REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench.

VOL. XI.

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. XI.

Containing the Cases of Easter, Trinity, and Michaelmas Terms, in the 49th and 50th Years of George III. 1809.

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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 SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

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

PRIESTLY, and MARY his Wife, *against* JANE WYNNE HUGHES, an Infant, and Others.

UPON a bill filed, which came on to be heard before the Master of the Rolls, wherein it appeared that the plaintiff *Mary* claimed certain estates of considerable value in the counties of *Merioneth* and *Carnarvon*, as heiress at law of one *Zachens Hughes*, who had an only son *John Wynne Hughes*, who died in the lifetime of his father; the principal question turned upon the validity of that son's marriage, whose lawful issue the defendant *Jane Wynne Hughes* claimed to be; and His Honour directed the following case to be made for the opinion of this Court.

*On the 9th of *September* 1792, a marriage was solemnized in the parish church of *Denis*, in the county of *Carnarvon*, between *John Wynne Hughes*, then above the age of 21 years, and *Jane Hughes*, (one of the defendants,) then an infant of the age of 16 years, the illegitimate child of one *Jane Roberts*, single woman, by *Thomas Jones*, who died several years before the said marriage. The marriage was had by licence, and

All marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act 26 *G.* 2. *c.* 33. which requires all marriages to be by banns or licence: and by three Judges a marriage of an illegitimate minor had *by licence* with the consent of her *mother* is void by the 11th section; the words *father* and *mother* in that section meaning legitimate parents: by one Judge it is *casus omissus* in the act, and the marriage good.

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without the publication of banns, but the licence was obtained and the marriage had with the consent of *Jane Roberts*, but without the consent of any guardian of the person of *Jane Hughes* appointed by the Court of Chancery. After the marriage *John Wynne Hughes* and *Jane Hughes* had issue the defendant *Jane Wynne Hughes*, and no other child. On the 30th of *January* 1795 *John Wynne Hughes* died; and on the 10th of *February* 1796 *Zacheus Hughes*, the father of *John Wynne Hughes* died intestate, and seised in fee of certain real estates. The question was, whether the marriage between *John Wynne Hughes* and *Jane Hughes* the mother, on the 9th of *September* 1792, in manner aforesaid, were a good and lawful marriage, to entitle *Jane Wynne Hughes* to succeed as heir to the real estates of which *Zacheus Hughes* died seised; or whether such marriage were not void by the marriage act 26 *Geo.* 2. *c.* 33.

This case was first argued in *Easter* term 48 *Geo.* 3. by *Owen* for the plaintiffs, and *Williams* Serjt. for the defendants; and again in *Hilary* term last by *Lens* Serjt. for the plaintiffs, and *The Attorney General* for the defendants.

The stat. 26 *Geo.* 2. *c.* 33. for better preventing of clandestine marriages, prescribes (*s.* 1.) the manner and place in
[3] which banns of matrimony shall be published, and enacts, "that all other the rules prescribed by the rubrick concern-"ing the publication of banns, and the solemnization of ma-"trimony, and not hereby altered, shall be duly observed." Sect. 3. provides that no minister shall be punishable for solemnizing marriages of infants "without consent of *parents or* "*guardians, whose consent is required by law*, unless he shall "have notice of the dissent of *such parents or guardians*;" and such dissent publicly declared at the time in the church where the banns are published shall avoid them. Sect. 4. regulates the granting of licences of marriage by any Ordinary or other person having authority to grant them. And sect. 6. saves the right of the Archbishop of *Canterbury* to grant special licences. Sect. 8. enacts that "all marriages "solemnized in any other place than a church or such public "chapel, unless by special licence as aforesaid, or that shall "be solemnized without publication of banns or licence of "marriage from a person having authority to grant the same "first had, shall be null and void to all intents and purposes "what-

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" whatsoever." And then sect. 11. (on which the question turned) enacts, that *all* marriages solemnized by licence, " where either of the parties (not being a widower or widow) " shall be under the age of 21 years, which shall be had with- " out the consent of the *father* of such of the parties so under " age, (if then living,) first had and obtained; or, if dead, of " the *guardian or guardians* lawfully appointed, or one of " them; and in case there shall be no such guardian or guar- " dians, then of the *mother*, if living and unmarried; or if " there shall be no *mother* living and unmarried, then of a " guardian of the person appointed by the Court of Chan- " cery; shall be absolutely null and void to all intents and " purposes whatsoever." Sect. 12. reciting that the *guardian* [4] or *mother* of the party so under age, may be non compos, or beyond seas, or unduly refuse their consent to a proper marriage, enables the Lord Chancellor, &c. on petition to authorize the same, as if such the *guardian* or *mother* had consented. Sect. 15. gives a form for the marriage register required to be kept, which mentions the " consent of *pa-* " *rents*, guardians," &c.

The questions made in argument were two; 1st, Whether illegitimate children were bound by all or any of the provisions of the marriage act, and particularly by those in the 11th section: and if they were, then, 2dly, Whether the consent of a *natural* father or mother to the obtaining of a marriage licence for their infant child would satisfy the words *father* and *mother*, as used in that clause.

For the plaintiffs it was contended, that the 8th section, enacting that *all* marriages solemnized without *banns*, or *licence*, should be void, necessarily included the marriages of illegitimate as well as of legitimate children; and both were equally within the general policy of the law, which was for the prevention of clandestine marriage, and to protect infants from surprize and imposition in contracting matrimony. The act is framed with reference to the ancient approved usages and discipline of the church as to the manner of celebrating marriages; the common and regular manner of doing which is by banns, and in that mode of celebration a bastard would have no more difficulty than any other person. But the act also recognizes another mode, by licence, which was practised before in the church, not as a matter of right, but indul-

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gence granted, upon special application and for good cause; and for which the consent of lawful *parents, authenticated upon oath, was an indispensable requisite; on pain of avoidance of the licence, as well as of ecclesiastical punishment (*a*). Then *[5] the act allowing of marriages by the one mode as well as by the he r, also imposes a condition upon the party obtaining the licence, which must be complied with in order to make it effectual, and that, by the 11th section, is the consent of the *father* of such party, if living; or, if dead, of the *guardian lawfully appointed;* or if no such guardian, then of the *mother*, if living and unmarried; or, if no such mother, then of a *guardian appointed by the Court of Chancery*. Now it is no argument to say that if some of these required consents cannot be obtained by a bastard, therefore he is absolved from the necessity of having any consent whatever for obtaining his licence; for the 8th section having first avoided *all* marriages solemnized *without banns* or *licence;* which would clearly include the marriages of bastards; the 11th section avoiding *all* marriages *by licence*, unless with the consent therein required, must necessarily also include all such persons. Nor will it follow, if the words, *father*, *guardian lawfully appointed*, and *mother*, used in that clause, must be confined to *legitimate* father and mother, and guardian appointed by a legitimate father, that a bastard cannot be married by licence; because a guardian may still be appointed by the Court of Chancery to consent for such a person: and it is well known that since the marriage act that Court is in the habitual practice of appointing guardians for that purpose; and that, frequently upon the application of the natural parents: and the very existence of such a practice in that court gives a sanction to the argument for the necessity of it. In *The King* v. *The Inhabitants of Hodnett* (*b*), the marriage by licence of an illegitimate infant, to which there was no consent of either parents or guardian of any description, was held to be void, within the 11th clause of the act. And in the case of *Horner* v. *Liddiard* (*c*), it was expressly decided by Sir *Wm. Scott*, after much deliberation, that bastards were

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(*a*) *Canon* 101. 103, 104. 2 *Burn's Eccl. Law*, tit. *Marriage-Licence*.

(*b*) 1 *Term Rep.* 96.

(*c*) Report by Dr. *Croke*.

bound

bound by the provisions of that clause. And upon this point of the argument the case of *The King* v. *Edmonton* (*a*) is not at variance with those decisions.

The next and most contested question was, whether the consent of the *natural mother* to the marriage licence after the death of the putative father, (and there being no guardian appointed, even if such an appointment could lawfully have been made by the putative father) would satisfy the words of the 11th clause; or whether the terms *father* and *mother* there used must not be taken in their strict legal sense, as denoting legitimate parents of children born in wedlock. The plaintiff's counsel contended for the latter sense, in which sense the legislature, they said, (following the principle of the common law,) was always to be understood when speaking generally of fathers, mothers and children. The common law considers a bastard as nullius filius. And the stat. 18 *Eliz. c.* 3. for the first time recognized the relation of an illegitimate child to its parents; but this was only for the purpose of burthening the parents with the maintenance of the child in exoneration of the parish: and the second section of that act describes them as guilty of an offence against the laws of God and man. [7] Besides it only uses the terms "*putative* father," and "*bastard* child." The stat. 13 & 14 *Car.* 2. *s.* 7. making further provision for the same purpose, uses the terms "*putative* father, and *lewd* mothers of *bastard* children." On the other hand, *bastards* have been held (*b*) not to be within the stat. 32 *H.* 8. *c.* 1. enabling persons holding lands in chivalry to dispose of 2-3ds thereof in advancement of *children*. And the stat. 43 *Eliz. c.* 2. *s.* 7. which requires the *father* and *grandfather*, and the *mother* and *grandmother* of poor *children* to contribute if of ability to their relief, has been held (*c*) not to extend to a putative grandfather. Two instances only are relied upon,

(*a*) *E.* 24 *Geo.* 3. *B. R.* 2 *Const.* 85.

(*b*) *Thornton's* case, *Dy.* 345. *a.*

(*c*) *Rex* v. *Reeve*, 2 *Bulst.* 344. was cited; but the order on the *reputed grandfather* seems to have been discharged rather on a collateral ground, as he was bound over again to appear at the next Quarter-Sessions. An opinion, however, to the effect stated is clearly expressed by *Whitlock* and *Croke* Justices, in the case of *The City of Westminster* v. *Gerrard*, p. 346. of the same book.

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in favour of the defendants, as leading to a different conclusion: the first is on the construction of the statutes 25 *H.* 8. *c.* 22. s. 3. and 28 *H.* 8. *c.* 16. *s.* 2. (*a*) relative to prohibiting marriages within the Levitical degrees only, which speaks of father, mother, brother, sister, &c.; and in *Haines* v. *Jeffreys* (*b*), on motion for a prohibition to the ecclesiastical court to stay proceedings there against a man for marrying his sister's bastard, the Court appears to have considered that such a marriage was within the Levitical degrees. Whether this were ultimately decided does not with certainty appear; some of the reports of the case saying that the matter was adjourned: but the opinion thrown out proceeded wholly on the ground of

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the particular subject matter of the law, the intent of which was to prohibit any connubial approach between persons of the same *natural blood*, and not merely of the same *civil* or *legal* blood. And what is said in *The Queen* v. *Chafin* (*c*) is to the same purpose. Those statutes of *H.* 8. were passed in order to enforce the ecclesiastical law, to which they referred, and therefore the construction was necessarily to be governed by that law; and the whole argument proceeded on the foundation that the ecclesiastical law, concerning the consanguinity of persons within the Levitical degrees, extended to illegitimate as well as legitimate relations; which appears by 1 *Gibs. Cod.* 413. (2d.edit.) The other instance relied on is the construction put upon the stat. 4 & 5 *Ph.* & *M. c.* 8. *s.* 3. which inflicts punishment on such as unlawfully take any maid or woman child unmarried within the age of 16 out of the possession and against the will of the *father* or *mother* of such *child*, or out of the possession and against the will *of such person as then shall happen to have by any lawful ways or means the order, keeping, education, or governance of any such maiden or woman child:* and in *Strange*'s report (*d*) of the case of *The King* v. *Cornforth and others*, it is said that the Court granted an information against the defendants for taking away a natural daughter under 16, under the care of her *putative* father; being of opinion that it was within that section of the act. But this

(*a*) And see 32 *H.* 8. *c.* 38.

(*b*) *Haines* v. *Jeffreys*, *Com. Rep.* 2. 1 *Ld. Ray.* 68. 5 *Mod.* 168. and *Comb.* 356.

(*c*) 3 *Salk.* 66. (*d*) *Hil.* 15 *Geo.* 2. 2 *Stra.* 1162.

might

might well have been decided upon the latter words of it; as the putative father has a natural right (*a*) to the care and education of his child; and this *was a taking of the child from the possession and against the will of a person having by lawful means the governance of her. And it appears from another report (*b*) of the case that it was decided on that ground.

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(*a*) The putative father, long before that determination, and at least since the st. 18 *Eliz.* and subsequent statutes, was chargeable with the maintainance and care of the bastard child. These statutes speak of the offence of the reputed father and mother *leaving* such children to be kept at the charge of the parish; which seems to imply that they have a duty imposed on them not to leave such children to be a charge on the parish; and that they have the *lawful keeping* of them at least till dispossessed of that charge by the crown. Vide *Newland* v. *Osman*, *Tr.* 27 *Geo.* 2. 1 *Const.* 406. and *Sayer*, 93. 1 *Burn's Just.* tit. *Bastard.* And vide *Rex* v. *Soper*, 5 *Term Rep.* 278. *Rex* v. *Dr. Mosely*, 5 *East*, 224. *Rex* v. *Hopkins*, 7 *East*, 579. and *Ward* v. *St. Paul*, 2 *Bro. Ch. Cas.* 583. And vide what is said by Sir *Wm. Scott* in *Horner* v. *Liddiard*, *Dr. Croke's Rep.* 174, 5.

(*b*) The book referred to was 1 *Const's Bott*, 405. tit. *Bastards*, which cites the case from MS. That this was the true ground of the decision is also confirmed by two MS. reports of the same case in my possession; one by Mr. *Ford*, the other by Mr. *Short*, a cotemporary at the bar. In the latter, the judgment of the Court is thus briefly, but intelligibly stated: "*Curia.* The point of the act is not whether the lady is legitimate or not, but the taking her from the possession of a person having by lawful means the government of her. The putative father of a natural child has a natural right to the care and education of it, and it is an act of humanity in him so to do; and he has therefore the care of it by lawful means; and the taking her from his possession is the abuse within the act. Information granted."

Mr. *Ford*'s note is, as usual, most full and satisfactory.

The KING *against* CORNFORTH.—An information was moved for against the defendant and others, for taking and carrying away one *Mary Boone*, then under the age of 16 years, out of the custody of her father, and marrying her without his consent to the defendant *Cornforth*. On shewing cause, it was sworn by several affidavits, that *Mary Boone* was an illegitimate child; and therefore it was insisted that this was neither an offence at common law, nor against the stat. 4 & 5 *Ph. & M.* c. 8. That a bastard was considered in law as the child of no particular person, nor could any one be her guar-

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ground. If these decisions upon the statutes of *Hen.* 8. and *Philip* and *Mary* be shewn to have no fair bearing upon the present * question, and the rule of law remain unshaken, that the

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dian either by common law or by testament. That her reputed father could not have ravishment of ward at common law, nor any remedy whatsoever for disparagement of marriage. That he was neither guardian by nature, nor nurture, and so could not be within the intent and meaning of the act of parliament, which is declaratory of the common law; and, that to bring her within the words, &c. she ought to be an heiress. Sed. vide the stat. 5 *P. & M. c.* 8.

E contrà, it was insisted, that this was an offence both at common law and within the statute. As to the statute, it might be the first primary intent of it to protect young heiresses or inheritors; but both the preamble and the enacting part of it have a much larger view and extent. The words of the preamble are "maidens, and women children, as well such as be heirs apparent to their ancestors, as others," &c. Then follows the enacting part. (*s.* 2.) That it shall not be lawful to take and convey away any maid or woman child unmarried, being within the age of 16 years, out of the possession and custody, or governance, and against the will, of the *father* of such maid or woman child, &c. But supposing the word *father* in this clause should be confined to the strict legal sense of the word, to import a legitimate father only; yet the words in the next clause are large enough to extend to the present case. "That if a person or persons shall unlawfully take or convey any maid or woman child unmarried out of the possession and against the will of the father or mother, or out of the possession and against the will of such person or persons as then shall happen to have by any lawful ways or means the order, keeping, education, or governance, of any such maiden," &c. These words are general, and include all persons (not only parents and guardians, who are expressly mentioned and provided for before,) but every person whatsoever that shall happen by any lawful ways and means to have the order, keeping, &c. And it cannot be denied but that the parent of an illegitimate child has by lawful ways and means the order, keeping, &c. The statute 18 *Eliz.* calls the parent of an illegitimate child the *father*, and obliges him to maintain and provide for it, and nature equally obliges him to provide for such children, as if they were legitimate. As to the common law; the offence that is here charged against the defendants is in nature of a conspiracy, which has always been considered as an offence at common law; it was so declared in the case of Lord *Ossulston*; and the

case

the general terms *father*, *mother*, and *child*, used in acts of parliament, must be taken to mean legitimate relations of that * description, unless the contrary be expressed, or of necessity to be implied from the subject matter, or by reference to some

case of *The King* v. *Twisleton*, 1 *Sid.* 387. 1 *Lev.* 257. is similar to this in its circumstances.

LEE C. J. The foundation of the application to the Court is for a contrivance to do an unlawful act, by taking and conveying away a young lady under the age of 16 years out of the possession and against the will of the person who by lawful ways and means happened to have the custody and government of her; and therefore it will not be necessary for this Court to enter into the consideration of that part of the case, Whether this young lady was the legitimate or illegitimate child of Mr. *Boone*; because that is not the foundation upon which this Court doth always proceed in cases of this nature. In regard to the fact, that is not denied; that the defendant came to Mr. *Boone*'s house with a number of people in order to take and carry away this young lady; of his bribing and corrupting the servants; of swearing that the young lady was 21 years of age, in order to procure a licence, when he had full knowledge to the contrary; that this was against the will of Mr. *Boone*, who had educated this young lady as his daughter, and under whose custody and government she then was. And as to the willingness and consent of the child to go with the defendant and marry him, that makes no difference at all, but is a circumstance taken notice of by the statute, (viz.) That maids and young women unmarried being allured and won by flattery and fair promises to contract matrimony, &c. and that was one of the principal mischiefs intended to be remedied by the statute.

CHAPPLE and WRIGHT, Justices, to the same effect.

Per Cur. Let the rule for an information against all the defendants be absolute.

In addition to this I am able to state, that the two first counts in the information, which was afterwards filed, were for a conspiracy, and did not conclude "against the form of the statute:" the third and fourth counts were framed upon the statute, with an apt conclusion; but did not state whose child she was, but merely that she was taken from the possession of *J. B.* he then and there having by lawful ways and means the order, keeping, education, and governance of her. The first count stated her to be the illegitimate daughter of *J. B.* and it had been inserted in the third and fourth, but was struck out. The defendants were afterwards convicted, fined 5*l.* and imprisoned for a year.

other

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other law which excludes the distinction; this brings the case to the true construction of the marriage act itself, which has these general words in the 11th section, and must therefore be taken to mean legitimate parents and children, unless the contrary be expressed on the face of the act, or must necessarily be implied. It must be admitted that a construction favourable to the defendant *J. W. Hughes* was put upon this clause of the act in *The King* v. *Edmonton* (*a*), by two at least of the Judges who decided that case; who relied however principally on *Conforth*'s case, which has been sufficiently distinguished from this: but the third (*b*) said, it was not necessary to give a decisive opinion on the construction of the marriage act; for if the case were within the act, there was nobody to consent to the licence but the *putative* father, and nobody else could be meant: and if the act only extended to cases where there was a *lawful* father, then the case was not within it, and no consent was necessary. It is uncertain therefore on which of those alternatives the learned Judge meant to rely: and if the legal conclusion does not necessarily follow from the alternatives so stated, it lessens in this instance the weight justly attached to his opinions in general. But in *The King* v. *The Inhabitants* of *Hodnett* (*c*), the marriage by licence of an illegitimate child under age was expressly held to be void within the 11th section of the act, for want of the consent thereby required: though that does not conclude the present question, because there was no consent of
[13] any person given in that case. The authority however of *The King* v. *Edmonton* is directly opposed by the judgment of Sir *Wm. Scott* in *Horner* v. *Liddiard*; for there the mother who had been appointed guardian by the putative father, consented to the licence, and yet the marriage was decreed to be void: and also by the established practice of the Court of Chancery, since the passing of the marriage act, to appoint a guardian to consent to the marriage by licence of an illegitimate minor, although the natural parents were still living. It is also material to be considered that by the ecclesiastical law to which the marriage act necessarily refers when speaking of licences,

(*a*) *E.* 24 *G.* 3. *B. R.* 2 *Const*, 85.

(*b*) *Buller* J.; Lord *Mansfield* C. J. was absent.

(*c*) 1 *Term Rep* 96.

no

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no licence can be obtained by a minor without oath of the consent of the father if living, or if dead, of the testamentary guardian if any; and no such oath could be made by, or would be received from a *natural* father, who must in the same breath accuse himself of an ecclesiastical offence for which he would be punishable by that law. Neither can any other but a legal father appoint a testamentary guardian by the stat. 12 *Car.* 2. *c.* 24. *s.* 8., as is shewn by Sir *Wm. Scott* in *Horner* v. *Liddiard* (*a*); and the guardian interposed by the 11th section of the statute, between the father and mother, whose consent is required to the licence, must be a testamentary guardian; for the only other guardian known to the law for this purpose is the one appointed by the Court of Chancery, who is mentioned after the mother in the same clause: and as the same learned Judge observed (*b*), the *father* and *mother* spoken of must be ejusdem generis, not a legal father and an illegal mother. And he has also pointed out the manifest inconvenience and uncertainty that would ensue from admitting the power of a putative father to bind the child by his consent, from the difficulty in many instances of ascertaining by whom such consent must be given. By the same rule it must be admitted that the publication of banns cannot be forbidden by natural parents. The result of the whole is, that illegitimate children are within the general provisions of the act prohibiting marriages otherwise than by banns or licence: but the consent of *fathers* and *mothers* required by the 11th section to the validity of a marriage by licence, where the child is under age, must, upon the principle as well of the common law as of the ecclesiastical law, be understood of *legitimate* fathers and mothers: and no such consent having been given in this case, nor any consent by a guardian appointed by the Court of Chancery for this purpose, the consequence is that the marriage was null and void by the express enactment of the statute.

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For the defendants, the case was argued in the alternative, either that natural children and their parents were within the several provisions of the marriage act; and then the words of the 11th section were satisfied by the consent of the natural mother *Jane Hughes*; the natural father being dead, and no

(*a*) *Dr. Croke's Rep.* 180. (*b*) *Ib.* 173.

guardian

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guardian intervening: or if the words of that section comprehended only legitimate fathers and mothers; then that this was casus omissus, and no consent was necessary to the obtaining of the marriage licence of the illegitimate infant. First, it must be admitted that the case falls within the express words of the act; and though the words *father* and *mother* there used must have the same relative construction; yet considering the nature of the subject matter and the avowed object of the act, to protect the youth and inexperience of children from surprise and imposition, there is no reason for restraining the natural meaning of the words, as [15] there may be in respect of laws regulating the succession to property, which are always governed by legal technical rules. The consent of illegitimate parents where they are known, as in this case, is as much within the general scope and reason of the act as that of legitimate parents, and their moral duty is the same. The marriage act, as Sir *Wm. Scott* states in *Horner* v. *Liddiard* (*a*), introduced a new rule; for at common law a marriage by parties at the age of consent (14 in males, 12 in females) was good, though without the consent of parents: and even when contracted before that age, if they did not dissent when they attained it. The canons of 1603, requiring the consent of parents to a licence, never bound the laity, but only the clergy; and before the marriage act nothing was more common than for minors to marry without any such consent. The question then is, whether the Court is bound to narrow the words of a new statute law against the freedom and policy of the common law, which admitted of no restraint in this matter. The act does not speak of *ancestor* or *heir*, or other words of legal technical signification, but of *father* and *mother*, which are terms of mere natural relation: hæres est nomen juris; filius est nomen naturæ: the word *guardian* was interposed merely to meet the provision of the stat. 12 *Car.* 2. *c.* 24. *s.* 8. enabling a father to appoint a testamentary guardian to his children. What is said in the books, as to a bastard being *filius nullius*, is merely applied to real descent and personal succession: but according to Lord *Coke* (*b*), a bastard may take as a purchaser by the name of

(*a*) P. 167. of *Dr. Croke's Report*. (*b*) *Co. Lit.* 3. *b*.

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the *son* of *J. S.* after he has gained a name by reputation as the son of *J. S.*; and this even in a deed, where the greatest certainty is required. And * though Lord *Coke* goes on to say in the same place that a remainder cannot be limited to a bastard by the name of son or issue of such an one, before his birth; yet the contrary of that was expressly adjudged in *Blodwell* v. *Edwards* (*a*), cited in the margin of the book, where the remainder was granted to the issue, whether lawful or unlawful, of *A.* on the body of *B.* to be begotten. So in *Bro.* tit. *Graunts*, pl. 17. where baron and feme had a daughter *Agnes* before their marriage, and afterwards made a feoffment, with remainder to *Agnes the daughter of the said baron and feme;* it was held to be a good name of purchase, and she recovered by that name in assize. If a woman, having a child before marriage by a man by whom after marriage she had other children, devise to her *children;* it was considered (in *Moor.* 10. pl. 39.) to be clear, that the bastard would take under that description, as being without doubt *her* child; though it was then doubted in the case of such a devise by the man. Certainly however the bastard would take in both cases, if such appeared to be the intention of the devisor. Before the statutes of *H.* 8. (*b*) the courts of common law had no jurisdiction in matrimonial causes; but now, having jurisdiction to construe those statutes, they would grant a prohibition to the ecclesiastical court, if it attempted to impeach any marriage not within the Levitical degrees as recognized by those statutes. But it is admitted (*c*) that natural relations within the terms of *father, mother, brother, sister,* &c. there used, would be prohibited from intermarrying: and this does not rest merely on the principle on which it is put in the ecclesiastical court, that moral restraints attach upon natural consanguity, but upon the true construction of those words in the statutes of *Hen.* 8., made in pari materiâ with the marriage act, as settled in the case of *Haines* v. *Jeffereys* (*d*). The argument derived from the difficulty of ascertaining the natural father applied as

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(*a*) *Noy*, 35. *Moor*, 430. 2 *Roll. Abr.* 43. *pl.* 11.
(*b*) 25 *H.* 8. *c.* 22. *s.* 3. 28 *H.* 8. *c.* 16. *s.* 2. and 32 *H.* 8. *c.* 38.
(*c*) *Horner* v. *Liddiard*, *Dr. Croke's Rep.* 177.
(*d*) *Com. Rep.* 2. 1 *Ld. Ray.* 68. 5 *Mod.* 168. and *Comb.* 356.

strongly

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strongly to the statutes of *H.* 8. as it does to the marriage act; but the Court thought that it was not insuperable, and that the fact might be ascertained by a jury upon evidence as in all other cases of disputed facts. The decision upon the stat. 4 & 5 *Ph.* & *M. c.* 8. followed in *The King* v. *Cornforth* (*a*). The 2d section of that statute first gives the power to the *father* to bequeath or grant by his *will* or other act in his *lifetime, the order, keeping, education, or governance* of his child: and it prohibits the taking such unmarried child, under 16, out of the possession and against the will of the father or of such person to whom by his will or other act in his lifetime he shall have bequeathed or granted the order, keeping, &c. of such child; with an exception of any taking, without fraud, by a master or mistress, or guardian in socage or chivalry, of such child. Then the 3d section on which the case of *The King* v. *Cornforth* was decided, speaking of a taking from the possession of the father or mother, or of "such person as shall *then* happen to have by any lawful means the order, keeping, education, or governance" of such child, must be understood of persons appointed by the *will or other act in the lifetime* of the *father*, that is, after his death, and deriving their authority from *him:* it could not mean that the consent of a school-mistress, with whom the child happened to be placed by her natural father, would
[18] take the case out of the act. If therefore the natural father from whose possession the child was taken were not, as such, within the act, it seems difficult to bring the case within it, as there was no pretence of authority from any other person named therein: and the report in *Strange* puts the decision on that ground; and so it was considered by *Buller* J. in *The King* v. *Edmonton* (*b*); which latter case is a direct authority at law, and is so admitted to be, upon the very point now in judgment. The case of *Thoroton* v. *Thoroton* (*c*) must also be considered as an authority on the same side. An action was first brought by the husband for criminal conversation with the wife, which was tried before Mr. Justice *Grose* on the *Midland*

(*a*) 2 *Stra.* 1162. And *vide* ante, p. 9. note.

(*b*) 2 *Const*, 85.

(*c*) Mentioned by Sir *Wm. Scott*, in *Horner* v. *Liddiard*, p. 188. of *Dr. Croke's Report*.

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circuit. Mrs. *Thoroton* was an illegitimate child, who had been married by licence with the consent of her putative father Mr. *Manners*: and it was open to the defendant to have taken that objection to the marriage, if well founded; but it was not taken. Afterwards the husband libelled in the Court of Arches for a separation for adultery, when all the circumstances appeared on the face of the libel; and after sentence, there was appeal to the delegates by whom the sentence for separation was confirmed: but no objection was taken to the marriage either by the civilians who argued, or by the Judges who decided the case; though Sir *Wm. Scott* said (*a*), that he could not take upon him to assert that it did in no degree fall under the consideration of the Court in the decision of the case. As to the objection arising from the provision of the 11th section of the marriage act interposing the consent of a testamentary guardian between the father and mother, because such a guardian cannot be appointed by a putative father under the stat. 12 *Car.* 2. *c.* 24. *s.* 8.; the reason why such an appointment could not be made under that statute, which was for the abolition of feudal tenures, was because it had relation to the descent of real property. Unless lands descended there could be no guardian in socage; and the 8th clause was to enable fathers to substitute guardians by will of their children for guardians in socage, and to extend the period from 14 to 21 years; but substantially they are the same (*b*). But the words of the 11th clause in the marriage act are as well adapted to the case where the father has no power to appoint such a guardian, as to the case where, having such a power, he has not chosen to exercise it; for they are, "in case *there shall be no such guardian*," (not, "in case *the father shall not appoint* such guardian",) then the mother is to consent. Then the practice of the Court of Chancery in appointing guardians to consent to the marriage by licence of bastards, which is relied on, cannot press much upon the argument as to the legal construction of

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(*a*) Mentioned by Sir *Wm. Scott*, in *Horner* v. *Liddiard*, p. 188. of *Dr. Croke's Report*.

(*b*) *Vaugh.* 179. *Duke of Beaufort* v. *Berty*, 1 *P. Wms.* 704. and *Eyre* v. *Countess of Shaftesbury*, 2 *P. Wms.* 107, &c.

the

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the statute; for it would be sufficient to account for it as a matter of abundant caution, that the question had been doubted by any professional adviser at any time: it is an ex parte proceeding, which could admit of no controversy: and the practice of the Court has always been to appoint the acknowledged father, if living, or, if dead, the mother.

But, 2dly, if the natural parents cannot consent within the act, then this is casus omissus altogether, and no consent was necessary. At common law no consent of parents was necessary, if the parties were of the age of consent; and the legislature could never have intended to impose a condition on any persons which was impossible to be performed by them. Of those to whom the law denies father, mother, or testamentary guardian, the consent of such cannot be required: the consent therefore required in that clause must be confined to legitimate children; and to make the construction of it consistent and uniform, the consent of a guardian appointed by the Court of Chancery must be taken to be only substituted in the place of the consent of the father, testamentary guardian, and mother, where there might have been persons standing in those relations to the minors spoken of. Considering the object of the act, this is a question of common sense rather than of technical construction on the words of it. If natural children be within the act at all, they must be within all the provisions of it; but they must be either altogether within or altogether out of it.

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The Court took time for consideration; and finally the Judges, not being all agreed in opinion, the following separate certificates were sent to His Honor.

THIS case has been twice argued before us by counsel: we have considered it, and are of opinion, that all marriages, whether of legitimate or illegitimate persons, are within the general provision of the statute 26 *Geo.* 2. *c.* 33. which requires all marriages to be by banns or licence; and that the consent of the natural mother to the marriage by licence of an illegitimate minor is not a sufficient consent within the 11th section of that act: consequently that the marriage had and solemnized between the said *John Wynne Hughes* and *Jane* the mother, on the 9th *September* 1792, in manner aforesaid, was not a good

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good and lawful marriage, but was void by force of the said statute of 26 *G.* 2. *c.* 33.

ELLENBOROUGH.
S. LE BLANC.
J. BAYLEY.

HAVING heard this case argued by counsel on the part of the plaintiff and defendant, and having considered the words and purview of the stat. 26 *G.* 2. *c.* 33., and particularly of the 11th sect. of that statute, it seems to me from the words of that section, that the legislature had in their contemplation only the marriages by licence of such legitimate children who had, or might have either parents to consent to the marriage of such children, or guardians whom the legislature intended to substitute for such parents under different circumstances; and that they had not in their contemplation to provide for the marriages of illegitimate children whose parents could not legally forbid the banns, if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th sect. of the act above-mentioned, that is, legitimate parents, if they were to be married by licence: and therefore that the marriage had and solemnized between the said *John Wynne Hughes* and *Jane Hughes* the mother, on the 9th *September* 1792 was *casus omissus* in the statute, and a good and lawful marriage to entitle the said *Jane Wynne Hughes* to succeed to the real estates of which the said *Zachary Hughes* died seised as aforesaid, as his lawful heir.

N. GROSE.

1809.

Thursday, April 20th.

PARKIN *against* TUNNO.

A policy of insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* Commander there, (the enemy having before got possession of every other port in the river,) will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs.

THIS was an action on a policy of insurance on goods on board the ship *Laurel*, at and from *Bristol* to *Monte Video*, and any other port or ports in the river *Plate* in possession of the *English*; and the plaintiff declared on a loss by perils of the sea. It appeared at the trial at *Guildhall*, before Lord *Ellenborough* C. J. that when the vessel arrived in the *Plate*, *Monte Video* and every other port in that river, except *Maldonado*, was in possession of the enemy; (there being then war between *Great Britain* and *Spain*;) and the *English* commander of *Maldonado*, ordered the vessel away immediately upon her arrival, in consequence of the urgency of public affairs, which did not admit of any delay: whereupon the vessel, being short of water, and in want of repairs, bore away directly for *Rio Janeiro* in the *Brazils*, being the nearest friendly port of safety, and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage.

It was therefore insisted at the trial, and now again by *The Attorney-General*, in moving to set aside a nonsuit, that the ship not being able under these circumstances to proceed to any port in the river *Plate* in the possession of an enemy, and being ordered away from *Maldonado* immediately after her arrival there, by the authority of the *British* commander whom the master was bound to obey, the policy continued to cover her to the nearest port of safety to which she was under the necessity of repairing. But

* Lord ELLENBOROUGH C. J. at the trial, and the rest of the Court now, were of opinion, that the policy containing a contract for a specific voyage could not be extended by implication to cover the ship in her voyage to *Rio Janeiro*, notwithstanding the circumstances which had occurred to induce the necessity of it: and therefore refused the rule.

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Thursday, April 20th.

IRWIN *against* DEARMAN.

Damages ultrà the mere loss of service having been given against the defendant for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition.

THIS was an action on the case for damages, charged in one count to be, for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service; and, in another count, for debauching his servant, generally, per quod, &c.: and the defendant having suffered judgment by default, a writ of inquiry was executed before the sheriff of *Middlesex*, when it appeared in evidence that the plaintiff, an officer in the army, had taken charge of the infant daughter of a deceased soldier in the regiment, who had been a friend and comrade of his, which daughter he had bred up for several years in his house, where she was performing the offices of a menial servant, (being the only one he kept,) at the time she was debauched by the defendant. The only actual damage proved by the plaintiff was the loss of the young woman's service for 5 weeks, during the time of her absence in the parish workhouse, where she lay in; the expence of her lying-in having been paid by the defendant. But the jury under these circumstances gave 100*l.* damages.

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Abbott now moved to set aside the inquisition of damages, as being greatly excessive, with respect to the general count; and having no legal foundation, with respect to the count charging in aggravation that the servant was the plaintiff's *adopted daughter*. The allowing of an action of this description even by a legitimate parent is an anomalous case; as enabling one person to recover damages for an injury done to another; but having been so long countenanced by the courts in practice, it cannot now perhaps be questioned upon principle. And the extension of the remedy, in *Edmondson* v. *Machell* (*a*), to an action by an aunt with whom the niece was living, was very much doubted at the time; and the case ultimately ended in a compromise. At least that cannot be called into precedent for a further extension of the principle to the case of one who is no relation at all, but only, as the count states, *by adoption*, which is not recognized by our law.

(*a*) 2 *Term Rep.* 4.

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Lord ELLENBOROUGH C. J. This has always been considered as an action sui generis, where a person standing in the relation of a parent, or in loco parentis, is permitted to recover damages for an injury of this nature ultrà the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of *Edmondson* v. *Machell*, to extend to an aunt, as one standing in loco parentis, I think that this [25] plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.

Per Curiam, Rule refused.

Thursday, April 20th.

STURMY qui tam *against* SMITH.

Action lies upon the stat. 44 *Geo.* 3. c. 13. *s.* 4. by a common informer, suing for himself and the king, to recover a penalty against the sheriff

THE stat. 44 *G.* 3. *c.* 13. *s.* 1. reciting that seamen had of late been taken out of the king's service by means of arrests and detainers, as well for real or pretended debts, as upon charges for alleged criminal offences, and have been afterwards discharged out of custody by due course of law, or by consent of the persons at whose suit or on whose complaint they had been so arrested or apprehended, in order to enable them to desert from the king's service; for remedy enacts, that whenever any seaman, &c. shall be arrested, apprehended, or

for the misconduct of his bailiff, in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of *sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution* such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "*other officers*" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully* and *wilfully* permitting the escape.

taken

taken in execution *by any sheriff or other officer or officers*, on mesne or other process, or by virtue of any warrant for any alleged criminal offence, and shall be thereby taken out of the king's service, &c. *the sheriff, gaoler, or other officer or officers, who shall have arrested or apprehended any such seaman, &c. or in whose custody* any such seaman, &c. shall happen to be by way of detainer, &c. shall not discharge any such seaman, &c. out of his or their custody either on satisfaction of the debt, or want of prosecution for or upon acquittal of the charge on which such seaman, &c. shall be in custody as aforesaid, or on bail or by consent, &c.; but shall detain every such seaman, in his or their custody, and with all convenient speed convey and securely deliver him to the commander in chief of some of his majesty's ships or to some authorized commissioned officer, &c. nearest to the place where such seaman, &c. shall be; in order that he may be kept to serve on board the fleet as before. And s. 4. enacts, that "in case any *sheriff, gaoler, or other officer or officers* shall not securely convey and deliver any such seaman, &c. to such commander in chief, &c. but shall *either wilfully* or *negligently* permit such seaman, &c. to escape; every such sheriff, gaoler, or other officer or officers, shall for every such offence forfeit 100*l.*, to be sued for by action of debt," &c.

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The present was an action of debt framed upon this statute, stating that *J. W.* was an impressed seaman in his majesty's navy on board the ship *Enterprize*, &c. and was in custody of a lieutenant of his majesty; that a bill of latitat issued to the sheriff of *Middlesex* to arrest him for 1*l.*, which was delivered to the sheriff to be executed, and by virtue of that the defendants did arrest *J. W.* and took him out of the said vessel, and that *J. W.* afterwards gave bail to the sheriff; yet the defendants, not regarding the statute, did not convey *J. W.* to any commander in chief, &c. but unlawfully and *wilfully* did permit *J. W.* to escape, whereby, &c. they forfeited 100*l.*, which the plaintiff sued to recover, half for himself, and half for the king.

At the trial before Lord *Ellenborough* C. J. at the sittings at *Westminster*, the latitat issued against *J. W.*; his arrest by one of the sheriff's bailiffs; the sheriff's return of cepi corpus; the situation of *J. W.* as an impressed seaman in the navy as stated in the declaration; and the wilful escape permitted by

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the bailiff after *J. W.* had given bail, were proved: and the only question was, Whether the sheriff were liable in this action for the acts of his bailiff, within the true construction of the statute; or whether the action should have been brought against the immediate bailiff who permitted the seaman to escape after his arrest: in other words, whether proof of the *wilful* act of the *officer* who suffered the escape were sufficient to sustain the allegation of a *wilful* escape against the *sheriff* in a penal action. The plaintiff recovered a verdict for the penalty at the trial; and leave was given to the defendant's counsel to move to enter a nonsuit, if the Court thought the action ill founded; this was accordingly moved in *Hilary* term, and a rule obtained, on the ground that the sheriff was only answerable civiliter, and not criminaliter, for the act of his bailiff; that a penal action was of a criminal nature, and that there was no instance in the books of such an action maintained against a sheriff for the act of his bailiff; though the sheriff was admitted to be liable in remedial actions by the party grieved; as in *Woodgate* v. *Knatchbull* (*a*). On this day Lord *Ellenborough*, after making his report, and stating the question as above mentioned, referred to *Laicock*'s case (*b*), where the general rule is laid down that the sheriff shall be answerable for every act of his officers in the execution of his office, except that he shall not be imprisoned or indicted for the act of his under-sheriff; but for other matters of damages to the party, the sheriff, (and not the under-sheriff, whose act [28] there was complained of,) shall answer to the party, and shall be fined and amerced; and *Whitlock* J. agreed that the sheriff, and not the under-sheriff should be charged for an escape, because it was a misdemeanor in the execution of his office, and the sheriff was the sole officer as to the Court.

The Attorney-General, *Garrow*, and *Richardson*, shewed cause against the rule; and relied on the manifest intention of the statute in question to make the sheriff liable for the acts of his bailiffs, by naming him in the several clauses; although the legislature could not have contemplated that arrests were made by his own hand; and therefore they must have intended to make him liable in respect of the acts of his officers: and the words "or other officer or officers," in addition to *sheriffs*

(*a*) 2 *Term Rep.* 148. (*b*) *Latch.* 187.

or

or *gaolers*, mean other officers of the same kind, such as bailiffs of liberties. They also referred to *Woodgate* v. *Knatchbull* (*a*), and *Pechell* v. *Layton* (*b*), which last was the case of a penal action against the sheriff for the act of his officer.

Marryat and *Comyn*, contrà, said that they could find no case of an action by a common informer for a penalty against the sheriff for the act of his officers; though he was answerable in damages to the party grieved by their misconduct: and they observed that both *Woodgate* v. *Knatchbull*, and *Pechell* v. *Layton*, were actions by the parties grieved, to whom alone the treble damages in the one case, and the penalty in the other, were given by the stat. 29 *Eliz. c.* 4. and the stat. 32 *G.* 2. *c.* 28. *s.* 12. on which those actions were respectively founded. They contended that the object of the act, in mentioning "sheriffs, gaolers, *or other officer or officers*," was to make each of them personally liable to his own misconduct in the particular case provided, and not to make the superior only answerable: if this were otherwise, *gaolers* would not have been mentioned by name, for whom as well as for his bailiff the sheriff is civilly responsible by the general law. No doubt the bailiff arresting and permitting the escape would be liable to the penalty. [Lord *Ellenborough* C. J. That is not so clear; for if the sheriff were meant to be made responsible for the acts of his own officers, I am not prepared to say that any of his bailiffs would be liable to the penalty in this clause: but it is not necessary to decide that question now.] At most the sheriff himself can only be charged as for a *negligent* escape by the improper conduct of his bailiff, and not for a *wilful* escape with which he is charged in the declaration: for *wilful* implies a personal act. Like any other master he may be chargeable with negligence through the medium of his servant, for whose acts within the scope of their employment the master is liable; because it is his duty to employ proper persons to execute his orders: but if the act be charged to be *wilfully* done by the servant, the master would not be liable.

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Lord ELLENBOROUGH C. J. Before the act of the 44th of the King was passed there existed that great inconvenience to the public naval service, that seamen who had volunteered or been impressed were afterwards taken out of the service by

(*a*) 2 *Term Rep.* 148. (*b*) *Ib.* 712.

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means of arrests or detainers for alleged debts or offences, from which they were afterwards discharged either by due course of law, or by collusion with the parties, and were thereby enabled to withdraw *themselves from the service. The act recites the mischief and provides a remedy, by requiring the sheriff or sheriffs, gaoler or gaolers, or other officer or officers who shall have arrested or apprerended any such seaman, or in whose custody he shall be by virtue of any writ, process, warrant, charge, or accusation, or of any judgment or sentence of a court, after the party would otherwise have been entitled to his discharge in respect of the arrest or detainer upon civil or criminal process, &c.; to detain him and deliver him over to some proper officer of the navy. And the penalty is afterwards given against the sheriff, gaoler, or other officer, who shall not make such delivery, but wilfully or negligently permit an escape. The legislature meant, therefore, to extend the duty of the officer who had the civil or criminal custody of the seaman, when that duty would otherwise have concluded with discharging him, to hold his person over for the other purpose, provided by the act, of the naval service in which he was before engaged. Now though it is admitted that this seaman was for all civil purposes to be considered as in the custody of the sheriff, by virtue of the arrest of his bailiff; and though the act expressly mentions seamen arrested, apprehended, or taken in execution by any "*sheriff* or *sheriffs* or other officer or officers;" yet it is in effect contended that the word *sheriff* in the act does not mean *sheriff*, but means under-sheriff or some other inferior officer in whose actual custody the seaman is. But why should not the legislature have meant that which they have expressed? Why should not that officer who is personally liable to the plaintiff at whose suit the seaman is arrested or detained upon civil process for his safe custody, be also made personally liable to the crown for his restoration to

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the public service out of which he had been before taken? In every case where the sheriff is mentioned in the act he must necessarily be liable; and there are other parts of the act where he is named as doing or liable to do certain acts, which it is notorious are always in fact done by his officers: and by the general rule of law the sheriff, though not personally acting, is liable for the wrongful act of his bailiff. As in *Laicock's* case, in *Latch*. 187. where the contention was that the under-

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under-sheriff was liable upon his personal misconduct for not arresting and detaining a person against whom a writ had issued at the suit of the plaintiff, which was delivered to the under-sheriff in whose presence the defendant in the suit then was: but *Doderidge* J. held that for every default in the execution of his office, although by the neglect or fraud of the under-sheriff, the sheriff shall be amerced and fined here and in the Exchequer: and *Jones* J. agreed, with this difference only, that the sheriff shall not be imprisoned, nor shall any indictment lie against him for the act of his under-sheriff. And *Whitlock* J. agreed that the sheriff, and not the under-sheriff, should be charged, because it is a misdemeanor in the execution of his office, and the sheriff is the sole officer with respect to the court. In truth, in all cases where the sheriff is attached for not bringing in the body, although by that proceeding he be made amenable to the benefit of the party injured, yet it is penal in the form of it, by fine to the King. But then it is said that there is no instance in which a sheriff has been held liable in a qui tam action for the act of his officer. Such an action was, however, brought in *Stanway q. t.* v. *Perry* (*a*), and the plaintiff recovered a verdict; no question was made but that the sheriff was liable in the penalty upon the 29 *Eliz.* *c.* 4. for the extortion of his officer; though that was not the principal point in the case, and a new trial was granted upon another ground: but the plaintiff afterwards had a verdict and judgment; so that the point did arise; but no objection was ever taken to it. Then as the sheriff is liable to the plaintiff in an action for the escape of the defendant out of his custody by the wilful act of his bailiff; so is he liable upon the statute to the King, who has an interest in the persons of those seamen who constitute the national force, and is injured by their being withdrawn from it.

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GROSE J. The question is, Whether the seaman must not be said to have been *arrested* by the sheriff at the suit of the plaintiff in the action? for if so, the statute is clear that the sheriff is chargeable with the delivery of the seaman over to the custody of the King's naval officer after satisfaction of the writ. Is such arrest then to be deemed the act of the sheriff or of his officer? It is made by the officer of the sheriff, and

(*a*) 2 *Bos.* & *Pull.* 157.

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by virtue of the sheriff's warrant. Then why is it not to be deemed the act of the sheriff, as much as it is with respect to the party at whose suit the seaman was arrested? And as the sheriff would be liable to such party for the wilful act of his officer in permitting an escape; it would be strange to say against the plain words of this statute, that the King should not have a remedy against his own officer for the misconduct of those employed by him in the execution of his office, when every subject has a remedy in like cases against the sheriff.

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LE BLANC J. The question arises on the construction of the stat. 44 *G.* 3. which specifically imposes a forfeiture of 100*l.* on every *sheriff*, gaoler, or other officer who shall not safely conduct and deliver to a naval officer any seaman in the King's service who shall have been arrested, apprehended, or detained by such sheriff, gaoler, or other officer, by virtue of any process, warrant, &c., when the seaman would otherwise have been entitled to be discharged out of custody upon such civil or criminal process. And the question is, Whether the legislature meant to impose the penalty on the sheriff only in case of his having personally arrested, apprehended, or detained the seaman? Now if the statute had not had the words "*or other officer or officers*" in it, it could hardly have been contended that the sheriff would not have been liable for the acts of his own officers: it is therefore material to consider what is the meaning of those words, "or other officer or officers." The statute in the first instance only speaks at first of seamen "*arrested, apprehended,* or taken in execution, by any *sheriff* or other officer or officers," by virtue of any writ or *process whatsoever,* or by virtue of any *warrant* for an alleged criminal offence: but when speaking afterwards of seamen *in custody,* it introduces the word *gaoler,* in addition to *sheriff* or *other officer.* The word *sheriff* therefore is used with reference to arrests, &c. of seamen charged with any process civil or otherwise, directed to the sheriff; and *officer,* with reference to such as may apprehend seamen charged with any offence by virtue of any warrant from magistrates; and *gaoler* is used when speaking of seamen committed to his custody. That this is the meaning of the word *officer* is further evident from the 2d section, which requires that in case any such seaman shall be removed out of the custody of any sheriff, gaoler, or other

or

officer, by whom he shall have been arrested or apprehended, or in whose custody he shall be, into the custody of any other sheriff, gaoler, or officer * by habeas corpus, &c., the sheriff, gaoler, or *other officer*, so having arrested or apprehended such seaman, or in whose custody he shall be, shall *certify* in writing to the sheriff, gaoler, or *other officer into whose custody* the seaman shall be so *removed*, upon the back of the writ or other proceeding by which such seaman thall be removed, that he is liable to be detained for his majesty's service. Now it is clear that *other officer*, than the sheriff or gaoler, could not there mean any sheriff's officer; for who but the sheriff himself or the gaoler to whose custody the party is committed, or other officer having the execution of process, is the officer to whom the writ of habeas corpus is ever directed, or who is to certify as there required. It cannot apply to any inferior officer of the sheriff, who is a mere servant of his, in whose actual custody the seaman may happen to be; but to such an officer to whom, as such, the writ of habeas corpus may be directed. Then if the sheriff only be meant, and not any of his inferior officers, under the description of "*sheriff, gaoler, or other officer*," it is clear that the sheriff would be liable upon the statute for the act of his officer.

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BAYLEY J. It is said that there is no instance where a sheriff has been held liable in a penal action by a common informer for the act of his officer: but in *Woodgate* v. *Knatchbull*, where the sheriff was held liable in the penalty of treble damages to the party grieved on the stat. 29 *Eliz.*, Mr. Justice *Ashhurst* intimated a strong opinion that the sheriff would be liable on the clause giving the penalty, half to the informer, and half to the King. And Mr. Justice *Buller* explained the expression in the books, that the sheriff is answerable civiliter, and not criminaliter, for the acts of his bailiffs, by reference to the authorities, to mean that the sheriff shall not be indicted for the acts of his bailiff, but shall be liable in a civil action to make pecuniary satisfaction. And Mr. Justice *Grose* said, that he would not give any opinion on the point whether the action could be maintained against the sheriff for the penalty, though he had not much doubt on that. Then the case of *Stanway qui tam* v. *Perry* was an action for the penalty by a common informer against the sheriff. It was twice tried,

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and the plaintiff recovered; and therefore if it had occurred either to the Court or the Bar, that the action was improperly brought against the sheriff himself for the act of his officer, no doubt it would have been questioned, Half of the penalty there went to the King, and half to the informer. It appears therefore that the assumed ground of objection to this action from the want of precedent, is not so strong as was supposed. Upon the words of this act there can be no doubt. It speaks of seamen *arrested, apprehended, or taken in execution* by *sheriffs or other officers.* Now it is well known that the sheriff personally never does arrest defendants, but always performs that duty by his officers. In fact the word *sheriff* must be struck out of this clause as for any real purpose, if he be not liable for the act of his officer. Then the observation made by my Brother *Le Blanc* upon the second clause is very strong. The writ of habeas corpus is never directed to the sheriff's bailiff, but to the sheriff himself; considering the actual custody of the party by the bailiff as the sheriff's custody (*a*).

Rule discharged.

(*a*) "This, (said Mr. Justice *Buller* in *Woodgate* v. *Knatchbull*, "2 *Term Rep.* 156.) has been carried so far, that a return made by a "sheriff, that the person arrested was rescued *out of the custody of* "*the bailiff*, has been held to be bad: the return must be, that the "person was rescued out of *his* custody."

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FAVENC and Others *against* BENNETT and Others.

Thursday, April 20th.

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *Bought* and *Sold* notes (delivered over to the respective parties by the broker) of "*payment* "*in one* "*month, money,*" may be paid for by the buyer to the broker within the month, and that by bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, *generally*, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment; such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer.

THIS was an action for goods sold and delivered; and the question was, whether certain coffee, the property of the plaintiffs, which had been sold to the defendants by the intervention of the *Kennions*, brokers employed by the plaintiffs for that purpose, had under the circumstances been duly paid for by the defendants, who had purchased the coffee from the brokers without knowledge of their principals, by means of a bill of exchange drawn by the *Kennions* on the defendants, and accepted by them, for a larger amount than the value of the goods in question; the defendants having also purchased other coffees of a different owner through the like intervention of the *Kennions*; for which they were at the same time indebted. The particular circumstances of the case are stated hereafter. A verdict was found for the plaintiffs under the direction of Lord *Ellenborough* C. J., before whom the cause was tried at *Guildhall*, after *Hilary* term 1808: and the merits of the case upon that direction were first discussed in *Easter* term 1808 upon a motion for a new trial, which in the ensuing term was supported by *Park*, *Topping*, and *Holroyd*, and opposed by *The Attorney General*, *Garrow*, and *Taddy*. The cases of *Fenn* v. *Harrison*, 3 *Term Rep.* 576., *George* v *Clagget*, 7 *Term Rep.* 359., and *Waring* v. *Favenc*, 1 *Camp. Ni. Pri. Cas.* 85., were referred to in the argument. The case stood over for consideration till the end of *Trinity* term; when the judgment of the Court was given.

* Lord ELLENBOROUGH C. J. On the motion for a new trial in this cause, which was tried before me, the question was, Whether 22 hogsheads of coffee bought by Messrs. *Kennion* and Son, brokers, from *Favenc* and Co., the plaintiffs, and sold to the defendants, and which were sworn by one of *Kennion*'s

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sons to have been paid for by the defendants to *Kennions*, the brokers, in a bill of exchange for 800*l.*, before the latter stopped payment, (which was on the 6th of *July*,) were so paid for, as to preclude the plaintiffs, the sellers, from afterwards demanding the price thereof from the defendants, the buyers? The brokers had sent *Bought* and *Sold* notes on the same day, (*i. e.* the 12th of *June*, the day of the sale,) to both the plaintiffs and defendants. In the sale note sent to the plaintiffs they had described *themselves* as the buyers from the plaintiffs, and in the bought note sent to the defendants, as the sellers to the defendants: in each there was this stipulation, "payment in a month, money, 1 per cent. discount." The plaintiffs gave the *Kennions* the *West India* Dock warrants, (which represent the goods sold, and enable the holders thereof to obtain immediate delivery of the goods therein mentioned,) on or about the day of the sale, *i. e.* the 12th of *June*; and the *Kennions* thereupon sent them to the defendants. The price of the plaintiff's coffee, after deducting the stipulated 1 per cent. discount, amounted to 707*l.* 10*s.* 8*d.* On the 15th of *June*, which, as far as I collect from the evidence, was three days after the brokers had delivered to the defendants, the buyers, the *West India* Dock warrants, without having taken any security in the mean time on the behalf of their employers, the plaintiffs, for the price of the goods, the defendants paid *Kennion* and Son in a bill
[38] drawn by *Kennion* and Son on them, the defendants, and accepted by the defendants, payable *in a month*, the sum of 800*l.*, which was meant to cover the above-mentioned price of the coffee in question, after deducting the 1 per cent. discount: and the difference was to be applied in part payment for another parcel of goods sold on that same 15th of *June* by *Kennions* to the defendants, in another account, with which the plaintiffs had no concern, for 272*l.* 10*s.* 4*d.* This bill for 800*l.* the defendants, the acceptors, immediately discounted for the convenience of the *Kennions* the drawers; so that the *Kennions* thereupon became paid in cash on the 15th of *June* for the price of the coffees, to be paid for by the terms of the contract (i. e. *in a month, money,*) on the 12th of *July* following; deducting, however, discount on the whole amount of the bill for 800*l.*, down to the 18th instead of the 12th, of *July*, including the three days of grace. The Court is desirous

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of being further informed, by another investigation to be had before a jury, respecting the mode of conducting sales between parties by the intervention of a broker, in order that they may judge whether a payment made to a broker, in the manner, and under the circumstances, already stated, be such a payment as is *usually* made *in the course of trade* to a broker on account of his principal. They wish also to know with precise exactness what, in the dealings and understanding of commercial men, is meant by the stipulation "*in a month, money*;" whether it be considered as importing only that the buyer shall pay for the goods in cash at the end of one month from the date of the contract; or that the buyer, whenever he should receive the goods, either at or before the month's end, should immediately give a bill for the amount of the price, so as to put the seller in cash for the same at a month's end from [39] the date of the contract. The Court have thought it proper to suggest thus particularly the points to which it wishes the evidence to be addressed, in order that the opinion of a jury may be hereafter taken, and their own judgment ultimately formed, with better advantage and effect upon the important commercial questions which this cause embraces.

Rule absolute for a new trial.

On the second trial, the jury were of opinion, upon the evidence, that the stipulation in the contract, of "*a month, money*," meant, in the understanding of commercial men, *payment at any time within a month*; and they were also of opinion that the payment in question within the month to the brokers with whom the defendants had dealt, without the knowledge of their principals, was a good payment to bind the principals; and they therefore found a verdict for the defendants.

The plaintiffs' counsel thereupon moved in the last term for a new trial, on the ground of the verdict being against law and evidence, and against the direction of the Lord Chief Justice. And they relied principally on an objection, which had been urged on the former occasion, and on which main stress was laid at the last trial, that there was no evidence to shew that the bill drawn by the *Kennions* and accepted by the defendants, and since paid, was intended at the time to cover the demand for the 22hhds. of coffee in question. The facts were these:—The brokers sold this lot of coffee to the defendants on the

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the 12th of *June* for 707*l.* 19*s.* 3*d.* (deducting the discount of 1*l.* per cent. on payment in a month, money.) The brokers had also sold to the defendants another lot of coffee belonging to another person to the amount of * 272*l.* 10*s.* 4*d.* Then the *Kennions* on the 15th of *June* drew the bill for 800*l.* on the defendants payable in a month, which they accepted, and which would not of course become due till the 18th of *July*, several days after the price of the first lot of coffee would be due by the terms of the contract of sale. This was relied on to shew that it was intended as a payment by the defendants to the *Kennions* on their general account, and not for the purpose of covering this demand in particular; the sum being greater, and also payable at a future time. And they also urged against this being taken as a specific payment to the brokers on account of the plaintiff's coffee, that the plaintiff could not have brought trover against the *Kennions* for the bill, because it was given for more than their demand: neither could they have maintained an action for money had and received; because the money was paid to the *Kennions* on account generally, and the sum was not sufficient to have paid both the plaintiffs and the owners of the other coffee their respective demands; and it could not depend on which of them first prosecuted their action for the amount. And how, they asked, was the amount of the bill to be apportioned between the different claimants? They also relied on a distinction between payments made to a factor, and to a broker; in the former case, unless the factor name his principal, he is dealt with as the principal: but a broker is known to be only an agent for another, though that other may not be known: the

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form of the *Bought* and *Sold* notes (*a*) declares him to be so. And though by the course of trade he may receive payment for his principal, yet such payment, in order to be binding upon the principal, must be made by the

(*a*) This was the form of the *Bought* note; and the *Sold* note was in like form, only substituting *sold* for *bought*, and addressed to *Favenc* and Co. instead of to the defendants.

"Messrs. *Bennett* and Co. *London*, 12th *June* 1807.

"We have this day *bought* by your order and for your account 22 hhds. *Jamaica* coffee, as per sample, at 5*l.* 8*s.* per cwt.—Payment in one month, money—1 per cent. discount.

Your's, &c. *J. Kennion* and Son."

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contracting party according to the terms of the contract: otherwise it cannot be taken to have been made on account of the principal, but on the general account of the broker himself. If the defendants had intended to have paid their money in discharge of any particular account, they should have declared such intention at the time, or have paid the specific sum due on that account, which must have been known to them. But by paying money generally on account to their brokers with whom they had different accounts to settle, they trusted to them, and did not thereby discharge themselves to the individual principals whom the brokers represented.

The defendants' counsel insisted that there was evidence sufficient to warrant the jury in finding that the bill for 800*l.* drawn by the *Kennions* was accepted by the defendants in order to cover the 707*l.* 19*s.* 3*d.*, the price of the plaintiffs' coffee, inasmuch as it appeared that the defendants themselves had discounted their own acceptance on the 22d of *June*, within the month for which time of payment was given for these coffees, and had given their check of that date for 797*l.* 3*s.* which was the exact amount of the 800*l.* bill, deducting the discount on the payment for the coffees within the month. But when pressed by the Court to account for the bill having been drawn for so much more than the price of the plaintiffs' coffee, if it were not meant to be a general payment of so much on the whole account between the brokers and the defendants; they said that it was a question for the jury whether the payment had not been made to cover the plaintiffs' whole demand in the first instance, and the surplus only to be applied to the other demand. And if it were to be so taken, as they contended that the verdict of the jury warranted them to do, it would follow that the *Kennions* were in cash on the 22d of *June* for this specific lot of coffee, and the plaintiffs their principals might then have maintained an action for money had and received against them, as upon a payment to them for the use of the plaintiffs.

