T. R.* 766. and vide *Scott* v. *Goodwyn*, 1 *B.* & *P.* 73, 75.; where the distinction between actions of contract and tort in this respect is shewn.

and

and *Sedgeworth* v. *Overend* (*a*). 2dly, The want of a conversion is objected; but a slight act will amount to it where a defendant has no title. The use or misuse of a thing is a conversion. A sale by a sheriff under an execution of the goods of a bankrupt, made after a commission of bankrupt issued, is in law a conversion (*b*). 3dly, If it be objected, that the plaintiffs as assignees ought to have derived title to themselves, by shewing a transfer to them in the mode prescribed by the Register Acts 7 & 8 *W.* 3. *c.* 22., 26 *G.* 3. *c.* 60., and 34 *G.* 3. *c.* 68., it is sufficient to answer that the property is vested in them by operation of law, and that the Register Acts do not contemplate such a case, but only where property is transferred by the act of the party. Then supposing the plaintiffs entitled upon the strength of their own title to recover the whole or at least three-fourths, it will be insisted, 4thly, That the defendant has a good title. But that is directly contrary to the determination of the same facts in *Heath* v. *Hubbard* (*c*), where the Court held that what was done by the present defendant, the getting the ship registered *de novo* in the port of *London*, *per saltum*, the sale being of the ship at sea then belonging to another port, without first delivering a copy of the bill of sale to the officer of the port to which the ship then belonged, for the purpose of his indorsing an entry of such transfer on the affidavit on which the original certificate of registry was obtained, and making a memorandum thereof in the book of registry, and giving notice of the same to the commissioners in *London*, as required by stat. 34 *G.* 3. *c.* 68. *s.* 16. was not sufficient to make a title to the ship. But supposing that construction of the act may be impeached, yet before that question can be raised the authority of *Moss and Others*, *Assignees of Kirkpatrick*, v. *Charnock* (*d*), must be gotten rid of; for here the Registry *de novo* in the port of *London*, whether sufficient or not in itself to complete the title under the bill of sale, was not done till after the act of bankruptcy, when the title of the assignees had intervened, and prevented its operation, by vesting the property in them. Under these circumstances it was holden in that case that the assignees of the bankrupt might recover the possession of the ship in trover from the vendee, though he had, subsequent to the bankruptcy, complied with all the requisites of the Register Acts.

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(*a*) 7 Term Rep. 279.
(*b*) *Cooper* v. *Chitty*, 1 Burr. 20.
(*c*) 4 East 110.
(*d*) 2 East 399.

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Scott contrà. 1st, The mere order of the Lord Chancellor to an assignee to assign away the bankrupt's estate cannot, without an actual re-assignment, operate to divest the property out of such assignee. The Lord Chancellor has no other power over a bankrupt's estate than what is given to him by statute. The stat. 5 *G.* 2. *c.* 30. *s.* 26. first empowers the commissioners to transfer the property from the bankrupt to his assignees. By *s.* 30. any assignee removed or displaced by the creditors is required to assign the estate and effects to any other assignee chosen by them, under a penalty in case of refusal or neglect. Then as it may sometimes be necessary to vacate the old and make a new assignment, the Lord Chancellor has, by *s.* 31., a discretionary power to make an order for that purpose upon petition of any creditors. But this must be done by an express order of the Lord Chancellor to vacate the former appointment and to make a new assignment. The inconvenience which may ensue from the assignee being
[414] abroad is no other than what may arise in every other case where a conveyance is necessary. 2dly, The sale of the ship by the defendant, not being tortious at the time and under the circumstances, is no conversion in law. There was a *bonâ fide* delivery of the ship from *Ward* the then owner to the defendant, and if *Ward* could not have maintained trespass, neither could he have maintained trover. The defendant had at least a rightful possession, though with a bad title. Then the assignees cannot convert that which was at first a lawful possession into a tortious one, without a demand and refusal. In 5 *Com. Dig.* 541. *Trespass* D. it is said, that "a man shall not be charged in trespass for goods which he had by the delivery of the party himself, except where by a wrongful act he makes himself a trespasser *ab initio*." So in *Weymouth* v. *Boyer* (*a*), *Buller* J., sitting for the Lord Chancellor, considered that trover would not lie against one in possession and making sale under the authority of the owner. And he said, that if it were no conversion at the time of the sale, no refusal afterwards would do. So where one gives an authority for doing a thing, he cannot for any subsequent cause punish that which is done by his own authority. 8 *Co.* 146 *b.* 3dly, The plaintiffs as assignees are bound to make title to the ship with all the formalities required by the Register Acts. They take the bankrupt's estate by the conveyance of the commissioners in the same manner as

(*a*) 1 Ves. Jun. 416. 424.

property

property is conveyed to any other. By st. 13 *El. c.* 7. persons purchasing the copyhold from the commissioners must compound with the lord like any other purchasers. And in *Drury* v. *Man* (*a*) it was ruled, that assignees of bankrupts stood in the same relation to the lord of the copyhold as any other vendors. Besides, if such assignees were not bound to take a conveyance of a ship under the Register Acts like others, the policy of the law would be greatly defeated; for many assignees are foreigners, who would by the medium of a bankruptcy become owners of *British* ships. But 4thly and principally, the defendant has done every thing required by the register laws to complete his title: and therefore the case of *Heath* v. *Hubbard* (*b*) proceeded on a mistake of those laws. The stat. 12 *Car.* 2. *c.* 18. does not provide for any case of transfer of ships. The stat. 7 & 8 *W.* 3. *c.* 22. is the first which regulates the transfer between individuals: and that requires (*s.* 21.) that "upon any transfer of property to *another* port" the ship shall be registered *de novo*, and the former certificate delivered up to be cancelled; and that "upon any alteration of property in the *same* port, by the sale of one or more shares in any ship after registering thereof, *such* sale shall be ackowledged by indorsement on the certificate of the register." By "*transfer of property to another port*" must be understood to some *person* residing at another port, by which the home of the ship would be changed (*c*); and in this case the direction is express that the ship shall be registered *de novo*, and that the certificate of the former registry shall be cancelled, and therefore no indorsement can be made of it; but such indorsement is to be and can only be made upon any alteration of property, by the sale of one or more shares to persons in the *same* port. The regulations were adopted to preserve the evidence of the ownership of *British* vessels remaining in *British* subjects with the least trouble, delay, and expense to individuals. It is evident in this statute that the word SUCH (*i. e.* "such sale shall be acknowledged by indorsement on the certificate of the registry") is necessarily confined to an alteration of property in the *same* port. The 16th sect. of the 26 *G.* 3. *c.* 60. reciting that the provisions made in the last-mentioned act, "touching the indorsement on certificates of registry, in case of any alteration

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(*a*) 1 Atk. 95. (*b*) 4 East, 110. (*c*) Vide 26 *G.* 3. *c.* 60. *s.* 5.

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of property in any ship in the *same* port to which she belongs have been found insufficient," directs further regulations to be complied with besides the indorsement thereby required. The same words are again referred to in sect. 15. of the stat. 34 *G.* 3. *c.* 68, which gives a form of the indorsement required to be made on the certificate of registry in case of any alteration of property in the *same* port to which the ship belongs. Then the 16th section of the last act provides, " that " if any ship shall be at sea, or absent from the port to which " she belongs at the time when *such* alteration in the property " thereof shall be made as aforesaid, so that an indorsement " on (*a*) the certificate cannot be immediately made, the sale, " &c. shall notwithstanding be made by a bill of sale," &c. and a copy thereof shall be delivered, and an entry thereof indorsed on the oath or affidavit, and a memorandum thereof be made in the book of registry, and notice given to the commissioners of the customs, &c. Now in commenting on the words of this last clause the Lord C. J. in the case of *Heath* v. *Hubbard*, considered that the word *such* (such alteration in the property) meant the same as *any* alteration. But it must rather be taken to refer to *such* alteration as was mentioned in the preceding section, to which it has evident relation; and the alteration there mentioned is an alteration of property in the *same* port, the same which was stated in the stat. 7 & 8 *W.* 3. which required an indorsement on the certificate of the former registry, and which is there plainly contradistinguished from a transfer of property to *another* port, which required a registering *de novo* and a delivery up of the old certificate to be cancelled. If the ship had been in her proper port at the time of the sale, the case could not have been at all affected by the 16th section, which is only applicable to transfers of property at sea or out of the proper port. Neither would it have fallen within the 15th section, because that is expressly confined to any alteration of property in the *same* port to which the ship belongs. And the 16th section only applies to the case of a ship absent from its own port, which, if at home at the time of the sale, would have fallen

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(*a*) In the case of *Heath* v. *Hubbard*, 4 East, 120. an error was noticed in the printed statute l. 3. of this clause, " indorsement *or* certificate," for " indorsement *on the* certificate." And vide the Lord C. J.'s reading of it in page 128 *ib.*

within

within the 15th section, and consequently cannot affect the present case, which is that of a *whole* ship transferred to *another* port, which at any rate requires a new register by the stat. 7 and 8 *W.* 3. *c.* 22. *s.* 21. And the stat. 34 *Geo.* 3. *c.* 68. *s.* 20, 21, & 22, confirms the distinction of the two modes of transfer, and extends the authority of the officers in certain cases to give new registers, even in the case of partial transfers in the same port. Then if this distinction be well founded, and this is a case where no indorsement of any certificate was necessary to convey the title from the vendor, but only a subsequent new registration, which is the act of the vendee himself, and merely calculated to give him the privileges of the *British* navigation, the case of *Moss* v. *Charnock* (*a*) does not apply, where a further act remained to be done by the bankrupt after his bankruptcy, in order to complete the title.

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Hall, in reply to the first objection to the plaintiff's action, as to the not joining the removed assignee, because the Lord Chancellor had not pursued the 31st section of the stat. 5 *Geo.* 2. *c.* 30. by vacating the former and appointing a new assignment to be made, observed, that the power at first given to the Lord Chancellor, was general, "to make such order as he should think just and reasonable:" and then the clause proceeds to state, that "*in case* a new assignment shall be ordered to be made," the bankrupt's estate "shall be effectually and legally vested in such new assignee," &c. which assumes that a new assignment is not necessary at all events to be made. And here it was not necessary, because there were other assignees remaining in whom the whole legal estate was already vested when *Johnston* was removed. To the second objection he answered, that however rightful a bare possession might have been at first, and until a demand and refusal, at any rate the defendant's taking upon himself to make sale of the ship without title was an actual conversion. As to the third objection, it was before answered. As to the fourth, which went to the defendant's title, the preliminary objection grounded on the case of *Moss* v. *Charnock* remains unanswered; for the due registering of the ship was as necessary to complete the title to her, whether to be done by the vendor or vendee, as the bill of sale. And the only distinction taken in the case of *Heath* v. *Hubbard* was between such acts as were necessary to be done by either of the parties, and such as were

(*a*) 2 East, 399.

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to be done by the officers or third persons, which latter alone were considered as *directory*, and not affecting the title. *And here the ship was not registered *de novo* (even if that would otherwise have done) till after the bankruptcy; and the bill of sale alone could not give the title. But in no instance now can a register *de novo* be granted without shewing a compliance with all the requisites of the 15th and 16th sections of the stat. 34 *Geo.* 3. *c.* 68. For the 20th section enacts, that when the property in any vessel shall be transferred to any other subject in *whole* or in *part*, and such vessel shall be required to be registered *de novo*, the proper officer shall require the bill of sale to be produced to him, &c. "Provided that all the *other* regulations required by the laws in force concerning the registry *de novo* of vessels be complied with." This presumes that there are other regulations besides the production of the bill of sale, and these are only to be found in the 15th and 16th sections.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered judgment. There were three objections taken in this case to the plaintiff's right to recover, founded on a supposed defect in the *title of the plaintiffs* to the ship in question. The first objection was, that *John Glen Johnston*, *one* of the *assignees* (in respect to whom the Chancellor's order for removing him from being an assignee is within stated,) ought, notwithstanding such order, to have been joined as a plaintiff, inasmuch as his interest as assignee was not divested by the mere operation of such order; but that a new assignment by the old to the new assignees, whereby the debts, effects, and estate of the bankrupt should be "effectually and legally vested in such new assignees," was necessary for this purpose. A second was, that there was *no conversion* of the ship in this case proved to have been committed by the defendant. The third objection was, that the plaintiffs, as assignees, ought to have derived a title to themselves, by shewing a compliance with all such forms as are required by the several statutes on the subject, to give effect to transfers of property in ships in other cases. Supposing however the plaintiff's right to recover not to be defeated on any of these grounds, it was then further insisted, on the part of the defendant, that *the defendant himself* had a good *right* to the ship in question, in virtue of his purchase

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purchase, and the registration of the ship *de novo* in the port of *London*, as stated in the case.

As to the first of these objections, assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are *three* out of the *four* assignees in whom the property of the ship originally was (and until a new assignment is made under the order of the Ld. Chancellor, continues to be) vested, from recovering more than their three-fourth parts in value of the property in question. For it is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, *viz. that all the several part-owners in a chattel have not joined in an action of trespass, or of tort brought in respect to it, by plea in abatement.* I will only refer to *Addison* v. *Overend*, 6 *T. R.* 766, in which most of the cases on the subject are collected; and *Sedgeworth* v. *Overend*, 7 *T. R.* 279.

As to the second objection, *viz.* that there is no proof of any *conversion* by the defendants of the ship in question; if in the result it shall appear that *the defendant had no title to the ship in question* at the time when he sold her by public auction on the 19th of *February* 1802, and afterwards, on the [421] 5th of *April* 1802, assigned her to persons who sent her to sea, where she was lost, it will in that case be very difficult to state an instance of an actual conversion to their own use more absolute and perfect on the part of the defendant than this. And though *Ward* could not, as the defendant's counsel said, have complained of the sale by *Hubbard* as a tortious act, it does not follow from thence that his assignees cannot. *Ward* could not have maintained trover for the ship against *Hubbard* while in his possession; but the plaintiffs, his assignees, most unquestionably might have brought such action if the property in the ship passed to them under the commission. It is by no means true, as a general proposition, that the assignees can maintain no other actions than what might have been maintained by their bankrupt. A bankrupt cannot recover the value of goods he had delivered in pursuance of a purpose of fraudulent preference in contemplation of bankruptcy, which his assignees may, and in daily practice constantly do. And many other instances to the same effect might be put.

As to the third objection, that the plaintiffs as assignees ought to have derived title to themselves by a compliance with the

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requisites of the stats. 26 *G.* 3. and 34 *G.* 3. (called Lord *Liverpool*'s acts) in respect to the transfer of property in ships; it is an objection which, if it could prevail, would have the effect of defeating every title that has been hitherto made under a commission of bankrupt to this species of property since the passing of those statutes. For I believe that in no instance the requisites of those statutes will be found to have been complied with in regard to assignments by commissioners of
[422] bankrupt. But there is no ground for this objection. These statutes only relate to transfer made by the act of the parties, *viz.* from a *former owner* to a new *owner*, and where the transfer is capable of being effectuated in the ordinary way by the mere operation of an instrument of assignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do. There the commissioners are not *former owners;* they do not *sell* in the sense in which the word *sale* is used in these stats. 26 & 34 *G.* 3.; although in pursuance of the directions of the st. 13 *E.* c. 7. *s.* 2. and other later stats. they *make sale thereof* in point of form by deed indented and enrolled, &c. as being the means specially appointed and described by the latter of those stats. for the execution of the *power* given to the commissioners in this respect, for the vesting of such property of the bankrupt in his assignees accordingly. The form of indorsement on change of property in the 15th sect. of the st. 34 *G.* 3. c. 68. clearly shews that the *sale* therein meant was a *sale* from a *former proprietor.* It runs thus: "Be it remembered, that [*I or we*] [names, residence, and occupation, of the *persons selling*] have this day sold and transferred all [*my* or *our*] right, share, or interest, in and to the ship or vessel," &c. But how can commissioners of bankrupt possibly be considered as persons selling any *right, share or interest of their own* within the meaning of these words [*my* or *our*]? The property transferred by them is neither legally nor equitably *theirs:* it does not vest in them for an instant: it passes *by* them, or rather by the act they are directed and empowered to perform, and not
[423] *through* them. It appears therefore to us that the assignments made by commissioners of bankrupt to the assignees of a bankrupt were not meant by the Legislature to be comprehended in the provisions directed to be pursued in respect to the transfer of property in ships between sellers and buyers; and that of course the assignment in this case is not liable to the objection

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which has been made on this ground. If indeed this objection were allowed, it would also defeat the object of provisional assignments, so far as respects a bankrupt's ship, and the crown's extent would constantly have the preference.

Supposing therefore that the title of the plaintiffs to recover in this action is not affected by any of these three objections, it remains to be considered whether the defendant has upon the face of this case a good title to the ship in question, in virtue of his purchase and the subsequent registration *de novo* above stated? And this depends upon the provisions contained in the statutes 7 & 8 *W. 3. c.* 22.; 26 *G. 3. c.* 60; and 34 *G. 3. c.* 68. as far as they respect the transfer of the entire property in a ship, and particularly upon the application of the provisions contained in the 16th sect. of the stat. 34 *G. 3. c.* 68. to the case of a transfer of the entire property in a vessel *when at sea* or *absent from the port to which she belongs*, as this ship was at the time when the assignment of it was made to the defendant. And first, the stat. 7 & 8 *W. 3. c.* 22. *s.* 21. provides, that no ship's name shall be changed without *registering such ship de novo*, which is required to be done *upon transfer of property to* ANOTHER *port*, and delivering up the former certificate to be cancelled. And in case there be any alteration of property *in the same port* by the sale of *one or more shares* in any ship after registering thereof, *such* sale shall always be acknowledged by *indorsement* of the certificate of registry before two witnesses, in order to prove that the *entire* property in such ship remains to some of the subjects of *England*. It is to be observed, that here is no provision in case of sale of the ship *at the same port*, for proving it to continue *English* property, if an indorsement on the certificate be only to be made in the case of a *partial* sale; for a new register is not required but on a transfer to *another port*. The st. 26 *G. 3. c.* 60. *s.* 3. reciting that it is expedient that the provisions made in the st. 7 & 8 K. *W.* should *be altered and amended*, and that the same should be extended and applied to ships other than those therein described, enacts what ships shall be registered. And by *s.* 4. directs that no registry shall be made but *at the port to which such ship or vessel properly belongs*. And *s.* 5. enacts that the *port, to which any ship or vessel shall thereafter be deemed to belong* within the meaning of that act, shall be the port from and to which such ship *shall usually trade*, or being a *new* ship shall *intend* to trade, and at or near which the husband or acting

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acting manager, or owner, usually resides. The 16th sect., reciting that the provisions made in and by the said recited act touching the indorsements on certificates of registry, in case of ANY *alteration of property in any ship or vessel in the same port, to which the ship or vessel belongs*, have been found insufficient, enacts, that in every *such* case, besides the indorsement required by the said recited act, there shall also be indorsed on the certificate of registry before two witnesses, the town, place, or parish, where all and every person or persons *to whom* THE PROPERTY *in any ship or vessel, or any part thereof*, shall be *so transferred*, shall reside, &c.; and the person to whom *the property* of such ship or vessel shall be so transferred, shall deliver a copy of such indorsement to the persons authorized to make registry, and who are to make an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and give notice to the commissioners of the customs. This clause speaks of transfer of the property in *the ship or any part thereof;* either considering the provisions for indorsement made by the st. of K. *W.* as extending to a transfer of *the whole*, or meaning to remedy the defect in their not being already so extensive. It is either a *legislative exposition* of the st. of K. *W.* or an *enlargement* of it. The st. 34 *G.* 3. *c.* 68. *s.* 15., reciting that by the laws now in force upon *any* alteration of property in any ship or vessel in the same port to which such ship or vessel belongs, an *indorsement* upon the certificate of registry is required to be made, enacts that such indorsement shall be made by the person "*transferring* THE PROPERTY *of the ship or vessel*," &c. and prescribes the form. This clause also considers the indorsement necessary upon *any* alteration of property, and does not speak of the person selling *one or more shares in the vessel*, but of persons "*transferring the* PROPERTY *of the ship*." And this act is in furtherance of the provisions of the stat. 26 *G.* 3. It is to be observed also, that the expression in the statute, of an alteration of property taking place *in the port* to which the ship belongs, means *when the ship is in the port* at the time the change of property takes place; in which case such change is to be indorsed on the certificate of registry; and is put in opposition to the case of the ship being *absent from the port*, or *at sea* (which is the object of the 16th section of this act), in which case the certificate being with the ship, the change

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change of property cannot be indorsed thereon, and is therefore directed to be noticed on the oath and in the book of registers. The 16th section, as already observed, provides for the case of the absence of the ship from the port to which she belongs at the time when *such alteration* in the property thereof shall be made as aforesaid. *That alteration*, by reference to the preceding section, is *any alteration*, and, by referring again to the 16th section of the stat. 26 *G.* 3. is *any alteration by which the property in any ship* or *any parts* thereof may be *transferred.* If these provisions be to be construed as being confined and limited to the transfer only of *shares and parts* of ships, this mischief might follow, *viz.* that the whole of the ship might by bill of sale be transferred to a *foreigner*, and if she did not change her port, the vessel might still trade with all the advantages of a *British* ship. But no such thing can happen, if the certificate of the registry be indorsed, as that must be shewn to the officers of the customs when required. And what reason can there be, if a ship be at sea, and *any shares* be sold, that the provisions of the 16th section of the stat. 34 *G.* 3. should be complied with; but not, if the *whole* be sold? For according to that construction, at least until the return of the ship, all the mischiefs intended to be prevented by the 16th section as to the transfer of *parts* of the ship would subsist as to the *whole* ship, if transferred when at sea. In *M'Neil*'s case in *Reeve's History of Shipping*, p. 504. Lord *Camden*, president of the council, said, that he thought the stat. 26 *G.* 3. was an act which in every view of it should be considered as a *remedial* act; it was to prevent a public mischief, *to amend and alter* the stats. 7 & 8 *W.* 3. It had appeared that frauds without number were committed under that act; and that was stated to be the reason of making the stat. 26 *G.* 3. The rule therefore of construction in applying and [427] explaining the act should be such as will most aid the advancing the means of relief and in suppression of fraud. And adopting this rule of construction, and collecting the intention of the Legislature as well as we are able from these several acts of Parliament, we feel ourselves obliged to consider the provision contained in the 16th section of the stat. 34 *G.* 3. *c.* 68. as to the alteration of property "in a ship or vessel *at sea*, or *absent from the port* to which she belongs," as applying to *any* alteration of property in the ship or vessel, whether the same be made by the transfer of the *whole* or by the sale of

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any share or *number of shares* therein, amounting to less than the whole interest in such ship or vessel. And as such provisions have not been pursued in respect to the assignment of this ship made on *Nov.* 9, 1801, when it is stated to have been *at sea*, we think that no interest therein has passed to the defendant by his purchase and registration *de novo* stated in the case; and that consequently the plaintiffs are entitled to retain the benefit of the verdict found for them to the extent of 1744*l.* 15*s.* and costs, being three-fourth parts of the sum of 2326*l.* 6*s.* 8*d.* mentioned in the case as the damages found for the whole ship; and the verdict being thus altered, we direct that judgment be entered for the plaintiffs accordingly.

Postea to the plaintiffs.

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Tuesday, June 19th.

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A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care

THIS was an action of assumpsit, brought to recover the amount of damage done to a quantity of yarn of the plaintiffs', delivered on board a lighter of the defendant's, to be carried therein from a quay at *Hull* to a sloop of one *William Barton* lying in a dock there, and to be delivered on board the same, for a reasonable reward to be paid to the defendant. The declaration stated (amongst others) a promise by the defendant that the lighter *was tight and capable of carrying the yarn;* also a promise by him that the lighter was so far as he knew *a proper and substantial vessel fit for carrying the yarn without damage;* and also a promise by him *to stow, load, and carry the yarn carefully*, and with due attention to the same. Plea *non assumpsit.* On the trial before *Thompson* B. at the last *York* assizes, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

On the 10th of *June*, 1802, several bales of yarn belonging to the plaintiffs were delivered on board the lighter, of which the

in the master or crew of the vessel, in which case he would pay 10*l. per cent.* upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies.

defendant

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defendant was the owner, in manner, and for the purpose above mentioned. The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops. Previous to the delivery the master of the defendant's lighter, when he was applied to fetch the yarn, undertook to bring it in the lighter to the sloop, and being asked if the lighter were fit to carry it, said *it was very fit and tight*, and that he had been down the day before with hemp and flax in her to some of their vessels at *South End*. In carrying the yarn in the lighter to the sloop the lighter leaked, and some of the bales of yarn were thereby wetted and damaged; and on the arrival of the lighter at the sloop the master of the lighter, on its being mentioned to him that he had got water in his boat, said, there was a bit of a weep (meaning a leak) abaft. Three or four of the bales of yarn were stowed upon the top of the pump, by which it was rendered entirely useless until they were removed. Before the second bale of yarn could be hoisted into the sloop the lighter was going down, and would have sunk to the bottom of the dock with the rest of the bales, but was prevented by getting tackle fixed to her to get her up. The damage thereby done to the yarn amounted to 274*l.* 16*s.* 4*d.* The lighter was *not tight and sufficient for the carriage of the yarn*, but was *leaky;* and the *master* of the lighter was guilty of *negligence* in not stowing the yarn properly. Previous to the shipping of the yarn on board the lighter the defendant published the following notice, of which the person who so shipped the yarn on behalf of the plaintiffs had notice, he himself being one of the persons who signed the same. "Navigation of the river *Humber* and of the "rivers falling into the same. To all merchants, tradesmen, "and others. We whose names are hereunto subscribed (by "ourselves or by our respective agents) do hereby severally give "notice, that we will not be answerable for *any* loss or damage "which shall happen to any cargo which shall be put on board "any of our vessels, unless such loss or damage shall happen or "be occasioned by want of ordinary care and diligence in the "master or crew of the vessel; when and in such case we will "pay to the sufferers 10*l. per centum* upon such loss or da-"mage, so as the whole amount of such payment shall not ex-

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"ceed

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"ceed the value of the vessel on board whereof such loss or damage shall have happened, and the freight of such vessel. "And we do hereby give this further notice, that any merchant "or other person desirous of having their goods or merchandise carried *free of any risk* in respect of loss or damage, whether the same shall happen from the act of God or *otherwise*, "may have the same so carried by entering into an agreement "for the payment of an *extra freight, proportionable* to the accepted responsibility, on application to us or our respective "agents. *Hull, Oct.* 1, 1800." This notice was signed by the defendant and by 49 other owners of vessels at *Hull*. The question for the opinion of the Court was, Whether the plaintiffs were entitled to more than 10*l. per cent.* upon the above damages? If they were so entitled, the verdict was to be entered for the plaintiffs for the above sum of 274*l.* 16*s.* 4*d.*; if they were not so entitled, then the verdict was to be entered for the plaintiffs for the amount of 10*l. per cent.* upon the damages.

Holroyd for the plaintiff, after premising that the whole facts of the case, and even the terms of the notice, shewed that the defendant was a common carrier, contended that in that character he was answerable by law for every loss except by the act of God or the king's enemies, and that he could not discharge himself from such responsibility by any notice. Besides which every master is liable for the actual negligence or misconduct of his servant acting within the scope of his employment, of which liability he cannot by any general notice divest himself. The common law attaches upon carriers by water as well as by land from one part of the kingdom to another, and their general responsibility is founded on public policy which it is the object of the notice in question to contravene. In *Kirkman* v. *Shawcross* (*a*), Lord *Kenyon* considered that innkeepers and common carriers could not get rid of their legal responsibility, the one for the safe custody of the goods of their guests, the other for safe carriage, though the latter might stipulate for a special reward adequate to the risk. That opinion was approved in *Oppenheim* v. *Russel* (*b*). And the distinction was more expressly taken by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Mersey Navigation* (*c*), between where a man is chargeable by law generally, as in the case of a common carrier, and where on his

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(*a*) 6 Term Rep. 17.
(*b*) 3 Bos. & Pull. 42.
(*c*) 1 Esp. N. P. Cas. 36.

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own contract: in the former he is liable for all losses, except those arising from the act of God or of the King's enemies, and cannot, says his Lordship, discharge himself from them by any act of his own, as by giving notice to that effect. So said Lord *Holt* in *Lane* v. *Sir R. Cotton* (*a*), though erroneously applied to the case of a postmaster. There is no need of a contract, for the law makes him answerable. He has a reward; which is the reason in the case of innkeepers, *hoymen*, &c. who are bound to keep safely and answer all neglects of those who act under them, *though they should expressly caution against it*. Now here the notice is not that the carrier will not be liable without a certain adequate price for his risk, which would admit of a different consideration, but that he will not be liable at all where the loss does not happen from want of care of the master and crew, [432] nor even then for above so much *per cent*. But no person can exempt himself from a common law obligation, without at least some consideration moving to the person to whom he is liable; such, perhaps, as his agreeing to carry for less than the usual reasonable price (as is the common case where parcels are of less than 5*l*. value, or paid for accordingly;) otherwise it is *nudum pactum*. If indeed a carrier charge more than reasonable rates he may be indicted for extortion. Here there is no consideration for the exception; and therefore the common law liability attaches upon a carrier for losses by the want of care of those whom he employs in his business, which is the same as his own. For *qui facit per alium facit per se*. And this liability sometimes extends to charge him even criminally. As where a bricklayer's servant leaves the rubbish of his work in the street, the master is indictable for the nuisance. Or where a bookseller or printer's servant sells a libel in his shop, that will charge the master for the libel. In all cases where a person engages to do a thing for a reward, the law implies an engagement to do it with reasonable care and diligence; and it is contradictory to the very nature of the engagement and the policy of the law to introduce such an exception as in this case. At all events however the loss in this case is out of the terms of the notice; for it did not happen from the want of care of the master or crew, but from the personal default of the carrier himself in not having provided a sufficient vessel, which it

(*a*) 1 Salk. 18. 12 Mod. 481—3. S. C.

was

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was his duty to have done: and there is no stipulation against his own personal wrong. And he referred to *Ellis* v. *Turner* (*a*), where a similar notice was given, and *yet the owner of the vessel was holden liable for the whole loss upon the special undertaking of the master.