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Lord ELLENBOROUGH C. J. The defendants were indebted for two parcels of coffee which they had purchased by the intervention of the *Kennions*, brokers; the one parcel amounting to above 707*l.*, the other to 272*l.* and upwards. They accept a bill for 800*l.*, which is much more than either of the sums alone, but less than the two together, and there is no specific

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appropriation of it to either at the time: why then is the whole to be now appropriated to the plaintiffs' demand, since the insolvency of the *Kennions*, when the justice of the case clearly is that the payment so made to the brokers on their general account as it seems by the evidence, should be apportioned between the respective owners of the coffee? This will cut down the plaintiffs' demand, but leave something to be recovered by them, for which they ought to have had a verdict.

The rest of the Court concurring in this view of the case, it was directed to stand over to obtain the consent of the respective parties. And, as I was informed, the matter was settled according to the apportionment recommended.

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[43]

Friday, April 21st.

DAGNALL *against* WIGLEY and Another.

A broker agrees with defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10*s.* per cent. but the broker was not to advance the money himself, nor was his name on the bills: Held that a bill accepted by the defendants, and negotiated by the broker upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 *Ann. c.* 16.

TO an action by the indorsee of a bill of exchange against the acceptors, the defence set up at the trial, before Lord *Ellenborough* C. J. at *Guildhall*, was, that the bill was drawn for an usurious consideration, and was therefore void even in the hands of an innocent holder, as the plaintiff was admitted to be. It appeared that the defendants, wanting to raise money, applied to *Rimmer*, a broker, to assist them in negotiating their paper, for which he stipulated to receive 10*s.*, instead of the usual charge of 5*s.* per cent., for brokerage; and several successive bill transactions had passed between them, which the defendants who accepted those bills had provided for, as each had become due, by negotiating another for the amount of the former bill with the addition of the legal discount and the brokerage agreed on; which latter *Rimmer* received, and deducted out of the money raised on each successive bill. The last bill of this description, on which this action was brought, was one which was drawn by one *Smith*, payable to his own order, for 82*l.* and upwards, upon the defendants, who accepted the same, and put it as usual into the hands of *Rimmer* to get it discounted. *Rimmer*, whose name was not upon the

bill,

bill, carried it into the market, and got cash for it, which he paid to the defendants, deducting the discount and 10*s.* per cent. brokerage for himself. Lord *Ellenborough* C. J. directed the jury, that there was no actual loan of money here for an usurious consideration, by the party advancing the money on the bill: and that the taking of exorbitant brokerage by *Rimmer* for getting the bill discounted by others, and which was deducted by him out of the money raised, would not avoid the security by the stat. 12 *Ann. c.* 16. in the hands of an innocent indorsee; and the jury thereupon found a verdict for the plaintiff.

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The Attorney General now moved for a new trial, on the ground that the words of the statute were large enough in that branch of it which avoids the security to include this transaction; though there were no actual loan from *Rimmer*, who was to receive the usurious consideration for which the bill was drawn from the defendants; and though, without an actual loan, no action for the penalty could have been maintained against *Rimmer* upon the other branch of the statute, which requires a *loan* by the party sued for the penalty. The words of the avoiding branch are, "that all bonds, contracts, and assurances whatsoever for payment of any principal, or money "to be lent, or covenanted to be performed upon or for any "usury, whereupon or whereby there shall be reserved or "taken above 5 per cent. as aforesaid, shall be utterly void." And this bill was drawn upon and accepted by the defendants upon a contract with *Rimmer* for a stipulated sum beyond what the defendants were to receive, in order to secure to him the usurious consideration agreed upon, and which he accordingly received out of the money raised on the bill. And this being agreed to be paid to him under the name of *brokerage* cannot vary the case; it being admitted to be double the amount of that usually paid to brokers for their trouble in getting bills discounted, and therefore a mere colour for usury. [*Bayley* J. *Rimmer* was not to advance the money himself upon the bill, but to get the bill discounted by others; and the person who advanced the money upon the bill paid the full sum, deducting only the legal discount.] He was to raise the money on the bill which was drawn for the purpose of securing to him the illegal consideration agreed upon: and it was indifferent to the

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DAGNALL *against* WIGLEY and Another.

defendants whether he advanced the money himself, or procured it from others.

Lord ELLENBOROUGH C. J. It does not appear that *Rimmer*'s name was upon the bill at all; nor was he to advance the money. It does not therefore strike me as as a security given for an usurious consideration; but *Rimmer* was to receive an exorbitant brokerage for his trouble in getting the bill discounted.

LE BLANC J. If *Rimmer* had agreed to advance the money for which the bill was given, that would have been a different matter: but here he advanced nothing: and the person who did advance the money for the bill received no more than legal interest for discount. *Rimmer* indeed got more out of the money when obtained; but that may be said to be for exorbitant commission or brokerage.

Per Curiam, Rule refused.

[46]

Friday, April 21st.

BEELEY *against* WINGFIELD.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the st. 32 *Geo.* 3. *c.* 57.; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal.

THIS was an action on a promissory note for 42*l.*, which it appeared had been given by the defendant to a parish officer under these circumstances. The defendant was indicted at the Sessions by the parish officers for a misdemeanor in ill treating his parish apprentice: and being convicted, it was suggested to him by the Chairman of the Court, that if he agreed to pay 40 guineas towards the expences of the prosecution, he would only be imprisoned 6 months instead of 12. The note was accordingly given, and he was sentenced to 6 months imprisonment. Objection was thereupon taken at the trial before *Bayley* J. at *Derby*, that the note given for such a consideration was illegal; which objection was over-ruled, and a verdict passed for the plaintiff, with leave to the defendant to move to set it aside, and enter a nonsuit, if the objection were well founded.

Vaughan

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BEELEY *against* WINGFIELD

Vaughan Serjt. now moved accordingly on two grounds; 1st. that the taking of such a composition for punishment in the particular instance was in derogation of the policy of the statute 32 *Geo.* 3. *c.* 57. *s.* 11., which provides, in case of the ill treatment of parish apprentices by their masters in certain cases, that it shall be lawful for two justices " to compel the churchwarden and overseers, &c. to enter into a recognizance for the effectual prosecution by indictment of such master, &c. for such ill treatment of any such apprentice, &c.; and also to order the costs and expences of such prosecution to be paid and discharged or reimbursed to such persons entering into [47] such recognizance as aforesaid ; one moiety thereof out of the poor rates of the parish, &c. and the other moiety out of the county stock." 2dly, On the more general ground, that this security was not given towards satisfaction of the party injured; which might be sanctioned by the practice of this Court where they permit an injured prosecutor and a convicted defendant to talk together before sentence, with a view to promote compensation to the party injured : but this security was given in order to save the parish and county purses. In *Cole* v. *Gower* (*a*), the parish officers who were authorised by the stat. 6 *Geo.* 2. *c.* 31. to take security from the putative father of a bastard child, for *indemnifying* the parish, having taken an absolute security for a sum certain; the Court considered such absolute security to be against the policy of the law, being a different kind of security than what the law authorized. [Lord *Ellenborough* C. J. observed, that the statute of *Geo.* 2. having prescribed to the parish officers the kind of security they should take, it was a breach of their trust to take a different kind of security than what the Legislature intended. But here the statute is only in aid of their general duty to protect the poor children, put out by them as apprentices, from wrong by the persons to whom they are bound. But he asked whether in this case the defendant was prepared to shew that the suggestion of the Chairman had been made use of to secure any benefit to the parish beyond their indemnity from the fair expences of the prosecution : which was answered in the negative. But it was suggested, that there was no obli-

(*a*) 6 *East*, 110.

gation

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BEELEY *against* WINGFIELD

gation on the plaintiff, the then overseer, to apply the money when recovered to the use of the parish. To this, * however, his Lordship said, that the plaintiff would be considered as a trustee for the parish.]

*[48] Lord ELLENBOROUGH C.J. There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expences incurred by them in bringing the defendant to justice. It did not stifle a public presecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears.

Per Curiam, Rule refused.

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Friday, April 21st.

DOE, on the Demise of HELLINGS and Wife, *against* BIRD.

One having power to appoint lands by will amongst children; and having other lands; by his will (not referring to the power) gives legacies to his several children; and then devises *all the rest, residue, and remainder of his lands, &c.* and personal estate, *after payment of his debts, legacies and funeral expences,* to his eldest son: Held that the power was not thereby executed. A demand of possession by one tenant in common, and a refusal by the other, stating that he *claimed the whole*, is evidence of an actual ouster of his companion.

UPON the marriage of the defendant's father in 1766 a settlement was made, whereby a certain estate, for an undivided portion of which this ejectment was brought in right of one of the daughters of the marriage, was settled, after the father's life, to the use of such child or children of the marriage, and for such estates, &c. as the father by his will should

appoint;

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Doe Dem. HELLINGS *against* BIRD.

appoint; and in default of appointment, to be divided amongst all the children as tenants in common. The father died in 1806, having made a will, whereby he gave to each of his daughters a legacy of 200*l.*; and then by a residuary clause he devised *all the rest, residue, and remainder* of his *messuages, lands*, &c. and personal estate, &c., *after payment of his debts, legacies, and funeral expences*, to his son *John Bird*, the defendant. The testator had other lands besides the settled lands (*a*), to the value of 40*l.* a year: and the question was, whether the residuary clause passed the settled lands as well as the other lands; there being no reference to the power, and the devise being of lands, *after payment of debts and funeral expences*, with which the settled lands were not chargeable; and which, it was contended on the part of the daughters, shewed that the father had no intention to execute the power by this residuary clause, according to *Roe d. Reade* v. *Reade*(*b*). And upon this ground a verdict passed for the plaintiff at the trial before *Chambre* J. at *Taunton*.

Burrough now moved for a new trial, and attempted to distinguish this from the case cited, by the circumstance, that here the testator had charged the lands devised with portions for all his other children, as he had authority to do under the power with respect to the settled lands; which he might think was the best mode of executing the power. And the charge of debts and funeral expences might refer to his other property. [50]

The Court, however, were of opinion that the power was not executed by the will. There was nothing in it referring in any manner to the power, nor from whence his intention to execute it could be inferred: and the charge of debts and funeral expences on the lands, &c. devised, shewed his intention to pass such lands only as were subject to those charges.

Another objection was then stated by *Burrough*, (which had also been made at the trial,) that in default of appointment, the lessor of the plaintiff and the defendant would be tenants in common; and that the ejectment could not be maintained without proof of actual ouster, and that the defendant was not

(*a*) The value of the settled estate was not stated.

(*b*) 8 *Term Rep.* 118.

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DOE dem. HELLINGS *against* BIRD.

bound by the common consent rule: for which *Doe d. White* v. *Cuff* (*a*), before Lord *Ellenborough* at *Westminster*, was cited. In order to get rid of this objection, (the validity of which however was not admitted; but it was said that the defendant ought to have entered into a special consent rule;) the plaintiff went into evidence of an actual ouster, and proved a demand of possession of the premises by letter under a power of attorney, to which demand a refusal was returned by the defendant, who stated at the time that he claimed the whole under the settlement: and this the learned Judge thought was sufficient evidence of an actual ouster. But *Burrough* contended that it was not sufficient, without shewing that the defendant had received the whole rent, and refused to account; and he cited *Reading*'s case (*b*), where it was said that between tenants in common there must be an actual disseisin, as turning him out, hindering him to enter, &c.; and that a bare perception of profits is not enough.

[51]

Per Curiam. One tenant in common in possession *claiming* the *whole*, and denying possession to the other, is beyond the mere act of *receiving* the whole rent, which is equivocal. This was certainly evidence of an ouster of his companion.

Rule refused.

(*a*) 1 *Campb. Ni. Pri. Cas.* 173. (*b*) *Salk.* 392.

Friday, April 21st.

STEVENS *against* WHISTLER.

Where the plaintiff had lands abutting on one side of a public highway, called *Shepherd's Lane*, (which is primâ facie evidence that half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

IN trespass, the declaration contained two counts; one for breaking and entering the plaintiff's close called *Shepherd's Lane*, the other for breaking and entering another close of the plaintiff, by name, in the same parish: and after a general verdict for the plaintiff,

Abbott

1809.

STEVENS *against* WHISTER.

Abbott moved to set it aside, and enter a verdict for the plaintiff on the latter count only. *Shepherd's Lane*, he stated, was proved at the trial to be an open parish highway, and there was no proof of the plaintiff's exclusive possession of that, but only that he had lands on one side of the lane, which at most would only shew that he was entitled to the soil and freehold of half the lane opposite to his own inclosures, and would not justify his declaring for a trespass in the lane generally; as if he claimed an exclusive right to the whole; which might be set up on other occasions. The trespasses proved were, that the defendant had depastured his cattle all along the lane, as well in the parts opposite to the plaintiff's closes, as in other parts, and they had also broken into an inclosure of the plaintiff.

This objection was taken at the trial before *Graham* B. at *Reading*, but was overruled.

[52]

Per Curiam. The plaintiff had an exclusive right to part of *Shepherd's Lane;* and if the defendant meant to drive him to confine the trespass complained of upon the face of his declaration to that part of the lane which was his, he should have pleaded soil and freehold in another; which would have obliged the plaintiff to new assign.

Rule refused.

MOORE *against* PYRKE.

Friday, April 21st.

An under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for *money paid* to the use of the latter; for immediately on the sale under the distress, the *money* paid by the purchaser vested in the landlord in satisfaction of the rent; and never was the *money* of the *under-tenant*.

PYRKE rented a house of one *Aspinall*, and let out part of it to *Moore:* the rent being in arrear, *Aspinall* distrained goods, part of which belonged to *Moore*, upon the premises, and sold them there under the distress, by the intervention of an auctioneer, to third persons, who paid the money for them to the auctioneer, which was received by *Aspinall* in satisfaction of his rent. Upon which the plaintiff *Moore* brought this action to recover back 14*l.* the value of his goods sold under the distress; and failing in the proof of his special counts, resorted to the general count for money paid by him to the defendant's use:

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MOORE *against* PYRKE.

use: and the question was, whether these facts would support that count; the objection being that the money for which the goods sold under the distress never existed as *Moore*'s money. Lord *Ellenborough* C. J. permitted the plaintiff to take a verdict at the trial at *Guildhall;* and in the last term a rule nisi was obtained for setting aside the verdict and granting a new trial, on the ground that the evidence did not support the count.

[53] *Park* and *Reader* now shewed cause, and contended that the plaintiff's goods having been sold by compulsion of law to pay the defendant's debt, the money produced by the sale must be considered as the plaintiff's money until it was paid over to the landlord by the auctioneer; and the case was the same as if the plaintiff had paid so much of his own money to redeem his goods from the distress, which would clearly have entitled him by the authority of *Exall* v. *Partridge* (*a*) to recover in this action. And here by not redeeming his goods, the plaintiff assented to the sale of them for the purpose of raising money to pay the defendant's debt; and for this purpose he may adopt the act of the auctioneer as his own. [*Le Blanc* J. How can a man be said to assent to a sale made in invitum?] It is the same then as if the landlord had distrained so much of the plaintiff's money in a bag.

Garrow and *Puller*, contrà, objected that this was not *the plaintiff*'s money, nor paid *by him*. The goods when distrained were taken by the landlord for his own benefit: till the sale he had a special property in them. At any rate, the plaintiff had no longer an absolute property in them, and the legal possession was transferred to another. They were sold for the benefit of the landlord, and not of the tenant or owner. While the money remained in the pockets of the purchasers, it cannot be pretended that it was the money of the plaintiff; and the instant it was paid, it was paid to the landlord's agent and for his benefit, and was at no moment of time under the control, or at the appointment, or even in the constructive possession of the

[54] plaintiff: it cannot therefore in any view be considered as his money. This is materially different from *Exall* v. *Partridge*, where the money was paid by the owner of the goods himself to

(*a*) 8 *Term Rep.* 308.

redeem

redeem the distress. And in answer to the case of *Smith* and *Others, Assignees, &c.* v. *Hodson* (*a*), which was mentioned, to shew that a party whose goods had been wrongfully taken might wave the tort, and bring assumpsit for the value of them, they observed that the action there was for goods sold and delivered. They also referred to *Spurrier* v. *Elderton.* (*b*)

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MOORE *against* PYRKE.

Lord ELLENBOROUGH C. J. Two points are to be established by the plaintiff, first that this was *his* money, secondly that it was paid by him to the defendant's use. Upon the latter (supposing the first to have been established) I should not have had much doubt, because the money paid to the landlord was the produce of the plaintiff's goods sold by compulsion of law under the distress to satisfy the landlord's claim of rent from the defendant for the premises, part of which were occupied by the plaintiff as under-tenant to the defendant. The difficulty is to consider this as *the plaintiff*'s money. While the plaintiff's property taken under the distress was in custodiâ legis, or in the landlord's particular custody, it was *goods*, and not *money*. Up to the time of the sale indeed the property in the goods would be in the plaintiff; for if cattle distrained die during the distress, the loss is that of the tenant and not of the landlord; which shews that the property remains in the tenant till the sale. But the statute (*c*) says, that the goods distrained shall be sold for the best price "towards satisfaction of the rent." Then does the money produced by the sale vest in the first instance in the landlord or in the tenant? On the best consideration I can give it, I think the money does not vest in the tenant, but is an instantaneous executed satisfaction of the rent vesting to that amount in the landlord, and that the tenant has only an interest in the surplus, if any. If this be so, the money paid to the landlord could not have been the plaintiff's money paid by him for the use of the defendant; for *as money* it never was the plaintiff's at all. If the money had ever vested in the plaintiff for an instant, then this case would have been governed by that of *Exall* v. *Partridge;* but I cannot say that it ever did.

[55]

GROSE J. I cannot in any manner make this out to be the plaintiff's money, when it was the produce of goods sold against his consent to satisfy the landlord's rent.

(*a*) 4 *Term Rep.* 211. (*b*) 5 *Esp. Ni. Pri. Cas.* 1.
(*c*) 2 *W. & M. st.* 1. *c.* 5. *s.* 1.

LE

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MOORE *against* PYRKE.

LE BLANC J. In the case of *Exall* v. *Partridge* the money paid by the plaintiff to redeem his goods from the distress was clearly *his* money: it was paid out of his pocket. But here the property of the plaintiff distrained was in *goods*, and when they were converted into money by the sale under the distress, the money paid by the purchasers became immediately the property of the landlord who distrained for the rent, and not of the tenant.

BAYLEY J. agreed. Rule absolute.

[56]

Saturday, April 22d.

DOE, on the Demise of FOLEY and Others, *against* WILSON.

1. Where copyholder for life cut trees, though none were applied to the repair of the premises till several monthsafter, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were stillout of repair, it is a question for the jury whether they were cut, bonâ fide for the purpose of repair, and were in a course of application for that purpose; and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant.

2. An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up.

THIS was an ejectment brought on the part of the lord of the manor of *Great Malvern* in *Worcestershire*, to recover a copyhold estate of which the defendant was tenant for life, and also a small parcel of the waste which had been inclosed by the defendant. The copyhold was sought to be recovered on the ground of forfeiture for voluntary waste in cutting down 15 oak trees, two of which had never before been headed; and also for permissive waste in suffering the house and fences to be out of repair. The trees had been cut down in *May* 1808, without having been previously set out for repair by the lord's bailiff, (which however was admitted not to be necessary,) and in *October*, after the ejectment brought, a few of them only had been applied towards the repairs of some of the premises; other buildings however still continuing out of repair: but, as it was suggested, not requiring all the timber which remained unappropriated. On this *Wood* B. left it to the jury to say whether the trees had been cut down for the purpose of making

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DOE, ex dem. FOLEY *against* WILSON.

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making the repairs, and were intended to be so applied in due course: which the jury found in the affirmative. With respect to the inclosure, which was very small, it appeared to have been taken in from the waste about 12 or 13 years before by the defendant, and annexed to some other land belonging to him. But the lord's steward was proved to have seen this inclosure from time to time after it was made, (the same lord and steward continuing all the time,) and no evidence of any objection made; which the learned Judge thought was sufficient to be left to the jury to presume a licence from the lord to inclose; in which case the defendant could not be made a trespasser without first receiving notice to throw up the land again. The jury accordingly presumed a licence, and found a verdict for the defendant.

Williams Serjt. now moved for a new trial; and after stating these facts and the learned Judge's direction, objected to the verdict on both points, but particularly on the last; observing that the mere knowledge of the inclosure by the steward, who might have been called as a witness, was no evidence of a licence, within so short a period: for what line could be drawn within twenty years when any presumption could begin to be made in favour of a trespasser?

Lord ELLENBOROUGH C.J. on the first point observed, that it was a question for the jury to decide, whether the trees were cut down for the purpose of repairing the premises bonâ fide, and were in a course of application for that purpose: and there was no evidence that they were to be applied to any other purpose. On the second point, though a grant from the lord would not be presumed within 12 or 13 years; yet the continual view of the steward acting under the same lord for that period, without objection, might be sufficient for the jury to presume a licence. If the object be of sufficient importance the lord may countermand the licence and bring another ejectment.

Per Curiam, Rule refused.

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Saturday, April 23d.

GOODRIGHT, on the Demise of LAMB, *against* PEARS.

A copyholder surrenders "his copyhold cottage, *with a croft adjoining*, and a common right, &c. belonging to the same; "*all which* "*premises* (as the surrender describes it) "*were then* "*in his own* "*possession:*" and on the same day he devises "all his "copyhold "*cottage and* "*premises* "*then in his* "*own possession:*" In fact *the croft*, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time: yet held that the whole passed under the description of "all his copyhold *cottage and premises;*" the words *then in his own possession*" being merely a mistaken description, following the mistake of the surrender, which mentions the *croft* with the rest as then being in his possession.

THIS was an ejectment to recover one croft and two roods of land in *Scotter*, in the county of *Lincoln*. The premises were copyhold, holden of the manor of *Scotter*, and claimed by the lessor of the plaintiff as heir of *Benjamin Lamb*, the tenant last seised. The defendant claimed under the widow of *Benjamin*, who derived title by devise from her husband, he having previously surrendered to the use of his will. That surrender was enrolled on the 28th of *October* 1800, and recited a surrender by *Benjamin* out of court on the 14th of *July* preceding of "all his copyhold cottage, *with a croft adjoining*, and a common right and north-moor-gate belonging to the same; *all which premises were then in his own possession*," to the use of his will. On the same 14th of *July* he devised to his wife "all his *copyhold cottage and premises then in his own possession*, for her life;" and after her decease, to *R. Elsom*, &c. The testator died within a few days after making his will. At the time of making his will and the surrender out of court he in fact only occupied the cottage and a garden behind it: the *croft*, which was separated only by a gooseberry hedge from the cottage and garden, was then and till the testator's death in the actual possession of the defendant as his tenant. It was contended at the trial before *Bayley* J. at *Lincoln*, that the *croft* mentioned particularly in the surrender, but omitted to be so mentioned in the will, and which was in fact let to and in the possession of another person, did not pass to the widow under the description of "his * copyhold *cottage and premises then in his own possession;*" though it was admitted that if the croft had then been in his possession, it would have passed under those words: but the learned Judge being of opinion that the latter words were a mere misdescription, copied probably from the words of the

surrender

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GOODRIGHT *against* PEARS.

surrender which misdescribed the fact; and that the former words, "copyhold cottage and premises," were sufficiently certain to carry the croft which formed part of those premises; nonsuited the plaintiff.

Vaughan Serjt. now moved to set aside the nonsuit, and stated the case as before mentioned.

Lord ELLENBOROUGH C. J. The surrender and the will are as one instrument. They were cotemporaneous acts; and that which was a mere mistake in the surrender, was followed in the will, in describing all the premises as being in the copyholder's possession, when part of them was in the possession of his tenant: but it is clear by the general words that all was meant to be passed.

LE BLANC J. The croft was not in the testator's possession at the time of the surrender to the use of his will, though it is there described as being in his possession. And that mistake was followed in the will.

Per Curiam, Rule refused.

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Saturday, April 22d.

BUTTERFIELD *against* FORRESTER.

One who is injured by an obstruction in a highway against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

THIS was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before *Bayley* J. at *Derby*, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in *August*, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding

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BUTTERFIELD *against* FORRESTER.

riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence *Bayley* J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

Vaughan Serjt. now objected to this direction, on moving for a new trial; and referred to *Buller's Ni. Pri.* 26. (*a*), where the rule is laid down, that "if a man lay logs of wood across a highway; *though a person may with care ride safely by*, yet if by means thereof my horse stumble and fling me, I may bring an action."

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BAYLEY J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of *Derby*. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

Lord ELLENBOROUGH C. J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Per Curiam, Rule refused.

(*a*) The book cites *Carth.* 194. and 451. in the margin, which references do not bear on the point here in question.

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LORD *against* HOUSTON.

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In debt by bill the declaration is good, though the sums demanded in the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected.

THE plaintiff sued by bill in debt, and declared against the defendant, *of a plea that he render to him the sum of* 7750*l.*, which he owes to and unjustly detains from him; for that whereas, &c.: and so the plaintiff proceeded to set out in his first count a certain deed for securing the payment of 1625*l.* and interest: and concluded that count by alleging, that thereby "the defendant became liable to pay to him 1625*l.* when requested, which still remains unpaid, whereby an action hath accrued to the plaintiff to demand and have of the defendant the said sum of 1625*l. parcel of the said sum of money above demanded.* In each of five other counts for goods sold, money paid, &c. the plaintiff respectively demanded 1625*l.*, the four first of those concluding that "by reason whereof an action hath accrued to the plaintiff to have and demand from the defendant the said last-mentioned sum of money, further parcel of the said sum above demanded." And the last count stating the 1625*l.* therein demanded to be "the *residue* of the said sum of 7750*l.* above demanded." And then the declaration concluded; "yet the said defendant although requested hath not paid the said *sum* of money above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly refused and still doth refuse, and the same still remains wholly due and unpaid; wherefore the plaintiff says that he hath sustained damage to the value of 500*l.*, and therefore he brings suit," &c. To this there was a demurrer, stating specially (amongst other causes relating to other particulars in the several counts of the declaration not set forth here) that in the beginning of the declaration the plaintiff has complained of the defendant in a plea that he render to him the sum of 7750*l.* only; and afterwards by the several counts thereof the plaintiff has claimed and declared for divers sums, amounting in the whole to a much larger sum, to wit, 9750*l.*, and that the declaration is in that respect repugnant and inconsistent. That the declaration states that the five several sums of 1625*l.* in the five first counts are *parcels* of the said sum by the delaration demanded, and that the 1625*l.* in the last count mentioned is the *residue* of the said 7750*l.* demanded;

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manded; which is impossible and repugnant. And the same objection was repeated in other different forms.

Dampier, in support of the demurrer, admitted that the plaintiff in debt might now recover less than he demanded by his declaration, though formerly it was considered otherwise; but here the plaintiff seeks to recover more by the aggregate demands of his several counts than he first demands in the queritur: and besides the repugnancy of stating these several larger sums in the aggregate to be parcels of a smaller sum, this mode of declaring is embarrassing to a defendant, who may have an answer to the general sum demanded, and defend the action on that ground; but may be misled if the plaintiff can recover more under the aggregate demand of his several counts. He referred to 5 *Com. Dig.* 54. tit. *Pleader*, C. 84. "So in debt for 100*l.* if the plaintiff declare on particular sums due which exceed 100*l.*, *and the defendant do not demur*, but there is a verdict for the plaintiff; if he release all above 100*l.*, he shall have judgment for 100*l.* *R.* 5 *Mod.* 214." From thence it must be inferred that it is a valid objection on special demurrer; though it may be cured by verdict and by releasing the surplus. But p. 217 of the same book, 2 *W.* 7. is directly in point. "If the debt be for a certain sum, and the particular contracts, whereon the plaintiff declares, amount to more, it is bad; for he has judgment for more than he demands. *R. Yelv.* 5." The case of *Smith* v. *Vowe*, *Moor* 298. was the reverse of that in *Yelverton*; for there the several sums in the counts in debt did not amount to the sum demanded in the *queritur*; which was assigned for error, and the judgment reversed. [Lord *Ellenborough* C. J. All those cases were decided at a period when it was considered that the plaintiff could only recover in debt the very sum demanded: but it has been long settled that he may recover less.] But the Court are now called upon to decide that the plaintiff may recover more than he first demands in the queritur.

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Richardson, contrà, insisted that it was not necessary for the plaintiff in debt to state how much he demands at the beginning of his declaration: all the cases which have held otherwise (*a*) were cases where the plaintiff sued by original, except

(*a*) Vide 5 *Com. Dig. Pleader*. 2 *W.* 7.

that

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that of *Crumpton* v. *Smith* (*a*) which came on upon error from an inferior court. It is said in 5 *Com. Dig. c.* 7. which cites *Co. Lit.* 302. *b.* 17. *a.*, that the declaration is an *exposition of the writ*, and adds time, place, and other circumstances. And that accounts for the introduction of the words "*of a plea that he render to him so much* (*b*)," which seem to have reference to some writ, and are introduced by assimilation to proceedings original in C. B., but have no sensible meaning when applied to the mode of originating proceedings in this court by bill, and may therefore be rejected altogether. Each count here contains in itself a perfect demand of a certain sum, and the reference to the sum in the queritur, as if the sum in each count were a part of the sum in the queritur, is immaterial.

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Lord ELLENBOROUGH C. J. There is no difficulty in disposing of this case. In this court where the proceedings are by bill, the words at the beginning, *of a plea that he render so much*, which raise the question, are themselves superfluous, and may therefore be rejected; and rejecting those words, there is in each count a perfect demand of a sum certain, without the reference to the sum first mentioned in the declaration, which would also be rejected: and then the declaration, concluding with a demand of damages for detaining the debt, will refer to the sum total of the debt demanded by the several counts. There is no occasion for our giving any opinion upon the mode of pleading in the Court of Common Pleas; but the argument of my brother *Marshall* in *M'Quillin* v. *Cox* (*c*) rather shews that if the sums declared for exceed the sum in the writ, it is more matter of a plea in abatement than in bar.

Per Curiam, Judgment for the Plaintiff.

(*a*) *Yelv.* 5.

(*b*) In debt by original in C. B. the declaration begins by stating that the defendant was *summoned to answer* the plaintiff *of a plea that he render to him so much*, &c. whereupon, &c.

(*c*) 1 *H. Blac.* 249.

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CHAMBERS *against* DONALDSON and Others.

In trespass quare clausum fregit, if the defendant plead soil and freehold in another by whose command he justifies the trespass, such command may be traversed by the plaintiff.

TO trespass for breaking and entering the dwelling-house of the plaintiff in the parish of *Mary-le-bone*, &c. the defendants pleaded that the said dwelling-house * at the time when, &c. was and still is the soil and freehold of *E. B. Portman* Esq., and that they as his servants *and by his command* broke and entered the same. The plaintiff replied, admitting the said dwelling-house to be the soil and freehold of *E. B. Portman*, but stating that one *Wm. Green* before the said time when, &c. demised the said dwelling-house to the plaintiff as tenant from year to year, by virtue of which the plaintiff entered, &c. and was possessed thereof; and being so possessed, the defendants, as the servants of *Green*, and *by his command*, committed the trespass complained of; and traversed that they were the servants of *E. B. Portman*, and by *his* command committed the said trespass in manner and form as in the plea mentioned. To this replication there was a demurrer, assigning for special causes, that though the plaintiff has by his replication admitted that the said dwelling-house was the soil and freehold of *E. B. Portman* as alleged in the plea; yet by his replication he has stated that *Green* demised the said dwelling-house to the plaintiff to hold as therein mentioned, without shewing any legal title in *Green* so to do. And also for that the plaintiff by his replication has admitted the said dwelling-house to be the soil and freehold of *E. B. Portman*, but has not deduced any title from him to *Green* to enable *Green* to make the supposed demise to the plaintiff: and also for that the plaintiff has traversed and endeavoured to put in issue an immaterial fact, and no material issue can be taken on the same. In support of these objections,

Scarlet now argued that the fact of *Portman*'s command alleged in the plea was not traversable, and cited *Trevilian* v. *Pyne* (*a*), where the distinction was taken between replevin and trespass quare clausum fregit: in the latter it was said that if the defendant justify, and allege freehold in another by whose

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(*a*) 1 *Salk.* 107.

command

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command he entered, the plaintiff cannot traverse the command, because it would admit the rest of the plea to be true, namely, that the freehold was in that other, and not in the plaintiff; which would be sufficient to bar the action, whether the defendant entered by his command or not. But that it was otherwise in replevin, which was the case in judgment; for there as none but the landlord has a right to enter for the purpose of distraining, the *command* is important. It is clear that if soil and freehold in another were pleaded in bar and found for the defendant, it would be a good defence to this action; and its the same thing if the plaintiff, by traversing the command, admits the title in another, and thereby shews that he has no right of action. Trespass being a possessory action, it is sufficient for the plaintiff to declare in the first instance on his actual possession; but if a superior title in another be pleaded, he must then shew title to his possession. If the plaintiff declared that the soil and freehold was in *A.*, and that *B.* gave him leave to enter, and that C., the defendant, entered upon him (the plaintiff) and turned him out; the plaintiff would by his own shewing appear to have no title to maintain the action: but that is the same case with the facts now appearing upon the whole record. [*Bayley* J. Is not actual possession sufficient to maintain the action against a wrong-doer?] That must be taken in its legal sense; that the law presumes the actual possessor to be the rightful one until the contrary be shewn; but here the contrary is shewn; for when title is admitted in another, which entitles him to the possession, the plaintiff himself appears to be a trespasser, and therefore cannot maintain the action on his own wrongful possession. 2dly, He objected that the plaintiff in his replication had derived title to a particular estate in the premises from *Green*, without shewing the commencement of that estate, as he ought to have done, according to the rule of pleading laid down in *Silly* v. *Dally* (*a*), "that the commencement of all particular estates ought to be shewn in pleas, avowries, &c." And this rule holds not only in pleas in bar, but in all the subsequent pleadings. Here it was not even averred generally that *Green* had a right to demise to the plaintiff. [*Bayley* J. The purpose of the replication is to identify the defendant with *Green*; for if

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(*a*) 1 *Ld. Ray.* 334.

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Green were estopped by his demise from disputing the plaintiff's right to the possession, then the defendant, acting by the command of *Green*, would also be estopped. In that view the plaintiff insists that it is immaterial what was the commencement of *Green*'s estate. [Lord *Ellenborough* C. J. All the cases wherein it is stated that the party pleading must shew the commencement of the particular estate are where he claims an interest out of that estate: but here no interest is claimed of the particular estate, but it is pleaded merely to set up an estoppel against the defendant, who has pleaded liberum tenementum in another.] He then put the case that *Green* might be the servant of *Portman*, and have permitted the plaintiff to enter as tenant upon the premises, without authority of his master; and might afterwards have entered upon the plaintiff by such authority: then by not stating the commencement of *Green*'s estate, the plaintiff would give no opportunity to the defendant to traverse the material fact.

[69] *Holroyd*, contrà, on the first point. The *command* may be traversed; and what is stated by way of inducement as to the title of *Green*, and as against *Green* and those who justify under him, cannot vitiate that traverse. The very principle laid down in *Trevilian* v. *Pyne* shews that the command may be traversed; for as against a wrong-doer, a plaintiff may maintain trespass whether he have title or not, as in *Graham* v. *Peat* (*a*). No sound distinction can be shewn in that respect between trespass and replevin; which latter was the case in judgment; and there it was held traversable; and the distinction taken as to trespass was extrajudicial and mistaken. Since it has been settled that trespass will lie upon mere possession against a wrong-doer, the plaintiff, by traversing the command, and admitting pro hâc vice the soil and freehold to be in *Portman*, does not admit that he has no cause of action; for though it were true that *Portman* had a right to enter upon the plaintiff, yet if the defendant had no such right the plaintiff may still maintain this action upon his actual possession against a wrong-doer. Suppose (which is the fact) that *Green* had taken a long building lease under *Portman*, and after letting to the plaintiff, had employed the defendant to

(*a*) 1 *East*, 244. and vide *Harker* v. *Birkbeck*, 3 *Burr*. 1563.

enter

enter upon him; if he could thus set up the title of *Portman*, which is unknown to the plaintiff, he would thereby be enabled to trespass with impunity upon his own lessee. This shews the materiality of the command which is traversed. Two things must concur to constitute a defence under the plea of liberum tenementum, namely, superior title in another, and that the defendant entered by command of that other: both must be pleaded, then why in common sense may not both be traversed? In *Cary* v. *Holt* (*a*) [70] the

(*a*) This was cited from 2 *Stra.* 1238. where it is very shortly reported. The following note of that case is from Mr. *Ford*'s MS.

CARY *against* HOLT, *M.* 19 *Geo.* 2. Trespass for breaking and entering the plaintiff's cellar. The defendant pleads that the place where, &c. is a copyhold tenement, parcel of the manor of *Hampstead*, and demised and demiseable from time immemorial at the will of the lord, according to the custom, &c., and that the lord, at a court held 11th *Nov.* 1721, granted a messuage, of which the cellar is parcel, to the defendant; and that by virtue thereof she entered, &c. and so justifies the entry, &c. The plaintiff replies that the defendant entered of her own wrong; and traverses that the cellar at the time when, &c. was parcel of the said customary messuage. Demurrer, and joinder in demurrer.

Lawson insisted that the replication was ill, because the plaintiff neither sets out a title in himself, nor traverses the defendant's in a material part. *Yelv.* 173, 4. *Priestly* v. *White*, 6 *Co.* 24. *Read*'s case, *Cro. Eliz.* 30. *Hering* v. *Blacklow*, 2 *Lutw.* 1337. 1342. *Meritons* v. *Benn and Others*, 8 *Co.* 66. *Crogate*'s case. That the plaintiff admits by his traverse that the cellar once was parcel, but not so at the time of the trespass; for by traversing that the cellar at the time when, &c. was not parcel of the customary messuage, he admits that it once was, and therefore ought to have shewn how seised. That the defendant's title is not put in question, but only whether the cellar is parcel, &c.; which is an immaterial issue. 1 *Roll. Rep.* 46. *Lee*'s case, *Cro. Car.* 190. *Shepherd*'s case.

Stracey, e contrà, insisted that this was an action of trespass in nature of a possessory action, founded entirely upon the possession, and therefore not necessary to set out a title. 18 *Ed.* 4. *fol.* 10. *p.* 21. Trespass; the defendant, as here, made title to the place where, &c., which the plaintiff denied, without shewing any title in himself; and it was held good and sufficient, because where the plaintiff traverses the defendant's

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the defendant in trespass made title and gave colour to the plaintiff, who replied de injuriâ, &c. and traversed the *title set out by the defendant, without shewing any in himself; and this was held good, as laying the defendant's title out of the case; and

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title, it would be unnecessary to shew any title in himself; for possession is sufficient title against a wrong-doer. *Vin. Abr.* tit. *Trespass*, 281, 2. E. per totum. The true distinction seems to be between action real, and personal actions. As to what is objected, that the traverse was immaterial, he insisted that the traversing the locus in quo, &c. to be parcel, &c. was the most material part of the plea, and puts the title in question; for when the defendant makes title to the cellar as parcel of the customary tenement, what can be more material than to deny it to be parcel, &c. The cases which have been cited in support of the objections do not come up to the present case. In *Yelv.* 174. the plaintiff not only omitted setting out a title in himself but likewise denying the defendant's title. The same answer to *Lee*'s case in 1 *Roll. Rep.* 46. The plaintiff traverses the command, which is perfectly immaterial, and not traversable without traversing the title. So as to *Crogate*'s case; the plaintiff replied de injuriâ suâ propriâ, &c.: but the plaintiff here likewise denies the cellar to be parcel, &c.

LEE C. J. The exceptions to the replications are two; 1st, That the defendant has shewn title by grant from the lord, and therefore it was not sufficient for the plaintiff to traverse that, without shewing a title himself. But although that rule may be good in general in real actions, yet it is otherwise in trespass; because in that case possession is the plaintiff's title, and the material thing to traverse is the defendant's title. And so it is held expressly in *Cro. Eliz.* 671. *Knight* v. *Lodge*; and the same distinction taken between real and personal actions. *Cro. El.* 891. *House* v. *Laxton*. 2d, That the traverse is too narrow; because it only denies that the cellar at the time when, &c. was parcel, &c.; which seems to admit that it once was parcel, and yet does not shew how severed. But in this action the only material thing in question is, Whether it was parcel at the time when, &c.; for the plaintiff was only to maintain his right to the possession at that time, and if not parcel at the time when, &c. the traverse maintains the action.

WRIGHT J. agreed with the Chief Justice, and cited *Cro. El.* 288. *Justice Tanner* v. *Fisher*; that in trespass it is sufficient to deny the defendant's title, without shewing a title in himself; and the same distinction is there taken between real and personal actions.

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and then it stood upon the plaintiff's possession, which was enough against a wrong-doer. The only principle on which a plea of liberum tenementum (*a*), which is anomalous, can proceed is, that it puts the plaintiff on shewing his right to the possession; for if title be pleaded in another, and that the defendant entered by command of that other, it puts the right of possession, as well as the possession itself, out of the plaintiff by the very act for which he seeks to recover; but if the other party had no title, or the defendant who entered had no authority from him, such entry did not devest the possession of the plaintiff. Title may be given in evidence under the general issue (*b*), and that the defendant entered on the plaintiff by command of the person entitled (*c*); and if so, surely the command may be traversed if pleaded; for if not traversable, it need not be proved; which is contrary to the current of authorities. The only case which bears against the plaintiff is *Witham* v. *Barker* (*d*); but that case has been much shaken [73] by Lord C. J. *Willes* in *Lambert* v. *Strootlier* (*e*), where the general subject was very fully discussed. Then, 2dly, if the command may be traversed, what is alleged in the replication with respect to *Green*, is mere inducement and will not hurt.

DENNISON J. 10 Ed. 4. 9. Distinction between trespass and real actions. *Gosling* v. *William*, 5 *Geo.* (1). Trespass for breaking plaintiff's close. The defendant justified under a feoffment from the Duke of *Beaufort*, and gave the plaintiff colour. The plaintiff replied, that the defendant entered, &c. of his own wrong, and traversed the feoffment. And upon a demurrer, the replication was held well; because the defendant's title was denied, and the plaintiff's possession sufficient. As to the 2d objection, unless the cellar is parcel of the messuage, the defendant's title is out of his case. If the lord had granted a cellar, the plaintiff must have denied it; but here he has only said that he granted the messuage with its appurtenances; and if the grant had been denied, such traverse would have tried nothing material.

So Judgment for the Plaintiff.

(1) *Fortes. Rep.* 378.

(*a*) Vide *Lambert* v. *Strootlier*, *Willes' Rep.* 222.

(*b*) *Dodd* v. *Kyffin*, 7 *Term Rep.* 354. and *Argent* v. *Durrant*, 8 *Term Rep.* 403. and the cases there cited.

(*c*) *Gilb. Evid.* 258. (*d*) *Yel.* 147. (*e*) *Willes*, 221.

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The plaintiff does not make title to himself; if he did, the general rule as to pleading particular estates would apply: but here it would have been sufficient to have said that the defendant entered of his own wrong and without the cause assigned, and all the rest is surplusage; and there is no repugnancy.

Scarlett, in reply, observed of the case of *Graham* v. *Peat* (*a*), the latest on this subject, that it did not contradict the principle he had contended for. There the title was shewn to be in the rector, under whom the plaintiff himself claimed by lease; and though that lease were void by the statute 13 *Eliz. c.* 20. for non-residence; yet if the rector did not dispute the possession of the plaintiff, he was in at least by licence of the person entitled, if not tenant from year to year by the payment of rent; and therefore still had a lawful possession. But here title is shewn in another, and nothing is stated to shew a lawful possession in the plaintiff.

Lord ELLENBOROUGH C. J. The position which is laid down in *Trevilian* v. *Pyne*, and which has certainly been the general opinion, that upon a plea to an action of trespass, of liberum tenementum in another by whose command the defendant entered, the command is not traversable, comes now for the first time that I am aware of, to be questioned in a court
[74] of law. That opinion was indeed delivered extrajudicially, for the case in judgment was in replevin, and the Court decided that the command there was traversable, because the possession of the place where the goods were taken was not the material point, but the right of the party to take the goods; but certainly in trespass the possession of the place is material. Now, however, that the position comes to be judicially questioned, it is necessary to examine the foundation on which it rests. And unless the command be traversable, it will be sufficient for a mere wrong-doer, who has invaded the quiet possession of the plaintiff, to plead title in another, and an authority from him; although that other himself did not question the plaintiff's possession. Nay the argument might be pushed further, and it might be contended that the same defence could be set up against a plaintiff who had been in possession for 20 years; and this monstrous consequence would ensue, that the wrong-doer would protect himself under

(*a*) 1 *East*, 244.

a title

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a title which the party himself could not assert in any possessory action. But since it has been settled in subsequent cases, as in *Graham* v. *Peat* (*a*), and *Harker* v. *Birkbeck* (*b*), that trespass may be maintained by a person in possession against a wrong-doer, we are called upon to strip the wrong-doer of this shield. And unless such a plea can be gotten rid of by traversing the command, this absurdity will follow, that if title be given in evidence under the general issue, the command may be traversed in evidence, as in *Graham* v. *Peat*; when, if the command be pleaded, with title in another, it is not to be traversed. The position, then, standing upon no decided case, but only laid down extrajudicially, and having been contradicted in effect by subsequent decisions with which it is inconsistent, we are brought back to consider what the rule was [75] before on principles of law and common sense; and if the defendant plead soil and freehold in himself, and the plaintiff cannot shew in reply any right to the possession against him; that will be sufficient: but if he plead soil and freehold in another, he must also shew that he had the authority of that other, and therefore such authority is traversable.

GROSE J. It has always puzzled me to discover any reason why the command might not be traversed as well as the soil and freehold of another in a plea of this description; for both constitute one defence: and also why it should not be traversed as well upon a special plea as denied under the general issue. There is no other case where the same defence may be made on the general issue and on special plea, that the same answer cannot be given to both. The good sense of the thing clearly is that the command should be traversable in the one case as well as it may be disproved in the other. I could never reconcile the opinion in *Salkeld*, and the practice, which has certainly prevailed in conformity to that, with the rule and practice of law in cases where the same defence was set up under the general issue: and I am glad that the question has at last been judicially raised, that it may be decided according to principles of law and sense.

LE BLANC J. The Court are called upon to determine between two contradictory rules, both of which are said to be rules of law; one of them is, that on a plea of liberum tene-

(*a*) 1 *East*, 244. (*b*) *Burr.* 1563.

mentum

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mentum in another, and that the defendant entered by his command, that* command is not traversable: the other is, that possession is sufficient to maintain trespass quare clausum fregit against a wrong-doer. Both these rules cannot stand: for if the latter be true, the plaintiff must be permitted to shew how the defender is a wrong-doer, by shewing that notwithstanding another may have a better title than the plaintiff, yet that the defendant had no authority from that other to make the entry complained of. If it could have been shewn to be a good plea in trespass, that the freehold was in a third person, without going on to state that the defendant entered by the command of that person, there would have been weight in the argument: but both those facts are always stated in the plea, and are considered to be necessary to constitute the justification: and it would be absurd indeed that several facts should be stated in the plea as necessary to constitute the entire defence, if the plaintiff could not traverse any of those facts which he pleased. To shew the monstrous consequence of such a doctrine, consider what must be the situation of persons who have been long in undisturbed possession of their houses held under sub-lessees and others, through various mesne assignments, with all which they may be unacquainted: if such possessions, especially in this metropolis, where the ground landlords, whose property is of great extent, are generally well known, were trespassed upon by wrong-doers, who could protect themselves by pleading soil and freehold in the ground landlord, and that they entered by his command; if the fact of such command could not be traversed, and the possessors were obliged to derive title from the ground landlord, all these persons would be precluded from standing upon their possession against mere wrong-doers.

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[77] BAYLEY J. The question is, whether a mere wrong-doer, when sued for a trespass upon the possession of another, has a right by this mode of pleading to call upon him to set out his title. If the command of the person in whom soil and freehold is pleaded may be traversed, then no other than the person who has the title to the freehold can compel the party in possession to shew his own title to that possession; but if the command be not traversable, then every wrong-doer may call on the party in possession to make that disclosure. Trespass is

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now understood to be a possessory action; but it must cease to be so, if every wrong-doer could in this manner oblige the party in possession to set out his title.

Judgment for the Plaintiff.

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The KING *against* GABORIAN.

Wednesday, April 26th.

THIS was an information in nature of a quo warranto, calling upon the defendant to shew by what authority he claimed to be mayor of the borough of *Saltash* in the county of *Cornwall*. The defendant pleaded that by charter of the 14 *G.* 3. the king granted to the village of *Saltash* to be and remain a free borough, and that the persons therein named should be incorporated by the name of the mayor and free burgesses of the borough of *Saltash:* that one of the aldermen should be mayor; and * that six other free burgesses of the inhabitants of the borough besides the mayor, to wit, seven capital free burgesses of the inhabitants of the borough, should be the aldermen and council of the borough: that the mayor, aldermen and free burgesses, or the major part of them, should every year in *September*, on the *Saturday* next before the feast of *St. Matthew*, assemble themselves in the Guildhall, &c.; and being so assembled, the mayor and aldermen, or the major part of them, should nominate and put in election for mayor two of the aldermen, and there should continue together, or in due manner should adjourn themselves, until the mayor, aldermen, and free burgesses aforesaid, or the major part of them then and there assembled, should have elected one of those two aldermen so put in election to be mayor for one year after the said feast of *St. Matthew* then next following; and that he should be sworn in yearly on the feast of *St. Matthew* before

Assuming that under the stat. 11 *G.* 1. *c.* 4. an election began at a corporate meeting whereat the mayor presided may be completed, in case of his absenting himself pending the proceeding, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote, and thereupon the remaining votes being equal, he declared the same, and that no election could be made, and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision (which turned out to be erroneous), but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election: held that such election was void even under the statute, as a surprize and fraud on the other electors.

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the last mayor his predecessor, or in his absence before two other aldermen, and in default of the mayor and aldermen, then before four or more free burgesses inhabitants of the borough, &c.; which charter was accepted. The plea then stated that no election was made of a mayor on the charter-day in the year 1806; nor was any election of such officer made upon the day next after the expiration of the time within which such election ought to have been made, or otherwise, pursuant to the direction of the statute (11 *G.* 1. *c.* 4.) And thereupon afterwards on the 24th of *November* 1806 a writ of mandamus issued, commanding the mayor and burgesses on the 20th of *January* 1807 to assemble at the Guildhall within the borough, and then and there proceed to the election of a mayor for the residue of the year from the feast of *St. Matthew* [79] then last past, according to the charter, and pursuant to the statute, and to administer the oath of office, &c. to the person elected mayor: which writ was delivered to the mayor and burgesses; and public notice of the time and place of meeting given. That on the said 20th of *January, James Buller* then being mayor and alderman, *John Buller* justice and alderman, *J. Cleveland, R. Hickes, J. Gaborian, S. Drew,* and *P. Spicer,* aldermen, and 13 others named free burgesses duly assembled at the Guildhall for the purpose of proceeding to the said election, and the said *Hickes, Gaborian, Spicer,* and *Drew,* aldermen, being the major part of the said mayor and aldermen, nominated and put in election for mayor the said *Hickes* and *Gaborian,* aldermen, inhabitants and residents in the borough. That after *Gaborian* had been so nominated and put in election, the said *James Buller,* together with *John Buller* and *Cleveland,* quitted the Guildhall, and absented themselves from the said assembly; but *Hickes, Gaborian, Drew,* and *Spicer,* aldermen, and the said 13 free burgesses continued together; and thereupon *Hickes,* who was then the nearest person present in place and office to the said *James* and *John Buller* who so absented themselves, presided at the said assembly: and such remaining aldermen and burgesses then and there proceeded in the same election, and named and elected *Gaborian* to be mayor, pursuant to the statute, who then and there in the absence of the said *James Buller* the last mayor, and

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and the said *John Buller*, who had so absented themselves, took the oath of office before *Hickes* and *Drew*, two of the aldermen, pursuant to the statute, and was thereupon duly admitted to the said office: by means of which premises the defendant claimed to be mayor.

The replication took several issues, 1. That *Spicer* at the time of the supposed nomination was not an alderman. 2. That the major part of the mayor and aldermen did not nominate and put in election *Hickes* and *Gaborian* to be mayor. 3. That *Hickes* was not the nearest person then present in place and office to *James* and *John Buller*. 4. That *Hickes* did not preside at the said assembly. 5. That *Hickes*, *Gaborian*, *Drew*, and *Spicer*, and the 13 free burgesses named did not name and elect *Gaborian* to be mayor pursuant to the directions of the statute. And 6. That *Gaborian* did not take the oath of office, and was not duly admitted to the said office according to the statute. Upon the trial of these issues a special verdict was afterwards found, which, with respect to the first issue, stated certain facts relating to the due election of *Spicer* as an alderman, which were before stated and discussed in the case of *The King* v. *Hawkins* (*a*), and the decision of the court having been there given upon them, no further argument was had upon that point. [80]

With respect to the 2d, 5th, and 6th issues, the jury found, that on the 20th of *January* 1807 *James Buller*, the mayor, *John Buller*, the justice, *Cleveland*, *Hickes*, *Gaborian*, and *Drew*, four of the aldermen, and also *Spicer* claiming to be an alderman as aforesaid, and several of the free burgesses, assembled in the Guildhall, in obedience to the writ of mandamus mentioned in the plea, commanding the mayor and free burgesses to proceed to the election and swearing in of a mayor for the residue of the year. That *James Buller*, the mayor, presided at such assembly, and he, together with *John Buller*, the justice, and *Cleveland*, nominated and put in election for mayor the said *John Buller* and *Cleveland*, two of the aldermen; that *Hickes*, *Gaborian*, and *Drew* nominated and put in election for mayor the said *Hickes* and *Gaborian*,

(*a*) Ante, 10 *East*, 211.

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for whom also *Spicer* as alderman tendered his vote, * but it was rejected by the presiding mayor. That the mayor then declared that the nomination being equal, no election could be come to, and directed proclamation to be made for dissolving the said assembly. That no objection was made, nor was any request made to him to stay and proceed in the election; and proclamation was accordingly made for dissolving the assembly by one of the town serjeants, and immediately afterwards the mayor, the justice, and *Cleveland*, and several of the free burgesses, and also the town-serjeants, went away and left the Guildhall; but *Hickes*, *Drew*, *Gaborian*, and *Spicer*, and several of the free burgesses remained and continued in the said hall. That after the mayor, the justice, *Cleveland*, and part of the free burgesses had so left the hall, *Hickes*, being the nearest person then present in place and office to *James* and *John Buller*, took the chair and presided, and the several aldermen and free burgesses who so remained in the hall proceeded to the election of a mayor out of one of the persons who had been so put in nomination as aforesaid, and gave their votes for the defendant *Gaborian* to be mayor. That the town clerk then and there, before *Hickes* the presiding officer and *Drew*, administered the usual oaths of office to the defendant. That a return to the mandamus was made by the mayor, the justice and *Cleveland*, and the several free burgesses who left the hall with them, stating (in substance) that at the meeting assembled in pursuance of the writ for the nomination and election of a mayor, three of the aldermen present had nominated and put in election *John Buller* and *Cleveland*, and the remaining three aldermen (excluding *Spicer*) had nominated and put in election *Hickes* and *Gaborian*; but that no aldermen of the borough were by *the major part* of the mayor and aldermen nominated or put in election for mayor. And that another return to the mandamus was also made by the said aldermen and free burgesses who voted for the defendant; stating (in substance) that the mayor, aldermen, and free burgesses assembled at the Guildhall on the 20th of *January* 1807, and that the mayor and aldermen having nominated and put in election for mayor *Gaborian* and *Hickes*, two of the aldermen, did then and there name and elect *Gaborian* into the office of mayor, according to the charter, and pursuant to the statute,

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and afterwards on the same day, by and before the said *Hickes* and *Drew* another of the aldermen, in the absence of the last mayor, did swear him into his office, pursuant to the directions of the statute. But whether or not *Spicer* at the time of the supposed nomination in the plea mentioned was an alderman of the borough: or whether or not the major part of the mayor and aldermen nominated and put in election for mayor the said *Hickes* and *Gaborian*: or whether or not *Hickes, Gaborian, Drew,* and *Spicer,* and the several free burgesses named, did elect *Gaborian* to be mayor, pursuant to the directions of the statute: or whether or not *Gaborian* were duly sworn into office, according to the statute; the jurors pray the advice of the Court, and find those issues accordingly. And as to the 3d issue, the jury find that *Hickes* at the time in the plea mentioned was the nearest person then present in place and office to *James* and *John Buller,* the mayor and justice. And as to the 4th issue, they find that *Hickes* did preside at the said assembly, as alleged in the defendant's plea.

A. Buller for the prosecution, upon the facts found in regard to the 2d, 5th, and 6th issues, touching the nomination, election, and swearing in of *Gaborian* to the office of mayor, contended that his title was invalid, upon the authority of *The King* v. *Buller and Another* (*a*), where an application having been made by the present defendant, claiming to be mayor under this election, for a mandamus to the then late mayor and deputy mayor to deliver up to him the insignia of his office; the Court were of opinion that the election, having been completed after the departure of the presiding officer who formed an integral part of the elective assembly, was void. [Lord *Ellenborough* C. J. observed that the question was not raised there upon the stat. 11 *G.* 1. *c.* 4., whether if the mayor did not preside, the next in order could not preside and make it a due election.] He then contended that this was not a good election under the statute. The object of the statute was to prevent the dissolution of corporations, and it points out two methods of proceeding in case the charter-day has been slipped without an election; either to proceed to the election on the next day, (excepting *Sunday,*) or on a day appointed by a writ of mandamus, on motion for that purpose: and in either

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(*a*) 8 *East*, 389.

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case if the mayor, or other chief officer who ought regularly to preside at and hold such election, be present and preside at the same, the election is to proceed and be made in the manner warranted by the charter or usage. But if the mayor or other chief officer be absent, then the nearest person then present in place and office to the person so absenting himself shall preside in the elective assembly, and shall have *the same power and authority* in all respects therein as belongs to the mayor or other chief officer, for doing any act necessary to be done in order to such election. On this occasion the mayor did preside; the election was proceeded upon in due form before him; but the votes being in his opinion, (however erroneous,) equal for the several candidates to be put in nomination, he declared that no election could be had, and directed proclamation to be made for dissolving the assembly; which was accordingly done, no objection being then made. Then after his departure no other presiding officer could continue that election, which had been begun under the presidency of the mayor; for the statute no where authorises two different presiding officers for the same election. The concluding words in the first clause, "or for doing any other act necessary to be done in order to such election," merely relate to the proceedings before the presiding officer, whoever he may be. The 4th section directs the oath of office to be taken "before such officer (singulariter) as shall *preside at such election* in pursuance of this act;" and therefore only contemplates one presiding officer at one election; and if there were two in fact, it would be difficult to say before which of them the oath was to be taken. The statute has not provided for the case of the mayor going away during the election, but left that to be corrected by the power of this Court. This case therefore must be governed by the rules of the common law, by which it is clear that this election could not have been supported. And for this purpose he referred to a MS. note of Mr. Justice *Clive*, of what was said by *Fortescue* J. in *Machell* v. *Nevinson* (*a*), which was just before the statute. Supposing however

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(*a*) MACHELL v. NEVINSON, *E.* 10 *Geo.* 1. *B. R.* MSS. *Clive* J. (amongst the MSS. of the late Mr. Justice *Buller*.)

Upon non electus returned by the same defendant (*Nevinson*) to another mandamus to swear in *J. S.* to the office of common council-man,

however there could be successive presiding officers for the election of the same officer on the same day; he contended that

man, the case upon evidence appeared to be thus. There being a vacancy of three common councilmen, the defendant, being mayor, proceeded to an election of three others in their room, which was accordingly done. There was a bye-law in this borough, by which the day of electing a mayor was fixed, but no certain day appeared to be settled for electing any other officer of the borough, only it had been the general custom to fill up such offices in the corporation as were vacant the same day the election of the mayor was; and contrary to it, the defendant having filled up the vacancy in the common council before the day of the election of the mayor, summoned the members of the corporation to meet and elect a mayor; and when they were assembled, one of the members told the defendant that there were vacancies in the common council, and proposed to him to fill up those vacancies before they proceeded to elect a mayor. In answer to this the defendant declared that he had only summoned them to elect a mayor, and that they could not elect any other officer, for there was no vacancy, and that he had already filled up those offices. Notwithstanding this declaration of the mayor, nine of the common councilmen, which was a majority, withdrew (as the custom was) into the common council chamber, and signed a paper, by which they declared that they elected *J. S.* into the office of common councilman, and tendered this paper to the defendant, who refused to accept it. *J. S.* having brought his mandamus to be sworn into this office,

Upon the trial it was insisted for the defendant that this election of *J. S.* was void; for there could be no election but upon a public proposal by the mayor for that purpose, but this election was even in opposition to his direction and express declaration. It was said that it is incident to the office of mayor to direct and regulate the proceedings, and when he gives directions to proceed to a certain election, it is in the nature of a charge to them, and they cannot undertake any other matter than what he proposes. That they are confined by his directions, and they might as well elect in the absence of the mayor as elect when he hath prohibited them. And another objection was that the election was made in another room, and not in the presence of the mayor, and therefore void. It was answered that the corporate body being lawfully assembled, and the mayor presiding, the majority might direct the proceedings. That it was usual to fill up the offices that

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that the proceedings should have commenced de novo before the second presiding officer; for the presidency of another officer

were vacant upon that day before they began the election of a mayor; and the body being assembled for that purpose, it was not necessary to have directions from the mayor, and if that power should be allowed to mayors it might be in the power of any mayor to dissolve the corporation. This is giving the mayor a negative; and the defendant ought to have given an instance where the mayor hath refused the proposal of the common council, and where that refusal hath been acquiesced under. And as the majority concurred in this election, it made it a corporate act, and the election was good. To the other objection it was said, that it was admitted that the presence of the mayor was necessary to make a corporate assembly; and though the members withdrew into another chamber, yet as it was only a separation for that particular purpose, the corporate meeting still continued, and the mayor was virtually present, and presided as their head.

PRATT Ch. J. This is a void election. It appears that the day of election of common councilmen is uncertain; and it appears that the mayor hath power to propose business to the members of the corporation; and it is so far from a new power in this mayor that it is a power which all the mayors in *England* have. If a mayor was not to have this power, every member would be making his own proposal, which would make the greatest confusion. It it insisted that there is a right in the common council to elect without the concurrence of the mayor, and to fill up the vacancies in their body upon the day of the election of the mayor; but no instance is given that the members ever proceeded to an election without the direction of the mayor. In this case the mayor acquinted them with the business of the day, which was to elect a mayor, and refused to proceed to other business, and gave a proper answer by saying there was no vacancy; and it doth not alter the thing by being since found that the election, which he intended, was not good. He cited *Carlisle*'s case, where the election was adjudged to be void, because the members were not assembled for that purpose, and proceeded to an election not directed by the mayor. There is no inconvenience in allowing this power to mayors; for if they refuse to make elections they ought to be compelled, and upon application to this Court the party may have remedy, but cannot proceed to an election without his direction.

POWIS J. agreed in all.

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officer made it a new elective assembly. But principally he insisted, that as no objection was made at the time to the mayor's breaking up the assembly, the whole body must be taken to have acquiesced in it: and it was a fraud upon those of the corporators who went away with the mayor, that the others who remained should proceed afterwards to make an election. In this view it makes no difference that the reason which the mayor gave for breaking up the assembly, namely, the supposed equality of votes, upon the rejection of *Spicer*'s vote, turned out afterwards to be bad (*a*). This is an attempt to support an election under the statute, which had originally been mede under the charter, as those who concurred in it had originally stated in their return to the mandamus.

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Adam junr. for the defendant, contended that the election was good within the statute, having been made at an elective assembly duly convened under the mandamus, and held before the next person then present in place and office to the mayor, after the mayor and his companions had absented themselves. In this view of the case, (which the Court had intimated to be the true question to be argued,) it was unnecessary, he said, to endeavour to support *The King* v. *Norris* (*b*), which he admitted had been shaken by what had fallen from the Court in *The King* v. *Butler* (*c*). The words of the statute are large

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FORTESCUE J. agreed in all, and said, that if a mayor and other members of a corporation should meet to do some corporate act, and if they should go half way in the business; yet, if the mayor leaves them; if they proceed after and make an election, it is void; for the mayor is the person who is to preside, and as the mayor has a power to refuse to meet, it is as illegal to proceed after he breaks up and leaves them, as if they should proceed without being assembled by him: and he cited *Whitehall*'s case to this point.

RAYMOND J. agreed in all, and said, if the members of a corporation are summoned to appear for one particular purpose, they cannot proceed to any other matter without the unanimous consent of the whole body. But if every member be present and consent, it is good; though they were not assembled for that very purpose.—And a verdict was found for the defendant.

(*a*) Vide *Rex* v. *Hawkins*, 10 *East*, 211.

(*b*) 1 *Barnard*. 385. (*c*) 8 *East*, 392.

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enough to include the case of a change in the presiding officer during an election; and such a case is expressly within the mischief intended to be remedied. As in *The King* v. *Pool*(*a*), an election began on the charter-day, and continued to the next day by adjournment, was held good under the statute. Whether the mayor or chief officer absent himself altogether, or be present in the first instance when the elective assembly is formed, and then depart before the election is concluded, it is precisely within the same mischief; and if the remedy be not extended to both cases, as the words are large enough to include both, the statute may be altogether evaded: for the head officer, intending to prevent an election, will attend and hold the court, and then depart or dissolve the meeting. But the statute expressly provides that if the mayor absent himself, (which includes as well an absence pending the proceedings as an entire absence,) the person next in place and office to him shall hold the court or preside in the meeting, and have the *same power and authority in all respects therein* as belongs to the mayor, &c. *or for doing any other act necessary to be done in order to such election*. These latter words were intended to meet every contingency where the regular presiding officer should [89] desert or neglect, his duty, from whatever cause it may arise. Then, as to the want of objection at the time to the mayor's dissolving the assembly by those who remained behind, it was not necessary to object, because the act was illegal and without any authority, and he was guilty of an offence in so doing; or at least he acted erroneously; for he was bound to know that *Spicer*'s title was good, as it was afterwards determined to be in this court. [Lord *Ellenborough* observed that it could hardly be said that the mayor was guilty of an offence in what he did. The validity of *Spicer*'s election was a point of great nicety, on which this Court deliberated; and even now the matter is sub judice upon a writ of error. The presumption indeed is that the mayor was wrong, and that this Court was right; but a court of error may ultimately think otherwise. The pinch of the case is, that those who relied at the time on the validity of *Spicer*'s vote did not give notice that they meant to proceed with the election, notwithstanding the determination of the mayor. On the contrary they appeared to acquiesce in

(*a*) *Rep. temp. Hard.* 23. 27. *Cun.* 11. 15.

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the breaking up of the meeting, and then, when the rest of the corperators were gone away, they proceeded with the election. Supposing it then to be ever so clearly established that an election could be completed under one presiding officer which had been begun under another; how can you get over the difficulty in this case?] It was the duty of all to remain and finish the election; and if the statute warrant and require this, it will be a good election, though the parties did not insist upon it at the time, and even though they had supposed that the election was good under the charter.

Lord ELLENBOROUGH C.J. As the Court are of opinion with the prosecutor on the last point, it is unnecessary to hear his counsel in reply. Assuming it to be clear, (though the point has never been judicially decided,) that an election begun under one presiding officer, as by the nomination of the two persons out of whom the burgesses were to choose one, could be completed by such choice made under another, after the departure of the first, and the breaking up of the meeting, as far as depended upon the act of the first presiding officer; the question still remains whether the election of the defendant, under the circumstances which took place on this occasion, can be supported. An assembly was regularly convened for the purpose of nominating and electing a new mayor, over which the then mayor presided. He declared that the persons with whom the power of nomination rests were divided 3 and 3, and consequently that no election could be made; and thereupon he directed proclamation to be made for dissolving the assembly. Nobody objected at the time to all this; still less was any notice given, that if the mayor departed, those who chose to remain would notwithstanding proceed and complete so much of the election as still remained to be made: but they suffered the mayor to depart, and many of the freemen with him, upon a supposition that no farther proceedings would be then had. This silence and acquiescence, at the time, of those who afterwards proceeded to make an election, operated as a surprise and fraud upon the other electors; and therefore the election made by them under such circumstances cannot be borne out by the statute. [90]

GROSE J. It is impossible to support an election which was proceeded in by a part only of the electors who remained be-

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hind after the rest were gone away, in consequence of a dissolution of the assembly to which no * objection was made at the time. An election so made was in fraud of those who went away. Those who objected to the dissolution of the assembly ought to have given notice, that they should remain notwithstanding, and still proceed with the election.

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LE BLANC J. The election of the defendant cannot be supported on the facts here stated, either under the charter, without calling in aid the statute, or on the statute. For supposing that it was an election under the charter, and that the case of *The King* v. *Norris* could be supported in all its parts, still this would not be a valid election, because that case only shews that an assembly once lawfully constituted may proceed on the business which was *begun* when the mayor was present, notwithstanding his subsequent departure: but here the business which began under the mayor had been *ended*; for the mayor as presiding officer had decided that the votes being equal no election could be had; and no objection was made to that decision: and then he directed proclamation to be made for dissolving the assembly; and no objection was made to that, nor any notice given by any persons that they meant to proceed in making an election. Then when the mayor was gone away, and a number of the burgesses also departed, considering the assembly as dissolved, and the rest proceeded to make an election; this was not a continuation of the business begun before the mayor, but an attempt to continue that which had been concluded. Then considering the case upon the statute, and that if the mayor absent himself, the next in place and order present may preside; yet here the mayor did not absent himself, but did preside, and as presiding officer determined upon the validity of the votes, that they were equal, and that no election could be had; and then dissolved the assembly; and all this without any objection made at the time: and in consequence of such dissolution of the assembly, unobjected to as it appeared, many of the freemen went away, and then the rest of them made the election in question: this was no election within the aid of the statute; which never meant to protect elections made by surprize and fraud.

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BAYLEY J. I do not think that the first point made by the prosecutor's counsel is clear. I think it is extremely probable

bable that the intention of the Legislature in this statute was that in case of the mayor's absenting himself during the election, the next in place and order to him might preside and go on with it, and that the wrongful act of the mayor in going away pending the proceeding would not defeat an election afterwards made by the body. But here the mayor presided at the meeting, and in the course of the proceeding a fair question arose, on which the mayor, without fraud, bonâ fide as we must presume, decided that there was an equality of votes, so that no persons could be put in nomination for the election: and this must be taken to have been acquiesced in at the time by there being no objection then made to it. The meeting was then declared to be dissolved; on which the mayor and two aldermen and many of the common burgesses were suffered to depart, without notice of any objection, after which the others proceeded and elected the defendant. This I think was a fraud upon all those who were suffered to depart; and therefore the election cannot be supported.

Judgment of ouster.

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The KING *against* The Inhabitants of ELVET.

Wednesday, April 26th.

A person renting the tolls and residing in the turnpike-house erected by order of the commissioners appointed by the 30 *G.* 3. *c.* 67. for paving, lighting, and regulating the streets of *Durham*, and for other local objects, cannot gain a settlement in the parish, by the general turnpike act 13 *G.* 3. *c.* 84. *s.* 56.

TWO justices by an order removed *Frances* the widow of *John Taylor*, and her five infant children, by name, from the township of *West Rainton* to the township of *Elvet*, in the county of *Durham*. The Sessions, on appeal, confirmed the order, subject to the opinion of the Court on this case. By an act of the 30 *G.* 3. *c.* 67. intitled, "An act for paving, light-" ing, watching, and regulating the streets, &c. of the city of " *Durham* and borough of *Framwelgate*, and the suburbs " thereof and streets thereto adjoining; for removing and " preventing nuisances, &c. therein; for widening and ren-" dering more commodious several of the said streets, &c. " and for regulating and improving the markets within the " said city and suburbs;" certain *commissioners* are appointed for carrying the above purposes into effect; and to enable them so to do, the act authorises them to take certain tolls, and

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and appoint proper persons to collect them in the streets of *Durham*: by the 32d clause it is provided, that if, instead of collecting the said tolls in this manner, it should appear to the commissioners more expedient to collect the same at toll-houses or turnpikes, it should be lawful for them to erect two turnpikes on the great north road, one to the south, the other to the north of the city, for the purpose of collecting the tolls; and that the right and property of all such turnpikes and toll-houses should be vested in the commissioners. And the 36th clause empowers the commissioners to lease the tolls. By virtue of this act the commissioners erected a turnpike-gate [94] and house for collecting the tolls at a place called *Farewell Hall*, upon the great north road within *Elvet*, and in 1796 demised the same with the tolls to one *Reather* for three years, who on the 23d of *August* 1796 leased the same by indenture to *Elizabeth* and *John Taylor* for three years, at the yearly rent of 202*l*. Under this lease *John Taylor* alone entered into the toll-gate and house, and continued to reside there with his family, collecting the tolls for the said term. The tolls were collected and appropriated to the general purposes of the act. Neither the tolls, nor the gatehouses, nor the respective lessees were assessed to the poor's rate. The Sessions were of opinion that the said gates and toll-houses were not such turnpike gates and houses as are within the meaning of the 56th sect. of the general turnpike act 13 *G.* 3. *c.* 84.: and that therefore the pauper's husband acquired a settlement in *Elvet*, by residing at the *Farewell Hall* turnpike, and renting the said tolls and gate-houses there.

By *s.* 56. of the general turnpike act, "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 removeable from such toll-house till actually chargeable. And no such gate-keeper, &c. shall thereby gain any settlement.

Hullock, in support of the order of Sessions, contended that the above-mentioned clause in the general turnpike act was confined to toll-gate keepers, &c. appointed by the *trustees* of *turnpike roads* to collect the tolls for such turnpike *roads*: whereas the tolls here were collected by order of the *commissioners* appointed by a local act for various local purposes, amongst

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amongst others for repairing the *streets* of the city of *Durham*, and not for the repair of * turnpike *roads* within the meaning of the general turnpike act.

Littledale contrà was stopped.

Per Curiam. There is no difference in effect, though the appellation of *turnpike road* does not occur in the local act: the one is a stone road, and the other a gravel road: and every character belonging to a turnpike road belongs as well to this. The commissioners are trustees for the repair of the roads: and this case is within the prohibition of the 56th clause in the general turnpike act.

Order of Sessions quashed.

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The KING *against* The Inhabitants of CHRISTOWE.

Wednesday, April 26th.

A parish apprentice, who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture; this being only evidence of the first master's consent to the service with the second under a new and distinct contract of apprenticeship.

ELIZABETH PAIN, a pauper, was removed by an order of two justices from the parish of *Moreton-hampstead* to the parish of *Christowe* in the county of *Devon*. On appeal to the Sessions, the respondents proved a settlement by birth in *Christowe*. In answer to which the appellants proved, that at the age of 7 years the pauper was bound an apprentice by the parish of *Christowe* to *William Ponsford*, with whom she lived there till she was 11 years old. They then produced a written paper purporting to be an assignment of the pauper by *Ponsford* to *John Smith* then of the same parish, with whom she lived in *Christowe* for some time, and afterwards lived with him in the parish of *Hennoch* for several * years till her apprenticeship expired. The following is a copy of the said written paper legally stamped: "This indenture made the 23d "of *January* in the 37th *G.* 3., &c. 1797, between *Elizabeth* "*Pain* and *William Ponsford* of the parish of *Christowe* in "the county of *Devon*, farmer, of the one part, and *John* "*Smith* of the parish and county aforesaid, labourer, of the "other part; witnesseth, that the aforesaid *Wm. Ponsford*, "together with the consent and approbation of the said *Eliza-*

"*beth* * [96]

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The KING *against* The Inhabitants of CHRISTOWE

" *beth Pain*, doth put and bind the said *Eliz. Pain*, and by " these presents hath put and bound the said *Eliz. Pain*, an " apprentice unto and with the aforesaid *John Smith*, with " him, after the manner of an apprentice, to dwell, serve and " abide from the day of the date hereof until she be full 21 " years of age. During all which term the said apprentice " her master faithfully shall serve, &c. (and so it proceeded " in the common form of an indenture of apprenticeship). " And the said *J. Smith* master of the said apprentice, for " and in consideration of the sum of 5*l*. 10*s*. to him in hand " paid, &c. and for his good will towards the said *Eliz. Pain*, " his apprentice, doth by these presents for himself, his exe- " cutors, &c. covenant with the said *W. Ponsford* and *Eliza-* " *beth Pain* to teach and instruct the said *Eliz. Pain* the ap- " prentice in all manner of housewifery work; and also shall " provide for her as well in sickness as in health sufficient " meat, drink, and apparel, washing, and lodging, and all " other necessaries during the said term. In witness," &c. (Signed and sealed by *Wm. Ponsford*, *Elizabeth Pain*, and *John Smith*;) and the consideration money and receipt for the duty for the same was indorsed and acknowledged on the back of the instrument by the proper officer. The counsel for

[97] the appellants admitted that the above instrument was not good as an assignment of an apprentice; but they offered it only as evidence of the first master's consent to the pauper's living with the second master. It was contended on the other hand by the counsel for the respondents, that being void as an assignment, which on the face of it it purported to be, it could not be received in evidence at all: and the Court being of that opinion, confirmed the order.

Harris and *Bray*, in support of the order of Sessions, contended, that as this instrument was not good as an assignment of the parish apprentice under the stat. 32 *G*. 3. *c*. 57. *s*. 7. it was bad, and wholly inoperative as a new indenture of apprenticeship, which it purported to be. That branch of the statute, reciting that persons were frequently compellable to take a greater number of parish apprentices than they could maintain or employ, and were therefore forced to place out or assign them to others; and that it was proper that such assignment should be *legally* made under the inspection and control of the magistrates, as well for the benefit of the apprentice, as

that

that the original master may be discharged from his covenants: and that it was fit that the person to whom such assignment should be made, and also the apprentice, should be subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; requires the assignment of the apprentice to be in writing in the form or to the effect there mentioned, with the assent of two justices under their hands; by which it was evidently meant to exclude any other manner of assigning an apprentice. The parties therefore to this instrument, which follows the old form of an indenture of apprenticeship under the st. 5 *Eliz.* c. 4. and not under the st. 43 *Eliz.* c. 2. with the concurrence of the parish officers and magistrates, must be taken to have contemplated an entirely different apprenticeship from that under which the apprentice was bound to her first master; which cannot now be converted into an assent by him that she should serve the second master under the first indentures. And if this attempt be countenanced, it will enable masters to continue to make a traffic of their parish apprentices as before, which it was the object of the late statute to put an end to. The instrument in question was no continuation of the original apprenticeship, but formed an entirely new engagement, which neither the first master nor the apprentice was competent to enter into.

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East, contrà, insisted that the question must be considered the same since the act of the 32 *G.* 3. as it was before under the stat. 43 *Eliz.* c. 2. It was equally incompetent to the first master to whom a parish apprentice was bound under the stat. 43 *Eliz.* legally to assign such apprentice without the consent of the parish officers, parties to the binding, as it is now under the stat. of *G.* 3. without the concurrence of the magistrates; and without such consent and concurrence the original binding remains in full force under the one statute as well as the other: but yet it has been decided in a long train of cases, that the assignment of a parish apprentice, whether by parol or in writing, though void under the stat. of *Elizabeth*, as made without the concurrence of the parish officers, is yet good to confer a settlement on the apprentice serving the second master in another parish, on the ground of the particular consent of the first master to the service of the apprentice with the second; which in contemplation of law is to be considered as a virtual service of the first master. And he referred particularly

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ticularly to the cases of *Rex* v. *St. George Hanover Square* (*a*), *Rex* v. *Tavistock* (*b*), *Rex* v. *St. Petrox* (*c*), *Rex* v. *Clapham* (*d*), and *Castor* v. *Aicles* (*e*); all of which were cases of parish apprentices assigned in fact, but without proper authority, who nevertheless gained settlements by serving the masters to whom they were so assigned, as serving them by the consent of the original masters; notwithstanding the same objection in substance was raised in each of those cases as here. In the first of those cases, Lord *Hardwicke*, who at first was in favour of the objection, ultimately concurred in overruling it; saying that they must take the apprentice to have been serving in the other parish upon the business of the first master, *because he consented* to such service. The same principle was acted upon, and for the same reason, in *Rex* v. *East Bridgeford* (*f*), though that was not the case of a parish apprentice. And in *Castor* v. *Aicles* it was laid down most distinctly, that though the apprentice were not assignable, yet the assignment amounted to a consent between the two masters, that the child should serve the latter: "So that this assignment is good by way of covenant, though it be not an assignment to pass an interest." This mode of gaining a settlement stands upon the stat. 3 W. & M. c. 11., which enacts that "if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, *such binding and inhabitation* shall be adjudged a good settlement." Now here there is a binding subsisting in point of law under the first indenture, and an inhabitation for the last 40 days of the apprentice by the consent in fact of her master in
[100] the parish of *Hennock* with *Smith*. Such consent is manifestly expressed in the instrument in question, which in its tenor is no more than the ordinary form of an indenture of apprenticeship; and its inefficiency in point of law to absolve the first master from his legal obligation to provide for his apprentice, and to transfer the obligation to the second, cannot make it less *a consent in fact* to the particular service, which it was the very object of the instrument to enforce in a more binding form than by mere parol.

Lord ELLENBOROUGH C. J. This instrument purports to be a new and original binding of an apprentice by indenture

(*a*) *Burr. S. C.* 12. (*b*) *Ib.* 578. (*c*) *Ib.* 248. (*d*) *Ib.* 266.
(*e*) 1 *Salk.* 68. and 1 *Ld. Ray.* 685. (*f*) *Burr. S. C.* 133.

by

by *Ponsford* to *Smith*: it does not recognize or refer to the original indenture of apprenticeship as being an assignment of the apprentice under that indenture; nor does *Ponsford* thereby assume to have any right to assent to the apprentice serving another master under any former indenture; but only to bind her de novo. How then can I say that this was a consent on his part that she should serve *Smith* as a continuation of the relation of apprenticeship which she had contracted before with him, *Ponsford*. This would be to intend a consent contrary to what appears upon the face of the instrument to have been the intention of the contracting parties. I should be sorry to overturn the decided cases; but it appears to me that this is distinguishable from them; and that there is no case where the first master affected to bind his apprentice to another de novo by an original indenture, in which his consent to a service as under the former binding has been inferred: and therefore, without disturbing those cases, but leaving them as we find them, I do not think that this instrument [101] proved the consent of *Ponsford* to the service with *Smith* under the original binding.

GROSE J. assented.

LE BLANC J. The leaning of the former decisions was to support every case of settlement by implying the assent of the first master to the service with the subsequent master; but then it must be a consent to the service with the new master under a recognition of the original binding; and there is no case where the settlement has been held to be gained under an entirely new binding by an indenture of apprenticeship: and if we were to hold this to be sufficient, it would be carrying the doctrine of constructive assent to a service under the original binding further than any of the former cases.

BAYLEY J. In this case the apprentice never undertook to serve the second master upon the terms of the original indenture of apprenticeship to the first master, nor did the first master consent to any such service.

Orders confirmed.

1809.

Friday, April 28th.

One having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in which the grant of the former patent was recited; and the latter patent contained the usual condition, that it should be void if the patentee did not, within one month, inroll a specification *particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed*: held that a specification containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition.

HARMAR *against* PLAYNE and Another.

THE following case was stated for the opinion of this Court by the Lord Chancellor. By letters patent of the 20th of *March* 1787, the King granted to *John* **Harmar* (the plaintiff) for 14 years the sole privilege of making, using and vending a certain machine by him invented for raising a shag on all sorts of woollen cloths, and cropping or shearing them, which together come under the description of dressing woollen cloths, and also for cropping and shearing of fustians: with the usual proviso or condition for avoiding the patent on failure of inrolling a specification. In pursuance of this proviso *Harmar* duly inrolled a specification of the said invention, with drawings of the machine in the margin thereof. On the 29th of *March* 1794 his majesty granted another patent to *Harmar*, whereby, after reciting that *Harmar* had obtained letters patent of the 20th of *March* 1787, authorizing him to make, use, and vend his invention of a machine for raising a shag on all sorts of woollen cloths, &c. for 14 years; and further, that he had invented considerable improvements in the said machine, for which improvements in the said machine he prayed his majesty's letters patent for the exclusive enjoyment thereof for 14 years, pursuant to the statute; the letters patent therefore granted to him the sole privilege and authority to make, use, and vend *his said invention*, and have the whole profit thereof. The letters patent also contained a proviso, that if *Harmar* should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in the Court of Chancery within one calendar month next and immediately after the date of the said letters patent, then they should become void. In pursuance of this proviso *Harmar* did in due time inroll a specification in Chancery, with drawings of the machine in the margin thereof; the introductory part of which † specification is as follows: "To all, &c. I *John Harmar* of *Sheffield*, send greeting

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" greeting. Whereas his majesty by his letters patent dated " the 29th of *March* in the 34th year of his reign, hath granted " to me especial licence and sole privilege, &c. that I, my " executors, &c. and assigns, at all times during the term of " years therein expressed should and lawfully might make, " use, and vend *the machine by me invented* and found out for " raising a shag on all sorts of woollen cloths, &c. (as before) " within *England*, &c.; and that I should enjoy the whole " profit and benefit, &c. of the said invention for 14 years " from the date of the said letters patent, according to the " statute, &c. And whereas in the said letters patent there " is a proviso or condition, that if I *John Harmar* should not " *particularly describe and ascertain the nature of the said in-* " *vention, and in what manner the same is to be performed*, by " an instrument in writing under my hand and seal, and cause " the same to be inrolled in Chancery within one calendar " month next after the date of the said letters patent, then " the said letters patent, &c. should become void.—Now " know you, that in obedience to the said letters patent, and " proviso, &c. I *John Harmar* do by these presents particu- " larly describe and ascertain the nature of the said invention, " referring to the drawings in the margin of these presents, " which I explain as follows." The specification then proceeds under different letters of the alphabet, corresponding with similar letters on the drawing, to set forth a full description of *the whole* of the machine: and the specification ends with these words: " And I *John Harmar* do hereby declare " that my said invention is intended to be worked in the man- " ner hereinbefore particularly mentioned." It was admitted [104] by the defendants that the improvements for which the second patent was granted are included in the general description of the second or improved machine, as set forth in the specification of the second patent; and that the second specification does contain a full and proper description of *the whole machine in its improved state*. But the second specification does not in any manner point out or describe the improvements upon the former machine by any verbal description, or by any delineation or mark in the drawing; and which drawing is not a representation of the *improvements alone*, but of the *whole machine in its improved state*; nor are the improvements in

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any manner substantively and individually explained by the second specification; nor is the machine in the improved state contradistinguished from the state and condition of it under the former patent by any explanation whatever, nor by any delineation or mark in the drawing; but what the former machine was, and what were the said improvements thereupon, are ascertainable and appear by referring to the first specification and the drawings thereon, and comparing the second specification and the drawings thereon with the same. The defendants insisted that the second specification was not a due performance of the condition of the second patent: and the question therefore for the opinion of the Court was, whether the proviso or condition in the letters patent of the 29th of *March* 1794 had been duly performed by the inrolment of the said specification thereof.

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Holroyd, for the plaintiff, contended that the condition had been duly performed. The patent, and the specification referring to it, are to be construed together as one instrument, as in *Hornblower* v. *Boulton* (*a*); and the second patent recites the first, and that the patentee had invented certain improvements in the former patent machine, for which improvements another patent was prayed, which the king grants. The first patent and specification being inrolled, the public must be taken to know their contents; or at least the second patent, by referring to the first, directs the party to the source from whence that information may be obtained in the manner required by law. The very nature of the second patent, which is for *improvements* in a machine for which a former patent had been granted, points to such former patent and the specification annexed: there need not be an express reference: and by comparing the two patents and specifications together, the party seeking for information, as to what he may lawfully make without the licence of the patentee, must necessarily see for what particular parts of the improved machine the second patent was granted; and the patentee was not bound to state in his second specification that which he had before stated separately in his first, and which the subject was bound to know. A specification need not contain every thing at length relating to the subject-matter, but may refer to other public instruments, or to general

(*a*) 8 *Term Rep.* 95.

sources

sources of knowledge, which every person of reasonable skill and information on the subject may fairly be presumed to know. There is a constant reference in these instruments to drawings which accompany them, and without which the description of the particular invention would not be intelligible. [Lord *Ellenborough* C. J. asked whether it were meant to be contended that a specification might refer to such and such articles in *Chambers*'s Dictionary for a description of one part of a machine, and to certain other descriptions in other books for other parts, and so on; which would lead to great inconvenience, and make the new invented parts described wholly unintelligible to those who were not furnished with those works; when the object of requiring a specification to be inrolled seemed to be to enable persons of reasonable intelligence and skill in the subject-matter to tell from the inspection of the specification itself what the invention was for which the patent was granted, and how it was to be executed.] The public must take notice at their peril of all patents on record, and the last of them to which the specification in question belongs refers to the other. No person can be misled by the specification of a patent for an *improved* machine describing the *whole* machine *so improved;* it is even more convenient than merely stating what the improvements are; which would be a literal compliance with the condition, but far less intelligible; for such a bare method of describing the new invention would require a much higher degree of knowledge and memory of the subject-matter, and of every former patent, than this which describes the whole combination of new and old parts, forming the entire improved machine. The patentee has only an exclusive right to the *whole combination* for which his patent is granted, and the use of particular parts only is no breach of his rights: the description therefore of the particular improvements, distinct from the parts in general use before, would be useless to all, and less intelligible to many. Patents were formerly considered as injurious monopolies, and were therefore construed by the Courts with great strictness; but now when a more liberal and just view of the subject prevails, they are properly considered as highly advantageous to the public, by holding out an encouragement to ingenious men to disclose their inventions; and Lord *Eldon*, when presiding in *C. B.*, said, in a case of *Cartwright* v. *Arnott*, in *Easter* term 1800, in that court, that they

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were to be considered as bargains between the inventors and the public, to be judged of on the principle of keeping good faith by making a fair disclosure of the invention, and to be construed as other bargains.

Lord ELLENBOROUGH C. J. The difficulty which presses most is, whether this mode of making the specification be not calculated to mislead a person looking at it, and induce him to suppose that the term for which the patent is granted may extend to preclude the imitation of other parts of the machine than those for which the new patent is granted, when he can only tell by comparing it with some other patent what are the new and what are the old parts: and if this may be done by reference to one, why not by reference to many other patents, so as to render the investigation very complicated? It may not be necessary, indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement; but on many occasions it may be sufficient to refer generally to them. As in the instance of a common watch; it may be sufficient for the patentee to say—take a common watch and add or alter such and such parts; describing them. And when Lord *Mansfield* said (*a*) that the meaning of the specification was that others might be taught to do the thing for which the
[108] patent was granted, it must be understood to enable persons of reasonably competent skill in such matters to make it; for no sort of specification would probably enable a ploughman, utterly ignorant of the whole art, to make a watch.

Wetherell, contrà. The proviso in the second patent is express, that the patentee shall "*particularly describe and ascertain* the nature of the *said invention*, (i. e. *the improvements*,) and in what manner *the same* was to be performed, &c.: if that condition be not performed, the patent is declared void. Now it is not pretended that the improvements of the machine, for which alone the second patent was granted, are *particularly described and ascertained* in the specification, but the *whole* machine, including indeed those improvements, is so described, without ascertaining the newly invented parts. But the patent was not for the *whole machine*, but for *a part* only: so that no

(*a*) *Liardet* v. *Johnson*. Sittings at *Westminster* after *Hilary* 1778, *Bull. Ni. Pri.* [76]

person

person looking only to the second specification, or to that and the patent to which it appertained, could inform himself for what parts of the machine that patent was granted: and that knowledge can only be acquired by looking to both the patents and specifications. Unless the alteration or addition to an old machine be bonâ fide an improvement and useful (*a*) to the public, the crown cannot grant a patent for it; and therefore it should appear upon the face of the instrument itself what the improvement is. Mr. Justice *Buller*, in the case of *The King* v. *Arkwright* (*b*), lays down certain rules for the construction of patents, under the 3d and 4th of which the objections to this patent range—"3dly, If the specification be [109] in any part of it materially false or defective," the patent is void. "4thly, The patent must not be more extensive than the invention: therefore if the invention consist in an addition or *improvement* only, and the patent be for the *whole* machine or manufacture, it is void (*c*)." Now here the specification is materially defective, in not ascertaining how much of the whole machine described is the new invention: and though the plaintiff has not taken out this patent for

(*a*) Vide *Bull. N. P.* [77.], *pl.* 4. Rule the 4th.

(*b*) Sittings at *Westminster* after *Trinity* 1785. *Ib.*

(*c*) For this latter is cited (among other cases, in which it was so ruled by Lord *Mansfield*,) the case of *The King* v. *Else*, Sittings at *Westminster* after *Michaelmas* 1785, cor. *Buller* J. The patent there was for a new invented manufacture of lace called French, otherwise Ground Lace. The specification went generally to the invention of mixing silk and cotton thread upon the frame. On the part of the prosecution, it was clearly shewn that, prior to the patent, silk and cotton thread had been used together and intermixed upon the same frame; and the defendant's counsel acknowledged the fact; but said he could prove clearly that the former method of using the silk and cotton thread was quite inadequate to the purpose of making lace on account of its coarseness, and that the defendant alone had invented the method of intermingling them, so as to unite strength with fineness. But per *Buller* J. It will be to no purpose. The patent claims the exclusive liberty of making lace composed of silk and cotton thread mixed; not of any particular mode of mixing it: and therefore, as it has been clearly proved and admitted that silk and cotton thread were before mixed on the same frame for lace in some mode or other, the patent is clearly void, and the jury must find for the crown. Verdict accordingly.

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for the whole machine, yet having obtained his patent for the *improvement* of the machine, he has not made a specification of that improvement, as he was bound by the condition of the grant to do; but has made a specification larger than the patent, upon the face of which the particular improvements cannot be ascertained. In *Turner* v. *Winter* (*a*) it was held that
[110] if the specification were ambiguous, or gave directions which tended to mislead the public, it avoided the patent. It is not enough then that persons of great skill and experience may be able to find out the invention from the specification; but it should be plainly stated, so that a person of reasonable knowledge and experience upon the subject may immediately be made acquainted with the invention. The specification ought to inform the public what the thing is for which the patent is granted, and how it is to be made, and not merely inform them where else that information is to be acquired; for that is not a compliance with the condition. No person applying to the specification of one patent is bound to know that another has been granted. If inquiry be necessary to be made for facts dehors the instrument itself, it is difficult to say where the line is to be drawn: references may as well be made to dictionaries of arts and sciences, philosophical transactions, &c. as to other patents and specifications: the patentee is not to throw on the party inquiring the trouble and expence and loss of time of acquiring the knowledge of his invention by investigation and comparison. The generality of the whole description may render it as ambiguous and difficult to be understood, as the too great generality of the particular terms in *Turner* v. *Winter* did. The public may well imagine from this specification that the plaintiff had a patent for the *whole* machine, when in truth it was only for a part of it. It may be doubtful whether a direct reference to the former specification would have sufficed; but here there is no such reference; but the two instruments are endeavoured to be connected through the intervention of the second and first patents. If there were a succession of patents
[111] for several improvements, ending at different periods, it might be extremely difficult for a person to collect from specifications of this kind the periods when the several inventions would be open to the public. But the true sense of the condition is to give the public direct and complete information of

(*a*) 1 *Term. Rep.* 602.

the

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the manner of executing the invention, without further search or trouble. [*Le Blanc* J. There lies the difficulty; for suppose the specification had merely described the improvements, such as the addition of a crank or a screw to such or such a part; must not the party still have referred to the original specification, or at least have brought a full knowledge of it with him, before he could understand truly how to adapt the new parts described to the whole machine?] Admitting that there may be some difficulty in satisfying the object of the specification by a mere description of the new parts to be added to the old machine, the patentee would be bound to state so much of the original specification as would make his description of the improvement intelligible; and perhaps the better and safer way would be to state the whole, and then to mark by references the new parts; but in whatever way it be done, the public should be able to ascertain at once, without looking to any other instruments, which are the new parts for which the patent is granted; and no objection could be made to any surplusage of explanation, provided it was not given in a manner to confound the inquirer as to the new invention.

Holroyd, in reply, said, that if references to other instruments were made in such a manner as to obscure the subject and confound the inquirer, that would avoid the patent: but so far as the public are interested in having a perspicuous description of the machine in its most improved state, it cannot be done more effectually than by describing the entire improved machine; and those who are interested in discriminating between the old and new parts can have no difficulty in doing so by comparing the two specifications; the latter of which, through the medium of the patent, having express reference to the former one; and every person being bound at his peril to notice these inrolments, and being liable to an action for infringing the patent, without having personal notice of it. Admitting, therefore, that a patentee cannot refer an inquirer to books or other writings, which he may or may not be able to obtain, or can only obtain by paying for it, or by the indulgence of another; yet here he is referred to a public source of information appropriated to this express purpose, which the patentee himself has afforded, and which the other has a right to have. [*Bayley* J. Suppose the former

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mer patent and specification to be lost by accident; how is the public to know from the specification of the second patent how much of the whole improved machine they may use?] The law presumes that all records will be properly preserved. The same difficulty, however, would occur if a drawing annexed to the specification in question were lost: and indeed in the case put, there would be an advantage to the public in this mode of specification more than sufficient to counterbalance the loss of the particular information, as thereby the knowledge of the whole improved invention would be preserved. The greater difficulty would be thrown upon the patentee himself in shewing what the precise improvement was, in an action for the infringement of his patent: his claim of monopoly being confined to the whole combination described. As to the labour or difficulty of comparing the second with the first specification, in order to find out the invention, some labour and difficulty of this sort must always occur where drawings are referred to annexed to the specification; they must be read and compared together, and the party must bring his general scientific or mechanical knowledge, and perhaps other general information, to bear upon the subject. If the first specification had been actually recited in the second, there must have been the same labour of comparison as in this case: the only difference here is, that the party must refer to another parchment on record.

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Lord ELLENBOROUGH C. J. I own I was disposed to think that it was a departure from the terms of the proviso for the patentee merely to tell the inquirer, who came to consult the specification, how he might learn what the invention was, instead of giving him that information directly. But I feel impressed by the observation of my Brother *Le Blanc*, that the trouble and labour of referring to and comparing the former specification with the latter would be fully as great if the patentee only described in this the precise improvements upon the former machine. Reference must indeed often be necessarily made in these cases to matters of general science, or the party must carry a reasonable knowledge of the subject matter with him, in order clearly to comprehend specifications of this nature, though fairly intended to be made. We will, however, consider of the case, and certify our opinion.

The

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The Court afterwards certified to the Lord Chancellor, that they had heard the case argued by counsel, and were of *opinion, that the proviso or condition in the letters patent, bearing date the 29th of *March* 1794, had been performed by the inrolment of the specification thereof set forth in the case.

*[114]

(Signed) ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

ESDAILE and Others *against* SOWERBY and MELLER.

Tuesday, May 2d.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendants, as indorsers of a bill of exchange dated the 18th of *November* 1807, drawn at three months date by *Cheetham* upon *Hill* for 200*l.*, payable to the defendants' order, and by them indorsed to the plaintiffs, and accepted by *Hill*, payable at the banking-house of *Were, Bruce* and Co. in *London*. Plea, the general issue. At the trial at *Guildhall* the jury found a verdict for the plaintiff, subject to the opinion of the Court on this case.

Cheetham, the drawer, being resident at *Manchester*, drew the bill in question upon *Hill* the acceptor, who was his clerk or agent resident in *London*, for the purpose of selling goods for him, but carried on no business on his own account, nor had he any property of his own. The defendants got the bill discounted by *Moss, Dale*, and *Rogers*, bankers in *Liverpool*, who remitted it to the plaintiffs their town bankers, who gave them credit for it in account. The bill was regularly presented for payment at the house of *Were, Bruce* and Co. on *Saturday* the 20th of *February* when it became due, but was dishonoured. * When *Cheetham* gave the bill to the defendants he owed them above 200*l.* *Hill* had effects of *Cheetham* in his hands at that time and afterwards, but not when the bill became due.

Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer and of the insolvency of the acceptor, before and at the time when the bill became due; and within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders communicated such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill, and who had transmitted it to the holders in *London*; yet that did not dispense with such holders' giving *notice* of the dishonour *in due time* to the indorsers.

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Cheetham stopped payment on the 24th of *January;* became bankrupt before the bill was due; and was in the *Gazette* as a bankrupt on the 26th of *February*. He acquainted the defendants with his situation at the time of his stopping payment, and told them that any paper which became due after that time would not be paid. They also knew that *Hill* had no funds when the bill in question was running but what *Cheetham* furnished him with. *Cheetham* on the 14th of *January* gave them some other paper to cover outstanding bills, and told them at the same time that the bill in question would not be paid. The other paper which was then delivered to the defendants turned out wholly unproductive. The plaintiffs sent back the bill in question from *London* by the post on *Monday* the 22d of *February*, but by mistake sent it to the bank at *Birmingham* instead of to *Moss*, *Dale*, and *Rogers* at *Liverpool*. The bill was returned by the *Birmingham* bank to the plaintiffs in *London* on the 25th, when they remitted it by the same post to *Moss*, *Dale* and *Rogers* at *Liverpool*, where it was received by them upon the 27th, and immediately sent to the defendants, who refused payment. The defendant *Meller* called on *Moss*, *Dale* and *Rogers* on the morning of the 25th of *February*, and asked if the bill were returned; and on being told that it was not, *Meller* said, "Gentlemen, I think it necessary to give you notice that I shall hold the parties responsible for this bill wherever the neglect lies." *Moss* said, "You know the drawer and acceptor are insolvent, and therefore I beg you will take such steps as if the bill had been
[116] "returned regularly." And upon *Moss* asking if it were possible the bill could have been paid, and expressing his surprize that it had not been returned, *Meller* answered, "It is impossible the bill can be paid, as both the drawer and acceptor "are insolvent, and bills of the same parties have been dishonoured, and therefore it is impossible the bill can be paid." If the bill had been sent back to *Moss*, *Dale* and *Rogers* on *Monday* the 22d of *February*, it would have reached them on *Wednesday* morning the 24th, twenty-four hours earlier than *Meller* made the above application. *Moss*, *Dale* and *Rogers* held the plaintiffs to be responsible for the bill to them; the neglect, if any, being in the plaintiffs, and not in the house of *Moss* and Co. The question for the opinion of the Court was, whether under the above circumstances the plaintiffs were

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were entitled to recover. If so, the verdict was to stand; if not, then a nonsuit was to be entered.

Lawes, for the plaintiffs, said that the question meant to be agitated was whether *knowledge* in the defendants of the insolvency of the drawer and acceptor of the bill, and that it must have been dishonoured at the time when it became due, were equivalent to actual *notice* given to them of such dishonour by the holders of the bill: but there were several cases (*a*) upon the subject in which the want of notice was held fatal; though this, he said, went farther than any of them: for not only no prejudice had arisen to the defendants from want of the usual notice; *Cheetham* the drawer having given them notice of his [117] insolvency before the bill was due, and the acceptor being known to them to be a mere man of straw; but the defendants had declared their knowledge of all these facts to the plaintiff's agents at *Liverpool* on the day after the very earliest intelligence of the actual dishonour of the bill could have reached them by a regular notice, which was only delayed by accident: and this communication he contended was a dispensation of any other notice.

Park contrà was stopped by the Court.

Lord ELLENBOROUGH C.J. It is too late now to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour. And as to knowledge of the dishonour by the person to be charged on the bill being equivalent to due notice of it given to him by the holder, the case of *Nicholson* v. *Gouthit* is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it.

LE BLANC J. Ld. Chief Justice *Eyre* was much disposed in that case to have dispensed with the notice, but found himself precluded by the authorities.

BAYLEY J. It was said in *Tindal* v. *Brown* (*b*) that *notice* means something more than *knowledge*; because it was competent to the holder to give credit to the maker, &c.

Per Curiam, Postea to the Defendants.

(*a*) Vide *Staples* v. *Okines*, 1 *Esp. N. P. Cas.* 333. *Nicholson* v. *Gouthit*, 2 *H. Blac.* 609. *Whitfield* v. *Savage*, 2 *Bos. & Pull.* 277., and *Clegg* v. *Cotton*, 3 *Bos. & Pull.* 239. And see *Russel* v. *Langstaffe*, *Dougl.* 515. and *Warrington* v. *Furbor*, 1 *East*, 245.

(*b*) 1 *Term Rep.* 169.

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Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an assumpsit, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before.

HALL *against* ODBER.

THE plaintiff declared in *Hilary* term 1808 upon a judgment obtained by him against the defendant, in the court of King's Bench at *Quebec* in *Lower Canada*, in *February* 1807, for 8096*l.* 15*s.* 8½*d.* with interest at 5*l.* per cent. from the 31st of *October* 1805. There were also counts for goods sold and delivered, for interest, for money lent, paid, had and received, and on an account stated. The defendant pleaded the general issue; and at the trial before Lord *Ellenborough* C. J. at *Guildhall* after last *Trinity* term, a verdict was found for the plaintiff for 9193*l.* 12*s.* 8½*d.*, subject to the opinion of the Court on the following case.

The plaintiff a merchant in *London*, and the defendant a merchant in *Canada*, had had various dealings together, and about the middle of 1806 the plaintiff brought an action against the defendant in the court of King's Bench at *Quebec* for 8096*l.* 15*s.* 8½*d.*, to which the defendant pleaded the general issue; and a cross cause, called in that court an incidental cause, was instituted there by the defendant for money alleged to be due to him. The following judgment was proved in evidence on the part of the plaintiff, entitled, "Province "of *Lower Canada*, district of *Quebec*. King's Bench, Su- "perior Term, *Friday* 20th *February* 1807, C. C. *Hall*, plain- "tiff, *v. T. T. Odber* defendant, and vice versâ. The Court "having duly examined and considered the pleading, proofs, "&c. as well in the cause in chief, as in the incidental cause, "&c.; it it considered and adjudged that the said C. C. *Hall* "do recover from the said *T. T. Odber* 8096*l.* 15*s.* 8½*d.* "* sterling, with interest thereon at five per cent. from the "31st of *October* 1805 until perfect payment and costs to "be taxed: but *execution is hereby stayed until the further* "*order of the Court*. And the Court declares that this judg- "ment so pronounced for the plaintiff in this cause in chief "shall be hereafter defeazanced and reduced by a deduction "of such sum as the said Court shall adjudge to the said "incidental plaintiff upon the final hearing of the said inci- "dental cause; reserving to the said C. C. *Hall* such recourse "for the residue of his demand as he may legally have, "&c.

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" &c. And it is further considered by this Court, that it be " permitted to the said incidental plaintiff to sue out with all " due diligence a commission for the examination of the inci- " dental defendant, and such necessary witnesses on the part " of the said incidental plaintiff as may be resident in *Great* " *Britain*, or elsewhere without this province, upon interroga- " tories and cross interrogatories to be duly filed, &c. And " in order that the said incidental plaintiff may have a reason- " able time allowed him to prove his demand, the Court doth " grant six calendar months from the date of this judgment " for the return of such commission. And the Court doth re- " serve its judgment, and all further directions upon the ex- " ceptions or demurrer filed by the incidental defendant in the " said incidental cause, until the final hearing of such cause." The defendant having arrived in *England*, the plaintiff on the 3d of *July* 1807 sued out a bailable writ against him for 5000*l.*; upon which the defendant was arrested on the 8th of *July* 1807, and committed to the King's Bench prison on the 24th of the same month, being within the six calendar months from the day of the beforementioned judgment at *Quebec*; no notice of any commission or proceeding in the incidental [120] cause having then or since been given by either party. The plaintiff also gave in evidence an account current between him and the defendant, signed by the defendant, commencing with a balance to the defendant's debt, as due to the plaintiff on a former account up to the 1st of *January* 1805, of 14,664*l.* 16*s.* 2*d.*; and after various items an each side of such account, concluding with a balance due to the plaintiff on the 31st of *October* in the same year of 8096*l.* 15*s.* 8½*d.* And no other evidence was given at the trial. The question for the opinion of the Court was, whether the plaintiff were entitled to recover either on the beforementioned judgment, or on the other evidence, notwithstanding such judgment had been adduced in proof. If he were, the verdict was to stand: if otherwise, a nonsuit was to be entered.

Marryat for the plaintiff, in answer to the expected objection on the part of the defendant, that this was only an interlocutory judgment, said it was immaterial whether it were interlocutory or final: if final, the action is sustainable on the judgment: if not final, then at most it is only evidence of an action

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action depending in an inferior court, and therefore is no bar, nor could it even have been pleadable in abatement (*a*), to the plaintiff's recovering upon the account stated. In fact however the judgment in the principle cause is final as to the debt due from the defendant to the plaintiff, on which sum interest is to be calculated: and only execution is stayed until a certain time, to give the *incidental plaintiff* (the defendant in this and in the original action) an opportunity of establishing
[121] his counter demand; which if he had succeeded in doing, it may be supposed that the provincial court would only have allowed execution to be sued out for the balance. But no such counter demand appears now to exist; and if it had, it would have been competent for the defendant to have set it off in this action. With respect to this action having been commenced before the six calendar months allowed to the defendant to prove his counter demand in the incidental cause, it is no objection; for even in the superior courts here, where the allowance of a writ of error in a stay of execution upon a judgment recovered, yet an action may be brought in the mean time upon the judgment either against the principal or against his bail on their recognizance; and it is a common motion in the Court to stay proceedings pending a writ of error. But though the simple contract debt were merged in the judgment, and the plaintiff were concluded from suing upon the judgment before the six months, yet the process and arrest being before the day is no objection, as the declaration was not filed till afterwards (*b*). 2dly, Supposing this were only an interlocutory judgment, then it would not stand in the way of this action on the original simple contract debt. Nor indeed is any foreign judgment more than evidence of a simple contract debt (*c*); for the defendant may impeach the regularity of the proceeding, or shew that it was not well founded; as by shewing that it was obtained in his absence (*d*). The pendency of another suit for the same cause of action even

(*a*) Vide *Sparry's* case, 5 *Rep.* 62.

(*b*) *Best* v. *Wilding*, 7 *Term Rep.* 4. and *Swancott* v. *Westgarth*, 4 *East*, 76.

(*c*) Vide *Walker* v. *Witter*, *Dougl.* 1. and the cases there cited.

(*d*) Vide *Buchanan* v. *Rucker*, 9 *East*, 192.

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in one of the superior courts here is only pleadable in abatement; and the pending of such * action in an inferior court (and every foreign court is to be taken as such) is not pleadable at all.

Copley, contrà. There having been a judgment by a court of competent jurisdiction between these parties, the plaintiff cannot now revert to his original cause of action, but must shape his demand in conformity with that judgment. In this respect there can be no difference between a foreign judgment or any other, whatever there may be in the form of action: the plaintiff who sued in the foreign court cannot be allowed to dispute the validity of the judgment obtained there by himself. Then by the terms of the judgment the plaintiff was prohibited from suing for his debt till a certain time allowed for the defendant to establish his counter demand, (which was in the nature of a set-off to the original action,) and till that was ascertained, it could not be told whether any thing, or how much, were really due to the plaintiff. The plaintiff therefore had no right to anticipate that period; which might afterwards be extended by the provincial court on application and reasonable ground shewn for further delay. In *Sadler* v. *Robins* (*a*) it was held by Lord *Ellenborough* at nisi prius, and afterwards by this Court on motion for a new trial, that assumpsit would not lie on a decree of a foreign court, whereby the defendant was ordered to pay a certain sum to the plaintiff on a particular day, *first deducting thereout the defendant's costs to be taxed by the proper officer*, without shewing that the defendant's costs had been taxed, so as to ascertain what was the sum really due. [Lord *Ellenborough* C. J. That was not a complete judgment as to what was due till the costs were taxed. But this is a complete judgment as to the debt due from the defendant to the plaintiff, and whatever might ultimately be deducted as a counter demand was to be ascertained in a collateral proceeding, which the defendant was at liberty to prosecute within a given time. I thought at first that the two cases were more alike than I find they are.] At any rate the evidence shews that there is still an unliquidated account subsisting between these parties, which will preclude the plaintiff's recovering upon

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(*a*) 1 *Campb. N. P. Cas.* 253.

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the account stated. The parties have met to state their account under the sanction of a court of competent jurisdiction abroad, chosen by the plaintiff himself; the items have been ascertained on the one side, but not on the other; and till that is done, or the proceeding there is closed, it cannot be told how much is due to the plaintiff. And as to the other evidence given of an account stated between these parties in 1805, that is done away by the evidence of the judgment, which shews that that account was again opened and in controversy in 1807. This is different from the case of a judgment recovered here, and a stay of execution on allowance of a writ of error; for this is the case of a *judgment suspended*, in order to ascertain what is the sum really due.

Lord ELLENBOROUGH C. J. There are two counts in the declaration; the one upon a foreign judgment, which is said to be suspended; the other upon an account stated. The judgment is for a sum certain found to be due from the defendant to the plaintiff, with interest thereon from a certain day past; but with a stay of execution till the further order of the Court: and this at first struck me as an incomplete judgment, on
[124] which no action could be maintained here. But we have been pressed with the course of proceedings in our own courts, where upon judgment recovered and a stay of execution upon the allowance of a writ of error, an action lies nevertheless upon such judgment in the mean time; and applications are continually made to the equitable jurisdiction of the court to stay proceedings in such actions pending the writ of error (*a*). No application of that sort was attempted to be made in the present instance, in analogy to such practice of the court in common cases. Can we then say that, taking this to be a final judgment, the plaintiff is not entitled to his action on the judgment, notwithstanding a stay of execution? But supposing this not to be considered as a final judgment it would not stay the plaintiff's action on the simple contract upon the account stated, and still the plaintiff would be entitled to recover upon the evidence on the account stated. In either view, strictly speaking, judgments in foreign courts are not to be considered upon

(*a*) Vide 1 *Tidd, ch.* 20.

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the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but assumpsit lies on them, and it is open to the parties to enter into the question of their regularity; as in the instance mentioned. If then the plaintiff's demand did not pass in rem judicatam, so as to become matter of record, and no objection can be made on that ground to the form of this action of assumpsit, the judgment was clearly evidence of his demand. And on the other ground, assumpsit lies to recover a liquidated balance. But then it is objected that there was a stay of execution for six months, and that the plaintiff could not sue for his demand before; but that time was gone by long before the filing of his declaration [125] in this action: and if we were to advert to the purpose for which the stay of execution was granted, it appears that the time had elapsed without any step taken by the defendant to sustain his counter demand: and if there had been any equitable ground for staying proceedings in this action he ought to have applied to this court. Therefore neither on legal nor on equitable grounds is there any objection to this action, either on the ground of the foreign judgment or on the account stated.

GROSE J. It is stated that the plaintiff gave in evidence an account current between him and the defendant, signed by the defendant, in which he acknowledged the balance due to the plaintiff which he has recovered: that is decisive to shew an account stated between them, and a certain sum due to the plaintiff: and there is nothing to shake this evidence; for a foreign judgment is only evidence of the debt due; and taking that judgment in every possible way, no objection can be raised upon it to the plaintiff's recovery in this action.

LE BLANC J. It was long ago determined that a judgment in a foreign court has only the force of a simple contract between the parties: it is evidence of the debt. This judgment therefore only went to shew what demand the plaintiff had against the defendant, and it ascertains the amount: but then it goes on to stay execution for a certain time, in order to enable the defendant to establish a cross demand if he had any; and that distinguishes this from the former case of *Sadler* v. *Robins*; for there the defendant's costs were first to be taxed, and deducted from the sum which had been

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found due to the plaintiff upon his original demand: *something* therefore was clearly due to the defendant; and that was first to be ascertained before the plaintiff was entitled to the fruits of his judgment; and till that was done his demand was not ascertained. But here the sum due to the plaintiff is ascertained by the judgment, and that is evidence of the debt due to him: and then assumpsit may well be brought to recover it, as it is clear that a foreign judgment is no merger of a simple contract debt. But this, it may be said, is evidence of the debt, with a stay of execution for a certain time. If however the defendant had had any real cross demand to establish which the bringing of this action prevented him from doing, he should have applied to this Court to stay the proceedings upon the ground that the Court abroad had reserved to him a certain time for that purpose; and if he had shewn any merits, the Court would have staid the proceedings in order to give him the fair benefit of that reservation: but no ground of that sort was laid before the Court; and therefore no answer has been given to the plaintiff's demand.

BAYLEY J. The plaintiff proved a settled account here between him and the defendant, by which the latter acknowledged to be indebted to him so much on the balance. He also proved a judgment recovered in a foreign court for this sum against the defendant: that was a confirmation of the account settled. But it appeared that the defendant in that suit had made a counter demand; and the Court there suspended the execution of the judgment given for the plaintiff for a certain time to give the defendant an opportunity of establishing, if he could, his cross demand. But this being only a foreign judgment did not extinguish or merge the plaintiff's
[127] simple contract debt, which can only be done by converting it into a debt of a higher nature; it is only evidence of the debt; and no answer has been given to it on the part of the defendant.

Postea to the Plaintiff.

1809.

HARWOOD and Another, Assignees of ODELL, a Bankrupt, *against* LOMAS.

Tuesday, May 2d.

The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt, (though before the date of the commission,) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half-yearly, given for the balance of an account consisting, amongst other articles, of *money lent* by the defendant to the bankrupt; such note not being given *in the usual and ordinary course of trade and dealing*, so as to be protected by the stat. 19 *Geo.* 2. *c.* 32. even supposing a *promissory note* to be within that statute, which only mentions *bills of exchange*.

THE plaintiffs declared for money had and received by the defendant to their use, as assignees of the bankrupt: and on the general issue pleaded, a verdict was found at the trial for the plaintiffs for 398*l.*, subject to the opinion of this Court on the following case.

On the 3d of *August* 1805 *Odell*, being indebted to the defendant in 400*l.*, gave him a promissory note for that sum, payable at 12 months, with interest half-yearly; and as a further security left a lease in his hands. A part only of the money having been paid, the defendant in 1806 arrested *Odell* for the remainder, and in *Hilary* term 1807 obtained final judgment for 346*l.* damages, and 19*l.* 10*s.* costs; which judgment, on error brought, was affirmed on the 5th of *Febuary* 1808. And on the next day *Odell* paid 398*l.*, the amount of the judgment, with the subsequent interest and costs, to the defendant's attorney, who paid it over to the defendant; and in a day or two afterwards the defendant delivered back to *Odell* the lease which had been so left with him. The commission of bankrupt against *Odell* was dated the 19th of *February* 1808, and the trading, petitioning creditors' debt, and assignment from the commissioners to the plaintiffs,* were regularly proved, with an act of bankruptcy committed by *Odell* on the 27th of *January* 1808. When the 398*l.* was paid to the defendant as aforesaid, he did not know, understand, or had any notice that *Odell* had become a bankrupt, or was in insolvent circumstances. And the question reserved for the opinion of the Court was, whether the payment of that sum by the bankrupt to the defendant was protected by the stat. 19 *Geo.* 2. *c.* 32.? If it were not, then the verdict was to stand: if otherwise, a nonsuit was to be entered.

Marryat for the plaintiffs. Supposing a promissory note to be a bill of exchange within the statute, at any rate the bill or

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HARWOOD *against* LOMAS.

note can only come within the protection of the statute if given and paid *in the usual course of trade and dealing*. First, it must be so given: the original consideration for the note is not stated in the case; but the defendant, who seeks to protect himself from the general operation of the bankrupt laws by the exception in the statute, ought to have shewn that it was given in the usual course of trade. But here are circumstances which rather negative that this bill was given in the usual course of trade. It was given for an antecedent debt, is drawn at an unsually long date, and reserves interest; which seems more in the nature of a loan: but the Court have before decided that the permitting a bill to remain over as a loan on interest is not in the usual and ordinary *course of trade and dealing* (*a*). 2dly, The money must be *received*, as well as the bill negociated, *in the*

[129] *usual and ordinary course of trading and dealing*; for these words are twice repeated in the statute (*b*). Now here the money was not paid when the note was due, but long afterwards, together with additional interest and costs incurred in the litigation. A payment under compulsion of legal process, and in order to avoid an execution, can in no sense of the words be deemed to be made "in the usual and ordinary course of trade and dealing;" but may rather be contrasted with that description in the statute. Such a compulsory payment is in contrast also with the preamble of the statute, which speaks of traders appearing publicly after secret acts of bankruptcy, and carrying on their trade and dealings, by buying and selling of goods, negociating bills, and paying and receiving money on account thereof in the usual way of trade, and in the same open and public manner as if solvent and not bankrupts. And *Bradley*

(*a*) *Vernon and Others, Assignees of Tyler*, v. *Hall*, 2 *Term. Rep.* 648.

(*b*) 19 *Geo.* 2. *c.* 32. *s.* 1. No person who is really and bonâ fide a "creditor of any bankrupt for or in respect of *goods* really and bonâ "fide sold to such bankrupt, or for or in respect to any *bill or bills of* "*exchange* really and bonâ fide *drawn, negociated, or accepted* by such "bankrupt *in the usual or ordinary course of trade and dealing*, shall "be liable to repay to the assignees, &c. any money which before "the suing forth of such commission was really and bonâ fide, *and in* "*the usual and ordinary course of trade and dealing, received* by such "person of any such bankrupt before such time as the person re-"ceiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances."

v. *Clark*

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v. *Clark* (*a*) shews how strictly the statute has been construed where money paid by a trader after a secret act of bankruptcy to a carrier for the carriage of goods was held not to be protected. He then noticed the judgment of the two Judges in *Cox and Others Assignees of Emmott* v. *Morgan* (*b*), against him; that payment to a creditor of a bill of exchange by a bankrupt under an arrest was protected by the statute; but relied on the arguments used by the dissenting Judge against the validity of that decision; and also mentioned *Southey* v. *Butler* (*c*), and *Hovil* v. *Browning* (*d*), as throwing great doubt upon it. But here the payment was not even made under the compulsion of an actual arrest, but under the apprehension only of process. With respect to the deposit of the lease, supposing the defendant to have had an equitable lien upon it to the extent of its value, the case is silent as to that value, or whether it ever came to the hands of the assignees: if they had received value for it, a court of equity, or perhaps a court of law, might have obliged them to allow such value in reduction of this demand; but nothing of that kind appears.

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Reader, contrà, admitted that to entitle the defendant to retain, it was necessary for him to shew, as well that the note was drawn in the usual and ordinary course of trade and dealing, as that the payment was so made. 1st. As to the objection that the note does not appear to have been drawn in the ordinary course of trade and dealing, it must be taken to be so, being in its nature a commercial instrument, unless the contrary appear; and that cannot be inferred from the mere circumstance of its having been drawn at a twelvemonths' date with interest. The word *dealing* is very large. But if it were doubtful whether the note were drawn "in the usual and ordinary course of trade or dealing," that was a question for the jury at the trial.

The Court, however, seemed strongly inclined to think, that it was incumbent on the party seeking the protection of the statute to bring his case within the terms of it. And Lord *Ellenborough* C. J. suggested that it should either be stated as a fact in the case, if the truth would warrant it, that the note was drawn in the usual and ordinary course of trade and dealing; or at least such facts should be stated as would warrant the

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(*a*) 5 *Term Rep.* 197. (*b*) 2 *Bos. & Pull.* 398.
(*c*) 3 *Bos. & Pull.* 237. (*d*) 7 *East*, 160. 162.

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Court in concluding that it was so drawn, in order to raise the other general question. But stated as it was thus generally, the Court could not say that a note given, reserving interest half-yearly on the principal sum, which, for aught appears, might have been to secure a loan of money, was drawn in the usual and ordinary course of trade?

The Attorney General, who was also of counsel with the defendant, said that if such were the opinion of the Court, it would be useless to send the case back to be restated, as the note had in fact been given for a balance of an account, consisting, amongst other articles, of money lent by the defendant to the bankrupt.