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Gaselee, for the defendant, said, that he was restrained by the order of *nisi prius* from disputing that the defendant was liable to the extent of 10 *per cent.*, otherwise he should have contended that he was not liable at all. He admitted that in the absence of any express contract the law implies a contract that the carrier shall be liable for all losses, except such as arise from the act of God or the king's enemies; but insisted that he might make a special acceptance, on which only he would then be liable. For *expressum facit cessare tacitum*, and the law never raises an implied contract against an express one; as in *Toussaint* v. *Martinnant* (*b*). The *dictum* of Lord *Holt* in *Lane* v. *Cotton* may indeed be opposed to this, but that stands unsupported, and is contrary to the principle of the modern decisions establishing the special acceptance of carriers in certain cases, as well as of some more ancient authorities. *Kenrig* v. *Eggleston* (*c*); *Tyly* v. *Morrice* (*d*); *Titchburne* v. *White* (*e*); *Gibbon* v. *Paynton* (*f*); *Clay* v. *Willan* (*g*); *Yate* v. *Willan* (*h*); and *Izett* v. *Mountain* (*i*). The *dictum* of Lord *Kenyon* in *Hide* v. *The Trent and Mersey Navigation* (*k*) does not go the length of saying that a common carrier cannot accept goods upon a special contract, but only that he cannot discharge himself by *his own act*, as by giving general notice. And it is no answer to the 5*l.* cases to say, that they proceeded on an undertaking of the owner, express or implied, that the parcel was not worth more than 5*l.*; for it is now settled that he shall not recover even the 5*l.* in case of such a special acceptance, if the parcel be of greater value. Taking the whole of the notice together, it appears that so far from the carrier declining the responsibility of the law, he was even willing to take more *onus* upon him, and indemnify the owner against even the

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(*a*) 8 Term Rep. 531. (*b*) 2 Term Rep. 100. (*c*) All. 93.
(*d*) Carth. 485. (*e*) 1 Stra. 145. (*f*) 4 Burr. 2298.
(*g*) 1 H. Blac. 298. (*h*) 2 East 128.
(*i*) 4 East 371. The account of the case of *Smith* v. *Shepherd*, Abbott's Law of Merchant Shipping 232. was also referred to.
(*k*) 1 Esp. N. P. Cas. 36.

acts

acts of God and the King's enemies for a *proportionable* reward. Then it must be inferred that the special risks, for which only the carrier contracted in the first part of the notice, were for less than a reasonable reward; and if so, there would be a sufficient consideration to the plaintiff for the defendant narrowing his common law liability. As to this not being a case within the terms of the notice, because it is the owner's duty to provide a proper vessel; that does not follow; because the want of repair may be as much the default of the master as of the owner. Besides the notice is that the owner will not be liable for *any* loss unless occasioned by the want of ordinary care in the master or crew, which excludes every other cause of loss. Then it was not competent to the servant beyond the declared scope of his authority, as limited by the notice, to bind the owner of the vessel by a promise which went to warrant the security of the vessel at all events; however the owner himself might have bound himself by such a promise; and therefore this is not like *Ellis* v. *Turner*, where the special promise of the master was collateral to the notice, namely, to deliver the goods at a particular place in the course of the navigation. [Lord *Ellenborough*, C. J.—Is it not within the scope of the servant's general authority to declare in what condition the vessel is, which may be the plaintiff's inducement to put his goods on board it?] If the servant make a fraudulent representation he himself would be liable, and might perhaps, in some cases, bind his employer for whose benefit he was acting, but the remedy would be in another form of action. [*Lawrence* J.—If the servant have authority to represent the vessel in good condition, why may not that be the foundation of an *assumpsit* as well as if the master himself had so represented it?] It would be so if he had a general authority, according to *Seignior* v. *Wolmer* (*a*); but here was only a special authority to contract within the terms of the notice, and therefore an execution of it under a different modification will not bind the principal, as in *Fenn* v. *Harrison* (*b*). If then the plaintiff must be bound by the notice, this action is misconceived; because the defendant did not contract as a common carrier, but especially with the restriction contained in the notice; and if he were bound to

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(*a*) Godb. 360.

(*b*) 3 Term Rep. 757. Sed vide S. C. 4 Term Rep. 177.

have

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have accepted the goods in his general character, he having refused to do so, the plaintiff's remedy should have been by an action on the case against him for such refusal.

Holroyd, in reply, noticed the statutes 7 *Geo.* 2. c. 15. and 26 *Geo.* 3. c. 86. which particularly exempted the owners of ships from losses of gold, silver, and jewels, put on board without their privity, beyond the value of ship and freight, and that on certain conditions: which shews that they were before considered as liable. And said that the 5*l.* cases certainly went on the ground of want of adequate consideration for the risk: and it was a sufficient reason why the carrier was not liable even to that amount,

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because if he had had notice that the value of the goods was more, he might have taken additional precautions against the loss. That as to the form of the action, it was settled in *Dale* v. *Hall* (*a*), that it made no difference whether it were in *assumpsit* or on the custom of the realm; for that by stating that the defendant carried for hire, it shewed that he was a common carrier, and that was a foundation for the *assumpsit*.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. delivered judgment. The general question submitted to our determination by the special case stated at *nisi prius* is, whether the plaintiffs be entitled to more than 10*l. per cent.* upon the sum of 274*l.* 16*s.* 4*d.* the damages stated to have been sustained by the plaintiffs in consequence of the injury done to their yarn while on board the defendant's lighter. That they are entitled to recover to the extent of 10*l. per cent.* is admitted by the terms of the question. On the part of the plaintiffs it has been argued, either that the notice given by the defendant, as set forth in the case, is illegal, being to exempt him from a responsibility cast on him *by law* as a carrier of goods by water for hire; or if that proposition be not maintainable, that in fact the present case does not fall within the terms and meaning of that notice. At the close of the argument the Court intimated an opinion that in the determination of this case it might perhaps not be necessary to enter into a consideration of the general question, as to the validity of these notices in point of law, and to what extent and

(*a*) 1 Wils, 281.

upon

upon what principles they may be supportable. And on further consideration we are all of opinion, that in the present case, admitting the notice given by the defendant *and the other owners of vessels to be valid as an agreement between them and the shippers of goods, the circumstances stated do not bring the plaintiff's loss within such agreement. In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate *substratum* of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so. The declaration here states such promise to have been made by the defendant; and it is proved by proving the nature of his employment; or, in other words, *the law* in such case without proof *implies* it. The declaration avers a breach that the lighter was *not tight and capable* of carrying the yarn safely; and the facts stated support the breach so alleged, by shewing that the vessel was leaky, and had nearly sunk in the dock before the yarn could be unloaded from the lighter into the sloop. This we consider as personal neglect of the *owner*, or more properly as a non-performance on *his* part of what he had undertaken to do, *viz.* to provide a fit vessel for the purpose. This brings me to consider the terms of the notice: "We will not be answerable for any loss or "damage which shall happen to any cargo which shall be put "on board any of our vessels, unless such loss or damage "shall happen or be occasioned by want of ordinary care and "diligence in the master or crew of the vessel, in which case "we will pay 10*l. per cent.* upon such loss or damage, so as "the whole amount of such payment shall not exceed the va-"lue of the vessel and the freight." I have before stated our opinion to be that this is clearly a neglect or breach of performance in the *owner* of the vessel, and not a neglect in the *master* or *crew;* it does not therefore come within the exception of such loss or damage as is to be compensated by 10*l. per cent.* But the notice states that "they will not be answerable

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swerable for any *other* loss or damage;" and therefore this must be contended to be within that *other loss or damage* for which they will not be answerable; a proposition however which seems to have struck the counsel for the defendant as not capable of being supported; for I take him to have admitted in his argument that if the *defendant* had *himself* made the promise stated in the declaration he would have been liable; and he could not contend otherwise: for it is impossible without outraging common sense so to construe this notice as to make the owners of vessels say, We will be answerable to the extent of 10 *per cent.* for any loss occasioned by the want of care of the *master* or *crew*, but we will not be answerable at all for any loss occasioned by *our own misconduct*, be it ever so gross and injurious; for this would in effect be saying, We will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them; we will not be bound even to provide a crew equal to the navigation of her; and if through these defaults on our part she be lost, we will pay nothing. Nay more, your compensation in case of misconduct of the master or crew can never exceed the value of the vessel and her freight; and therefore
[439] by providing a rotten and leaky vessel of little value, we lessen our own responsibility *pro tanto* even in the only event in which we are to be at all responsible. Ridiculous as this supposed state of the agreement must appear, yet these and more absurd stipulations must be introduced into it if we give it a construction which shall bring this case within it. Indeed that this is the true construction will further appear from the part of the notice respecting *additional freight;* for it is addressed to those who are desirous of having their goods carried free of risk "from the act of God or otherwise;" words importing that the thing for which an increased freight is to be paid, is that which is properly the object of risk, and of course may or may not happen to the goods, *i. e.* that which may arise from accident and depends on chance, and not that which is certain and must inevitably be the consequence of a defect in that which the carrier has engaged to provide. Every agreement must be construed with reference to the subject-matter; and looking at the parties to this *agreement* (for so I denominate *the notice*), and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters

lighters was to limit their responsibility in those cases only where *the law* would otherwise have made them answer for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against. For these reasons we are of opinion that the plaintiffs are entitled to have their verdict entered for the full sum of 274*l.* 16*s.* 4*d.* and that the postea be delivered to them for that purpose.

Postea to the plaintiff.

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LYON *against* MELLS.

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Wednesday, June 20th.

WIGLEY *against* JONES, Marshal of the Marshalsea.

In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process and brought before a Judge at chambers by virtue of a *writ of habeas corpus*, and was by him thereupon *committed* to the custody of the marshal *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for properly speaking, such documents are not *records* nor capable of becoming so: or, considering them *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the K. B. prison with whom they are properly deposited.

IN an action against the marshal of *B. R.* for an escape the declaration stated that one *Mary Bergeret de Frouville* was indebted to the plaintiff in 34*l.* 9*s.* for goods sold and delivered, for the recovery of which the plaintiff in *Trinity* Term, 41 *G.* 3. sued out of *B. R.* a bill of *Middlesex* to arrest her, founded on an affidavit of debt for 34*l.* 9*s.* filed of record in *B. R.*, and which precept was indorsed for bail for the said sum. By virtue of which said precept the said *M. B. de F.* on the 23d of *September*, &c. was arrested by the sheriff of *Middlesex*, and detained in custody for want of bail; and being in such custody for the cause aforesaid, on the 24th of the same *September* she was brought before Sir *S. Le Blanc*, one of the Justices of *B. R.* at his chambers, &c. in the custody of the said sheriff by virtue of a writ of *habeas corpus* issued out of *B. R.* and directed to the sheriff, &c. and the said *M. B. de F.* was thereupon *committed* by the said Judge to the custody of the marshal of the Marshalsea, &c. at the suit of the plaintiff in the plea aforesaid, and for the cause aforesaid, there to remain until, &c. *as by the record thereof now remaining in the court of our said lord the king before the king himself manifestly appears*, by which commitment the defendant, then marshal, &c. took the said *M. B. de F.* into his custody, &c. in the King's Bench prison. The declaration then alleged the subsequent escape of the

prisoner,

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prisoner, while the debt remained unsatisfied, to the damage of the plaintiff, &c. Plea not guilty.

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The only question at the trial was, Whether the averment of the writ of *habeas corpus* and the commitment thereon *appearing of record* were proved? the only proof being the production of the original writ itself (*a*) with the *committitur* annexed, which were produced by the clerk of the papers of the King's Bench prison, with whom, as the servant of the marshal, such documents are and have been for a considerable period past deposited. It was objected on the part of the defendant that these documents were not *records*, and that nothing else would satisfy the averment than shewing that they had been duly recorded *in court*, which could only appear by the production of such a record filed in the court, or an examined copy of it. And the case of *Turner* v. *Eyles* (*b*) was relied on as in point, where the Court held that evidence like the present was not sufficient to sustain such an allegation; but that there ought to have been an examined copy of the record of commitment as recorded in court. Lord *Ellenborough* C. J., before whom the cause was tried at the Sittings at *Westminster* after *Michaelmas* Term last, suffered a verdict to be taken for the plaintiff, but reserved the point, and gave the defendant's counsel leave to

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move to set aside the verdict and enter a nonsuit if the Court should be of opinion that the objection was well founded.

(*a*) The *habeas corpus* in this case was directed to the sheriff of *Middlesex*, commanding him to have the body of *Mary Bergeret Frouville* detained in prison under his custody under safe and secure conduct, together with the day and cause of her being taken and detained before Lord *Kenyon*, C. J. at his chambers in Serjeants' Inn, *Chancery-lane*, *London*, immediately after the receipt of this writ, to do and receive all such things which the Ch. J. should then and there consider of her in this behalf. Dated 25th of *June*, 41 *G.* 3.

The return of the sheriff stated that the prisoner was taken and detained by him by virtue of several bills of *Middlesex*, amongst others, at the suit of *Wigley*. On which was indorsed as follows; "*Mary B. de F.* "is this 24th of *September* 1801 committed to the custody of the mar- "shal, &c. for want of bail, with the causes within mentioned, by *S. Le* "*Blanc*."

(*b*) Bos. and Pull. 456. and also from a MS. note of the same case which was read on moving for the rule.

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Such a motion was accordingly made and a rule *nisi* granted last term, which was supported by *Erskine*, *Garrow*, and *Wood;* who, in addition to *Turner* v. *Eyles*, referred to *Wightman* v. *Mullens* (*a*): and it was opposed by *Gibbs* and *Marryatt*, who distinguished this from the other cases, because they were commitments in execution, and this was a commitment on mesne process, which either was no record at all, at least while continuing in the hands of the officer; in which case the allegation was impertinent and to be rejected as surplusage; or if it were a record, the allegation was well proved by producing the original itself out of the hands of the officer of the court who had the proper custody of it. *The Court* said that the question being of general consequence they would look further into it before they gave their opinion. And now

Lord ELLENBOROUGH, C. J. delivered judgment.

This was a motion for a new trial in an action brought against the marshal of the King's Bench prison for an escape on mesne process. The declaration alleged that one *Mary Bergeret de Frouville*, being brought before Sir *S. Le Blanc*, Knt. by virtue of an *habeas corpus*, was by him thereupon committed to the custody of the marshal at the suit of the plaintiff "as by the *record* thereof now remaining in the "court of our said lord the now king before the king himself "manifestly appears." In proof of this commitment of the defendant in that action, verified as alleged to be by *record* thereof, the plaintiff produced in evidence the actual *writ of habeas corpus* with the *committitur* of Mr. Justice *Le Blanc* [443] indorsed thereon, *from the office of the clerk of the papers* in the *King's Bench prison*. It was objected on the part of the defendant that the writ of *habeas corpus*, with the *committitur* entered thereon, having all along remained in the hands of the officer, and in the place above mentioned, as it appeared to have done, and not having been *filed of record* in the Court of King's Bench at *Westminster*, was not *a record* of this Court within any proper sense of that word; and that therefore the plaintiff, who had in his declaration alleged it so to be, had failed in proving it, and ought on that account to be nonsuited. It appeared to me, from all

(*a*) 2 Stra. 1226. and vide also *Unwin* v. *Kirchoffe*, *ib.* 1215. and *Pearson* v. *Rawlins*, 1 East, 405. as to commitments *in execution* which are entered of record.

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the account I could obtain at the trial of the deposit and custody of these writs, that they were never kept in any other manner than this was, and that they were never in fact filed or deposited amongst the records of the court in the Treasury-chamber at *Westminster*, or elsewhere; and that therefore the allegation in question was either surplusage, the writ and committitur thereon never being entered *of record* at all; or that the depositing and keeping thereof in the usual place of custody for that purpose was sufficient to maintain the allegation of its remaining *of record*. As, however, it was stated to me that there had been a late case of *Turner* v. *Eyles* decided in the Common Pleas, on the same subject, in which that Court had holden that as the party had alleged the existence of such a record he was bound to prove it, the jury under my direction found a verdict for the plaintiff, (which was for 1*s*. only), and I gave leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that other proof was necessary upon this head. Since the argument upon the motion for a new trial we have

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caused the most diligent enquiry to be made as to the existence of any records of this kind, and we do not find that any such writs of *habeas corpus* with committiturs thereon, have ever been returned to, or filed, or kept by the court or any of its officers, at *Westminster* or elsewhere, except in the place, and by the officer, above-mentioned; but that the same have always remained, as any other warrant naturally would, in the hands of the officer to whom it is immediately directed, and whose voucher or authority for the act of detaining the party it properly is. Nor, by analogy to the case of any similar writs, do we think that they are properly capable of being entered on *record*, either by themselves or as part of any other record or proceeding. In the case of a commitment on a writ of *habeas corpus* where the party had been taken upon *a writ of execution*, and which was the case in *Turner* v. *Eyles*, 3 *B. & P.* 456., it might possibly be otherwise; and such *habeas corpus* and commitment thereon might be noticed in the sheriff's return to the writ of execution filed of record. But that is not the present case. As, therefore, the writ and committitur neither *are* of *record*, nor are properly *capable* of being so, the allegation respecting them, as *remaining of record*, is either an impertinent allegation, and

and may be rejected as surplusage, and requiring no proof, or as at any rate requiring no other proof than it has received, by the production of the writ and return, which are *quasi of record;* as the *Jamaica* judgment in the case of *Walker* v. *Witter*, in *Doug.* 1. was holden to be within the meaning of the words "*of record*" in that case, as applied to the subject-matter.

Rule discharged.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED 1804.

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

In the Forty-fifth Year of the Reign of GEORGE III.

In the last vacation VICARY GIBBS, Esq. one of His Majesty's Counsel learned in the law, and Attorney-General to His Royal Highness the Prince of WALES, was made Chief Justice of CHESTER; AND

SAMUEL COMPTON COX, Esq., JOHN S. HARVEY, Esq., and JAMES STANLEY, Esq., Barristers at Law, were appointed Masters in Chancery.

JONES *against* VAUGHAN and HALL.

Thursday, Nov. 8.

IN trespass for breaking and entering the plaintiff's dwelling-house and taking his dogs, the defendants pleaded the general issue, and also justified the trespass, the one as constable and the other in his aid, under the warrant of a magistrate to the constable to search the house and take the dogs, granted on information that the plaintiff, not being qualified, kept the dogs there for the purpose of killing game, &c. *Replication de injuriâ*, &c. At the trial before *Lawrence* J. at the last *Hereford* assizes, the fact of the trespass being proved to have happened in *January* last, and that the plaintiff on the 17th of *May* served a notice in writing on the defendants, in pursuance of the stat. 24 *G.* 2. *c.* 44. *s.* 6. demanding a perusal and copy of the warrant under which they acted, which demand was not complied with till the 25th of

A constable executing the warrant of a [446] justice of peace, and sued in trespass without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six days* after such demand, as the act directs.

1804.

JONES *against* VAUGHAN.

the same month, when the perusal and copy were given; it was objected on the part of the plaintiff, that the defendants were not entitled to a verdict under the statute (*a*), because the demand was not complied with *within six days* afterwards, according to the requisition of the statute, which put them out of the protection of it. But the learned Judge was of opinion, that however the action might have been well prosecuted against these

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defendants if it had been commenced *after* the expiration of the six days, and *before* compliance with the demand of the perusal and copy of the warrant, yet not having been commenced till after such compliance, the magistrate ought to have been made defendant; and that these defendants were entitled to a verdict; which was taken for them accordingly.

Jervis now moved for a new trial, on the ground that the statute was imperative on the officer executing the warrant of a magistrate to comply with the demand of a perusal and copy of it within the six days, otherwise he forfeited the protection of it, and could not restore himself to his privilege by a subsequent compliance with the demand. That this appeared plainly to be the meaning of the first part of the clause: and was confirmed by the subsequent part, which says, that "in case after *such* demand and compliance therewith" any action shall be brought without making the justice defendant, the officer on proof of the warrant shall be entitled to a verdict. For the word *such* has reference to the period of compliance before mentioned as well as to the demand. And the latter part was merely added to supply the omission in the former in not stating *by whom* the copy of the warrant was to be taken, which is there required to be done by the party demanding the same. That if the officer could indemnify himself at any time after the six days, by giving such perusal and copy of the warrant, he might be induced to

(*a*) By s. 6. it is enacted, "That no action shall be brought against any "constable, &c. for any thing done in obedience to any warrant of any "justice of the peace until demand made, &c. by the party intending to "bring such action, in writing, of the perusal and copy of such warrant, "and the same hath been refused or neglected for six days after such de-"mand. And in case, after such demand and compliance therewith, by "shewing the said warrant to and permitting a copy to be taken thereof "by the party demanding the same, any action shall be brought against "such constable, &c. for any such cause as aforesaid, without making the "justice who signed or sealed the said warrant defendant, that on pro-"ducing or proving such warrant at the trial of such action, the jury shall "give their verdict for the defendant, &c. And if such action be brought "jointly against such justice and also against such constable, &c. then, on "proof of such warrant, the jury shall find for such constable," &c.

withhold

withhold them to a period so late as to exclude the injured party from the benefit of his compliance; for by a former clause in the act, (*s.* 1.) the magistrate, who is to be substituted as a defendant in lieu of the officer, cannot be sued without one calendar month's previous notice in writing. and by another clause, (*s.* 8.) the action must be brought within six calendar months after the act committed.

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JONES *against* VAUGHAN.

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Lord ELLENBOROUGH, C. J.—It appears to me that the construction put on the act by my brother *Lawrence* at the trial is the proper one. I do not think that the word *such* is necessarily to be referred to the time which is given to the officer to comply with the demand, but that it meant only to refer to "such *demand*" (the word with which it is joined) as was before mentioned, namely, *of the perusal and copy of the warrant*; which construction will best satisfy the object of the act.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J.—The object of the clause in question was the protection of those officers who are charged with the execution of magistrates' warrants, who before that time were subject to indictment if they did not execute the warrants directed to them, or to vexatious actions if they did. For this purpose the Legislature proposed to substitute the magistrate by whom the warrant was granted, and who was supposed to be cognizant of the legality of it, in lieu of the officer who was merely the instrument to execute it, and who was probably ignorant of the grounds on which it issued. It therefore has given the officer a period of six days after demand of his authority for the production of it, within which time if he comply with the demand he secures his indemnity. But if he delay after that time, he subjects himself to be sued as any other person, and it is then his own fault if the party sue him before he has complied with the demand. But neither the words nor the intent of the act exclude his protection unless he comply within the six days, provided the party do not sue him in the interval, after the six days, and before such his compliance. And this construction will, I think, best insure the object of the Legislature.

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LE BLANC, J.—It must be the party's own fault if he delay demanding a copy of the warrant till it be too late to sue the magistrate. And if the demand be made in time, and the officer, to protect whom was the principal object of the clause in question, delay to comply with it, after the six days allowed him by the statute, he acts at his peril till he do comply, and subjects himself in the interval to be sued as any common person.

 Rule refused.

Friday, *Nov.* 9th.

HUNT *against* SILK.

A. agreed, in consideration of 10*l.* to let a house to *B.*, which *A.* was to repair and execute a lease of *within ten days*, but *B.* was to have immediate possession, and in consi- [450] deration of the aforesaid was to execute a counterpart and pay the rent. *B.* took possession and paid the 10*l.* immediately but *A.* neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B.* still continued in possession; held that *B.* could not, by quitting the house *for the default of A.*, rescind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract: and here *B.* had had an intermediate possession of the premises under the agreement.

IN assumpsit for money had and received, the facts appeared at the trial before Lord *Ellenborough* C. J. at the last sittings at *Westminster* to be these. On the 31st of *August*, 1802, an agreement of that date was made between the parties, whereby the defendant, in consideration of 10*l.* *to be paid at the time of executing the lease* after mentioned, and for other considerations therein stated, agreed that *within ten days* from the date thereof he would grant to the plaintiff a lease of a certain dwelling-house for nineteen years (determinable by the plaintiff in 5, 10, or 15 years) from the 29th of *September* then next, (but possession to be immediately given to the plaintiff,) at the yearly rent of 63*l.* And the defendant also agreed at his own expense to make certain alterations in the premises, and that the premises, fixtures, and things should *at the time of executing the lease* be put in complete repair. And the plaintiff, *in consideration of the aforesaid*, agreed to accept the lease at the rent and in manner aforesaid, and to execute a counter-part, and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the 10*l.* at the same time in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period and some days after having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default, and brought this action to recover back the money he had paid. Lord *Ellenborough* however thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and therefore directed a nonsuit. Which

Reader now moved to set aside, and to have a new trial, on the authority of *Giles* v. *Edwards* (*a*), where the defendant agreed to sell to the plaintiff all his cord wood then growing at 11*s.* 6*d.* per cord ready cut, which the plaintiff was to pay for in *March*, 1792, and the defendant was to cut, cord, and clear from off the premises by *Michaelmas* following. And the custom of the country was for the seller to cut off the boughs and trunks,

(*a*) 7 Term Rep. 181.

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and cord the wood, and for the buyer to re-cord it, after which it became his property. In *March*, 1792, the plaintiff paid 20 guineas on account; and the defendant having corded only ten out of sixty cords which were cut (half a cord of which the plaintiff had re-corded, and measured the rest), and neglecting to cord the remainder of the wood, the plaintiff gave notice of rescinding the contract, and brought an action for money had and received to recover back what had been paid. The same objection was there made as is now insisted on; but *Lawrence* J. before whom it was tried overruled it, on the ground that as it was the defendant's own fault that the contract which was entire was not executed, the plaintiff might recover back the money he had paid, the consideration having failed. And this direction was approved by the Court, upon a motion for a new trial. So here the contract was entire: the 10*l.* was to be paid in consideration of the repairs being done, and the plaintiff was not bound to have paid it before; nor could the defendant have sued him for it without averring performance on his part. But the plaintiff, having paid it upon the faith of the agreement which has not been performed by the defendant, has paid it in his own wrong and without consideration. The former case is even stronger than this; for there was a partial performance of the contract by both parties, whereas here the defendant has done nothing towards the execution of it. And again, in that case the money was paid in pursuance of the terms of the contract, and so far confirmed it, whereas here the plaintiff was not bound by the contract to have paid any thing, and therefore the payment was no affirmation of it, but was made merely upon the confidence that it would be performed, a consideration which has wholly failed.

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Lord ELLENBOROUGH, C. J.—Without questioning the authority of the case cited, which I admit to have been properly decided, there is this difference between that and the present; that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the lease executed. The plaintiff there had no opportunity by the terms of the contract of making his stand to see whether the agreement were performed by the other party before he paid his money, which the plaintiff in this case had: but instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waived his right, and voluntarily paid the money; giving the defendant credit for his future performance of the contract; and afterwards

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wards continued in possession notwithstanding the defendant's default. Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties cannot be put *in statu quo*.

GROSE, J. of the same opinion.

LAWRENCE, J.—In the case referred to, where the contract was rescinded, both parties were put in the same situation they
[453] were in before. For the defendant must at any rate have corded his wood before it was sold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premises under the agreement. If indeed the 10*l.* had been paid specifically for the repairs, and they had not been done within the time specified, on which the plaintiff had thrown up the premises, there might have been some ground for the plaintiff's argument that the consideration had wholly failed: but the money was paid generally on the agreement, and the plaintiff continued in possession after the ten days, which can only be referred to the agreement.

LE BLANC, J.—The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract. But the parties cannot be put in the same situation they were in, because the plaintiff has had an occupation of the premises under the agreement. Rule refused.

Saturday, Nov. 10th.

The KING *against* The Inhabitants of ABERAVON.

Where a corporation was seised in fee of certain uninclosed lands which were stocked with the cattle of the resident burgesses, or the widows of such who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor rate; the Sessions on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the stat. 41 *G.* 3. *c.* 23. *s.* 6. having *quashed* the rate, this Court confirmed that order.

D. Jones appealed to the Quarter Sessions of *Glamorganshire* against a poor rate made, for the parish of *Aberavon* in that county, and the Sessions quashed the rate, subject to the opinion of this Court on the following case.

The

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The KING *against* The Inhabitants of ABERAVON.

The parish, town, and borough of *Aberavon* in the county of *Glamorgan* are co-extensive, and have churchwardens and overseers appointed in the common way. The portreeve, aldermen and burgesses, some of which latter reside in the borough and parish, some in the neighbourhood, and others at a distance, are seised in fee in their corporate capacity of certain inclosed lands, to the amount of acres, and they are also, in like manner, seised of 2 or 300 acres of uninclosed marsh lands, called *Aberavon Marsh*, worth 10*s.* an acre, and of about 100 acres of mountain, worth 5*s.* an acre. The inclosed land is annually parcelled out between the resident burgesses, who occupy the same as tenants, paying to the corporation certain rents according to the size and value. These inclosed lands are charged in the rate to the burgesses, the renters, as occupiers, in proportion to their several rents, and as such those burgesses pay the poor rates, and also the land-tax, to which the inclosed lands are also rated. In the poor rate the inclosed lands are charged under the title of "*The Burgesses' land*," (which covers the three columns in the other part of the rate reserved for *landlords*, *tenements*, and *occupiers*,) adding the person's name from whom the rate is collected, and the valuation of his occupation, and the sum to be collected. The corporation have not any live stock by which they can occupy, nor any personal chattels, except their maces and halberts. The uninclosed marsh and mountain have never been charged to either land-tax or poor rate. They are occupied as common land by the individual burgesses or their widows who are residents, and keep stock to occupy; but those burgesses who have not any stock, or are non-resident, do not receive any benefit from the same. The burgesses do not permit any person but burgesses or their widows to claim a right of pasturage on these uninclosed lands, but they [455] suffer by way of charity and in ease of the parish some poor persons who are residents, not being burgesses, to depasture there. Of those who depasture every person occupies according to the quantity of his stock, so that one occupier may have 18 head of cattle, and 100 sheep, there being no limitation, and another not more than one cow or one horse, or even one sheep. In the poor rate in question the uninclosed marsh and mountain lands are as usual left out. And *D. Jones* gave notice of appeal against the rate to the churchwardens and overseers of the poor of the parish, and also to the portreeve, aldermen and burgesses of the town and borough of *Aberavon*, stating therein, as the ground of objection, that they had omitted to rate the marsh and mountain lands, called *Aberavon Marshes*, and *Aberavon Mountain*, all which

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which said premises were in the possession or occupation of the said portreeve, aldermen and burgesses. This notice was admitted to be well served on the churchwardens and overseers of the poor, and on the portreeve, aldermen, and two of the principal burgesses in their corporate capacity; but the majority of the resident burgesses and other persons who were occupiers of the said uninclosed lands were not served, and a number of outdwelling burgesses within the county and jurisdiction of the court were not served. On the hearing of the appeal the questions before the Court were, first, whether these uninclosed lands should, under the circumstances of the occupation, be rated at all: secondly, whether, if they were rateable, the portreeve, aldermen, and burgesses were to be considered as occupiers, and to be rated as such, and notice of appeal to them in their corporate capacity to be deemed sufficient; or whether the several and respective burgesses and other persons who were the [456] actual occupiers were not the persons to be rated, and that in proportion to their respective stocks: and if such persons were to be rated, whether the Court could quash or amend the rate without such persons first having notice under the stat. of the 41 *Geo.* 3. *c.* 23. *s.* 6., which they had not.

Praed Serjt. and *Bevan*, in support of the order of sessions, contended, 1st, That the uninclosed lands, producing profit, were clearly rateable (which was not denied). 2dly, That the corporation who were the owners of the fee were properly rated for such land in their corporate capacity, there being no known distinct occupation by any other; according to *R.* v. *Gardner* (*a*). The persons who actually stock the land are either the different members of the corporation, who, *as such*, claim the privilege, or the widows of such, who are admitted by the curtesy of the body to participate in their enjoyment, or poor persons who are suffered to turn stock there out of charity, and in ease of the parish, who have never been deemed proper objects of rating. The enjoyment of the common being indiscriminately by such of the burgesses as are resident and have stock cannot constitute an occupation distinct from that of the corporation in general in right of which they so enjoy it: and the value of the individual enjoyment is liable to fluctuate from day to day, and cannot be ascertained; which differs these from the inclosed lands, where the respective burgesses have individually an exclusive occupation of their several shares, distinct from the possession of the [457] corporation itself. In order to render these persons individually rateable they must be considered as tenants to the corporation;

(*a*) Cowp. 79.

whereas

whereas they assume to occupy in their own right as members of the corporation, and not as tenants, whether with or without rent. Then as to the poor persons who are permitted out of charity to turn upon the common, they cannot be considered as occupiers who are rateable. [*Lawrence* J.—The mere circumstance of a person being permitted to occupy land out of charity is no objection to his being rated in respect of such occupation (*a*). Supposing the persons to be tenants at will without rent, they would not therefore be exempt from being rated.] They are not *tenants* at will; they have no interest at all in the land, which a tenant at will has till the will is determined. Then taking the corporation to be the occupiers of the common land by means of the actual occupation of their own members generally, and of those persons who as their servants are allowed a gratuitous occupation; the notice required by the st. 41 *G. 3. c. 23. s. 6.* to be given to the parties *interested*, as well as to the parish officers, where a rate is appealed against for the omission of any person who ought to be rated, has been complied with. That entitled the appellant to have his appeal heard, and to obtain redress; and it was discretionary in the Sessions afterwards whether they would quash the rate on account of the magnitude of the omission or the uncertainty of the value to be added to the rate. And at all events, such a *primâ facie* case of occupation by the corporation was proved as called upon them to shew a distinct occupation in other persons; according to the doctrine in *Rex* v. *Gardner*. And this is a more reasonable construction of the act than requiring notice to be given to every individual who may happen to turn a single sheep upon the common one day, and none the next, whose numbers it would be scarcely possible to ascertain, and still less the value of their several interests in order to rate them equally. The corporation is the only body really "interested in the event of the appeal," within the fair meaning of the act. But supposing it were uncertain in whose occupation the common lands were, yet the subject-matter being admitted to be rateable, and not rated, it was sufficient to warrant the Sessions in quashing the rate to compel the parish officers, whose proper duty it is, to find out in whose occupation the property really was, and make their assessment accordingly.

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Erskine and *Comyn contrà*. The st. 41 *G. 3. c. 23. s. 6.* is peremptory, that any appellant objecting to a rate on account of the omission of any person, shall give notice to the party interested as well as to the parish officers, in order to enable

(*a*) Vide *Rex* v. *Munda and others*, 1 East. 584.

such

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such party to come and defend his interest, and the appellant is not entitled to be heard without proving such notice. Then every such appellant is bound to know who the persons are, the omission of whom in the rate he complains of; and if he cannot give reasonable evidence to satisfy the Sessions that such party ought to have been included, his appeal must be dismissed. It is not enough to shew that some other person is omitted to whom he has not given the notice required by the act; because if that person were before the Court he might be able to satisfy it that the omission was proper; and therefore in a doubtful case the notice required would be purposely withholden in order the more easily to procure the rate to be quashed upon *ex parte* evidence. But upon the case stated, so far from its being shewn that the corporation were the occupiers of the common land, that their occupation is negatived; for it is stated that [459] they had no stock wherewith to occupy it, and an actual occupation is shewn by others, to whom there was no notice to defend, as required by the statute. It is not enough to shew that property yielding profit is omitted in a rate, without shewing some beneficial occupier who is liable to be rated for it; as in the case of *St. Luke*'s hospital (*a*). The poor's rate is not a tax upon property, but upon persons in respect of property. And the law does not look to the title, but the actual beneficial occupier. The several burgesses then who turned upon the common have an individual beneficial occupation of it distinct from any corporate character, though such benefit may be derived to them through that title. In like manner as the officers of an hospital, who have an individual benefit derived to them from their occupation of certain rooms, are rateable in respect of that beneficial occupation. The circumstance of their occupying without payment of rent only proves their occupation to be more beneficial. Besides, in order to apply the occupation of individual members of the corporation to the corporation itself, all the members ought to enjoy the same privilege, whereas this is confined to the resident members. Then again the occupation of the widows of corporators can only be applied to an individual occupation. And the circumstance of other persons being permitted to occupy out of charity does not render them less liable to be taxed in respect of the property which they so enjoy.

Ld. ELLENBOROUGH, C. J.—The case is very loosely and inac- [460] curately drawn. We ought to have the right of enjoyment more distinctly stated. It does not appear whether the burgesses who

(*a*) 2 Burr. 1053.

turned

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turned stock on the common did so in right of their franchise or by permission of the corporate body. I own I have great difficulty in deciding that a person who has a mere permission to turn his cattle on another's land is rateable as an occupier.

GROSE, J.—The questions put at the end of the case might be very proper to be considered by the Sessions; but that is not the proper form of drawing up a case for the opinion of this Court. We can only say whether the Sessions have done legally in quashing the rate.

The Court then seemed inclined to send the case back to the Sessions to be restated; but after some further consultation on the bench,

Lord ELLENBOROUGH, C. J. said, On further consideration, I think we may deal with the case as it is. Here is a large track of property producing profit which is liable to be rated, and no person is in fact rated for it. This property is stated to belong to the corporation, and it may be doubtful whether the occupation shewn be their occupation or that of individuals. Under these circumstances I cannot say that the Sessions have done wrong in quashing the rate. The rate therefore is quashed because no person has been rated for property which ought to have been rated.

Per Curiam, Order of Sessions confirmed.

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COXETER *against* BURKE and Another, Bail of PRICE.

Saturday, Nov. 10th.

A *scire facias* upon a recognizance of bail taken in open court in *B. R.* is properly suable *in Middlesex*, where the record is, tho' all the previous proceedings which commenced by original were in *London*. And semble that it could not be sued elsewhere than in *Middlesex*.

THE principal was arrested on a *testatum* special *capias* issued out of *London*, where the action was commenced by original, and the venue laid there: and the bail were also put in with the filacer for *London*, but they justified *in open court at* Westminster. And after judgment by default and a writ of enquiry executed, and final judgment entered, and a writ of *capias ad satisfaciendum* issued into *London*, which was returned *non est inventus*, writs of *scire facias* and *alias scire facias* issued against the bail, and were lodged with the sheriff of *Middlesex*, and two *nihils* returned. Whereupon this rule was obtained by

Garrow and *Lawes*, for setting aside the proceedings against the bail for irregularity, because the writs of *scire facias* ought to have been prosecuted in the same county in which all the prior proceedings were had, according to *Harris* v. *Calvert and another* (*a*), and where the bail might naturally expect to look for those

(*a*) 1 East, 603.

proceedings,

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proceedings, by which it was the intention of the law and practice of the Court to give them notice to render their principal.

Humphreys, who shewed cause against the rule, said, that in the case referred to the Court considered the bail which had been put in improperly in *Middlesex* as a nullity, and therefore that there was nothing to warrant the suing out of the *scire*

[462] *facias* in that county; but here the recognizance of bail was regularly taken in *Middlesex*, and consequently there could be no objection to suing upon it, as upon a record, in the same county. And he cited *Bond* v. *Isaac* (*a*) as in point, that the *scire facias* must be sued out into *Middlesex* where the recognizance remained, and not into *London* where the original cause of action was. He also insisted that the irregularity, if any, had been waved, because the defendants had appeared to the *scire facias* since the rule *nisi* had been obtained. But to this latter ground it was answered, and so ruled by the Court, that the rule having been obtained on the last day of last term, which was no stay of proceedings, the defendants were obliged to appear, and therefore it was no waver. And on the principal point

The Court were clearly of opinion, that the writs of *scire facias* and *alias scire facias* were regularly prosecuted in *Middlesex*, where the recognizance of bail was recorded. And

Lord ELLENBOROUGH, C. J. referred to *Shuttle* v. *Wood* (*b*) as in point; and added, that it never was doubted but that an action founded on matter of record might be brought in the

[463] county where the record was filed; and that there was the proper county, though in some special cases there might be an option between that and some other county where the cause of

(*a*) 1 Burr. 409.

(*b*) Salk. 564. 600. 659. 6 Mod. 42. and Holt's Rep. 612. According to this case the action on the recognizance of bail in *B. R.* can only be brought in *Middlesex*, because it is always entered generally as taken in court, though taken actually by a Judge at chambers; and it is no record till entered. But it is otherwise in *C. B.*: where the recognizance binds as a record from the first caption, and before it is filed at *Westminster*: and therefore where it is taken by a Judge of *C. B.* at Serjeants' Inn, in which case a special entry is made of its being so taken on a day certain, and afterwards it is filed at *Westminster*. a *scire facias* lies on it either in *London*, where it is so taken, or in *Middlesex*, where it is filed and becomes a record in court. And vide *Hall* v. *Winckfield*, Hob. 195. *Pickering* v. *Thomson*, Barnes, 207. *Cock* v. *Green*, G. Cooke's Rep. 31.; and *Kenny* v. *Thornton*, 2 Blac. Rep. 768.

action

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action in part arose. That here the *scire facias* was properly brought in *Middlesex*, whether the principal action were commenced by original or by bill. And *Lawrence* J. observed of the case of *Harris* v. *Calvert*, that the only point decided was that the *putting in* of bail in *Middlesex* by mistake, where all the prior proceedings in the cause were in *London*, was a nullity, and therefore did not warrant the suing out of the *scire facias* in *Middlesex*.

Rule discharged.

WOOLNOTH *against* MEADOWS.

Tuesday, Nov. 13th.

IN an action on the case for slander the plaintiff declared That whereas he had never been guilty nor suspected of the detestable crime of buggery, or of any other such detestable crime, or of any attempt or disposition to commit the same, &c.; but had obtained the good opinion of divers subjects, and had been proposed as a volunteer for the defence of the country at a certain society, &c., yet the defendant knowing the premises, but maliciously intending to injure the plaintiff, and to subject him to the pains and penalties of the law, &c., and to cause it to be believed that he was a person of unnatural passions, and guilty of the crimes aforesaid, or some of them, and to cause him to be rejected as a volunteer by the said society and to be abhorred and shunned by all mankind, as a person unfit for and unworthy of all society, on, &c., in a certain discourse which the defendant had with divers subjects, members of the said society, &c., wrongfully, falsely, and maliciously spoke these false, scandalous, and malicious words of and concerning the plaintiff having been proposed as a volunteer as aforesaid, *viz.*, *His* (meaning the plaintiff's) *character is infamous. He would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him and hunt him*

Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that *his character was infamous*, that *he would be disgraceful to any society*, that *those who proposed him as a member of any society must have intended an insult to it*, that *he would publish his shame and infamy*, that DELICACY

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forbad him from bringing a direct charge, but it was a MALE *child who complained to him*; such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *innuendo* to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming, for the first time, the person from whom the defendant heard the complaint.

him

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him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy; delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me (meaning that a male child of nine years old had complained to the defendant of some unnatural crime committed by the plaintiff upon such male child.) And then the plaintiff averred that the words were so uttered and published by the defendant with intent and meaning to convey, and that the same were by the said persons in whose presence they were so uttered and published, understood and believed to convey a charge against the plaintiff that he was a person of unnatural passions and appetites, and was capable of committing, and had committed the abominable crime of buggery, and was thereby rendered infamous, and unworthy of all society, &c. There were several other counts, laying the same charge in different ways. To this the defendant pleaded, 1st, The general issue; 2dly, As to the words laid in the first count, that before the speaking and publishing them, to wit, on, &c. a certain male child of nine
[465] years old, to wit, one *A. B.* did complain to the defendant of an unnatural crime before that time committed by the defendant upon such male child. And so the defendant justifies speaking the words. To this there was a general demurrer; and to this and a third plea to the same count, in substance the same, there were assigned as special causes of demurrer, that the defendant had not justified or answered the special matter of the first count, nor had averred that the complaints in those pleas respectively alleged to have been made to the defendant were true, or that the defendant believed the same to be true; and that the matter of those pleas do not amount to a traverse of the first count, but are consistent therewith, &c.; and that the matters attempted to be put in issue by those pleas are immaterial, &c. The same causes of demurrer were assigned to the fifth plea, which contained a similar justification of the words as laid in the other counts of the declaration. And to the fourth and sixth pleas, the one applying to the first, and the other to all the counts, alleging, by way of justification, the fact of the plaintiff's having committed the crime imputed to him as well as the relation of *A. B.*'s complaint to the defendant before the uttering of the words, the plaintiff replied *de injuriâ suâ propriâ absque tali causâ.*

Scarlett,

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Scarlett, in support of the demurrer, relied on the authority of the rule in Lord *Northampton*'s case (*a*), recognized in *Davis* v. *Lewis* (*b*), that if one speak slanderous words without naming at the same time the person from whom he heard them, he cannot afterwards justify it by naming the original slanderer. The reasons for which are, that, by naming the person at the time, he gives the party injured an action against such slanderer, and is himself a witness to prove it; and he also does not pledge his own credit to the slander, but merely that of the first relator of it, which so far abates the injurious effect of it. Upon this ground the justifications demurred to, where the name of the original author of the slander is first mentioned, are bad. But further, it would not be enough for the defendant even to name the author if, as in this case, he repeat the slander in such a manner as to signify his own belief of, and intention to act upon it. As in *Maitland* v. *Goldney* (*c*) it was considered by Lord *Ellenborough* that one who repeated slander, after knowing it to be unfounded, could not justify it by having named his author at the time.

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Burrough, contrà, contended that the declaration itself was bad, because there was no direct negative of the boy's having made the complaint, as in *Meggs* v. *Griffith* (*d*); which accounts for the question of justification having been there entered into upon the plea of not guilty, which put in issue the fact of the defendant having heard the slander from another before he repeated it. And *Crawford* v. *Middleton* (*e*) is in point to this: where the plaintiff having declared for slanderous words charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested by the opinion of three judges for want of an averment that in truth nobody had said such words to the defendant; against the opinion of *Twysden* J. who thought that the words being laid to be spoken falsely and maliciously, and so found by the verdict, was a proof that nobody had said so to him.

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[Lord *Ellenborough*, C. J.—The rule in Lord *Northampton's* case, confirmed in *Davis* v. *Lewis*, is that slanderous words can in no case be justified upon the report of another, unless the name of the original slanderer be given at the time.] Those cases only apply where an action would lie upon the words against the

(*a*) 12 Rep. 133, 4. (*b*) 7 Term Rep. 17. (*c*) 2 East, 426.
(*d*) Cro. Eliz. 400. (*e*) 1 Lev. 82.

original

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original speaker. But here no action could have been maintained against the boy upon any words imputed to him. And where words are uncertain in themselves, as those spoken by the defendant, they cannot be rendered more certain by an *innuendo*, without first introducing prefatory matter to which they may be applied, as was settled in *Rex* v. *Horne* (*a*). An *innuendo* cannot enlarge the sense, which is attempted to be done, by introducing under it, that the words spoken, which were merely that a male child had *complained* to the defendant, meant that such male child had *complained* to the defendant *of some unnatural crime*. [Lord *Ellenborough* C. J.—Consider the case then as if the *innuendo* were struck out, and attend to the words themselves; whether, when taken altogether, they do not naturally import a charge of this sort. *Grose*, J.—We must read the words in the same sense as common people who heard would understand them.] The words are certainly abusive; but they do not in themselves necessarily point to the particular crime; though they might have been shewn to have done so by introductory matter. If the plaintiff had been before charged with having been guilty of indecency to a woman, these words would have been equally applicable.

Scarlett, in reply, observed, that the opinion of the three Judges in *Crawford* v. *Middleton* went upon the ground that
[468] the defendant might have justified the slanderous words upon the report of another without naming him at the time; which was contrary to the rule in Lord *Northampton*'s case, now settled to be law. That from the frequency of actions for slander in former times the judges were accustomed to construe the words in *mitiori sensu*, where they would in strictness admit of different constructions; but since the case of *Baker* v. *Pierce* (*b*) a more sensible rule has prevailed, namely, to construe words in the sense in which they are commonly understood, as applied to the subject-matter. And *Phillips* v. *Kingston* (*c*) is to the same effect. [*Lawrence* J.—Many of the old cases on slander went to a very absurd length. There is one (*d*) where the charge

(*a*) Cowp. 684.

(*b*) 2 Ld. Ray. 959. Vide *Button* v. *Hayward*, as reported in 1 Vin. Abr. 507. from MS.

(*c*) 1 Ventr. 117.

(*d*) This is the case of Sir *T. Holt* v. *Astgrigg*, Cro. Jac. 184.

was

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was, that the plaintiff "had struck his cook on the head with a cleaver and cleaved his head; the one part lay on one shoulder, and another part on the other;" and yet the judgment was arrested after verdict because it was not directly averred that the cook was killed, but only argumentatively. But all those cases have been long set at rest.] Then as to the objection, that the words do not point at any certain crime, it is impossible to read them without understanding what sort of crime was meant to be imputed. The only use of the *innuendo* was to fix the defendant's intention to be to use the words in the common acceptation of them. The words state that the plaintiff is unfit for all society, that he is unfit for the society of *men*; that the defendant would publish his shame and infamy; that he was restrained by *delicacy* from bringing a direct charge, and that the complaint was made to him by a *male* child of 9 years old.

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Lord ELLENBOROUGH, C. J. (after stating the pleadings). The pleas demurred to are bad, because they fall directly within the rule laid down in Lord *Northampton*'s case (*a*), which was confirmed in the late case of *Davis* v. *Lewis* (*b*), that in order to enable a defendant to justify slanderous words upon hearsay he must disclose at the time of uttering the slander the name of the person from whom he heard it, and it is not sufficient to name him for the first time by his plea; the object of which is to give the plaintiff his action in the first instance against the original author of the slander. The pleas then being out of the way, the question arises upon the sufficiency of the words laid in the declaration to maintain the action. And it is first objected that it should have been averred that nobody had made the complaint stated to the defendant. But that objection is founded upon the supposition, that if it had been so averred, the defendant would have been let into proof that such complaint had in fact been made to him, and that he could have thereby justified speaking the words. Lord *Northampton*'s case, however, is an answer to that. If there had been such an averment, it would have been wholly immaterial to the defendant's justification, because he did not name the party at the time from whom he received the complaint. That brings it to the second question, whether the words spoken, unassisted by the *innuendo* at the conclusion of them, which it must be admitted can only explain, and cannot extend the meaning of the ante-

(*a*) 12 Rep. 133, 4. (*b*) 7 Term Rep. 17.

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cedent words, do in their plain obvious meaning import the charge of any certain crime? and upon that I think there can be but one opinion. The defendant begins by saying, that the plaintiff's character is * *infamous*. That of itself might only
*[470] import general infamy; that he would be disgraceful to any society; that whoever proposed him must have intended it as an *insult*, meaning to the particular society of which he was proposed as a member; that is somewhat stronger, but might still be general. Then he says he will pursue and hunt him from *all society*. That shews that he intended to speak of some crime which rendered him unfit for society. Then he says that *delicacy* forbids him from bringing a direct charge. That points to some species of infamy, mixed with the intercourse of the *sexes;* and of what nature that was he alludes in a manner not to be mistaken, when he adds that it was a *male* child of nine years old who *complained* to him. What else could the defendant mean by these expressions, but to charge the plaintiff with some infamous crime which would expel him from all society, and that crime relative to a male child, which delicacy forbad him to make the subject of a direct charge. Applying our understanding to these words like any common persons, can we give them any other meaning than that which the pleader meant to give them by the *innuendo* at the conclusion. But it does not stop here, for the count goes on to aver, "that the words were so uttered and published by the defendant with intent and meaning to convey, and that the same were by the persons in whose presence they were so uttered understood and believed to convey, a charge of an unnatural crime against the plaintiff." Now upon a count so framed, the plaintiff must have gone into other proof than of the mere speaking of the words, and he must have not only shewn that the defendant's meaning was to impute a crime of that nature to the plaintiff,
[471] but that the words were so understood by the hearers. Therefore not only upon the words themselves, but followed as they are by the last-mentioned averment, we must take them to have been spoken in the sense imputed.

GROSE, J.—We are first to consider whether the declaration be bad; and if that be sufficient, whether the pleas in question be an answer to it. As to the declaration, I agree that the *innuendo* cannot extend the meaning of the words: and then the question is, whether the words be in themselves actionable? Now

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Now a court of justice must read the words in the same sense in which the hearers would at the time they were spoken understand them. When I first read them I had no idea that any serious doubt could be entertained of the sense meant to be conveyed by them, namely, an imputation of an unnatural crime. I think so still; and therefore must consider the declaration as sufficient. Then as to the sufficiency of the pleas demurred to; I cannot say, under the authority of the late determinations, that those pleas can be supported. The question having been so lately under consideration, it is unnecessary to enlarge upon it; it is sufficient to say, that I adhere to the rule laid down in *Maitland* v. *Goldney* (*a*), as collected from the former cases, that in order to justify the repetition of slanderous words spoken by another, the defendant must give a certain cause of action against that other by naming the author of the slander, and giving the very words which he used.

LAWRENCE J.—On the authority of Lord *Northampton*'s case, and the subsequent cases, I agree that the pleas demurred to are bad: and I think that the rule on which they proceed is a good one: that if a party will repeat slanderous words which he hears another say, he ought to do so in such a manner as will give the person injured an opportunity of bringing his action against somebody. But here no action could have been maintained upon these words against the boy. Whereas if the defendant had named the boy at the time, and repeated truly what he had said to him, the plaintiff would have had his action against the boy. The only question then is this, Whether the declaration be sustainable? and I agree with the defendant's counsel, that if the words, as laid, would not, in the ordinary understanding of mankind, bear the meaning imputed to them, the *innuendo* will not help them. In *Peake* v. *Oldham* (*b*) Lord *Mansfield* lays down the rule, that "where words from their general import appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them." The argument then goes too far, when it is contended that the words must be such as must necessarily bear a criminal import, and no other, in order to maintain an action upon them. For then, if the words had been

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(*a*) 2 East 437. (*b*) Cowp. 275—8.

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a direct charge of an *unnatural crime* by using those very words, it might be argued that no action would lie upon them without some explanation of what was meant by an *unnatural* crime; as it might be said that all crimes are against the order of nature; and so they are in a general sense. But the true question is, whether in the ordinary acceptation of the words, any person can reasonably doubt of their signification. No such doubt can, I think, be entertained in this case, and therefore the declaration is good.

[473] LE BLANC J.—It is clear that the pleas cannot be supported upon the cases which have been decided, because a person who reports slanderous words which he heard from another must give the name of the person from whom he heard it at the time he reports it; and it is not sufficient to do so for the first time in his plea to an action for those words. Then as to the sufficiency of the declaration, if the words themselves do not convey to all persons who hear them what the sense of the speaker was, I admit that they cannot be extended by an *innuendo*. But nobody can read these words without seeing what they meant to impute against the plaintiff. It is not sufficient to shew by argument that the words will admit of some other meaning; but the Court must understand them as all mankind would understand them, and we cannot understand them differently in court from what they would do out of court. And it would be impossible for a number of persons, indifferently assembled, not to agree in the meaning which has been imputed to these words in the declaration.

Judgment for the plaintiff upon the demurrers to the 2d, 3d, and 5th pleas.

Tuesday, Nov. 13th.

COLLINS *against* Lord Viscount MATHEW.

A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury.

THE plaintiff declared in debt upon a judgment recovered in the Court of Exchequer in *Ireland* for 360*l.* 16*s.*, and also 50*s.* and 2*d.* *Irish* currency, for damages and costs, "as by the *record* and proceedings thereof remaining in the said court

of

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of our Lord the King of his Exchequer at *Dublin* in *Ireland* aforesaid, more fully appears, &c.; which said judgment still remains in the same court of *Dublin* in *Ireland* aforesaid in full force and not satisfied," &c.: and concluding with an averment that the said 360*l.* 16*s.* and 50*s.* 2*d.* so recovered were of the value of 335*l.* 7*s.* 2*d.* of lawful money of *Great Britain*. To this there was a plea of *nul tiel record*, with a verification; and a demurrer on the part of the plaintiff to such plea; assigning for special causes, that the plea of *nul tiel record* is not pleadable to an action of debt on a foreign judgment; or, if pleadable at all, it ought to have concluded to the country, and not with a verification.

Wood, in support of the demurrer, contended at first that this fell within the same distinction as governed the case of actions on foreign judgments, to which it was settled that *nul tiel record* could not be pleaded. For since the appellate jurisdiction of this Court from the courts of *Ireland* was taken away (*a*), there is no method of bringing the original *Irish* record into this Court, and consequently no way of trying its existence but by an examined copy, and that verified on oath, of which a jury only can judge, and not the Court by whom the question of the identity of our own records is properly determinable. And this gives rise to the next objection, that if it be pleadable at all as a *record*, the plea ought to have concluded to the country, and not with a verification.

The Court now intimated a clear opinion, that since the Union between *Great Britain* and *Ireland* the judgments of the *Irish* courts are properly pleadable as *records*. And Lord *Ellenborough* C. J. said, that such records were now brought before [475] the House of Lords of the United Kingdom on appeals and writs of error, though no longer returnable into this court by *certiorari*. But his Lordship, addressing himself to the defendant's counsel, asked what answer could be given to the last cause of demurrer assigned? For though the *Irish* judgment be a record, yet being only proveable by an examined copy on oath, the verity of the evidence could only be tried by a jury, and not by the Court; and therefore the conclusion should have been to the country.

(*a*) Vide 23 *Geo.* 3. *c.* 28. explaining and enforcing the stat. 23 *Geo.* 3. *c.* 53.

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Lawes, in support of the plea, (as to this, which was the principal point made in argument,) said, that the judgments of the *Irish* courts being admitted to be records since the Union, must be taken to be and pleadable as such, with all legal consequences, as the records of other courts within this part of the kingdom; and such pleas have always been pleaded with a verification. The cases of *Walker* v. *Witter* (*a*), and *Galbraith* v. *Neville* there cited (*b*), which were actions of debt on foreign judgments, where the plea of *nul tiel record* was said to be a nullity, do not apply.

The Court all agreeing that the objection to the conclusion of the plea was well founded, for the reason before stated, gave

Judgment for the plaintiff.

(*a*) Dougl. 1.

(*b*) Ib. 5, 6. It is there stated that the rule for a new trial in *Galbraith* v. *Neville* was made absolute. But according to my note of the case, it stood over from *Easter* 29 to *Mich.* 31 *Geo.* 3. for the Court to advise upon it, when Lord *Kenyon* C. J. said, that the Court had considered the matter, and were all of opinion, that no new trial ought to be granted. He added, that without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was *primâ facie* evidence of the debt; and they were of opinion that no evidence had been adduced to impeach this; and therefore discharged the rule.

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Friday, *Nov.* 16th.

SMITH *against* M'CLURE.

A bill of exchange payable to the *order* of *A.* is payable to *A.*, without alleging any order made, and it is sufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reason of the premises and according to the custom of merchants became liable to pay the contents to *A.*; without alleging a *re-delivery* of the bill by the defendant; for if a re-delivery, or something tantamount to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c.

THE plaintiff declared upon a bill of exchange, dated 1st. *December*, 1802, drawn by himself upon the defendant at two months for 134*l. payable to his own order*, and that he delivered the said bill to the defendant, which he upon sight thereof *accepted* according to the custom of merchants; *by reason of which said premises* and according to the said custom and law of merchants the defendant became liable to pay to the plaintiff the sum specified in the said bill, &c. and being so liable the

defendant

defendant promised to pay, &c. To this there was a demurrer assigning for special causes, 1st, that although it is alleged that the plaintiff delivered the said bill of exchange to the defendant before his acceptance thereof, yet it is not alleged, nor does it appear that he ever re-delivered the same to the plaintiff. 2. That it is not alleged nor does it appear that the plaintiff did not make any *order* for the payment of the said bill to any other person, or that he ever made any *order* for the payment of it to himself.

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W. Walton in support of the demurrer, as to the first objection said, that it did not appear by the declaration but that the defendant had kept the bill when it was delivered to him; and as it was drawn by the plaintiff himself, it never was of any value while in his hands, nor could become so till re-delivery by the acceptor, by which he finally consented to charge himself with the payment of it. And, secondly, that being drawn payable only to the *order* of the plaintiff, and not *to him* or *his order*, and no order by him being stated to have been afterwards made, he shewed no title in himself to recover. But

Lord ELLENBOROUGH, C. J. said there was nothing in either of the objections. That the acceptance of the bill, which was admitted by the demurrer, and must be taken to be a perfect acceptance, vested a right in the drawer to sue upon it; and if after such an acceptance the acceptor improperly detained the bill in his hands, the drawer might nevertheless sue him on it, and give him notice to produce the bill, or on his default give parol evidence of it. And as to the second ground of objection, a bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other; and no such order appearing, it must be presumed that none was made (*a*).

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Per Curiam, Judgment for the Plaintiff.

(*a*) Vide *Frederick* v. *Cotton*, 2 Show. 8. S. P. and *Fisher* v. *Pomfret*, 12 Mod. 125. and Cunningham's Law of Bills of Exch. 66.

Friday, Nov. 16th.

The KING *against* DOUGLAS.

A seaman serving in the merchant service is not exempt from being impressed because he is a freeholder.

ERSKINE applied for a writ of *habeas corpus* to bring up the body of the defendant, who had been impressed and taken on board one of his Majesty's ships of war. He moved this on an affidavit, stating that the defendant, who was serving as a mate on board a merchant vessel, was at the time of his being impressed seised of a freehold estate of the annual value of 56*l.* which had been some time before bequeathed to him, and of which he was in possession of the rents and profits. He said that he was not prepared to state any direct authority that a freeholder was not liable to be impressed; but that *Good*'s

[478] case (*a*) at least shewed that it was a matter of doubt; and considering the importance of the consequences in a general view, it was well deserving of mature consideration before such an exemption was negatived. There the writ was moved for on an affidavit that the party was in possession of a freehold estate of 26*l.* a-year; but it not being negatived that he was a seafaring man, the Court desired to have that point cleared up; and it being sworn the next day that he was only a ship-carpenter, and never used to the sea, the writ was awarded. But, in order to obviate any misconstruction, the Court declared that they had given no opinion as to the possession of the property not being of itself sufficient to procure the man's discharge. But

The Court, being satisfied, upon inquiry, that the defendant was actually engaged in the merchant service at the time he was impressed; and being answered in the negative to a question, whether there were even a *dictum* in the books in support of a freeholder's claim of exemption from the impress service, who in other respects was a fit subject for it, said that they saw no ground for granting the writ.

Writ denied.

(*a*) 1 Blac. Rep. 251.

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Wednesday, Nov. 21st.

The KING *against* CUNNINGHAM and Others.

Iron mines are not rateable to the relief of the poor; and being rated conjointly with coal-mines, the coal whereof was raised by the owner of the lands for his own use in smelting the iron, the order of Sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed.

UPON the appeal of *Cunningham* and others, iron-masters, and co-partners, against a rate made for the relief of the poor of the parish of *Bedwelty*, at the sessions holden for the county of *Monmouth*, the rate was confirmed, subject to the opinion of this Court on the following case: [479]

Messrs. *Cunningham* and Co., who are lessees and occupiers of a large tract of land in the parish of *Bedwelty*, and of several mines of iron ore and coal under the same, were assessed in the rate as follows: "For the farm and lands 32*l*. For the iron and coal mines 70*l*." The iron ore and coal which they raise is applied solely to the manufacturing of iron in furnaces built for that purpose, part of which is raised under the farms and lands rated, and part under the mountains. Messrs. *Cunningham* and Co. objected to the rate on the following grounds: First, That having been charged for part of the surface, they ought not to be separately charged for minerals under that surface. Secondly, That iron mines are not assessable to the poor's rate. Thirdly, That the coal itself, being raised for making iron, is also not liable to be assessed.

Dauncey (and *Abbott* was to have argued on the same side) in support of the order of Sessions, beginning by observing that it could not be contended on the part of the defendants, who appealed against the rate, that coal mines were not rateable.