On this ground, therefore, *The Court* gave judgment for the plaintiffs, without entering into the consideration of the other general point: Lord *Ellenborough* C. J. saying, that even considering a promissory note to be within the statute, (on which, however, no opinion was given,) the note in question having been originally given on the account now stated, could not be said to have been given in the ordinary course of trade and dealing.

Per Curiam, Postea to the Plaintiffs.

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Wednesday, May 3d.

The KING *against* The Inhabitants of KEA.

A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of Sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed.

UPON an appeal to the Sessions from an order of two justices, removing *Thomas Pope*, son of *Mary Davey*, now the wife of *James Davey*, by her former husband *M. Pope*, deceased, aged 7 years and 6 months, from the parish of *Kea* to *St. Eval*, both in the county of *Cornwall*; it appeared that *Martin Pope* married *Mary Davey* in 1793, who during such their marriage was delivered of the pauper in the parish of *Kenwyn* in the said county. That *Martin Pope* was, at the time of the birth of the pauper, and up to the time of his own death, in 1806, legally settled in *St. Eval*. That the pauper,

being

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being of the age of 7 years and upwards, had not gained any settlement in his own right. That on the 6th of *January* 1800 a marriage in fact took place between *Mary Davey* (by her maiden name of *Hitchens*) and *James Davey*, and at the time of the conception of the pauper, they were living together in *Kenwyn* as man and wife; and that *Mary Davey* was re-married to *James Davey* in the beginning of the present year. And after other witnesses had been examined for the purpose of proving that *Martin Pope* had not had access to *Mary Davey* at the time of the conception of the pauper, nor for many months before; and after *Mary Davey* (objection having been first made to her competence to prove this fact, and over-ruled,) was examined, and it appeared from the evidence that *Martin Pope* had not access to her during the period aforesaid; the Sessions, as well on the testimony of the said other witnesses as to the *non-access of* Martin Pope, *as on the evidence so given by* Mary Davey *as aforesaid, and not exclusively on either*, reversed the order of removal, subject to the opinion of this Court on the question, Whether the evidence of *Mary Davey*, in proof of such non-access of the said *Martin Pope*, her late husband, ought to have been received?

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Lord ELLENBOROUGH C. J., when this case was called on, said that to hold this evidence receivable would be in direct contradiction to *The King* v. *Reading* (*a*), and other cases (*b*); which were not meant to be over-ruled in *The King* v. *Luffe* (*c*): the Court in that case intending that the wife had been examined only to those facts which she might legally prove, and not to the non-access of the husband; the principle of public policy precluding her from being a witness to that fact. And the rest of the Court signifying their concurrence in this opinion;

Burrough and *Casberd*, who were to have supported the order of Sessions, said that this case was distinguishable from others, because the husband was dead at the time when the wife was examined; and therefore if the rule had stood merely on the ground that the giving of such testimony was calculated to promote dissention between husband and wife, it would

(*a*) *Cas. temp. Hard.* 79.

(*b*) These are all collected in the *King* v. *Luff*. (*c*) 8 *East*. 193.

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have ceased to apply in this instance, where one of the parties was dead: but if the Court considered that the rule stood on the broad ground of general public policy, affecting the children born during the marriage as well as the parties themselves, they could not pretend to argue in support of the order.

The Court unanimously assented to this. And *Le Blanc* J. added, that they were bound on the statement of this case to notice the objection taken to the competency of the wife to prove the fact of non-access; for the Sessions, after hearing her evidence to that point, had declared that they found the fact as well on her evidence as on the testimony of the other witnesses, and not exclusively on either. And this ought to be noticed as an ingredient in the decision of the Court.

The Attorney General and *Dampier* were to have argued against the order.

Order of Sessions quashed.

Thursday, May 4th.

DENNE *against* DUPUIS.

Where a party gave a bond to secure an annuity, whereby he bound himself, his *heirs*, executors, &c.; a memorial describing such security generally as *a bond* from *A.* to *B.* in such a sum, &c. is defective and void under the annuity act 17 *G.* 3. *c.* 26.

A RULE was obtained on a former day by *Marryat* for setting aside a judgment on bond entered up upon a warrant of attorney given to secure an annuity, and for directing such warrant of attorney to be delivered up to be cancelled. The objection was, that the annuity was secured by a bond whereby the defendant bound himself, his *heirs*, executors, &c.; and the memorial enrolled under the annuity act (*a*) only stated it to be "*a bond* from *C. Dupuis* to *J. Denne* in the sum of 1050*l.*, with a condition," &c.; which was contended to be void, on the authority of *Horwood* v. *Underhill*. (*b*)

* *The Attorney-General* and *Garrow*, on shewing cause, attempted to distinguish this from the case cited, because the memorial there, stating that *the parties* themselves had become bound, might be taken to be in exclusion of their *heirs*: whereas here the security was stated generally to be *a bond* from

But the Court only set aside the judgment entered up by warrant of attorney on such bond, and directed the warrant of attorney which was in court to be deposited with the proper officer of the court.

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(*a*) 17 *Geo.* 3. *c.* 26. (*b*) 10 *East*, 123.

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from the one to the other, without stating who were bound by the security. But

The Court said, that this was in effect the same as the former case, and must be governed by the same rule. But they only made the rule absolute to the extent of setting aside the judgment: and when pressed by *Marryat* to direct the warrant of attorney to be delivered up to be cancelled, they said that there was no necessity for doing that; but the warrant of attorney being produced in court, they ordered it to be delivered into the custody of the proper officer in court.

ATKINSON *against* ABBOTT.

Thursday, May 4th.

Insurance on provisions "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either," which provisions were intended for the supply of the *British* fleet and army then engaged in the expedition against *Copenhagen*, (of which they were then in possession, but were about to evacuate it,) and were consigned to merchants there, and at *Elsineur*; held good; although in consequence of expected hostilities with *Denmark*, an order of the king in council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg*, a *Swedish* and neutral port in the neighbourhood of *Denmark*; the adventure being legal, and not contravening the spirit of the order of council.

THIS was an action on a policy of insurance made on the 20th of *October* 1807 on goods on board a certain ship "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either." It appeared that previous to such insurance a great naval and military force had been sent from this country to *Copenhagen* for the purpose of taking possession of the *Danish* capital and fleet, and that the *British* armament had effected this purpose, and had possessed * themselves of *Copenhagen* after a bombardment which ended in a capitulation, by which it was agreed to be evacuated by the *British* forces on the 19th of *October*, though in fact, owing to some unavoidable delay, the evacuation did not take place till the 20th: but the fact of such evacuation was of course unknown at the time of the policy effected: and though intelligence of it had reached this country before the vessel sailed from the *Nore*, and the captain admitted, on his cross-examination at the trial, that he had heard the report; yet he swore that he did

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not believe it. The government however having anticipated the probability of hostilities with *Denmark*, consequent upon the expedition and seizure of the *Danish* fleet, an order of the king in council issued on the 2d of *September* 1807, prohibiting the clearing of any *British* ship from this country for any port in the dominion of the king of *Denmark*: in consequence of which no clearance could have been obtained by this vessel for any such port. And therefore though the true object of the adventure was to carry out provisions for the use of the *British* armament then supposed to be at *Copenhagen* or *Elsineur*, yet the captain on the 15th of *October* took a custom-house clearance for *Helsingberg*, a *Swedish* and neutral port, to which he had no intention at that time to go; his consignees being *British* merchants at *Copenhagen* and *Elsineur*, and his bills of lading being for the *Sound* and *Copenhagen*. It appeared to be the usual practice at the custom-house to take out a clearance for one only of the ports to which the ship was destined. The ship sailed from the *Nore* on the 22d of *October*, and was captured by a *Danish* vessel on the 11th of *November* at the entrance of the *Sound* in her way to *Copenhayen*, where
[137] the captain still expected to meet the *British* armament, and Mr. *Blaurock*, his consignee, on board a ship off that port. The jury were satisfied of the honest intention of the assured and of the captain in this adventure, to supply the British armament with the provisions which were the subject of the insurance; and being directed by Lord *Ellenborough* C. J. that the insurance was not avoided by the custom-house clearance having been taken out under these circumstances for *Helsingberg*, to which place there was no contemplation at the time of proceeding, unless any circumstances should occur in the prosecution of the adventure to render it necessary; they found a verdict for the plaintiff. Whereupon a rule was applied for in the last term for setting aside the verdict and granting a new trial, on the ground that the taking out of a custom-house clearance for a place to which there was no intention of going in the course of the voyage was such a fraud as avoided the policy.

Garrow, *Park*, *Taddy*, and *W. Adam*, now shewed cause against the rule, and denied that there was any fraud either in fact or in law in the captain having taken out his custom-house clearance for *Helsingberg*: it was rendered necessary by

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by the situation of public affairs at the time, and made no difference whatever in the contract made with the underwriters; the true object of the adventure being to carry provisions to the *British* armament at a place to which by the terms of the policy the assured had an option to go. And they relied on *Planche* v. *Fletcher*, *Dougl.* 251., where the taking out of a false custom-house clearance, for the purpose of evading the laws of a foreign country, was held to be no fraud on the underwriter; the real object and destination of the ship being legal by the laws of this country, and within the terms of the [138] policy. Then as to the order in council of the 2d of *September*, this adventure was not within the true meaning of it; the object not being to carry on trade with the *Danes*, or to go to any port of the king of *Denmark* other than such as was *British* at the time, for *British* purposes. Though in the case of *Sands* v. *Child*, 4 *Mod.* 176, the breach of an order in council was considered not to avoid a policy.

The Attorney-General, *Best* Serjt., and *Lawes*, in support of the rule, said, that they did not mean to insist that the policy was avoided by reason of any disobedience to the order of council in this particular case; though they denied the generality of the position, that disobedience to an order of council might not avoid a policy of insurance by making the forbidden adventure illegal, as the King by his prerogative, in regulating general matters of navigation between this and foreign countries, might for public purposes well do. But they relied on the false clearance which had been taken out for a place to which there was no intention at all of proceeding; which they said was very different from the practice referred to of not mentioning in that document *all* the ports of destination of the vessel on her intended voyage. And this they argued was a fraud upon the navigation laws of the kingdom, and particularly upon the stat. 13 & 14 *Car.* 2. *c.* 11. *s.* 3., by which every ship before her departure from any port of this kingdom is required to take out a custom-house clearance for the port to which she is destined. Now if it would be illegal, as cannot be denied, for a vessel to sail without any clearance at all, it follows necessarily that it must be illegal to take out a false clearance, which is the same in effect as none at all, and is a fraud upon the law. And they urged [139] that the bearing of this law upon such a practice was not brought

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brought before the Court in *Planche* v. *Fletcher*, which could not, therefore, be considered as an authority against the objection. They also pressed the consideration, that however the principal object of the adventure might have been the supply of the *British* armament, if it were still, against all reasonable probability, as it appeared from the dates of the several transactions connected with that expedition, to be found at *Copenhagen*; yet there was strong reason to believe that a secondary object of it was at all events to carry the provisions to *Copenhagen* or *Elsineur*, where alone the consignees resided, and where it might well have been expected under the existing circumstances to meet with a good market: but a voyage to *Helsingberg* was quite out of contemplation at the time.

Lord ELLENBOROUGH C. J. I am perfectly satisfied, and so were the jury on the trial, that the voyage was not illegal either in intention or in act; but that the adventure was undertaken for the meritorious purpose of supplying the *British* fleet and forces, then understood to be in possession of *Copenhagen*. And though an order of the king in council, contemplating that this kingdom might be placed in a state of warfare with *Denmark*, in consequence of the measures then meditated or in execution, had issued on the 2d of *September* preceding the policy in question; and though intelligence of the capitulation had been received in this country before the policy was effected, and the evacuation of *Copenhagen* was then contemplated to take place on the 19th of *October*; yet that will not affect the honesty or legality of the transaction. The adventure may be said to have begun
[140] on the 16th of *October*, when the vessel left her moorings in the river; the object of it was to supply the *British* fleet and forces engaged in the expedition to *Copenhagen* with provisions; and though the evacuation of the place was contemplated to take place on the 19th, yet circumstances might intervene to delay the departure of our forces; and their provisions might be expected to be at a low ebb. The consignment was made, not to the subjects of *Denmark*, but to a *British* merchant at *Copenhagen*, who, if the evacuation had taken place at the time of the ship's arrival, was expected to be found on board a *British* ship off that port. There could then be no objection to the legality of the adventure, if the

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avowed object of it had been disclosed, and the ship had cleared out at once for *Copenhagen* at this period: but the order of council stood in the way of getting a clearance for *Copenhagen*, which order had been issued, as a precautionary measure, to prevent the vessels of this country from being detained in the *Danish* ports in the event of hostilities; and to obviate this difficulty the clearance was taken out for *Helsingberg*, a *Swedish* port, without any purpose of defeating the order of council or trading with an enemy. This is continually done upon adventures for supplying the *British* armies and fleets on foreign service. Nor is it to be taken for granted that in no event whatever was the ship intended to go into *Helsingberg* in the prosecution of the adventure: the captain had certainly no immediate intention of going there; but if he found that the *British* armament had left the *Danish* territories before his arrival, he might have found it expedient to proceed to the neighbouring *Swedish* port, which he was entitled to do within the terms of the policy. But I am not satisfied that it would have made the insurance illegal if the captain have never meditated to go into *Helsingberg* at all. There is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy to which there is no intention of going. The stat. of *Car.* 2. only gives a penalty of 100*l.* for taking out a false clearance: but there is nothing in that to make the voyage illegal. That was determined in *Planche* v. *Fletcher*; and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the Court. Here the object of the voyage was not illegal, but meritorious: the assured never meant to go to a *Danish* port, as such, but merely for the supply of the *British* fleet and army then supposed to be lying off *Copenhagen*; and the jury were quite satisfied of that fact.

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GROSE J. declared himself of the same opinion.

LE BLANC J. If it had been made out in evidence that this was a voyage intended to supply the enemy with provisions, that would at once have avoided the policy: but the defendant failed in his attempt to do that; and the jury were satisfied that that was not the object of the adventure. The obvious intention of it, and so it was understood by the jury, was to supply our own fleet and army off *Copenhagen*; and if

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on his approach to that place the captain had not found that fleet there, he would probably have gone to *Helsingberg*. It has been determined, however, that the mere circumstance of taking a clearance to a place where a ship does not intend to go does not make the voyage illegal so as to vacate the policy: but I am not satisfied that the captain had determined not to go to *Helsingberg* in any event.

BAYLEY J. The whole of the evidence shews that the object of the voyage was to supply our fleet engaged upon the expedition to *Copenhagen*, with provisions, and not to run into an enemy's port, where the vessel would be sure to be captured.

Rule discharged.

Thursday, May 25th.

BOYDELL *against* DRUMMOND.

If it appear to have been the understanding of the parties to a contract at the time that it was not to be *completed* within a year, though it might and was in fact in part performed within that time, it is within the 4th clause of the statute of frauds 29 *Car.* 2. *c.* 3.; and if not in writing signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intituled "Shakespeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the Boydell Shakespeare, cannot be connected together, so as to take the case out of the statutes, as such connexion could only be established by parol evidence.

THE declaration stated that the plaintiff and his deceased partner (the late Mr. Alderman *Boydell*) had proposed to publish by subscription a series of large prints from some of the scenes in *Shakespeare*'s plays, after pictures to be painted for that purpose, under certain conditions, viz. 72 scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing 4 large prints, at the price of 3 guineas a number, 2 of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number: and on the delivery of each number 2 guineas were to be advanced by the subscribers towards the succeeding number; and that one number at least should be *annually* published after the delivery

of

of the first. And then the declaration stated that on the 7th of *April* 1790 the defendant became *a subscriber for one set of prints, and paid his 2 guineas; and that in consideration that the plaintiff and his late partner had promised to perform the conditions on their part as such publishers, the defendant promised to perform the conditions on his part as such subscriber: and then it alleged that although the publishers had performed and were ready to perform the conditions and promises on their part in all respects, and although one set of the prints had been long since published and ready for delivery to the defendant, according to the form and effect of the said conditions, of which he had notice on the 10th of *December* 1804; and though the defendant was duly requested to accept the said prints and to pay for the same according to the said conditions and his promise, and he did accept two numbers, and paid the plaintiff a further sum of 3 guineas on the delivery of each of those numbers, according to the said conditions; yet he refused when so requested to accept the residue of the prints or pay for the same. There were other counts laying the contract more generally, and the common money counts. To all which the defendant pleaded non-assumpsit, and that the cause of action did not accrue within six years.

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It appeared at the trial that the first prospectus of the work was published in 1786, and a second prospectus in 1787. On the first of *May* 1789 the *Shakespeare* Gallery was opened in *Pall-Mall*, with an exhibition of 34 large pictures then finished, and in *March* 1790 an additional number were exhibited, amounting in all to 56: and also specimens of several of the prints in a state nearly ready for publication. In *April* 1790 the defendant became a subscriber to the large prints; (a splendid edition of the letter-press of the plays, and a series of small prints to bind up with it, forming a distinct part of the proposed plan of publication.) The defendant's subscription was No. 1103., the whole number of subscribers at the close having been 1384. At the time of his subscription the defendant paid his two guineas in advance, and had a receipt given him for the same. The delivery of the first number was made in *June* 1791 (*a*), when it was delivered to the defendant's

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(*a*) It was offered to be proved at the trial that the delivery of the numbers was advertised in some of the public newspapers to give notice to

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ant's order, who thereupon paid the third guinea and two more in advance for the next number. The second number was delivered to the defendant on the 29th of *March* 1792, was advertised as before, and the defendant also sent for that, and paid his 3 guineas, two of them in advance for the 3d number as before. These numbers were delivered out at the Gallery in *Pall-Mall*, being the place where the defendant had subscribed. Others were delivered out to other subscribers at Messrs. *Boydell*'s shop in the city. After this time at least one number was delivered to the subscribers in general in every year, sometimes two, and in two instances three within a year, until the whole were completed; but the defendant never sent for any more of the numbers, though he never gave notice of his intention to discontinue taking them in. Nor did the plaintiff ever make any particular demand
[145] on the defendant to take the remaining numbers and pay for them till 1807, after the whole work was completed and published; but the rest of the numbers as they came out were regularly laid by for him according to the order of time of his subscription. The last number was published in 1803, and the number of prints finally delivered to the subscribers who sent for them was 12 more than the stipulated number. This was the general nature of the case and of the evidence, which branched out into several questions; but as the judgment of the Court ultimately turned solely on the application of the statute of frauds to this case, it is only necessary to state the evidence with particularity as to that point.

The first prospectus of the work, in *December* 1786, stated the intention of Messrs. *Boydell* "to publish by subscription, (as an accompaniment to the letter-press,) a series of large

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to the subscribers, that they might send for them: but Lord *Ellenborough* C. J. would not receive the evidence, unless it were also shewn that the defendant was in the habit of taking in one of such newspapers; which the plaintiff was not prepared to prove: this part of the cause therefore rested on the fact of the delivery of the two first numbers to the defendant's order; but the point was ultimately saved with the rest: and when it was mentioned again in court, his Lordship still thought the evidence of notice deficient for the reason before stated.

prints,

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prints, after pictures to be *immediately* painted," by certain artists named, from the most striking scenes of *Shakespeare*. And that as soon as the pictures were engraved, they would be hung up in the *Shakespeare* gallery. It then stated certain conditions in substance the same as those set out in the declaration, together with others calculated to shew the magnitude and difficulty of the undertaking, the great number of artists necessary to be engaged in its performance, and that the completion of it would unavoidably take a considerable time. The expence of it was therein estimated at above 50,000*l*. (*a*), and it was "hoped that the public would be forward in their *subscriptions*, and *thereby incite* the various artists engaged in the present arduous design to exert their utmost abilities in the execution of it." One of the conditions [146] was, "that one number at least should be published *annually*; and the proprietors were confident they should be enabled to produce *two numbers* within the course of *every year*." The other prospectus published in *January* 1807, gave an account of the progress of the work so far as it was then published, and of the preparations for its continuance, with observations on the means employed and the delays and difficulties which might occur in its execution. Printed copies of the two prospectus were laying about the shop for public inspection at the time of the defendant's subscription, and the general practice was to deliver them to subscribers at the time of their subscription. But the book in which he subscribed his name had only for its title, "*Shakespeare* Subscribers, their signatures," without any reference to either prospectus in the terms of it. After the whole work was completed and published, an application was made to the defendant in *August* 1806, and again in *March* 1807, to take and pay for the remaining numbers of his subscription: to which latter he returned an answer in writing, dated 1st of *April* 1807, in which he stated that he ceased taking in the numbers of the *Boydell Shakespeare* many years ago, in consequence of the engagement not being fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, he did not consider himself called upon to complete the set.

(*a*) The work was afterwards stated to have cost considerably above 100,000*l*.

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(Signed by the defendant.) The receipt for the defendant's subscription was in this form: "Received from *J. Drummond* Esq. one guinea as the second subscription to the first number of the *Shakespeare* with large plates; and at the same time received two guineas as the first subscription to the second number, *agreeably to the original proposals.*" (Signed for the plaintiffs.)

[147] Several objections were taken to the action; 1st, that this was an agreement partly evidenced by writing; and not coming within the exception of the stat. 23 *Geo.* 3. *c.* 58. *s.* 4. as a contract for the sale of goods, required to be stamped. 2dly, That it was not a contract to be performed within a year, and was therefore void within the statute of frauds 29 *Car.* 2. *c.* 3. *s.* 4., the whole contract not having been reducing to writing, and signed by the parties, &c. 3dly, The defendant insisted, that by the nature of a contract of this sort, he was entitled to abandon it whenever he pleased, on forfeiture of the two guineas advanced for the number succeeding that which was last delivered to and accepted by him. 4thly, That there having been no acceptance of any number on the one hand, nor tender on the other, for 16 years prior to the tender of the remaining numbers in 1807, this was evidence of a mutual abandonment of the contract before the action brought: even though the case, taking this to be one continuing contract, which was not completed till 1803, might not be strictly and entirely within the statute of limitations. The plaintiff was nonsuited at the trial, and all these points were reserved. And, 5thly, it was contended, that the statute of limitations would cover the demand for every number except the last.

Park, *Holroyd* and *Dampier* shewed cause against a rule for setting aside the nonsuit. 1st, As to the want of a stamp; every contract which is to be evidenced by writing requires a stamp, unless it come within the exception of the statute 23 *G.* 3. *c.* 58. *s.* 4. as a contract for the sale of *goods*, which this does not; as the exception is confined to contracts for the sale of *goods in esse*, in the state in which they are to be delivered:

[148] for which they cited *Buxton* v. *Bedall* (*a*), and *Waddington* v. *Bristow* (*b*). And here the whole contract was clearly executory. 2dly, It was morally certain from the subject

(*a*) 3 *East*, 303. (*b*) 2 *Bos. & Pull.* 452.

matter

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matter of this agreement that it could not be executed within a year, and it provided in the very terms of it for the *annual* performance of certain portions of the work: it is therefore void by the statute of frauds for want of being reduced to writing and signed by the parties. It was indeed proved that the defendant had subscribed his name in a book with the title of "*Shakespeare subscribers, their signatures,*" and that printed copies of the prospectus were lying about the shop, one of which it was the general practice to deliver to each subscriber at the time of his subscription; but there was nothing to connect the prospectus with the signature in the book except by parol testimony; and it was the very object of this branch of the statute to exclude the intervention of parol testimony where parties were to be bound by contracts that were not to be completely performed within a year. No copy of the prospectus was ever affixed to the book (*a*). Where a parol contract is to be performed at an indefinite period, it lies on the party insisting on performance of it to shew at least that it might have been performed within the year. [*Le Blanc* J. Supposing all the prints could have been completed within a year, would the subscribers have been compellable to take and pay for them within that time under the terms of the agreement? Lord *Ellenborough* C. J. Was it in the contemplation of the subscribers to be called upon to make so large a payment, as the whole would have amounted to, within so short a period?] It seems not within the fair [149] meaning of such an agreement, one object of which is to diminish the pressure of the expence by dividing it into moderate annual instalments. 3dly, This is the first instance of an action brought for the non-performance of a contract of this nature; and no person can hereafter venture with prudence to subscribe to works published in numbers, (a method of publication which is now become very common in respect of all large and expensive works,) if it were not generally understood that every subscriber is at liberty to withdraw his subscription whenever he pleases. The publisher in fixing his price calculates upon such an eventual partial loss: and

(*a*) On this head, the defendant's counsel afterwards referred at the conclusion of the argument, to *Hinde* v. *Whitehouse*, 7 *East*, 558.

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in this, as in most other instances of the kind, it is endeavoured to be guarded against or compensated by the forfeiture of the advance paid on the delivery of one number towards the payment of the next. This is the implied condition of release from the engagement. It is a contract from number to number; and that is also shewn by the form of the receipts. It must be admitted that this power to retract will be mutual; and it is reasonable that it should be so; for if there had only been 100 subscribers to the work, Messrs. *Boydells* would not have been bound to go on with a publication which must have ended in certain ruin to them. The facility of retraction is even advantageous to the publishers of popular work in numbers, by engaging many more subscribers than could be obtained, if each were bound to continue his subscription to the end, however inconvenient or burthensome it might afterwards become; an obligation which would extend also to executors, when their ability to bear it might be essentially impaired. 4thly, At all events there was evidence of a mutual abandonment of the contract by the parties, after
[150] 16 years intermission of taking in the numbers on the one hand, and no tender of the prints and demand of payment for them on the other. On the numbers being published if the plaintiff meant to enforce the contract, he ought to have made an actual tender of them to the defendant, according to *Calomel* v. *Briggs* (*a*), unless discharged by the latter saying that he would not receive or pay for them if sent; and this ought to have been done within a reasonable time after each publication; otherwise it shews that the contract was meant to be abandoned: and if once abandoned as to any prior number, the defendant could not be compelled to take the subsequent numbers, the value of which would be materially diminished by the chasm in the set; and no person can be bound to take part only of a work. In this view the statute of limitations would be a bar even with respect to the last number, which was published within six years before the action commenced. But 5thly, at any rate it must operate in bar of any claim for the numbers published more than six years ago, on which the money became due immediately, if at all.

(*a*) 1 *Salk.* 112.

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The Attorney-General, Garrow, Marryat and *Bolland,* in support of the rule, on the 1st point contended that no stamp was necessary within the exception of the stat. 23 *G.* 3. *c.* 58. *s.* 4., which covers not only contracts for the *sale* of goods, but such as *relate to the sale of goods;* which latter words were held in *Warrington* v. *Furbor* (*a*) to extend to a contract for the payment of goods thereafter to be purchased by a third person, and which goods therefore might not exist in specie at the time of the contract made. [Lord *Ellenborough* C. J. It is rather to be implied from that case, that the goods which were [151] the subject of the contract were in existence at the time: for the parties contemplated an immediate delivery; and the delay arose only from the want of a guarantee; and as soon as a guarantee was obtained, the delivery took place. It was therefore a contract for goods which had a present capacity of being delivered.] The indulgence meant to be granted to mercantile contracts would be rendered almost nugatory by a different construction; for it can seldom happen that goods which are contracted for on a large scale are all complete at the time of the order given: it is sufficient to bring the case within the words of the exception if the contract be for the delivery of goods. [Lord *Ellenborough.* Is it meant then to be contended that a contract for the supply of goods to another for 20 years to come would not require a stamp?] It would not, if the contract were simply for that which would be goods when delivered; and not for work and labour. *Buxton* v. *Bedall* (*b*) was of the latter description; and *Waddington* v. *Bristow* (*c*) went partly on the contract affecting the realty. The 2d, they said, was a new and important question. It is not necessary, in order to take an executed contract out of the 4th section of the statute of frauds, to make it appear by the terms of the contract that it must be executed within a year: on the contrary it was said by *Dennison* J. in *Fenton* v. *Emblers* (*d*), that "the statute plainly meant an agreement not to be performed within a year, and *expressly* and *specifically so agreed.* A contingency is not within it, nor any case that depends upon contingency. It does not extend to cases where the thing

(*a*) 3 *East*, 242. (*b*) 3 *East*, 303.
(*c*) 2 *Bos. & Pull.* 452.
(*d*) 3 *Burr.* 1281. *and* 1 *Blac. Rep.* 353.

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only may not be performed *within a year; and the act cannot be extended further than the words of it. And with this agrees *Smith* v. *Westhall* (*a*). It is sufficient that it may be; and if the question depended upon the possibility or impossibility of performance within the year, the jury must decide upon it. Before the defendant subscribed, the *Shakespeare* gallery had been opened with an exhibition of 56 pictures, with specimens of several of the prints nearly ready for publication; and in fact the first number was published in little more than a twelvemonth after his subscription. Then when the defendant accepted the first number, he entered into a new contract for the second and subsequent numbers, and he confirmed that contract by the acceptance of the second. Such acceptance, therefore, took the case out of the statute, by the partial execution of the contract. If this were otherwise, one who contracted with another for the building of a house, if not in writing, would be absolved from his contract, unless the house were to be finished within a year. Suppose goods sold and delivered for a certain price, at 13 months credit, without writing; the terms of payment would be a part of the contract, and if no evidence could be given of that by the statute, the vendor would not be bound by the stipulated price, and the jury could only give a verdict for the value of the goods. [Lord *Ellenborough*. In that case the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period.] [153] The policy of the statute does not apply to contracts which are to be in part executed, though not completed, within the year: because a partial execution of itself furnishes evidence of the reality of the contract; and the danger meant to be guarded against was the setting up, by perjured testimony, of supposed contracts, which were not evidenced by any acts of the parties within a year; which period was taken as the limit of reasonable time, within which it was probable that the execution of a mere parol contract; not evidenced by any acts of the parties, would be postponed, and which was therefore required to be evidenced by writing. And as a delivery

(*a*) 3 *Salk.* 9. and 1. *Ld. Ray.* 316. All the cases were stated to be collected in *Roberts* on the Statute of Frauds.

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of part of the goods at the time, by way of earnest to bind the bargain, will take a case out of the statute, so will part-performance within the year, which is analogous to earnest. But supposing it to be necessary to prove the contract by writing, signed, &c. they contended that there was such evidence of it in this case: for the terms of the contract were stated in the printed prospectus, to which there was sufficient reference by the title of the book in which the subscribers' names were entered, viz. "*Shakespeare* Subscribers, their Signatures." [Lord *Ellenborough* C. J. The prospectus cannot be connected with the book of subscriptions without parol testimony. What is there in the title to refer to the particular prospectus rather than to any other? If it had referred to the particular prospectus then published, it would have helped the plaintiff over the difficulty.] It is not pretended that there was any other prospectus to which it could refer; and the defendant's letter recognizes this *engagement* with the proprietors of the *Boydell Shakespeare*; and no other engagement than that contained in the prospectus was shewn. On this head they cited *Welford* v. *Beazeley* (*a*), and *Tawney* v. *Crowther* (*b*). 3dly, As to the defendant's right to abandon the contract on forfeiture of his two guineas advanced for the next number; it is contrary to the nature of every contract that one of the parties should be at liberty to abandon it without the consent of the other, while it is in progress towards execution. The argument would be the same, if instead of the series of prints, the defendant had subscribed to the letter-press. The plaintiff would have been answerable for a breach of his contract, if after delivery and receiving payment for half a book, he had refused to proceed with the work, which would have rendered that half altogether useless and of no value to the defendant: the latter therefore must in like manner be answerable for not preforming his part of the contract. The parties would not be put upon equal terms by extending the liberty of abandonment to each; for a great part of the expence of many successive numbers was incurred before the delivery of the second, upon a scale of expence adapted to the existing number of subscribers; and the defendant, by having taken two of the numbers and discontinuing

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(*a*) 3 *Atk.* 503. (*b*) 3 *Bro. Chan. Cas.* 161. and *ib.* 319.

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the rest, puts the plaintiff in a worse situation than if he had not taken any; for the set is spoiled, and all the succeeding numbers, which were in a state of preparation before notice of abandonment, would be so much loss incurred. If one subscriber could abandon, all might; and the publishers must necessarily have incurred a loss of many thousand pounds. The very nature of the thing, therefore, requires that every subscription should be considered as one entire and absolute contract for the whole work. If so, then 4thly, there is no evidence of its having been abandoned by the plaintiff. It was not necessary for the plaintiff to give notice to each subscriber as the num-
[155] bers came out: it could not be told where they were to be met with; they were dispersed all over the kingdom, and many in foreign countries. The subscribers invariably sent for their numbers, and the defendant did the same as to the two numbers which he took in. The defendant's numbers were regularly set apart for him as they were published: and he ought at least to have given express notice of his intention to discontinue the work, before any presumption of the plaintiff's consent to such discontinuance could be inferred from the mere act of not calling upon him to take the numbers. 5thly, If the contract were entire, and not abandoned, the statute of limitations would not run upon any part of it, as the demand was made and the action was brought within six years after the last number was published: and of course it could not affect the demand for that number.

Lord ELLENBOROUGH C. J. On conference with my brothers, finding that we are all of opinion that the action is not maintainable on one of the grounds of objection taken to it, it is not necessary to discuss the others. We are all clearly of opinion that this was not a contract which was to be performed within a year, and ought therefore to have been evidenced by writing signed, as required by the statute of frauds. The whole scope of the undertaking shews that it was not to be performed within a year: and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued that an inchoate performance within a year is suf-
[156] ficient to take the case out of the statute; but the word used in the

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the clause of the statute is *performed*, which ex vi termini must mean the *complete* performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part-performance of an agreement to supersede the necessity of reducing it to writing; which shews that when the legislature used the word *performed*, they meant a complete and not a partial performance. If this were not the true construction of the statute, great inconvenience would ensue in the execution of contracts for large works, which must necessarily require a long time for their completion; as in the instance of *Somerset* house, which occupied many years in the building. If one stone were laid within a year from the making of the contract by parol, it would, according to the argument, have taken the case out of the statute, leaving the terms on which the great mass of it was to be built to falacious memory alone, to be exercised at some distant period; which would let in the very mischief which the statute meant to guard against. Therefore to exclude perjury, and to perpetuate the true terms of contracts which were not to be performed within a year, there is no doubt that the statute meant a consummate performance within that time. Now here by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year, for the agreement was to publish at least one number *annually* after the delivery of the first, and according to the number of pictures to be published, at the rate of two from each play, the work would consist of many numbers. On this ground the case appears to be clearly within the statute, and the objection taken to the action to be well founded. Without considering therefore the question on the stamp, though I [157] have not much doubt on that or on other questions which have been raised, it is sufficient to say that the nonsuit ought to stand. I should add, that I cannot connect the subscription of the plaintiff's name in the book with the prospectus; nor does the defendant's letter refer to the prospectus produced at the trial. It speaks indeed of his *engagement* with the proprietors of the *Boydell Shakespeare;* but it cannot be shewn to be the engagement contained in the particular prospectus without parol evidence, which the statute excludes. If there had been a plain reference to the particular prospectus, that

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that might have helped the plaintiff; but there is nothing of that kind.

GROSE J. Considering the nature of the work, and the whole of the two prospectus, it is impossible to say that the parties contemplated that the work was to be performed within a year; for it was to be published *annually* in numbers, and it was clear that it would take many years to complete it. This therefore is one of those cases which the statute of frauds contemplated, and in which it is eminently useful and necessary: and it is clear that the contract ought to have been in writing.

LE BLANC J. Looking at the two prospectus, it appears by the very terms of the contract, as it is to be collected from them, that it was to be performed at a period beyond the space of one year; for the publishers considered it possible that two numbers might be produced in every year, but not more; and at that rate it would necessarily require many years to complete the work. And if it had been possible to complete the
[158] whole in one year, few subscribers would have been found who would have engaged to pay the whole money within that time. The contract therefore, not being contemplated to be performed within a year, is required by the statute of frauds to be in writing and signed by or on behalf of the party to be charged. Then can we say that this was in writing and so signed? The evidence is, that the defendant subscribed a book intitled, "*Shakespeare* subsribers, their signatures." If there had been any thing in that book which had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the statute of frauds. And then the only question is, whether the case can be taken out of the statute, because there was a *part* performance of the contract within the year: but no case goes the length of deciding that; and such a construction would leave the whole mischief intended to be remedied by the act still subsisting. For such part performance does not shew that it was the particular prospectus produced at the trial

trial of the defendant's signature referred to; and if that can only be established by parol evidence, which is necessary to connect the signature with the two papers, it still leaves the case within the mischief meant to be provided against. I am sorry therefore for the justice of the case, that the objection, which goes on a ground beside the merits of the question, must prevail.

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BAYLEY J. It was clearly the understanding of all parties that the contract was not to be performed within a year: and if the publishers could by possibility have *completed* the work within that time, they could not have compelled the defendant to have taken and paid for it immediately. I use the word *completed*, because I think that it is the true meaning of the word *performed* used in the statute. The cases have decided that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must appear to have been the understanding of the parties, that it was not to be performed within a year. That does appear in the present case; and I cannot say that a contract is *performed*, when a great part of it remains *un*performed within the year; or in other words, that *part performance* is *performance*. The mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it. If part performance were to supply the want of writing, a party might be fixed with a contract for supplying goods for 20 years together, at the price which was paid for them in the first year, although the price might have risen considerably; for it would be said that the price paid for those delivered immediately was evidence of the rate agreed upon for the delivery in subsequent years. But here it is argued that the book of signatures may be connected with the two prospectus which were published at the time and delivered to the subscribers: but that cannot be done without the intervention of parol evidence, and that opens a door to perjury, which it was the object of the statute to prevent. Besides, it would still be left uncertain upon the face of the papers to what the defendant's subscription applied; for there were subscribers to the whole work, and subscribers to the prints

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prints only; and it would not appear to which of these the defendant's signature was meant to apply.

Rule discharged.

Friday, May 5th.

BEBB and Another *against* T. S. PENOYRE, ELIZABETH ANN CASTELL, C. LITTLEDALE, and CATHERINE LOUISA his Wife, R. COOK, Clerk, and ANN MARIA his Wife, and J. DRUMMOND and HARRIETT his Wife.

Two being seised of undivided moieties as tenants in common in fee, quære whether a devise by the one of *his half part* to the other will carry the fee? But at any rate the fee did not pass by a residuary clause, whereby the testator after several pecuniary bequests, *ordered* the lease of his house, with his furniture, to be sold, and *all the rest and residue to be divided*

THE plaintiffs, as surviving assignees of *Samuel Castell* and *Walter Powell*, bankrupts, filed their bill in Chancery against the defendant *Penoyre*, as the purchaser at an auction of a certain freehold estate put up to sale by the assignees, and against the other defendants as claiming some interests therein, to compel the completion of the purchase by the one, and the discovery of title against the rest. The defendants in their answer stated the will of *John Castell* deceased, brother to the bankrupt *S. Castell*, and contended that under it the bankrupt was entitled only to an estate for life in an undivided moiety of the premises, with remainder in fee to the defendants (excepting *Penoyre*) by virtue of the residuary clause in the will. And on the hearing of the cause his Honor directed this case to be made for the opinion of the Court.

* *John* and *Samuel Castell*, being seised in fee each of one undivided moiety of the premises in question, *John Castell* on the 2d day of *February* 1802, by his will duly executed, devised (inter alia) as follows: "I give to my brother *Samuel* "*Castell my half part* of the five freehold houses which I hold "with him in *Leadenhall-street*, opposite to *Cree* church. I "give 4000*l.* Bank stock, and 4000*l.* 3 per Cent. Cons. "amongst the four daughters of my brother *Samuel Castell*, "to be divided equally between them, share and share alike." Then after two several bequests of stock to other persons,

amongst other persons; and appointed executors; for such division of the *rest and residue* must be intended to be made by the *executors* as such, and therefore continued to personal property.

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the will proceeds: "I give to *T. Ryder* Esq. and to *his heirs* "*for ever*, my two freehold houses in *Sherborne-lane*," &c. Then after several other bequests of other stock, and of pecuniary legacies, the will concludes as follows: "I order the "lease of my house with all the furniture (except the eight "work'd chairs) to be sold, and *all the rest and residue* to be "divided amongst the four daughters of my brother *Samuel* "*Castell*, share and share alike. I appoint *J. S.* and *J. S.* "executors," &c. The devisor died seised in *November* 1804, leaving his brother *Samuel* his heir at law. He was also at the time of making his will and at the time of his death seised in fee of the freehold houses in *Sherborne-lane*, but not of any other freehold estate. The defendants *Elizabeth*, *Catherine Louisa*, *Anna Maria*, and *Harriett*, are the four daughters of the testator's brother *Samuel*. The question was, what estate *Samuel Castell* took under the will, or as heir at law, in *John Castell*'s moiety of the five messuages.

Burrough, for the plaintiffs, contended that *Samuel Castell* took a fee under his brother's will by the devise of "*my half* "*part*," &c. The two brothers being seised in fee of undivided moieties, the devise by *John* of *his half part* to *Samuel* must be understood to mean his whole interest in the one moiety, such as *Samuel* already had in the other; especially in the case of a devise to an heir at law. But at any rate, if those words carried only a life-estate, for want of words of limitation, the fee descended to *Samuel* as heir at law, not being included in the residuary clause to the daughters, which is confined to personalty. The devise of "*all the rest and* "*residue*," follows pecuniary and chattel bequests. The testator *orders the rest and residue* to be divided amongst the daughters; and whom but his *executors* can he *order* to make such division? The words *share and share alike* was before applied by the testator to the bequest of stock amongst the daughters.

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Littledale contrà. There are no words of limitation or necessary implication to extend the devise to *Samuel* beyond a life-estate. In *Pettywood* v. *Cook* (*a*), a devise of *totam illam partem* was held not to carry a fee, but only expressed the thing devised. So a devise of a man's *share* in the New River

(*a*) *Cro. Eliz.* 52. 2 *Leon.* 129. 193. *and* 3 *Leon.* 180.

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only carries a life-estate; as in *Middleton* v. *Swaine* (*a*). It cannot make any difference that the two brothers held undivided moieties as tenants in common in fee; for their estates were entirely separate and distinct, and the words must be construed in the same manner as if the devise were to a stranger. It appears by the devise to *Ryder* and *his heirs* that the testator knew how to pass a fee. Then the fee passed by the devise of "*all the rest and residue*" to his nieces. The
[163] testator had before devised real as well as personal property; the presumption therefore is that he meant the rest and residue of both; and there is nothing to confine it to personalty. The words "share and share alike," are as often applied to realty as to personalty. The executors are not directed to make the division, but the law will make it, as it makes tenants in common by the words *share and share alike*.

Burrough in reply, questioned the case of *Pettywood* v. *Cook*, where by the words "totam illam partem," the testator seemed rather to have meant all the interest that had been before devised to the first taker, which was the whole fee. And as to the case of *Middleton* v. *Swaine*, the word *share*, as applied to property in the New River water, was in common appellation merely descriptive of the thing. But he relied principally on the fee being indisposed of by the residuary clause.

Lord ELLENBOROUGH C. J. If there be any doubt on the devise of the testator's *half part* to his brother, whether it will carry the fee for want of words of limitation, it is not important to the decision of this case, if it be not taken from him by the residuary clause; as the fee, if indisposed of by the will, descended to *Samuel* as heir at law. Though if it had been necessary to decide upon the import of the words "*my half part*," as at present advised I should rather be disposed to think that they were sufficient to carry the fee; and I am not prepared to say that I should have come to the same conclusion as the Court did in the case of *Pettywood* v. *Cook*, upon the words of the will there stated (*b*). But it is not
[164] necessary to decide the case on that point; for upon the meaning of the residuary clause there can be no doubt. After giving several pecuniary bequests, the words are, "I *order*

(*a*) *Sir.* 339. and *Comb.* 201.
(*b*) Vide *Denn* v. *Balderston*, *Cowp.* 257.

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the lease of my house, &c. to be sold, and *all the rest and residue* to be divided," &c. Order whom? He must have meant his executors, immediately afterwards named, by whom the lease of his house, &c. was to be sold. The words *rest and residue* therefore, in the place in which they stand in this will, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate.

The rest of the Court agreed in this construction, and afterwards the following certificate was sent to his Honor.

This case has been argued before us by counsel: we have considered it, and are of opinion, that the said *Samuel Castell* took, under the said will, or as heir at law of the said *John Castell*, an estate in fee in the moiety of the said five messuages or dwelling-houses whereof the said *John Castell* was so seised as aforesaid.

(Signed) ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

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GASKELL *against* KING.

Friday, May 5th.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property-tax and all other taxes imposed on the premises or on the landlord in respect thereof, though void and illegal by the stat. 46 *G.* 3. *c.* 65. *s.* 115. will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.

THE plaintiff declared in covenant upon an indenture of the 2d of *March* 1807, whereby he demised to the defendant a messuage for 12 years, at a certain rent, payable quarterly, *clear of all and all manner of parliamentary*, parochial, and other *taxes*, *rates*, *assessments*, and deductions whatsoever. And the defendant covenanted to pay to the plaintiff the *said rent in manner the same as is therein before made payable*. The plaintiff then alleged a breach of the covenant by the non-payment of 26*l.* 5*s.* for a quarter's rent, due on the 25th *December* 1808. The defendant craved oyer of the indenture, in which the covenants were stated in the manner and order

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before mentioned: and then followed immediately after the words, *in manner the same as is hereinbefore made payable*, these words: "And also shall well and truly pay the land-"tax, *property-tax*, and all and all manner of other taxes, &c. "whatsoever, parliamentary, parochial, or otherwise how-"ever, which now are, or which shall at any time during the "continuance of the said term hereby demised be rated, "taxed, assessed, or imposed on the said demised premises "or any part thereof, or on the said plaintiff, his executors, &c. "on account thereof, and save harmless and indemnified the "plaintiff therefrom, and from all costs and charges which "may happen on account thereof." And then it set out a covenant by the defendant to keep the premises in repair, and other covenants, amongst others, a covenant for re-entry of
[166] the plaintiff in case of the breach of any of the covenants by the defendant, including the non-payment by the defendant of the property-tax and other taxes covenanted to be paid by him; concluding with a covenant by the plaintiff, that the defendant, paying the said yearly rent thereby reserved in manner aforesaid, and performing his covenants aforesaid, shall quietly enjoy the premises during the term. And then the defendant demurred generally. And the question was, Whether the covenant for payment of the lessee of the property-tax rendered the whole lease void by the act of the 46 *Geo.* 3. *c.* 65. *s.* 115. and 195., which avoids such a covenant (*a*)?

Lawes,

(*a*) 46 *Geo.* 3. *c.* 65.—By sect 115. If any person shall refuse to allow any deduction authorized to be made by this act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. 4. schedule (A), or out of any annuity or annual payment mentioned in schedule (C) or (E), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of 50*l.*; and all contracts, covenants, and agreements, made or entered into, *or to be made or* entered into for payment of any interest, rent, or *other annual* payment aforesaid, IN FULL, *without* ALLOWING *such deduction* as aforesaid, shall be utterly void.

Sect. 195. Provided that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes or assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon

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Lawes, for the defendant, contended in the affirmative. The covenant in question is interwoven in effect with the covenant for payment of the rent, and is in fraud and against the policy of the law. If the tenant had paid the *property-tax upon this covenant, he could not have recovered back the money from the landlord. *[167]

Lord ELLENBOROUGH C. J. The covenant by the lessee for payment of the property-tax, and for indemnifying the landlord from it, is void by the statute; but that will not avoid other independent covenants in the lease which are good, such as that for payment of rent. The covenants are entirely distinct.

LE BLANC J. If the subsequent covenant for payment of the property-tax had not been inserted in the lease, it could not have been pretended that the lease would be void because it reserved the rent clear of all parliamentary taxes; for that must be understood of taxes which the tenant might lawfully covenant to pay in exoneration of his landlord.

BAYLEY J. In the construction of the general words stipulating for the payment by the tenant of all parliamentary taxes, the law would imply an exception of such taxes as could not legally be defrayed by him: and the subsequent illegal covenant by the tenant for indemnifying his landlord from the payment of the property-tax will not avoid the former general and good covenant for the payment of rent clear of all parliamentary taxes, &c.: and if the tenant had paid the property-tax for his landlord, he might, notwithstanding such covenants, have produced the collector's receipt to the landlord in discharge of so much of the rent. (*a*)

Per Curiam, Judgment for the Plaintiff.

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thereon as aforesaid, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

(*a*) See Art. 9. of No. 4. Schedule (A), sect. 74. of the Property-act.

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Friday, May 5th.

WEATHERHEAD *against* DREWRY, HOPE, and HORROCKS.

A high-constable may be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county of itself, by virtue of the the stat. 13 *Geo.* 2. *c.* 18; though no such officer had been appointed, or such rate levied before; the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate, the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purpose.

AN action of trespass was brought against the defendants, of whom *Drewry* and *Hope* were justices of the peace for the borough of *Derby*, and *Horrocks*, high constable of the same, acting under the appointment aftermentioned, for taking the plaintiff's goods under a warrant of distress for a rate. The defendants pleaded the general issue, and at the trial before *Grose* J. at *Derby*, a verdict was found for the plaintiff for 71*l.* 10*s.* 9*d.* subject to the opinion of the Court on this case.

At the Quarter Sessions of the borough of *Derby*, held on the 13th of *October*, 1806, before the defendant *Drewry*, the mayor, and several other justices of peace for the borough, including *Hope*, an order was made, appointing *Horrocks* to be high-constable, and *Crompton* to be treasurer of the borough. And it was further ordered, "that 250*l.* be rated and assessed upon the borough, as a general rate or assessment for the same, in the nature of a county rate, for such purpose as it is applicable to according to law." And further, that the said sum of 250*l.* should be rated and assessed upon the five several parishes within the borough in certain proportions, of which the proportion for the parish of *All Saints* was 71*l.* 8*s.* 9*d.* And further, that *Horrocks* the high-constable should demand of the respective overseers, &c. of the several parishes the sum assessed on each; and should pay over the several sums, when received, to the treasurer, to be by him paid to such * persons, as the justices in sessions should by their orders from time to time appoint, "for such uses and purposes as the public stock of the said borough is or may be applicable to by law." Accordingly on the 14th of *October* 1806, the defendant *Horrocks*, served a precept on the plaintiff, then one of the overseers of the poor of the parish of *All Saints* in the borough, requiring him to pay out of the money collected by him for the relief of the poor of that parish,

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71*l.* 8*s.* 9*d.* as the proportion of the parish for the said assessment for the borough in the nature of a county rate: and upon the non-payment thereof, and after a summons issued to the plaintiff and the other parish officers, under the hands and seals of the defendants *Drewry* and *Hope*, to shew cause, &c. the latter issued a warrant of distress to *Horrocks*, which was executed by him on the goods of the plaintiff for 71*l.* 10*s.* 9*d.* the amount of the rate, and the charges of the distress. The case then set out a charter of the 34th of *Charles* 2.; by which, reciting that the borough of *Derby* had been immemorially a corporate town, and that all former charters had been surrendered, the king incorporated the burgesses by the name of the mayor and burgesses, &c. giving them a mayor, 9 aldermen, and other officers; of whom the mayor and certain other officers named should be "justices of the king, &c. as well to keep the peace in the same borough and the liberties and precincts thereof, as to keep the statutes of vagabonds, artificers, and labourers, weights and measures within the borough, &c.; with power to any three or more of them, whereof the mayor and recorder to be two, to inquire, hear and determine within the borough, &c. all murders, felonies, misprisions, riots, routs, oppressions, extortions, forestallings, regratings, trespasses, offences, things, matters, and articles, whatsoever; and to hold sessions, to commit and [170] discharge prisoners; and also to do and execute all other things within the borough aforesaid and the liberties of the same, in as ample a manner as the justices of the peace in the county of *Derby* or elsewhere within the kingdom of *England* might do." After which followed a non intromittant clause as to the justices of the county. The king also granted to the mayor and burgesses the goods of felons, waifs and deodands within the borough, &c. "And further, for the melioration of the state of the borough, and *that all common charges there might be better and more easily supported*," the king granted to them all issues, fines, amerciaments, redemptions, and penalties, of all the inhabitants or refiants within the borough, &c. and also 7 fairs yearly, and a free market weekly with the tolls, &c.; and he confirmed all former grants of franchises, immunities, and lands before enjoyed by

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the mayor and burgesses, or their predecessors, &c. The case also set out a charter of the 1st of queen *Mary*, whereby the queen, as well in consideration that the bailiffs and burgesses of the town of *Derby the charges of the said town* might be the better able to support, as for other considerations there mentioned, granted to them certain lands, subject to certain small charges. And the case stated, that the corporation of *Derby* were possessed of estates of the present annual value of nearly 1400*l.*; and that the charitable and other charges to which they were subject amounted to 300*l.* a year and upwards. That in the year 1800 the corporation contributed 500*l.* for the public service under the voluntary aid and contribution act; and 500*l.* about four years afterwards towards the expences of the volunteers of the
[171] town; and since then a further sum of 500*l.* towards the county infirmary, and 100*l.* towards an organ for the parish church of *All-Saints*. That the borough of *Derby* has never contributed towards a county rate: neither has a rate in the nature of a county rate or any other rate upon the inhabitants ever before been made by the magistrates of the borough. That those expences which in the county, without the limits of the borough, are paid by a county rate have always within the borough of *Derby* been defrayed from the funds of the corporation, except only in the expences occasioned by the militia, which have been always discharged by the respective parishes. That no appointment of high-constable has, except in the present instance, ever been made. That at the time of making the above order there were no presentments of any thing within the borough, to which a county rate or a rate in the nature of a county rate was applicable: but that there are from time to time occurring within the borough various expences, which in the county, without the limits of the borough, are defrayed by a county rate; such as the expences of passing vagrants, the expences incident to the gaol and house of correction, and transporting felons; all which expences however have hitherto been defrayed from the funds of the corporation. If the plaintiff were entitled to recover, the verdict was to be entered for 71*l.* 10*s.* 9*d.* If otherwise, a verdict was to be entered for the defendants.

Copley, for the plaintiff, endeavoured to distinguish this from

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the case of *James* v. *Green* (*a*), where the first time the right of appointing a high-constable and making and levying a county rate de novo were established *by this court in the instance of the town corporate of *Nottingham*; but *Nottingham* had been erected by charter into a county of itself; and on that ground he accounted for the case not having been argued with reference to the words of the stat. 13 *Geo.* 2. *c.* 18., on which he contended that the case now in question solely turned. But if the cases were not distinguishable in principle; then he denied the former decision to be law, which he said had been made without any consideration of the statute. It is unnecessary to advert to the terms of the st. 12 *Geo.* 2. *c.* 29. intitled, "An act for the more easy assessing, collecting, and levying of *county* rates," the 5th section of which provides that the act "shall not extend to make any persons, liberties, di-"visions, or places liable to pay to any rate to be made in "pursuance of that act, to which such person, liberty, &c. "did not, or was not liable to contribute before the passing "thereof," &c. But the stat. 13 *Geo.* 2. *c.* 18. reciting that by the former act "several powers and authorities were given "to the justices of the peace in *England* within the respective "limits of their commissions, at their general or quarter ses-"sions, from time to time to make one general rate for such "sums as they in their discretion shall think sufficient to "answer all the purposes of the acts therein recited;" And reciting the before-mentioned proviso; and that "some doubts "had arisen whether the said act extended to *liberties* and "*franchises* which are not within the jurisdiction of the *com-*"*missions of the peace* for the *counties* in which such liberties "and franchises lie, and so never did nor were liable to "contribute to the said county rates: to the end therefore "that such liberties and franchises, may not be wholly "deprived of the benefit of the recited act, it is declared, "and enacted, that where any *liberties* or *franchises* within "*England* have *commissions of the peace* within themselves, "and are not subject to the jurisdiction of the commissions "of the peace for the counties in which such liberties or fran-"chises lie, and do not nor did before the making of the re-"cited act contribute to the several rates made for the said

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(*a*) 6 *Term. Rep.* 228.

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" counties, it shall and may be lawful for the justices of the " peace of such liberties and franchises, within the respective " limits of their commissions, to have, use, and exercise all " and singular the powers, authorities, and methods, given or " prescribed by the recited act; and all such liberties and " franchises are declared to be subject thereto in the same " manner to all intents and purposes as counties at large are," &c. This he contended only extended to exclusive liberties and franchises having commissions of the peace immediately from the crown, and not to towns corporate, like *Derby*, having only *charter* justices: and that *Lambert*, *Fitzherbert*, and *Dalton*(*a*), pointed in their treatises to the distinction between justices of the peace by charter and those by commission; 1st, in the mode of their appointment, the one being by commission from the king, the other by election made by those to whom the king had granted the power. 2dly, In their powers; for justices by charter have not all the powers given to those acting under commission. 3dly, In their qualifications, as required by statutes 18 *H.* 6. *c.* 11. and 18 *Geo.* 2. *c.* 20. 4thly, In the duration of their authority; those by commission being revocable at the will of the crown; but not those by charter. The words *liberties* and *franchises* in the statute were meant to apply to districts or places within the
[174] bodies of counties having separate commissions of the peace from the crown, such as the city and liberty of *Westminster*, the hundred of *Cashio* or liberty of *St. Albans*, in *Hertfordshire*, the *Isle of Ely*, the *Tower Hamlets*, the *Soke of Southwell*, in the county of *Nottingham*, the *Soke of Peterborough*, and other places. Where the legislature have intended to include the magistrates of cities, boroughs, and towns corporate, they have named them; as in the statute of bridges and highways, 22 *H.* 8. *c.* 5.: of vagrants, 17 *Geo.* 2. *c.* 5. *s.* 5.; of coroners, 25 *Geo.* 2. *c.* 29. *s.* 5.; of houses of correction, 22 *Geo.* 3. *c.* 64. *s.* 1. He also contended that the corporation having estates granted to them for public purposes, and having always hitherto sustained the burthens which this rate was made to defray, were bound to apply their revenues to the same purposes as far as they would go, and therefore that there appeared

(*a*) Vide *Dalton's Justice*, ch. 3. p. 11.

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to be no necessity for making such a rate. [Lord *Ellenborough* C. J. If the justices had the power of making the rate, we cannot inquire in this case whether they have exercised that power unnecessarily. *Bayley J.* There is nothing stated in the cause to shew that there may not be sums necessary to be raised now for the purposes of such a rate more than the corporate funds are able to bear after defraying all other charges, even supposing them applicable to these purposes]. The surplus of the corporation revenues, after defraying the specific charges upon them, appear to be more than sufficient to cover the amount of the present rate. [Lord *Ellenborough* C. J. It lies on those who insist on the particular application of the corporate estates to shew that the corporation are compellable to apply their revenue to these purposes. If estates have been granted to them, have they not a right to apply the produce in what manner they please, as other persons may do, unless they are restricted by the terms of the grant to apply it to a particular purpose?] The corporation are required by the grants to pay *all the charges of the town:* and those must be taken to comprize all such public charges upon the town as may arise from time to time, and which the inhabitants may become liable to bear. The corporation cannot have the benefit of the grant, and discharge themselves from the burthen.

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Reader contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. We cannot enter in this form upon the question of irregularity or want of necessity in making the rate: the only question is, whether the justices in sessions had power to make such a rate, upon the true construction of the act of parliament? And upon that I am clearly of opinion that the words, "liberties and franchises, having commissions of the peace within themselves," are sufficient to include charter justices. Is not this corporate jurisdiction a franchise; and do not the justices who are appointed under the charter act under the king's commission? A general commission of the peace gives a temporary authority to those who act under it until revoked by the crown: and the charter gives a permanent authority from the crown for the same purposes; and is a permanent instead of a temporary commission of the

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peace. It would be mutilating the act of parliament to give it the confined construction contended for.

LE BLANC J. I do not think that any difference was intended to be made by the legislature between charter justices, and justices under a general commission: but the act of the 13 *Geo.* 2. was meant to apply to places with separate commissions of the peace, which were not counties of themselves nor liable to the county rates, and therefore not within the general provision of the former act of the 12 *Geo.* 2.

GROSE and BAYLEY, Justices, concurred.

Postea to the Defendants.

Saturday, May 6th.

The KING *against* The Inhabitants of STRATFORD-UPON-AVON.

An apprentice who went to lodge at his mother's in an adjoining parish to that of his master, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged.

TWO justices by their order removed *Thomas Barnett*, his wife and children by name, from the borough of *Stratford-upon-Avon* to *Old Stratford*, both in the county of *Warwick*. The Sessions, on appeal, quashed the order, and stated the following case for the opinion of this Court.

T. Barnett was bound apprentice by the parish officers of *Old Stratford* to *H. Heming* of *Stratford-upon-Avon*, cordwainer; and, among other covenants in the indenture, the pauper engaged "faithfully to serve his master in all lawful business." He lived with his master about 12 months, when his thumb became affected with scrofula, and he left his master, and went to his mother's in the adjoining parish of *Old Stratford*, to have his thumb cured, where he continued till the time his master went away from *Stratford-upon-Avon*, which was about two months afterwards. He slept at his mother's house more than 40 days, and he never afterwards slept in *Stratford-upon-Avon*, nor in any other place for 40 days during the continuance of his apprenticeship. During the whole * time he so slept at his mother's, he went almost every day to his master's, and was on some days employed for 3 or 4 hours in each day by his master in going of errands, and was always ready at his master's house whenever wanted by him,

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him, but was unable to work at his trade in consequence of the complaint in his thumb. The sessions were of opinion that the paupers were legally settled in *Stratford-upon-Avon*.

Reader, in support of the order of Sessions, contended that no settlement was gained in *Old Stratford* by the lodging of the pauper there with his mother; his residence there being casual, on account of sickness, and not a residence under the indenture. For though the general rule be that the settlement is in the parish where an apprentice or servant lodges, and not where the service is performed: yet it must be a lodging in the prosecution of the master's service, and not merely casual. In *Rex* v. *Alton* (*a*), a pauper going with his master to a watering place (*Scarborough*) and staying there above 40 days, was held not to gain a settlement; the residence of the master there being merely casual. [Lord *Ellenborough* C. J. I am really at a loss to conceive what distinction there is between a residence at a watering place and at any other place, so as to make the one to be considered as casual, when it would not be so considered at the other. That doctrine was overruled in the case of *The King* v. *Bath Easton* (*b*), and common sense is with the last case.] But here the residence in *Old Stratford* was occasioned entirely by sickness, which must be admitted to be casual; and though the apprentice was not [178] thereby disabled from going of errands for his master, the distance from his mother's to his master's being short; yet it prevented him from working at his trade, which was the principal object of the binding, and he was therefore substantially withdrawn from his master's service. The master was bound to provide for his apprentice in sickness as well as in health, and when he abandoned his duty and sent him to his mother's, he had no right to require from him any sort of service, and what the apprentice did must be considered as voluntary. He referred to the cases of *Titchfield* v. *Mitford* (*c*), *Rex* v. *Sutton* (*d*), *Rex* v. *Barnby-in-the-Marsh* (*e*), the two last having overruled the intermediate case of *Charles* v. *Knowstone* (*f*), [*Le Blanc* J. It was not considered in that case, that the

(*a*) *Burr. S. C.* 418. and *Burn's Just.* tit. *Poor*—Settlement by Service.
(*b*) *Burr. S. C.* 774.
(*c*) *Burr. S. C.* 511.
(*d*) 5 *Term Rep.* 657.
(*e*) 7 *East*, 381.
(*f*) *Burr. S. C.* 706.

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pauper went to his grandmother's in the parish of *Knowstone* for the purpose of cure; but that the original master, who lived in the same parish and was bound to receive him, did receive and place him there.]

Morice contrà, said that if this residence of the apprentice would not gain him a settlement, it was difficult to say that any settlement could be gained by an apprentice residing in a different parish from his master. He continued serving his master the whole time, though not in the way of his trade, and he was placed with his mother merely to have the benefit of her care. The Court then stopped him and *Reynolds*, who was to have argued on the same side, thinking it unnecessary to hear any further argument.

[179] Lord ELLENBOROUGH C. J. The facts stated leave no doubt that there was a service of the master by the apprentice while he lodged at his mother's in the adjoining parish. He went to lodge there indeed in order to get cured, in consequence of an arrangement between the master and the mother; but he continued to serve his master every day; and though he could not work at the trade himself, yet he performed other service, and he might attend the work and learn the trade of his master; he must therefore be considered as still in the service of his master as an apprentice while he lodged with his mother. If the mother had lived more remote from the master's house, so that he could not have served his master while he resided at his mother's for the purpose of cure, that would have altered the case, and likened it to *The King* v. *Barnby-in-the-Marsh:* there there was no service of the master; but here the service to the master continued, and therefore the apprentice gained a settlement by the last 40 days residence in the parish where he lodged with his mother.

GROSE J. There is no pretence for saying that the apprentice was serving any other person than his master, and the case shews that he was serving him during the time he lodged at his mother's. If the Sessions had considered that there was any fraud in the master's sending him to his mother's, they would have stated it. But though the boy went to his mother's for the purpose of having his thumb cured, yet he continued to serve his master every day; and then, according to all the cases, he gained a settlement by such service in the parish where lodged.

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LE BLANC J. The question is, Whether during the last 40 days that the boy lodged at his mother's he was resident there *as an apprentice?* and the facts stated put an end to the argument; for it is found that during all that time he was serving his master, not indeed to the full extent of the service required by the indenture, but to the full extent of his ability to perform it. In the other cases, where it has been held that the apprentice gained no settlement while resident in a different parish from the master's for the purpose of cure, he was not serving his master during such residence. But while an apprentice continues serving under the indenture, all the cases agree that his settlement is in the parish where he lodges, and not in that where the service is performed. Here he was serving his master all the time, and I cannot say that the service was not of such a nature as was proper for an apprentice.

BAYLEY J. was of the same opinion.

Order of Sessions quashed.

JOHNSON and Others *against* HUDSON.

Saturday, May 6th.

A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but

THIS was an action to recover 60*l.* 7*s.*, the value of 21lbs. of tobacco-segars, sold and delivered by the plaintiff to the defendant in *November* 1806. The tobacco appeared to be partly manufactured; and the *principal question made at the trial, at *Guildhall*, was, Whether the plaintiffs, who had never before dealt in tobacco, but had had the tobacco in question, parcel of a larger quantity, consigned to them from *Guernsey*, to be disposed of, and who had made a regular entry of it on importation, but had *not entered themselves with the excise office as dealers in tobacco,*

without having entered himself with the excise office as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as *a dealer* in tobacco within the meaning of the stat. 29 *Geo.* 3. *c.* 68. *s.* 70., which requires every person who shall *deal* in tobacco first to take out a licence under a penalty.

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nor had any licence to such, and who had sent out to the defendant, at his desire, the tobacco in question, *without a permit*, were entitled to maintain this action against him for the value of it? Lord *Ellenborough* C. J. thought that the plaintiffs were entitled to recover, and they obtained a verdict accordingly. But an objection having been made to the action on the ground of the requisites of certain acts of parliament not having been complied with by the plaintiffs to entitle them to sell this commodity, leave was given to the defendant's counsel to move to set aside the verdict and enter a nonsuit, if, upon further examination of the acts, the objection should appear to be well founded.

Wigley accordingly moved to that purpose in the last term, and stated the several provisions of the acts on which he relied. The stat. 29 *Geo.* 3. *c.* 68. for granting the duties on tobacco, enacts, (*s.* 70.) that every person who shall deal in tobacco, shall, before he shall deal therein, take out a licence; which by *s.* 72. is to be renewed yearly, under a penalty of 50*l.* The stat. 30 *Geo.* 3. *c.* 40. *s.* 4. enacts, that no tobacco (except *Spanish* or *Portuguese*) shall be imported either wholly or in part manufactured, on pain of forfeiting all such tobacco, with the packages, and also the ship in which it was imported. And by stat. 43 *Geo.* 3. *c.* 134. *s.* 5. prize tobacco is made subject to the
[182] regulations and forfeitures of the former acts. Upon these acts he contended that none but a licensed dealer could legally deal in this commodity; and the dealing in it by every other person being made illegal, no action could be maintained upon any such contract of sale by the plaintiff, on the same principle which prohibits a recovery upon a smuggling contract (*a*). The goods were also seizable in their transit without a permit, and afterwards in the stock of the vendee, which would have been by so much increased without any permit to cover and protect that increase. And he referred to *Gallini* v. *Laborie* (*b*), where it was held that no action could be maintained for breach of an agreement to dance at an unlicensed theatre, the stat. 10 *Geo.* 2. *c.* 28. prohibiting all theatrical representations without licence.

(*a*) *Clugas* v. *Penaluna*, 4 *Term Rep.* 466. *Waymell* v. *Reed*, 5 *Term Rep.* 599.

(*b*) Vide 5 *Term Rep.* 242. and vide *Ribbany* v. *Crickett*, 1 *Bos. & Pull.* 264. and *Blatchford* v. *Preston*, 8 *Term Rep.* 89.

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The Court, in the absence of Lord *Ellenborough*, reluctantly granted a rule to shew cause; observing that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; nor any clause making the contract of sale illegal; but at most it was the breach of a mere revenue regulation, which was protected by a specific penalty: and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the act. And when in this term, the Court being full, it was moved to make the rule absolute; no counsel appearing on the behalf of the defendant to shew cause when the cause was called on in the paper of new trials; Lord *Ellenborough* C. J. said that the Court had considered the question since the rule was granted, and were all satisfied that no objection lay to the action; therefore they discharged the rule.

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EDWARDS *against* DUNCH.

Monday, May 8th.

A RULE was given to declare in replevin within 14 days after the end of *Hilary* term (*a*), which ended on the 12th of *February*, but it was not served till the 23d; and no notice being taken of it, judgment was signed for want of a declaration. Whereupon *Wigley* on a former day moved to set aside the judgment for irregularity; and contended that the rule must be served at least 4 days before the expiration of it; (which had not been done here;) otherwise it might as well be served at any time, even after the time mentioned in the rule was out. *Marryat* now resisted the alleged irregularity, upon the ground that it was sufficient to serve the rule to declare in replevin at any time before it expired, and the plaintiff was bound to declare within 4 days after such service. And on reference to the Master by the Court, he reported the practice to be as last stated; and the judgment was therefore held to be regular, the rule for setting it aside was discharged.

The rule to declare in replevin may be served at any day before the time in the rule is expired, and the plaintiff must declare within 4 days after such service.

(*a*) These rules are entered as of the last day of the term.

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Monday, May 8th.

FLINT *against* HILL.

The plaintiff in trespass for breaking his close, who recovers less than 40*s.* is not entitled to costs of increase merely because a view was granted, before trial, though upon the application of the defendant.

IN trespass for breaking and entering the plaintiff's close, to which the general issue was pleaded, the defendant applied for a view, which was had accordingly; and at the trial the plaintiff obtained a verdict for 10*s.*; but the Judge did not certify that the title came in question. And on a former day in this term a rule was obtained by *The Attorney General* for the defendant to shew cause why the plaintiff should not be allowed his costs of increase, and that the Master should tax such costs upon the postea: and he relied upon the case of *Kempster* v. *Deacon* (*a*), where upon a view granted in trespass, the plaintiff had his full costs allowed, though the jury gave under 40*s.*, and there was no certificate that the title came in question.

Clarke and *Hullock* opposed the rule, and answered the case cited by shewing that it was before the statute 4 *Ann. c.* 16. *s.* 8. allowing the Court on motion to direct a view. Before that statute (*b*) there could be no view till after the cause had been brought to trial, when, if the Judge thought proper, the cause was adjourned to enable the jurors to have a view; and this was entered upon the record, as was done in the case referred to; and then the Court inferred that the title must have come in question. But no such inference can now be made, when a view is granted of course upon the previous motion of either party. And it matters not that it was had
[125] upon the motion of the defendant in this case; for if the fact of a view having been had is to carry the costs, though the verdict be under 40*s.*, and there be no certificate of the Judge, every plaintiff in trespass will move for a view, which will operate as a repeal of the stat. 22 & 23 *Car.* 2. *c.* 9. restraining the costs where the verdict is under 40*s.*, unless the Judge certify that the title was in question; or under the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 4. that the trespass was wilful and malicious.

Lord ELLENBOROUGH C.J. There seems to be no reason for allowing costs of increase because a view was had, for that may be granted where the title is not in question.

Per Curiam, Rule discharged.

(*a*) 1 *Ld. Ray.* 76. and *Salk.* 665. (*b*) Vide 2 *Tidd*, 716.

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DOE, on the several Demises of SUSAN BLACKSELL, JOSEPH PALMER, WM. CLARKE, and SARAH his Wife, JOSEPH COOKE, BENJAMIN WHITE, and JANE his Wife, and MARY HARRIS, *against* TOMKINS and Wife. *Tuesday, May 9th.*

Devisees of contingent remainders in a copyhold, not being in the seisin cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs.

THIS was an ejectment to recover possession of certain copyhold lands and buildings held of the manor of *Thorpe-in-the-Soken*, in *Essex*; the demises were held on the 12th of *January* 1808; and at the trial a verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

John Blacksell being seised to him and his heirs of the premises above described, and having duly surrendered them to the use of his will, by his will dated the 3d of * *January* 1761, devised them to his brother *Thomas Blacksell* for life; remainder to his nephew *T. B.* junior, son of his said brother, "for life; and, *after his decease, unto such of my nieces*, daughters of my said brother *Thomas*, which he had by *Elizabeth* his late wife deceased, *as shall be then living*, to be equally divided amongst them, share and share alike," as tenants in common in fee. The testator died in 1769; whereupon *Thomas Blacksell* sen. was admitted to the premises for life; and at a court baron held in *July* 1774 *T. B.* jun. was admitted for his life in reversion, expectant on the estate for life in his father. At the same court, *Sarah* the wife of *R. Hackney*, *Elizabeth* the wife of *J. Burnby*, *Martha the wife of R. Wallis*, and *Mary*, *Jane*, and *Susan Blacksell*, spinsters, the testator's six nieces, daughters of his brother *Thomas* by *Elizabeth* his wife, were severally admitted in fee to an undivided sixth part each, in reversion expectant on the two former life estates of their father and brother, and immediately surrendered to their brother *Thomas*; *Sarah Hackney*, *Elizabath Burnby*, and *Martha Wallis*, being first severally and secretly examined apart from their respective husbands by the steward, according to the custom of the manor, and freely consenting; and *T. Blacksell* the testator's nephew was thereupon admitted in fee. The husbands of the three married sisters were no parties to their admissions or to the

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the surrenders by them to their brother *Thomas*. *Thomas Blacksell* sen. and jun. at the same court mortgaged the premises for 500*l*. to *J. Ratford*, who afterwards made a further advance, and in 1784 had a surrender of the equity of redemption from the son; the father being then dead; and *Ratford* was thereupon admitted in fee, and surrendered to the use of his will. *Ratford* devised to trustees for the defendant *Ann*

[187] *Tomkins* his only child; which trustees have been admitted as the devisees under his will; and she and her husband are in possession of the premises in question. *Thomas Blacksell* jun. died 7th *June* 1801; at which time only four of the testator's neices were living, namely, *Susan*, the first named lessor of the plaintiff, *Sarah* then the widow of *R. Hackney*, *Martha* then the wife of *R. Wallis*, and *Mary* then the wife of *J. Harris*, *Martha*, *Sarah*, and *Mary*, all died before the date of the demises in this ejectment. *Joseph Palmer*, the second lessor, is the grandson of *Sarah Hackney* by a deceased daughter, who with *Sarah* the wife of *W. Clarke*, the third lessor, were her coheiresses. *Joseph Cooke* the fourth lessor is the heir of *Martha Wallis*, and *Jane* the wife of *Benjamin White*, and *Mary Harris* spinster, the remaining lessors, are the daughters and coheiresses of *Mary* the wife of *J. Harris*. *Elizabeth Burnby* and *Jane Blacksell*, the only two other neices of the testator, died in the lifetime of their brother *Thomas Blacksell* jun. The lessors of the plaintiff were duly admitted at the lord's court to their several proportions claimed in the premises on the 23d of *February* 1808. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover?

Marryat, for the plaintiffs, began by arguing that the testator's nieces had only contingent remainders at the time of the surrenders made by them, which surrenders were therefore incapable of being made, and could not operate by way of estoppel. And that the surrenders by the feme coverts, without their husbands, was clearly void, according to *Stevens* v. *Tyrell*. (*a*)

[188] *The Court*, however, thought it unnecessary to hear him; it being clear that the remainders to the nieces were contin-

(*a*) 2 *Wils*. 1.

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gent; and being of opinion that a party who was not in the seisin could not surrender a copyhold; and that a surrender could not operate by way of estoppel, but could only pass what the party then had. And *Lawes*, who was to have argued for the defendants, admitting that he could not support their title on these grounds; the Court gave judgment for the postea to be delivered to the plaintiff. (*a*)

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(*a*) Vide 1 *Watk.* 210. *Taylor* v. *Philips*, 1 *Ves.* 230. and *Goodtitle* v. *Morse*, 3 *Term Rep.* 365.

FISHER *against* PIMBLEY.

Tuesday, May 9th.

TO debt on bond, dated 12th of *March* 1807, for 300*l.*, the defendant craved oyer of the bond and of the condition, by which it appeared that the bond was given for the performance of an award of certain arbitrators to whom it was referred to arbitrate and determine concerning all causes of action, controversies, and demands whatsoever between the plaintiff and defendant, so as the award in writing under their hands should be ready to be delivered on or before the 12th of *June* 1807: and then he pleaded that the arbitrators in the condition named *did not make any award* under their hands ready to be delivered, &c. on or before the said 12th of *June*, and this he is ready to verify, &c. The plaintiff replied that the arbitrators in the condition named, within* the time limited, &c. *duly made their award* in writing under their hands of and concerning the premises in the condition mentioned, ready to be delivered, &c. by which they awarded that the defendant should pay to the plaintiff 124*l.* 5*s.* 2*d.* on the 8th of *July* 1807, as a compensation for all the coal by him gotten in such manner as was therein before mentioned: and they thereby further awarded mutual releases up to the date of the bonds of reference: and that the plaintiff should also execute and

Debt on bond, which was conditioned to perform an award; plea no award; replication setting out an award; rejoinder stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission:) and then demurring.

Held that the rejoinder was not inconsistent with, nor a departure from the plea. Under a submission of all matters in difference between *A.* and *B.*, an award on matters in difference between *A.* and *B.*, *C.* and *D.* jointly, directing *A.* to pay *B.* a certain sum as a compensation for coals gotten by *A.* belonging to *B.* or to *B.* and others, and directing *B.* to give *A.* a bond to indemnify him against the claims of *C.* and *D.*, is bad.

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deliver to the defendant at his expence a bond in the penalty of 40*l.* conditioned to indemnify the defendant from all actions, &c. and demands by *J. Rothwell* (and two others by name) on account of the defendant having worked or gotten any coal out of a certain estate called *Shaw Place*, and a certain lane adjoining, or either of them, before the date of the bonds of reference, &c. And then the plaintiff alleged that the defendant had notice of this award, but did not pay the 124*l.* 5*s.* 2*d.*, the sum awarded. The defendant rejoined, that the said supposed award is in the words following, to wit, &c. and then he set out the whole award verbatim, wherein the arbitrators stated the bonds of reference, by which it appeared that *the subject of reference* was of all actions, controversies, &c. and demands *between the plaintiff and defendant*, as before set forth, and that the arbitrators found " that the defendant had at the date of the said bonds worked and gotten divers quantities of coal belonging to the plaintiff, *or to him and some other person or persons*, in and under a certain estate called *Shaw Place*, &c. and under a certain lane adjoining, &c., and that the plaintiff demands from the defendant a compensation for all the coals so gotten by the defendant. And they awarded the defendant to pay to the plaintiff 124*l.* 5*s.* 2*d.* on the 8th
[190] of *July* then next " as and for a compensation for all the coal gotten by him as aforesaid :" and then they awarded the mutual releases and the bond of indemnity from the plaintiff to the defendant as mentioned in the replication. To this rejoinder the plaintiff demurred, and alleged for special cause, that such rejoinder was a departure from the plea, and neither confessed and avoided, nor denied, the matters pleaded in the replication, &c.

The grounds of objection to the award were, 1st, its having directed the money to be paid to the plaintiff for coals stated to have been gotten by the defendant belonging to the plaintiff, *or* to him and some *other person or persons;* when the submission was confined to matters in difference between the plaintiff and defendant only. 2dly, That it directed a bond of indemnity to be given to the defendant at his expence against future claims and actions by three several persons, upon matters not submitted to the arbitrators, and was therefore uncertain and not final. And the validity of the first of these objections

jections was very faintly questioned by *Scarlett* on behalf of the plaintiff, (supposing the rejoinder to be good.) But against the second, he relied on *Philips* v. *Knightley* (*a*), * where an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages and expences which should happen by means of any further proceedings in an action begun at the instance of the defendant, and at issue in C. B., wherein *Marshall qui tam* was plaintiff, and the then plaintiff defendant, was held good. And he urged that at any rate, if the award of the bond of indemnity were void, the award would only be void for that excess. (*b*)

* [191]

The principal question, however, argued was, whether the rejoinder, setting out the award in fact, according to the truth, which award had been defectively set out by the plaintiff in his replication, were a departure from the defendant's plea, wherein he had before stated that the arbitrators had made no award?

Scarlett contended that it was a departure; for a plea of *no award* means no award in fact: and cited *Farrer* v. *Gate* (*c*), *Skinner* v. *Andrews* (*d*), *House* v. *Lander* (*e*), *Harding* v. *Holmes* (*f*), wherein several other cases in point were referred

(*a*) *Stra.* 903. *Page* J. there held the award bad: the other three Judges held it good. According to Mr. *Ford*'s MS. the majority said "that the poor being interested in the suit as well as the plaintiff, he could not *release:* nor would the award bind the poor, they not being parties to the submission. And though it were objected that the covenant might be a foundation for a fresh suit, so might a bond or any other security, without which no possible end could be made of the matter: and therefore the Court held it good *for the necessity of the case.* As to the other part of the objection, that the costs were uncertain; these might be ascertained by the party himself, if he thought proper to proceed. And *Lee* J. cited *Beale* v. *Beale*, *Cro. Car.* 380., where an award to pay *the charges* of a *suit* was held good, because they would be ascertained by the attorney's bringing in his bill. And so judgment was given for the plaintiff; *Page* J. still dissenting. *Note*—They all agreed that if the suit could possibly have been released, or otherwise immediately discharged, the award would have been void."

(*b*) Vide *Ingram* v. *Milnes*, 8 *East*, 445. (*c*) *Palm.* 511.

(*d*) 1 *Lev.* 245. (*e*) *Ib.* 85. (*f*) 1 *Wils.* 122.

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to, and *Praed* v. *The Duchess of Cumberland* (*a*). The defendant ought to have rejoined *no such award* as set out in the replication: and if issue had been taken on that, and any material variance had appeared between the award set out in the replication, and the award proved, the issue must have been found for the defendant.

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Yates, contrà, was stopped by the Court.

Lord ELLENBOROUGH C.J. The last is the only point which was argueable. The award is clearly bad, inasmuch as it awards compensation to the plaintiff for coal gotten by the defendant belonging to the plaintiff, *or* to him *and some other* person or persons: and though it directs a bond of indemnity to be given by the plaintiff to the defendant against any demands by three certain persons; non liquet that those were the persons interested with the plaintiff in the coals which had been gotten by the defendant, and for which the compensation was awarded. The compensation therefore has been awarded to the one party, without any equivalent appearing on the other side. Then the award being bad, the only question is, whether the defendant can shew such bad award in his rejoinder, consistently with his former allegation in the plea, that there was no award? The plaintiff in his replication sets out an award; and if he had set it out truly, it is clear that the defendant might have demurred to it; but not having set it out truly, where is the inconsistency, or departure from the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in fact, and then demurring to the true award so set out? He thereby still maintains his former allegation, that there was no award; in other words, that there was no legal and valid award under the submission, which is the same as no award. There is no inconsistency in this, and therefore no departure.

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LE BLANC J. (*b*). The award cannot be maintained, as it was made of matters not submitted to the arbitrators; for the submission was only of matters in difference between the plaintiff and the defendant; and the award is of matters between the defendant and the plaintiff *and other*

(*a*) 4 *Term Rep.* 585. and 2 *H. Blac.* 280.

(*b*) *Grose* J. was absent from indisposition.

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persons. If the matters submitted between these parties had comprehended matters in difference between the defendant and the plaintiff together with others, then an award of compensation to the plaintiff for the whole value of the coals taken, with an indemnity from him to the defendant against the claims of those others for their proportions, might have done: but the submission was not so extended. Then as to the departure, the defendant by his rejoinder only puts the plaintiff's case in the same state on this record as it would have been if he had set out the award truly; and it only shews that the award in fact made is not a good award in point of law.

BAYLEY J. A submission of matters in difference between *A.* and *B.* does not include matters in difference between *A.* and *B. and others jointly:* the award therefore was bad. Then a plea of no award means no award according to the submission; that is the plain meaning of it. I do not agree with the argument, that the defendant might have defended himself by taking issue upon the award as stated in the replication; for there was such an award as is there stated; but it was not an award made conformably to the submission, which would have appeared to be the case if the whole had been truly set out in replication. Then the rejoinder first setting out the true award, and then demurring to it, is no more in effect than saying that there was no award conformable to the submission, and therefore no award; which maintains the plea.

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Judgment for the Defendant.

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Tuesday, May 9th.

Sir HENRY STRACHEY Bart., and GILES, *against* TURLEY, BURT, and Others.

Where an election committee had, under the st. 28 *Geo.* 3. *c.* 52. reported to the House of Commons that *two several* petitions against the return of members to serve in parliament for *East Grimstead* were frivolous and vexatious, whereupon the then Speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions *jointly*, and had first granted a certificate of the amount of such *joint* taxation and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition *separately*, and how much *jointly*: held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed *separately* on each distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new parliament; the act mentioning *the Speaker* generally.

IN consequence of the former decision of the Court in the cause between these parties, which is reported in my 7th volume, 507, nonsuits were entered in the three several actions of debt which had been brought by these plaintiffs; the first upon the Speaker's original certificate for costs against *Frost* and these defendants *jointly*, on account of their frivolous and vexatious petition against the return of the plaintiffs as burgesses for the borough of *East Grimstead* to the parliament which met in 1802; the second, upon the Speaker's amended certificate against *Frost alone*, for *his separate* proportion of the costs given to the plaintiffs; and the third, upon the same amended certificate against these defendants *alone*, for *their separate* proportion of the costs. These nonsuits were entered in *Trinity* term 1806. On the 24th of *October*, in the same year that parliament was dissolved, without any further proceedings having been had by the plaintiffs for the recovery of their costs; and a new parliament was assembled on the 22d of *June* 1807. On the 17th of *March* 1808 the Speaker made the two following *certificates, which were produced in evidence. Whereas *J. H. Ley*, Esq. clerk assistant of the House of Commons, and *Nicholas Smith* Esq, one of the masters of the High Court of Chancery, who were duly authorized and directed by me according to the act of the 28th *Geo.* 3 (*c.* 52.) to examine and tax the costs and expences of Sir *H. Strachey* Bart. and *D. Giles* Esq. incurred by them in opposing the petition of several persons whose names are thereunto subscribed, on behalf of themselves and others stiling themselves the electors of the town and borough of *East Grimstead*, presented to the House of Commons upon the 1st of *December* 1802, complaining of the undue election

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and return of them the said Sir *H. S.* and *D. G.* as burgesses to serve in parliament for the said borough of *East Grimstead*, have reported to me the amount of such costs and expences; now I do hereby certify that the said costs and expences allowed in the said report amounted to the sum of 361*l.* 14*s.* 2*d.* Given under my hand this 17th of *March* 1808. *Cha. Abbot*, Speaker.—There was a similar certificate of the Speaker, certifying the amount of the plaintiff's costs in opposing the petition of Mr. *Frost* at 361*l.* 0*s.* 10*d.* On the 18th of *April* 1808, a copy of the first of these certificates was served on the defendants, and payments of the costs therein mentioned demanded of and refused by them: and a copy of the last stated certificate was served on Mr. *Frost*, and payment of the costs therein mentioned was demanded of and refused by him. Thereupon this action of debt was brought, wherein the plaintiffs declared that the defendants were indebted to them in 361*l.* 14*s.* 2*d.* by virtue of the stat. 28 *Geo.* 3. *c.* 52.; to which the defendants pleaded the general issue: and at the trial at *Westminster* a verdict was given for the plaintiffs, subject to the opinion of the Court on a case reserved; in [196] which all the facts of the former case were stated, with the addition of those above-mentioned: and if upon the whole the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

Burrough for the plaintiffs. 1st, It is no objection to the present certificate of the Speaker, on which the action is brought, that he had before granted certificates, which were inefficient: for the authority given to him for this purpose by the stat. 28 *Geo.* 3. *c.* 52. is special: and it is a clear principle of law that every special authority ought to be pursued in substance and effect (*a*), and if not well executed in the first instance, may afterwards be executed properly (*b*): and here it appears from the former decision (*c*) that the Speaker's authority was not well executed before; for the first certificate was bad, because it did not assess the costs on each petition separately; and the second certificate was of course

(*a*) *Co. Litt.* 303. *b.*

(*b*) 3 *Vin. Abr.* tit. *Authority*, 423. B. *pl.* 42.

(*c*) 7 *East*, 307.

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avoided, because it was founded upon the first. 2dly, It is no objection that the Speaker who has granted the present certificate was chosen by a different House of Commons from that out of which the committee who reported the petition to be frivolous and vexatious was nominated. The act of the 28 *Geo.* 3. does not confine the power to be exercised by the Speaker of that parliament, but refers to him the name of *the Speaker* as a known officer whenever a parliament is in being. The words of the 19th sect. are, that wherever any petition shall have been reported by a committee to be frivolous or vexatious, [197] " the party or parties, if any, who shall " have appeared before the committee in opposition to such " petition, *shall be entitled to recover, &c. the full costs and* " *expences*," *&c.* This vests the right to the costs in the party grieved: and then the clause proceeds, " such costs and expences to be ascertained in the manner hereinafter directed." Then by *s.* 22. for ascertaining the costs, *the Speaker*, on application, is to direct the same to be taxed by certain officers, who are required to report the amount to *the Speaker*, and he is to sign and deliver to the parties a *certificate* of the same signed by himself. The Speaker therefore acts throughout as a mere ministerial officer, without exercising any judgment of his own either upon the propriety of giving costs at all, or upon the amount of them. It never could have been the intention of the legislature that the party's right to costs once vested should be afterwards defeated by the dissolution of the parliament, any more than by the death or resignation of the individual Speaker, before his signature of the certificate. This is not like parliamentary proceedings *in fieri* in the House of Commons, which fall to the ground of course on the political death of the House. The resolutions of election committees are all entered on the Journals, which are the records of the nation, and a copy of which, by the 23d clause, is to furnish evidence of the debt.

Clifford, contrà, admitting that a special authority not well executed at first may be executed afterwards; and that the Speaker in certifying the amount of the costs, had only a ministerial duty to perform; contended, 1st, that authority was only given to the Speaker to sign one certificate; and [198] that authority having been once exercised by him, in certifying

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fying the separate costs on the two petitions, could not be resumed again even in the same parliament. The power of awarding costs rests altogether upon the stat. 28 *Geo.* 3. *c.* 52., and the wording of the 22d clause, with reference to the other provisions of the law, evidently applies to the grant of one certificate by the Speaker of the then existing House of Commons. The certificate is to be granted on application (singulariter) to the Speaker, and the officers appointed to tax the costs are to report the amount to *the Speaker* of the *said* House. And by *s.* 23. the costs *so certified as above* are given to the party entitled, and *the certificate* (which can only extend to *one* certificate) of the Speaker, and a copy of the Journals of the House of the resolutions of the committee, are to be the evidence of the debt. If a new action were now brought upon the former certificate, a recovery in this action upon the subsequent certificate would be no bar to the other. This Court exercising its discretionary power may direct the Master to review his taxation of costs, if faulty, and may amend what is wrong; but the Speaker, having a bare authority in this respect, and having once exercised it, however defectively, is functus officio, like an arbitrator (*a*), and cannot resume the authority again. The parties having made a wrong application before to the Speaker will not authorise them to make other applications to him for the same purpose; and without their application the Speaker has no power to direct the taxation. The 22d section directs fees to be paid to the officers for taxing the costs; but it never could have been meant that those fees should be paid more than once because of the blunder of the persons applying. By *s.* 24. the whole amount of the taxed costs may be recovered from any of the persons liable, and the one who pays may recover over a proportionable share from the rest: but if a taxation once made could be rescinded at any subsequent time, and a new certificate issue, it would lead to great difficulty. But, 2dly, whatever the case might be of a second certificate issued during the same parliament, at all events the Speaker's authority was at an end upon the dissolution of that parliament. The party entitled must suffer by his laches. The general law and usage of parliament

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(*a*) *Henfree* v. *Bromley*, 6 *East*, 309. was cited.

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is clear that, except where otherwise specially provided by the statute, all proceedings pending in the House of Commons expire with the dissolution of the representative body, and therefore the power of their Speaker must necessarily expire at the same time. It cannot make any difference that the same individual happened to fill the chair of the House in successive parliaments. The report of the taxed costs is to be made to *the Speaker* of the *said* House, which confines the authority to the Speaker of the then existing House of Commons in which the proceedings originated. Suppose after the vote of the committee that the petition was frivolous and vexatious, the parliament had been dissolved, no proceedings could have been had upon that vote, because there could have been nobody to make or receive the report upon it; and if the political existence of those who had a judgment to exercise upon the matter were expired, of course the authority of their ministerial officer must also have expired. It was even necessary to make legislative provision by the 33d section of the act, that an election committee should not be dissolved by a prorogation of parliament.

[200] *Burrough*, in reply, admitting that if the parliament were dissolved before the report of the committee to the House, the proceedings might fall to the ground, contended that after such report, which would be placed on the Journals, the decision was conclusive, and all the consequences would follow, there being nothing but mere ministerial acts to be done.

Lord ELLENBOROUGH C.J. There is no doubt upon either ground but that the last certificate of the Speaker is valid. It is objected that the Speaker having granted one certificate could not grant another: and I admit that if he had before granted an effective certificate, he would have been functus officio, and could not have granted another; as in the case referred to of the arbitrator who had once made a valid award. But if he had before only granted void certificates, and the costs had been taxed in a manner which the legislature did not intend, and for which there was no authority, the first and second certificates were mere nullities, and the last, which alone pursued the authority given by the act, is valid. The act directs (*a*) that every committee, when they report to the

(*a*) Sect. 18.

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House their final determination on the merits of *the petition* which they are sworn to try, shall also report whether *such petition* were frivolous or vexatious: and (*a*) whenever they report *such petition* to be frivolous or vexatious, the party opposing "*such petition* shall be entitled to recover from the person or persons who shall have signed *such petition* the full costs and expences," &c. The other clauses follow in the same terms. This therefore is a direction applying specifically to *one* petition, and not to several, and therefore the remedy must be applied severally to each petition; and the costs and [201] expences of opposing several petitions cannot be consolidated together in one certificate, as was done in the first certificate granted upon this occasion. Then the second certificate was also bad, which apportioned part of the costs separately as to the two petitions, but still certified the great bulk of the costs jointly against the two sets of petitioners. Both these certificates were considered by the Court in the former case in 7 *East*, 507. to be void. With respect to the next question, as to the authority of the Speaker, by whom the present certificate was granted, to make it; his ministerial function, as it is rightly called in this respect, is described in section 22., which mentions him in general terms as *The Speaker*; it does not say, "the Speaker at the time of making the report of the committee," or the *same* Speaker, or use any words to that effect, so as to confine the power to the identical individual who then happened to be Speaker. If it had been so confined, I do not say that we should violate the plain letter of the act, in order to relieve a party grieved who is only entitled to the relief given by the act: but we would not confine the relief in the manner contended for, if the words of the act and the sense and reason of the thing do not enforce such a construction. The clause says, that "on application made to the Speaker of the House of Commons by any such petitioner, &c. for ascertaining such costs, he shall direct the same to be taxed by two persons out of a certain description of officers. Now suppose the Speaker had died after the report of the committee, and before such a direction to those officers could have been made, or suppose after such direction, the parti-

(*a*) Sect. 19.

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cular officers charged with the taxation had died; *can it be contended that the succeeding Speaker in the one case could not have directed the costs to be taxed; or in the other that the same Speaker would have had no power to direct the taxation to be made by other officers in the place of those who have died? Such a construction would be most manifestly against the sense of the act; and yet the argument would still apply that the authority was only given to the same Speaker, and that he could only once refer the costs to be taxed. The words of the act are, *The Speaker*, that is whosoever shall be Speaker when the certificate is to be granted: there is nothing in the act to narrow the description to the identical person who was Speaker at the time of the report. All the words and the sense of the act will be answered by reading it "the Speaker for the time being." And no difficulty can arise from supposing that different certificates might be granted by different Speakers; for as soon as any Speaker has legally exercised his function, no other certificate could be granted by himself or any other Speaker. The Speaker's authority, quà Speaker, does certainly end with the parliament: but this is a statuteable authority given to be exercised by the Speaker for the time being, whoever he may be: and if it be not well executed by one, it may be executed by another.

LE BLANC J. (a) There is no dispute as to the principles upon which this case is to be decided. It is a special authority given to *the Speaker* of the House of Commons, and if it be not well executed by him by granting a valid certificate, it may be executed again, until there be a valid execution of the

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authority. The first question then is, whether the Speaker has made more than one *valid* certificate? And I think, for the reasons before given, he has only made *one valid* certificate; and there has therefore been only one certificate, and one taxation pursuant to the act, because the others were invalid, not being conformable to the act, and no action could have been maintained upon them. Then it is objected that the last certificate was granted by the Speaker of another parliament, or not granted by the same Speaker who had been applied to and had directed the taxation. I agree that no-

(a) *Grose* J. was absent, indisposed.

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thing turns on the fact of the same individual having been chosen Speaker in the different parliaments, and I think the question would have been exactly the same if the direction to tax had been given by one Speaker in one parliament, and the certificate had been signed by another Speaker in the next parliament: such a certificate would have been good. And so, if after the Speaker's direction to one master in Chancery and one clerk of the House to tax the costs, either had died or been removed before the taxation made, the Speaker might have directed another clerk and another master to tax the costs. Or suppose after those officers had reported the taxation to the Speaker, and before he had made his certificate, the Speaker had died, or a new parliament had been assembled, the new Speaker might have made the required certificate: for though the individual Speaker may be different, yet it is the same *officer*, and this is an authority given to the *officer*, and not to the *person*; and it must be executed according to the directions of the act. The certificate in question is the first and only certificate which has been legally and validly granted, and therefore is good, though the Speaker by whom it is signed was not the Speaker of the same House of Commons in which the report of the committee was made, and in which the direction to tax the costs was given. And [204] this is not like the case cited of the award, because the arbitrator there had made a valid award in the first instance, and therefore a second award was an excess of his authority. The 24th section does not extend to distinct petitioners in different petitions, but only to joint petitioners in the same petition.

BAYLEY J. This is a remedial legislative provision, and therefore there ought to be such a construction put upon the words as will make the remedy effectual for the purpose to which it was meant to be applied. I consider the taxation and certificate on which the action is brought as the first valid taxation and the first valid certificate of the costs. If there were separate petitions against the same return, the act mean that there should be a separate taxation upon each; and so the Court have decided; and therefore the first and second certificates were void, because the costs in the different petitions were taxed jointly in both of them. How then, upon the construction of a remedial act can it be said, that a separate and valid taxation

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or certificate is not good, because former taxations and certificates made were invalid. It is next objected that the authority does not extend to the Speaker of another parliament: but it is agreed that the act to be done is merely ministerial, and may as well be performed in respect of the object by one Speaker as by another. The act mentions *the Speaker* generally; and though it do not add *for the time being*, yet if such a construction be necessary to advance the remedy, we must so construe the general words. No injustice can ensue from such a construction; but great injustice would ensue from a narrower one: for immediately after a report made of a frivolous and vexatious petition, parliament might be dissolved before any taxation could be made, of which I remember an instance: and then if the Speaker in the next parliament could not direct the taxation and grant a certificate, the remedy would altogether fail.

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Postea to the Plaintiffs.

Tuesday, May 9th.

FORSTER and Others *against* CHRISTIE.

A *British* ship insured from *Hull* to *St. Petersburgh*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a king's ship in the *Baltic* from an apprehension of hostilities for 11 days, and then proceeded to a point of rendezvous for convoy, where she waited 7 days longer, and then sailed under convoy till the king's officer received intelligence that a hostile embargo was laid on *British* ships at *St. Petersburgh*, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull*; held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance, by the king's officer, she would have arrived in time at *St. Petersburgh* to have delivered her cargo before the embargo.

THIS was an action on a policy of insurance in the usual form, effected on the 8th of *October* 1807 by the plaintiffs, and subscribed by the defendant for 400*l.* on woollens, on board the ship *Wolga*, upon a voyage at and from *Hull* to the *Sound* and *St. Petersburgh*, at a premium of ten guineas per cent., to return 2*l.* per cent. for convoy to the *Sound* or *Belts*, and 2*l.* per cent. more for any convoy in the *Baltic* and arrival. In the margin of the policy was a memorandum, that in case of partial loss or damage the neat proceeds were to be the basis of contribution.

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bution. The interest was stated by the declaration to be in *Dawson, Burrel,* and Co., and the loss was averred in different counts to have happened of the goods and of the voyage by the perils of enemies, and by the arrest, restraint, and detainment of kings, princes, and people, and was also specially described according to the facts hereinafter stated. There were also counts for money had and received, and upon an account stated. The goods in question belonged to *Dawson, Burrel,* and Co., merchants of *Wakefield,* and where shipped by them on board the *Wolga,* a *British* ship, at *Hull,* in *October,* 1807; on the 10th of which month she sailed with convoy to the *Sound,* where she arrived on the 16th. She proceeded on her voyage, and was at anchor off the town of *Drago* on the 20th, when she was boarded by the crew of a boat from his majesty's brig *Muscata,* with orders for the *Wolga* to put herself under the protection of the king's ships in *Copenhagen* Roads; and the boat's crew remained on board to enforce obedience to the orders. The *Wolga* weighed anchor accordingly, and came back to *Copenhagen* Roads, where she remained until the 31st, when she went to *Helsingberg* Roads for convoy, and remained there waiting for convoy until the 7th of *November,* when she sailed on her voyage under convoy of his majesty's sloop of war the *Ganet.* The *Wolga* proceeded on her voyage in the *Baltic* until the 16th of *November,* when the commander of the *Ganet* informed the captain of the *Wolga* that an embargo was laid on the 15th on all *British* ships in the *Russian* ports, and ordered the *Wolga* to proceed no further on her voyage, but to keep close by him, and that the *Wolga* should receive orders from the commander in chief in *Copenhagen* Roads as to her future destination. When the *Wolga* arrived off *Copenhagen* she was ordered by the king's officers to proceed down to *Helsingberg* Roads; and afterwards the captain, under all the circumstances of the case, thought it best to proceed to *England,* which he did accordingly under convoy of his majesty's brig the *Providence,* and arrived at *Hull* on the 11th of *December* 1807. An embargo was in fact laid in the ports of *Russia* upon all *British* ships on the 15th of *November* 1807, and war was declared and hostilities commenced by *Russia* against *Great Britain* on the 18th of *December* 1807, and continued

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Wolga, however, had not been detained by the king's officers she would have arrived according to the usual course of the voyage at *St. Petersburgh*, and delivered her cargo there, previous to the laying on of the embargo. Upon the ship's arrival in the *Humber*, the goods insured were safely landed and deposited in the same state as when first put on board in the warehouses of the plaintiff's agents, where they remained when the action was brought. On the 28th of *December* the plaintiffs abandoned the goods to the defendant and the other underwriters. A verdict was taken at the trial for the plaintiff, subject to the opinion of this Court on the facts above stated; and if the plaintiffs were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Taddy, for the plaintiffs, contended that the voyage had been lost by a peril insured against, and therefore the assured were entitled to abandon. The voyage might have been performed but for the detention of the king's officers; and such a detention is within the terms of the insurance against "arrests, restraints, "and detainments of all kings, princes, and people of what "nation, condition, or quality soever." The general word *capture* has indeed been held (*a*) not to extend to *British* capture; but that is on the ground of public policy, because it tends to throw the loss on *British* subjects instead of upon the enemy, and so to paralize the warfare of the state: but nothing of state policy intervenes in this case; for where the contract of insurance is between two subjects of the realm, and the question is on whom a certain loss is to fall which must take place, the state
[208] has no interest in the decision, unless it be that the burden should be divided as much as possible, which it is the object of such a contract to effect. Where a loss may fall upon some one or other of innocent subjects, in order to promote the general welfare against the acts of an enemy, there can be no reason why one subject should not contract to indemnify another against the risk; in like manner as landlord and tenant often contract to indemnify each other against certain taxes; which, as between themselves, if not specially directed otherwise by law, is good. Suppose it had been necessary for the public

(*a*) Vide *Kellner* v. *Le Mesurier*, 4 *East*, 396. 402. and *Lubbock* v. *Potts*, 7 *East*, 451.

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service to have taken the ship altogether in order to employ her against the enemy, by whom she had been captured or damaged, on what principle could it have been contended that the underwriters would not have been liable (*a*). In *Green* v. *Young*(*b*), where a *British* ship was seized by the government and converted into a fire ship, Lord *Holt* at nisi prius considered that the underwriters would be liable: and this opinion was approved of by Lord *Kenyon* in *Rotch* v. *Edie*(*c*). And in *Goss* v. *Withers* (*d*) Lord *Mansfield* says, that by the general law the assured may abandon in the case merely of an arrest on an embargo by a prince *not* an enemy. The opinions of foreign juries are strong to this effect: as in 2 *Val.* 134. If after the voyage commenced the ship put into a harbour, be it into the same or any other, and be there stopped by order of the king, the assurance shall have effect, so that the assured may abandon in the same manner as if it were the act of a foreign prince. [Lord *Ellenborough* C. J. asked, on which act of detention the plaintiff's counsel relied, as the act occasioning the loss of the voyage, which entitled him to abandon? To which it was answered, the first principally.]

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Carr, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. This is no more than a detention by the convoy for a certain period, till by the laying of a hostile embargo in the destined port, the further prosecution of the adventure became impracticable, and the voyage was lost; which according to *Hadkinson* v. *Robinson* is not a loss within the policy. There was indeed a detention by the king's ship, but there was no loss on that detention. Suppose there had been fair weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received advice of the embargo which obliged her to put back; could that have been declared upon as a loss by the perils of the sea? and yet that might as well be said to be the causa remota of the loss of the voyage, as the detention in this case: but that will not

(*a*) Vide *Park on Insurance*, *chap.* 4. 6th edit. *p.* 106. &c. where several late cases are mentioned.

(*b*) *Ld. Ray* 840. and 2 *Salk.* 444. (*c*) 6 *Term Rep.* 422, 3.

(*d*) 2 *Burr.* 696.

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do; the risk insured against must be the effective cause of the loss, in order to charge the underwriters. But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return and of the loss of the voyage: and the king's officer only prevented the ship from going into the enemy's port, and incurring a loss by capture; and such detention is not within the meaning of the clause against "the arrest and detainment of kings," &c. Lord *Alvanley*, in the case of *Hadkinson* v. *Robinson*, said, that in order to bring the loss [210] within the policy, the peril insured against which occasions it must act directly, and not collaterally, upon the thing insured.

The rest of the Court agreed; and *Bayley* J. added, If the port of *St. Petersburgh* had continued open, and there had been no embargo and no war between this country and *Russia*, it could not have been pretended that the prior detention by the king's ship would have been a loss within the policy.

Per Curiam, Postea to the Defendant.

Tuesday, May 9th.

RUGG and Others *against* MINETT and Others.

Where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within 30 days on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those 30 days, after which they were to pay the rent; and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to gauge them; but before he could fill up the rest a fire consumed the whole in the warehouse within the 30 days: held that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them guaged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the guaging, must be taken to have been done as agent for the buyers, whose concern the guaging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.

IN an action for money had and received by the defendants to the use of the plaintiffs, a verdict was found for the

plaintiffs

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plaintiffs for 1415*l.*, subject to the opinion of the Court upon the following case.

On the 28th of *April* 1808 the defendants, as prize agents to the commissioners for the care and disposal of *Danish* property, put up to public sale by auction, at *Dover*, the cargo of a *Danish* ship in lots, and the lots No. 28. to 54. inclusive consisted of turpentine in casks. The quantity contained in [211] each lot being marked on the catalogue thus—10 cwt. 3qrs. 26 lbs., the mode of bidding was this; each lot (except the two last, which were sold at uncertain quantities,) was to be taken at the weight at which it was marked, and the bidding was to be at so much per hundred weight on that quantity. The plaintiffs employed one *Acres*, the warehouseman of the defendants, to bid for them, and all the lots of turpentine (with the exception of 3 lots, which were sold to other bidders) were knocked down to *Acres* so acting for the plaintiffs. No conditions of sale were distributed prior to the sale; but the auctioneer, before the bidding commenced, read aloud the following conditions: 1st. The highest bidder to be the buyer; but if any dispute should arise, the lot to be put up again. 2d, 25*l.* per cent. is to be paid to the auctioneer as a deposit immediately after the sale, and the remainder in 30 days. The remainder of the purchase-money is to be paid on the goods being delivered. Should the goods remain after the limited time, the warehouse-rent from that time to be paid at the rate of 2*s.* per ton per month, by the purchaser. 3d, The goods to be taken at the neat weight printed in the catalogue. 4th, The goods to be taken away in 12 months, or resold to pay the warehouse-rent. Upon failure of complying with these conditions, the deposit-money is to be forfeited, and the commissioners to be at liberty to resell any lots belonging to defaulters, by whom all charges attending the same shall be made good. 1*s.* per lot under 10*l.*—1*s.* 6*d.* from 10*l.* to 25*l.* —and 2*s.* above 25*l.* lot-money to be paid by the buyer to the auctioneer. Tare allowed for turpentine 1*s.* 5*d.* Upon the turpentine being put up to sale, the auctioneer, by the direction of one of the defendants present, announced to the bid- [212] ders that the casks of turpentine were to be filled up before they were delivered to the purchasers: and that in order to effect this, the two last lots would be sold at uncertain quantities, and the preceding lots would be filled from them. The

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whole of the turpentine, with the exception of the 3 lots before mentioned, were sold to the plaintiffs; and they also were the purchasers of the two last lots, from which all the lots without exception were to be filled up; and those two last lots were accordingly marked by the auctioneer in his catalogue with the words "more or less." Immediately after the sale 200*l.* was paid by the plaintiffs to the auctioneer, as their deposit: and on the 9th of *May* 1808 the plaintiffs paid to the defendants 1715*l.* upon account of the turpentine, and the duties payable thereon. The turpentine remained in the warehouses of the defendants as before the sale, but was entered at the custom-house at *Dover*, in the name of the plaintiffs, on the morning of the 10th of *May* 1808, before the fire, by *Acres*, who paid on behalf of the plaintiffs 450*l.* as a deposit for the duties. On the same morning the cooper, who had been employed by the defendants to make up all the casks previous to the sale of the 28th of *April*, was sent for by *Acres*, who was warehouseman to the defendants, and who acted as agent for the plaintiffs, to fill up the casks of turpentine, and he had filled all of them except 8 or 10; leaving them with the bungs out to enable the custom-house officer, who was expected every minute, to take his guage in order to ascertain the duties. The two last lots, which were sold at uncertain quantities, and marked "more or less," contained more turpentine than was sufficient to fill up all those bought by the plaintiffs, and also those bought by the buyers of the three lots. In

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filling the casks sold to the plaintiffs one of the two last lots was used, and instead of the other of the two last lots, a preceding cask in point of number, which had been found to be an ullage cask, was substituted by the cooper, and from one of the two last lots the lots sold to the other buyers had been previously filled up. All the lots sold to the other buyers had been taken away before the cooper came on the 10th; and while the cooper was employed in filling up the plaintiffs' lots, and placing them ready, with the bungs of the casks out for the custom-house officer to guage, but before he had filled up all the casks, or bunged any of them, a fire took place in the defendant's warehouse, which consumed the whole of the turpentine knocked down to the plaintiffs; the casks not having been weighed again by the plaintiffs, or guaged by the custom-house officer. While the money paid by the plaintiffs

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to the defendants on account of the turpentine remained in their hands, they received notice from the plaintiffs not to pay it over; and the present verdict is composed of that sum, deducting the 450*l.* paid on account of the duty, which has been restored to the plaintiffs by the commissioners of customs. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover back the money so paid to the defendants? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Puller, for the plaintiffs, contended that the contract for the sale was still executory (*a*) at the time of the loss by fire, inasmuch as there still remained something for the vendors to do, and consequently that the loss must fall upon them, and not upon the vendees. By the conditions of sale 30 days were to be allowed to the vendees for taking the casks from the warehouse of the vendors, and before they were removed the vendors were out of the two last casks to fill up all the rest, so as to make them correspond with the weights at which they were marked: and that was the more material, because until it was done, it could not be ascertained what was the whole price to be paid, as those two casks were to be paid for according to their contents, after the rest were filled up: the weighing of them therefore must necessarily precede the delivery, and the remainder of the whole purchase money was to be paid on the delivery of the goods. This brings the case within the decision of *Hanson* v. *Meyer* (*b*), where the vendee had agreed to purchase all the starch of the vendor then lying in the warehouse of a third person at so much per cwt. by bill at two months, the weight of which starch was afterwards to be ascertained, and 14 days were to be allowed for the delivery: and the vendor having given a note to the vendee addressed to the warehouseman, directing him to *weigh and deliver* to the vendee *all* his starch; the Court held that the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery and to ascertain the price; and that the vendee having become bankrupt before the whole had been weighed and delivered, the vendor might retain the remainder. It is true that in that case the whole was to be weighed before delivery: and here only the

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(*a*) 1 *Com. Dig.* 541. (*b*) 6 *East*, 614.

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two last casks: but here also all the prior casks were to be filled up, which was not done at the time of the loss; and none of them were in a condition to be delivered, as the bungs * were left out, in order to permit the custom-house officer to guage the casks, without which they could not be removed, and it was part of the business of the vendors to replace the bungs, and put the casks in a proper condition to be delivered. In *Hammond* v. *Anderson* (*a*), all the bales lying at a wharf, which had been sold for an entire sum, had been taken possession of by the vendee and weighed, and part had been removed by him before his bankruptcy; and therefore it was held that the vendor had no right to stop what remained in the hands of the wharfinger. In *Hinde* v. *Whitehouse* (*b*), though the sugars were in the king's warehouses under the locks of the king and the owner, from whence they could not be removed till the duties were paid; which were to be paid by the sellers; yet they had been weighed and the duties ascertained; and one of the conditions of sale at the auction was, that the sugars were to be taken with all defects as they then were, at the king's weights and tares, with the allowance of draft, or re-weighed giving up the draft, *and to be at the purchaser's risk from the time of the sale;* by which latter was evidently meant, from the time when the lot was knocked down to the highest bidder; and besides, the acceptance of the sample by the purchaser, as part of the thing purchased, was held to bind the sale. If a horse were sold, and agreed to be delivered by the vendor after he was shod; and the horse died before; the loss would fall upon the vendor. So here, the act of filling up the casks was to be performed by the vendors before delivery: and though if the case rested upon that circumstance alone, a distinction might be taken as to those casks which had been filled up; yet the vendees were entitled to have the whole rebunged before delivery. [Lord *Ellenborough* C. J. observed, that the vendees were entitled to have the casks filled up and the bungs belonging to them; but that the vendors had no concern with the unbunging or bunging of them, the former of which was done, on account of the custom-house officer intervening to do his duty before the goods were removed by the vendees. And

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(*a*) 1 *New. Rep.* 69. (*c*) 7 *East*, 558.

upon

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upon inquiry at whose instance the guaging was to be performed, it was admitted that the vendees could not have removed the goods till they were guaged; and therefore the Court considered that it was their duty to get them guaged. The Court also inquired as to the number of casks which had been filled up: and it was agreed that all had been filled up except 10; on which they asked the defendants' counsel what answer he had to give to those 10.]

Carr, for the defendants, admitted that the vendors could not claim the value of the two casks, out of which turpentine had been taken to fill up the others, because the quantities they contained were not ascertained by weighing at the time of the loss; but with respect to the last 10 which had not been filled up, he still contended that the property passed by the sale: for by the contract the mark on each cask was conclusive as to the quantity, and the price being also ascertained, every thing material to the perfection of a contract of sale was complete: and at any rate the vendees should have called upon the vendors to fill up the remainder. [Lord *Ellenborough* C. J. Still the fact is, that by the vendors' not having filled up the last ten casks, they were not in a deliverable state at the time of the loss: and it was certainly a material act to be done, to make up the quantity marked.] The warehouseman who was to do it was the common agent of both: and this case is so far distinguishable from that of *Hanson* v. *Meyer*, that there the vendee could not have removed the goods till they were weighed; but here the quantity and price being ascertained, the vendees might have waved calling on the vendors to fill up the casks, and might have taken them away when they pleased. [167]

Lord ELLENBOROUGH C. J. The court have already intimated their opinion, as to those casks in the first lots which were filled up, and on which nothing remained to be done on the part of the sellers, but only the casks were left to remain for 30 days at the option of the purchasers in the warehouse at the charge of the sellers: the payment of the warehouse-rent however is not material in this case: and when the casks were filled up, every thing was done which remained to be done by the sellers. It was necessary however that they should be guaged before they were removed, and the bungs were left

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out for the purpose of the guager's doing his office, which it was the buyer's business to have performed; and therefore according to the case of *Hanson* v. *Meyer*, and the other cases, every thing having been done by the sellers, which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them.

[218] LE BLANC J. (*a*) The case is to be considered as involving so many distinct contracts as there were distinct lots bought by the plaintiffs. The turpentine was purchased at so much per cwt., and it was to be taken according to the weight marked on each lot; but the casks were to be filled up by the sellers out of the turpentine *belonging to them*, in order to make the weights agree with the marks. I say *belonging to the sellers*, because the two last casks were only sold according as their actual weights should turn out to be, after filling up the rest; and if more turpentine had been wanted than those casks could have supplied for filling up the rest, it must have been settled which of the respective purchasers was to take less than his calculated quantity. Till the several casks therefore were filled up I consider the property as remaining in the sellers. But a certain number of casks were filled up; and with respect to them nothing further remained to be done by the sellers. But it was necessary that the custom-house officer should guage them before they could be removed. Then the warehouseman who was acting as the common agent of the buyers and sellers, having filled up those casks, on the part of the sellers, left them unbunged for the purpose of the officer's guaging them, and ascertaining the duties, which was an act to be done on the part of the buyers, to entitle them to remove the goods. Then as nothing more remained to be done by the sellers on those casks which were filled up, they were from that time at the risk of the buyers: but those which were not filled up continued at the risk of the sellers.

(*a*) *Grose* J. was indisposed and absent.

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BAYLEY J. In many cases it happens, where every thing has been done by the sellers which they contracted to do, that the property passes to the buyers, though the goods may still continue in the actual possession of the sellers. It lies upon the plaintiffs then to make out, that something still remained to be done to the goods by the sellers at the time when the loss happened. But with respect to those casks which had been filled up, nothing remained to be done but the gauging by the officer, and as that was to be procured to be done by the buyers, *Acres*, who left out the bungs for the purpose of enabling the officer to guage, must be taken to have acted as the agent of the buyers for that purpose; and therefore nothing more remaining to be done by the sellers, the property passed. But with respect to the other casks, something did remain to be done by the sellers, namely, the filling them up: and it is not sufficient for them to say that they were not called upon to do so by the buyers; for if they meant to relieve themselves from all further responsibility, they should have done what remained for them to do, and until that was done the property continued in them.

Upon this it was agreed that the proportion to be allowed to the plaintiffs on the ten casks should be settled out of court; and that the verdict should be entered accordingly.

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GOODRIGHT, on the Demise of DREWRY, *against* BARRON and Another.

Tuesday, May 9th.

THIS was an ejectment for a messuage and land in the parish of *Ulceby* in *Lincolnshire;* in which a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

John Drewry being seised in fee of the premises in question, before his death in 1793, devised as follows. "As touching

After introductory words, "as "touching" the testator's "worldly *estate*," &c. he devised a cottage house, &c. to *A.* and his heirs, and also gave to *B.*, whom he made his executrix, "all and singular his lands, messuages, and tenements *by her freely to* "*be possessed and enjoyed*," held that the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispunishable of waste; and that the word *estate* in the introductory clause could not be brought down into the latter distinct clause.

"such

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"such worldly *estate* wherewith it hath pleased God to bless "me in this life, I give, devise, and dispose of the same "in the following manner and form: first, I give and be- "queath to my brother *Thomas Drewry* a cottage house and "all belonging to it, to him and his heirs for ever; *W. C.* "tenant. Also I give and bequeath to my wife *Elizabeth*, "whom I likewise make my sole executrix, all and singular "my lands, messuages and tenements, *by her freely to be pos-* "*sessed and enjoyed.*" The premises in question were not included in the devise to *Thomas Drewry*. Upon the testator's death his widow entered upon the premises, and after conveying them to the defendant *Barron*, died in 1808. The lessor of the plaintiff is the heir at law of the testator: and if he were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Copley, for the heir at law, argued that *Elizabeth*, the widow, took only a life estate under the will of her husband. There are no express words giving her a greater estate; and
[221] no such intention is *necessarily* to be implied (and a *probable* intention is not sufficient) (*a*), either from the introductory words, "as touching such worldly estate," &c. which of themselves have never been deemed sufficient to carry a fee (*b*), or, 2dly, from the words "*by her freely to be possessed and* "*enjoyed*," which may mean free of incumbrances or the molestation of any other during the period of her own possession and enjoyment: but if the meaning of them be equivocal, that is not sufficient to disinherit the heir; and it cannot be denied that the addition of the words, "*for life*," or "*in fee*," would have rendered the meaning more clear; and that the sense of the words used would well have admitted of either of those additions. This case is distinguishable from *Loveacres* v. *Blight* (*c*), where similar words of devise were relied on to carry a fee; for there was a charge on the devisees which might enure longer than their lives, and there was a blank left

(*a*) Per *Willes* C. J. in *Moore* v. *Heaseman*, *Willes Rep.* 141.

(*b*) *Doe* v. *Wright*, 8 *Term Rep.* 64. *Doe* v. *Allen*, *Ib.* 497. and *Doe* v. *Clayton*, 8 *East*, 141. 144. were cited; and vide *Loveacres* v. *Blight*, *Coup.* 356. per Lord *Mansfield*.

(*c*) *Coup.* 352. 357.

which

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which could only be sensibly supplied by the word *heirs*, which would have been decisive. But here it appears from the devise to the brother *and his heirs*, that the devisor knew how to give a fee in legal terms where he so intended; and this has been relied on in several cases against giving a fee by mere implication.

Balguy jun., contrà, only relied on the introductory words as a circumstance conjoined with the others to shew a clear intention to pass the fee in this property to the widow; and carrying down the introductory words, the will would read thus:—"As touching such worldly *estate*, wherewith it has [222] "pleased God to bless me in this life, I give and bequeath to "my wife *Elizabeth*, whom I likewise make my sole execu- "trix, all and singular my lands, &c. *by her freely to be pos-* "*sessed and enjoyed*." By this he would give all his *estate* in the lands, &c. to his wife *freely to be possessed and enjoyed by her*. And even these latter words were considered in *Loveacres* v. *Blight* to be sufficiently indicative of an intent to pass the fee, and were not merely to be taken as meaning only to give a life-estate free of incumbrances: though the intent to give a fee in that case was also evinced from the previous charge on the devisees in respect of the estate devised. Then if the intent be clear in this part of the will, the mere circumstance of giving a fee in technical terms to his brother in another property will not vary the construction of the words in question.

Copley in reply said, that if the carrying down and applying the introductory words to the particular devise were to enlarge the sense of the latter, the same argument would have had more weight in the former cases.