Lord ELLENBOROUGH, C. J. said, that it was likely they would contend, and that with success, that iron mines were not rateable: and that though the coal-mines were rateable (concerning which it could make no difference whether the coal were sold by the owner to another who used it in an iron-foundery, or whether he applied it himself to the like purpose), yet being rated conjointly with something else which was not rateable, and the Court here having no means to ascertain the several proportions, so as to rectify the excess of the rate, they could do nothing else than quash the order of Sessions, which had confirmed the rate generally, such order being at all events wrong. [480]

Dauncey thereupon admitted that he could not support the rate *in toto*, as iron mines were not rateable, not being named as

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as coal mines are, in the stat. 43 *Eliz. c.* 2.; but he suggested, as the rate was good for the farm and lands, and for the coal-mines, that it might be sent back to the Sessions to ascertain the proportion at which the iron-mines were rated, and amend the rate by striking out so much. But

Gibbs, *contrà*, said, that it would be as easy to make a new rate as to amend the former. And

The Court said, that as the order of Sessions was certainly wrong in affirming the rate so framed, there was no objection to quash it.

Order of Sessions quashed.

Saturday, Nov 24th.

The KING *against* WATSON.

Where a corporation were seised in fee of lands [481] which by the custom were annually meted out under their control by a leet jury, according to a certain stint to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were *tenants in common* of the lands so occupied by them, and as such *occupiers* were liable to be rated for the same.

JAMES WATSON, an inhabitant, and occupier of a house in the parish of *St. Mary*, in the borough of *Huntingdon*, in the county of *Huntingdon*, appealed to the Quarter Sessions for that borough against a poor's rate of the said parish, dated the 9th of *May* last, objecting, by his notice of appeal, to the rate, because *E. Howson*, *R. Thompson*, and *C. Garner* were not rated for certain common lands, called the Mill Common and Pitts, situate in the said parish of *St. Mary*, in, over, and upon which said lands the said *Howson*, *Thompson*, and *Garner* have certain commonable rights for feeding and depasturing their cattle, according to the custom of the said common and common lands, according to their respective rights as commoners using the same; and which said lands, so called the Mill Common and Pitts as aforesaid, are in the respective occupation of the said *Howson*, *Thompson*, and *Garner*, for the purpose of enjoying the said commonable rights, and from which they actually do derive a local, visible, and beneficial advantage, by stocking, using and feeding the same with their commonable cattle respectively, and therefore ought to be rated for the same. Upon hearing this appeal the justices confirmed the said rate, stating the following case for the opinion of this Court: "That the mayor, aldermen, and burgesses of the borough of *Huntingdon* are the owners or proprietors of certain large tracts of land within the said borough, used as a common of pasture, and stocked by such resident burgesses of the said borough in right of their burgerships

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as think proper to stock, according to a stint annually fixed by the leet jury, who are burgesses of the borough, under the control of the mayor for the time being; part of which lands, namely, the Mill Common and Pitts mentioned in the notice, are in the parish of *St. Mary*, and part in other parishes in the said borough. That no part of the said common was ever assessed to the poor's rate. That there are about 80 resident burgesses who have rights of common, some of whom stock to the full of their rights, others partially, and some do not stock at all; but in the latter case receive an annual payment of 19*s.* 4*d.* in lieu thereof, which is paid by those who do stock. That the said *Howson*, *Thompson*, and *Garner*, the persons named in the notice of appeal, are burgesses, having right to stock the common, and who did stock in the course of the year 1804."

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Gibbs and *Wilson*, in support of the order of Sessions. It does not appear that any of the persons, the omission of whom in the rate is complained of, are actual inhabitants of or occupy exclusively any lands within the parish of *St. Mary*; and therefore the objection is resolvable into this, that certain persons resident in another parish have not been rated for an incorporeal right, such as a right of common is, which they exercise within the parish. But there is no instance of the rating of any such right; nor is it warranted by the stat. 43 *Eliz.*; and the rating it would be attended with practical inconveniences. The only case where the attempt has been made is *R.* v. *Aberavon* (*a*), which was recently decided; but there the Sessions had quashed the rate in which the common land was omitted: and all that this Court decided was, that the land yielding profit was rateable in its nature; without determining the question of occupancy, whether the corporation who were seised in fee of the land, and who permitted poor persons and others to stock it, or the persons by whom it was so stocked, were to be considered as the occupiers to be rated. There too the persons occupying it stocked to an indefinite amount; here according to a certain stint fixed by the leet jury. It is therefore nothing more than a verbal permission to these persons to turn on a certain number of cattle for a year. Taking it however to be a right exercised by grant, it is not annexed to real property, but a grant of a stinted right of common in gross for a year. Now the stat. 43 *Eliz.* c. 2. has no words to comprehend persons having such a right as this. The

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(*a*) Ante, 453.

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only description which can apply to them is, "*occupiers* of lands;" but they could not maintain trespass against a wrongful intruder, and therefore they cannot be *occupiers* in the legal sense of the word, who must be in possession of the land itself. A *cattle gate* (*a*) indeed has been holden to be a tenement, the occupation of which would enable a person to gain a settlement; but that gives a title to the soil, and the interest passes by lease and release. Then the numbers interested, with the minuteness and complexity of the interest to be rated, are material to be considered in the decision of a new question. The numbers here interested amount to 80, and must in many instances be indefinite. Where large commons run into different parishes, all the persons who stock will be liable to be rated proportionably in each, when in many instances the interest must be very minute, and not capable of being divided so as to be the subject of rating. By the same rule a right of digging stone or turf, or getting sand, will be rateable, and the omission of every trifling interest will be the ground of an appeal. If land so applied be rateable at all, it would be less inconvenient to rate it in the hands of the corporation who are seised of the freehold; though many difficulties of another sort would present themselves against such a rating. In *R.* v. *Jolliffe* (*b*), one who had a way-leave over another's land, which was an enjoyment of the
[484] soil in a particular mode, was holden not rateable for it, though it were a thing of value and let for a large rent; because the occupier of the land over which it passed was rated for it, and the land could not be rated twice. That indeed was said to be only an *easement;* but there is no magic in words. And in *R.* v. *Bell and Others* (*c*), where the occupiers of such way-leaves were deemed rateable, it was because the land itself was conveyed to them. In the former case the owner of the land was, from the nature of the thing, excluded from any actual enjoyment of so much of it as was appropriated to the way-leave; and yet he was deemed to be the occupier in law. So here if there be any occupier, it must be the corporation. And it was settled in *R.* v. *Gardner* (*d*) that a corporate body is rateable.

(*a*) 1 Term Rep. 137.
(*b*) 2 Term Rep. 90.
(*c*) 7 Term Rep. 598.
(*d*) Cowp. 98.

Erskine

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Erskine and *Best* contrà. The case of *The King* v. *Aberavon* is in point to shew that property of this description must be rated, and that a rate omitting it altogether was properly quashed. [Lord *Ellenborough* C. J.—The Court decided nothing in that case upon the question of occupancy. All that we determined was, that we could not say that the Sessions had done wrong in quashing a rate, when a large tract of land beneficially occupied was wholly omitted to be rated.] There it was uncertain by what right the several persons stocked the common; but here there is a distinct occupation stated in the several resident burgesses, who have their respective rights individually allotted to them by the leet jury, and who have in fact a beneficial enjoyment of the land of a determinate value. It is immaterial by what title they claim the possession of the land; it is sufficient that they are in the actual beneficial occupation of it. [485] If an officer of a corporation be entitled in virtue of his office to a distinct occupation of a tenement or land, he, and not the corporation, must be rated for it. So of any other public officer (*a*). The corporation as such could have no right to occupy in this case after the personal occupation by stint was settled by the leet jury amongst the individual resident burgesses. The right is exercised here by a definite number of known persons, and not as in the *Aberavon* case by an indefinite, unknown, and fluctuating body. The value of this right is a subject of calculation, and divisible. Each of those who stock pay 19*s*. 4*d*. to those who do not. A right of this sort may be considered as a tenement; as a common in gross was holden to be in *R*. v. *Dersingham* (*b*); and the enjoyment of it is an inhabitancy in law. And every occupier of land is rateable, though he be not actually resident within the parish. The ability to maintain trespass is not the criterion of being liable to be rated in respect of the property. The impropriator of tithes is rateable, who cannot be said to occupy them, and cannot maintain trespass. [*Lawrence* J.—Tithes are rateable by the express words of the statute 43 *Eliz*. But the question is very different where the party, if rateable at all in respect of the land, must be rated as *occupier*. Occupation, properly speaking, implies *possession* (*c*), and trespass

(*a*) Vide *Eyre* v. *Smallplace*, 2 Burr. 1059. *R*. v. *Munday and Others*, 1 East 584.; and *Rex* v. *Terrott*, 3 East 506.

(*b*) 7 Term Rep. 671.

(*c*) Vide *Jones* v. *Mansel*, Doug, 302.

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can only be brought by him who is in possession of the land.] Then the burgesses whose stock must be considered as in possession, since they have a right in exclusion of all others. If there were only one *who stocked, he would be in the actual and sole possession of land of the admitted value of nearly 80*l.* a-year, for which it would be impossible to contend that he would not be rateable, however his title to it were derived; then it cannot make any difference that the number of those whose stock is greater, the value being divisible.

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Lord ELLENBOROUGH, C. J.—The whole cloud which has been cast over the case arises from a misconception of the nature of the property occupied by these persons. It has been resembled to an incorporeal hereditament; but it is no such thing. The corporation are the owners in fee of the land, and they dole it out annually, according to the custom, to certain of the burgesses; such of them as take it paying a certain sum to those who do not turn on any stock. Then when the number of persons who stock it is ascertained, what is there to distinguish them from other tenants in common? Each of them might maintain trespass for an injury done to his occupation in common. It has been decided that a common in gross is a tenement, and it should seem from thence to follow that it is rateable: but without considering that, this case steers clear of all difficulty; for I do not consider this as an incorporeal hereditament, but as a corporeal tenement, of which the several burgesses who stock are tenants in common. And we cannot say that an enjoyment of land which is of such value as that those who do not actually enjoy it, but who might if they so pleased, are entitled to a compensation from those who do, is not something which is rateable; and being rateable, it must be rated in the hands of those who have the beneficial possession of it.

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GROSE J.—This is in truth a question whether the occupiers of land are rateable for that land. The portion of each is indeed small, but that can make no difference. This is common land belonging to a corporation who deal it out annually amongst certain of the burgesses, and when they are ascertained, they are tenants in common of the land. Then have they any thing worth rating? It is stated, that there are 80 in number of them, and that each of those who do not stock receives annually 19*s.* 4*d.* in payment from those who do. This shews that those who

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who do stock have a beneficial enjoyment of the land, for which they think it worth while to pay so much.

LAWRENCE J.—This is the case of certain persons, who having, as I understand the case, the exclusive enjoyment of land for a year for the purpose of turning on their cattle, are to be considered as tenants in common of it. The corporation are the owners of the land; the burgesses it seems are by the custom entitled to have it divided amongst certain of them every year, according to a certain stint settled by the leet jury: when it is so meted out to them, they are tenants in common. I think it would be very difficult, after the land was so meted out, to say that the corporation could maintain trespass for any injury done on the land to the rights of these persons; because if that were so, it would shew that the corporation were in the occupation of it. For, as I said before, trespass can only be maintained by those who are possessed of the land. But, according to what I collect from this case, the resident burgesses are the occupiers.

LE BLANC J.—It appears that there is a large track of commonable land, yielding profit, and the objection made is, that [488] the commoners by whom it is stocked have not been rated for it. Then how does the case stand? The corporation are the owners of it. How is it enjoyed? Not by the corporation as a body; but it is every year meted out by them, according to the custom, amongst certain of the burgesses, by whom it is to be enjoyed for one year. It appears from hence, that the fee is vested in the occupation for the benefit of the resident burgesses. It is meted out annually to such of these as choose to stock, and those who do not receive a compensation from the rest. Those persons then are the actual occupiers of it. It is improper, therefore, to call it a right of common; because it is holden in fee by the corporation for the benefit of the resident burgesses. The corporation themselves, as a corporation, have no benefit from the land, but the resident burgesses to whom it is meted out annually by the leet jury. This view of the case avoids the difficulty stated in the argument of rating persons having a right of common running into several parishes: for this is a case of persons having an equitable right to the land, the fee of which is vested in the corporation for their benefit.

Per Curiam, Let the rate be sent back to the Sessions to be amended by the insertion of the burgesses occupying the land.

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Monday, *Nov.* 26th.

WARD *against* MALLINDER.

Where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and *the costs to abide the event*; if the arbitrator find less than 40*s.* damages the plaintiff cannot have his costs, though it be also found that the trespass was *wilful*, and that the defendant should pay the plaintiff his costs: for costs being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for costs under the stat. 22 [490] & 23 *Car.* 2. *c.* 9. where the trespass is wilful is not transferred to the arbitrator under such a rule of reference.

IN trespass for breaking and entering the plaintiff's close and destroying his corn growing there, with the defendant's poultry, on not guilty pleaded, it was agreed at the assizes that a verdict should be taken for the plaintiff, with 10*l.* damages, subject to the award of an arbitrator, and the costs to abide the event. The arbitrator afterwards awarded 10*s.* damages, but also found that the trespass was wilful, being after notice, and that the defendant should pay the plaintiff his costs. The damages however being reduced below 40*s.*, and there being no certificate of a Judge under the stat. 22 & 23 *Car.* 2. *c.* 9. that the trespass was wilful, the Master doubted whether he had authority under this direction of the arbitrator to tax the plaintiff his costs. Whereupon

Clarke and *Reader* moved that the Master might be at liberty to tax the plaintiff his costs. They admitted that the case of *Swinglehurst* v. *Altham* (*a*) pressed against them: but endeavoured to distinguish it from the present by observing, that in that case the arbitrator who had awarded under 40*s.* damages was silent as to the costs, which therefore properly followed the legal event: whereas here the arbitrator has expressly found the trespass to be wilful, and directed the defendant to pay the costs. Either then this was a case within the statute 22 & 23 *Car.* 2. *c.* 9. and the certificate of the arbitrator, who is put in the place of the judge, is equivalent to a certificate of the judge himself that the trespass was wilful: or it is a case wholly beside that statute, being one where no certificate could be granted, and therefore the plaintiff would still be entitled to his costs under the statute of *Gloucester;* as in the case of an execution of a writ of inquiry in trespass, where though the damages be assessed at less than 40*s.* the costs follow. They observed also that the two cases cited in *Swinglehurst* v. *Altham*, and on which the Court relied, did not warrant the general conclusion drawn from them, that the arbitrator's award of the trespass being wilful was not tantamount to a Judge's certificate under the statute. For they were not cases of trespass, and in neither did the arbitrator assume to

(*a*) 3 Term Rep. 138.

certify.

certify. In one of them the plaintiffs against whom the award was made were executors, and therefore not liable to costs: and in the other the sum found to have been originally due to the plaintiff was under 40*s.*, and therefore in no event could he have had costs. And (in answer to a question put by the Court, how it could appear by the record that the trespass was wilful so as to warrant them in giving judgment for costs, when the verdict as entered on the roll would appear to be for damages under 40*s.*,) they observed, (in which they were supported by the Master,) that the granting of a certificate by the Judge is never entered on the roll.

Lord ELLENBOROUGH, C. J.—It is to be regretted that no provision was made in the rule of reference for the event which has happened, of the arbitrator's finding the damages to be under 40*s.*, but that the trespass was *wilful*, in which case a Judge's certificate, if the cause had been tried and the same conclusion come to before the Court, would have carried the costs. We have however the authority of a decided case that an arbitrator is not in this respect substituted in the place of a Judge, to whom alone the statute has given the power of certifying for costs. Then the case stands as a verdict for 10*s.* damages, without a certificate; and the costs being by the rule of reference to abide *the event*, must be taken to mean the *legal* event; and therefore the plaintiff cannot have costs.

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Per Curiam, Rule refused.

Monday, Nov. 26th.

RIGHT, on the Demise of W. FISHER, S. NASH, and J. HYRONS, *against* ANN CUTHELL.

Where a lease for 21 years contained a proviso that in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing *under his or their respective hands*, the [492] term should cease; held that a notice to quit, signed by *two* only of *three* executors of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three; neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companions by an act done *for his benefit*; for *non constat* that the determination of the lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice.

THIS was an ejectment to recover possession of twelve certain messuages and the appurtenances in the the parish of *St. Botolph, Aldgate*, in the county of *Middlesex*. The first count was on the demise of *Fisher, Nash*, and *Hyrons*; the second on the demise of *Fisher* and *Nash* only, which latter it was admitted could not be supported. The premises consisted of houses, formerly the property of one *Moses Adams*, and by him demised by a lease dated 20th of *October*, 1789, to one *William Cuthell*, (since deceased, whose representative the defendant is) for a term of 21 years commencing from *Michaelmas* then last past. In which lease was contained a *proviso* that in case either landlord or tenant, or their respective heirs, executors, &c. should be desirous at the expiration of the first 7 or 14 years of the term to determine the lease, and should give six months' previous "notice in writing *under his or their respective hand or hands* to or for the other or others, or for the heirs, executors, &c. of the other or others of them, then the term should cease." *Adams* afterwards died, having made his will, wherein he appointed *Fisher, Nash* and *Hyrons* his executors (*a*), who proved the will. Six months previous to the expiration of the first 14 years, (*Hyrons* one of the executors being at that time abroad,) *Fisher* and *Nash* by a notice in writing dated the 23d of *March*, 1803, reciting the indenture of lease of the premises to *William Cuthell* for 21 years, and the proviso abovementioned: and reciting further that *Moses Adams* had in his lifetime made his will and appointed *Fisher, Nash*, and *Hyrons* his executors, and that they had proved the will and taken on

(*a*) It was admitted that the messuages were freehold, and that the executors who had a power to sell took as joint tenants in fee.

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themselves the execution thereof, and were still executors of the same, proceeded thus: "Now the said *W. Fisher* and *S. Nash*, do *on the part and behalf of themselves and the said J. Hyrons* hereby give you (the defendant) notice that they are desirous and do intend at the expiration of the first 14 years of the said term of 21 years to determine the said lease. And they do further *for themselves and the said J. Hyrons* require and demand of you the possession of all the premises at the expiration of the first 14 years, &c. and give you notice to quit and deliver up the possession thereof at that time accordingly." Signed "*W. Fisher* and *S. Nash*." At the trial of this case before Lord *Ellenborough*, C. J. at the last *Westminster* Sittings, the plaintiff proved his case by producing the original lease, with the proviso; the death of *Adams*; his will, whereby the lessors of the plaintiff were appointed his executors; the possession of the defendant under *W. Cuthell* deceased; and the abovementioned written notice to quit, signed by two only of the executors, the other being abroad; but no authority was proved from the latter to the other two, to enable them on his behalf to determine the lease, further than as it might be presumed by law from the circumstances of the notice itself, and the ejectment having been brought in the name of the three. It was objected however by the defendant's counsel, that no such presumption could be made, and that as the executors were joint-tenants under the will, the two could not bind the third by such an act as this, without his concurrent assent at the time, and that no subsequent ratification of the third, even if such appeared, (which was denied) would be sufficient to bind the defendant. His Lordship being of this opinion nonsuited the plaintiff. It was moved on a former day in this term to set aside the nonsuit, on the ground that the notice itself, purporting to be given by the authority of all three of the executors, must be taken to have been so until the contrary were proved. That it need not have been signed by either of them; for if delivered by a common agent or steward, as by their authority, it would have been sufficient, without proving specifically his warrant from each of them individually. But that if there were any doubt of the authority, the act of the two was recognized by the third, in his permitting the ejectment to be brought in his name without any complaint made on his behalf to the Court, that his name had been used without his assent. And the case of *Wilkinson* v. [493]

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Colley (*a*) was referred to, where a receiver appointed by the Court of Chancery for the benefit of infant devisees, *cestuy que* trusts, was holden to be an agent *lawfully authorized* to give notice to a tenant to quit, and in * default to make him liable to pay double rent, within the stat. 4 *Geo.* 2. *c.* 28. *s.* 1. in an action brought in the name of the trustee who had been decreed by that Court to account, &c.

Gibbs and *Espinasse* now shewed cause against the rule. The executors who took this estate as joint-tenants under the will (which was admitted), could not act by a majority, but were all bound to join in the notice in order to determine the lease under which the defendant claims: and no authority was shewn from *Hyrons* to the other two to determine it. [Lord *Ellenborough*, C. J.—The rule of law is this, as laid down in *Rud* v. *Tucker* (*b*), that every act done by one joint-tenant for the benefit of himself and his companion shall bind the other; but not those acts which prejudice the other. The only question therefore for consideration is, whether the giving notice to determine the lease, whereby the joint-tenants are to acquire possession of the estate, be such an act as must necessarily be a benefit to the third joint-tenant, or whether it may prejudice him?] Then nothing appears from whence the Court can collect whether the determination of the lease will be a benefit or a prejudice to *Hyrons*. It is matter of individual judgment resting in the opinion of those who are to give the notice. If the rent reserved be an adequate one, and the tenant responsible, it might fairly be considered by him as prejudicial. And if it be only doubtful, the two joint-tenants have no right to elect for the third. And if on the return of *Hyrons* from abroad he would have a right to disaffirm the notice, it follows necessarily that the

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defendant could not be bound by it at the time; for the lease being entire, the lessee was not bound to take notice to quit two-thirds of the estate. He is entitled to hold all the premises, if bound to hold any of them. Then he is not bound to accept any notice which is not binding upon all his landlords as well as upon himself; for it must be such as he can with certainty act upon at the time; and therefore if the notice to quit may be disavowed afterwards by one, no subsequent recognition of his can make it good; because in truth it only becomes his

(*a*) 5 Burr. 2694. (*b*) Cro. Eliz. 803.

notice

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notice from the time of the recognition. If the tenant were bound to quit at a certain time by a notice which is binding upon those from whom he derives title, he of course would lay out no more upon the premises than would suffice under his lease for the period when his occupation is to cease; whereas if the term were continued for seven years longer, it might be necessary or convenient for him to expend larger sums, and do other acts within the period between the notice to quit and the expiration of the 14 years, in order to profit by his subsequent occupation of the premises. Then the notice in this case does not even profess to state that the two executors had authority from the third to determine the lease; but only that they for themselves and the third give notice, &c. The case of *Wilkinson* v. *Colley* (*a*) does not apply; for there the receiver appointed by the Court of Chancery had the authority of that Court for letting the premises, and had been acknowledged by the tenant himself as acting in the place of the original trustee, and he had before received rent from the tenant in that character.

Erskine and *Marryat* in support of the rule. The notice to [496] quit purports to be given by the authority of the three executors, and must be taken so to be, at least till the contrary be proved: more especially when it is followed up by the action of ejectment brought upon the demise of the three; which is not merely to be taken as a subsequent recognition, (which might be subject to the objection taken,) but as evidence of a prior authority from the third executor who was abroad. But further, the very nature of the act done furnishes a presumption that it is beneficial to the absent joint-tenant; for it is to put an end to a long lease holden at the original rent, and to restore to him the possession of the estate. This is again strengthened by the tenant's resistance to the ejectment; by which he proves his own sense of the benefit of the lease to the possessor of the land, and the benefit of possession to the owner must be in the same proportion. And this is confirmed to be the opinion of the absent joint-tenant himself, by permitting the ejectment to be brought in his name. At any rate, the interest of the three executors being apparently the same, the Court will not conclude that an act which appeared to be beneficial to the two was prejudicial to the third, without some evidence to shew such a

(*a*) 5 Burr. 2694.

distinction

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distinction. For all acts done by parties, having a general authority to act on the subject-matter, must be presumed to have been rightly done until the contrary be shewn. Here the notice given on behalf of all three is legal on the face of it, and it lies on the defendant to shew that *Hyrons* did not consent to it in the first instance, especially against the evidence of his having since acted upon it, as if it had been issued by his authority. Notice to quit given by a steward or agent has been always [497] deemed sufficient when the act is adopted and acted upon afterwards by the owner, without proving a particular authority at the time. As in *Fitchet* v. *Adams* (*a*), an entry by a stranger, without authority, was holden good to take advantage of a condition broken, if it were assented to before the day of the demise laid in the declaration in ejectment by the heir at law. [Lord *Ellenborough* C. J.—There no third person's act was to depend upon the validity of the entry at the time it was so made. *Lawrence* J.—That case goes upon the principle that *omni sratihabitio retro trahitur et mandata æquiparatur*. But that cannot apply to a case like the present, where the tenant was entitled to receive such a notice as he could act upon with certainty at the time.] The tenant could not have been injured if he had acquiesced; for the absent executor could not have shewn that the act done was prejudicial to him.

Lord ELLENBOROUGH, C. J.—This was a notice to quit given to the tenant under a proviso in a lease for 21 years, that in case either party wished to put an end to the term at the expiration of the first 7 or 14 years, six months' previous notice in writing should be given *under* his or *their respective hands*. Now this is a notice signed by *two* only of *three* joint-tenants, under whom the defendant held, purporting however to be given on behalf of themselves and the other. It is a notice to defeat an estate: the person therefore to whom it is given ought to be assured at the time he receives it, and when he is to act upon it, that if he deliver up possession at the end of the six months, he will be [498] acquitted of all further claims in respect of the remainder of the term. But if *two* only of the *three* joined in the notice, how could the defendant be assured of this? How could he be assured that the third might not disavow the notice afterwards, and claim the defendant still as a tenant to him? But it is said,

(*a*) 2 Stra. 1128.

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that *Hyrons* suffering the ejectment to be brought in his name is a ratification of the others' authority. But a ratification given afterwards will not do in this case; because the tenant was entitled to such a notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third co-executor chose to ratify the act of his companions or not, before the six months elapsed. Then the rule of law is relied on to shew that the two joint-tenants who signed the notice had authority to bind the other in this case: and it is asked how the act appears to be *prejudicial* to the third? But it is not necessary for the defendant to shew that it would be *prejudicial* to *Hyrons*. The rule of law is, that every act of one joint-tenant which is *for the benefit* of his co-joint-tenant shall bind him. And it is a condition on the part of those who set it up and would avail themselves of it as binding, to shew that it was *beneficial* to *Hyrons*. For the two joint-tenants had no right to bind the third in his absence, unless the act done appear to have been *for the benefit of all*: and how does that appear? Subsequent acts cannot be brought in aid. It must be done under a competent authority at the time. And in order to satisfy the condition on which the lease was to be defeated, the notice ought to have been given under the respective hands of the three executors.

GROSE, J.—The tenant who took the entire lease of the whole was not bound to accept notice to quit a part only, but such notice only as was obligatory upon all the joint-tenants. Here there was a proviso in the lease, that in case either party wished to put an end to it at the expiration of the first 7 or 14 years, it should be lawful so to do upon giving the other six months' previous notice in writing under his or *their respective hands*. That was not done in this instance; for the notice was only signed by two out of three of the persons interested, and therefore the tenant was not bound by it.

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LAWRENCE, J.—I think there is great weight in the argument of the defendant's counsel, that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them: because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security. But if it be to depend upon a subsequent ratification of one of the joint tenants,

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tenants, landlords, whether or not it is to be binding upon him, the condition and situation of the tenant must remain doubtful till the time of such ratification. Now the intention of the parties to the lease was, that the tenant should not be obliged to quit without being apprised of it for a certain time, that he might have an opportunity to provide himself with another dwelling; but if a ratification will do, instead of six months, he might not know certainly for as many days or hours whether he must quit or not. The rule of law, that *omnis ratihabitio retro trahitur, &c.* seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on whether there be a subsequent ratification. But here the intermediate acts of the tenant referable to the terms of his lease are to be affected by relation.

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LE BLANC, J.—I cannot satisfy myself that the nonsuit was wrong. Here is a power of determining a lease by the notice to quit of *three* persons; and *two* only give the notice: then I must be satisfied that they had authority to bind the third, before I can say that their notice was good. And when I see that by the terms of the proviso the notice is to be given *under their respective hands*, I cannot say that a notice under the hands of two only is good. Besides, the tenant is to act upon this notice at the time, and he must be satisfied that it is such a notice as will bind all the three. No evidence was offered to shew that the two acted by the authority of the third; and if the defendant had yielded to it, and could not have proved the concurrence of *Hyrons* to it, the latter might afterwards have disavowed the act of his co-joint-tenants, and have come upon the defendant for his rent.

Rule discharged.

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Doe ex dem. THOMAS STOPFORD *against* ROBERT STOPFORD. *Tuesday, Nov.* 27th.

EJECTMENT for the moiety of certain premises situate at *Dalton* in the county of *Lancaster*, upon two demises for 14 years, one stated to be made on the 23d of *April* 1799, and the other on the 25th of *March* 1803. Plea, not guilty. At the trial before *Chambre*, J. at the Spring Assizes 1804, at *Lancaster*, a verdict was taken for the plaintiff, subject to the opinion of this Court, on the following case;

Richard Stopford, being seised to him and his heirs of an estate *pur auter vie* in the premises in question, in *May* 1779 died intestate, leaving his widow *Jane*, and an only son, *John Stopford*, who thereupon became in like manner seised of the same estate. *John Stopford* the son had three sons, *Richard* the eldest, *Robert* the defendant, the second, and *Thomas* the lessor of the plaintiff, the youngest, and one daughter. *John Stopford* died so seised in *December* 1779, having by his will dated 1st of *December* 1779, and duly executed, devised as follows: "First, I direct all my just debts, funeral expenses, and the probate, &c. of my will to be paid out of my personal estate; and I devise and bequeath all that my messuage and tenement, with the lands, &c. in *Dalton* in the county of *Lancaster*, being leasehold, under *R. W. B.* Esq. and now in the occupation of *W. N.* as farmer thereof, unto my son *Richard Stopford*, to hold the same from and after the decease of my mother to him, his heirs, executors, &c. during all the residue of my leasehold estate and interest therein. And I devise and bequeath all that my messuage or dwelling-house and tenement in *Mawdesley* aforesaid, whereat I now live, and the lands, &c. being leasehold under Sir *R. H.*; and also all those my closes, &c. called the closes on *Blackmoor* in *Mawdesley* aforesaid, which I hold by lease under

The word *share* may carry a leasehold estate. As where a testator, having three sons and one daughter, and leasehold estate and personal funds, devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow *durante* [502] *viduitate*, and that on her death or marriage it should be divided equally between his three sons *share and share alike*;

and then he gave his daughter 600*l.* to be paid her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share* alike; and lastly directed that "if *any* of his said children died under age, and without lawful issue, the SHARE of *him* or *her* deceased should go equally amongst his surviving sons:" held, that the word SHARE in the last clause referring, as it must do, to the *whole* share or portion of the daughter, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them; and that upon the death of the eldest son, under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons.

the

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the earl of *Derby*, unto my son *Robert Stopford*, to hold the same to him, his heirs, executors, administrators, and assigns during all my several and respective estates and interests therein. Provided that my executors, and their executors and administrators, shall hold, manage, and dispose of all and every my said messuages, tenements, closes, &c. hereinbefore devised till such time as my said sons to whom the same are given shall respectively attain the age of twenty-one years; and till that time dispose of and apply the clear yearly rents, issues, and profits therefrom arising in manner hereinafter mentioned. And I give and bequeath unto *E. Caunce* and *R. Culshaw* my executors afternamed, their executors and administrators, 340*l.* upon trust that they and the survivor, &c. place the same out at interest, and out of the yearly interest shall pay unto my wife *Elizabeth* 15*l.* a year during her life *(durante viduitate)*, &c. And if the principal sum of 340*l.* shall make more interest than 15*l.* yearly, I direct that the overplus, as well as the same principal upon my wife's decease or marriage, whichsoever shall first happen, shall go unto and be divided equally amongst my sons, *Richard Stopford* and *Robert Stopford*, and my son *Thomas Stopford*, their respective executors and administrators *share and share alike*. And I give and bequeath to my daughter *Jane Stopford*, her executors and administrators, 600*l.*, to be paid her as soon as she shall attain the age of twenty-one years. And all the rest, residue, and remainder of my worldly effects not hereinbefore disposed of, I give, devise, and bequeath to my said three sons *Richard*, *Robert*, and *Thomas*, to be divided equally amongst them, their respective executors and administrators, *share and share alike*, when and as soon as they shall attain the age of twenty-one years. And I direct that the profits and produce of my real and personal estates shall be applied towards bringing up my said children till of age. And I further direct, that if any of my children die under age, and without lawful issue, the SHARE of *him* or *her* deceased shall go equally amongst my surviving sons. And I hereby constitute and ordain the said *E. Caunce*, and *R. Culshaw* my joint executors, &c." *Jane Stopford*, the mother of the testator *John Stopford*, died in *July* 1781. *Richard Stopford*, the devisee of the premises in *Dalton* mentioned in the will, died in *August* 1785, at the age of sixteen years, intestate, and without issue. From the testator's death until the defendant *Robert Stopford*, the next brother and heir at

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at law of *Richard Stopford* the devisee came of age, the executors were in the receipt of the rents, issues, and profits of the premises devised to *Richard Stopford;* since which the defendant, *Robert Stopford*, has had the possession of them. The lives upon which the estate is held are still in being. This action is brought by the lessor of the plaintiff *Thomas Stopford*, being the youngest son of *John Stopford* the testator who attained his age of 21 years on the 22nd of *April* 1799, to recover the moiety of the said leasehold estate in *Dalton*, to which moiety he lays claim by virtue of his father's will. The question for the opinion of the Court was, whether, upon the construction of the will of *John Stopford*, the lessor of the plaintiff has become entitled to a moiety of the said leasehold estate? If the Court should be of opinion that he is, then the verdict to stand; if not, then a verdict to be entered for the defendant.