Lord ELLENBOROUGH C. J. Though it may be assumed, as Lord *Mansfield* once said, that in almost every case where property is devised to one generally, the testator means to give a fee; yet we are tied down by a positive rule of law, that in the devise of real property, where there are no words of limitation, and no necessary implication from the words of the devise to give a larger estate, the devisee can only take an estate for life. On the first view of the case of *Loveacres* v. *Blight* I thought the words here used might be sufficient to carry the fee: but the observation there made is material, that the words "*freely to be possessed and enjoyed*" by the devisees, [223] could

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could not mean only *free of incumbrances*, because the testator had before charged the estate with the payment of an annuity to his wife; and therefore they must either have been meant to give a fee, or they had no meaning at all. But here the testator has not put any charge on the estate; and therefore the same observation will not apply to the present case; but these words may have been meant to make her dispunishable of waste, for which as tenant for life only she would have been liable. With respect to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee, but juncta juvant. The word *estate* used in the introductory clause is completely disjoined from the devise in question, and cannot be brought down to join in with the latter clause without doing violence to the words. For want therefore of words of limitation, or some words from whence the intention to pass the fee must be necessarily implied, the widow only took an estate for her life. The case has been very well argued on both sides, and not the worse from the omission of saying any thing which was not material to the case.

LE BLANC J. (*a*). We are bound by a rule of law, contrary to what I think was the probable intention of the testator in this case, to say that the widow only took a life-estate. There are no words of limitation added to the devise to her, but there are three parts of the will from whence it is contended that we may collect his intention to give her the fee; 1st, from the introductory words in general; 2dly, from the [224] words in the particular devise, "*by her freely to be possessed and enjoyed*;" 3dly, from carrying down the word *estate* from the introductory clause into the subsequent clause. And if this last could be done, it would solve the difficulty very easily; but it is impossible thus to transpose the word *estate*; for the clauses are quite distinct, and there is an intervening devise to his brother, to whom he gives "a cottage-house and all belonging to it." Those words could not have been read "*my estate in a cottage-house*." But the testator goes on to give that to his brother *and his heirs*. So neither can the subsequent devise to his wife be read "*my estate* in all and singular my lands," &c.

(*a*) GROSE J. was indisposed and absent.

Then

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Then as to the introductory words in general, it has been held those alone will not suffice to give a fee, though they are a circumstance, with others, from whence the testator's intent to do so may be collected. This brings it to the question on the words, "by her freely to be possessed and enjoyed." If the words *during her life* had been added, that would have made the intent clear in one way: if the words *in fee*, or *by her and her heirs*, had been added, it would have have been clear the other way. The words used are not inconsistent with a life-estate only. If he had given her the lands, &c. "*freely to be disposed of*," that would have shewn his intent to pass the fee; but there is nothing in the words used to shew that he must have meant to pass the fee. In *Loveacres* v. *Blight*, Lord *Mansfield* thought that these words could not mean *free of incumbrances*, because the testator had before incumbered the property devised; and there were other circumstances in that case, on which it was decided, which distinguish it from the present. But here there are no circumstances to extend the words of devise beyond a life-estate.

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BAYLEY J. If all the words of the will can be satisfied by giving the widow a life-estate, we are not warranted in giving her a greater estate against the heir at law. The only words on which any doubt could arise are "*freely* to be possessed and enjoyed:" but they may mean *freely during her life*; they may mean *free from all charges*; *free from impeachment of waste*: they may indeed also mean *freely for all purposes against the heir*; but as it is not certain that the testator used them in this latter sense, we cannot give them so extended a meaning against the heir.

Postea to the Plaintiff.

1809.

Wednesday, May 10th.

DRING *against* DICKENSON.

If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E.*, *sued by the name of W.*, nor declare against him de bene esse in that form; and the proceedings were set aside for irregularity after interlocutory judgment signed for want of a plea.

THE defendant, whose christian name was *Edward*, was served with a writ on the 18th of *April*, in which he was sued by the name of *William;* and not having appeared to it, the plaintiff, on the 28th of *April* in this term, filed common bail for him in his right name of *Edward, sued by the name of* William, and also served him with notice of a declaration de bene esse by the name of *Edward*, sued by the name of *William*, and with notice to plead in 8 days. No plea having been filed within the time, the plaintiff signed interlocutory judgment, and gave notice of executing a writ of inquiry. Whereupon *Espinasse* having obtained a rule for setting aside the proceedings for irregularity;

Puller now shewed cause, and referred to *Oakley* and *Giles* (*a*), where, in a penal action, the defendant having *been sued by a wrong name, but served with notice of declaration in his right name, the Court held a judgment signed for want of a plea regular; saying, that pleas in abatement might be struck out of the books, if judgments could be set aside for such misnomers: and also to *Delanoy* v. *Cannon* (*b*), where, though the Court set aside the proceedings under similar circumstances, upon objection urged before plea; yet they distinguished it on that ground from the prior case of *Oakley* v. *Giles*. He observed that, in this case, common bail having been filed for the defendant by his right name, and he having had personal service of a notice of declaration by his right name, should have come in the first instance to stay proceedings, and not have waited till judgment had been signed.

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But *The Court* held the judgment to be irregular, on the ground that the plaintiff, having sued out process against the defendant by a wrong name, could not cure that defect by his own act of filing common bail for the defendant, and serving him with notice of declaration de bene esse by his right name.

Rule absolute.

(*a*) 3 *East*, 167. (*b*) 10 *East*, 328.

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JEFFERIES *against* DUNCOMBE.

Friday, May 12th.

THE declaration stated that at the time of committing the grievance after mentioned the plaintiff was the occupier of a certain dwelling-house, situate, lying and * being *in a certain public street called Artillery-street*, to wit, *in the parish of the Old Artillery Ground*, in the county of *Middlesex, in which said house* the plaintiff dwelt and inhabited, and then and *there* carried on the business of a carpenter, and let out part of the said house in lodgings, &c.: and that the defendant, intending to defame him and expose him to punishment by the laws inflicted on the keepers of bawdy-houses, maliciously and without probable cause, to wit, on the 25th of *August* 1801, *in the parish aforesaid* and county aforesaid, *erected and placed in the* said public-street called *Artillery-street, to wit, in the parish aforesaid*, in the county aforesaid, a certain lamp in front of and near adjoining to the said dwelling-house of the plaintiff, and caused the same to be lighted and kept burning in the day-time, &c.: thereby intending to mark out the said dwelling-house of the plaintiff as a bawdy-house, &c. The nusance was proved at the trial, but it appeared that there was no such parish as *the parish of the Old Artillery Ground*; whereupon objection was taken to the plaintiff's right to recover in this action; which was overruled, but the point was reserved: and the plaintiff having recovered a verdict with damages, at the Sittings at *Westminster*, before Lord *Ellenborough* C. J. a rule was obtained on a former day for the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered.

An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature; and if the declaration, after describing the house as situate in a certain street called *A-st. in* the parish of *O. A.* (there being no such parish) afterwards state the nusance to be *erected and placed in the parish aforesaid*; it will be ascribed to venue, and not to local description, and therefore the place is not material to be proved as laid.

Park and *Espinasse* now opposed the rule, and observed that there is nothing local in the nature of the action, which is case and not trespass; and the parish is laid merely as a venue, and not as a local description of the nusance, nor is the place at all material. Besides which the whole description is laid under a videlicet. †And they cited *Frith* v. *Gray* (*a*), and *The Mersey and Irwell Navigation Company* v. *Douglas* (*b*), as in point.

(*a*) *H. 7 Geo. 3 B. R.* mentioned by *Grose* J. in *Drewry* v. *Twiss*, 4 *Term Rep.* 561.

(*b*) 2 *East*, 497.

Garrow

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Garrow and *Bolland*, in support of the rule, endeavoured to distinguish this from the cases cited. *Frith* v. *Gray* was an action for the breach of a contract, and of course there was nothing of locality in it. *Drewry* v. *Twiss* was also a transitory action. And though in the *Mersey and Irwell Navigation* case it was considered not to be necessary to give a local description to the nusance in an action on the case for diverting the water of the navigation by the erection of a weir; yet the question turned on the application of the word *there*, whether it were to be referred to local description of the place where the navigation was on which the nusance operated, or to venue; and the Court would not intend that it was meant for local description when it might apply to venue. But it was admitted that the plaintiff in such an action might make it necessary to prove the gravamen in a particular place by giving it a specific local description; as by alleging the nusance to be standing and being at a certain place particularly described. Now here the injury itself only attached upon the plaintiff in respect of his occupation of the house, and must therefore be considered as local, and the description of the parish in which the house was situated is carried all through the declaration; and the nusance is alleged to have been *erected and placed in the parish aforesaid*, so described, not as a matter of venue, or under a viz. for the venue is repeated afterwards under the videlicet.

[229] Lord ELLENBOROUGH C. J. This is not a local injury: the house indeed is local, but the imputation meant to be conveyed by the nusance is not against the property, but against the man who occupies it. Supposing the plaintiff had declared that in front of a certain house which he then inhabited the defendant had set up this mark for the purpose of defaming him; there needed no local description of the house; and it is quite immaterial where it was: the action therefore might as well have been brought in any other county as *Middlesex*; and the place mentioned is mere matter of venue, and not of local description.

The other Judges concurred; and the

Rule was discharged.

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The KING *against* The Justices of KENT.

Saturday, May 13th.

A mandamus to the justices in Sessions to allow an item of charge in the coroner's account, refused; because the justices were of opinion under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death, and therefore that the inquisition had not been duly taken; and this Court seeing no reason for interfering with that judgment. *[230]

GARROW moved for a mandamus to the defendants to allow an item (which they had before rejected) in the coroner's account, for his fee on an inquisition taken by him on the body of *John Sutton*. This application was made on the affidavit of Mr. *De Lasaux*, coroner of the county of *Kent*, stating that in *December* last he was sent for by the parish officers of *Wye* in that county, to take an inquest on view of the body of *T. Austen*, supposed to have been killed by the kick of a horse. That he went there and took the inquest; and on his arrival at the inn where the jury were assembled, several * of them informed him that there was another inquest for him to take, as one *John Sutton*, who had lately come from *Surrey* to reside at *Wye*, had just before the coroner's arrival died suddenly in a shop in the town while he was purchasing some furniture. That in consequence of this information, after the inquest on *Austen* was taken, the coroner reswore the jury to inquire into the cause of *Sutton*'s death, in pursuance of the stat. 4 *Ed.* 1. *st.* 2. directing the coroner to go to the place where a person is slain or suddenly dead. That it appeared in evidence before the coroner, that *Sutton* went into Mr. *Howard*'s shop apparently in very good health; that he complained of a pain in his hip, sat down in a chair in the shop, and suddenly died. In consequence of which evidence, and that of the surgeon who was immediately sent for to attend him, and who endeavoured to restore him but without effect, the jury returned a verdict of, died by the visitation of God. That on carrying in his bill to the last *Easter* Sessions pursuant to the stat. 25 *Geo.* 2. *c.* 29. the coroner charged the county 1*l.* for the last-mentioned inquisition, when the magistrates disallowed this charge, being of opinion that the inquisition had been improperly taken. The mandamus was now pressed for on the ground that the item ought to have been allowed; the death having been in fact sudden, and the coroner having been called upon by respectable inhabitants of the place to execute his office before he

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had interfered: and the refusal of the magistrates to allow it being felt by the coroner as an imputation of improper practice on his part.

The Court, however, exculpated the coroner from the imputation of any intentional improper practice in the particular instance, as the taking of the inquisition seemed * to have been suggested to him by others. Though Lord *Ellenborough* C. J. observed that there were many instances of coroners having exercised their office in the most vexatious and oppressive manner, by obtruding themselves into private families to their great annoyance and discomfort, without any pretence of the deceased having died otherwise than a natural death; which was highly illegal. But the Court still thought that that there was no sufficient ground for the present application; for the statute had directed that the fees should be allowed to the coroner for all inquisitions *duly taken;* and the justices were to judge whether the inquisition in question had been duly taken; and there was no reason for imputing to them that they had exercised their judgment with any undue bias; and the Court did not see any occasion to interfere with that judgment in this instance.

Rule refused.

Friday, May 12th.

The KING *against* SAMSON. (*a*)

A defendant in custody under a writ de excommunicato capiendo, for contumacy in not paying a sum *for alimony*, and also for costs, in the ecclesiastical court, is not entitled to his discharge as an insolvent debtor under the stat. 33 *G.* 3. *c.* 5. *s.* 4. which extends only to persons in custody on such writ for non-payment of costs and expences only.

THE defendant was brought up to take the benefit of the Lords' Act, as an insolvent debtor, when it appeared that he was in custody under a writ de excommunicato capiendo, for his contumacy in not paying 15*l.* 10*s.* *for alimony* to the prosecutrix, and 30*l.* 1*s.* for costs in the said cause. *Lawes* objected that this was not a case within the stat. 33 *Geo.* 3. *c.* 5. *s.* 4. which only extends to persons committed "upon "any writ of excommunicato capiendo or other process for

(*a*) Mr. *Dealtry* did me the favour to communicate this note.

"or

" or * grounded on *the non-payment of costs or expences* in any " cause or proceeding in any ecclesiastical court." And the whole *Court*, upon consideration, were of that opinion, and ordered the defendant to be remanded.

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The KING *against* SAMSON.

PULLER and Another *against* STANIFORTH.

Saturday, May 13th.

Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburgh*, and to load a cargo there

THIS was an action on a policy of assurance in the common printed form, with none of the blanks filled up, but containing the following memorandum written at the bottom of it. " In consideration of 10 guineas per cent. hereby received, we, the underwriters on this policy, agree to pay a total loss, in case the ship *Ann*, Capt. *Flower*, is not allowed by the *Russian* government to load a cargo at *St. Petersburgh* on the voy- and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, *or discharging the outward cargo*, the freighters might detain the ship at *St. P.* for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, *the master should be at liberty to return to* London, and *the freighters should pay him* 2500*l. immediately upon the arrival* of the ship at *London*. The freighters then procured a policy of insurance, whereby the underwriters agreed *to pay a total loss in case the ship was not allowed by the* Russian *Government to load a cargo at St. P. on the chartered voyage*. In fact the *Russian* Government, when the ship arrived at *St. P. presuming that the outward cargo was* British, *refused permission to unload her*, and consequently she could not take in a *Russian* cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a *Swedish* cargo to *London*, and earned freight thereon. Held, 1. That the insurance was legal in the terms of it.

2. That the refusal of the *Russian* Government to permit the ship to unload her outward cargo, was, in effect and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. P.*; and consequently that a total loss within the policy was incurred.

3. That the proceeding directly from *St. P.* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2500*l.*; but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,

4. That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm* to *London*, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity.

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age he is at present chartered by Messrs. *C.* and *R. Puller*." The declaration, after setting out the policy, of which the
*[233] * defendant on the 26th of *April* 1808 became an underwriter, proceeded to state, that on the 18th of *April* 1808, by a certain charter-party of affreightment of that date between *S. Flower*, master of the *American* ship *Ann* of *New York*, then in the port of *London*, and the plaintiffs, *Flower* let the said ship to freight to the plaintiffs for the voyage on certain terms and conditions; whereby *Flower* covenanted that the ship should be properly manned, &c. and provided for her intended voyage, and take on board from the plaintiffs a full and complete cargo of all such *lawful* goods as they should put on board, and immediately depart with the same from the port of *London*, and proceed to *St. Petersburgh* in *Russia*, and then and there *unload and make a right and true delivery and discharge* of all the said cargo to the agents of the plaintiffs; and upon delivery and final discharge of all the said cargo so put on board at *London*, that *Flower* should immediately receive and take on board the said ship at *St. Petersburgh* from the plaintiffs' agents a full and complete cargo of hemp and such other goods as they should think proper to load, &c.; and *the said cargo so being loaded* and the ship dispatched, *that she should immediately proceed and return to the port of* London, and then and there make a right and true delivery of all the said cargo of hemp and other goods so put on board at *St. Petersburgh*. In consideration whereof the plaintiffs covenanted with *Flower*, that they should provide the ship with a *British* licence, and not only put on board the said cargo at *London*, and on her arrival at *St. Petersburgh* unload the same, and thereupon put on board such return cargo of hemp, &c. and on her arrival at *London* unload and receive the same, but also should pay to
[234] *Flower* in full for the freight of the ship at the rate of 10*l.* per ton, with 10*l.* per cent. for primage, and 100 guineas as a gratification to him as master, *immediately upon the delivery of the return cargo at* London. And *Flower* covenanted, that if political or other circumstances should arise *to prevent the shipping a return cargo, or discharging the outward cargo*, the plaintiffs or their agents should be at liberty to detain the ship at *St. Petersburgh* for 40 running days in the whole after her arrival there. And the plaintiffs covenanted, that after the ship should

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should have remained at *St. Petersburgh* for 40 running days, without such outward cargo being unloaded and delivered, and consequently without the return cargo being put on board, *Flower should be at liberty to return* with his vessel to *London* or any other port in *England: and that the plaintiffs should pay* Flower 2500*l. immediately upon the arrival of the ship at* London or any such port in *England.* The plaintiffs then averred that afterwards on the 26th of *April* 1808 the ship so taken to freight had a licence from the *British* government for the voyage in the policy and charter-party mentioned; and that the plaintiffs were interested in the voyage insured to the amount of what was so agreed to be paid to *Flower* for the use of his ship: that she afterwards sailed from *London* upon the said voyage, and arrived at *St. Petersburgh; but was not allowed by the* Russian *government to load a cargo at* St. Petersburgh on the said voyage chartered, &c.; and after remaining there 40 days, without unloading and delivering her outward cargo, and without a return cargo being put on board her, she departed from *St. Petersburgh* and arrived at *London:* by reason of which premises the defendant became liable to pay to the plaintiff 200*l.* the amount of his insurance. There were also the common money counts. The defendant pleaded a tender of the premium, which was admitted, and the general issue to the rest of the demand.

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The facts proved at the trial were in substance the same as stated in the first count: the ship, which was *American,* sailed on the insured and chartered voyage with a *British* license: but when she arrived at *St. Petersburgh,* it appearing upon examination of the captain that he had come immediately from *England,* with which *Russia* was then at war, he was refused permission to unload his cargo, being presumed to be *British,* though no particular examination of it was had; and being obliged to depart with his original cargo, and without any return cargo, the captain, judging as he thought for the best, determined to proceed to *Stockholm,* to see if he could dispose of his cargo there. He did accordingly proceed to *Stockholm,* and disposed there of his outward cargo of lead, though to disadvantage; and also took in other goods there, and returned from thence to the port of *London:* and freight was made on the goods shipped at *Stockholm* and brought home.

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The plaintiffs went at the trial for the amount of the dead freight stipulated by the charter-party to be paid to *Flower*, amounting to 2500*l.*: or if not entitled to the whole of it, to so much of it as would remain after deducting the amount of the freight earned by the ship from *Stockholm* to *London*. The defendant on the other hand contended at the trial, first, that this was in effect a wagering policy, for the underwriters to pay 2500*l.* if the government of *Russia* would not suffer the ship to load at *St. Petersburgh;* and was therefore illegal; (and this objection, if any, appeared on the record.) But, 2dly, supposing it to be legal, that the assured were bound to have presented the ship at *St. Petersburgh* in a condition to receive a homeward-bound cargo, without any obstacle interposed by their own act to the obtaining permission to load from the *Russian* government: whereas it appeared that the refusal of the *Russian* government to permit the ship to load was founded altogether upon the nature and property of her outward-bound cargo then on board, which from the circumstances of the case was concluded to be *British;* and not upon any objection to permit their own export trade. And it was argued to be a very different question whether a foreign government would allow of an import trade from a particular country, or of their own export trade. That by the terms of the policy the underwriters were entitled to insist, as a condition precedent, that the ship should be presented at *St. Petersburgh* in a condition ready to receive on board a *Russian* cargo, in which case it did not appear that the *Russian* government would have refused its permission; the only refusal given by it being *to unload a British cargo;* against which the underwriters had not undertaken to indemnify the plaintiffs. 3dly, It was objected (which went only to the quantum of the verdict,) that this being a contract of indemnity, and as the plaintiffs would be entitled to deduct out of the dead freight of 2500*l.* payable to *Flower* the amount of the freight earned by him in the course of the voyage home from *Stockholm*, the underwriters were also entitled to have the same deduction made. The plaintiffs having recovered a verdict at the trial (which was taken for the whole sum) these grounds of objection were stated again upon a motion in arrest of judgment, for a new trial, or for a proportionable deduction from the sum recovered.

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Garrow and *Puller* shewed cause against the rule: 1st, This is no wagering policy, but strictly for an indemnity against any loss under the charter-party. The ship was chartered to proceed outwards with a cargo of *British* goods, and return with a *Russian* cargo instead; and if the assured could not dispose of the first and procure the second, they would be subject at all events to the payment of dead freight; and against this eventual loss it was the object of the policy to indemnify them. The insurance therefore, which was to protect an adventure for the exchange of *British* for foreign commodities, was strictly legal. The insurance of any event is not prohibited by the st. 14 *Geo.* 3. *c.* 48. if the assured be really interested in it, and the event itself be not illegal (*a*): and it cannot be denied that the plaintiffs had an interest in the event. 2dly, It is neither expressed in the terms, nor can be inferred from the nature of the contract of insurance, that the assured engaged that the ship should be in a condition to receive a homeward cargo by the delivery of the outward cargo. On the contrary, the memorandum in the policy refers to the charter-party, in which the nature of the adventure is disclosed; stating the outward cargo to be goods shipped by the plaintiffs from the port of *London;* and the event is therein provided for "if political or other circumstances should arise to prevent the shipping a return-cargo or discharging the outward cargo." And under this charter-party the ship sailed with a *British* licence. It is impossible therefore to imply a condition that the ship should at all events be empty at *St. Petersburgh*. 3dly, The captain's proceeding to *Stockholm* was wholly out of the charter-party, and a new adventure resting upon his personal responsibility. Whether he may have rendered himself liable in damages to the plaintiffs for having taken upon him to dispose of their property in a manner unauthorized by and disadvantageous to them, is another question with which the underwriters on this policy can have no concern; for the loss which they have undertaken to indemnify accrued before the voyage to *Stockholm*. But at any rate this objection only goes to the quantum of the verdict; and if the Court should be of opinion that the freight

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(*a*) Reference was made to what was said by *Lawrence J.* in *Lucena* v. *Crawford*, in error, in *Dom. Proc.* 2 *New Rep.* 300, &c.

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earned in that voyage may be deducted by the plaintiffs out of the amount of the deadfreight they have engaged to pay to *Flower*, considering the policy in question on the strict ground of indemnity, as in *Godsal* v. *Baldero* (*a*), the quantum of the deduction may be ascertained by an arbitrator. [Lord *Ellenborough* C. J. An unforeseen event has recouped part of the total loss; which brings the case within the principle of *Godsal* v. *Baldero*; this being strictly a contract of indemnity: the plaintiffs must therefore write off the difference. *Le Blanc* J. Supposing any loss to have happened upon the sale of the lead at *Stockholm*, that was part of the adventure, and cannot affect the question of freight; the loss of which has evidently been diminished pro tanto by the freight earned from *Stockholm*. *Bayley* J. The freight received on the cargo brought from *Stockholm*, on account of the plaintiffs, has paid part of the total loss which had at one time accrued.]

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The Attorney General, *Park*, and *Wigley*, in support of the rule, after slightly touching on the first question, as thrown out for the consideration of the Court, whether the event insured were such as it was legal for a subject of this country to speculate upon in a policy, proceeded to urge the second objection on the same ground as before: that the risk of the underwriters was much enhanced by the nature of the outward-bound cargo, a risk not contemplated by them, or provided for in the terms of the policy; which was attempted to be enlarged so as to indemnify the assured against the risk *of not being permitted to* UNLOAD *a cargo of* British *goods in order to load a* Russian *cargo*. The underwriters were not bound to look into the licence granted by the *British* government, which was only required in order to legalize the voyage to *St. Petersburgh* in the existing state of things. The underwriters laid a wager with the plaintiffs, that the *Russian* government would let the ship *load* a cargo at *St. Petersburgh*; and the evidence is that when she arrived there, that government would not suffer her to *unload* a *British* cargo; she was never therefore in a condition to ask for a *Russian* cargo, which the assured impliedly engage that she shall be, without any obstruction interposed by their own act. On the last point they urged, that if the captain could not recover the whole of the dead freight against

(*a*) 9 *East*, 72.

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the plaintiffs who had chartered his ship, by reason of her having earned a certain proportion of freight from *Stockholm* to *London*, the plaintiffs could not be entitled to recover the whole from the underwriters on a contract of mere indemnity, as this was.

The Attorney-general then started another objection, that, by the terms of the charter-party, Captain *Flower*, if not permitted to unload at *St. Petersburgh*, was (after waiting 40 running days there if required) "*to return* with his vessel to *London* or "any other port in *England*;" which must necessarily be understood that he was to return with the outward cargo *directly* to *London*, &c. from *St. Petersburgh*; and on that condition only the plaintiffs covenanted to pay him the 2500*l.* for dead freight, "*immediately* upon the arrival of the ship at *London*, &c." The captain therefore not having performed this condition, but having upon his own judgment proceeded upon a different voyage and adventure to *Stockholm*, and there disposed of the cargo to a loss, is not entitled upon the charter-party to recover the stipulated sum; and consequently the plaintiffs cannot recover upon this contract of indemnity.

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Lord ELLENBOROUGH C. J. I have no doubt upon any of the grounds on which this case was originally argued. First, I see nothing illegal in a contract entered into by *British* freighters for dividing their loss with underwriters in case a foreign port, to which it was lawful for them to ship the goods, should be shut against them. They have no interest in conducing towards the event, or in promoting war between the two countries. But the event against which they were desirous of being protected, not being within the common perils insured against, was supplied by a special memorandum, referring to the voyage on which the vessel was then chartered, I have no difficulty therefore in considering this as a contract legal in its terms. But then it is said that the underwriters have only insured against the risk of the *Russian* government not permitting the ship *to load* a cargo at *St. Petersburgh*. But looking to the nature of the adventure and the risk insured, the underwriters must have contemplated the event which happened. It was not likely that a vessel should be permitted to load a cargo there, if the *Russian* government would not permit its subjects to receive the cargo then on board: the refusal therefore to unload

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the outward cargo was in effect a refusal to permit a *Russian* cargo to be loaded, and brings the case within the plain meaning of the policy. Then the only question is that which has been recently made, whether the 2500*l.* is demandable at all by Captain *Flower* against the plaintiffs, by reason of his not having proceeded directly to *England* from *St. Petersburgh*? At present it does not appear to me that there is any express covenant on his part to do so, so as to make it a condition precedent to his demand of that sum, but only a mere liberty reserved to him. However we will look further into the terms of the charter-party, and deliver our opinion upon that point another day. With respect to the quantum to be deducted on account of the freight made from *Stockholm* to *London*, should the plaintiffs be entitled to recovery any thing, the amount may be settled out of court.

The other Judges concurred in opinion with his Lordship upon the points decided by him: and the case stood over for consideration upon the last objection made by the Attorney-General. And two days afterwards

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

On hearing the argument on the rule for a new trial in this case before the Court on *Saturday*, the point upon which we then took time to consider was not one which had been urged at the trial, nor upon the motion to set aside the verdict, but was a point which suggested itself to the defendant's counsel in the course of the argument after the plaintiff's counsel had

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shewn cause against the rule. It was this, that according to the terms of the charter-party Captain *Flower* was bound to come direct from *Petersburgh* to this country, and to bring his outward cargo with him; that his doing so was a condition precedent, without performing which he could not claim the 2500*l.* or any part of it; that his going into *Stockholm*, and disposing of part of his outward cargo there, was a breach of that condition; that he could therefore have no claim upon the plaintiffs in consequence of his not being permitted to take in a cargo at *Petersburgh*: and consequently that the plaintiffs can have no demand upon the underwriters for an indemnity. It may be conceded, for the purpose of the present case, that the plaintiffs can have no demand upon the underwriters, if

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Captain *Flower* could have supported no claim against them; and it is therefore material to see whether Captain *Flower* could or could not have supported a claim against them. The parties foresaw when they entered into the charter-party, that circumstances might arise to prevent the shipping a return-cargo; and they therefore provided that the plaintiffs should be at liberty to detain the ship 40 running days after her arrival at *St. Petersburgh:* and the plaintiffs covenant, that after the ship shall have remained the 40 running days without the outward cargo being unloaded, and consequently in all probability without the return cargo being put on board, Captain *Flower* should be at liberty to return to *London* or any other port in *England*; and also that they would pay him 2500*l.* immediately on the ship's arrival in *London* or any other such port in *England*. There are therefore no words expressing it as a condition, that the ship should come direct to *England*, and with the whole of her outward cargo; and in the absence [243] of such words, is there any thing from which such a condition is either necessarily or fairly to be implied? Many circumstances might occur to make it prudent and for the interest of all concerned, that the captain should touch at some port in his way home, should dispose of the outward cargo, and should get a freight home. Is such a construction then to be put upon the charter-party by implication, as to take away from him all power of availing himself of those circumstances? If he were to do it improperly, he would be answerable in damages for whatever injury his misconduct should occasion: so that justice would be done to the freighters, though this were not held a condition precedent; and the holding it to be a condition precedent might in the case I have just put be extremely prejudicial to them. Indeed if it were a condition precedent, the putting into a port for a single hour, or parting with a single pig of the lead, would be a breach, and would take away from the captain all right to his 2500*l.*, although such act of the captain were in ever so slight a degree injurious to the interest of the freighters, and might be compensated by trifling damages; and so would any deviation, or disposal of the cargo be, however beneficial it might be to the freighters. As, however, the words do not import that this is a condition precedent; as the nature of the thing does not require

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require that it should be so held; as great prejudice might result to the freighters from so holding, and as they will be entitled to indemnity for any damage, though it be not so held; we are of opinion that it is not to be deemed a condition precedent; that Captain *Flower* therefore is entitled to 2500*l.* from the plaintiffs; and that they are therefore entitled to recover it from the underwriters; subject to the deduction from that sum for the freight actually earned by Captain *Flower* from *Stockholm*, as we before intimated when the cause was last before us.

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Postea to the Plaintiffs.

Saturday, May 12th.

CLEMENTI *against* GOULDING.

An action is maintainable on the stat. 8 *Ann.* c. 19. for pirating a *single sheet* of music.

THE plaintiff obtained a verdict with damages against the defendant in this action, tried at the Sittings before Lord *Ellenborough* C. J. for pirating a sheet of music of which the plaintiff had the copyright; and the only question was, whether this being a *single sheet* were within the protection of the stat. 8 *Ann.* c. 19. which, mentioning in the preamble "*books and other writings*," speaks in the enacting part only of *book* or *books:* and liberty was reserved to the defendant to move to set aside the verdict and enter a nonsuit. *Garrow* moved accordingly at the beginning of the term, and pressed to have the point settled; adverting to the words of the act which speaks in another part of "every sheet or sheets being *part* of such book or books." On which the Court, as the point had been reserved, granted him a rule nisi; but Lord *Ellenborough* C. J. then said, that though he had leant in favour of the objection at the trial, yet on further consideration he was now disposed to consider that a *sheet* was a *book* within the meaning of the act: and he recollected that when the same question was made in a cause a few years ago (*a*), the Court were disposed to

(*a*) This was in *Hime* (or *Hine*) v. *Dale*, which was tried in *December* 1803, and came on first in this court in *Hil.* 1804, upon a motion

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to think that the case * was within the statute. And such appeared to be the opinion of the other Judges. And now, when the cause was called on in the paper of new trials, *Scarlett* moved to discharge the rule, understanding that it was abandoned: and *Garrow* said that he believed the parties had submitted to the intimation given by the Court of their opinion on his moving for the rule.

Per Curiam, Rule discharged.

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motion by Mr. *Erskine* to set aside a nonsuit, founded on an objection taken at the trial, that the publication in question, which had been pirated, was *a song printed upon a single sheet of paper*. He referred to *Bach* v. *Longman*, *Cowp.* 623. where a *sonata* was certified by this Court to be a *writing* within the statute; and to *Storace* v. *Longman*, Sittings after *Mich.* term 1788, at *Guildhall*, before Lord *Kenyon* C. J., where, in an action for pirating music, the composition was stated in the declaration to be "a certain musical air tune and writing," and which was in fact a single sheet of paper; but no objection was taken on that ground; and the plaintiff recovered a verdict. He observed that several works of great labour and utility were published on single sheets; such as lunar tables, and almanacs: and he referred to *Jones'* Index to the Records, which mentions the Sheriffs' *book;* one of which he produced in court; and it was a single piece of parchment about a foot long; and he recalled to recollection the familiar name of *horn-book* as an instance of the old popular application of the term *book*, which was derived by *Johnson* from the *Saxon boc*, a beach, because they wrote on beachen boards; as *liber* was derived from the bark of a tree used for the like purpose. And he also argued from the inconsistency of permitting an action to be maintained against a man for pirating a sheet of another's book, which might be composed of two or more sheets; and yet refusing the same protection to the same composition if published alone. Finally the case stood over till *Easter* term following, when the Court, without hearing any argument, made the rule absolute for a new trial; Lord *Ellenborough* C. J. saying that it was not fit that such a question should be decided upon a nonsuit; but it would be better to put it upon the record.

Monday, May 15th.

DOE, on the Demise of JOSEPH TOFIELD, *against* ESTHER TOFIELD, Widow.

Real property may pass under the description of "*personal* estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention. A surrender out of court to the use of his will made by the surrenderee of a copyhold before his admittance is absolutely void and of no effect, and cannot be made good by his subsequent admittance.

THIS ejectment was brought by *Joseph* the brother and heir at law of *William Tofield* deceased, against *Esther* his widow and executrix, to recover the possession of certain premises at *Stewkley* in the county of *Bucks*, and of certain freehold and copyhold lands in the common fields of *Stewkley* parish. At the trial a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

William Tofield in 1793 purchased of *R. Goldthorpe* certain freehold, leasehold, and copyhold lands in *Stewkley*. The freehold and leasehold were duly conveyed to him; and on the 10th of *October* in the same year, the copyhold lands, being copyhold of inheritance, and held of the manor of *Stewkley*, were surrendered out of court, according to the custom of the manor, by *R. Goldthorpe* and *Elizabeth* his wife, into the hands of the lady of the manor by the hands of the deputy steward to the use of *Wm. Tofield* in fee: and on the 14th of *November* 1793 they were again surrendered out of court by *Wm. Tofield*, by the hands of two other customary tenants of the manor, according to the custom thereof, to the use of his last will. Both these surrenders were presented at a manor court holden on the 17th of *June* 1795; and at the same court *Wm. Tofield* was admitted to the premises upon the surrender made by *Goldthorpe* and his wife in *October* 1793; there not having been any court previous to this time since the 15th of *June* 1791. *William Tofield* in 1801 purchased of *W. Griffin* other freehold lands in *Stewkley*, which were * duly conveyed to him. In *April* 1804, *W. Tofield* died without issue, being at the time of his death and of the making of his will hereinafter mentioned possessed of the said leasehold premises, and seised of the said freehold and copyhold lands purchased of *Goldthorpe* and *Griffin*, and also seised in fee of certain other tenements specified in his will, namely, of two tenements in the occupation of *H. Chandler* and *J. Coles*, and the

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the house wherein he himself dwelt, with the closes adjoining. On the 2d of *January* 1804 he made his will duly executed and attested, wherein, after giving pecuniary legacies to his brothers *Joseph*, *Benjamin*, and *John*, and to his sisters *Mary* and *Elizabeth*, he proceeds thus: I give and devise unto my father and mother *William* and *Ann Tofield* two tenements now occupied by *H. Chandler* and *J. Coles*, with the yard, &c. for and during the term of both or either of their natural lives; and from and after their decease I give and devise the said premises to my executrix herein also named. I also give and bequeath unto the trustees of the Methodist chapel in *Stewkley* 30*l.* &c. I give unto my wife *Esther Tofield* all my stock of cattle, corn, hays, and grain, sheep, hogs, and cattle of all kinds, household goods and furniture, ready money, and securities of money, rights, credits, and *personal estates* whatsoever and wheresoever, subject nevertheless to the above legacies, to hold to the said *Esther Tofield* for and during the term of her natural life, provided she keep single; but and if she marry, she shall receive no profits or benefits from my estates whatsoever, but at the time of her marriage shall resign up all my *personal* estates to the after-mentioned legatees in manner following; first, I give and bequeath unto my brother *John Tofield* the house and premises wherein I now dwell, with the closes adjoining, and all the appurtenances thereunto belonging, with the tenements, to hold to him my said brother *John Tofield*, his heirs and assigns for ever: and the remaining of my *personal* estates I give and bequeath to my brother *Joseph Tofield*, my sister *Elizabeth Ratlidge*, and my sister *Mary Capel*, share and share alike, to hold to them their heirs and assigns for ever. But and if the said *Esther Tofield* shall remain single or unmarried, I hereby declare that she shall possess *all my abovementioned estates* for and during the term of her natural life, and at her decease I give devise and bequeath *my personal estates as abovementioned*; that is, to *John Tofield* my brother the house and premises wherein I now dwell, with the appurtenances thereunto belonging, to hold to him his heirs and assigns for ever; and *the remaining of my personal estates* I give and bequeath to my brothers *Joseph* and *Benjamin*, and my sisters *Elizabeth* and *Mary* equally share and share, to hold to them their heirs and assigns for ever. Lastly, I do appoint my said wife sole executrix, &c.

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The question for the opinion of the Court was, whether the lessor of the plaintiff, as heir at law of the testator, were entitled to recover the freehold and copyhold estates of which the said testator died seised, or any and what part thereof.

This case was argued on a former day by *Peckwell* for the plaintiff, and *Best* for the defendant; when two questions were made; 1st, whether the widow took for life the residue of the testator's *real* property, not before specially devised, under the description of *personal estates*. And if she did; 2dly, whether the copyhold would pass to which the testator had not been admitted at the time of his surrender to the use
[249] of his will. The last point, with the arguments bearing on it, was so fully discussed by the Court in delivering the judgment, that it is unnecessary to recapitulate the arguments urged at the bar. Upon the first point, it was urged by the plaintiff's counsel, that no case had gone so far as to give effect to a devise of realty against the heir at law, where the testator had used the word *personal*, importing in legal sense and common understanding the very reverse of *real* estate: although he admitted that if such a construction could be put on the word, it might be collected from the rest of the will that the testator had used it in that sense. But Lord *Ellenborough* C. J. said, that if it distinctly appeared, as it did in this case, that the testator meant to pass his real property under that description, the Court must pronounce their opinion that it did pass according to such manifest intention. And the rest of the Court being clearly of the same opinion, no further argument was had on this point. But the Court took time to consider of their judgment on the other point. And now

Lord ELLENBOROUGH C. J. delivered judgment. This ejectment was brought for certain freehold and copyhold lands, which the lessor of the plaintiff claimed as heir at law to *William Tofield*, and the defendant claimed as his devisee. As to the freehold lands, the Court has had no doubt: the only question as to them was, whether they passed under the words "*all my personal estates*;" and it being clear beyond all possibility of doubt upon the face of the will, that the testator meant by these words (not what is ordinarily understood by them, but) such real property over which he had an absolute
[250] personal power of disposition and controul, we have no hesitation in saying that the freehold passed by this description.

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With regard to the copyholds, the facts were these. They were surrendered out of court into the hands of the deputy-steward to the testator's use on the 10th of *October* 1793, and before that surrender was presented, and before the testator was admitted upon it, to wit, on the 14th of *November* 1793, the testator surrendered the same into the hands of two customary tenants to the use of his will. On the 17th of *June* 1795, and not before, these surrenders were presented at a court holden for the manor, and the testator was then admitted. The question therefore is, whether the surrenderee of a copyhold can himself surrender to the use of his will before the surrender for his use is presented, and before he is admitted: and if he do, whether his admittance afterwards will make that surrender to the use of his will valid? Until admittance the surrenderor is the only person to whom the lord can look as his tenant, and he is the person to discharge all the services. The surrender so far binds the land, that the surrenderor cannot surrender to any other person; but the whole legal estate remains in the surrenderor: he has a right to retain the possession (subject however to account for the mesne profits if the surrenderee be afterwards admitted. 2 *Wils.* 15.); and if he die, the estate devolves upon his heir. *Co. Cop. s.* 39. and 7 *East*, 8. The surrenderee has no legal right to enter; and if he do, the surrenderor may bring trespass against him; the surrenderee cannot support an ejectment, unless he procure an admittance before trial; and if he commit a capital offence, the copyhold is not forfeited. 2 *Wils.* 13. *Roe de Jefferies* v. *Hicks*. In all these [251] respects a surrenderee differs from an heir: for the heir is tenant before admittance; he is entitled to the possession; he may support trespass or ejectment; and he may surrender, or forfeit. The point whether a surrenderee can surrender to a stranger before admittance is distinctly put by Lord *Coke* in his *Cop. s.* 39. His words are, "if he surrender to the use of another, the surrender is merely void, and by no matter ex post facto can be confirmed." And he gives the reason; "for though the first surrender be executed (i. e. by "admittance) before the second; so that at the time of the "admittance of him to whose use the second surrender was "made, his surrenderor hath a sufficient interest as absolute "owner; yet because at the time of the surrender he had but

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"a possibility of an interest, therefore the subsequent admittance cannot make this act good, which was void ab initio." This passage is adopted by Mr. Justice *Blackstone* in the 2d vol. of his *Comm.* 368., and it is confirmed by other authorities. In *Wilson* v. *Weddall*, *M.* 6 *Jac.* 1. *Yelv.* 144. mentioned also in *Co. Litt.* 60. *a. n.* 2, by the name of *Wilson* v. *Woodfall*, it was adjudged that if a surrenderee surrendered, and died without admittance, though his surrenderee was afterwards admitted, such surrenderee had no title against the heir of the surrenderor. The case there was this: A copyhold was surrendered to the use of *Leonard* in fee, and he surrendered to the use of *Margery* for life: *Margery* was admitted, but *Leonard* never was. The first surrenderor's heir brought ejectment; and on special verdict it was adjudged, that a surrender of a copyhold to *J. S.* is not of effect till *J. S.* is admitted; and if *J. S.*, before admittance, surrender to a stranger who is admitted, that is nothing worth to the stranger; for *J. S.* himself had nothing, and so could pass nothing; and the admittance of the grantee shall not be taken by implication the admittance of himself, (viz. the grantor). But it was held that the right and possession still remained in him who first surrendered, and descended to his heirs. And a difference was taken between a surrenderee, and an heir to whom a copyhold descends, who may surrender before admittance, because in by course of law; for the custom casts the possession upon him from his ancestor: but a surrenderee has nothing before admittance; because he is a purchaser; and till admittance he is not a customary tenant; so that he can transfer nothing to any other. This was adjudged in *Dixie's* case, 24 *Eliz.* In *Rawlinson* v. *Green*, *M.* 14. *Jac.* 1. *Poph.* 127. a copyholder surrendered out of court, and the surrender was presented at the next court; the surrenderee surrendered before admittance; and one question was, whether he could? *Houghton* J. held that he could not: and he said that the entry of the surrenderee would not make an admittance, because it is the sole act of the steward: and *Dodderidge* J. agreed. It appears indeed by 3 *Bulstr.* 237—240., where there is a fuller report of this case, that it ended in a compromise; so that this at the most is the opinion of the two judges only, and not a decision. There is however an able argument to shew that the surrender was void in *Bridgm.* 81. Against these authorities I find nothing which bears upon the point,

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point, except a passage in 1 *Roll. Abr.* 505. X. *pl.* 1. 6 *Vin.* 82. and a note in *Co. Litt.* 60. *a. n.* 2. The passage in *Rolle* is to this effect: Surrenderee surrenders in court before admittance: this shall endure as an admittance on the first surrender, and afterwards as a second surrender; for by the acceptance of the surrender he is admitted to be tenant. *Dubitatur. B. R.* 38 & 39 *Eliz.* in *Keeping* v. *Bunning*, *Pasch. B. R.* 41 *Eliz.* in *Calchin's* case. In *Keeping* v. *Bunning*, however, it appears from *Cro. Eliz.* 504. (reported by the name of *Gyphen* v. *Bunney*) that the first surrenderee was a remainder-man; and the tenant for life, on whose estate his remainder depended, was admitted; and the Court proceeded on the ground that the admittance of the tenant for life was the admittance of the remainder-man; so that the first surrenderee was in that case considered as admitted. And *Colchin* v. *Colchin*, as appears by *Cro. Eliz.* 662. was the case of an *heir* who surrendered before admittance, not of a *surrenderee*; and all the authorities agree that an heir is in before admittance, and may surrender. The note in *Co. Litt.* first notices *Dixie's* case, and *Wilson* v. *Weddall* (there called *Wilson* v. *Woodfall*) in these terms: "*A.* surrenders to the use of *B.*, who "before admittance surrenders to the use of *C.*, and *C.* is admitted: ruled that *C.* takes nothing; for *B.* who surrenders "has not any interest to surrender till admittance." And then it proceeds; "But yet it hath been ruled good; for the admit- "tance of *C.* shall be implied to be an admittance to *B.* first, "and so there shall be priority. *M.* 24 *Car. B. R. Baker* v. *Denham P.* 41 *Eliz. C. B. Colchin* v. *Colchin. Vide T.* 15 *Jac. B. R.* 2. *Pop.* 5." It has already been noticed, that *Colchin* v. *Colchin* was the case of an *heir;* so that the point could not have been ruled there. *Baker* v. *Denham* is stated in the supplement to Lord *Coke's Copyholder, s.* 4.; and from that statement it is obvious that the point supposed in the note in *Co. Litt.*, if it arose at all, was ruled the other way. This is the statement: "The custom of a manor was, that a copy- "holder might surrender his copyhold out of court to the use "of another; the party, to whose use it was, to be admitted at "the next court; such a surrender was made; but before the "next court cestui que use died, and so was not admitted. "It was resolved in this case that he was not a copyholder "within the custom: for by the surrender before admittance

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" the surreuderee hath no possession; and the heir (viz. of " the surrenderor) is in by descent, and holds by the copy of " his ancestor; and so the cestui que use is not a perfect or " complete copyholder. The surrender is but quasi incho- " atum till the surrenderee be admitted to the copyhold." It is not impossible upon this statement, that a surrenderee might have surrendered out of court before admittance; and the question might be, whether such surrender were within this custom. But as it was resolved that he was not capable of surrendering, it could not have been ruled that his surrender was good. The reference in the note to 2 *Poph.* 5. evidently applies to *Rawlinson* v. *Green*, already cited, which is the 5th case in the 2d part of *Popham*'s Reports. The authorities therefore of *Co. Cop. s.* 39. *Yelv.* 144. and *Poph.* 127. are not to be considered as impeached by the passage in *Roll. Abr.* or the note in *Co. Litt.*: but we may still conclude that a surrenderee is incapable of surrendering to the use of a stranger before admittance, and that no subsequent admittance will make his surrender valid. It was argued, however, that though a surrenderee might be incapable of surrendering before admittance to the use of a stranger, it did not follow that he could not surrender to the use of his own will. But no authority was adduced for such a distinction, and there seems no foundation for it upon principle. The reasons why [255] he cannot surrender to the use of a stranger are, that he is not tenant to the lord, and has no legal interest; and those reasons apply equally against his making any surrender. This distinction therefore seems untenable. In considering this case the point occurred, whether, as neither surrender was presented till the day of admittance, each surrender might not be considered as of the same date with the admittance; and then, ut res magis valeret, the admittance might be taken to have preceded the surrender to the use of the will. But as it is estsblished that the presentment is to be made, though surrenderor, surrenderee, and the other persons who took it, all die before the next court; it follows that the surrender, when presented, must be treated as a surrender of the day on which it was in fact made. As to the case of *Benson* v. *Scott*, 3 *Lev.* 385. and other cases which might have been cited, where the admittance has had such relation to the surrender as to make the estate pass in the same course of descent, and give

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give the same right to dower and curtesy, &c. as if the admittance and surrender had been contemporaneous acts: the answer seems to be, that though every act of law which would have operated upon the estate, had the admittance immediately followed the surrender, shall still operate upon it; it cannot be affected by any act of the party. And this is agreeable to the distinction in *Buller* and *Baker*'s case, 3 *Co.* 29. *a.* cited by Mr. *Peckwell*, that relation in many cases shall help acts of law; as in the case of *dower*, &c., but shall never help acts of the parties; that is to say, to make the void acts of the parties good by relation or fiction of law. For these reasons it appears to us that the surrender out of court, made by *William Tofield* on the 14th *November* 1793, to the use of his will, could not operate, so as to enable him to pass [256] the copyhold tenements by his subsequent surrender; he not being at the time of such surrender admitted tenant. And although he was afterwards admitted on the first surrender made to him, such admittance could not operate by relation, so as to render valid the surrender to the use of his will. The consequence is that the copyholds are undisposed of, and the plaintiff as heir at law is entitled. The postea must therefore be delivered to the plaintiff, with liberty for him to enter up Judgment for the copyhold premises only.

CROSBY and Another, Assignees of BOUCHER, a Bankrupt, *against* CROUCH.

Monday, May 15th.

IN trover for printed books and stationary, alleged to have been the property of *Boucher* before his bankruptcy, and afterwards to have belonged to the plaintiffs, as his assignees under a commission of bankrupt issued against him, the ques-

Where the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him,) it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time. Nor will the transaction, being bonâ fide and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world.

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tion was, whether the goods had come to the possession of the defendant before the bankruptcy of *Boucher* by his voluntary and undue preference of the defendant, in fraud of the bankrupt laws, or by the due diligence of the defendant himself seeking his own security or indemnity? It appeared in evidence at the trial before Lord *Ellenborough* C. J. that *Boucher* at the time of his bankruptcy in *March* 1808, and for about 18 months before, was a bookseller and stationer, having been
[257] before that a pawnbroker, in which last-mentioned business he had made a composition with his creditors, of whom the defendant a pawnbroker was one, for 5*s.* in the pound. The nature of the dealings between them since that period was disclosed in the defendant's examination taken on the 30th of *April* 1808 before the commissioners upon *Boucher*'s bankruptcy; in which it was stated, that about a year and a half or two years before, the defendant was applied to by the bankrupt to indorse a bill for 125*l.*, drawn by the bankrupt on one *Jones*, a baker: which bill was given for the purpose of settling a composition made by the bankrupt with his creditors about that time, when he was a pawnbroker. That bill became due in *November* 1807, and was held by a Mr. *Williams* for the trustees who were to raise money to pay the composition. That 4 or 5 month's after the defendant's indorsement of that bill the bankrupt brought at different times small quantities of books and paper to him to dispose of, in order to raise money to pay the bill; some of which goods the defendant caused to be sold at *Robins*'s auction-rooms, and others he disposed of in his own shop. When the bill became due the defendant took it up, by giving his own note at a month for part (since paid) and the remainder in cash; having at that time 70*l.* in hand, the produce of part of the said goods, and also remaining goods to nearly the amount of the bill. The bankrupt afterwards brought other goods to the defendant, which when sold overpaid him his advance on the bill, and he returned the difference, about 7*l.* to the bankrupt. That in *September* 1807 the bankrupt applied to the defendant to discount three bills for him of 50*l.* each: two of them drawn by the bankrupt on the said *Jones*; the other upon one *Young*; all of which the defendant cashed before the bill for 125*l.* became due: but immediately after that bill was dishonoured

by

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by *Jones* the acceptor, the defendant, being alarmed lest the three 50*l.* bills should not be paid, applied to the bankrupt to know whether they were not accommodation bills, who informed him that they were: on which he required the bankrupt to put some security in his hands to answer the payment of them, in case the acceptors should not pay them when due. That in consequence of the defendant's application the bankrupt at different times between *November* 1807 and *February* 1808 brought to him different parcels of books, to the amount of 270*l.* or 370*l.* in value, as stated by the bankrupt, and which books were deposited with the defendant for the purpose of being sold by him in case the three 50*l.* bills should not be paid by the acceptors, in order to reimburse him the amount; and those bills were still held by the defendant. And the defendant negatived in his examination that the books were pledged with him in the way of his business as a pawnbroker, or for safe custody, or for any other purpose than to cover the bills, as before stated. And he also stated, that the books were brought to him in coaches, and generally in the evening after dark; that *Boucher* always came with them himself; that there might have been one or two parcels come in the day-time. The defendant further stated that he had known *Boucher* about two years and a half: that he knew him when he failed in the business of a pawnbroker, and paid his creditors a composition of 5*s.* in the pound: that he himself was then a creditor of his for 18*l.* and received the composition: and that he never knew that *Boucher* had realized any capital after his failure, or that he possessed any money to enable him to enter into the business of a bookseller. Lord *Ellenborough* C. J., being of opinion upon this evidence, that [259] the security having been required of the bankrupt by the defendant, and not offered voluntarily by him, negatived the undue preference, would have left the case to the jury with that instruction; whereupon the plaintiff's counsel submitted to a nonsuit, in order to take the opinion of the Court, whether assuming such to have been the direction of the Lord Chief Justice to the jury, it was warranted by the evidence. A rule nisi was accordingly obtained for setting aside the nonsuit; which was supported by *The Attorney-General*, *Garrow*, and *Lawes*, and opposed by *Park* and *Marryat*; each of whom

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argued upon their respective views of the facts. After which the case stood over some days for consideration: when

Lord ELLENBOROUGH C.J. delivered the judgment of the Court.—This was an action of trover brought by the assignees to recover the value of a quantity of books received by the defendant from the bankrupt, and which had been privately conveyed from the bankrupt's shop in a hackney coach after dusk at several times between *October* and *February*, and delivered by him to the defendant. No act of bankruptcy was committed till the *March* following. The commission was in *May* following. The goods were delivered on the defendant's requiring to have some security against three running bills which he had discounted for the bankrupt, and of the payment of which the defendant had become apprehensive, on understanding they were accommodation bills. The defendant's examination before the commissioners of bankrupt was read on the part of the plaintiff, in which the defendant deposed, "that the books in question were deposited with the deponent [260] "for the purpose of being sold by him, in case the three bills "for 50*l.* each should not be paid by the acceptors thereof, to "reimburse him the amount thereof." The bankrupt had before satisfied the defendant the amount of a bill of exchange which he, as indorsee, had taken up for the bankrupt, as drawer, by the sale of books and paper delivered to him by the bankrupt, part of which the defendant had sold in his own shop as a pawnbroker, and part at another person's auction-room. The fair result of the whole evidence was, that the defendant had reason to believe that *Boucher* was in bad circumstances, and that so believing, and having incurred the risk of becoming an indorser of these three bills which the bankrupt *Boucher* was liable to pay, he required, and, on his requisition, obtained from the bankrupt security against those bills by a deposit of goods by the bankrupt, to be sold if the acceptors did not pay those bills. The circumstance of the debt secured not being demandable, and capable of being enforced at the time, makes no difference; as was held in the case of *Thompson* v. *Freeman*, 1 *Term Rep.* 155., and in *Hartshorn* v. *Slodden*, 2 *Bos. & Pul.* 584., decided as to that point on the authority of *Thompson* v. *Freeman*. The question therefore, is whether, upon the facts thus stated, the delivery of the goods in dispute

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dispute were an act of voluntary preference on the part of the bankrupt in contemplation of bankruptcy? Two things are necessary to concur in order to avoid the delivery of the goods; namely, the purpose of voluntary preference in respect to such delivery, and the contemplation of bankruptcy at the time when the goods were delivered. In considering whether the act in question were in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from [261] the defendant. It certainly proceeded wholly from the defendant: he is stated to have *required* the act to be done. It is therefore, upon any fair interpretation of the words, not referable to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit: and it has not been suggested that such requisition and urgency were colourable. This distinction between payments and deliveries by the bankrupt which are *voluntary*, and those which are not so, with reference to this head of bankrupt law, was so fully considered and discussed by Lord *Alvanley* and the other judges of the court of Common Pleas in *Hartshorn* v. *Slodden*, 2 *Bos. & Pul.* 583., that it is enough upon the present occasion to refer to the argument of those Judges upon this point. It is there laid down to be immaterial whether the debtor had or had not an act of bankruptcy in contemplation at the time, if the creditor pressed for payment or security, and thereby obtained such payment or security. As there was no doubt, at the trial, of the fact of urgency for the security; such fact appearing upon the face of the defendant's deposition read in evidence by the plaintiff; what fact was there to be left to the jury; unless indeed it were contended that such urgency was colourable; but no such point was made at the trial. The receiving of goods, removed under the circumstances of secrecy already stated, has been treated in argument as fraudulent: but if the creditor were entitled to demand, and, demanding, to receive a security in goods for a running debt, I want to know upon what principle he was obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, and which might be in other respects injurious to the general [261] credit

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credit of such debtor. The defendant had no interest to keep up his credit, as he owed him no other debt. If his debtor made the payment or gave the security exacted from him, surely it was allowable to the creditor to leave the time and manner of doing so to the debtor's own convenience and discretion, as seems to have been done in this case. If such a bonâ fide urgency for the security, as must be taken to have existed in this case, exclude the security from being considered as a voluntary one, it is then unnecessary to consider whether there were evidence to have been left to the jury in respect to the other point, viz. of a contemplation of bankruptcy. Though as to that, it might be perhaps too much to hold that any particular act of bankruptcy, or even the event of becoming a bankrupt at all, was specifically in the bankrupt's contemplation in *September*, and the other successive months during which the delivery was made up to *February:* the act of bankruptcy not taking place till late in the *March* following. But this point, for the reason already given, is not material to be considered upon the present occasion.

Rule discharged.

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VIVIAN *against* BLAKE and Others.

Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.* Pleas, 1. Not guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription: Held that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff is not entitled to costs.

THIS was a question of costs, which was argued in the last term by *Moore* for the plaintiff, and *Dampier* for the defendants; and was then directed to stand over for consideration. And now

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

This was a rule obtained in the last term on behalf of the plaintiff, calling on the defendants to shew cause why the master should not tax the plaintiff his costs, on the ground that a verdict was entered for the plaintiff on the first plea of not guilty, with 1*s.* damages. The pleadings in substance were these: the declaration complained of a trespass by the defendants in the plaintiff's free fishery in the creek, otherwise the river, in the parish of *St. Anthony*; and also in the free fishery of the plaintiff in the parish of *St. Just:* and also in his free fishery in the parishes of *St. Anthony* and *St. Just.* Pleas, first, not guilty, generally. 2d, That the said free fisheries were parcel of a public navigable harbour or creek in which the tide flowed and reflowed, where all the king's subjects had a right to fish. Replication to the second plea, protesting that the free fisheries are not parcel of the public harbour; replies, that the plaintiff is seised in fee of the manor of *Bohurra*, and prescribes for a free fishery in the said place in right of his said manor. Rejoinder takes issue on the prescription. A verdict has been entered on the general issue for the plaintiff, with one shilling damages: and on the prescription, for the defendant. The question on * the verdicts on these issues is, whether the issue on the prescription, which has been entered for the defendant, do not go to the whole trespass; for if it do, the finding on the whole record being in favour of the defendants, the plaintiff cannot be entitled to costs. And we are of opinion that the issue found for the defendants does go to the whole. The free fishery claimed by the plaintiff, and which by his count he complains of the defendants having broken and entered, is by his replication confined to a free fishery in the right of his manor of *Bohurra*; and

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and the verdict finds that he is not entitled to any such free fishery. It resembles the case put in argument at the bar, where to an action of trespass quare clausum fregit the defendant pleads not guilty, and liberum tenementum of *A.*, by whose command the defendant entered. The replication deduces a title to the plaintiff under *A.*; which derivative title is traversed, and found for the defendant; in which case the plaintiff cannot be entitled to costs, because the issue found for the defendant goes to the whole. The consequence will be, that the rule must be discharged.

DE TASTET and Others *against* BARING and Others.

Monday, May 15th.

THE plaintiffs declared that one *J. Hodgson*, on the 24th of *November* 1806, at *London*, according to the custom of merchants, made his bill of exchange of the same date directed to *Joza da Silva* in *Lisbon*, being in *Portugal* beyond the seas, and required him at 12 months' date to pay to the order of the said *J. Hodgson* 2220 mil 767 reis. That *Hodgson* on the 27th of *February* 1807 at *London* indorsed the said bill to *Henzelman* and *Rickarby*, who indorsed to the defendants; and the defendants on the 7th of *April* 1807 at *London* indorsed to the plaintiffs by their trading firm of *Anthony Mangin*; and the plaintiffs on the said 7th of *April* indorsed to *Treves* and Company. That the bill when due and payable on the 30th of *November* 1807 at *Lisbon* was duly presented to *Joza da Silva* for payment, who refused so to do, and *Treves* and Co. caused it to be protested for non-payment; and it was returned to the plaintiffs as indorsers, and they were obliged to pay the sum therein contained, being of the value of 650*l.* sterling, together with exchange and *re-exchange*, interest, damages, costs and charges, &c. of all which the defendants had notice; and by reason of the premises, and according to the usage and custom of merchants, they became liable to pay to the plaintiffs the said sum in the said bill or the value thereof, together with the exchange, re-exchange, &c. There was another set of counts, only charging that the defendants became liable * to pay the exchange, re-exchange, &c. without charging that the plaintiffs had been obliged to pay the same.