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This case was argued in *Trinity* term last by *Holroyd* for the plaintiff, and *Scarlett* for the defendant, who severally commented upon the different clauses of the will. The former contended, that in the concluding devise in the will, wherein the testator directs, that "if any of his children die under age, and without lawful issue, the SHARE of him or her deceased should go equally amongst his surviving sons," the word SHARE was intended to carry the leasehold property specifically devised to the two eldest sons respectively, in case of the death of either before 21, &c. as well as the personal funds before bequeathed to them. The latter contending, that the meaning of the word *share* must be limited to the residue of the personal funds only, of which there was sufficient to satisfy it, according to its ordinary construction, and the sense in which it was used in other parts of the will. And he intimated that the Master of the Rolls had once been of this opinion, when the same parties were before him, upon the construction of this will. But in reply it was stated, that his Honour had afterwards entertained doubts on the subject, and that *Chambre* J., before whom this ejectment was tried, had finally been of opinion with the lessor of the plaintiff.

The Court then said, it would be proper for them to consider the case more deliberately before they delivered their opinion upon it. And now

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

The

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The question, whether the lessor of the plaintiff, the youngest son, be entitled to a moiety of the leasehold estates devised to *Richard Stopford*, the eldest son of the testator, in the event which has happened of *Richard*'s death under age and without issue, depends upon the meaning of the word *share* in this part of the will. Its sense, as that of every other word capable of several distinct meanings, is properly to be collected from the context in the place where it occurs. In another part of the will, *i. e.* where the 340*l.*, and the overplus of interest after paying thereout 15*l.* a year to the testator's wife is spoken of, and directed to be divided equally amongst his three sons and their respective executors and administrators *share and share alike*, the word *share* necessarily means an equal proportion of a *personal* fund to be divided amongst them. In the bequest of the residue of his worldly effects to his sons and their respective *executors and administrators*, it means in like manner an equal proportion of a *personal* fund. In the last instance in which the word *share* occurs, (which is the instance in question), after having directed that the profits and produce of his real and personal estate should be applied towards the bringing up his sons till of age, the testator orders that if *any of his children* should die under age without lawful issue, "the *share* of him or *her* deceased should go equally amongst his surviving sons." Here the "*share* of *her deceased*" can mean only the entire fortune or portion before given to the daughter under her father's will, *i. e.* her 600*l.* for she had no participation with her brothers under the will either in the legacy of 340*l.* and the contingent overplus of interest thereupon beyond the 15*l.* a year given thereout to the wife, nor in the residue of worldly effects. [506] If therefore the word *share* can only mean (as it only can) in respect to the daughter *her entire portion or share assigned her under the will*, it is reasonable to give it the same meaning in the same place in respect to the sons, unless the intention of the testator to be collected from any other part of the will, or some rule of law, should be contravened thereby. But neither of these effects follow from giving this construction to the word *share* as applied to the son's interests under the will. It occasions indeed, what may be attended with some inconvenience, (and a wish to avoid which, and a probably presumed intention in the testator on that account, inclined me at first to a different construction) *i. e.* the necessity of dividing what is an entire tenement

nement as between the lord and tenant, between two surviving sons, as several tenants of their respective shares of the same: an inconvenience, in respect to the payment of rent, contribution to fines of renewal, and the like, which, as far as it exists, the testator had in the first instance steered clear of, by giving the several holdings entire to each of his sons to whom he devised the same. But upon consideration I do not feel that this circumstance can weigh against the otherwise clear and necessary meaning of the word *share* as it occurs in this place. We are therefore of opinion that the lessor of the plaintiff, the younger brother, is under this word *share* entitled to a moiety of the leasehold estate for lives, which was in the first instance devised to his brother *Richard;* and that the whole thereof does not descend to *Robert*, the elder of the two brothers, as heir at law of *Richard;* and of course that the verdict in favour of the plaintiff for such moiety ought to stand.

Postea to the Plaintiff.

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DOE d. STOFFORD *against* STOFFORD.

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Tuesday, Nov. 27th.

NICHOLSON and Another *against* WILLAN and Another.

Where one delivered goods of *above* 5*l. value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above the* value of 5*l.* UNLESS insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5*l.* as by the terms of the notice the carriers stipulated not to be answerable at all for goods above 5*l.* value, unless paid for accordingly.

THIS was an action on the case against the defendants as common carriers, wherein the first count of the declaration stated, that the plaintiffs, on the 20th *Feb.* 1803, at *Nottingham*, caused to be delivered to the defendants, and the defendants then and there accepted of the plaintiffs certain goods of the plaintiffs of a certain value, *viz.* 100*l.* to be by the defendants carried by the *London* and *Leeds* royal mail coach, which was to depart in the same morning from *Nottingham*, to be delivered to the plaintiffs for certain reasonable hire to be paid to the defendants on that behalf: and that although the said mail coach did on the morning of the day and year aforesaid depart from *Nottingham* for *London*, yet the defendants, not regarding their duty, &c. instead of carrying the said goods by the said mail coach, or delivering the same goods in *London*, &c. wrongfully, and without the licence and against the will of the plaintiffs, carried the said goods from *Nottingham* by a different coach, not

being

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being a mail coach, and took such bad care of the said goods that they were lost, &c. The second count stated a general contract to carry the goods from *Nottingham* to *London*, and that they were lost by negligence. The third count stated a special delivery to and acceptance of the goods by the defendants, to be carried from *N.* to *L.* by the mail coach, or if not sent by the mail coach, then to be re-delivered to certain persons at *N.* for the use of the plaintiffs; and then averred a breach of that contract by not sending the goods by the mail and detaining them from those persons at *N.*, and afterwards
[508] losing the goods by negligence. The fourth count stated a general contract by the defendants to take care of the goods for a certain reward, and that by their negligence the goods were lost. The fifth was a count in trover. Plea not guilty. At the trial before Lord *Ellenborough*, C. J. at the Sittings after last term at *Guildhall*, it appeared that the defendants were proprietors of two coaches travelling from *Leeds* through *Nottingham*, to *London*, the one a mail coach, the other a heavy coach, which went out six hours later every day than the other. The parcel in question, containing goods to the value of 58*l.* was (as a witness for the plaintiffs proved, and which the jury found to be true,) *delivered and accepted to be carried by the mail coach.* It appeared however to have been booked to go by the heavy coach, and to have been afterwards lost, but whether in a course of conveyance by the heavy coach, or out of the warehouse, or how otherwise, did not appear. It was proved that the defendants had for some time before put up an advertisement on a board in their office at *Nottingham*, and of which the plaintiffs were also proved to have had notice, in the following terms: "Take notice, that the proprietors of coaches transacting business at this office will not be accountable for any passengers' luggage, money, plate, jewels, watches, writings, goods, or *any package whatever* (if lost or damaged) *above the value of* 5*l.* UNLESS insured and paid for at the time of delivery, and demanded in one month after such damage was sustained." (Signed by one of the defendants.) The jury found a verdict for the plaintiffs for 5*l.*, subject to the question which was reserved by his Lordship for the opinion of the Court, whether the verdict should stand for that sum, or be entered for 58*l.* the value of
[509] the goods, or whether a nonsuit should be entered. A rule *nisi* having been obtained in the last term for entering a nonsuit,

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Erskine and *Cowley* shewed cause against it, and contended, 1st, That the plaintiffs were entitled to recover the whole value of the goods, as upon a breach of the special contract laid in the first count, whereby the defendants, after contracting to send the parcel by the *mail*, had sent it by another coach. The gist of that contract was, that the goods should be sent by a particular mode of conveyance, which the plaintiffs might think was more safe as well as expeditious than any other, and would on that account be content to stand their own insurer against any loss beyond the 5*l.* which the defendants at all events engaged to make good. The defendants do not in their notice object to *carry* for the ordinary price goods above 5*l.* in value, but they stipulate that they will not *insure* them from loss above 5*l.* for that consideration: by this must necessarily be understood losses arising from accident or misfortune, which as common carriers they would otherwise be liable to answer for at common law, and not such as arise from their own wilful misfeazance. Their liability then arises, not from any implied negligence in the execution of the contract for carrying, but from actual misfeazance in doing an act which put it out of their own power to perform their contract in the manner stipulated. If the goods had been sent by the mail and lost, the defendants would so far have performed their contract within the terms of the notice, that at most they would not have been answerable for above 5*l.*: but here there was no inception of the contract of carriage by the mail. The breach of contract therefore is collateral to the notice, and the same as if the defendants had thrown the parcel into the streets, where it was lost or destroyed. As in *Ellis* v. *Turner* (*a*), a carrier having carried the goods beyond the place where he had stipulated to leave them, after which they were lost, it was ruled to be a case out of his general notice not to be liable beyond 10*l. per cent*, and that he was liable to pay the whole loss. A pawnee (*b*) is not liable if the goods be stolen without his default: but if they be taken from him while using them contrary to his contract, he loses his privilege. But, 2dly, it is not competent to common carriers, such as the defendants are, to limit their common law liability by means of general notices. If their reward be not adequate to their risk, they should accept specially (*c*) in

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(*a*) 8 Term Rep. 531. (*b*) *Coggs* v. *Bernard*, 2 Ld. Ray. 917.
(*c*) *Kenrig* v. *Eggleston*, All. 93. *Morse* v. *Slue*, 1 Ventr. 238. *Tichburne* v. *White*, 1 Stra. 145.

each

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each case at a rate proportioned to the value of the goods. Carriers have been for some years gradually encroaching on their general legal responsibility, and extending from time to time their exemptions till the policy of the common law is entirely defeated. In *Gibbon* v. *Paynton* (*a*), where such notices were first considered, the exception was only of *monies*, *jewels*, or other like valuables, for carrying which a certain higher rate was demanded. The plaintiff there sent money hid in an old bag of hay; and held that he could not recover for the loss of the money, because it was a *fraud* upon the carrier. Now the exceptions extend to all goods whatever. In *Doct. & Stud.* 270. *Dial.* 2. *c.* 38. after speaking of the general liability of a carrier it is added, "and if he would per case refuse to carry goods unless promise were made unto him that he shall not be [511] charged for no misdemeanor that should be in him, the promise were void; for it were against reason and good manners." The same thing is said in *Noy's Maxims* 92. And this doctrine was lately confirmed by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Mersey Navigation* (*b*), who said, that common carriers could not discharge themselves from losses by any act of their own, as by giving notice.

Garrow and *Wigley* contrà. The goods were delivered to and accepted by the defendants in their character of carriers, and the notice which applies as well to the mail as the heavy coach, and was communicated to the plaintiffs, amounts to a special acceptance on the part of the carriers, which the authorities prove may legally be made. Then however an indictment or action might have lain against them for refusing to accept the goods otherwise than specially, yet having so accepted them, they can only be liable on their special contract. If the goods had been lost immediately after such acceptance, the defendants certainly could not have been charged further than the terms of the notice warranted: then it cannot make any difference that they were lost in the progress of their carriage out of the heavy coach. Now by the terms of the notice the defendants expressly refuse to make good at all the loss of goods of the value of more than 5*l.* (as these confessedly were), *unless* insured and paid for accordingly. The plaintiffs therefore, if bound by the terms of the notice, are not entitled to recover even the 5*l.* as was ruled in *Izett* v. *Mountain* (*c*). For upon the first count,

(*a*) 4 Burr. 2298.
(*b*) 1 Esp. N. P. Cas. 35.
(*c*) 4 East 371.

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the plaintiffs fail in proving their allegation that the defendants *accepted* the parcel upon *the terms there stated, which are not consonant to the terms of the notice; and this applies to all the other counts stating a contract; and the fifth count in trover cannot at any rate be maintained, without shewing a wilful and tortious act, by which the loss happened; of which there is no evidence. For at the most, the sending them by a different coach was no more than an act of negligence: they still acted in their character of common carriers.

Cur. adv. vult.

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Lord ELLENBOROUGH C. J. in this term delivered the judgment of the Court; and after stating the several counts in the declaration, and observing that as there was no evidence applicable to an alternate contract of the kind laid in the third count, that count may be laid out of the question; and also stating the several facts proved at the trial in the manner before set forth; proceeded thus:

On the part of the plaintiffs it was contended that they were entitled to recover the 58*l.* the value of the goods, notwithstanding the notice given by the advertisement, which excludes from the carriers' general responsibility for the same at common law all goods above the value of 5*l.* unless the terms therein specified, namely, of insuring and paying for the goods at the time of delivery, should be complied with, and which was not done in this instance. The ground on which they so contended was that the loss in question was one not incurred in the course of their employment as carriers, but occasioned by an act of tortious conversion in direct contravention of the terms on which the goods were delivered to and accepted by them. But to found this argument there was no other evidence but the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, which can amount to no more than a negligent discharge of duty in their character of carriers, and not to an entire renunciation of that character and of the duties attached to it, so as to make them guilty of a distinct tortious misfeazance in respect to the goods in question.

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It was also contended on the part of the plaintiffs that such a special acceptance of goods by a common carrier as is contained in the defendants' notice is contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by the only excepted causes of loss, *viz.* "the act of God and the King's enemies."

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But considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction also and countenance of the Legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carriers' responsibility in certain cases, on the grounds of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract: considering also that there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied: we cannot do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the Legis-
[514] lature if it shall think fit to apply such remedy hereafter as the evil may require. In the absence therefore of any evidence to support the plaintiffs' claim as founded upon a supposed tortious conversion of the goods in question, and of any valid objection in point of law to the special terms of acceptance contained in the defendant's, the carrier's, notice, we cannot help giving effect to those terms in the notice; by which, inasmuch as the goods in question were above the value of 5*l.* and not insured and paid for at the time of delivery, the plaintiffs are not accountable for the same: and of course the verdict even for the 5*l.* must be set aside, and a nonsuit entered.

A nonsuit entered.

Tuesday, Nov. 27th.

WYNNE and Another *against* RAIKES and OTHERS.

A letter from the drawees of a bill in *England* to the drawer in *America*, stating that "their prospect of security being so much improved they shall *accept or certainly pay* the bill," is an *acceptance* in law, although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in *England*, and again after the writing such letter refused payment of it when presented for payment; and although such letter written before were not received by the drawer in *America* till after the bill became due.

THE first count of the declaration stated that on the 9th of *November* 1801, *Aquila Brown* drew a bill of exchange on the defendants for 500*l.* payable to the order of *Thomas Andrews*

and

and *Butler* at 60 days' sight; that *Thomas Andrews* and *Butler* indorsed the said bill to the plaintiffs; and that the defendants, upon sight thereof, duly accepted the bill. There were also counts for money paid, and for money had and received. The defendants pleaded the general issue, and at the trial before Lord *Ellenborough* C. J. at the sittings after last *Hilary* term at *Guildhall*, a verdict was found for the plaintiffs, for 555*l.* subject to the opinion of this Court on the following case.

On the 9th of *November* 1801, *Aquila Brown*, who resides at *Baltimore* in *North America*, drew the bill of exchange in question at that place upon the defendants, who reside in *London*, and for a valuable consideration paid the bill to *Thomas Andrews* and *Butler*, residing in *Baltimore*, who afterwards for a valuable consideration, indorsed it to the plaintiffs, who reside in *London*. On the 9th of *November* 1801, *Aquila Brown*, by letter of that date, advised the defendants of having value on them by divers bills amounting altogether to 5548*l.* 14*s.* 2*d.* sterling, of which the bill in question was one, the amount of which bills *Aquila Brown* in that letter *requested the defendants to honour with acceptance*, and place the amount to his debit, and which letter of advice was duly received by the defendants. The plaintiffs, on receiving the bill in question in *England*, presented it on the 2d of *January* 1802 to the defendants for their acceptance, but the defendants refused to accept it. On the 13th of *January* 1802 the defendants wrote a letter to *Aquila Brown*, the drawer, which letter, after mentioning some damage which the cargo of the *Chesapeak* consigned to the defendants, had sustained, and difficulties in which it had been involved; as also an attachment laid upon the property of *Aquila Brown* in the hands of the defendants, (among other things) contains the following passages: "Under these circumstances, while your property in the *Chesapeak* appeared in so very questionable a state that we could not tell what security to rest upon it, you could not expect that we could interfere for any of your bills refused by Mr. *Mangin*, or even accept all the bills of yours which came in upon us. Several of them of course have been noted for non-acceptance, and Messrs. *Finlay*, *Bannatyne* and Co. have officiously sent you a protest on that for 551*l.* 15*s.* for non-acceptance. We have however now the satisfaction to mention to you that Mr. *Mangin*, having resolved to pay many of your bills on him, Messrs. *Mellish* and Co. have taken off the attachment in our hands, and

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and since the receipt of Messrs. *Muilman*'s letter of the 5th instant, our prospect of security on the *Chesapeak* is so much improved that *we shall accept or certainly pay all the bills* which have hitherto appeared; the one for 6500*l*., the 19th of *October*, has not yet been presented to us, but we will hope that the state of your funds will likewise permit us to take care of that." The bill in question was one of those which had appeared prior to the writing the above letter of the 13th *January* 1802, and which letter was *received by Aquila Brown* in *America* on the 19th *March* 1802. On the 6th of *March* 1802, which was 60 days and three days of grace after the bill in question was presented for acceptance, the plaintiffs presented the bill to the defendants for payment; but the defendants refused to pay the same, and the plaintiffs caused it to be protested for non-payment. *Aquila Brown*, the drawer of the bill, was at the time the same was drawn indebted to the defendants in the sum of 5000*l*. and hath so continued to the present time. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover. If the Court should be of that opinion, the present verdict to stand; if otherwise, a nonsuit to be entered.

Littledale, for the plaintiffs, relied on the case of *Clarke* v. *Cock* (*a*) as in point to shew not only that an acceptance of a bill may be by parol or collateral writing, but also that the terms of the defendants' letter of the 13th of *January* 1802, wherein they state "that the prospect of security in the *Chesapeak* was so much improved that they *shall accept or certainly pay* all the bills" which had then appeared, did in law amount to an acceptance. In that case the acceptance was by letter to the drawer, acknowledging notice of the bill having been drawn, and assuring him that it would meet with due honour from him. The only difference between the two cases is, that here the letter of the defendants was not communicated to the plaintiffs before the bill became due. But however material that might have been if the letter were to be considered merely *as a special agreement* to accept or pay the bill, it matters nothing considering it as in itself a legal *acceptance* of the bill; which is a technical term, binding the acceptor equally into whosesoever hands the bills shall come, and not merely confined in its operation to the particular person to whom the promise was made, or any other to whom it may have been communicated previous to the bill becoming

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(*a*) 4 East, 57.

due.

due. If the promise to accept, so made, were to be considered only as a special agreement, the liability of the acceptor would be continually varying, according as the bill got into this or the other person's hands, who had or had not notice of the special agreement, and who had or had not taken the bill upon the credit of it. According to the known practice and law of merchants, it is sufficient to fix the acceptor absolutely, if his promise to pay be made to the drawer, who is the fountain-head of the bill, or to the first indorser by whom it is put into circulation. When the letter had once passed out of the defendants' hands, it had its operation, and they had no further concern with the bill than to pay it when due. In the case of *Powell and Another* v. *Monnier* (*a*) the plaintiffs, indorsees, had received the bill before the letter of *Monnier* to the drawer, promising that the bill should be duly honoured, was written, and which was holden to be an acceptance. The plaintiffs therefore could not [518] have taken the bill on the credit of the letter. So in *Pierson* v. *Dunlop* (*b*) there was a prior refusal to accept given to the holder, as in this case; yet a subsequent letter to the drawer, saying that his bill would receive due honour was considered as an acceptance: and some expressions to the contrary, attributed to Lord *Mansfield* in one part of his judgment, were noticed by Lord *Ellenborough* in *Clarke* v. *Cock* (*c*), as clashing with what was said by the same noble judge in *Pillans* v. *Van Mierop* (*d*), and with other authorities.

Puller, contrà, at first proposed a question whether the letter of the 13th of *January* did amount to a positive promise to pay the bill even as between the drawer and acceptors: but finding the opinion of the Court decidedly against him on that point, he proceeded to distinguish this from the other cases, by observing that here the defendants had expressly refused to the holders, the plaintiffs, to *accept* the bill, and they followed up such refusal, after writing the letter of the 13th of *January* to the drawer, by denying payment. That letter, therefore, can only be taken to be a private engagement to the drawer to *pay* the bill when it became due, upon the supposition that they should then have funds of his in their hands, but accompanied with a direct *refusal to accept* the bill, so as to make themselves

(*a*) 1 Atk. 611. (*b*) Cowp. 571. (*c*) 4 East, 70.
(*d*) 3 Burr. 1666—9.

liable

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liable upon it in the hands of a third person. The promise to pay to the drawer never reached him in *America* till after the bill had become due and had been refused payment. It could not then have any operation. In order to have effect it must have relation to an existing bill, according to *Johnson* v. *Collings* (*a*); and it cannot vary the case whether the promise be made before the bill is drawn, or after it is due and has been refused payment, when the operation of it is spent. In *Beawes' Lex Mercatoria* 454. *pl.* 16. it is said that "if the possessor of the bill hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draft, *though previous to the knowledge of the drawer's misfortunes he had acquainted him with his intention to honour his bill.*" As to the case of *Powell* v. *Monnier*, the defendant, after giving the drawer the promise to accept, kept the bill in his hands ten days previous to the time when it became due, without objection, and then returned it to the indorsees; and for several days after he had so received it the drawer continued solvent; by which laches the acceptor clearly made the bill his own. [Lord *Ellenborough*, C. J.—It does not appear by the report that that formed any part of the ground of Lord *Hardwicke*'s decision. He went on the ground that the letter was an acceptance.] Here the letter never reached the drawer till after the bill had become due and was refused payment; so that it could not possibly have influenced any person to take the bill. And it is on this ground that a collateral promise to accept was considered by Lord *Mansfield* in *Mason* v. *Hunt* (*b*) as constituting an acceptance. And this was confirmed by *Le Blanc*, J. in *Johnson* v. *Collings* (*c*). Here however the possibility of the promise influencing any third person is negatived by the circumstances of the case.

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Littledale, in reply, observed, that the payees in *America* would act upon the letter when received, and therefore it would influence the conduct of third persons.

The Court considered the case of *Powell* v. *Monnier* to be in point to the present: but as it went somewhat further than the other cases, they wished to see if there were any other report of it varying from that in *Atkyns*. Upon this day

Lord ELLENBOROUGH, C. J. delivered judgment.

(*a*) 1 East 98. (*b*) Dougl. 299. (*c*) 1 East, 105.

This case, in all its material circumstances, resembles that of *Powell* v. *Monnier*, 1 *Atk.* 611., the authority of which has not been, as far as we have been able to find, ever shaken. The letter of the defendants, stated in the case to have been written on the 13th of *January* 1802 to *Aquila Brown*, the drawer, when the bill in question, amongst others drawn by him upon them, had been refused acceptance, after commenting upon the circumstances which had before made the property of the drawer appear to them, the defendants, to be in a very questionable state, particularly in respect to what the drawer had in the *Chesapeak*, says, "Our prospect of security in the "*Chesapeak* is so much improved that *we shall accept* or *cer-* "*tainly pay* all the bills which have hitherto appeared." And the first question in this case is, Whether this promise be an *acceptance?* If either branch of the alternative contained in this promise would be an effectual acceptance, if standing alone, surely it cannot be less so because the promise is couched in terms of an alternative of which each branch is an acceptance. A promise *to accept* an existing bill is an acceptance. [521] A promise *to pay it* is also an acceptance. A promise therefore to do the one or the other, *i. e. to accept* or *certainly pay*, cannot be less than an acceptance. It amounts, I think, in effect to this, "Whether we shall send for the bill again, and "accept it in form or not, is uncertain, but at any rate you may "depend upon its being paid." Supposing it be an acceptance, the time when it is to be considered as made, namely, Whether at the date of the letter, or at the time when it reached the drawer to whom it was written in *America*, (which was on the 19th of *March* 1802, after the bill had become due), is immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill is good. (*Jackson* v. *Piggot*, 1 *Ld. Raym.* 364. *Salk.* 127. and *Mutford* v. *Walcot*, 1 *Ld. Raym.* 574. *Salk.* 129, &c.)

The second question in this case is, Whether, inasmuch as the bill was not taken by the holders upon the credit of this promise of the defendants so made to the drawers, nor was the same known to them to have been made at all till after the bill was due, they, the holders, can avail themselves of it as an acceptance? In the case of *Powell* v. *Monnier*, already mentioned, that which was holden an acceptance enuring to the benefit of the indorsees, the plaintiffs, was an acceptance contained

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tained in a letter to the drawer, one *Newburgh*, promising, "that his bill should be duly honoured." The promise, being long subsequent to the time when the plaintiffs in that case became possessed of the bill by indorsement, could of course have formed no part of their original inducement to take it. And the promise was in that case, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor's hands; and it does not appear in the one case more [522] than in the other that the holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without oversetting the authority of the case of *Powell* v. *Monnier*, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover. And as in adhering to it we violate no principles of commercial convenience, but confirm a rule of law, which we find established on a subject which least of all others endures uncertainty and change, we cannot do otherwise than hold the plaintiffs in this case entitled to recover.

Postea to the plaintiffs.

Saturday, Nov. 27th.

DOE on the Demise of WHITBREAD *against* ANN JENNEY, Widow.

Where a copyholder in fee who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and re-admittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay her fine, after proclamations made and presentment by the jury, the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good, though the person next in remainder were known and named in the surrender.

THIS was an ejectment to recover certain copyhold premises, parcels of the manor of *Usford*, with the members, in the county of *Suffolk*, which was tried before *Hotham* B. at the last assizes at *Bury*, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

In

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Doe d. Whitbread *against* Jenney.

In 1787 the lessor of the plaintiff purchased and became, and is now lord of the manor of *Usford*, and the lands in question are parcel of this manor. In 1749 *Edmund Jenney* was admitted in fee to the lands in question; upon whose admission a full fine was paid. On the fourth of *September* 1765 he surrendered the lands to the uses of his marriage settlement, *viz.* to the use of himself for life, remainder to the defendant, then *Ann Brook*, spinster, for life, with divers remainders over. On the 10th of [523] *April* 1766, *E. Jenney* was admitted tenant of these lands, to hold to himself for life, "according to the form and effect of the said surrender by the rod, at the will of the lord, according to the custom of this manor, by the rents and services therefore due and of right accustomed saving every person's right." No fine was paid by *E. Jenney* on his admission in 1766, as tenant for life under the marriage settlement, or assessed or paid in respect to the remainders. In *August* 1801, *E. Jenney* the tenant for life died, and the defendant was called on to be admitted; and thereupon she appeared at a court baron of the manor on the 3d of *December* 1801, and offered to swear her fealty or have it respited: but she refused to be *admitted*, insisting at the same time that she was the lord's tenant by virtue of the surrender and admittance of *E. Jenney*, the prior tenant for life. On this refusal there was a presentment by the homage that *E. Jenney* died seised; and three proclamations were made at three different courts that if *any* person or persons would come into court and make any just claim or title in or to all or any of the lands or tenements holden of the said manor, whereof the said *E. Jenney* died seised, such person or persons should come into court and take admission to the same. And no one coming in to be admitted, a precept was issued by the steward of the manor under his hand, and dated the 11th of *December* 1802, directed to the bailiff of the manor, authorizing him in the presence of two or more copyhold tenants of the manor to seize into the hands of the lord, *quousque* the tenant should come in to be admitted, all such copyhold lands and tenements holden of the said manor by copy of court roll, whereof the said *E. Jenney* died seised, as aforesaid, to and for the use of the lord, *quousque* [524] the tenant comes in to be admitted: and then the lands are specified under a *videlicet*. And the lands were accordingly seized by the bailiff into the hands of the lord, in the presence of two copyhold tenants of the manor *quousque* the tenant should come in to be admitted. And after such seizure the lord made the lease

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DOE d. WHITBREAD *against* JENNEY.

lease in question, on which the present ejectment is brought. And the jury found, that by the custom of the manor, when a person who has been admitted tenant for life of a copyhold estate holden of the manor dies, the tenant in remainder, whether for life, in tail, or in fee, shall come in to be admitted and pay a fine thereupon. And they also found a verdict for the plaintiff, subject to the opinion of the Court on the following question, *viz.* Whether, under these circumstances, the plaintiff in the ejectment were entitled to recover the lands in question?