A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *London* on *Lisbon*, upon evidence that the enemy were in possession of *Portugal* when the bill became due, and *Lisbon* was then blockaded by a *British* squadron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances

been negotiated between them through *Hamburgh* and *America* about that period, the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law whether any exchange or re-exchange could be allowed between this and an enemy's country. *[266]

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It appeared at the trial before Lord *Ellenborough* C. J. at *Guildhall*, that the facts and dates of the several transactions corresponded with those stated in the first count of the declaration, except that it did not appear that the plaintiffs had in fact paid any re-exchange. It further appeared that the plaintiffs had purchased the bill in question of the defendants, and that when it was returned dishonoured, the defendants had offered to pay the principal, interest, and all expences attending the dishonour, except the claim for re-exchange, (which was the only claim now in question; the rest having been paid into court;) and which claim they resisted on the ground, that at the time when the bill became due and was dishonoured the *French* were in possession of *Portugal*, and entered *Lisbon* on the 1st of *December* 1807; which then and for some time before was actually blockaded by a *British* squadron at the mouth of the *Tagus*; and that there was not in fact any exchange existing at the time between *Portugal* and *England*, even if it could legally take place while the two countries were in a state of hostility. On the other hand, an instance or two were shewn of an exchange of bills about this time between the two countries, through the medium of other bills on *Hamburgh* or *America*. Lord *Ellenborough* C. J. told the jury, that if the plaintiffs had paid the re-exchange, or were in the common course of dealing liable to pay any, a verdict should be found for them, reserving the question of law, whether in the relative situation of the two countries at that period a charge for re-exchange could legally be demanded. The jury found a verdict for the defendants. On which *The Attorney-General* [213] moved for a new trial, assuming the verdict to have passed, not upon the ground that there was no exchange in fact between the two countries at the time, the contrary of which he considered to have been shewn in evidence; but that the jury had been led to suppose, by the course which the cause had taken, that the plaintiffs were not entitled to the re-exchange, without proving that they had in fact paid it. This he contended was not necessary; but it was sufficient to entitle the plaintiffs to recover, if they were liable to pay the re-exchange to the holders of the bill at the time of the dishonour. And then the question of law, which had been reserved, would arise. A rule nisi having been obtained; Lord *Ellenborough*

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borough C. J. now, on reporting the evidence, stated the manner in which he had left the case to the jury: which he observed was a special jury consisting of many eminent merchants conversant with the subject, and therefore he had encouraged them to take an active part in the examination of the witnesses; which they had done: and they had drawn their conclusion from the whole evidence in favour of the defendants against the claim of re-exchange.

Garrow and *Marryat*, against the rule, said that at this period there was in fact no market at *Lisbon* for bills on *London*, and consequently there could be no re-exchange, the charge for which consisted of the sum which would have been paid in the *Lisbon* market for a bill drawn there on *London* of the same relative value as the dishonoured bill, supposing there had been any exchange at that time existing between the two countries. That in effect the same purpose was answered by the defendants having engaged to pay to the plaintiffs in *London* the actual loss sustained by them on the bill in consequence [268] of its having been dishonoured, which was the principal and interest and the amount of the charges of protesting and returning the bill; and they only resisted the payment of an arbitrary sum, which was said by some persons to be the charge of transmitting the money from *Lisbon* to *London*, through the medium of bills on *Hamburgh* or *America* or *Paris*, when all direct exchange between *Lisbon* and *London* had then ceased. That the verdict of the jury was founded upon the fact that no such exchange existed between the two countries at the time; and that in point of law it could not exist, as the right to re-exchange in this case must be founded upon the right which persons in *Lisbon* then had to draw upon others in *London*, and the obligation of the subjects residing here to pay such bills; an obligation which could not exist during the continuance of hostilities between the two countries; and if it were illegal to do it directly, it must be equally illegal to do it indirectly, though the discovery of it might be more difficult in the latter case.

The Attorney-General and *Littledale*, contrà, said that at all times, and particularly in the present state of the commercial world, it would require grave consideration before it was laid down as a general rule, that no bill drawn from a foreign hostile country upon this could legally be paid here: it frequently

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quently happened that this was the only medium by which our own merchants abroad were able to remit their property home out of an enemy's country. A merchant in *England* might be indebted to a foreign merchant; and a *British* merchant in a foreign country, invaded by the enemy, might make over property which he had upon the spot to that foreigner in exchange for his bill upon the *British* merchant at
[269] home; and in these and the like cases no actual property is transmitted from this country to the enemy's country; for the money is paid to a subject at home, and the principal benefit of the transaction centers here. Then the nature of the transaction which gives rise to the question of exchange and re-exchange is this—A merchant in *London* draws on his debtor in *Lisbon* a bill in favour of another for so much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the *London* market for bills on *Lisbon*, and the facility of obtaining them: the difference of that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustains is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for re-exchange. And it is quite immaterial whether or not he in fact re-draws such a bill on *London* and raises the money upon it in the *Lisbon* market; his loss by the dishonour of the *London* bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by re-drawing for the amount of the former bill, with the addition of the charges upon it, including the amount of the re-exchange, if unfavourable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here: but that party is at all events liable to him
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for the difference; for as soon as the bill was dishonoured, the holder was entitled to re-draw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market or exchange afterwards; for as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavourable to *England* before he re-drew; so neither could the party here fairly insist on having the advantage if the exchange happened to be more favourable when the bill was actually drawn. Where re-exchange has been recovered on the dishonour of a foreign bill, it has not been usual to prove that in fact another bill was re-drawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonour, the rule will become extremely complex for settling what is to be paid on the bill between different indorsees, each of whom takes it at the value of the exchange when he purchased it. If then the amount of the re-exchange between the two countries at the time of the dishonour be the true measure of damage which the holder at *Lisbon* was entitled to receive from his indorsee in *England*; and that re-exchange consist of the amount of a bill on *London* which would put the holder of the dishonoured bill in the same situation as if he had received the contents of it when due in *Lisbon*; it cannot make any difference whether the exchange between *Lisbon* and *London* at the time were carried on directly, or through the medium of other places. The more circuitous and difficult it was, the greater would be the loss of the holder by the dishonor.

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The Court said they would consider of the case, and two days afterwards

Lord ELLENBOROUGH C.J. delivered their opinion, that the rule for a new trial should be discharged, on the ground that the question was properly put to the jury, to allow the plaintiff damages or expences in the name of re-exchange, if the plaintiff were either liable to pay, or had paid, re-exchange on these bills. And that as it did not appear to have been clearly made out, that there was at the time any course of re-exchange between *Lisbon* and *London*, the Court must presume, that the jury, which was one particularly conversant in subjects of this sort, found for the defendant on that ground; viz. that the

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plaintiff was not liable to pay re-exchange in this case, and not on the ground that the plaintiff had not actually paid it.

Rule discharged.

Monday, May 15th.

WATHEN and Another *against* BEAUMONT and Another, Bail of ASKEW.

On a four-day rule for bail in scire facias to appear and plead in term, *Sunday*, though an intermediate day, is not to be reckoned.

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A RULE was given by the plaintiffs, *Saturday* the 6th of *May*, to the defendants, the bail, to appear and plead to the writ of scire facias, otherwise judgment would be signed: and default being made, judgment was signed on *Friday* the the 12th (*Thursday* being a dies non, &c.) *Bowen* thereupon obtained a rule nisi for setting aside the proceedings for irregularity; which was now opposed by *Abbott;* and the question was, Whether **Sunday*, being an intermediate day within the term, were to be reckoned as one of the four entire days which the defendants were entitled by the practice to have, in order to appear and plead in scire facias; in which case, *Thursday* being a dies non, &c. the judgment signed was one day too soon. It was observed against the rule, that there was nothing in this case to do in court, and therefore it was not like a rule for judgment nisi, &c. (*a*) But after reference to the Master, Lord *Ellenborough* C. J. said that it appeared to be the settled practice now in all rules for pleading against bail in scire facias to exclude *Sundays* and *holidays* from the computation of time given, though not happening on the last day.

Per Curiam, Rule absolute. (*b*)

(*a*) Vide *Tidd's Pract. ch.* 38. referring to 4 *Burr.* 2130.

(*b*) In *Roberts* v. *Quickenden*, *M.* 50 *Geo.* 3. this case was explained as not meant to extend the like mode of computation to rules for pleading in actions in general. The practice appears to be thus—in rules to plead, in actions in general, a *Sunday* or a holiday reckons as a day, except it be the last; but in rules for judgment, a *Sunday* or a holiday does not reckon, though it be not the last day: and in proceedings in scire facias against bail the rules for pleading are assimilated to, and operate in this respect as, rules for judgment, and are entered as such in a separate book in the office.

MEMORANDUM.—On the last day of the term *Robert Henry Peckwell* of *Lincoln's Inn*, and *William Frere* of the *Middle Temple*, Esquires, were called Serjeants, and took for the motto on their rings, "Traditum ab antiquis servare."

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

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

REGULA GENERALIS.

Rule for changing the venue to be drawn upon reading the declaration.

INCONVENIENCE having arisen in some cases from the venue having been improperly changed, without adverting to the cause of action; Lord *Ellenborough* C. J. early in this term said that the Court would require in future that all Rules for changing the venue in any action should be drawn up "upon reading the declaration."

BOLTON *against* SOWERBY and Another.

Saturday, June 3d.

A *farmer* and *grazier* exercising also the business of a *drover*, by buying and selling cattle from time to time beyond the occasions of his farms, is exempted from the operation of the bankrupt laws by stat. 5 *Geo.* 2. *c.* 30. *s.* 40. And the purchase of hay *for the support of his cattle*, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader.

IN trover for cattle and other goods, tried before *Lawrence* J. at *York*, the sole question was, Whether the plaintiff were a trader at the time when a commission of bankrupt was taken out against him, under which the defendants claimed.

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BOLTON *against* SOWERBY.

It appeared that the plaintiff lived on his own farm, of 60 or 70 acres, at *Faceby*, and had a great deal more stock upon it than the farm could support. In the course of 1806 and 1807 he bought cattle to sell again for profit, and sold them off as fast as possible. At one time, in *June*, when he had already more cattle on his farm than it would carry, he bought 40 lean cattle, with a view to sell them again directly, and make money of them as he expected: and he sold two in a day or two afterwards. He had bought more before; and he bought about four score of lean cattle just before *Candlemas*, when he had no grass on his farm for them; but these latter were for the use of another rented farm, of 1000 acres, at *Langton*, to which he was going at *Lady-day*. He also bought at different times lots of lean *Scotch* cattle travelling along the roads, for the purpose of selling again as fast as he could find purchasers: once he re-sold some on the same day; sometimes within a few days; at other times they were re-sold several months after the purchase. Sometimes he took cattle to different fairs for sale. His pastures were always much overstocked, and at several times he was obliged to purchase stacks of hay for the support of the cattle. On one occasion he sold part of one of the purchased stacks which had not been consumed by the cattle;
[275] and on another occasion he exchanged one stack for another. Several lots of cattle bought were unfit for the farm; and were sold by him in their lean state as well as in better condition; and he admitted that he had lost money by all the cattle he had bought in 1807, except one or two. On this evidence the jury found a verdict for the plaintiff for 65*l.*; and liberty was given to the defendants to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was a trader within the bankrupt laws; it being admitted that the cattle he had bought were much more than he wanted for the occupation of his farm at *Langton*. A rule nisi was according obtained in the last term for entering a nonsuit, which was now opposed by

Park and *Holroyd:* but after the former had referred to the case of *Mills* v. *Hughes* (*a*), as in point, that persons who bought and sold cattle for profit came within the description of *drovers*, who together with *farmers* and *graziers* are

(*a*) *Willes*, 588.

expressly

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expressly excepted (*a*) out of the operation of the bankrupt laws; and had observed that every act of the plaintiff done for the purpose of gaining a livelihood was referable to one or other of the three excepted characters; the Court called on the defendants' counsel to support their rule.

Cockell Serjt., *Topping*, and *Hullock*, then insisted that the plaintiff was a trader within the general provisions of the bankrupt laws, having sought his livelihood by buying and selling cattle plainly beyond the occasions of his farms, and therefore not protected by the character of *farmer* or *grazier*; and that [276] he did not come within the exception of a *drover*, who, by the description of such persons in stats. 5 and 6 *Ed.* 6. *c.* 14. and 5 *Eliz. c.* 12., is one who buys cattle in one place in order to sell in fairs and markets at a distance, and who was regulated and required to be licensed by those acts. That one, who, like the plaintiff, was a farmer or grazier, and bought and sold cattle which was stocked on his own farms, could never have been obliged to take out a licence, though such buying and selling were not for the purpose of farming or grazing his own land, but to carry on a trade in cattle. The true description of this man, they said, was that of a farmer dealing in cattle beyond the occasions of his farm: it was a mixed character, not falling precisely within either of the exceptions, and must therefore be governed by the general provisions of the bankrupt laws. They admitted, however, that the case in *Willes' Reports*, which was not adverted to at the trial, pressed against them; and they did not urge the argument further, after Lord *Ellenborough* C. J. had observed, that the plaintiff could not be less exempt from the operation of the bankrupt laws because he came under all the three descriptions of excepted persons, namely, of farmer, grazier, and drover; to one or other of which characters all his acts were attributable. And with respect to the single instance in which the plaintiff had sold hay before purchased by him, *Le Blanc* J. observed that the hay had been purchased for the sake of the cattle, and not to sell again; and the sale of it was quite accidental, because the plaintiff found he had more than was wanted for the consumption of his cattle; and therefore there was no ground for calling that a trading in hay.

(a) By st. 5 *Geo.* 2. *c.* 30. *s.* 40. made perpetual by st. 27 *Geo.* 2. *c.* 16.

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Lord ELLENBOROUGH C.J. afterwards continued—Three descriptions of persons are specifically exempted by the stat. 5 *G.* 2. from the operation of the bankrupt laws; farmers, graziers, and drovers of cattle. The plaintiff's character of farmer or grazier would not protect him for any trading carried on ultrà his business of farming or grazing, and collateral to the management of his farms. But the question is, whether all the acts of buying and selling cattle proved to have been done by the defendant do not come within the other description, that of drover; or whether every act, not done by him as a farmer or grazier, were not done by him as a drover? And the case in *Willes*, which was much discussed, is a strong authority in his favour. Reliance, however, is had upon the statutes of *Ed.* 6th and *Elizabeth*, to shew that the character of drover was then considered to be different from the present condition of the plaintiff; such persons then not having farms of their own, but going about the country purchasing cattle at one market or fair and selling them at another. The condition of such persons has indeed altered in that respect since the time of *Ed.* 6th, and probably even since the 5 *Geo.* 2. Many of them now hold large farms, combining the character of farmer or grazier with that of drover as it was formerly practised: but a person cannot be less exempt from the operation of the bankrupt laws, because he is exempted partly as a farmer, partly as a grazier, and partly as a drover, for the several acts done by him in those respective characters. The question is, whether any one act has been done by him which does not come within one or other of those characters? He had one farm of his own, and another he rented as a grazier, for the feeding of his cattle, which he bought for the
[278] purpose of fattening upon his land and then selling them. In addition to this he bought other cattle for the purpose of selling again immediately as opportunity offered. This latter occupation brings him within the character of a drover. Then there was an union of all the three characters, each of which is exempted by the statute. If there had been any dealing beyond the scope of those employments, such dealing might have subjected him to the bankrupt laws; as in the case of *Bartholomew* v. *Sherwood* (*a*), where a farmer sought his living

(*a*) *M.* 27 *Geo.* 3. *B. R.* cited in *Putman* v. *Vaughan*, 1 *Term Rep.* 573. Vide *Steward* v. *Ball*, 2 *New Rep.* 78.

by

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by buying and selling horses collaterally to the business of his farm.

GROSE J. The legislature contemplated to exempt persons from the bankrupt laws who made the most of their own land or of the lands of others by farming, grazing, or dealing in cattle; under the names of "farmer, grazier, and drover of "cattle." The plaintiff acted in all instances as one or other of these, and as a drover or dealer in cattle cannot be less within the protection of the act, because he also partook of the character of farmer or grazier.

LE BLANC J. In the case of *Mills* v. *Hughes* (*a*), a construction was put upon the word *drover* in the stat. 5 *Geo.* 2. at no great distance of time from the passing of it, and after much consideration, which has decided the legal meaning of that word; and, according to that, the meaning of it is not confined to the description of a drover as collected from the statute of *Ed.* 6th, but extends to persons buying cattle at different places and selling them afterwards as opportunity [279] offers. The act of *Geo.* 2. exempts the three descriptions of persons; "farmer, grazier, and drover of cattle;" which latter is in fact a dealer in droves of cattle. And the cases in *Willes* decides that a person employing himself in buying cattle where he can, though not in large droves, and selling them again, is a drover within the act of *Geo.* 2.; in short, that a drover in a small way is within the same protection as one upon a great scale. The plaintiff then, by buying and selling cattle beyond the occasions of his farm, has only added to his business of farmer and grazier that of drover, which is equally exempted by the act. And if a drover of great droves would be exempted, he could not be less a drover or less exempt, by buying 2 or 3 head of cattle at a time in different places as they came along the road from *Scotland*. Such a dealing would still be conformable to his general character of drover.

BAYLEY J. It was necessary for the defendants to shew that the plaintiff was a dealer, by such acts of dealing in buying and selling as do not range themselves under the occupations of farmer, grazier, or drover; but no such acts were given in evidence: and the case in *Willes*, which was much considered,

(*a*) *Willes*, 388.

has

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has determined that a drover is a person who employs himself in buying cattle and selling them again. Were it not for the exemption in the statute, a person seeking his livelihood by buying and selling cattle would have been a trader within the meaning of the bankrupt laws; but the stat. 5 *G.* 2. exempts him. The case of *Bartholomew* v. *Sherwood* was that of a farmer who bought and sold horses for profit.

Rule discharged.

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Monday, June 5th.

ROE, on the Demise of JOHNSON and HUMPHREY, *against* IRELAND.

The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent, but in 1649 the parliamentary survey charged the churchwardens with 6*d.* rent under the head of "*freehold* rents," and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804, and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it.

IN ejectment for certain copyhold lands, in which a verdict had been found for the plaintiff before *Heath* J., at *Chelmsford* assizes, upon a rule nisi for a new trial, the only question was, Whether the learned Judge ought to have left it to the jury, under all the circumstances, to presume an enfranchisement by the crown? in which case the verdict ought to have been for the defendant. It appeared upon the report, and was now agreed, that the lands in question, which lay within the manor of *Westham*, were once copyhold, and continued so at least down to the 30th of *April* 1636, in the 12 *Car.* 1., when one *J. Newman*, who had been admitted tenant in the 5 *Jac.* 1., on the surrender of certain persons to him and his heirs, surrendered the premises in question, consisting of two cottages with gardens, &c. to the use of *B. Collier* and another, churchwardens of the parish of *Westham*, and to their successors. These entries were read from the court rolls, and no mention was made of the rent in either of those entries: but it appeared that 6*s.* 6*d.* was the old copy-

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ROE, on the Demise of JOHNSON, *against* IRELAND.

hold rent. And it was admitted that no tenant appeared on the rolls at any time subsequent to *Newman*'s surrender, but that the annual rent of 6*d*. had been constantly paid by the holders of these tenements since that time. There was also given in evidence the copy of a tablet of parochial benefactions suspended * in the church, dated 30th *April* 1656, (the old letters of which were still visible, though it had been then recently painted,) viz. " *John Newman* surrendered unto the churchwardens 2 messuages and 2 gardens, situate in the church-yard." There were also proved two leases from the crown of the manor of *Westham*, the one of the 10th *January*, 14 *J*. 1. 1616, granted by the king to Sir *Francis Bacon* and others for 99 years absolute from *Mich*. then last past, to the use of Prince *Charles* and *Henrietta Maria* his consort and Queen *Catharine*. The other, of the 15th *June* 1694, to Sir *George Booth*, for 99 years absolute from the death of Queen *Catharine*, which was to be concurrent with a former lease. The last lease expired in *December* 1804. A conveyance from the crown to the lessors of the plaintiff under the land-tax act was admitted. And in 1806 and 1807 several proclamations were made in the manor court calling on the tenants to come in and be admitted; and none appearing, proceedings were had thereupon, according to the custom of the manor, the result of which was, that the premises were declared to be forfeited to the lord. For the defendant it was insisted that the jury ought to presume that these, which were formerly copyhold premises, had been enfranchised by the crown; and in support of such presumption the following evidence was given. First, The parliamentary survey in 1649, under the title of the manor of *Westham*. There were 3 columns of rents; one of freehold, another of copyhold, the 3rd of rents not ascertained; and in the column of *freehold* rents the churchwardens were marked 6*d*. rent. Receipts given by the steward of the manor from 1803 to 1805 were for *quit rents*. The style of these receipts was endeavoured to be accounted for by the steward, by saying that the discovery of the premises being copyhold was made subsequent to those receipts, by finding the ancient court rolls of the manor, from which the entries first mentioned were read, in the evidence-room of Lord *Henniker*, the late lessee of the crown; the rentals at first given to the witness being without distinction

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of freehold or copyhold. And it was suggested that the compilers of the parliamentary survey might probably have been led into the same mistake if they could not get the court rolls; and that so the mistake might have been continued down; and was the less likely to be discovered, because it did not occasion any diminution of the revenue of the crown. Upon this evidence the learned Judge told the jury, that, considering all the circumstances, he saw no ground for their presuming an enfranchisement, inasmuch as it would be subversive of the maxim of the law, nullum tempus occurrit regi. This direction was objected to, upon a motion for a new trial made in the last term, when the case of the mayor of *Kingston-upon-Hull* v. *Horner* (*a*) was referred to, where a grant or charter was presumed against the crown upon a possession of 350 years.

Garrow, *Marryat*, and *Walford*, in shewing cause against the rule, relied principally on the ancient court rolls recently discovered, the existence of which was probably not known to the parliamentary commissioners; and if not, it would account for the mistake they had made in classing the 6*d.* rent under the head of *freehold* rents. The present steward had fallen into the same mistake as his predecessors before the discovery of the court rolls. Then the presumption of a grant
[283] of enfranchisement was rebutted by the silence of the court rolls and of the parochial church tablet in respect to any such enfranchisement; though the latter noticed the benefaction of these premises, as copyhold, by the surrender to the churchwardens. Next, they urged, that during all the time within which a grant from the crown could be presumed to have been made, if at all, which was between 1636, when *Newman* surrendered the copyhold to the churchwardens, and 1649, the date of the parliamentary survey, the premises were out on lease, and could not have been enfranchised without the concurrence of the lessees. And, lastly, they asked to whom the grant of enfranchisement was to be presumed to have been made? Not to *Newman*, after his surrender of the copyhold to the churchwardens and their successors: and these latter could not take a grant of land to them and their successors(*b*).

(*a*) *Cowp.* 102.

(*b*) See 3 *Bac. Abr.* 377. tit. *Grants*, in margine, and 1 *Bac. Abr.* 601. tit. *Churchwardens*. And see also what is said by Lord *Kenyon* in *Withnell* v. *Gartham*, 6 *Term Rep.* 396.

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[It was suggested that the grant might have been to the two first churchwardens and their heirs in trust for their successors, who had continued ever since in possession.] The possession of the churchwardens was equally accounted for, whether the premises continued copyhold or were enfranchised.

The Attorney-General, Shepherd Serjt., and *Pooley*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C.J. The copyhold rent having been 6*s.* 6*d.*, and no evidence that any other rent than 6*d.* had ever been paid for the premises in question, which are described to be freehold in the parliamentary survey, it is impossible to say that this was not evidence to go to the jury that they were freehold: but their consideration of the question was excluded by the learned Judge, who told them that they could not in this case presume a grant against the crown. The parliamentary survey stands very high in estimation for accuracy: it has happened to me to know several instances in which the extreme and minute accuracy of the commissioners who drew it up has exceeded any thing which could have been expected. And when I find from thence that a freehold payment of 6*d.* was made for the premises in 1649, and there is no evidence of any other payment since that time; and when I find that there were persons existing between 1637 and 1649 (for the king continued in the exercise of his regal functions during the greater part of that time) competent to make an enfranchisement; I would presume any thing capable of being presumed in order to support an enjoyment for so long a period. As Lord *Kenyon* once said on a similar occasion, that he would not only presume one, but one hundred grants, if necessary, to support such a long enjoyment. It is clear, therefore, that there ought to be another investigation of the case. And his Lordship, after consulting with the rest of the Court, added that the costs should abide the event.

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Per Curiam, Rule absolute.

1809.

Monday, June 5th.

MOWBRAY, one, &c. *against* FLEMING.

An attorney, not having delivered any bill to his client before action brought; but having delivered a bill of particulars of his demand under a Judge's order after action brought; is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the st. 2 *G.* 2. *c.* 23. *s.* 23. requiring a bill to be delivered a month before the action brought.

THIS action was brought by an attorney, to recover the amount of certain charges for business done and money paid for the defendant. There was no bill delivered a month before the action brought, as is required by the stat. 2 *Geo.* 2. *c.* 23. *s.* 23. before an attorney can "maintain any action or "suit for the recovery of any *fees, charges, or disbursements at* "*law or in equity*:" and which bill, the statute says, upon application of the party to the Court, &c. "*in which the business* "*contained in such bill*, or the greatest part thereof in amount "or value, *shall have been transacted*," is to be taxed. But after the action brought, a bill of particulars of the plaintiff's demand was delivered by him under a Judge's order, containing, amongst several other items, for attendances on the defendant and writing letters, which it was admitted were not in themselves taxable, this item: "To attendances with you both by myself and clerk on Mr. *Touse* in the city, respecting a suit at law commenced against your brother *Rd. Fleming*; when, after consulting counsel, and after several other attendances and letters, the business was adjusted to your satisfaction, 2*l.* 2*s.*" The last item was this—"To cash paid by me for the stage-hire of your son down to *Chertsey* and back to *London*, agreeable to your request, 8*s.*" It was objected at the trial before *Heath* J. on the Home Circuit, that the item first specified was for business done by the plaintiff as an attorney in the course of a cause in court, which was taxable, and therefore that the whole bill was taxable; and being so, no action could be maintained for the *amount, without complying with the requisition of the statute; and the learned Judge being of that opinion nonsuited the plaintiff. This nonsuit was moved in the last term to be set aside, on the ground that the item in question was not taxable, as not relating to any cause in which the defendant himself was concerned, or for any thing done in court in the course of that suit. And at any rate that the plaintiff was entitled to recover for the last item in the bill of particulars, which had no manner of relation to the business of an attorney.

Best

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MOWBRAY, one, &c. *against* FLEMING.

Best Serjt. now shewed cause, and was going to refer to cases (*a*) to shew that if there were one taxable item in the bill, the whole bill was taxable: but the Court said that he need not labour that point, but proceed to shew that there was any one taxable item in the plaintiff's bill: on which he rested on the first mentioned item; and cited *Winter* v. *Payne* (*b*), where items for "attending and taking instructions to commence an action; drawing and engrossing affidavit of debt; attending the party to be sworn," &c. were considered as business done *in court*. [Lord *Ellenborough* observed that that was a proceeding in court.] Here there was a consultation with immediate reference to a cause in court; and it is enough that there be a cause existing, and that the business be done with reference to that cause. This has always been considered as a very beneficial statute, and fit to be extended as far as the words will warrant: and the present case comes within the reason and the words of it.

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BAYLEY J. asked what he had to say, why the plaintiff might not recover the amount of the last item, for cash paid by the plaintiff for the stage-hire of the defendant's son, which had no manner of reference to the business of an attorney? To which *Best* replied, that in *Hill* v. *Humphreys* (*c*) Lord *Eldon* had considered that an attorney would not be entitled to recover such items mixed with others in a taxable bill, if the statute were not complied with.

Lord ELLENBOROUGH C. J. What was there said by Lord *Eldon* was with reference to a case where an attorney had delivered a bill including taxable items: but this is not the case of a bill delivered, as an attorney, but an account of the plaintiff's whole demand against the defendant obtained under a Judge's order, as in any other case.

(*a*) Vide *Hill, one, &c.* v. *Humphreys*, 2 *Bos. & Pull.* 343., where other cases are collected, all of which were referred to on moving for the rule. And vide also *Benton* v. *Garcia*, *Kingston Lent* Assizes, 1800, 3 *Esp. N. P. Cas.* 149., where *Heath* J. held that the attorney's demand could not be severed, though no bill were delivered by him before the action brought. But there the whole demand was connected with the plaintiff's character of an attorney.

(*b*) 6 *Term Rep.* 645.

(*c*) 2 *Bos. & Pull.* 343.

All

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MOWBRAY, one, &c. *against* FLEMING.

All the Court agreed in respect to the last item; and some of the Judges doubted whether the first item were to be considered as any thing more than an attendance by the defendant's desire for the purpose of compromising the suit against his brother.

Rule absolute.

Garrow and *Nolan* were to have supported the rule.

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Monday, June 5th.

DENNE, on the Demise of BOWYER, *against* JUDGE.

Where one devises land to 5 trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land *as executors*, but as devisees in trust and joint tenants. And at any rate the case is not helped by the stat. 21 *H.* 8. c. 4. so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy, and convey 3-5ths of the estate, to be held in common with the two remaining parts.

IN ejectment brought for a messuage at *Maidstone*, the lessor of the plaintiff derived title under the will of *T. Smith*, dated the 15th of *March* 1806, by which he devised his real property to five trustees named, in trust to sell the same, and apply the purchase-money to certain uses. He also gave specific legacies, disposed of the residue, and made the same persons executors of his will, whom he had before appointed trustees of the real estate for the purpose of sale. Deeds of lease and release to the lessor of the plaintiff were then produced by him, appearing upon the face of them to have been duly executed by all the five trustees, but the execution of three of them only was in fact proved. On the part of the defendant it was insisted that this was a defective conveyance, and proved no title in the lessor to any part of the property. But the Chief Baron was of opinion that some estate at least passed to the releasee; either the whole, or 3-5ths, by severance of the joint estate, to be held in common with the two remaining parts: and therefore he directed the jury to find a general verdict for the plaintiff, which might be confirmed, or modified, or a nonsuit entered, as the Court thought proper. A rule nisi having been obtained for entering a nonsuit, or confining the verdict to 3-5ths;

Best Serjt., and *Roberts*, shewed cause against the rule; endeavouring at first to sustain the verdict for the whole under

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the st. 21 *H.* 8. *c.* 4. which enacts, that where part of the executors, named in a will directing a sale of *lands by executors, refuse to act, and the residue accept the charge, all bargains and sales of such lands by the acting executors shall be as good as if all the others refusing to administer had joined with them. And they referred to *Co. Lit.* 113. *a.* and *Bonifaut* v. *Greenfield* (*a*), where the case was this; one devised lands to *J. S.* and three others and their heirs, to sell and apply the money to the performance of his will; and appointed the four executors; one of whom refusing to meddle, the other three sold the land: and such sale was held good either by the common law or the statute. For when he devised the land to four to sell, and afterwards made them his executors, it was tantamount to devising at first that such his executors should sell.

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Lord ELLENBOROUGH C. J. The statute was passed to remedy the inconvenience where some of the executors refuse to act: but here there was no such refusal: so far from refusing to act, they have all apparently concurred in the conveyance, though there was a defect of proof as to the execution of two of them. Besides, here the estate was not devised to them as *executors* to be sold, but as *devisees;* though they were also appointed executors. They had nothing to do with the land as executors. If indeed the fund, when raised, had been distributable by them in that character, that might have brought the case within the rule contended for.

Lawes, for the defendant, admitting that the plaintiff was entitled to enter his verdict for 3-5ths, it was ordered by the Court accordingly.

(*a*) *Cro. Eliz.* 80.

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Tuesday, June 6th.

DOE, on the several Demises of ANDREW and Others, *against* LAINCHBURY and Others.

A devise of all the residue of the testator's "money, "stock, *pro-* "*perty*, and "*effects*, of "what kind "or nature "soever," to *A.* and *B.* "to "be divided "equally "between "them, "share and "share "alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating "as to my "money and "*effects*, I "dispose "thereof as follows," &c., and then proceeded to dispose of parts of his *real* estate. And again, having lands interlaying with another's lands, he directed the purchase of the latter, if offered for sale, *to be added to his other adjoining property*.

IN ejectment for the recovery of one undivided moiety of certain messuages in the parish of *St. Andrew, Holborn*, in *Middlesex*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

James Lainchbury being seised in fee of the said messuages, and also seised and possessed of other real and personal estate of considerable value, consisting, among other things, of an estate in the county of *Oxford*, part freehold and part copyhold, and of various leaseholds in the county of *Middlesex*, by his will, dated the 13th of *March* 1800, and duly executed and attested, devised as follows: "As to the little *money and affects* with which the Almighty has intrusted me, I dispose thereof as follows, that is to say, first, I order my set of chambers (in *Gray's Inn*) to be sold within twelve months after my decease, together with such part of my fixtures, books, and furniture as may not be wanted and not hereinafter disposed of. I leave unto my brother *William Lainchbury* all my houses, farm, lands, and estate, both freehold and copyhold, situate at *Ramsdon* and *Finstuck* in the county of *Oxford*, for his life; all of which said premises, being copyhold, have been by me surrendered to the use of my will. And if my said brother *William* should happen to die before his present wife *Martha*, then I leave unto his said widow *Martha* 20*l.* a-year, payable quarterly during her life, out of my landed estate above mentioned, by the person or persons next after in possession; and which after * my said brother's death I leave all the said houses, farm, lands, and estate, as aforesaid, unto my nephew *James Lainchbury* for his life; he keeping the same in good tenantable repair, and committing no waste. And after the death of my nephew *James*, then I leave the same unto my sister's eldest son *Edward*

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DOE, on the Demise of ANDREW, *against* LAINCHBURY.

Lainchbury for his life; he keeping the same in good tenantable repair, and committing no waste. And after the death of my nephew *Edward*, then unto his brother *William* for his life; he keeping the same in good repair without waste. And after the death of my brother and three nephews, as herein-above described, I then leave all the said houses, lands, farm, and estate, both freehold and copyhold, situate at *Ramsdon* and *Finstuck*, in the county of *Oxford* aforesaid, unto and amongst my five nieces, or as many of them as shall or may be then living, share and share alike." Then, after giving several life annuities to different relations, and some small legacies, the will proceeds: "I do hereby also charge all and every of my freehold and leasehold ground rents, that now do, or that shall or may hereafter belong to me, in *London* or elsewhere, with the several payments of all and every the said annuities herein mentioned." And then he directs that on sale or assignment of any of the annuities, they shall cease. "And whereas I have reason to suppose that the two grounds and a little slip of woodland formerly belonging to the late *J. J.*'s estate, which I purchased of his nephew *E. B.*, must be sold after the death of the present owner, and as the owner of the said grounds has a right to a road to and through my lands to theirs, it may be adviseable for me or my heirs to become the purchaser, in order to lay them together; and if it should ever so happen, it is my wish to have them purchased, and add them to my *other adjoining property*, and to be held in rotation during the several lives, as hereinbefore I have left and bequeathed my other lands. And for that purpose I bequeath 500*l.* in trust to purchase the said two grounds and woodland when a fair opportunity shall offer. And in the mean while, it is my request that the said 500*l.* so left be invested in the 3 per cent. consols, in my nephew *James*'s name, in trust until the said purchase can be obtained, provided the same can be had in 10 years after my decease; and if not, I leave the said 500*l.*, with all interest, unto my said nephew *James*," &c. The testator then gives small legacies to different friends, and concludes as follows: "And as to all the rest, residue, and remainder of my money, stock, *property*, and *effects*, of what kind or nature soever the same may be at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew *James* and my niece *Sarah Lainchbury*, for to be divided equally between them, share and share alike. And I do hereby

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also appoint my said nephew *James Lainchbury* and my niece *Sarah Lainchbury* executor and executrix, &c. and likewise joint and equal residuary legatees, &c. The testator died on the 2d of *April* 1802, leaving *William Lainchbury* of *Ramsdon*, in the county of *Oxford*, in the will named, his only brother and heir at law. By indentures of lease and release of the 7th and 8th of *July* 1803, being the marriage-settlement of the said *Sarah Lainchbury*, with *Paul Moore*, (both lessors of the plaintiff,) the said undivided moiety of the premises in question was conveyed to *T. Andrew* and *J. P. Vincent*, the other lessors of the plaintiff, as trustees upon the trusts therein mentioned. And by certain other indentures of lease [293] and release, dated the 14th and 15th of *June* 1808, the premises in question were conveyed by *William Lainchbury*, the testator's brother and heir at law to *James Lainchbury*, the nephew, and the other of the residuary legatees of the testator, and one of the defendants in this action. The other defendants are tenants in possession. The question for the opinion of the Court was, Whether any estate in the premises in question passed by the said will to *Sarah*, now the wife of *Paul Moore*, and whether the plaintiff were entitled to recover? If he were so entitled, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson, for the plaintiff, contended, that the devisor's real property in *Oxfordshire* and *Middlesex* passed under the residuary clause, by the words "*property* and *effects*, of what kind or nature soever;" though preceded by the words "*money* and *stock*;" such being the apparent intention of the devisor. A residuary devise of all a man's "*effects* both *real* and *personal*," was held in *Hogan* v. *Jackson* (*a*), to pass land. The addition of the word *real* in that case only shewed the intent more clearly; and here it is shewn by the introductory words, as to "my *money* and *effects*, &c. I dispose thereof as follows;" and then proceeding to dispose immediately of his *real* estate; which shews a more consistent use of the word *effects* as referring to realty than was shewn in the former case, where the introductory words were "as to my *worldly substance*." And the word *effects* being clearly used as descriptive of realty in the beginning of his will, it may fairly be presumed that he used it in the same sense in the residuary clause. In *Doe d.* [294] *Chilcott* v. *White* (*b*), when the testator having before devised

(*a*) *Cowp.* 299, and 7 *Bro. P. Cas.* 467. (*b*) 1 *East*, 33.

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real and personal property to his wife for her life, empowered her to give what she thought proper of her *said effects* to her sisters for their lives: this was held to extend her disposing power over the realty. The cases of *Doe d. Spearing* v. *Butler* (*a*), and *Camfield* v. *Gilbert* (*b*), which may be cited for the defendant, only shew that the word *effects*, unless coupled with an apparent intention from the context to pass real estate, will only pass personalty; and there were circumstances in each of those cases to shew that the testator only meant to pass personalty. Here also the word *property* is used, which is as applicable to real as to personal estate. And in *Huxtep* v. *Brooman* (*c*), a devise of "all I am worth," which can mean no more than "all my property," was held to include realty. So Lord *Mansfield* in *Hogan* v. *Jackson* (*d*), considered a devise of "all a man's property" to be synonimous with "*real* and personal effects:" which were there held to carry the land. [Lord *Ellenborough* C. J. observed, that there was a further reason in the present case for saying that the testator must have meant the *realty* by the word *property*, as he had evidently used it in that sense in another part of the will, where he directs money to be laid out in the purchase of a certain piece of land to be added to his "other *adjoining property*."]

Reader, contrà, admitting this to be a question of intention, distinguished this case from *Hogan* v. *Jackson*, on account of the word *real* there added to *effects*: and from *Doe* v. *White* by the addition of the word *said* before *effects*, which referred it to the realty before devised, and which could only be enjoyed after the death of the first taker. And he relied principally on *Camfield* v. *Gilbert*, as coming nearest to the present case; where a devise of "all the residue of her *effects* wheresoever and whatsoever, and *of what nature, kind, or quality* soever," &c. was held not to pass land. And though there was an *exception* added of wearing apparel and plate; and the division of the residue was to be made by her *executors*; from whence it might be collected that the testatrix only meant the residue of her *personal* effects: yet the indication of such an intention from these collateral circumstances was fully counterbalanced by her having before reserved a rent-charge out of the land to her *heir at law* for life. Here the testator first

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(*a*) 6 *Term Rep.* 610. (*b*) 8 *East*, 516.
(*c*) 1 *Bro. C. C.* 157. (*d*) *Cowp.* 304.

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directs his chambers, fixtures, books, and furniture to be sold; and then he disposes of his real estate; and afterwards in the residuary clause he bequeaths his personalty; associating the words "*property* and *effects*" with "*money* and *stock*," which latter are first mentioned by him: and the argument to be derived from such association was strongly put by *Grose* J. in *Camfield* v. *Gilbert*; and that will serve as an answer to the observation made upon the use of the word *property* in a former part of the will. At any rate the heir will take if there be any doubt of the testator's intention.

Lord ELLENBOROUGH C.J. It is a known maxim that an heir at law is not to be disinherited but by express words or necessary implication. Here are no express words; but the question is, whether there be not a plain implication from the words used, that the testator meant to pass real as well as personal property and effects by the words used in the residuary
[296] clause. The word *effects* indeed, in its natural sense, more peculiarly imports moveable personal property; but that this testator did not mean to confine it to that sense, the first sentence of his will shews. For he begins, "As to the little "money and *effects*, &c. I dispose *thereof as follows*; *that is to* "*say*," and then he first orders his chambers in *Grays Inn* to be sold: that was not moveable personal property; it was at least a chattel real; and if no more, still it would shew that he meant to include chattels real. But he proceeds next to devise lands, &c. freehold and copyhold; and that clearly shews that in his understanding of the word *effects*, it was sufficiently large to carry his real estate. He afterwards directs money to be laid out in the purchase of land to be added to his "*other adjoining property*." That gives us a standard of his meaning of the word *property*, and shews that he meant by it real estate. Then follows the residuary clause, by which he disposes of the rest of his "money, stock, property, and "effects of what kind or nature soever," &c. Then having before shewn his meaning of the word *effects* and of the word *property*, as comprehending real estate, are we to look for a different use of the word by other persons on other occasions, when we have an index of his own mind to resort to in the very instrument before us, where he has told us that by those words he meant real estate? I know of no word in general use so inflexibly importing one meaning only as to be incapable of bending to the manifest sense of the party using it differently.

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In a late case (*a*) before us, we held that the words "*personal* "*estate*" carried *real* estate, such being the clear meaning of the testator as collected from the rest of the will. In *Hogan* v. *Jackson* the word *effects* joined with *other words importing the realty would carry it; and in *Camfield* v. *Gilbert*, we restrained it to personalty, because it appeared by the context that personalty only was intended. But here it evidently was meant in the larger sense, and therefore we must give it that meaning, without doing any violence to any different construction put upon the same word in any other case.

The rest of the Judges concurred in the reasons given by his Lordship.

Postea to the Plaintiff.

(*a*) *Doe d. Tofield* v. *Tofield*, ante, 246.

GYFFORD *against* WOODGATE and Another.

Tuesday, June 6th.

In case against a judgment-creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa.: held that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons.

IN case, the declaration, after setting forth a judgment obtained by the defendants against the plaintiff, stated that they sued out a writ of fieri facias thereupon, indorsed to levy 71*l.* 1*s.* besides sheriff's poundage, &c.; by virtue whereof the sheriff, at the defendants' request, seized the plaintiff's goods to a much greater amount than was necessary; yet that the defendants, before the sheriff had made any return to that writ, and before they could lawfully sue out another, wrongfully and maliciously sued out an alias fieri facias, under colour and pretence thereof, indorsed to levy 72*l.* 2*s.* 4*d.* besides poundage, &c.; whereby the plaintiff was put to unnecessary expence and oppressed, &c. The defendants pleaded the general issue, and also a licence, which was denied by the replication. At the trial before Lord *Ellenborough* C. J. at

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Westminster, the writ of fieri facias *having been given on evidence on the part of the plaintiff, the following return annexed to it was required to be read by the defendants' counsel, as part of the instrument produced by the plaintiff; and though resisted by the plaintiff's counsel, was directed to be read by his Lordship. It ran thus—"By virtue of the writ annexed, I have seized and taken in execution the goods and chattels of the within named *E. Gyfford*, in my bailiwick hereafter mentioned, to be sold and disposed of; and at the request of the within named *E. Woodgate* the elder and *E. W.* the younger, the plaintiffs, and *E. Gyfford*, the defendant, I kept and retained the same in my custody until the return of the annexed writ; and at the return thereof, in pursuance of an agreement made between the said plaintiffs and defendant for that purpose, a writ of alias fieri facias, returnable, &c. indorsed to levy 72*l.* 2*s.* 4*d.* besides sheriff's poundage, &c. was delivered to me the said sheriff, and at the request of the said *E. Gyfford*, I forbore to sell the same until the 26th of *August* last, when I sold and disposed of the same for the sum of 110*l.* 17*s.* and paid and applied the same as stated and set forth in my return to the writ of alias fieri facias." To the alias fieri facias, (also given in evidence) the sheriff made a very special return, (also read in evidence) stating, that he had paid to the now defendants the sum indorsed on the writ: That he had disposed of other part of the money, for which the goods sold, in payment of rent and taxes, for which the now plaintiff was liable: and that he had always been ready to pay to the latter the residue there of if he would accept the same. On the part of the defendants it was contended, that

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these returns were conclusive evidence in support of the plea of licence, and shewed that all that the plaintiff now complained of had been sanctioned by him at the time. On the other hand, it was denied that the plaintiff *Gyfford*, who was no party to the sheriff's return, which was in effect made on the suggestion of the then plaintiffs, (the *Woodgates*) ought to be affected by its contents: and it was contended, that the execution having been irregularly made, it lay upon the defendants to shew the fact of the now plaintiff's licence and consent to that irregularity, and not the mere dictum of the sheriff, made in his own justification. Lord *Ellenborough* C. J. however, was of opinion that this was primâ facie evidence of the facts stated in the return, upon the ground that faith

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was to be given to the official act of a public officer, like the sheriff, even where third persons were concerned. That if the sheriff returned a rescue, the court above, to which the return was made, would so far give credence to it, that they would issue an attachment in the first instance (*a*): though upon an indictment for a rescue, it would be open to the defendant to shew that the return was false.

Objection was now again made, upon motion for a new trial, by *Garrow* and *Curwood*, to the admissibility of the evidence and the direction of the Lord Chief Justice; but his Lordship (and the rest of the Court concurred with him,) still thought that the sheriff's return was primâ facie evidence of the facts therein stated; and therefore the Court refused a rule.

(*a*) *Rex* v. *Elkins*, 4 *Burr.* 2129.

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LAW *against* HODSON.

Tuesday, June 6th.

THIS was an action of assumpsit to recover the value of a quantity of bricks which had been sold and delivered by the plaintiff to the defendant. An objection was taken at the trial that the bricks were made of less dimensions than is required by the statute 17 *Geo.* 3. *c.* 42., which after reciting "that inconveniences had arisen to the public by frauds committed in lessening the size of bricks under their usual proportion, without any diminution of price; for remedy thereof, and for the common good and benefit of the subject," enacts, that all bricks made for sale shall be of certain dimensions therein specified: and then gives a penalty, on conviction, of 20*s.* per thousand for the breach of this regulation. It appeared in evidence, that the bricks in question had been seen by the plaintiff, and selected by him out of a larger quantity, some of which had been rejected by him for other defects, but no notice had been taken of the size; and the bricks were afterwards received and used by the defendant. But

The st. 17*G.*3.*c.*42. which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them.

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Lord *Ellenborough* C. J. being of opinion that the making and selling of such bricks was a fraud upon the statute, nonsuited the plaintiff.

Garrow now moved to set aside the nonsuit, on the ground that, however the breach of the law might have been a reason for the defendant's rescinding the contract, and returning the bricks when he discovered them to be under the statutable dimensions, yet having accepted and actually converted them to his own use, the contract was executed, and the vendee was at all events liable to pay the actual value of the goods. That the legislature had not avoided the contract itself, but only subjected the brickmaker to a penalty, which was also limited to be sued for within a month.

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Lord ELLENBOROUGH C. J. This was a fraud upon the buyer, whom the legislature meant to protect. He gave credit to the maker at the time that the bricks were of the statutable size, and they turned out to be all under that size.

GROSE J. The legislature has prohibited the general sale of bricks which are under size.

LE BLANC J. It did not appear that the defendant bought the bricks, knowing them to be under size.

BAYLEY J. The policy of the act was to protect the buyer (*a*) against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold.

Rule refused.

(*a*) Vide *Johnson* v. *Hudson*, ante, 180. and note this distinction.

Friday, June 9th.

BOGGETT *against* FRIER and Another.

A wife cannot, as a feme sole, maintain trespass for breaking and entering her house, and seizing goods in her possession, by replying, in answer to a plea of coverture, that her husband had four years before deserted her and gone beyond seas without leaving her any means of support, and that he had not since been heard of by her; and that during all the time she had lived separate from him and had traded and contracted as a sole trader and single woman, and as such was lawfully possessed, &c. the defendant rejoining that the husband was a natural born subject, &c. and had not abjured this realm, or been exiled, or banished, or relegated therefrom.

TRESPASS for breaking and entering the dwelling-house and shop of the plaintiff *Sarah Boggett*, on the 8th of *April* 1807, and expelling her therefrom, and taking her goods, &c.

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Plea, that the said *Sarah*, at the time of the trespass committed, and from thence hitherto hath been and still is, under coverture of one *Joseph Boggett*, her husband, who is still alive, &c. Replication, That before the time of committing the trespass, to wit, on the 17th of *February* 1805, the said *Joseph* deserted and left the said *Sarah*, and departed out of this kingdom to certain parts beyond the seas, to wit, to *America*, without leaving any means of necessary provision and support to the said *Sarah:* and that from the time of his said departure hitherto, the said *Joseph* has not returned to this country, nor corresponded with, nor been heard of by the said *Sarah;* and that during all that time the said *Sarah* hath lived in this kingdom separate and apart from the said *Joseph*, and made contracts and obtained credit as a single woman, and for her necessary support and maintenance hath during all that time carried on the trade and business of a merchant as a single woman and sole trader, and as such was lawfully possessed of the said dwelling-house and shop in the declaration mentioned. Rejoinder, That the said *Joseph* was born within this realm, and from his birth hitherto hath been and still is a subject of our lord the king, owing allegiance, &c.: And that the said *Joseph* hath not at any time hitherto abjured this realm, or been exiled or banished or religated therefrom, &c. To this there was a general demurrer, which

Roberts was to support: but he was asked in the first instance by *the Court*, whether he could distinguish this case in principle from that of *Marshall* v. *Rutton* (*a*): on which he urged the departure of the husband in this case out of the [303] realm, and consequently beyond the reach of process, under circumstances which evinced a permanent desertion of his wife and country. And he also referred to several cases and authorities, which either bore against the doctrine of *Marshall* v. *Rutton*, or distinguished this case from it; particularly that of *de Gaillon* v. *l'Aigle* (*b*); where the wife having traded and obtained credit in this country, as a feme sole, in the absence of her husband, a foreigner, who resided abroad, was held liable to be sued for her own debts.

But all these cases, it was observed by the Court, were antecedent to that of *Marshall* v. *Rutton;* and, so far as they

(*a*) 8 *Term Rep.* 545.

(*b*) 1 *Bos. & Pull.* 357. where all the prior cases are collected.

were

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were opposed to, were overruled by that decision, which restored what was the old established rule of law, founded generally upon the relation of husband and wife, by which, with certain known specific exceptions, no married woman was capable of contracting or acting as a feme sole, or of suing or being sued as such. And Lord *Ellenborough*, C. J. referred to *Marsh* v. *Hutchinson* (*a*), which was under discussion at the same time as *Marshall* v. *Rutton*, and was afterwards decided in conformity with that determination, as bearing strongly upon the present case. And the same principle he said was acted upon in *Chambers* v. *Donaldson*. (*b*)

The only cases mentioned by *Roberts*, as subsequent in time to these, were *Carrol* v. *Blencow* (*c*), and *Farrar* v. *Granard* (*d*). The first was the case of a married woman, whose husband had been transported for seven years from *March* 1794, and during this time she had sold and delivered goods
[304] to the defendant, for which the action was brought, and which came to trial at the sittings in C. B. after *Easter* in *June* 1801: and it was objected, that the term of transportation being expired, the husband was competent to sue for this debt. But there being no evidence of the husband's return, Lord *Alvanley* C. J. permitted the plaintiff to recover. In the other case, which was in *Trinity* term 1804, the Court overruled, upon general demurrer, a replication to a plea of coverture; stating, that the defendant's husband resided in *Ireland*, and the defendant in this kingdom, separate from her husband as a single woman, and as such contracted and promised, &c.; the Lord Chief Justice of C. B. saying, that the terms of the replication were consistent with a mere *temporary* absence.

Neither of these cases were considered by the Court as bearing against the opinion they had intimated; and therefore, without hearing *Littledale*, who was to have supported the rejoinder, they gave judgment for the defendants.

(*a*) 2 *Bos. & Pull.* 226. (*b*) 9 *East*, 471.
(*c*) 4 *Esp. N. P. Cas.* 27. (*d*) 1 *New Rep.* 80.

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The KING *against* The Inhabitants of the Parish of BRIDEKIRK in CUMBERLAND.

Saturday, June 10th.

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into 7 townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted was within the township of *G. B.* &c. and that the residue, &c. was within the township of *L. B.* &c. and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying *what part* of the highway lay within one township, and what part within the other.

THIS was an indictment for the non-repair of a common highway within the parish; which, after stating the termini of the highway, charged that a *certain part* of the same highway between such and such places (describing them with the length and breadth,) on the 1st of *June* 1807, &c. was out of repair, &c. and then it alleged * that the inhabitants of the parish of *Bridekirk* were immemorially bound to repair the said highway. The defendants pleaded, that the parish of *Bridekirk* from time immemorial was divided into seven townships (naming them,) and that the inhabitants of the said several townships respectively from time immemorial have repaired, independent of each other, when necessary, such and so many of the several and respective ancient common king's highways respectively situated within the said respective townships as would otherwise be repairable by the inhabitants of the said parish at large. That *part* of the said part of the said king's common highway in the indictment specified, and thereby supposed to be ruinous, now is, and during all the time in the indictment mentioned *hath been situate in the said township of* Great Broughton in the said parish, and during all that time was and still is a king's common highway, which but for the said prescription or usage would have been and would be repairable by the inhabitants of the said parish at large: *and that the residue of the said part* of the said king's common highway in the said indictment specified, &c. is, and during all the time, &c. hath been situate within the said township of *Little Broughton* in the said parish, &c. And by reason of the premises the inhabitants of the said parish at large ought not to be charged with the repairing the said *part*, &c. of the highway in the indictment specified; *but the respective parts thereof*, situate in the said respective townships of *Great Broughton* and *Little Broughton*, ought to have been and still ought to be repaired by the repective inhabitants of these respective townships independent of the rest of the inhabitants of the said

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parish, &c. To this there was a special demurrer, because the plea did not set forth or distinguish *what part* of the highway alleged* to be ruinous lies within the township of *Great Broughton*, and *what part* within the township of *Little Broughton*.

Holroyd argued in support of the demurrer, that the inhabitants of the parish at large, being liable at common law to the repair of all highways within it, could only discharge themselves by shewing with certainty on whom the burthen lay, and in what right. For which he cited *Rex* v. *Sheffield* (*a*), *Rex* v. *Penderryn* (*b*), and *Rex* v. *Great Broughton* (*c*). The plea therefore should have stated that such a part of the highway, specifying it, was situate within the township of *Great Broughton*, the inhabitants of which township were immemorially bound to repair it: and that such other part, specifying it, (or the residue of the highway stated in the indictment,) was situate within the township of *Little Broughton*, and that the inhabitants of that township were immemorially bound to repair such other part.

The Court were decidedly of opinion, that this objection was well founded. That the parishioners must necessarily know the limits of the several townships within it; and were bound to shew with certainty the parties who were liable to repair every part of the highway indicted, and in what right they were so bound. But the Court offered to give *Littledale*, who was counsel for the defendants, leave to amend before argument; which he accepted.

(*a*) 2 *Term Rep.* 106. (*b*) *Ib.* 513. (*c*) 5 *Burr.* 2700.

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April 22*d*.

The KING *against* TEAL and Others.

All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them.

THIS was an indictment against *Thomas Teal*, *Hannah Stringer*, *G. Etherington*, and *Sarah Cumberland*, for conspiring falsely to charge the prosecutor with being the father of a bastard child born on the body of *Hannah Stringer*, which indictment had been removed by writ of certiorari, at the instance of the defendants, into this Court. Before the trial a noli prosequi was entered as to *Hannah Stringer*; and at the last *York* assizes *Teal* and *Cumberland* were convicted upon four

four counts of the indictment, and *Etherington* was acquitted. On the fourth day of the last term *Teal* appeared personally in Court, and *Cockell* Serjt. on his behalf moved for a new trial, on the ground that improper evidence had been admitted on the part of the prosecution, and that other evidence tendered on the defendant's part had been improperly rejected.

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The Court inquired if all the defendants who had been convicted were then in court; and being informed that *Sarah Cumberland* was not present, they said they could not entertain a motion for a new trial in her absence, of which, if granted, she must also have the benefit; because if such a precedent were once established, the person most criminal might keep out of the way, and take the opinion of the Court by putting forward one of the other defendants who had been convicted. They also inquired if the defendants had defended separately at the trial, which was answered in the negative; but *Cockell* Serjt. added, that he was now only instructed by the defendant *Teal*, and that his client had no [308] control over *Sarah Cumberland*, and could not compel her attendance: and it would be very hard for him in a case where there was no pretence of any collusion, to be deprived of the opportunity of moving for a new trial by her absenting herself. But *the Court* said that they could not permit the motion to be made, unless all the defendants appeared, or a special and separate ground were laid before them, for dispensing with the general rule. But they said they would bear in mind what passed now when the defendants were brought up for judgment. And the prosecutor not moving for *Teal*'s commitment, he was not committed into custody.

Afterwards, on the 6th of *May*, *Teal* and *Cumberland* being present in court, Mr. Justice *Lawrence*'s report of the evidence on the trial was read; and *Cockell* Serjt. would then again have moved for a new trial: but *the Court* said, that the four days being now expired, he was not entitled to make such a motion; though they would hear any arguments which he had to suggest upon the report, in order to satisfy them in the performance of their own duty, that justice had not been done upon the trial; and if they were of opinion, on hearing those arguments, and considering the learned Judge's report, that there ought to be a new trial, they would of their own accord award it. And they referred to *The King* v. *Holt*, 5 *Term Rep.* 436. and to *The King* v. *Atkinson*, there cited.

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The defendants' counsel accordingly stated the grounds upon which he impeached the former trial, and *the Court* said they would consider of them; and in the mean time the Court committed the defendants to the custody of the marshal without making any rule for a new trial.

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And now in this term Lord *Ellenborough* C. J. said that the Court had considered the objections which had been made to the trial, and though not in the form of a motion for a new trial, yet with the same benefit to the parties concerned: and they were of opinion that there was no foundation for either of them. After this, affidavits in mitigation were put in by the defendants' counsel and read, and the defendants were directed to be brought up for judgment on *Monday* the 19th of *June*, when the Court, taking into consideration the imprisonment they had already suffered, and the expences of the prosecution, sentenced *Teal* to six months, and *Cumberland* to two months imprisonment in *York* gaol.

A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is not an *incompetent* witness against him on an indictment for a conspiracy; but the objection goes strongly to her credit.

The objections which *Cockell* Serjt. urged on the 6th of *May* against the verdict were, 1st, that *Hannah Stringer*, who was examined at the trial on behalf of the prosecution, was an incompetent witness. The general purpose for which she was called was to prove that she had before sworn, at the instigation of the defendant *Teal*, to the prosecutor having been the father of her bastard child; but that in truth the defendant *Teal* was the father; and consequently she was to prove herself forsworn. It was therefore objected on the part of the defendant, not only that she was incompetent to contradict the fact she had before sworn to; which seemed to be admitted, he said, by the learned Judge; but that she was an incompetent witness for any purpose, on the ground of her acknowledged perjury and infamy. It was urged, that if she had been convicted of perjury at common law, she could not have been examined at all unless restored to credit by the King's pardon; or in the case of felony, by burning in the hand, which operates as a statute pardon: and that it was not the *punishment* which worked the infamy, but the *crime*, as stated by Ld. Ch. B. *Gilbert* (*a*) and *Hawkins* (*b*). That it made no difference whether the infamy were found by verdict, or by the confession of the party tendered as a witness; for there could not be more certain evidence of the fact than the confession of the party in

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(*a*) *Gilb. L. of Evid.* 127. (*b*) 2 *Hawk. ch.* 46. *s.* 19. *&c.*

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open court. Being asked by the Court what he had to say to the common case of an accomplice giving evidence, though admitting himself guilty of a fact, such as treason, which, if convicted of it, would render him incompetent? he answered, that there the accomplice did not admit himself guilty of the very crimen falsi which shewed him unworthy of being believed. [*Le Blanc* J. observed from the report, that the learned Judge at the trial was of opinion that the woman might be examined on those counts, which did not state that she went before a magistrate and took the oath of filiation.] Objection was taken that evidence could not be received of what the woman had sworn before the magistrate, which had been taken down in writing, unless the deposition itself was produced: on which the magistrate, before whom it was taken, offering to put in the deposition, though that was put aside for the sake of regularity at the instant, the examination of the witness *Stringer* went on with reference to such deposition. He then insisted much upon the case of *Titus Oates* (*a*), where the evidence of a witness, that he had before perjured himself at the suggestion of the defendant, was rejected by this Court on a trial at bar; though the witness had not been convicted of perjury: and this decision was approved of in the case of *Elizabeth Canning* (*b*). Upon the same principle one who admits himself to be an infidel is disqualified to be a witness. [Lord *Ellenborough* C. J. An infidel cannot admit the obligation of an oath at all, and cannot therefore give evidence under the sanction of it. But though a person may be proved on his own shewing, or by other evidence, to have forsworn himself as to a particular fact; it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the Judge; it only goes to the credit of the witness, on which the jury are to decide.] Ld. Ch. B. *Gilbert* (*c*) says, "another thing that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts, &c.; this takes from the witness all credibility, inasmuch as contraries cannot be true." And again he says (*d*), that "if the mother of a bastard child

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(*a*) 4 *St. Tr.* 47.
(*b*) 10 *St. Tr.* 390.
(*c*) P. 136. 6th edit.
(*d*) *Ib.* 139.

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charge two persons, she loses her credibility, that she cannot charge either of them." [Lord *Ellenborough* C. J. observed, that those passages, contrasted with others, pointed at the distinction between *competency* and *credibility*. And then called on *Cockell* to state his other objection on account of the rejection of evidence proposed.]

Where a witness admitted herself to have been connected with different men, and the Judge thought it immaterial to hear witnesses tendered by the defendant to shew her connection with other persons, as leading merely to the same conclusion as to her character, the Court being satisfied that this could have had no influence on the verdict, refused a new trial on that account.

The other objection amounted to no more than this, that *Hannah Stringer*, the witness, having admitted that she had been connected with two or three persons, the learned Judge thought it immaterial to examine witnesses tendered on the part of the defendant to shew that she had been also connected at other times with several other persons; considering that by her own shewing she was a * common woman. But it was now urged that the extent of her prostitution might have shaken her credit in a greater degree. On this Lord *Ellenborough* C. J. observed, when he afterwards delivered the opinion of the Court, as before mentioned, against the objections, that if the evidence had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict.

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Saturday, June 10th.

DOE, on the Demise of SPICER, *against* LEA.

A lease of lands by deed, since the new stile to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*; and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad.