Alderson for the plaintiff, made two points; 1st, That, independent of the custom, the defendant, next in remainder after the death of the tenant for life, was bound, upon his death, to come in and be admitted. But, 2dly, That at any rate she was so bound by the custom, which was a good one. 1. The admittance of tenant for life is so far only the admittance of those in remainder as to vest their estate; but not so as to prejudice the lord in respect of his fine on admission. The statute of limitations, however comprehensive the terms of it, and binding on copyholders, extends not to bar the lord of his fine (*a*). So the stat. 16 *R.* 2. *c.* 5. which made it a forfeiture of land generally to purchase bulls of the pope, does not attach on copyholds,
[525] because that would prejudice the lord (*b*). The rule for these expositions is given in *Bacon's Abridgement* (*c*), that where an act of Parliament by general words alters any estate, interest, tenure, custom, or service of a manor, or does any thing in prejudice either to lord or tenant, it shall not extend to copyhold estates; but otherwise where the act is made for the public good, and no prejudice accrues to the lord or tenant. So neither shall the general rule of law, that the admittance of the tenant for life is the admittance of all in remainder, extend to deprive the lord of his fine due on the admission of each individual tenant. But as the fine is only due to the lord on the admission of the tenant, if the remainder-man were not bound to come in and be admitted on the death of the tenant for life, the lord would be deprived of his fine. Lord *Coke* (*d*) therefore

(*a*) Vide 1 Bac. Abr. 711, *in margine.* (*b*) Co. Copyh. 149.

(*c*) 1 Vol. 711.

(*d*) Co. Copyh. 157. *s.* 56. Lord *Coke* concludes in the same manner as to an heir, (*s.* 41. *p.* 115.) "that an admittance is principally for the benefit of the lord *to entitle him to his fine* and not much necessary for the strengthening of the heir's title."

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lays down the general rule with this limitation, that "if a copyhold be surrendered for life, remainder to a stranger; though the admittance of tenant for life be sufficient to invest the estate in him in remainder, *yet upon the death of tenant for life, he in remainder shall be admitted, and pay a fine.*" And this is confirmed by Lord C. B. *Gilbert*, in his book on Tenures, 194; and indeed it would be incongruous that where the first taker takes for life only, the next taker on his death should not be admitted and pay his fine, when he would be bound to do so if the first taker had taken in fee. The cases agree in this distinction: for in *Auncelm* v. *Auncelm* (*a*) the question being only as to the title between two contending tenants, the admittance of tenant for life [526] was holden to be the admittance of him in remainder. But in the *Earl of Bath* v. *Abney* (*b*), which was a case between lord and tenant, it was determined that the executor of a termor was bound to be admitted, and that the lord was entitled to a fine upon such admittance. The question there was, Whether a fine were due on every change of tenant, or only on every change of estate? and it was considered that on every change of tenancy the succeeding tenant was compellable to be admitted, though claiming under the same title as the antecedent one, because a fine was due to the lord on every such change, and to entitle him to it, it was necessary that the tenant should be admitted. 2dly. At all events the custom found is obligatory upon the defendant to come in and be admitted. Custom is the soul and essence of a copyhold, and determines the law of it. There is nothing unreasonable in the custom, nor inconsistent with the nature of the estate granted. Till admittance the tenant was not entitled to the lord's protection; and it is a reasonable consideration for it that he has thereby a certain place for assuring his title. And if the lord be entitled to his fine in respect of the premises, it is reasonable that he should have the means of enforcing the payment of it by a seizure of the premises *quousque* the tenant comes in and is admitted. In many instances the lord cannot tell who is the next in remainder till he comes in.

Best, contrà, after observing that this was more a question between the tenant and the steward than between the lord and tenant; for that the latter did not decline her fealty, but had offered it, and only objected to paying a fine as for a new admis- [527]

(*a*) Cro. Jac. 31. (*b*) 1 Burr. 206.

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sion, when she considered that she was already admitted tenant upon the rolls of the manor; contended, 1st. That by the general law of copyholds, the true rule of which was to be collected from *Brown's* case (*a*), and from *Barnes* v. *Corke* (*b*), the admittance of a tenant for life is the admittance of him in remainder, though by special custom two fines may be due. That consequently, if the tenant were already admitted, this ejectment cannot be maintained; but the lord has another remedy for his fine. The passage therefore cited from Lord *Coke*'s Copyholder requiring the *admission* of him in remainder stands alone, and has no authority cited in support of it (*c*). And the case cited of *Auncelm* v. *Auncelm* (*d*) is express that the admittance of the tenant for life is the admittance of him in remainder *without any other admittance.* But at any rate a new admittance can only be necessary, if at all, in cases where the remainder is to a man's *right heirs*, or in the like cases where he who is to take next was not before designated upon the lord's roll, and where consequently the lord cannot tell who his tenant is from whom he is to have suit and service, until he has come in and been admitted by name. Such was the case of the *Earl of Bath* v. *Abney*(*e*) where the surviving trustee, who was named as tenant being dead, the lord had no tenant on whom he could [528] call till the admittance of the executor of the last tenant, whose name was then for the first time put upon the roll. Then, 2dly, a custom to admit one who is already admitted tenant is absurd and unreasonable, and repugnant to the nature of copyhold; in like manner as a custom to surrender by attorney or out of court is void *as a custom*, because by the general law of copyhold it is incident to the tenure to do such acts. Then the custom stated is also void for uncertainty, in not desiring any time within which the admission is to be taken, and before which time the lord could not proceed to compel the tenant to come

(*a*) 4 Rep. 23. *a.* and vide *Gyppen* v. *Bunney*, Cro. Eliz. 504.

(*b*) 3 Lev. 308.

(*c*) Vid. Co. Copyh. *Supplement*, *p.* 28. *s.* 7. cites *Dell* v. *Higden*, Moor, 358. which goes to shew, that without a custom the lord is not entitled to a new fine from the remainder-man; though Lord *Coke* says it is otherwise of him in reversion. And then according to the case of *Tipping* v. *Bunning*, Moor, 465. which was afterwards referred to by the Court, where the lord is to have a fine, there must be a new admittance.

(*d*) Cro. Jac. 31.

(*e*) 1 Burr. 206.

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in. He also objected, 3dly, to the regularity of the proceedings; and contended, that this being a case of forfeiture was not to be encouraged, but that the proceedings should be construed strictly. [*Per Curiam.* It is no *forfeiture*, but only a *seizure quousque*, to compel the tenant to come in and be admitted.] If the admittance of the tenant for life be by the general law the admittance of him in remainder, the seizure should have been, not *pro defectu tenentis*, but for the non-payment of the fine. Then the next tenant being known and named in the rolls, the proclamations and the presentment should have been against her by name, the first requiring her personally to come in, the latter presenting her personal default. And such is the usual practice where the next taker is known. He also referred to *Kitchen of Courts*, 244. 4th edit.

Alderson in reply, said, that the case of *Barnes* v. *Corke* (*a*) shewed at least that a fine might be due by custom on the admission of a remainder-man; and here the jury have found such a custom. Then as to the irregularity of the proceedings, [529] the custom need not fix any time for the next in remainder to come in, and then he must come in within a reasonable time after the death of the tenant for life; and that is after the usual proclamations. And no prejudice can arise to the tenant; for, as was said by Lord *Kenyon* in *Roe* d. *Tarrant* v. *Helier* (*b*), the seizure is merely to compel the tenant to come in, and the lord can only retain the possession *quousque*. Then as to the generality of the proclamations and presentment, it was sufficient in a court baron as in other courts to make general proclamation for all persons bound to attend to come in; there is no occasion to proclaim each absentee individually, whether known or not.

Lord ELLENBOROUGH, C. J. adverted to the case of *Tipping* v. *Bunning*, *Moor*, 465., which had not been mentioned, where it was adjudged, that if a copyhold be granted to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder; the reason given for which is, that the lord is not to have a new fine upon the death of the tenant for life; *but where the lord is to have a fine, there must be a new admittance.*

Best observed, that the necessity of a new admittance was not stated so strongly in the report of the same case, in *Cro. Eliz.* 504. by the name of *Gyppen* v. *Bunney*.

(*a*) 3 Lev. 308. (*b*) 3 Term Rep. 162.

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The case stood over for consideration; and now

Lord Ellenborough, C. J. delivered the judgment of the Court.

*In this case two questions have been made; the first and principal of which is, Whether the defendant, who claims a copyhold estate, the subject of this ejectment, under a surrender made on her marriage to the use of her late husband *Edmund Jenney* for life, remainder to herself for life, was, on the death of her husband, bound to come in and be admitted; there being a custom in the manor that where a tenant for life dies, the tenant in remainder shall come in to be admitted and pay a fine? The 2d question is, Whether the presentment that *E. Jenney* died seised, and the proclamations made, "that if any person would come into court and make just claim or title to the lands whereof *E. Jenney* died seised, such person should come into court and take admission to the same," be sufficient; inasmuch as the defendant, being designated by the surrender as the person to take in remainder on the death of *E. Jenney*, was not named in the presentment or proclamations? The defendant in this case does not object to paying the fine due by the custom from the person to whom the estate is limited in remainder; but contends that the admission of her husband was in law the admission of herself, and that any further admission is nugatory; and that a custom requiring one already admitted to be admitted again is unreasonable and void. To shew that the admission of the tenant for life is the admission of those in remainder, *Brown*'s case, 4 *Rep.* 22 *b.* was relied on, in which the doctrine is laid down, *that the admittance of the tenant for life is the admittance of him in remainder to vest the estate in him, but not to bar the lord of his fine;* and *Auncelm* v. *Auncelm*, *Cr. J.* 31. where a surrender having been made by a copyholder to *Martha* his wife for life, remainder to *Matthew* his son in fee; on which

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Martha was admitted; and *Matthew* the son without other admittance having surrendered to the use of the plaintiff, the Court determined in his favour against the heir of *Matthew;* being of opinion that the admittance of the feme was the admittance of him in remainder; as the particular estate and that in remainder made in law but one estate. And this last case was much relied on to shew, that the admission of the tenant for life is fully and completely the admission of him in remainder when designated on the roll, as in the present case the defendant is. On the other

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other hand it was insisted, that where by custom a fine is to be paid by the remainder-man, he is in such case bound to be admitted according to the doctrine of Lord *Coke* in his Treatise on Copyholders, 130, adopted by Lord C. B. *Gilbert*, in his Treatise on Tenures, p. 194: and that the case of *Auncelm* v. *Auncelm* only proves that the admittance of tenant for life is the *admittance of the tenant in remainder, so far as to vest in him the estate in remainder*, and enable him to convey a title to it, but that it is not such an admission as to make him full and complete tenant to the lord. And further, that though it should be holden that, where there is no custom, the remainder-man need not be admitted; yet the present defendant was bound to be admitted, there being such custom within this manor, which is the life of copyholds: and that the custom is a reasonable one; as by means of it will appear distinctly upon the rolls of the manor to whom the different copyholds belong, and the lord will be better able to call for his fines and enforce his suits and services. In addition to the cases mentioned by the plaintiff's counsel, that of *Gyppen* v. *Bunney*, as reported in *Moor*, 465. may be added; where it is laid down, that if a copyhold be surrendered to one for life, remainder to another in fee, *if the lord is to have a fine from the remainder-man there is occasion for a new admittance.* But without deciding whether that be necessary without a custom, [532] we think such custom good for the reasons suggested by the counsel for the plaintiff; and it is analogous to what is the law of copyholds, as it respects the heir, who upon the descent of the customary estate may surrender to the lord to the use of another before admittance, and who on the death of his ancestor is immediately tenant by copy of court roll: the reason of which, as assigned by Lord *Coke* in *Brown*'s case, 4 *Co.* 22 *b.* is because the copy made to his ancestor belongs to him, as the admittance of tenant for life is the admittance of him in remainder: and yet according to Lord *Coke* in his Copyholder, p. 94, the heir is not complete tenant before admittance to all intents and purposes; for till then peradventure he cannot be sworn on the homage, nor maintain a plaint in the nature of an assize.

In support of the second objection no authority has been cited, but it has been rested wholly in what was said to be the usual practice in courts baron of mentioning in the presentment and proclamations the name of the person, when known, who ought

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ought to come in and be admitted. If the tenant, when known, were likely to be prejudiced by not being named, this objection would have weight. And though as the object of the presentment is for the information and instruction of the lord, it would in respect of him be better to mention the person who ought to come and be admitted, when known; yet in respect to the heir or remainder-man, this is not the purpose of the presentment, nor are the proclamations intended to inform persons of their titles, but to give notice to those who have a right to be admitted, that the tenancy is vacant, and that the lord requires [533] of those who are entitled to take upon them the tenancy: and it seems sufficient, so far as the tenant is concerned, if the presentment and proclamations be in the general terms used on this occasion. For these reasons we think there should be judgment for the plaintiff.

Postea to the plaintiff.

Tuesday, Nov. 27th.

WIGGINS *against* STEPHENS.

Bail may render without justifying; and where the rule expires in vacation, a render on the first day of the ensuing term *sedente curiâ* is good, though notice were not given till afterwards on the same day, and after a writ of *procedendo* had issued to an inferior court where the cause originated.

MARRYAT obtained a rule to shew cause why the writ of *procedendo* issued in this cause to the Judges of the Palace Court should not be set aside for irregularity with costs. The cause having been removed by *habeas corpus* into this court, special bail was put in, and a rule obtained in the vacation for better bail, which the defendant had till the first day of this term to comply with, when the bail attended to justify; but being rejected in a prior cause, they did not justify in this, but rendered the defendant, *sedente curiâ;* which render was lodged with the proper officer of the Palace Court and allowed, and notice of it given to the plaintiff's attorney about 7 o'clock in the evening; before which time, *viz.* about 4 o'clock, after the rising of the Court, the writ of *procedendo* had been sued out.

Lawes shewed cause, and contended that the render was not complete till notice, which ought therefore to have been given *sedente curiâ;* the rule to render having expired in the vacation and the bail having only by indulgence till the rising of the Court on the first day of term to complete the render. But by [534] Lord ELLENBOROUGH, C. J.—The bail, though unable to justify

justify, were sufficient to render their principal (*a*); and having till the last moment of the sitting of the Court to do so, the notice must necessarily be given afterwards; and having the whole day to give notice, if it be given any time in the day it is sufficient.

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Per Curiam, Rule absolute (*b*).

(*a*) *Edwin* v. *Allen*, 5 Term Rep. 401. S. P.

(*b*) Vid. Tidd's Pract. 150. which mentions the same point ruled in *H.* 26 *Geo.* 3. and vid. ib. 190.

BINGHAM *against* SERLE.

Wednesday, Nov. 28th.

ASSUMPSIT for money had and received, and upon an account stated. Plea *non assumpsit*. At the trial before Lord *Ellenborough* C. J. at the Sittings at *Westminster* after the last term a verdict was found for the plaintiff for 14,780*l*., subject to the opinion of the Court on the following case:

The plaintiff is the incumbent of the chapelry of *Gosport*, and the person named in the warrant and inquisition after mentioned. The defendant is receiver-general of the land-tax for the county of *Southampton*. On the 18th of *November* 1803 a warrant was signed, and issued by two of his Majesty's deputy lieutenants for the said county, directed to the sheriff thereof, stating that "whereas his Majesty had authorised the Master-general and principal officers of his Majesty's ordnance to survey and mark out the piece of land situate at *Gosport*, in the parish of *Alverstoke*, in the county of *Southampton*, holden by the Rev. *R. Bingham*, under lease from the Lord Bishop of *Winchester*, and also the parcel of land granted by him for the purpose of erecting a dwelling-house, &c. for the residence of the incumbent of *Gosport* chapel, together with such dwelling-house, &c. (and mentioning also certain other lands in the occupation of other persons, under lease from the Bishop of *Winchester*), the same being wanted for his Majesty's service: and whereas they the undersigned, two of the deputy-lieutenants, &c. had, pur-

When the stat. 43 *Geo.* 3. *c.* 55. *s.* 10. enabled a jury to assess a compensation to the owner or persons interested in land, which was taken possession of by government; which compensation was to be made "for the possession or use thereof *during the time for which the same should be required for* [535] *the public service*;" held that the assessment of a compensation only *in gross* and without reference to time, as by an annual rent, was bad; because of the uncertainty of the period for which the land would be required, of which no probable average estimate could be formed pending the exigency.

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suant to the statute in such case made, issued their warrants under their hands and seals, commanding possession of the said premises to be delivered to Col. *John Eveleigh*, the commanding royal engineer at *Portsmouth*, for the public service; they therefore required the sheriff to summon a jury to appear at *Gosport*, &c. on a certain day, to *inquire of and ascertain the compensation which ought to be made for the possession or use of the abovementioned premises* " *during the time for which the same should be required for the public service*, to the several persons interested therein, and to whom the same ought to be paid." In pursuance of this warrant an inquisition was taken before the sheriff on the 28th of *November*, at the place and by the jurors therein named; whereby the jurors found " that the Rev. *R. Bingham* was entitled to receive 14,780*l.* as a compensation for his damages by reason of giving up the premises therein mentioned to be required from him *for the exigency of Government, during the time the same shall be so required* to be paid *to him for his own use;* and to the further sum of 470*l.* as incumbent of the chapelry of *Gosport*, to be paid to the said *R. Bingham*, to the Lord Bishop of *Winchester*, and to the Rev. *J. Sturges*, LL. D. *as trustees* for the benefit of the incumbent of the chapelry of *Gosport* for the time being; (and then it proceeds to find the compensation due to other lessees of the bishop for their damages sustained.) Which several sums the jurors found ought to be paid to the
[536] several persons aforesaid immediately upon demand thereof for the purposes aforesaid." The case then stated, that a certificate of the inquisition was signed by the said two deputy lieutenants, and was on the 30th of *November* served, together with the inquisition and warrant annexed, upon the defendant, who was required by the plaintiff to pay the sum of 14,780*l.* That the defendant at that time had money in his hands, as such receiver-general, sufficient to discharge the same, and promised to write to his deputy, and that there should be no delay in the payment. [Upon the suggestion of the Court during the argument, that the act of Parliament required certain preliminary steps to be taken, which did not appear on the face of the case to have been pursued, the case was afterwards agreed to be amended by inserting the following facts.] That the officers of the Board of Ordnance were duly authorised by his Majesty to survey and mark out the premises mentioned in the several warrants and certificate after-mentioned, and to treat and agree with the persons having any interest therein for the possession or use thereof

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during such time as the exigency of the service should require That in pursuance of such authority the premises of the plaintiff in the said warrant mentioned were duly surveyed and marked out, and a treaty was duly entered into with the plaintiff for the purpose aforesaid. That the plaintiff refused to enter into such contract touching the same as was satisfactory to the said officers. That the said officers of the Board of Ordnance did thereupon require two of the deputy lieutenants for the county of *Southampton* to issue their warrant according to the form of the statute, &c. to put his Majesty's officers into immediate possession of the said premises. That in pursuance thereof, on the 14th of *November* 1803, a warrant was signed and [537] issued by them, directed to and served upon the plaintiff, and others holding or renting the parcels of ground therein mentioned, stating that "Whereas his Majesty had authorised the Master-general, &c. of the Ordnance to survey and mark out the parcel of land situate at *Gosport*, &c. holden by the Rev. *R. Bingham* under lease from the Lord Bishop of *Winchester*, and also the parcel of land granted by him for the purposes of erecting a dwelling-house &c., for the residence of the incumbent for the time being of *Gosport* chapel, together with such dwelling-house, &c. the same being wanted for the public service; and that whereas the undersigned, two of the deputy-lieutenants, &c. pursuant to the statute, certified that the possession or use of the said premises was necessary for the public service *during such time as the exigency of the service should require:* they therefore required and commanded the plaintiff, &c. to deliver the immediate possession of the said premises to Col. *John Eveleigh*, &c. or other his Majesty's officers appointed by him for that purpose, for the public service." That a certificate was also signed by the said deputy-lieutenants on the same day, stating that "Whereas his Majesty had authorised the Master-general, &c. of the Ordnance to survey and mark out the lands in question, (describing them) holden by the Rev. *R. Bingham* under lease from the Lord Bishop of *Winchester*, &c. the same being wanted for the public service; they therefore certified, that the possession or use of the said premises *was necessary for the public service, during such time as the exigence of the state should require*, pursuant to the stat." &c. That under the said warrant possession was taken by the officers of government of all the premises therein mentioned, except of the dwelling-house, which by con-

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sent of the Board of Ordnance the plaintiff was allowed to occupy as tenant at will to the said board upon his undertaking to quit immediately upon notice for that purpose. The question for the opinion of the Court was, whether the plaintiff were entitled to recover? If he were, the verdict was to stand; if not, a verdict was to be entered for the defendant.

The case was argued on a former day of this term by *Scarlett* for the plaintiff, and *Gaselee* for the defendant. The argument turned on the construction of the stat. 43 *Geo.* 3. *c.* 55. *s.* 10. and reference was also had to *s.* 11. which was amended by stat. 43 *Geo.* 3. *c.* 96. And the principal grounds of contention on the part of the defendant were shortly these; that a *gross* sum (such as had been given by the jury in this case) could not be a proper compensation for a temporary possession of uncertain duration, depending upon the *exigency of the public service*, of which no probable computation could be made, there being no criterion by which it could be measured. 2dly, That the Bishop of *Winchester*, who was interested in the compensation to be given, was not a party to the proceeding before the jury. 3dly, That it was uncertain on the face of the inquisition what interest the public took in the premises, in respect of which the compensation was awarded. To which it was answered, in substance, that the duration of life and other uncertain periods, the value of good-will in houses for trade, and other contingencies, were daily the subject-matter of computation, and verdicts were often founded thereon. That the question of value was a matter of fact; and that after verdict the interest of the plaintiff must be taken to have been justly valued. 2dly, That it was no fault of the [539] plaintiff if all the persons interested were not brought before the jury, as he was merely passive in the proceeding, which was compulsive upon him on the part of Government. That Government might have agreed with the lord for his compensation; or if not, that compensation might still be made to him if he shewed a grievance. But that the jury might have considered, that the injury from the temporary possession compensated was too remote to reach the lord. 3dly, That the act did not require the inquisition to state what interest the Government took in the premises; and on the contrary, the whole proceeding was founded on an assumption of the uncertainty of the time for which it would be necessary to take the land. It was sufficient that the inquisition pursued the act of Parliament, and was as certain as that.

Lord

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Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was an action for money had and received, brought under the st. 43 *G.* 3. *c.* 55. by a lessee of the Bishop of *Winchester*, of a piece or parcel of land situate at or near *Gosport*, against the receiver-general of the land-tax for the county of *Southampton*, to recover the sum of 14,780*l.*, which had been (as alleged by the plaintiff) duly assessed by a jury, as a compensation to the plaintiff for his damages by reason of giving the possession and use of that piece of land "*during the time for which the same should be required for the public service.*" The 10th clause of the act, upon which the claim is founded, and in conformity to which the assessment of compensation is stated to have been and can alone really be made, enacts, "that it shall be lawful for his Majesty, &c. to authorize any officer, &c. to survey and mark out any piece of ground wanted for the public service, and to treat and agree with the owner thereof, or any person having any interest therein, for the possession or [540] use thereof during such time as the exigency of the service shall require. And in case the owner, &c. shall decline to enter into such contract touching the same as shall be satisfactory to such officer, &c. or shall be unable, &c., it shall be lawful for the person so authorized by his Majesty, &c. to require two or more deputy-lieutenants, &c. to put his Majesty's officers into immediate possession of such piece of ground, &c., and shall for that purpose issue their warrant, &c., and shall also issue their warrant to the sheriff, &c. to summon a jury, &c. to enquire of and ascertain the compensation which ought to be made for the possession or use of such piece of ground during the time for which the same shall be required for the public service to the several persons interested therein, and to whom the same ought to be paid: the verdict of which jury shall be certified by such deputy-lieutenants, &c. to the receiver-general of the land-tax, &c. where such lands shall lie; which receiver-general, &c. shall out of any money in his hands pay such compensation to such person or persons in such manner and for such purposes as by such verdict shall be directed," &c.

Three objections have been taken to the plaintiff's right to recover the compensation which has been thus assessed. 1st. That a gross sum (as this appears to be) cannot be a proper compensation for a temporary possession of uncertain duration.

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2dly. That all the proper parties interested in the compensation to be assessed were not before the jury. 3dly. That it is uncertain on the face of the inquisition what interest the public take in the premises in respect of which the compensation is awarded. The validity and effect of this inquisition merely depends on its conformity to the powers and provisions of the act under which it was taken: it can neither be helped or impugned by any intendment to be drawn from any extrinsic matter. If the inquisition be not conformable to the powers and provisions of the act, it constitutes no obligation on the part of the receiver-general to pay the money assessed thereby, and of course lays no foundation for the implied promise, upon which this action should be supported.

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As to the first of these objections, that a gross sum cannot be a proper compensation for a temporary possession of uncertain duration; it is not only true that a compensation proportioned to and measured by the time during which the occupation on the part of the public should continue is a better mode of compensation for a possession of uncertain continuance than the assessment of a gross sum, but the latter seems to be upon principle, and in all cases, radically vicious. If I should assess a compensation upon a supposition that the exigency will terminate immediately, I may give far too little: if I calculate that it will last to a very distant period, I may give greatly beyond the mark; if I divide the difference, I place myself in the medium only between two extremes of similar injustice: but still I am not morally sure of doing justice or any thing near justice, only I have a chance of doing less injustice than if I adopted either extreme. Perhaps a gross sum, by way of immediate compensation for the mere immediate damage and inconvenience of removal or the like, and which occurs at once, and a payment afterwards, either annually or at certain fixed periods of time as long as the individual should be kept out of his property, would be the best mode of compensation. But a compensation only in gross, and without any reference to time, for an occupation which may either terminate immediately, or last for an indefinite length of time, which has not any circumstances connected with it upon which an average estimate of its probable continuance, and a valuation calculated accordingly, may be formed; as the average duration of human life affords towards an estimate of the value of a life annuity or the like; but which

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rests

rests upon the mere duration of public exigency under all the various uncertainties to which not a calculation merely, but even a conjecture on such a subject is liable: I say a compensation so adjusted cannot in its principle be otherwise than erroneous. If any prospective estimate in the shape of a gross sum can be right, I admit that we must assume the sum assessed by this verdict to be that sum; but as long as the public exigency continues, and which may last indefinitely, it is always liable to be wrong, and till the exigency be passsed can never be proved to be right. Can it be said therefore that what is always liable to be wrong and can never (as at present whilst the exigency continues it never can) be proved to be right, is not fundamentally defective? The most that can be said in favour of such a mode of assessment is, that by accident it is barely possible that the sum total of the several portions of compensations, assessed according to time, might in the result happen to amount to the very same sum as is now assessed in gross. But the bare possibility of its happening to be right will not make the ground upon which it is decided less objectionable. If several numbers were written down by jurymen, and put into a hat, the jury may draw out that very sum upon paper, and accordingly pronounce their verdict for that very sum which upon a just consideration of all circumstances, if they had considered them, might have turned out to be the most proper amount of damages which they could have found. But would a verdict, so right by accident, be itself right, or could it be sustained for a moment? A judge either deciding at hazard or by a vicious rule, *licet æquus statuerit, haud æquus fuerit.* The amount of damages assessed by a rule so vicious as that of compensation in gross is, and which can only be right in an event which is barely within the limits of human possibility to happen, must be wrong; and if so, it is less material to discuss at large either of the two other remaining grounds of objection.

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Upon the 2d of them however it may not be amiss to add, that the 10th sect. of the act in terms directs a jury to be summoned "to inquire of and ascertain the compensation which ought to "be made for the possession and use of the ground during the "time for which the same shall be required for the public service "to the several persons interested therein, and to whom the "same ought to be paid." And although in this instance the warrant of the two deputy-lieutenants for summoning the jury specified

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specified as it ought to do the abovementioned objects of their inquiry; and although it also expressly stated on the face of it that the piece of land in question, for the use of which during the public exigency the compensation was to be made, was holden by the Rev. *R. Bingham*, the plaintiff, under lease from the Lord Bishop of *Winchester*; so that it appeared that there were in the very terms of the act "several persons interested therein," namely, the lessor, the Bishop of *Winchester*, as well as the plaintiff, the lessee; yet the jury have by this inquisition found the compensation for *R. Bingham*, the plaintiff, only, and have directed the same to be paid to him for his own use, without
[544] either compensating the reversionary interest of the Bishop of *Winchester* therein, or declaring that from its insignificance in value on account of the length of the existing term they had considered it as an interest not requiring any, or at least any substantial compensation. The length of the term is however no where stated; and it does not appear with certainty that recourse can be had under this act a second time to a jury to inquire of and ascertain a compensation for an interest which, though known to them to exist, was omitted to be compensated under the first inquisition; the possibility of which at least ought clearly to appear in order to excuse and obviate the consequences of such an omission. I admit that if the reversion of the bishop was, as has been supposed in argument, a reversion at the expiration of some extremely long term, that it would be very difficult to assign any just compensation by a sum in gross for the remote and contingent use of the land during the period of such reversion. However, even upon this supposition, a compensation in the form of annual rent, to be paid so long as the public exigency should require the use of this land, would at any rate insure to the reversioner his proper quantum of satisfaction at the last, if the required use of the land should continue beyond the duration of the existing term; which again evinces the fitness of a compensation measured by time, and the unfitness of any other rule of compensation as applied to such a subject as the present. As the inquisition therefore appears to us not to be maintainable, the consideration for the implied promise of the defendant of course fails, and the plaintiff cannot on that account recover. The verdict therefore must in this case be entered for the defendant.

Postea to the defendant.

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BARING *against* CHRISTIE.

Wednesday, Nov. 28th.

IN an action on a policy of insurance in *C. B.* a special verdict was found, on which there was judgment for the defendant; and on error brought in this Court that judgment was affirmed (*a*), and the single costs only of the writ of error were taxed by the Master for the defendant; on which a rule was obtained on a former day for the Master to review his taxation; the defendant contended that he was entitled to double costs upon the stat. 13 *Car.* 2. *st.* 2. *c.* 2. *s.* 10. which enacts, "that if "any person shall prosecute any writ of error for reversal of any "judgment whatsoever given after any verdict in any of the "courts aforesaid, and the said judgment shall afterwards be "affirmed, then every such person shall pay unto the defendant "in the said writ of error his *double* costs, to be assessed by the "court where such writ of error shall be depending, for the "delaying of execution."

The stat. 13 *C.* 2. *st.* 2. *c.* 2. *s.* 10. giving *double* costs to the defendant in error if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for the *plaintiff below*, and not where the defendant below obtains judgment upon a special verdict.

Gibbs, *Park*, and *Puller*, shewed cause, and said that it was plain from the preamble to that enactment, which was in the 8th section of the statute that that provision was made solely with a view to prevent *plaintiffs* who had recovered verdicts below from being delayed in their damages by writs of error, and that it did not apply to cases where the defendant below had obtained judgment after verdict, and the writ of error was brought by the plaintiff; because he could not be said in that case to delay execution for any debt. The 8th clause recites and approves the statute 3 *Jac.* 1. *c.* 8. which enacts, "that no execution should be staid or delayed by any writ of error, &c. [546] for the reversing of any judgment in any action of debt, &c. *or upon any contract*, &c. unless the person in whose name such writ of error shall be brought, with two sufficient sureties, shall before such stay made be bound to the party for whom such judgment was given by recognizance *in double the sum adjudged to be recovered by the said former judgment* to prosecute the said writ of error with effect, and *also to satisfy and pay*, if the said judgment shall be affirmed, all the *debts*, *damages*, and costs adjudged on the former judgment, and all costs and damages to be also

(*a*) Ante, 398.

awarded

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awarded for the same delaying of execution," &c. And then reciting, " that divers other cases *within the same mischief* by delays of execution, &c. are not provided for," it makes provision for other cases by *s.* 9.: and then by *s.* 10. gives the double costs as a means of guarding against such delays by writs of error. And they also observed that even the single costs of defendants in cases like the present did not depend upon this statute, but upon the subsequent stat. of the 8 & 9 *W.* 3. *c.* 11. *s.* 2.

The Court expressing a strong opinion in favour of this interpretation of the statute, which they said was consonant to the practice, *Erskine*, who had obtained the rule *nisi*, did not attempt to support it. And

Lord ELLENBOROUGH, C. J. added, that even if there could have been any doubt upon the meaning of the stat. of *Car.* 2. which was made to prevent delays of suit, and which therefore could not apply to writs of error brought by plaintiffs, who could not be said to *delay* the defendants; yet the subsequent statute [547] of King *William*, which for the first time made provision even for *single* costs for defendants, against whom writs of error were prosecuted after having obtained judgment below, was a legislative interpretation of the former statute, which could not be answered.

Rule discharged.

Wednesday, Nov. 28th.

MAXWELL *against* SKERRETT.

A demand of a plea indorsed on the declaration when delivered is good, and a rule to plead may be given afterwards without any fresh demand of a plea.

ON a rule for setting aside the proceedings for irregularity with costs, the facts were, that the declaration was delivered the 9th of *November*, indorsed to plead in four days, and with a demand of a plea in writing on the back of the declaration: but no rule to plead was given till the 12th of *November*; and on the 17th, interlocutory judgment was signed as for want of a plea, without any other demand of one.

Marryat in support of the rule contended, that there could be no plea till after a rule to plead given, and that there should afterwards be a demand of a plea 24 hours before interlocutory judgment could be signed, for want of which in this case the judgment was irregular.

Reader

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MAXWELL *against* SKERRETT.

Reader, contrâ, said, that it had been decided in *The Churchwardens of Edmonton* v. *Osborne* (*a*) that a demand of a plea may be made at the time of delivering the declaration. And that it was sufficient that a rule to plead had in fact been given, though afterwards. And

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Per Curiam (after consulting the Master). The demand of a plea at the time of delivering the declaration has been determined to be good; and though it be usual to give a rule to plead when the declaration is delivered, yet as a rule has been given, though given afterwards, whereby the defendant had more time to plead, there is no objection to it.

Rule discharged.

(*a*) 6 Term Rep. 689.

PIERSON *against* ROBERT VICKERS, ANN his Wife, and Others.

Tuesday, Nov. 20th.

GENTLE MORRIS, by his will duly executed, dated the 12th of *October*, 1789, devised all his freehold and copyhold estates whatsoever, situate at *Belton* in the county of *Lincoln* (which copyhold estate he had surrendered to the use of his will) with all and every their appurtenances unto his daughter *Ann* (the defendant *Ann Vickers*), and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common and not as joint tenants; and in default of such issue he devised the said hereditaments and premises to his sisters (the defendants), *Mary Vickers* and *Jane Preston*, for their joint lives, with remainders to trustees to preserve contingent remainders during the lives of his said sisters. And from and after the decease of either of the said last named sisters of the testator, he devised the said hereditaments and premises unto all and every the child and children of his said sisters, whether sons or daughters, and their heirs and assigns for ever, as tenants in common, and not as joint tenants. The testator died soon after; whereupon his daughter, *Ann Vickers*, or her husband in her right, entered into, and is now in the possession and receipt of the rents and profits of the testator's freehold and copyhold estates. The defendants *Mary Ann Vickers*, *Mary Vickers*, *Mary Haldenby*, *John Vickers*, *Joshua Vickers*, *Elizabeth Vickers*, *Charles*

Under a devise of all freehold and copyhold estates whatsoever situate at *B.*, with their appurtenances to *A.* and the heirs of her body lawfully to be begotten whether sons or daughters, as tenants in common; and in default of such issue then over; held, that *A.* took an estate tail.

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PIERSON against VICKERS.

Charles Vickers, and *Gentle Vickers*, are the children of the said *Ann Vickers*, the testator's daughter. *Robert Vickers* and *Ann* his wife having been advised that she took an estate in tail general in the freehold and copyhold premises in *Belton* by virtue of the said will, in *Hilary* term 41 *Geo. 3.* suffered a recovery of the freehold premises in that parish; and by lease and release of the 6th and 7th of *February*, 1801, the uses of such recovery were declared as to certain parts of the freehold estate (comprehending the premises in question) to be to such persons, for such estates, under such powers, and in such manner and form, as *Robert Vickers* should by deed or will (to be executed and attested in the manner stated in the release) appoint; and in default of such appointment, to the use of the said *Robert Vickers* in fee. *Robert Vickers* having been also advised that by the means aforesaid he had acquired an estate in fee-simple, or a power of conveying a fee in the said freehold premises in question, he some time after suffering such recovery, contracted in writing to sell the same to the plaintiff *H. Pierson;* who objecting to his title, and contending that *Ann Vickers* took only an estate for life in the said freehold premises, by virtue of the said will, exhibited his bill in the Court of Chancery against *Robert Vickers* and *Ann* his wife, and the several other parties, defendants, for a specific performance, if it should appear that a good title could be made to the premises so contracted for, or
[550] if not, to have the contract cancelled; and after a hearing before the Master of the Rolls, his Honour directed this case to be stated for the opinion of this Court, upon the question, What estate *Ann Vickers* took or acquired under and by virtue of the said will in the said freehold premises in question?

Holroyd for the plaintiff contended, that *Ann Vickers* took an estate tail. The estate is not devised to her *for life*, and after her decease to the heirs of her body, *whether sons or daughters, as tenants in common;* but it is given to *her and the heirs of her body, &c.;* this indicates that the testator did not mean to confine the devise to his daughter *Ann* to an estate for life, especially when it appears that where he meant only to give a *life* estate he has so expressed himself, as in the subsequent devise to his two sisters: and there he has interposed trustees to preserve contingent remainders between the devise to his two sisters, and that to their *children*, who he meant should take as purchasers. By "*sons or daughters*," then was meant no more than "male or female."

female." It is true he intended that the heirs of the body of *Ann* should take as *tenants in common*, which they could only do by taking as purchasers; but that would be inconsistent with his principal intent which was that the estate should not go over to his two sisters and their descendants till failure of all the issue of his daughter *Ann*; for the remainder over is only "in default of such issue," *i. e.* of his daughter. But if the children of *Ann* took as purchasers they could only take for life, there being no words of limitation or other words annexed to the devise to them to carry a greater estate. And again there being no cross remainders (*a*) between them, the share of each dying would go over in remainder, which would be contrary to the declared intent of the testator, that the estate should not go over to his sisters till default of issue of his daughter. Then if the two intents of the testator cannot take effect, namely, that the heirs of the body of *Ann* should take as tenants in common, and also that the estate should not go over in remainder till total failure of her issue, the latter, being the general and principal intent, must prevail over the former and minor intent; and that can only be by giving *Ann Vickers* an estate tail by reason of the devise to her and the heirs of her body, and the remainder over being in default of issue. As in *Doe* d. *Candler* v. *Smith* (*b*), where the devise was to *Mary Ascough* and the heirs of her body to be begotten, for ever, as tenants in common and not as joint tenants; and in case she shall happen to die before 21 or without leaving issue of her body, &c. then over: it was holden, that there being a general intent that the estate should not go over till failure of all her issue, she should take an estate-tail, although there was a particular intent that her issue should take as tenants in common, which by that construction would be defeated. The case of *Doe* v. *Cooper* (*c*) is still stronger, because in addition to the devise to the issue of the first taker as tenants in common, the limitation to the first taker was expressly *for life*. And so it was in *Robinson* v. *Robinson* (*d*). And these were recognized by Lord *Alvanley* in the late case of *Poole* v. *Poole* (*e*).

Wood, contrà, contended that the limitation to heirs of the

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(*a*) The limitation over, *in default of issue* of his daughter, is of *the said hereditaments and premises*: vide therefore *Watson* v. *Foxon*, 2 East, 36.

(*b*) 7 Term Rep. 531.

(*c*) 1 East, 229.

(*d*) 1 Burr. 38.

(*e*) 3 Bos. & Pull. 620.

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body of *Ann Vickers*, which in itself would have given her an estate tail, was controlled by the subsequent words "*sons and daughters*," which are words of purchase, descriptive of what the testator meant by *heirs of the body*, and by the limitation to such sons and daughters as *tenants in common;* for, as such, they can only take by purchase and not by descent. Then *Ann Vickers* takes only for life, and her children take as purchasers in fee, by reason of the word *estates*, which is sufficient of itself to carry a fee to the sons and daughters of *Ann Vickers:* and the intention of the testator that she herself should only take for life is shewn by making her children take as purchasers. In all the other cases the devise was of *lands*, *tenements*, or *hereditaments*, which of themselves would not carry the fee; such was *Doe* d. *Candler* v. *Smith* (*a*), and *Doe* v. *Cooper* (*b*); and in neither of them were the words *heirs of the body* or *issue* described as here to mean *sons or daughters*. [Lord *Ellenborough*. —How do you get rid of the words "*in default of such issue?*"] *Such issue* has reference to *sons or daughters*, and the testator meant that if *Ann Vickers* left no sons or daughters living at her death, the estate should then go over, which makes the subsequent devise an executory devise, being limited after a fee. [*Lawrence* J.—What is there in the will to confine the words "in default of such issue" to issue living at the time of *Ann Vickers*' death?] Because a fee was before given to the children. [*Lawrence* J.—These words are always construed to mean an indefinite failure of issue, unless restrained by other words.] It is clear that the testator meant to prefer the issue of his daughter to the issue of his sisters; and having given the latter a fee, it cannot be supposed that he meant to give the former a less estate.

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Holroyd in reply observed, that if the word *estates* as here used would carry a fee, it would vest the fee in *Ann Vickers*, to whom it applied in the first instance. But it is clear that the testator did not intend that her children should take the whole; for the estate is limited over in default of her issue. Then there are no words of limitation superadded to the devise to her children; which distinguishes this from *Doe* v. *Laming* (*c*); so that unless *Ann Vickers* takes an estate-tail, it does not appear that her issue can have a greater estate than for life; and there being no cross remainders the share of each dying would go

(*a*) 7 Term Rep. 531. (*b*) 1 East, 229. (*c*) 2 Burr. 1100.

over, which would be manifestly contrary to the general intent of the testator to prefer his daughter's issue to his sisters'.

Lord ELLENBOROUGH, C. J.—The two cases cited of *Doe* d. *Candler* v. *Smith* and *Doe* d. *Cock* v. *Cooper*, seem to apply very strongly to the present. Though it is very doubtful in all these cases whether we do not act contrary to the real intention of the testator in giving more than a life estate to the first taker. However we shall certify our opinion.

LAWRENCE J.—In *Doe* d. *Candler* v. *Smith*, Lord *Kenyon* felt very forcibly what was the particular intention of the testator, for he says there that "beyond all doubt the testator meant that the first taker should take only an estate for life because he has said so in express terms;" but as that appeared to him to be [554] inconsistent with his general intent as expressed in the subsequent parts of the will, in order to give effect to such general intent, he held it necessary to enlarge the first taker's estate to an estate-tail. I doubt in this case how the word *estates* can be construed to carry a fee, coupled as it is with words of local description, and followed by a devise of the *appurtenances*, which would necessarily have been included if he had meant to give a fee by the word *estates*.

LE BLANC, J.—In almost every case of this sort the rule of law has prevailed against the particular intent, in giving a larger estate than for life to the first taker.

The Court afterwards, on the 28th of *November*, unanimously certified in the usual form to the Master of the Rolls, that they were of opinion that *Ann Vickers*, under and by virtue of the will of *Gentle Morris*, took an estate in tail general in the freehold premises in question.

END OF MICHAELMAS TERM.

AN

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OF THE

PRINCIPAL MATTERS.

and was maintained by her father. *Dean* v. *Peel*, *E.* 44 *G.* 3.

2. No such action is maintainable, unless laid with a per quod servitium amisit. *Satterthwaite* v. *Duerst*, *E.* 25 *G.* 3. 47 *n.*

3. But though the daughter be of age, yet the action is maintainable if she be living with her father. *Booth* v. *Charlton*, at *Lancaster*, in 1789, cor. *Wilson*, J. 47

ACTION, NOTICE OF.

See JUSTICES OF PEACE.

The stat. 39 *G.* 3. *c.* 69. *s.* 184, directs that the *West India* Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and *s.* 185., after extending the protection of the stat. 24 *G.* 2. *c.* 44. for privileging justices of peace in actions brought against them, as such, to the lord mayor and aldermen of *London* acting under this act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c.: held that the treasurer of the Company is a *person* within the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but *qu.* Whether in assumpsit? *Wallace* v. *Smith*, *Treasurer of the West India Dock Company*, *E.* 44 *G.* 3. 115

AFFIDAVITS.

Affidavits in support of or in answer to a rule for setting aside an award made a rule of court under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1., there being no action previously brought, nor any cause in court, need not be entitled. *Brainbridge* v. *Houlton*, *E.* 44 *G.* 3. 21

AGENT.

See PRINCIPAL AND AGENT.
PRIZE, No. 1.

AGREEMENT.

See PASSAGE-MONEY.

1. For the meaning of the word *Agreement*, as it occurs in the statute of frauds, see *Frauds Statute of.*

2. The Toleration Act 1 *W.* & *M.* *c.* 18. provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation under that Act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next Sessions, and on conviction forfeit 20*l.* to the Crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates (the now defendants), that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*: held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgecombe* v. *Rodd and Others*, *T.* 44 *G.* 3. 294

3. A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned

casioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l.* per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by a personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice; which was meant to exempt the carrier from losses by accident or chance, &c. even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T.* 44 *G.* 3. 428

4. *A.* agreed, in consideration of 10*l.*, to let a house to *B.*, which *A.* was to repair and execute a lease of *within ten days*, but *B.* was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart, and pay the rent. *B.* took possession, and paid the 10*l.* immediately; but *A.* neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B.* still continued in possession; held that *B.* could not, by quitting the house for the default of *A.*, rescind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract: for a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract; and here *B.* had an intermediate possession of the premises under the agreement. *Hunt* v. *Silk*, *M.* 45 *G.* 3. 449

5. Where one delivered goods of *above* 5*l.* value to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package *above* the value of 5*l.*, *unless* insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5*l.* as by the terms of the notice the carriers stipulated not to be answerable at all for goods *above* 5*l.* value, *unless* paid for accordingly. *Nicholson* v. *Willan*, *M.* 45 *G.* 3. 507

APPRENTICE.

See Stamps, No. 1.

1. The Court will not, at the prayer of the *master*, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte Landsdown*, *E.* 44 *G.* 3. 38

2. The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master to recover wages for the service of such apprentice. *Eades* v. *Vandeput*, *M.* 25 *G.* 3. 39 n.

ASSETS.

See Executor, No. 1.

ASSUMPSIT.

See Award, No. 1. Bills of Exchange, No. 1. Toll, No. 1.

1. No person can upon the statute of frauds be charged upon any promise to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise as well as the promise itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that parol evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and gave no cause of action. *Wain* v. *Walters*, *E.* 44 *G.* 3. 10

2. The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Flushing*; and in the

course of the voyage, within four days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage money upon an implied assumpsit pro rata itineris if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for non constat, but that the ship might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 *G.* 3. 316

3. *A.* agreed in consideration of 10*l.* to let a house to *B.*, which *A.* was to repair and execute a lease of *within ten days*, but *B.* was to have *immediate* possession, and in consideration of the aforesaid was to execute a counterpart, and pay the rent. *B.* took possession and paid the 10*l.* *immediately*, but *A.* neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B.* still continued in possession; held that *B.* could not, by quitting the house for the default of *A.*, rescind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract: for a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract: and here *B.* had an intermediate possession of the premises under the agreement. *Hunt* v. *Silk*, *M.* 45 *G.* 3. 449

ATTACHMENT.

See AWARD, No. 2.

AWARD.

See AFFIDAVIT, No. 1.

1. Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of nisi prius, he cannot award a *greater* sum than that for which the verdict was taken; and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken. *Bonner* v. *Charlton*, *E.* 44 *G.* 3. 139

2. Where parties by an indorsement in general terms on the bonds of submission to arbitration agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time shall be made *a rule of Court;* and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the stat. 9 & 10 *W.* 3. *c.* 15. *Evans* v. *Thomson*, *E.* 44 *G.* 3. 189

3. *A.* declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator;* yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award.* *Charnley* v. *Winstanley and his wife*, *T.* 44 *G.* 3. 266

1 Where the plaintiff gave the defendant in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state: held that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 *G.* 3. 124

2 Where *A.* and *B.*, traders living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, to be sent to *M.* and Co. *at Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B.* *at Hamburgh;* and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. *at Hull, to be shipped for* Hamburgh *as usual:* held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. *at Hull;* for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods: and the goods, after their arrival at *Hull*, *were to receive a new direction from the vendees*. But it was competent for *A.* and *B.*, who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu. *Dixon and Others, Assignees of Battier and Son, Bankrupts*, v. *Baldwen and Another*, *E.* 44 *G.* 3. 175

3. An order of the Lord Chancellor, made under the stat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to devest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. *Bloxam and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407.

4. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other assignees who sue can only recover their proportional parts. *ib.*

5. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *ib.*

6. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt. *ib.*

BARON AND FEME.

See POOR-REMOVAL, No. 1.

BILLS OF EXCHANGE.

1. Where the plaintiff gave the defendant, in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance; and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate

certificate of discharge by the law of that state; held that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 *G.* 3. 124

2. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is sufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reason of the premises and according to the custom of merchants became liable to pay the contents to *A.* without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or something tantamount, to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, *M.* 45 *G.* 3. 476

3. A letter from the drawees of a bill in *England*, to the drawer in *America*, stating that "their prospect of security being so much improved they *shall accept* or *certainly pay* the bill," is *an acceptance* in law; although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in *England*, and again after the writing such letter refused payment of it when presented for payment; and although such letter written before were not received by the drawer in *America*, till after the bill became due. *Wynne* v. *Raikes*, *M.* 45 *G.* 3. 514

CARRIER.

1. A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the *personal* default of the carrier himself, (such as the not providing a sufficient vessel,) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T.* 44 *G.* 3. 428

2. Where one delivered goods of *above 5l. value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package *above* the value of *5l. unless* insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers: for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the *5l.* as by the terms of the notice the carriers stipulated not to be answerable at all for goods *above* 5l. *value*, *unless* paid for accordingly. *Nicholson* v. *Willan*, *M.* 45 *G.* 3. 507

CHARGES.

Where a private Act of Parliament for building Stonehouse Bridge directed that certain persons and their heirs should stand seised of the tolls of the bridge "to the same uses, trusts, and estates, and subject to the same wills, settlements, limitations, remainders, *charges*, tenures, rents, and incumbrances," as an ancient ferry was, in lieu of which the bridge was erected: held that the word *charges* only extended to *private* charges on the estate. *The case of Stonehouse Bridge*, *H.* 44 *G.* 3. 356 *n.*

CHARTER.

See CORPORATION.

COMMITMENT.

See AGREEMENT, No. 2.

COMPENSATION.

Where the stat. 43 *G.* 3. *c.* 55. *s.* 10. enabled a jury to assess a compensation to the owner or persons interested in land, which was taken possession of by Government; which compensation was to be made "for the possession or use thereof during the time for which the same should be required for the public service: held that the assessment of a compensation only *in gross*, and without reference to time, as by an annual rent, was bad; because of the uncertainty of the period for which the land would be required, of which no probable average estimate could be formed pending the exigency. *Bingham* v. *Serle*, *M.* 45 *G.* 3. 534

CONSTABLES.

See JUSTICES OF PEACE OR TRESPASS, No. 1.

CONVICTION.

By the Vagrant Act 17 *G.* 2. *c.* 5. after a rogue and vagabond has been committed to the Sessions, and they, adjudging him to be a *rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service pursuant to the statutes, &c.;* held that the whole forms one sentence; and such order being defective in the latter part for want of adjudicating whether the party were to serve his Majesty by *sea* or *land* as discriminated in the statute, the conviction should be quashed, though the former part of the sentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett*, *T.* 44 *G.* 3. 339

COPYHOLD.

See the NEXT HEAD.

1. Till the admittance of the surrenderee of a copyhold upon mortgage the surrenderor continues the legal tenant, and he cannot devise the equity of redemption even after the surrender made without a new surrender to the use of his will, but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgagee. *Doe* d. *Shewen*, *Widow*, v. *Wroot*, *E.* 44 *G.* 3. 132

2. Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and re-admittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay his fine after proclamations made and presentment by the jury, the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good; though the person next in remainder were *known* and *named* in the surrender. *Doe d. Whitbread*, v. *Jenney*, *M.* 45 *G.* 3. 522

COPYHOLD AND CUSTOMARY ESTATES.

See COPYHOLD.

1 Where there is a grant of a *particular* thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant. Therefore where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will, "*all and singular the lands, tene-*"*ments, &c. whatsoever in the manor* "*which he held of the lord by copy of* "*court*

"*court-roll*, in whose tenure or occu- "pation soever the same were, *being of* "*the yearly rent to the lord in the whole* "of 4l. 10s. 8½d., *and compounded for*;" held that the words "*and compounded for*" restraining the operation of the surrender to that description of copyholds then belonging to the surrenderor; and that the words "*being of the yearly rent*, "*&c. of* 4l. 10s. 8½d.," which were not referable to any actual amount of the rents, either compounded or uncompounded, though much nearer to the whole than to the *compounded* only; could not qualify or impugn the restriction. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

2. Where a testator had *freehold*, *customary* and *copyhold* estates; and after introductory words, as to *all his worldly estate*, devised two rent-charges out of *all his real* estate, and also two *copyholds* in *Middlesex* for lives, and subject thereto devised "all his *freehold* manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his on for life, with successive remainders n tail male to his first and other sons, with like remainders to other branches in the male line;" and in default of such issue he devised all his "*said* (freehold) manors, land," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughters: and by the residuary clause devised *all other* his manors, lands, &c. either *freehold* or *copyhold* (except those in the counties of *York*, &c. which he had before disposed of), subject to the said *rent-charges*, *in failure of issue male of his son* and himself, to his three daughters, as tenants in common in fee: held that certain *customary* estates, which the devisor had, with *freehold* property in *Yorkshire*, did not, on failure of the male line, pass to the eldest daughter under the description of all his *freehold* manors, lands, &c. in that and other counties. For, supposing that the *freehold* of such *customary estates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the custom of the manor*, and the tenants being entitled to the timber and mines, and the estates being demised and demiseable in fee simple or otherwise; yet as they were holden by copy of court-roll, and passed by surrender and admittance, and were generally reputed and called *copyholds*, and the testator having distinguished in other parts of his will between *copyhold* and *freehold*, he must be presumed to have used the word *freehold* in its usual and popular signification, as not including these *customary estates* considered by himself as *copyholds*; and therefore such customary estates passed to the three daughters under the residuary clause. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son and of the devisor; he, the son, the heir at law, took an estate-tail by implication in the customary estates not before devised. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

CORPORATION.

See TOLL, No. 1.

1. A charter granted to the mayor, bailiffs, and burgesses, or the greater part of them, to choose *one of themselves* to be mayor; but the same charter appointed the first mayor to continue for a year and until some *other burgess* should be elected and sworn, and the two first bailiffs to continue until *two other burgesses* should be elected and sworn: and it also directed the new mayor to be sworn in before the *last* mayor, *his predecessor*, and the bailiffs, for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the *last* bailiffs and the burgesses present. These latter provisions explain the first, and shew that the mayor must be chosen *out of the burgesses at large*, and not out of *the bailiffs*; and this avoids any question as to the validity of a *swearing in* of an officer *before himself* by his name of office. *Rex* v. *Harper*, *E.* 44 *G.* 3. 208

2. Where

2. Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *The Inhabitants of Chippingnorton*, *T.* 44 *G.* 3. 239
3. The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4. *s.* 6., unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex* v. *Corry*, *T.* 44 *G.* 3. 372
4. Where a corporation was seised in fee of lands, which by the custom were annually meted out under their controul by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex* v. *Watson*, *M.* 45 *G.* 3. 480

COSTS.

1. Where the plaintiff recovered a verdict at the trial and had judgment in C. B., and upon a bill of exceptions returned into this court judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs. *Bell* v. *Potts*, *E.* 44 *G.* 3. 49
2. The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue in the superior courts for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th section of the Act. *Sandby*, *Clk.* v. *Miller*, *E.* 44 *G.* 3. 194
3. Where in assumpsit the defendant pleaded the general issue, and the statute of limitations to the whole sum demanded, and as to part of it that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs: held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial which the plaintiff was entitled to on the issues found for him: aliter where all *the issues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry. *Postan* v. *Stanway*, *Executrix*, *T.* 44 *G.* 3. 261
4. An application to make the plaintiff, who resided abroad, give security for the costs, refused after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Frythall*, *T.* 44 *G.* 3. 338
5. Where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and the costs *to abide the event*; if the arbitrator find less than 40*l.* damages, the plaintiff cannot have his costs, though it be also found that the trespass was *wilful*, and *that the defendant should pay the plaintiff his costs*: for costs being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for costs under the stat. 22 & 23 *Car.* 2. *c.* 9., where the trespass is wilful, is not transferred to the arbitrator under such a rule of reference. *Ward* v. *Mallinder*, *M.* 45 *G.* 3. 489
6. The

6. The stat. 13 *C.* 2. st. 2. *c.* 2. *s.* 10. giving *double* costs to the *defendant* in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for *the plaintiff below*, and not where *the defendant below* obtained judgment upon a special verdict. *Baring* v. *Christie*, 45 *G.* 3. 545

COURT OF REQUESTS, LONDON.

See LONDON COURT OF REQUESTS.

COVENANT.

1. One who covenants for *himself*, *his heirs*, *&c.* and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person*. *Appleton* v. *Binks*, *E.* 44 *G.* 3. 148

2. *A.* declared in covenant against *B.* and her husband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.*, protesting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* *B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B. intermarried after* the submission and *before the award* made; in which case, although the plaintiff could not recover upon the breach assigned, *for non-payment of the sum awarded*, because the *marriage* was a *countermand* of the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award*. *Charnley* v. *Winstanley and Wife*, *T.* 44 *G.* 3. 266

CUSTODY.

B. being in custody at the suit of *A.*, in a joint action against *B.* and *C.*, *B.* justifies bail in an action entitled by mistake "*A.* against *B.*" only, and a rule so entitled is served on the marshal of *B. R.*, who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: held that the marshal was liable in an action for an escape. *White* v. *Jones*, *Marshal of K. B. &c. T.* 44 *G.* 3. 292

CUSTOMARY ESTATES.

See COPYHOLD AND CUSTOMARY ESTATES.

DAMAGES.

See COMPENSATION.

DEBAUCHING DAUGHTER,

See ACTION ON THE CASE, No. 1.

DEVISE.

See WILL.

1. Where a testator had *freehold*, *customary*, and *copyhold* estates; and after introductory words, as to *all his worldly estate*, devised two rent-charges out of *all his real* estate, and also *two copyholds* in *Middlesex* for lives; and subject thereto devised "all his *freehold* manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line:" and in default of such issue he devised all his "*said* (freehold) manors, land," &c. to

his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughters: and by the residuary clause devised *all other* his manors, lands, &c. either *freehold* or *copyhold* (except those in the county of *York*, *&c.* which he had before disposed of,) subject to the said *rent charges*, *in failure of issue male of his son* and himself, to his three daughters as tenants in common, in fee: held that certain *customary* estates, which the devisor had, with freehold property in *Yorkshire*, did not, on failure of the male line, pass to the eldest daughter under the description of all his *freehold* manors, lands, &c. in that and other counties. For supposing that the *freehold* of such *customary estates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the custom of the manor*, and the tenants being entitled to the timber and mines, and the estates being demised and demiseable in fee simple or otherwise; yet as they were holden by copy of court-roll, and passed by surrender and admittance, and were generally reputed and called *copyholds*, and the testator having distinguished in other parts of his will between *copyhold* and *freehold*, he must be presumed to have used the word *freehold* in its usual and popular signification, as not including these *customary* estates considered by himself as *copyholds;* and therefore such customary estates passed to the three daughters under the residuary clause. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son and of the devisor; he, the son, the heir at law, took an estate-tail by implication in the customary estates not before devised. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

2. One devised thus: "Concerning my "worldly estate, I give and bequeath to "*M. M.* 1*s.* *Also I give and bequeath* "to *A. M.* 2*s.*" (with pecuniary bequests to several others in the same form of words); "*Also I give and bequeath* "to *G. S.* my messuage and lands, &c. "in *W.* *Also I give and bequeath* to "the said *G. S.* and his wife all my "lands, &c. in *B.* *Also* all my messuages, &c. in *W.* *Also* all my goods, "chattels, &c. and personal estate *after* "*having thereout first paid and discharged* all my *debts and funeral expences: Also subject to the payment* "*thereout all the aforesaid legacies.* "And I nominate the said *G. S.* to be "*sole executor*, *whom I charge* with the "payment of my debts, legacies, and "funeral expences," &c. Held that *G. S.* and his wife took a fee in the real estate devised to them, by reason of the words "*having thereout paid all my debts, &c.*" which was a personal charge on them in respect of the realty as well as personalty, all devised in one entire sentence, together with such charge. *Doe d. Stevens and Pain* v. *Snelling*, *E.* 44 *G.* 3. 87

3. Under a devise of *lands*, *arrears of* rent, and *a bond and judgment*, to trustees and the *survivor*, and the *executors*, *&c.* of such survivor, in trust, *out of the rents and profits* of the said estates and arrears, &c. to pay certain *annuities* for *lives*, and *a sum in gross;* and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he also gave a general power of *leasing* to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble; held that *the purposes of the trust being all answered* by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail, (the life estate being spent,) took the *legal* estate in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication;* but the uses in remainder limited on such lesser estates so given to them shall be executed by the statute. And in this case it is sufficient to answer the purposes of the trust to give the trustees by implication an estate *for the lives of the annuitants;* with *a term of years in remainder* sufficient for the purpose

purpose of raising the *gross sum* charged *out of the rents and profits*. And this construction is further confirmed in this particular case by the bequest to the trustees of the *arrears* and *the bond and judgment*, as well as of the rents and profits; for otherwise the interest in the bond, &c. would go to different representatives than the estate, if the trustees took a fee; and the *leasing power* was only to be executed as the occasions of the trust required. And there was also a *personal remuneration* to the trustees of 10*l.* a year for their trouble, which was not extended to their *heirs*. *Doe d. White* v. *Simpson*, *E.* 44 *G.* 3. 162

4. Under a devise "to *A.* for life, and "after him to his eldest or any other "son after him for life, and after them "to as many of his descendants issue "male as shall be heirs of his or their "bodies down to the tenth generation, "during their natural lives:" held that *A.* took no more than a life estate; for here is no *general* intent to create an estate tail, as contradistinguished from the *particular* intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in esse, which the law will not allow. *Seaward* v. *Willock*, *E.* 44 *G.* 3. 198

5. The word *share* may carry a leasehold estate. As where a testator, having three sons and one daughter, and leasehold estates and personal funds, devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow, durante viduitate, and that on her death or marriage it should be divided equally between his three sons, *share and share alike;* and then he gave his daughter 600*l.* to be paid her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share alike;* and lastly directed that "if any of his said children died under age and without lawful issue, the *share* of *him* or *her* deceased should go equally amongst his surviving sons:" held that the word *share* in the last clause, referring as it must do to the *whole* share or portion of the *daughter*, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them; and that upon the death of the eldest son under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons. *Doe d. Stopford* v. *Stopford*, *M.* 45 *G.* 3. 501

6. Under a devise of all freehold and copyhold estates whatsoever situate at *B.* with their appurtenances, to *A.* and the *heirs of her body* lawfully to be begotten whether *sons or daughters*, as *tenants in common;* and in default of such issue, then over: held that *A.* took an estate tail. *Pierson* v. *Vickers*, *M.* 45 *G.* 3. 548

DISCHARGE OF DEBTOR.

See ESCAPE.

EAST INDIA COMPANY.

See INDICTMENT against Officers in *India* for receiving Presents contrary to the stat. 33 *G.* 3. *c.* 52. *s.* 62.

EJECTMENT.

See COPYHOLD, No. 2. JOINT TENANTS, No. 1. NOTICE TO QUIT.

In Ejectment the legal title must prevail, vid. *Weakley* d. *Yea*, *Bart.* v. *Rogers*, in the Exchequer Chamber, *M.* 30 *G.* 3. and other cases referred to in the note to *Doe* d. *Shewen* v. *Wroot*. 138-9

EQUITY OF REDEMPTION.

See COPYHOLD, No. 1.

ERROR, WRIT OF.

See PRACTICE, No. 2.

ESCAPE.

1. *B.* being in custody at the suit of *A.* in a joint action against *B.* and *C.*, *B.* justifies

tifies bail in an action entitled by mistake "*A.* against *B.*" only, and a rule so entitled is served on the marshal of *B. R.* who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: held that the marshal was liable in an action for an escape. *White* v. *Jones, Marshal of K. B. &c. T.* 44 *G.* 3. 292

2. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal *as by the record thereof now remaining in the court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for, properly speaking, such documents are not *records* nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they were properly deposited. *Wigley* v. *Jones, Marshal of the Marshalsea, T.* 44 *G.* 3. 440

EVIDENCE.

1. No person can by the statute of frauds be charged upon any promise to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and gave no cause of action. *Wain* v. *Warlters, E.* 44 *G.* 3. 10

2. An averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the transfer was to be made until the close of the transfer books, which was the latest time when the transfer could be made. *Bordenave* v. *Gregory, E.* 44 *G.* 3. 107

3. An averment that stock was to be transferred *on request* is not proved by evidence that it was to be transferred on *a certain day*. *Bordenave* v. *Bartlett, E.* 44 *G.* 3. 111

4. The Sessions having decided in favour of a settlement in *A.*, by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the only evidence to oppose this being that of the pauper's own birth in *B.*; this Court confirmed the order of Session on a case reserved. *Rex* v. *The Inhabitants of Wakefield, T.* 44 *G.* 3. 335

EXECUTION.

If one of two defendants taken on a joint ca. sa. be discharged under Insolvent Debtors' Act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff. *Nadin* v. *Battie and Wardle, E.* 44 *G.* 3. 147

EXECUTOR.

A count upon an account stated with the plaintiff, *executrix*, *&c.* (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, *&c.* it could be so joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets? *Henshall* v. *Roberts, in error, E.* 44 *G.* 3. 150

EXEMPTION.

Where an Act directs that the *tolls* of a navigation should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls* qua *tolls* altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company*, *T.* 44 *G.* 3. 325

FALSE IMPRISONMENT.

1. The Toleration Act, 1 *W. & M. c.* 18. provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation under that Act, on proof before a justice of peace, shall find sureties in 50*l.* or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.*, to the Crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff *with the consent* of the committing magistrates (the now defendants,) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment:* held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff; and *their consent* afterwards to the prosecutor, dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgecombe* v. *Rodd and Others*, *T.* 44 *G.* 3. 294

2. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the Court of Record of the town and county, &c.* of *P.*, issued their writ, directed to *T. B. one of the Serjeants at Mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said Court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented the arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the Court:* and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

FOREIGN SENTENCES.

1 Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured: such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from ex parte ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exchange Assurance Company*, *E.* 44 *G.* 3. 99

2. A sentence of a foreign Court of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such Court, upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured by a *French* ship of war, (*Denmark* being at peace with *France*,) and the court in which she was libelled as prize, pro-

professing to consider that the *built* of the vessel was *unknown*, that she was *sold* to a *neutral* subject *only since* the declaration of war, that the bill of sale did not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize;* such condemnation is conclusive against the warranty of neutrality in an action on the policy against the underwriter: and no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appears to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladestone*, *E.* 44 *G.* 3. 155

FORFEITURE.

See AGREEMENT, No. 2.

FRAUDS, STATUTE OF.

1. No person can, by the statute of frauds be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise, as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person without stating on what consideration, it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and gave no cause of action. *Waine* v. *Warlters*, *E.* 44 *G.* 3. 10
2. The statute is supposed to have been drawn by Lord *Hale*. *ib.* 17

FREEHOLD

See PRESSING, No. 2.

FREIGHT.

See INSURANCE, No. 3. PASSAGE-MONEY.

GRANT.

1. Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51
2. Therefore where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will "*all* "*and singular the lands, tenements, &c.* "*whatsoever, in the manor, which he held* "*of the lord by copy of court-roll*, in "whose tenure or occupation soever the "same were, *being of the yearly rent to* "*the lord in the whole of* 41. 10s. 8½d, *and* "*compounded for:*" held that the words "*and compounded for*," restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "*being of the yearly rent &c. of* 41. 10s. 8½d." which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *ib.*

HABEAS CORPUS.

See APPRENTICE, No. 1. RECORD.

1. The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Englishwoman*,

lishwoman, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension. *Rex* v. *de Manneville*, *E.* 44 *G.* 3. 221

2. If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother. *Rex* v. *Moseley*, *H.* 38 *G.* 3. 224

HUSBAND AND WIFE.

See POOR-REMOVAL, No. 1.

INDICTMENT.

1. Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But, except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation: and if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

2. Therefore, where an information on the stat. 33 *G.* 3. *c.* 52. *s.* 62. prohibiting *officers* of the *East India* Company, *residing in* India, from receiving presents, charged that the defendants being *British subjects*, on the 1st *January* 1794, and from thence for a long time, to wit, *until* the 29th *November* 1795, held certain offices under the Company, and *during all that time resided in the* East Indies; and that *whilst* they held the said offices *as aforesaid*, and *whilst they resided in the* East Indies *as aforesaid*, to wit, *on the 29th of* November 1795, they received certain presents: held that the context shewed that the word *until* was to be taken *inclusive* of the 29th *November* 1795. *ib.*

3. But that if it had been incapable of receiving an *inclusive* construction, the words under the first videlicet, "*until the 29th of November* 1795," could not have been rejected as surplusage; for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *ib.*

4. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of the *Court of Record of the town and county*, &c. of *P.* issued their writ, directed to *T. B. one of the Serjeants at mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said Court*, but that the defendant assaulted *T. B. in the execution of his office*, and prevented his arrest; held such indictment bad; it not appearing that *T. B.* was *an officer of the Court*; and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated; which cause appears to have been that the officer was attempting to make an illegal arrest of another, which, being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

5. The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4. *s.* 6., unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex* v. *Corry*, *T.* 44 *G.* 3. 372

INFERIOR JURISDICTION.

See LONDON COURT OF REQUESTS.

INSOLVENT DEBTORS' DISCHARGE.

See EXECUTION. No. 1.

INSU-

INSURANCE.

1. Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured: such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from ex-parte ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exchange Assurance Company*, *E.* 44 *G.* 3. 99

2. A sentence of a foreign Court of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such Court upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured by a *French* ship of war (*Denmark* being at peace with *France*,) and the court in which she was libelled as prize, professing to consider that the *built* of the vessel was *unknown*, that she was *sold* to a *neutral* subject *only since* the declaration of war, that the bill of sale does not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize*; such condemnation is conclusive against the *warranty of neutrality* in an action on the policy against the underwriter. And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appeared to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladstone*, *E.* 44 *G.* 3. 155

3. Upon a hostile embargo in a foreign port, the owner, who had separately insured *ship* and *freight*, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight: held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. *M'Carthy* v. *Abel*, *T.* 44 *G.* 3. 388

4. The 25th article of the treaty of *February*, 1778, between *France* and *America*, which requires the vessels of the allies, in case either is at war, to be furnished with a passport expressing (inter alia) *the place of habitation* of the commander of the vessel, is not complied with by a passport granting leave "to *G. D.* commander of the ship called *M. V. of the town of P.*, of the burden of," &c.; such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured by the *French*, and condemned as prize. *Baring* v. *Christie*, *T.* 44 *G.* 3. 398

INTEREST.

See PRIZE, No. 1.

JOINDER IN ACTION.

1. A count upon an account stated with the plaintiff, *executrix*, *&c.* (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether, if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could

so joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets. *Henshall* v. *Roberts*, in error. *E.* 44 *G.* 3. 150

2. *A.*, *B.*, and *C.*, having dissolved partnership, *C.* after such dissolution drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution; upon which *D.* brought his action against all the former partners; and *C.* having pleaded his bankruptcy, *D.* entered a noli prosequi as to him, and recovered judgment against *A.* and *B.*, which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their *joint* credit: held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.* *Osborne and Amphlett* v. *Harper*, *T.* 44 *G.* 3. 225

3. An order of the Lord Chancellor, made under the stat. 5 *Geo.* 2. *c.* 30. upon the petition of creditors for removing one of the several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the Commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the other assignees for a ship belonging to the bankrupt's estate: but if he be not joined, advantage can only be taken by a plea in abatement to the whole action: though the other assignees who sue can only recover their proportional parts. *Bloxam, Knt. and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407

JOINT-TENANT.

Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs or executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing *under his or their respective hands*, the same should cease; held that a notice to quit, signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companions by an act done for *his benefit*; for non constat that the determination of the lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. *Right d. Fisher and Another* v. *Cuthell*, *M.* 45 *G.* 3. 491

JURISDICTION.

See London Court of Requests. Prize, No. 1. Prohibition.

1. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the court of record of the town and county*, &c. of *P.*, issued their writ, directed to *T. B.*, *one of the serjeants at mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented the arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the court:* and that there could not be judgment after a *general* verdict on such account as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for ought appeared, have lawfully interfered

interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

2. The stat. 39 *Geo.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts *at Westminster;* and any penalty not exceeding 20*l.* *shall and may* be recovered before any justice of peace; but it also gives, in the same clause, a form of declaration *for recovering* 20*l.* *in the courts of Westminster.* Yet held, that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming qui tam*, v. *Bailey*, *T.* 44 *G.* 3. 313

JUSTICES OF PEACE, CONSTABLES, &c.

1. Where goods were taken by constables under a warrant of distress, granted by a justice of peace for the county of *Kent*, directed "to the constables of the Lower Half Hundred of *C.* and *G.* *in the county of* Kent;" which warrant recited that the plaintiff (whose goods were distrained,) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty; for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the Cinque Ports, and *not within the county of* Kent, the constables are not within the protection of the stat. 24 *Geo.* 2. *c.* 44. *s.* 6. and may be sued in trespass without the magistrate's being made a defendant. *Milton* v. *Green and Jenner*, *T.* 44 *G.* 3. 233

2. A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

LEASEHOLD VALUE.

See COMPENSATION.

LONDON COURT OF REQUESTS.

The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th sect. of the Act. *Sandby, Clerk*, v. *Miller*, *E.* 44 *G.* 3. 194

MARRIAGE.

A. declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants* the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum After verdict, on non est factum pleaded. held that upon this declaration it mus, be taken that *B.* *intermarried after* the submission and *before* the *award* made;

in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator;* yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award. Charnley* v. *Winstanley and his Wife*, *T.* 44 *G.* 3. 266

MASTER AND SERVANT.

See ACTION ON THE CASE, No. 1.

MINES.

See POOR-RATE, No. 3.

MISDEMEANOR.

See AGREEMENT, No. 2.

MORTGAGE.

See COPYHOLD, No. 1.

NOTICE OF ACTION.

See ACTION, NOTICE OF.

NOTICE TO QUIT.

Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing *under his or their respective hands*, the term should cease; held that a notice to quit signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint-tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companion by an act done for *his benefit;* for non constat that the determination of the lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. *Right d. Fisher and Another* v. *Cuthell*, *M.* 45 *G.* 3. 491

PARENT AND CHILD.

See ACTION ON THE CASE, No. 1. for debauching the plaintiff's daughter.

1. The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom and the mother being an *Englishwoman*, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension. *Rex* v. *de Manneville*, *E.* 44 *G.* 3. 221
2. If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother. *Rex* v. *Moseley*, *H.* 38 *G.* 3. 224

PARTNERSHIP.

A., *B.*, and *C.*, having dissolved partnership, *C.* after such dissolution drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution; upon which *D.* brought his action against all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a noli prosequi as to him, and recovered judgment against *A.* and *B.*, which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money

ney on their *joint* credit: held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.* *Osborne and Amphlett* v. *Harper*, *T.* 44 *G.* 3. 225

PASSAGE-MONEY.

The plaintiff contracted to carry the defendant, his family, and luggage from *Demerara* to *Flushing;* and in the course of the voyage, within four days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship: but the defendant and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court no such action could be maintained; for non constat, but that the ship might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 *G.* 3. 316

PAYMENT.

See Accord and Satisfaction, No. 1.

PENAL ACTION.

The stat. 39 *G.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the Act *exceeding* 20*l.* may be sued for in the courts of *Westminster;* and any penalty not exceeding 20*l.* *shall and may be* recovered before any justice of peace: but it also gives, in the same clause, a form of declaration *for recovering* 20*l.*, in the courts of *Westminster*. Yet held that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty: and that the form of the declaration must be read *in blank*, as to sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming qui tam*, v. *Bailey*, *T.* 44 *G.* 3. 313

PLEADING.

See Joinder in Action.

1. A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets? *Henshall* v. *Roberts*, *in error*, *E.* 44 *G.* 3. 150
2. An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244
3. *A.* declared in covenant against *B.* and her husband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* protesting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After

After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award. Charnley* v. *Winstanley and his wife*, *T.* 44 *G.* 3. 266

4. The demandant in a writ of right must allege in his count that his ancestor was seised *of right* as well as that he was seised *in his demesne as of fee. Dowland* v. *Slade and Wife*, *T.* 44 *G.* 3. 272

5. *Qu.* Whether if one through whom title is derived be improperly stated to be heir to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as heir to her brother, be fatal? *ib.*

6. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for properly speaking, such documents are not *records* nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they are properly deposited. *Wigley* v. *Jones, Marshal of the Marshalsea*, *T.* 44 *G.* 3. 440

7. Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that "*his character was infamous; that he would be disgraceful to any society; that those who proposed him as a member of any society must have intended an insult to it; that he would publish his shame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him:*" such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an innuendo to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming, for the *first* time, the person from whom the defendant heard the complaint. *Woolnoth* v. *Meadows*, *M.* 45 *G.* 3. 463

8. A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Lord Viscount Mathew*, *M.* 45 *G.* 3. 473

9. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is sufficient to declare that *A. delivered* the bill to the defendant which he *accepted*, and by reason of the premises, and according to the custom of merchants, became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or something tantamount, to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, *M.* 45 *G.* 3. 476

POOR-RATE.

1. Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the *tolls*, and the other not; though

POOR-REMOVAL.

PRACTICE.

certain as in the common form. *Reubel* v. *Preston*, *T.* 44 *G.* 3. 291

5. An application to make the plaintiff, who resided abroad, give security for the costs refused after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Frythall*, *T.* 44 *G.* 3. 338

6. Where a writ of fi. fa. expires in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it. *Rex* v. *The Sheriff of Berks*, *T.* 44 *G.* 3. 386

7. A demand of a plea indorsed on the declaration when delivered is good, and a rule to plead may be given afterwards, without any fresh demand of a plea. *Maxwell* v. *Skerrett*, *M.* 45 *G.* 3. 547

8. Bail may render without justifying; and where the rule expires in vacation a render on the first day of the ensuing term, sedente Curiâ, is good, though notice were not given till afterwards on the same day, and after a writ of procedendo had issued to the inferior court where the cause originated. *Wiggins* v. *Stephens*, *M.* 45 *G.* 3. 533

PRESSING.

1. The Court will not, at the prayer of the *master*, grant a habeas corpus to bring up an apprentice impressed, be being willing to enter into the king's service. *Ex parte John Landsdown*, *E.* 44 *G.* 3. 38

2. A seaman serving in the merchant service is not exempt from being impressed because he is a freeholder. *Rex* v. *Douglas*, *M.* 45 *G.* 3. 477

PRINCIPAL AND AGENT.

One who covenants for *himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person*. *Appleton* v. *Binks*, *E.* 44 *G.* 3. 148

PRINTERS.

See PENAL ACTION, No. 1.

PRIZE.

See FOREIGN SENTENCES, PASSAGE-MONEY.

The Prize Court of Appeals has jurisdiction to decree that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And *B. R.* will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceedings below that the agent was a *registered* agent under the stat. 33 *G.* 3. *c.* 66.; because that Court has original jurisdiction *in rem* and its incidents, independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the Act from decreeing restitution of more than the *net proceeds* of the sale, awarded upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis* v. *The Commissioners of Appeals in Prize Causes*, *E.* 44 *G.* 3. 22

PROHIBITION.

Where the Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an Act of Parliament, otherwise than as the common law requires, prohibition lies after sentence: although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below. *Gould* v. *Gapper*, *Clerk*, *T.* 44 *G.* 3. 345

PROMOTIONS.

Mr. *Mansfield*, one of the king's counsel, on the death of Lord *Alvanley*, Lord Chief Justice of *C. B.* was promoted to that office in *Hilary* Vacation 1804, and was knighted. And on the 25th of *April* was called to the degree of Serjeant at Law, and took his seat on the bench, and gave rings with this motto, *Serus in cœlum redeas.*

On *Saturday* the 28th of *April* 1804, the following gentlemen took their places within the bar;

As King's Serjeant, Mr. Serjeant *Williams.*

As King's Counsel, Mr. *Hollist*, Mr. *Milles*, Mr. *Wilson*, Mr. *Topping;* and with a patent of precedence, Mr. *Fonblanque.*

In the *Trinity* Vacation 1804 Mr. *Gibbs*, was made Chief Justice of *Chester;* and Messrs. *Cox*, *Harvey*, and *Stanley*, Barristers at Law, were appointed Masters in Chancery. 445

RECORD.

1. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a Judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for, properly speaking, such documents are not *records*, nor capable of becoming so; or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they are properly deposited. *Wigley* v. *Jones*, *marshal of the Marshalsea*, *T.* 44 *G.* 3. 440
2. A scire facias upon a recognizance of bail taken in open court in *B. R.* is properly suable in *Middlesex*, where the record is, though all the previous proceedings which commenced by original were in *London*. And semble that it could not be sued elsewhere than in *Middlesex*. *Coxeter* v. *Burke and Another*, *Bail of Price*, *M.* 45 *G.* 3. 461
3. A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Ld. Viscount Mathew*, *M.* 45 *G.* 3. 473

RELATION.

See JOINT-TENANT, No. 1.

REQUESTS, LONDON, COURT OF.

See LONDON COURT OF REQUESTS.

RIGHT, WRIT OF.

1. The demandant in a writ of right must allege in his count that his ancestor was seised *of right*, as well as that he was seised *in his demesne as of fee*. *Dowland* v. *Slade and Wife*, *T.* 44 *G.* 3. 272
2. *Qu.* Whether if one, through whom title is derived, be improperly stated to be *heir* to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister, as heir to her brother, be fatal? *ib.*

ROGUE AND VAGABOND.

See VAGRANT.

SEAMAN.

See PRESSING.

SETTLEMENT.

See POOR-REMOVAL, No. 1.

By Apprenticeship.

Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9.; held well, though in fact only four guineas were paid; for the *full sum received, given, paid, agreed, or contracted for*, as required by the Act, was inserted, and the duty paid for it; and the stamp used

used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex* v. *The Inhabitants of Keynsham*, *T.* 44 *G.* 3. 309

By Estate.

One who is resident on an estate granted to him for lives in consideration of two guineas fine and 1*s.* rent, cannot be removed therefrom, though actually chargable. But semble he cannot gain a settlement by 40 days' residence as on *his own* estate under the stat. 9 *G.* 1., the consideration being under 30*l.* *Rex* v. *The Inhabitants of Martley*, *E.* 44 *G.* 3. 40

By Evidence of Relief.

The Sessions having decided in favour of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the only evidence to oppose this being that of the pauper's own birth in *B.* this Court confirmed the order of Sessions on a case reserved. *Rex* v. *The Inhabitants of Wakefield*, *T.* 44 *G.* 3. 335

By Hiring and Service.

Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, it is a *weekly hiring* only. Therefore where the contract was for the servant to live with his master, the latter finding him board and lodging, and *paying him* 2*s.* 6*d.* *per week*, no settlement could be gained by service for more than a year under such contract. *Rex* v. *The Inhabitants of Pucklechurch*, *T.* 44 *G.* 3. 382

By taking a Tenement.

1. Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *The Inhabitants of Chipping-Norton*, *T.* 44 *G.* 3. 239
2. One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided*, though such residence be *in a turnpike house*, as servant to the collector for whom he received the tolls; for the general turnpike Act 13 *G.* 3. *c.* 84. *s.* 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement," *i. e.* by such taking of the toll-house or renting the tolls. *Rex* v. *The Inhabitants of Denbigh*, *T.* 44 *G.* 3. 333

SHARE.

See DEVISE, No. 6.

SHIPS.

1. The ship register Acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt. *Bloxam Knight and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407
2. Under the ship register Acts 7 & 8 *W.* 3. *c.* 22. *s.* 21., and 26 *G.* 3. *c.* 60. *s.* 3. 4, 5. 16., and 34 *G.* 3. *c.* 68. *s.* 15, 16. in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry (which officers are *directed* to make an entry thereof, to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs); and it is not sufficient for the vendee to register such ship de novo in another port where he resided though he removed the ship thither, and she never returned to her original port after the sale. *ib.*

SLANDER.

Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that "*his character was infamous; that he would be disgraceful to any society; that those who proposed him a member of any society must have intended an insult to it; that he would publish his shame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him;*" such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable without the aid of an innuendo to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming for the first time the person from whom the defendant heard the complaint. *Woolnoth* v. *Meadows*, *M.* 45 *G.* 3. 463

SPIRITUAL COURT.

See PROHIBITION.

STAMPS.

Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9.; held well; though in fact only four guineas were paid; for *the full sum received, given, paid, agreed, or contracted for*, as required by the Act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex* v. *The Inhabitants of Keynsham*, *T.* 44 *G.* 3. 309

STATUTES.

The construction thereof, though relating to matters of an ecclesiastical nature, belongs to the superior courts of common law. *Gould* v. *Gapper*, *T.* 44 *G.* 3. 345

Edward I.

6. *c.* 1. (Stat. of *Gloucester*. Costs.) 262

Henry VIII.

23. *c.* 15. (Costs.) *ib.*

James I.

4. *c.* 3. (Costs.) *ib.*

Charles II.

13. *st.* 2. *c.* 2. (Costs in error.) 545
19. *c.* 6. (Leases for lives.) 42
22 & 23. *c.* 9. (Costs. Certificate.) 489
29. *c.* 3. *s.* 4. (Statute of frauds.) 10

William and *Mary*, and *William*.

1. c. 18. *s.* 18. (Toleration Act.,) 294
7 & 8. *c.* 22. (Ship register.) 407
9& 10 *c.* 15. (Awards.) 21. 189

Anne.

4. *c.* 16. *s.* 4. (Costs.) 261. 3
8. *c.* 9. *s.* 35. 39. (Stamps.) 309

George I.

9. *c.* 7. *s.* 5. (Settlement.) 40
11. *c.* 4. s. 6. (Corporate election.) 372

George II.

5. *c.* 30. (Bankrupts.) 407
7. *c.* 8. *s.* 6. (Stockjobbing.) 107
13. *c.* 17. (Apprentice impressed.) 38
17. *c.* 5. (Vagrant Act.) 339
24. *c.* 44. *s.* 6. (Justices of peace and constables. Action.) 233. 445

George III.

7. *c* (*Stonehouse* Bridge Act.) 356
10. *c.* (*Leeds* and *Liverpool* canal Act.) 325
13. *c.* 84. *s.* 56. (Settlement. Turnpike.) 333
26. *c.* 60. (Ship register.) 407
33. *c.* 52. *s.* 62. (*East India* Company.) 244
c. 66. (Prize.) 22
34. *c.* 68. (Ship register). 407
39. *c.* 69. *s.* 184. (*West India* Dock Company. Notice.) 115
c. 79. (Printers.) 313

STOCK.

1. In an action on the case for not accepting stock agreed to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock, which he refused, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the Bank on the day when it was understood that the transfer was to be made until the close of the transfer books, which was the latest time when the transfer could be made.. *Bordenave* v. *Gregory*, *E.* 44 *G.* 3. 107
2. Semble that in such an action it is not necessary by the stat. 7 *G.* 2. *c.* 8. *s.* 6. for the plaintiff to shew that he transferred the stock to another at the *next* possible transfer day after default made by the original contractor, provided the stock were transferred before the action brought: though, if the plaintiff might have obtained more for the stock by a sale on any intermediate day between the original default and the actual sale, that will go in reduction of the damages sustained by the plaintiff by such default. *ib.*
3. In another case of the same kind, the evidence being that the stock was contracted to be transferred on *a certain day*, and the averment in the declaration being the same as in the above case, that it was to be transferred *on request*, the Court said, that if the objection had been taken at the trial there must have been a nonsuit. *Bordenave* v. *Bartlett*, *E.* 44 *G.* 3. 111

SURPLUSAGE.

An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex.* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

STOPPING IN TRANSITU.

Where *A.* and *B.*, traders living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, *to be sent* to *M.* and Co. *at Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B.* *at Hamburgh*; and on the 31st of *March* *A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. *at Hull*, *to be shipped for* Hamburgh *as usual:* held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. *at Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at *Hull*, *were to receive a new direction from the vendees.* But it was competent for *A.* and *B.* who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July.* And held that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu. *Dixon and Others*, *Assignees of Battier and Son*, *Bankrupts*, v. *Baldwin and Another*, *E.* 44 *G.* 3. 175

SUPERSEDEAS,

See PRACTICE, No. 2.

TENANTS IN COMMON.

Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock; held that the burgesses, who so stocked, were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex* v. *Watson*, *M.* 45 *G.* 3. 480

TENDER AND REFUSAL.

See EVIDENCE, No. 2.

TITHES.

The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3. *c.* 104. over a contract for the retention of *tithes* by the tenant, the value of which was under 5*l.*; and therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ for the purpose of ousting the plaintiff of his costs under the 12th section of the Act. *Sandby, Clerk*, v. *Miller*. *E.* 44 *G.* 3. 195

TOLERATION ACT.

See FALSE IMPRISONMENT, No. 1.

TOLLS.

See TURNPIKE.

1. Where it appeared in evidence upon an action of indebitatus assumpsit for toll that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city on horses or in carts or waggons (that is, at the rate of 1*d.* for every horse load and 2*d.* for every cart load drawn by one horse, and 2*d.* more for each additional horse); held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches instead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods. *The Mayor, &c. of Carlisle* v. *Wilson*, *E.* 44 *G.* 3. 2
2. Where a corporation by a verbal agreement with a pauper leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal: therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *The Inhabitants of Chipping-Norton*, *T.* 44 *G.* 3. 239
3. Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the *tolls*, and the other not; though the voyage happened to finish on the unexempted line where the tolls become due and are received, yet the Canal Company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the Act directs that the tolls should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the Act had not been made; that goes to exempt the *tolls* quà *tolls*, altogether from being rated in respect of the line so exempted leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company*, *T.* 44 *G.* 3. 325

TRESPASS.

See FALSE IMPRISONMENT.

1. Where goods were taken by constables under a warrant of distress granted by a justice

a justice of peace for the county of *Kent* directed "to the constables of the lower Half Hundred of *C.* and *G. in the county of* Kent;" which warrant recited that the plaintiff (whose goods were distrained), *of the parish of* G. *in the said county*, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty, for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.* within the jurisdiction of the Cinque Ports, and *not within the county of* Kent, the constables are not within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6. and may be sued in trespass without the magistrate's being made a defendant. *Milton* v. *Green and Jenner*, *T.* 44 *G.* 3. 233

2. A constable executing the warrant of a justice of peace and sued in trespass, without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6. and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

TROVER.

1. An order of the Lord Chancellor, made under the stat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. *Bloxam and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407

2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though if there be no such plea the other assignees who sue can only recover their proportional parts. *ib.*

3. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *ib.*

TURNPIKE.

One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided*, though such residence were *in a turnpike house*, as servant to the collector for whom he received the tolls; for the general Turnpike Act 13 *G.* 3. *c.* 84. *s.* 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement," *i. e.* by such taking of the toll-house or renting the tolls. *Rex* v. *The Inhabitants of Denbigh*, *T.* 44 *G.* 3. 333

UNTIL.

See INDICTMENT, No. 12.

VAGRANT.

By the Vagrant Act 17 *G.* 2. *c.* 5. after a rogue and vagabond has been committed to the Sessions, and they adjudging him to be *a rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service pursuant to the statutes, &c.;* held that the whole forms one sentence; and such order being defective in the latter part, for want of adjudicating whether the party were to serve his Majesty by *sea* or *land* as discriminated in the statute, the conviction shall be quashed, though the former part of the sentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett*, *T.* 44 *G.* 3. 339

VALUATION OF PREMISES.

See COMPENSATION.

VARIANCE.

See STOCK, No. 3.

VIDELICET.

An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a videlicet, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stephens and Agnew*, *T.* 44 *G.* 3. 244

See INDICTMENT, No. 1, 2, 3.

VENUE.

A scire facias upon a recognizance of bail taken in open court in *B. R.* is properly suable in *Middlesex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And semble that it could not be sued elsewhere than in *Middlesex*. *Coxeter* v. *Burke and Another*, *Bail of Price*, *M.* 45 *G.* 3. 461

WEST INDIA DOCKS.

The stat. 39 *G.* 3. *c.* 69. *s.* 184. directs that the *West India* Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and *s.* 185., after extending the protection of the stat. 24 *G.* 2. *c.* 44. for privileging justices of the peace in actions brought against them, as such, to the lord mayor and aldermen of *London* acting under this Act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this Act*, until after 14 days' notice in writing, or after tender of amends," &c.: held that the treasurer of the Company is a *person* within the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but *qu.* Whether in assumpsit? *Wallace* v. *Smith*, *Treasurer of the West India Dock Company*, *E.* 44 *G.* 3. 115

WILL.

See COPYHOLD, No. 1. DEVISE.

WORDS, CONSTRUCTION OF.

"*Charges.*" *See* CHARGES.
"*Share.*" *See* DEVISE, No. 6.
"*Unless.*" *See* AGREEMENT, No. 3 and 5.
"*Until.*" *See* INDICTMENT, No. 12.

WRIT.

See PRACTICE, No. 6.

The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reubel* v. *Preston*, *T.* 44 *G.* 3. 291

WRIT OF RIGHT.

See RIGHT, WRIT OF.

END OF THE FIFTH VOLUME.

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