IN ejectment for lands in *Wiltshire*, the demise was laid on the 12th of *October* 1808, and it appeared, that notice was given on the 24th of *March*, to quit on the 11th of *October*, *Old Michaelmas* day. The facts were that the original tenant, who had under-let to the defendant, had in 1780 taken the farm by parol from *Old Michaelmas*; but after holding for about three years, he took a lease of it for 13 years, to hold *from the feast of* St. Michael: and after the determination of that lease, which expired in 1796, the tenant had held on without coming to any new agreement. It was thereupon

objected

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objected at the trial, on the part of the defendant, that the tenant must be taken to hold according to the terms of that lease; and that being to hold from the feast of *St. Michael*, generally, must be taken to mean *New Michaelmas*, and could not be explained by parol evidence to mean *Old Michaelmas*; and then the notice to quit at *Old Michaelmas* was wrong. *Chambre* J., before whom the cause was tried, agreed that the terms of the lease concluded the holding to be from *New Michaelmas*: but that as the notice was served before *New Lady-day*, and the tenant had thereby had more than six months' notice to quit, no injustice was done to him, and that the notice was sufficient; he therefore directed the jury to find a verdict for the plaintiff. But as the point was new, he gave the defendant's counsel leave to move to enter a nonsuit, if the Court should think the objection well founded. A rule nisi for that purpose having been obtained in the last term;

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Jekyll and *East* now shewed cause against the rule, and contended, first, that the lease being from *Michaelmas* generally, though primâ facie that must be taken to mean *New Michaelmas*, was capable of being shewn by extrinsic evidence, such as the fact of the previous holding, and the understanding of the parties to mean *Old Michaelmas*. And they referred to *Forley d. the Mayor, &c. of Canterbury* v. *Wood* (*a*), *Kent* Sum. Assizes, 1794, before Lord *Kenyon* C. J., where the tenancy was from *Michaelmas* to *Michaelmas*, and the notice was given on the 20th of *March* 1793 to quit on the 10th of *October* following; which was objected to be insufficient, as it ought to have been to quit either at *Michaelmas* generally, or on the 29th of *September*. But Lord *Kenyon* permitted evidence to be given, that by the custom of the county of *Kent*, such a tenancy from *Michaelmas*, generally, was considered to be *Old Michaelmas*; and held the notice to be regular. [Being asked whether the holding there were by deed?] they said that it did not so appear; but that would make no difference; for here the lease had expired, and the tenant only held by implication under the terms of it. 2dly, Supposing the evidence to be conclusive that the tenancy was from *New Michaelmas*, yet the notice was sufficient. The law required reasonable notice (*b*), which had been deemed in these cases

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(*a*) This was cited from *Runnington's Ejectment*, 112. The same case is reported in 1 *Esp. N. P. Cas.* 198. with some variation.

(*b*) Vide per *Wilmot* J. in *Timmins* v. *Rowlinson*, 3 *Burr.* 1609.

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to be half a year's notice to quit before the end of the tenant's year: and here the tenant had had half a year's notice and more; for the notice was given before *New Lady Day*; and therefore he could not complain; for no prejudice could ensue to him from the excess of the time, and he had all the benefit of it if he pleased to remain after *New Michaelmas*. It was therefore different from the case where a notice is given to quit at a different quarter or half year from the commencement of the tenant's holding; for there he would have to pay additional rent, and be subjected to all the intermediate burthens of his tenure. But here no such inconvenience could ensue. They also wished to rely on evidence of a subsequent waver; but were answered, that that point was not reserved.

Lens Serjt. and *Casberd* contrà were stopped by

The Court, who were of opinion, on the first point, that no extrinsic evidence could be given to explain the time of holding stated in the deed, which must be taken to be from *New Michaelmas*, since the act of parliament for altering the stile: unless, as Lord *Ellenborough* observed, there had been any reference in the deed itself to the prior holding. And nothing having been shewn, subsequent to the expiration of the
[315] lease, from whence a new time of holding could be inferred, the tenant must be taken to have held on under the terms of that lease. They were also of opinion with the defendant on the second point: that considering the tenant's year to end at *New Michaelmas*, the notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, was bad, for the notice must be to quit at the end of the tenant's year; and if it might be given to quit 12 days afterwards, it might as well be at any other time. That the landlord could not alter the period of quitting by his notice; and this was given specifically as a notice to determine the tenancy at *Old Michaelmas*, and not as a liberty to the tenant to remain at his option for so long after his tenancy expired.

Rule absolute.

TAYLOR *against* FORBES.

Monday, June 12th.

Affidavit of debt, stating that defendant was indebted to the plaintiff in so much for goods sold and delivered (not saying by the plaintiff) to the defendant, is insufficient.

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THE affidavit of debt made by the plaintiff to hold the defendant to bail stated that the defendant was *indebted* to the plaintiff in so much, for goods sold and delivered *to the defendant*, (not saying "sold and delivered *by the plaintiff* to the defendant.") On which *Burrough* obtained a rule calling on the plaintiff to accept common bail, upon the insufficiency of such affidavit; and cited *Mackenzie* v. *Mackenzie* (*a*), *Perks* v. *Severn* (*b*), and *Cathrow* v. *Hagger* (*c*), as in point. *Marryat* now shewed cause, and said that *Cathrow* v. *Hagger* went further than the former cases, and was decided without reference to *Coppinger* v. *Beaton* (*d*), which was contrary to it. And that the meaning of this affidavit being obvious, the Court would not, as they had declared in the last-mentioned case, entangle the suitors in unnecessary niceties. But by

Lord ELLENBOROUGH C. J. The strictness required in these affidavits, is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits. And the leaning of my mind is always to great strictness of construction where one party is to be deprived of his liberty by the act of another.

Per Curiam, Rule absolute.

(*a*) 1 *Term Rep.* 716.
(*b*) 7 *East*, 194.
(*c*) 8 *East*, 106.
(*d*) 8 *Term Rep.* 338.

SPRANG *against* MONPRIVATT.

Monday, June 12th.

Where a writ of error is allowed, before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, *or* to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff.

WIGLEY obtained a rule on the plaintiff to shew cause why the proceedings against the bail upon the writs of scire facias should not be stayed pending the writ of error; the bail undertaking to pay to the plaintiff the damages recovered,

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OR *to surrender the defendant* within four days of the determination of the writ of error, in case it should be determined in favour of the original plaintiff (*a*). This was now opposed by *Marryat*, unless the bail undertook to pay the damages and costs in the original action, the costs of proceeding against them, and of this application, and also the costs in error, within four days after the determination of the writ of error, if determined in favour of the original plaintiff. And the question was, on which of these conditions, the proceedings were to be stayed.

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The writ of capias ad satisfaciendum issued, and was lodged in the sheriff's office on the 25th of *April*, returnable on the 3d of *May*; on which non est inventus was returned. The writ of error was tested on the 6th, and allowed on the 9th of *May*. The scire facias against the bail issued on the 8th of *May*, was lodged with the sheriff on the 9th, and was returnable on the 15th of *May*. The alias scire facias issued on the 25th, was lodged with the sheriff on the 26th, and was returnable on the 2d of *June*, the first day of this term: on which last day the rule to appear to the writs of scire facias was given.

Marryat, against the rule, urged that though a writ of error was a supersedeas as to the principal, it was not so as to the bail; which was proved by the necessity the bail were under to apply to this Court to stay proceedings against them, pending the writ of error: and therefore coming to ask a favour of the Court, they must submit to fair terms. The case of *Capron* v. *Archer* indeed seems to have proceeded on the ground that the allowance of the writ of error was a supersedeas even as to the bail; and that it was enough that the allowance was before the time indulged to the bail for rendering, though notice of the allowance were not given till afterwards; but that was decided by only two judges in court, and stands alone. Whether the writ of error there were sued out before or after the capias does not appear: but here the writ of error was not sued out till after the return of the capias ad satisfaciendum, and the bail did not apply to stay the proceedings till the time for rendering their principal was out; in which case it was said by the Court, in *Richardson* v.

(*a*) This is according to the form of the rule in *Capron* v. *Archer*, 1 *Barr.* 340. which was referred to on moving for the rule.

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Jelly (*a*), that they would not give the bail any time for that purpose, but only four days to pay the money in, after the judgment was affirmed.

Wigley, contrà, relied on the case of *Capron* v. *Archer*, where a similar rule was granted on the ground, as it is expressed in the report, that the defendant's writ of error was allowed *before the time was expired within which the bail had indulgence to surrender the principal*. That must mean after the first scire facias; and shews that the allowance of the writ of error was not till after the capias ad satisfaciendum; and the notice of the allowance there could not have been given till after the expiration of the time for rendering: because the report states, that the writ of error was allowed before the time expired within which the bail had *indulgence* to surrender. Here the allowance of the writ of error, which was on the 9th of *May*, was clearly before the issuing of the second scire facias (*b*); and therefore within the precedent of *Capron* v. *Archer* (*c*): and *Buchanan* v. *Alders* (*d*), where further terms were imposed upon the bail, went upon the ground that the bail were fixed before the writ of error was sued out; [319] which recognizes the same principle. [*Le Blanc* J. asked if he were aware of the case of *Copous* v. *Blyton* (*e*), which seems to have proceeded on the time within which the bail applied for the indulgence, and not upon the time of the allowance of the writ of error. To which it was answered, that the practice was different in C. B.] And

Lord ELLENBOROUGH C. J., after consulting with the rest of the Court, said, that they were of opinion that consistently

(*a*) 2 *Stra.* 1270.

(*b*) It seems from 1 *Tidd*, 115, 6. (2 edit.) and the result of the cases, that as matter of right, the bail cannot render their principal after the return of the capias ad satisfaciendum. But by the indulgence of the Court, where the proceedings are by bill, the bail may render any time before the rising of the Court on the return-day of the second scire facias, or of the first sci. fa., where a scire feci is returned. Where the proceedings are by original, they may render at any time before the rising of the Court on the appearance-day or quarto die post of the return of the second scire facias, or of the first, where a scire feci is returned.

(*c*) 1 *Bos.* 340. (*d*) 5 *East*, 546.

(*e*) 1 *New Rep.* 67.

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with the cases which had been decided in this court, the time to be looked to was when the writ of error was allowed, and not when the indulgence was applied for: and therefore in this case the writ of error having been allowed before the time allowed for rendering the principal was out, the rule must be made absolute on the terms in which it was moved.

Monday, June 12th.

FRICKER *against* EASTMAN.

A Judge's order "that *upon payment* of debt and costs by a certain day all proceedings should be stayed," is only conditional on the defendant.

A RULE was obtained on the defendant to shew cause why a Judge's order, dated the 17th of *May* last, ordering "that *upon payment* of 62*l.* 14*s.* the debt, and the costs to be taxed by the master, on or before *Wednesday* next, *all proceedings should be stayed*," should not be made a rule of Court; and why the master should not be directed to tax the plaintiff his costs: the plaintiff intending afterwards to move for an attachment upon this rule. On the 15th of *May* an order for time to plead expired. On the 16th the defendant took out a summons for the plaintiff to shew cause why, *on payment* of the debt and costs within a week, further proceedings should not be stayed: on which the plaintiff's attorney consented to the order in question, which was accordingly obtained on the 17th; and but for this order, the plaintiff would have been entitled to sign judgment for want of a plea on that day. Notwithstanding this, the defendant waited till the 24th of *May*, when the order for the payment of the debt and costs was out: and then he pleaded the general issue; which the plaintiff refused to accept, and applied to the master to tax the costs; the master however refused to do so, considering that order to be conditional: whereupon the plaintiff obtained the present rule; and the question was, whether such an order were *conditional* or *peremptory*?

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Barrow resisted the rule, relying upon the general understanding in the master's office and amongst the practitioners, that such orders were only conditional in this court, though peremp-

peremptory in C. B. (*a*): and such he insisted was the grammatical construction of the words of it. 1809.

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Holroyd, contrà, insisted that as the effect of such an order was to stay the plaintiff from proceeding in the mean time, it must in its nature be considered as peremptory; and also by analogy to rules of court drawn up on payment of a sum of money, which are always deemed to be compulsory (*b*), except in the common case of paying money into court, where there is no stay of proceedings.

Lord ELLENBOROUGH C. J. It is true that the order procured for the defendant an immediate stay of proceedings up to the 24th, by which he has secured to himself an advantage [321] without any equivalent to the plaintiff, unless the order be considered as absolute: but this ought not to be taken by implication, when the plaintiff might have required words of obligation to be inserted in the order, as is very frequently done. But as the order is now drawn up, the strict construction of the words is only to make it conditional; and such has been the general understanding in the profession.

Per Curiam, Rule discharged.

(*a*) Vide *Barnes*, 283. *Pr. Reg.* 259.
(*b*) *King q. t.* v. *Clifton*, 5 *Term Rep.* 257.

HILL *against* JONES.

Monday, June 12th.

If bail to the sheriff be put in above, and exception taken *before* an assignment of the bail-bond, they are bound to justify notwithstanding such assignment.

THE defendant was arrested on the 1st of *May* above 60 miles from *London*, and gave a bail-bond to the sheriff: on the 6th the same bail were filed above: on the 10th exception was taken to the bail; and they not having justified by some mistake, the plaintiff's ten days afterwards took an assignment of the bail-bond, and commenced proceedings thereon. In the mean while the defendant had obtained further time for justifying his bail, and then applied to set aside the proceedings for irregularity; and *Phelps* on his behalf contended that the plaintiff having taken an assignment of the bail-bond had thereby precluded himself from objecting to the sufficiency of the same bail, and waved his exception: upon the same principle that he could not have excepted to them *after* he had taken an assignment

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ment of the bail-bond (*a*). *Epinasse* contrà insisted on the necessity of justifying the bail, the exception having been well taken at the time. That bail regularly excepted to, and not justified, are *considered as no bail; and the plaintiff is thereupon entitled to take an assignment of the bail-bond: and that he ought not to be placed in a worse condition by the defendant's having put in the same bill above.

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The Court directed the matter to stand over, and on this morning *Le Blanc J.* said that they were of opinion that the exception to the bail having preceded the assignment of the bail-bond, the defendant was bound to justify them. But under the circumstances, they gave leave to the defendant to justify his bail after the usual time.

(*a*) 1 *Tidd*, 133. cites 1 *Salk.* 97. *and* 7 *Mod.* 62.

Tuesday, June 13th.

DOE, on the Demise of the Earl and Countess CHOLMONDELEY, *against* WEATHERBY and Others.

A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator having before devised certain other real estates in strict settlement, and given annuities for life to *A. B.* and *C.*, which annuities he charged upon "all and singular his manors, lands, tenements and hereditaments, &c. not before disposed of;" devised "all and singular his said manors, lands, &c." and other his real estate *so charged with and subject to the said 3 several annuities as aforesaid:* although one of the annuitants had a prior life-estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly or by necessary implication excluded from its operation; and no intention of the testator to exclude the reversion is necessarily to be implied from the circumstance that the charge of one of the annuities could not attach upon this reversion; as the other two might; and the cause will be construed reddendo singula singulis.

THIS ejectment was brought in a right of Lady *Cholmondeley*, as co-heiress with Lady *Willoughby* of *Robert* Duke of *Ancaster*, to recover possession of an individual moiety of certain lands in *Westminster* for life, included in the marriage settlement hereafter mentioned. A verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

By indenture of the 6th of *January* 1767, made between *Thomas Panton* the elder, *Priscilla* his wife, *T. Panton* their only son, *Elizabeth Bird* and others; being the marriage-settle-

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ment of *T. Panton* jun. with *Elizabeth Bird*; and by a fine levied in pursuance thereof; divers manors, lands, &c. in *Cambridgeshire, Hants, Leicestershire,* and *Middlesex,* were conveyed and settled to certain uses which, with respect to the premises in question, were as follows: after the marriage, to the use of *T. Panton* the elder for life; remainder to secure a jointure of 800*l.* per annum to Mrs. *Priscilla Panton* for life; remainder to the use of *T. Panton* the younger for life; remainder to secure a jointure of 700*l.* a year to *Elizabeth Bird* for life; remainder to trustees for 500 years, to raise 10.000*l.* for portions of younger children; remainder to the use of the first and other sons of the marriage successively in tail male; remainder to the use of the first and other sons of *T. Panton* the younger by any subsequent wife succesively in tail male; remainder to the use of all the daughters of the marriage and of any subsequent marriage or marriages of *T. Panton* the younger, as tenants in common in tail general; remainder to the use of other trustees, during the life of *Mary* the Duchess of *Peregrine* Duke of *Ancaster,* and daughter of *T. Panton* the elder, upon trust during her life to pay the rents, &c. to her sole and separate use, &c.; remainder to the use of the said *Peregrine* Duke of *Ancaster* for life; remainder to the use of *Robert* Marquis of *Lindsay,* their son, in fee. On the 12th of *August* 1778, *Peregrine* Duke of *Ancaster* died, and was succeeded by his son *Robert*. Duke *Peregrine* also left two daughters by the said Duchess, namely, Lady *Willoughby* the wife of Lord *Gwydier,* the defendants, and Lady *Cholmondeley,* one of the lessors of the plaintiff. Duke *Robert* by his will of the 29th of *May* 1779 devised all his freehold and copyhold manors, rectories, advowsons, messuages, lands, tenements, tithes, rents, hereditaments, and other his real estate whatsoever and wheresoever, and all his estate and interest therein, in manner thereinafter mentioned, (that is to say,) as to his capital mansion-house at *Grimthorpe* in *Lincolnshire,* &c. (describing various estates, by name, in that county, subject in part to a certain mortgage to *Welby,*) to *Denshire* and *Parker* in fee, upon the several uses declared, viz. as to the said hereditaments and premises not in mortgage to *Welby,* to the use of *James* and *Wm. Cecil,* for the term of 3000 years, upon the trusts after mentioned. As to the premises so in mortgage, under and subject to the said mortgage; and as to the said premises so limited to *Js.* and *Wm. Cecil* for 3000 years; to

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the use of Lord *Brownlow Bertie*, (late Duke of *Ancaster*,) for life; remainder to trustees, &c.; remainder to the first and other sons of *Brownlow* Duke of *Ancaster* in tail male; remainder to the use of Lord *Robert Bertie* for life; remainder to trustees, &c.; remainder to the use of the first and other sons of the said Lord *Robert Bertie* successively in tail male; remainder to the use of the testator's sister (the now Lady *Willoughby*) for life, sans waste; remainder to trustees, &c.; remainder to the use of her first and other sons successively in tail male; remainder to the use of her first and other daughters successively in tail male; remainder to the testator's sister (the now Lady *Cholmondeley*) for life, sans waste; remainder to trustees, &c.; remainder to the use of her first and other sons successively in tail male; remainder to the use of her first and other daughters successively in tail male; remainder to the testator's own right heirs for ever. And the trusts of the term of 3000 years were by mortgage, sale, &c. to raise 2000*l.* to be paid to his executrix and executors
[325] named; which sum he gave, together with the rest and residue of his goods, chattels, and personal estate, to his executrix and executors, upon trust to discharge all mortgages, except the mortgage to *Welby*,) and all other his just debts and legacies. And he gave *one clear annuity of* 1300*l. to his mother* the said *Mary* Duchess Dowager of *Ancaster during her life*, over and above all annuities or other provisions, she might be entitled to receive out of any part of his real estate. And he also gave *two other life annuities* therein specified; and *charged the said three annuities* upon and directed the same to be *payable out of the rents, issues, and profits of all and singular his manors, messuages, lands, tenements, tithes, rents, and hereditaments, whatsoever and wheresoever, not thereinbefore particularly devised and disposed of* to the said *Brownlow* Duke of *Ancaster* for life, with remainders over as aforesaid. And he gave to the several annuitants the usual powers of distress and entry, and perception of the rents and profits of the premises so charged with the payment thereof. And *as to*, for, and concerning *all and singular his said manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, rents, hereditaments, and other his real estate, whatsoever and wheresoever*, not therein before devised and disposed of, *so charged with and subject to the said three several annuities aforesaid*, he thereby devised the same unto *Denshire* and *Parker* and their heirs, on the

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the several uses declared, viz. to the use of *James* and *William Cecil*, for a term of 5000 years, sans waste, upon the trusts thereinafter mentioned: and after the determination of the said term, and subject thereto, and to the trusts thereof, in the mean time to such person and persons, in and for such estate and interest therein, and upon such uses as are thereinbefore particularly declared concerning the premises first thereinbefore *devised, in case of failure of issue male of Lord *Robert Bertie*, viz. To the use of his sister (the now Baroness *Willoughby*) for life, sans waste; remainder to trustees, &c.; remainder to her first and other sons successively in tail male; remainder to her first and other daughters successively in tail male; remainder to his sister (the now Countess *Cholmondeley*) for life; with like remainders in strict settlement to her sons and daughters in tail male; remainder to his, the testator's, own right heirs. And he declared that the term of 5000 years so limited to *Js.* and *Wm. Cecil* was upon trust, by mortgage or sale of the premises comprised in the said term, to raise, in aid of his personal estate, &c. sufficient to pay off the residue of his mortgages, (except the mortgage to *Welby*,) and all other his debts and legacies, and the portion of 20,000*l.* provided for the now Countess *Cholmondeley*, &c. and then the term to cease. And he gave among other legacies, 10,000*l.* to his sister (the now Lady *Cholmondeley*,) in addition to her portion. *Robert* Duke of *A.* died *July* 8th 1779, leaving his mother *Mary* Duchess Dowager of *A.*, his said two sisters, and *T. Panton* the elder and *T. Panton* the younger, him surviving; and being seized in possession in fee at the time of making his will and at his death of very considerable estates in the county of *Lincoln* and in *Wales*, besides those specified in the first part of his will, and therein mentioned to be in mortgage to *Welby*. *T. Panton* the elder died in *December* 1782, leaving his son *T. Panton* the younger, his daughter the said *Mary* Duchess Dowager of *A.*, and two grand-daughters, the said Lady *Willoughby* and Countess *Cholmondeley*, him surviving. *Mary* Duchess Dowager of *A.* died in 1793. Lord *Robert Bertie* died without issue in the lifetime of *Tho. Panton* the younger, who died *November* 30th 1808, without having ever had issue; leaving Lord *Brownlow Bertie*, afterwards Duke of *Ancaster*, him surviving, who died in 1809, without issue. The defendants are in possession of the premises for which this ejectment is brought. If the lessors of the plaintiff were entitled to recover

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recover the moiety of the premises, the verdict was to stand; if not, a nonsuit was to be entered.

Scarlett, on behalf of Lady *Cholmondeley*, contended that the ultimate remainder in fee in the estate in question did not, on the death of *Thomas Panton* jun., pass to Lady *Willoughby*, under the general residuary clause in the will of *Robert* Duke of *Ancaster*, but descended as a reversion undisposed of to his co-heiresses, the Ladies *Willoughby* and *Cholmondeley*. He admitted that the words of that clause, "all his lands, tenements, and hereditaments," &c. were large enough to pass any species of interest which the Duke had either in possession or reversion, if nothing expressly appeared in the will or were necessarily to be collected from it, to shew that his intention was confined to pass other specific estates and interests, and therefore to exclude this reversion. And he also admitted that it was not necessary for the devisee to shew that her testator had this specific reversion in contemplation when he used general words sufficient in themselves to comprehend it, and where his apparent intention upon the face of the whole will was to pass all he had. But he contended, that where such general words were followed by others which shewed that the intention of the testator in using them was confined to particular parts only of his property, the construction must be narrowed and
[328] confined to the parts so defined. Now here the Duchess, his mother, had an estate for life secured to her in the property in question and the other settled estates under the marriage-settlement of 1767, before the reversion could descend upon Duke *Robert*. So circumstanced, he first disposed of certain estates in *Lincolnshire* in strict settlement on different members of his family, including the Ladies *Willoughby* and *Cholmondeley*. Then he gives an annuity of 1300*l.* to the Duchess Dowager his mother for her life, over and above all annuities and other provisions she was entitled to out of any part of his real estate, and charged this annuity upon *all his other lands*, &c. not before particularly devised. From this description he must have meant to *exclude* those lands in which she had before a settled life-estate; for it would be absurd to impute to him an intention to give his mother a limited annuity for her life in an estate, the whole of which she was already entitled to for her life. And excluding that estate from his contemplation, the estates intended to pass by the residuary clause must be confined to the other estates which he meant to charge with the additional

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additional annuity of 1300*l.* to his mother and the two other annuities: for he thereby only disposes of all his "manors, lands, &c. and other his real estates," not before specifically devised, "*so charged with and subject to the said three several annuities as aforesaid.*" And as this *reversion* never could have been charged with his mother's annuity, as it never could have come to him till after her death, it follows that it could not pass by these words to Lady *Willoughby* and the other devisees under the residuary clause. [Lord *Ellenborough* C. J. objected that this argument was raised upon too narrow a basis; for it did not apply to the other two annuities, which were charged on the residuum.] It equally shews the intention of the testator to exclude the settled lands in which his mother had a life-estate, as he only meant to pass such estates as were charged with all the three annuities. He then distinguished this from *Wheeler* v. *Walrone* (*a*), and *Willows* v. *Lydcot* (*b*); because there appeared no intention in either of the wills to exclude the reversions in question, which were created by the testators themselves, as was also the case in *Chester* v. *Chester* (*c*), and must therefore probably have been in their contemplation. But this reversion, which was remote, was created by the prior settlement. And he relied on *Cook* v. *Oakley* (*d*), where a devise to one of a red box, *and all things not before bequeathed*, was held not to pass part of a considerable leasehold estate, which had come to the testator by the death of his father, but of which he was ignorant at the time. [Lord *Ellenborough* C. J. The things before bequeathed were rings, buttons, and a chest of cloaths; and it was reasonable to suppose that he meant by the words of bequest such like trifling articles, as he had before specifically mentioned.] In *Roe* d. *Reade* v. *Reade* (*e*) Lord *Kenyon* observed, that undoubtedly the words were sufficiently comprehensive to pass the estate in question, "if it "could be collected from the will that the devisor intended "that it should thereby pass." In *Strong* v. *Teatt* (*f*) this Court, and afterwards the House of Lords, held that general words in a will might be restrained in cases where it appeared that the devisor did not intend to use them in their general sense. That case illustrates the present: the question was whether the reversion of an estate settled on the marriage of

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(*a*) *Allyn*, 28. (*b*) 2 *Vern.* 285. (*c*) 1 *Eq. Cas. Abr.* 211.
(*d*) 1 *P. Wms.* 502. (*e*) 8 *Term Rep.* 1181—22. (*f*) 2 *Burr.* 912.

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the devisor's eldest son passed under a devise of "all other his *lands, tenements, and hereditaments," &c.; which lands were devised to his three younger sons in succession. And there was a provision, that if the settled estate should come to the third son by the death of the two elder without issue male in his life-time; then he should not take any interest or estate in the lands before devised to him by the residuary clause, but the same should go over to the fourth son. And then the argument was, that if the reversion of the settled estate passed by the residuary clause, the third son never could get it if the settled estate came to him; an absurdity which was relied on to shew that the testator could not have contemplated that reversion, but only the lands of which he was seised in fee in possession. Now that argument did not shew that he contemplated the reversion and intended to *exclude* it, but that he specifically contemplated something else, and therefore that the reversion must be excluded. So in *Goodtitle* v. *Miles*(*a*), one having the reversion of lands settled on him for life, remainder to his issue in tail, and having only two daughters, devised to his eldest daughter in tail his unsettled estates by name, and *all other* his lands *which were not settled in jointure;* remainder to his other daughter *for life;* remainder to her children, &c. charged, &c.; remainder to his nephew in fee. And it was held that the *reversion* of the *settled* lands did not pass, but were excepted out of the general clause by the restrictive words "*and which are not settled in jointure,*" and because of the incongruity of imputing to the devisor an intention of devising *estates tail* and *for life* to his daughters in lands which were before settled on them in *tail general*. And that decision was the stronger, because it did not appear that the devisor had

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any other real estate on which the general clause could operate except the reversion of his settled lands. In *Chester* v. *Chester* (*b*) the reversion was not settled, and therefore when the testator devised all his lands, &c. *not formerly settled,* those words clearly comprehended the reversion, if that alone would have sufficed to pass it, where no such intention appeared. Upon the whole of this will, it appears that the Duke of *Ancaster* did not mean to pass any estates by the residuary clause, except such as were charged with the annuity of 1300*l.* to his mother: he could not therefore have meant to pass this

(*a*) 6 *East*, 494. (*b*) 1 *Eq. Cas. Abr.* 211.

reversion

reversion which could not be subject to that charge, because she had already an estate for life in the whole property; but he must have meant to confine the devise to such estates as he had in possession. [Lord *Ellenborough* having asked whether he had attended to the case of *Goodright d. the Earl of Buckinghamshire and Others* against *the Marquis of Downshire* (*a*), where the governing principle of all these cases was well laid down by Lord *Alvanley*;] he observed that (supposing the words "*then and in such case*," which were not noticed in the argument or judgment, did not make the devise of the residue of the real estate depend on a condition (*b*) which did not happen,) the case only came to this question, whether a devise of "all the rest and residue of real estates," would pass a reversion not before disposed of; concerning which there could be no doubt, if there were no other words to restrain the generality of their meaning: and Lord *Alvanley*'s judgment is not inconsistent with the construction contended for upon the effect of the restraining words in this will.

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Dampier contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. Referendo singula singulis, the charges of the three annuities on the several estates devised by the residuary clause, there is nothing in the objection founded upon one of the annuitants having a prior life-estate in the property in question, the reversion only of which was in the testator. This case is completely decided by that of *Goodright* v. *The Marquis of Downshire*, where Lord *Alvanley* in delivering the judgment of the Court of *C. B.* lays it down, that the operation of a residuary clause of real estates carries every real interest of every kind whatsoever, whether known or unknown to the testator, unless it be *manifestly excluded*. How then can we say that this reversion, which it is admitted would pass by the general words, is manifestly excluded, because the devise of the residuum is charged with the payment of three annuities for lives, two only of which could attach upon this particular estate. All the antecedent cases

(*a*) 2 *Bos. & Pull.* 600.

(*b*) Quære the punctuation of the will in p. 603. of the printed report; and whether the residuary clause were not read as commencing with the disposition of the residue of his real estates; making the preceding sentence end with the words "*for her life only*;" particularly as the last sentence concludes with devising the subject-matter to the wife; her *heirs*, executors," &c.

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bearing upon this point were fully considered in the former case, amongst others that of *Strong* v. *Teatt*, which has been relied upon in the argument. But that case went on the ground stated by Mr. Justice *Wilmot*, that the intention not to pass the reversion was as clear upon the whole tenor and complexion of the will as the *strongest express negative* clause could have made it. And so Lord *Mansfield* considered the case; that there were plain expressions in the will to shew * that the testator did *not* intend to devise the reversion of his settled estate: that there were in effect negative words to exclude it from the operation of the general words in the clause. Now here, by referring the charges of the three annuities to the several properties devised in the residuary clause, singula singulis, the devise will attach on all the estates as to two of the annuities, and upon all but this reversion, as to the three annuities: and there is not a scintilla of intention upon the face of the will to shew the contrary, which by all the authorities is necessary to except the reversion out of the general words of the residuary clause.

GROSE J. declared himself of the same opinion.

LE BLANC J. The question is, whether we can see such an evident intention of the testator *not* to pass this reversion by the general words of the residuary clause as to take the case out of the general rule. He subjects all other his real estates not before disposed of to the charge of *all* the annuities; and the argument is, that this reversion cannot pass, because it could not be subject to the charge of *one* of the annuities: but that is not a sufficient reason for excluding it as to the other two.

BAYLEY J. There must be something in the will either expressed or necessarily to be implied shewing an intention in the testator to exclude this reversion, in order to prevent the general words of the residuary clause from passing it: but here there is nothing of that sort expressed, nor is it necessary to imply any such intention upon the face of this will, in order to give it effect.

Postea to the Defendants.

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Tuesday, June 13th.

Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, 4 vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the 4 vicars; and, by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking in severalty any one of such vicarial houses with the appurtenances, of which option an entry was made in the corporation *act book* and signed by the vicars: held that a new vicar having made an option, which was entered in the act book and signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of *J. S.*, which were not all the appurtenances formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the entire premises, and to have it entered in the act book, as against the corporation; yet no such option having been made and entered in the act book according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment.

THIS ejectment was brought to recover a dwelling-house, and other buildings, with a garden and curtelage, in the close of the cathedral of *Chichester;* and the demise was laid on the 6th of *April* 1808. At the trial at the last assizes for *Sussex* a verdict was found for the plaintiff, subject to the opinion of the Court on this case.

Mr. *Miller*, the lessor of the plaintiff, in 1807, became one of the members of a prescriptive ecclesiastical corporation, called "the Vicars Choral," and in their endowment "the principal and commonalty of the vicars of the cathedral church of the *Holy Trinity* of *Chichester*," and has done all necessary acts to render himself an efficient member thereof. This corporation has a common seal, and consists, when full, of four clergymen, who have certain clerical duties to perform in the services of the cathedral; and has, besides other estates in common, four separate vicarial houses with the appurtenances in the cathedral close, which have constantly been appropriated to the use and residence of the said members; each of them regularly enjoying one, and either residing in or letting the same. It has been a *constant *custom* in this corporation, that whenever a vacancy has occurred by death or otherwise, *the members for the time being, according to their seniority as such, have had and exercised an option or election of taking and enjoying in severalty any one of such vicarial houses with its appur-*

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tenances, which, through death, or the exercise of any new option, had become vacant; *an entry of every such option being made in the corporation act book and signed by the members.* In 1759, *Wm. Waring*, clerk, then one of the corporation, and as such enjoying in severalty one of the four houses, with the garden and appurtenances anciently attached to it, being desirous of annexing to it a stable, and also a piece of garden or gateroom which belonged to the corporation in fee, but was then held under a lease from the corporation to *T. Yates* for an unexpired term of 11 years, made such proposal to the other members, and obtained such consent, as is thus stated in their act book: "At this meeting Mr. *Waring* informed his "brethren that he proposed to purchase the stable late belonging to Mr. *Yates*, adjoining to Mr. *Waring*'s garden, for the "residue of the term granted by the principal and commonalty of vicars aforesaid, upon condition that the body would "consent that the stable should, from the time of such purchase, be annexed to and enjoyed as part of the vicarial "tenement now in the possession of the said *W. Waring*; and "the said body do hereby agree that if Mr. *Waring* shall make "such purchase, the said stable shall and may be enjoyed from "time to time, and at all times from and after such purchase, "as part of the vicarial premises now enjoyed by the said "*W. Waring*." Dated 26th *January* 1759, and signed by the 4 vicars. Mr. *Waring* accordingly completed the purchase; and on the 27th *June* 1760 the personal representative of Mr. *Yates*, in consideration of a sum paid by Mr. *Waring*, by his direction executed a deed-poll of surrender to the corporation, who accepted the same, of the said stable and piece of garden or gateroom, to the intent, as expressed in the deed, "that "the same might be annexed to and made part of the vicarial "dwelling-house or tenement then possessed and enjoyed by "the said *W. Waring*, and should from time to time, and "at all times for ever thereafter, be occupied and enjoyed "therewith, as part and parcel thereof, and belonging thereto, "according to an act or agreement of the said principal and "commonalty of vicars, passed and made at a meeting held "on the 26th of *January* 1759, and then entered on their act "book." At the next meeting of the principal and vicars, on the 3d of *December* 1760, the following entry, of that date, was made in their act book: "Stable near Mr. *Waring*'s vicarial house to be enjoyed therewith—At this meeting the "Rev.

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" Rev. Mr. *Waring* produced a surrender and conveyance of " the stable and gateroom in the *Canon-lane*, late belonging " to Mr. *Yates*, &c. And it is agreed between Mr. *Waring* " and the rest of the commonalty of vicars aforesaid, that the " said stable and gateroom should be, from the date of the " said conveyance, annexed to the vicarial tenement now en- " joyed by the said Mr. *Waring*, and be from thenceforth " used and enjoyed by the said Mr. *Waring* and such future " vicars as shall be legally possessed of the same premises, " without paying any rent or other consideration for the " same, and free of all arrears of rent reserved on any de- " mise of the said stable and gateroom." Mr. *Waring* died in 1779, having from 1760 till his death enjoyed the same vicarial house with the stable and ground so annexed to it, [337] and a coach-house and loft built on part of such ground, by actually occupying them himself during part of the time, and by receiving rent of a tenant to whom he let them during other part of it. Soon after Mr. *Waring*'s death, Mr. *Shenton*, then one of the members, at a corporate meeting made choice of the said dwelling-house with its appurtenances; and an entry of such option of his was made and duly signed in their act-book: " At a meeting of the principal and com- " monalty of vicars aforesaid on the 23d of *August* 1779, " the dwelling-house with its appurtenances, late the Rev. " *W. Waring*'s, being declared vacant by his death, the Rev. " Mr. *Shenton* does hereby make an option thereof for his " dwelling-house." Mr. *Shenton*, in right of his said office and option, continued in the exclusive enjoyment of the said vicarial house, and the said annexed stable, coach-house and premises, by letting and receiving the rents of them for his own separate benefit, until his death on the 30th of *October* 1785; he occupying another house himself. The Rev. *Moses Toghill*, another member of the corporation, rented the said stable, coach-house, and ground, as tenant to Mr. *Shenton* at the time of his death. 70*l.* had been laid out in repairing Mr. *Toghill*'s own vicarial house, which money had been borrowed for that purpose from the Dean and Chapter of *Chichester*, to be repaid to them out of the share arising to him or his successors in that house from certain annual profits called bread-money payable to the Dean and Chapter, and divisible in certain proportions amongst the vicars, and other members of the cathedral. This was the usual method of

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defraying the expence of repairing the four vicarial houses. Mr. *Toghill* and Mr. *Moore*, the members who succeeded Mr. *Shenton*, came to an * arrangement for their mutual accommodation, that Mr. *Toghill*, instead of making a new option of the house, stabling, and premises, which had become vacant by Mr. *Shenton*'s death, should continue the house he had so repaired, and have the before-mentioned stable, &c. with that house so long as Mr. *Moore* should have the dwelling-house and rest of the premises so vacated by Mr. *Shenton*. The following entry in the act-book was made and signed by the four members at their next corporate meeting, on the 21st of *April* 1786. "It is agreed that the four vicarial houses, in-"cluding the buildings and gardens now holden with the "same respectively, shall during the joint lives of the present "members of the body be enjoyed as follows; viz. that the "house, buildings and gardens now in the possession of Mr. "*Toghill* shall continue to be enjoyed by him, and that in con-"sideration of his having expended a considerable sum of "money in the repairs of such house, he shall have and enjoy "therewith the stable, coach-house, hay and straw lofts, and "yard, in the *Canon Lane*, now also in his possession. That "the house, buildings, and garden, late in the occupation of "the said *Moses Toghill*, and now of *Sarah Joes* widow, or her "under-tenants, shall be enjoyed by Mr. *Walker*. That the "house and buildings (except the said stable, coach-house, "hay and straw lofts, and yard) and the garden to such house "and buildings belonging heretofore, in the occupation of "*Duke*, spinster, shall be enjoyed by Mr. *Moore*: and "that the house, buildings and garden, late in the possession "of the Rev. *R. Shenton*, and now of *Susannah Newhouse*, "widow, shall be enjoyed by Mr *Middleton*." In 1790 Mr. *Toghill* ceased to be a member; and thereupon a new option took place conformably to the following entry made and duly signed in the act-book. "At a meeting of the principal and "commonalty of the vicars at the common room aforesaid on "the 16th of *November* 1790; the Rev. Mr. *Toghill* having "quitted the body, the Rev. Mr. *Walker* made an option of the "house, buildings, and garden, now in the occupation of Mr. "*Toghill*. And the stable, which at a former meeting it was "agreed the Rev. Mr. *Toghill* should enjoy with the above-"mentioned house and premises, it was now agreed should be "enjoyed by the Rev. Mr. *Moore*, as appurtenant by right to "the

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" the house and buildings and garden now held by the Rev. " Mr. *Moore*. And it was also agreed that the Rev. Mr. " *Newman* (the newly elected member) shall enjoy the house, " buildings and garden in the occupation of Mrs. *Heath*, re- " linquished by Mr. *Walker*." From the date of this entry till *September* 1806, Mr. *Moore*, in virtue of such option and act, continued to hold and enjoy by himself or his tenants the vicarial house, garden and appurtenances held by Mr. *Waring*, with the additional stable and premises so purchased and annexed thereto as already stated. Shortly before the 2d of *Sept.* 1806 an agreement was framed for a lease to the late Mr. *Drew*; and accordingly a lease under the corporation-seal was executed on that day, of a part of the ancient garden of such vicarial house, which had never been leased before, together with the said additional stabling and premises on the north side of *Canon-lane*, within the close of the cathedral church aforesaid, containing in breadth from north to south 19 feet and a half; to hold to Mr. *Drew* for 40 years from the preceding *Midsummer*, at the yearly rent of 8*s*. On the same day the following entry was made and signed in the corporation act-book; which, after mentioning the execution of such lease, states the true arrangement under which it was executed. " *September* 2d, " 1806. Agreement relative to Mr. *Drew*'s fine, and all sub- " sequent fines.—And it was at this meeting agreed, that as " such stable and piece of ground were always considered as " attached to the messuage in the same close, belonging to the " same principal and commonalty of vicars, now enjoyed by " the Rev. Mr. *Moore*, the present fine shall be wholly re- " ceived by him: and that all future fines, as well as the quit " rent reserved, shall be paid to him during the whole time " he shall continue in the enjoyment of the same house. But " that after such period, such fine shall be for the mutual " benefit of the body." The fine on granting the said lease, amounting to 30*l*., was accordingly paid to Mr. *Moore*. Mr. *Drew* shortly afterwards took down the old stable; and upon the scite where it had stood, and upon that part of the ancient garden-ground of the vicarial house, which was included in the said lease to him, built a new dwelling-house and offices, with a small garden attached thereto; and these premises were carried by Mr. *Drew* into the ancient garden of Mr. *Moore*'s vicarial house, to the extent, from *Canon-lane*, of 20 feet 6 inches, at the narrowest part, to 23 feet 6 inches, at the broadest part: being

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4 feet more than had been leased to him by the said corporation as aforesaid. Mr. *Drew* died in the commencement of the year 1808, leaving the defendants his executors; who were at the date of the demise, and still are, in the receipt of the rents and profits thereof. On the 29th of *August* 1807 the Rev. Mr. *Walker*, one of the said vicars, resigned his office; and on the same day the lessor of the plaintiff was duly appointed in his stead. At a corporate meeting on the 30th of

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October in the same year, Mr. *Moore* having made option of another vicarial house, which was vacated by the said Mr. *Walker*, the plaintiff's lessor made option of the premises relinquished on that occasion by Mr. *Moore*, and the following entry thereof was made in the act-book, and also signed by the several then members. Neither this nor any of their other acts before stated were under their corporate seal, except the lease to Mr. *Drew*. "At this meeting it was also "agreed that the Rev. Mr. *Miller*, the newly elected member, "should enjoy the house and garden now in the occupation "of Mrs. *Riley*, and relinquished by the Rev. Mr. *Moore*."

Mr. *Miller*, having since become acquainted with the before-mentioned facts concerning Mr. *Drew*'s lease, brought this ejectment for the recovery, as well of the before-mentioned parts of the ancient garden of his vicarial house, as also of the scite of the stable so leased to Mr. *Yates*, and surrendered as above set forth; together with the new erections on the same respectively. Mr. *Miller*, at the time of the demise laid in the ejectment, was not in the actual occupation of the said vicarial house and premises, of which he made option as aforesaid, or any part thereof; but the same were at that time, and at the time of the trial, in the possession of Mrs. *Riley*, who had been tenant from year to year to Mr. *Moore* at the time of his resignation, and had never received any notice to quit.

The question for the opinion of the Court was, Whether under these circumstances the plaintiff's lessor were entitled to recover the whole or any part of the premises in question? and the postea and judgment were to be entered according to that opinion.

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Marryat, for the lessor of the plaintiff, stated that he claimed by this ejectment three distinct parcels; 1st, the encroachment made by Mr. *Drew* of 4 feet in the vicarial garden anciently attached to the vicarial dwelling-house with its appurtenances, of which the lessor had made option;

2d,

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2d, that part of the same vicarial garden which was included in the lease to *Drew*; 3d, the scite of the stable and coach-house, part of the freehold originally belonging to the corporation which had been leased to *Yates*, and purchased by Mr. *Waring* for the purpose of being annexed to the same vicarial house, now the property of Mr. *Miller*, and which had been accordingly so annexed by the corporation, and which had been enjoyed by the predecessors of Mr. *Miller* in his vicarial house as annexed thereto since 1759. He then contended that by the prescriptive custom of this body the freehold of their estates, which, before any option made according to the custom, was vested in the whole corporate body, by such option made and entered in the act-book became vested in the individual vicar choral to whose use it was appropriated. And that the possession of Mrs. *Riley*, who took the vicarial house and premises of Mr. *Miller*'s predecessor, as his tenant, was the same as his own individual possession. To shew the nature of this interest in the vicars choral, and that after the option made, the lessor of the plaintiff had such a freehold-interest in every part of the premises appropriated to his dwelling-house as would enable him to maintain this ejectment on his own demise, he referred to *Co. Lit.* 4. *a.*, where it is said that though land be the most fixed inheritance, and fee simple the highest and most absolute estate that a man can have, yet may the same at several times be moveable, sometimes in one person and alternis vicibus in another; nay sometimes in one place and sometimes in another: as if there be 80 acres of meadow used time out of mind to be divided between certain persons, and [343] that a certain number appertain to each; *e. g.* to *A.* 13 acres to be yearly assigned and lotted out; so as sometimes the 13 acres lie in one place, sometimes in another: and so of the rest: *A.* hath a moveable fee-simple in 13 acres. The nature of this estate is like that of a Dean and Chapter, where there is not a sufficient number of houses for the canons and prebendaries, who then occupy them in succession: during a vacancy, the freehold is in the Dean and Chapter; but when the house is appropriated, the freehold is in the residentiary canon or prebendary. Here, then, by the appropriation of the ancient vicarial house to Mr. *Miller*, which had been formerly held by Mr. *Waring*, the freehold of that and of the ancient garden, and of all other the premises annexed to the

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occupation of that dwelling-house, became absolutely vested in Mr. *Miller*; and therefore as to that part of the premises sought to be recovered, which was part of the ancient garden belonging to the dwelling-house, and which is not included in the vicarial lease to Mr. *Drew*, there can be no doubt that the lessor is entitled to recover. 2dly, As to that part of the ancient vicarial garden under the vicarial lease, though the stat. 14 *Eliz. c.* 11. *s.* 17. controls the restraining statute of the 13 *Eliz. c.* 10., so as to enable ecclesiastical bodies of this description to lease houses belonging to them for 40 years; yet they are restrained by the latter statute from leasing dwelling-houses for the habitation of such persons, and are required to reserve the accustomed yearly rent at least; which latter [344] stipulation would prevent them from leasing that which had never been leased before, as well as the prohibition to lease houses for the habitation of the ecclesiastical members of the body, which would extend to ancient gardens annexed to such residentiary houses. And though these houses have been leased, yet that has been by the individual vicars choral to whom they were appropriated.

The Court here interposed, and suggested to *Marryat*, that supposing Mr. *Miller* were entitled to demand from the corporate body the appropriation of all that he now sought to recover; yet having agreed at a corporate meeting of the whole body to take only that which was then in the possession of Mrs. *Ryley*, of which the parcels sought to be recovered formed no part; and the custom being stated in the case to be that the members, according to seniority, exercised *an option to take and enjoy in severalty* the several vicarial houses with their appurtenances; of which an entry is made in the corporation act-book, and signed by the members; the difficulty was to shew that the lessor of the plaintiff could not relinquish his option to take any particular part of that which had been enjoyed by his predecessor; and that though he had not made his option to take those parts in severalty, he could nevertheless maintain an ejectment for them, as if he had a several freehold in them.

Marryat then contended that the vicars could not relinquish the rights attached to their vicarial houses; and that the lessor having made his option of his present vicarial house, the right to every thing appurtenant to it was necessarily vested in him in virtue of his office. That his ignorance of what were

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were his rights, at the time when the choice was proposed to him and he made his option of that which was proposed, could not bind him when he was afterwards better informed of what his rights were. That no agreement of the individual nor even of the whole body could alter or abridge the rights of the vicar choral; and therefore no such agreement could abridge his right of occupation attached to his office: these were the original separate freeholds of each: they could not even amongst themselves carve out their possessions differently from that which had been anciently separated and occupied together by each vicar choral; for otherwise the majority might assume to share the whole amongst themselves exclusively of the rest.

Lord ELLENBOROUGH C. J. The members of this corporation have estates in common; and they appropriate from time to time certain vicarial houses with their appurtenances to be enjoyed by each in severalty. Then granting for argument sake, that the lessor of the plaintiff may insist on the appropriation to himself of the entire house and garden as held before by his predecessors; yet if he agree to take less than he is entitled to, why may he not do so? and how can he maintain an ejectment for that which has not been appropriated to him in severalty? What separate legal title can he have to that part before any appropriation? By his own shewing there must be an option made by him and entered in the act-book, in order to give him the right; and no such option has been entered; but on the contrary the entry is of an option by him to take something less, and not that which he now claims. The option must be made and entered to take the entire thing, in order to give him a separate right to the entire thing. He has not therefore brought himself within the terms of his own custom as stated in this case. When he claims his entire rights, and does not accede to an agreement to take less, and when the body stands out hostilely against such a claim, we will try that right; but we cannot do it on this case, where he states that an option has been made by him to take less, and he does not bring himself within the custom.

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GROSE J. agreed.

LE BLANC. J. Suppose no option had been made amongst them of any sort, could Mr. *Miller*, on being appointed a vicar choral, have brought this ejectment? He could not have set up a separate right to this property without an option

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tion of it duly made and entered; for when the body came to make their options, any one who was his senior might have taken it.

BAYLEY J. The very custom relied on by the lessor of the plaintiff shews that something was necessary to give him a legal title to this particular property, which it appears has not been done in this instance; namely, that he should have made an option to take it, which is to be entered in the corporation act-book.

Postea to the Defendant.

Lawes was to have argued for the defendant.

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Tuesday, June 13th:

CORMACK *against* GLADSTONE.

A ship from *Stockholm* to *New York* was by the course of the voyage to touch at *Elsineur* for convoy, and to pay the *Sound* dues: and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elsineur* before the *Sound* dues could be paid: held that the voyage not being thereby delayed, though the occurrence was foreseen and intended, the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea.

THIS was an action on a policy of insurance on the ship *Bess*, valued at 1200*l.*, and on the captain's books, cloaths and instruments, valued 100*l.*, "at and from *Stockholm* to *New York*." The interest in the ship was alleged and proved to be in the Earl of *Selkirk*, and the interest in the books, cloaths and instruments, in the captain. The loss was alleged to be by the perils of the sea. At the trial before Lord *Ellenborough* C. J. at *Guildhall* a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

In *August* 1803 the ship *Bess*, being at *Stockholm*, took in a cargo of 62 live sheep to be carried on the voyage insured, and sailed from thence on the 14th of that month. An agent of Lord *Selkirk* sailed in the vessel to take care of the sheep. Understanding that the vessel was to touch at *Elsineur* he did not take in sufficient provender for the sheep at *Stockholm* for the voyage to *New York*. The ship in the regular course of her voyage touches for convoy, and to pay the *Sound* dues, at *Elsineur*, where sufficient provender was taken on board for the voyage; but the ship was not thereby delayed at all in her course; the whole additional provender being on board before

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the *Sound* dues could be paid. In all other respects the ship had sufficient water and provisions for the voyage from *Stockholm* to *New York*. The ship proceeded immediately under convoy from *Elsineur* on the voyage insured, but was lost by the perils of the sea. If the Court should be of opinion that the plaintiff was not entitled to recover, a nonsuit was to be entered: if he were so entitled, the verdict was to stand.

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Scarlett for the defendant, having been called upon by the Court to begin, attempted to distinguish this from the case of *Raine* v. *Bell* (*a*); because there the ship had been originally fitted out with every necessary for the voyage which could be procured at her lading port, and it was unavoidable necessity within the perils insured against which compelled her to put into another port during the voyage. But here it appears that the vessel left her lading port without a sufficient stock of provender for the sheep, which she might have laid in there: and therefore she sailed with a necessity imposed upon herself of stopping somewhere in the progress of her voyage to get more; and if she had not found an adequate stock at *Elsineur*, she must have touched at some other place to obtain it. In *Delaney* v. *Stoddart* (*b*) there was a usage of the trade to protect the taking in an additional cargo at the place into which the ship was driven by stress of weather; without which it would have been considered as a deviation. But here there was no such usage, and the underwriters could not calculate upon the ship going into *Elsineur* for such a purpose.

Lord ELLENBOROUGH C. J. The not taking in sufficient provender for the sheep at *Stockholm* for the whole voyage is not like neglecting to take a sufficient crew, or tackling, or other necessary relating to the equipment or navigation of the ship; but this omission only affected the safety of the cargo of sheep: and while the vessel was staying for other necessary purposes at *Elsineur*, the provender was laid in without any delay of the voyage; which brings the case within the principle of the former decision.

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GROSE J. agreed.

LE BLANC J. The vessel left *Stockholm* with the foreknowledge of the agent that she must go into *Elsineur* for other purposes in the regular course of her voyage, when he might

(*a*) 9 *East*, 195. (*b*) 1 *Term Rep.* 22.

complete

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complete his stock of provender during the performance of those other purposes.

BAYLEY J. It does not follow that the master might or would have gone elsewhere for provender, if he could not have procured it at *Elsineur* without delaying the voyage. The sheep might have been thrown overboard.

Postea to the Plaintiff.

Puller was to have argued for the plaintiff.

Tuesday, June 13th.

THORNHILL *against* The Men inhabiting the Township of HUDDERSFIELD.

An action on the case lies upon the stat. 6 *Geo.* 1. *c.* 16. *s.* 1. by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover his damages in the *same manner and form* as given by the stat. 13 *Ed.* 1. *st.* 1. *c.* 46. for dikes and hedges overthrown by persons in the night; upon which the usual course of proceeding has been by the writ of noctanter.

THE plaintiff declared in case, and stated in his first count, that some person or persons, to him unknown, on the night of the 16th of *April* 1807, with * force and arms, at *Huddersfield* in the county of *York*, did wilfully, unlawfully, and feloniously set fire to, burn, and destroy 500 oak trees, &c. of the plaintiff, standing, growing, and being in the township aforesaid, of the value of 300*l.* and certain coppice-wood, and certain underwood growing on ten acres of land in the said township, of the value of other 300*l.*, without the consent of the plaintiff the owner of the said several things so set fire to, burnt, and destroyed, or of the persons chiefly entrusted with the care and custody thereof; against the peace, &c. and against the form of the statute in such case made and provided; whereof the defendants had notice; and that six months had elapsed since the committing of the said offence; and that the parties committing the same were not within the said six months next after the committing the said offence, nor had hitherto by the defendants or otherwise been convicted thereof; yet the said defendants not regarding the statute, &c. had not, though requested, made any satisfaction or recompence to the plaintiff for the said damage by him sustained as aforesaid, but had thereto refused and still refused so to do. The second count was the same, except that

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it omitted the word *feloniously* : and the whole concluded to the plaintiff's damage of 400*l*. The defendants pleaded not guilty ; and the cause was tried before *Lawrence* J. at *York*, when a verdict was found for the plaintiff for 373*l*., subject to the opinion of the Court on the following case.

The plaintiff, at the time of committing the offence mentioned in the declaration, and after mentioned, was sole owner and proprietor of a plantation situated in and surrounded by the township of *Huddersfield*. In the night of the 16th of *April* 1807, the same was wilfully set on fire by some person [351] or persons unknown to the plaintiff, and five acres thereof were burnt and destroyed, without the consent of the plaintiff, or of the persons chiefly entrusted with the care and custody thereof. The fire began and terminated in the township of *Huddersfield*, and the agents of the plaintiff used every means to discover the offender or offenders, without success. It was proved that the person or persons committing the offence was and were not within six months after committing the same, nor had hitherto by the defendants or otherwise been convicted thereof. That the value of the trees, wood, and underwood, destroyed by the fire, amounted to 372*l*. ; and that the action was not brought by the plaintiff against the defendants till more than six months had elapsed after the fire. The question was, Whether the plaintiff were entitled to recover ?

Ainslie for the plaintiff began by referring to the statutes giving the remedy, and on which the action was framed. The stat. 6 *Geo.* 1. *c.* 16. for protecting this species of property, and for providing satisfaction for the damages the respective proprietors thereof shall sustain by the unlawful acts there stated, enacts, that if any persons shall by day or night take, destroy, or burn, &c. any trees, underwoods, coppice-woods, &c. without consent of the owners, &c. " such owners, &c. damaged thereby, shall have such remedy, and have and receive such satisfaction and recompence of and from the inhabitants of the parishes, towns, hamlets, villages, or places adjoining on such wood grounds, &c. and recover such damages against the parish, &c. or places aforesaid, and in the same manner and form as for dikes and hedges overthrown, &c. as by the stat. 13 *Ed.* 1. *st.* 1. *c.* 46. is set forth or provided :" unless the of- [352] fenders shall by such parish, &c. be convicted of such offence within six months from the commission of it. The statute of *Ed.* 1. to which reference is made merely states that when " the

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men of the towns near will not indict such as be guilty of the fact, the towns near adjoining shall be distrained to levy the hedge or dike at their own cost, *and to yield damages*." Upon these acts, he contended, that the general principle attached, that where a statute prohibits a wrong and gives a remedy to the party grieved, without prescribing the mode of it, the common law intervenes and supplies the form of action; of which instances are given by Lord *Coke* (*a*) in his Comments on Magna Charta and on the Statute of *Marlebridge*. Also in his Comment (*b*) on the stat. 13 *Ed.* 1. *c.* 46. as to the remedy of the party grieved; having first said, that by the indictment of the towns against the misdoers the lord shall know against whom to bring *his action;* he says, that if the bordering town do not indict within time, then shall the lord or other party grieved *bring his action upon this branch* against the towns bordering round, &c. and judgment shall be given, that they shall at their proper costs make the ditch or hedge, &c. and yield damages; and so it was holden in *H.* 14 *Jac.* Sir *Wm. Mallorie*'s case. That case is reported in 1 *Rol. Rep.* 365. and there Lord *Coke* says, that he had seen an ancient reading upon this statute, that if the will do not indict the offenders within the time, the party grieved shall have *an action upon this statute*, as a man who is robbed shall have upon the statute of *Winton* against the hundred: and that, in the time of *Ed.* 4. *Pigott* J. had held accordingly. The reporter adds his own approbation of this law, and says that the Lord Chancellor afterwards
[353] agreed particularly to every thing which was said by Lord *Coke*. Now the statute of *Winton* (*c*) does not prescribe any particular form of action, but only says that the hundred shall be answerable in damages for the robbery; yet the common law has given the action on the case: and Lord *Coke* would not have compared the two statutes together in this respect, if he had conceived that the statute in question had only afforded a special mode of proceeding, as by the writ of *noctanter:* it rather appears by the authorities mentioned, that Lord *Coke*'s notion of the remedy was by action on the case. If then the plaintiff's remedy in this form of action be not fettered by the cases in which another mode of proceeding upon the statute of *Ed.* 1., by the writ of *noctanter*, has been adopted, the principle and

(*a*) 2 *Inst.* 55. and 118. (*b*) *Ib.* 476-7.
(*c*) 13 *Ed.* 1. *st.* 2. *c.* 2.

general

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general authorities on which it is supported must decide the point in favour of the action; especially as it is founded in general convenience; and no particular inconvenience can arise from it, as the plaintiff must state every thing in his declaration to bring himself within the stat. 6 *Geo.* 1. [Lord *Ellenborough* C. J. How is the writ of noctanter to be applied generally to the stat. 6 *Geo.* 1., which gives the remedy whether the offence be committed by day or by night?] He then referred to the cases treating of that writ. First, the case of *Dean* forest (*a*), which states the original writ of *noctanter* sued out of Chancery to the sheriff, commanding him to inquire, by a jury of the county, who were the malefactors who threw down the hedges and dikes of *J. G.* noctanter, &c. and to bind them to answer, &c.: the sheriff's return, stating the facts of the grievance committed, but that the offenders were unknown: the writ of distringas, which issued thereon, reciting the first writ and return, and commanding the sheriff to inquire of and distrain the inhabitants of the adjacent towns to make good the damage: on which the sheriff certified the names of the adjacent vills, and finally returned an inquisition annexed, finding that the party grieved had sustained damage to the amount of 200*l.* And after some exceptions taken to this return, which were overruled, *Noy*, Attorney-General, prayed for and obtained a new distringas to distrain the adjacent vills to repair: upon the authority of a record which he shewed of *T.* 15 *Ed.* 1. Another case is that of the inhabitants of *Epworth* and 15 other vills (*b*), where the course of proceeding was nearly the same. In another instance a distringas for the like purpose was prayed for by the Attorney-General against the circumjacent vills of *Dorling* (*c*): but the Court doubted whether he should have it without a scire facias (*d*) sued to answer, and what process he should have: on which they took time to advise: the result does not appear. In *Malabar* v. *The Inhabitants of Lakenheath* (*e*) all the proceedings upon the writ of noctanter, varying in some respects from the former cases, are set out at length, with the pleadings upon the merits of

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(*a*) *Cro. Car.* 280. (*b*) *Ib.* 439. (*c*) *Ib.* 580.

(*d*) In the case in *Lutw.*, next cited, (p. 157.) the Court solved the doubt, by saying that the writ of distringas ought to contain in itself a scire facias.

(*e*) 1 *Lutw.* 141. other cases are referred to, in this report, of proceedings on the same writs.

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the case, and the record of the trial, verdict, judgment, and execution thereupon. But there is nothing in any of these cases, or in the words of the statute of *Ed.* 1. which excludes the ordinary remedies given by the common law; nor does the statute even * point to such a remedy as the writ of noctanter, which is an inquisition on the crown side of the court. (*a*)

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Holroyd contrà. This is a novel attempt to sustain an action by the party grieved against the inhabitants of the township: for notwithstanding what is stated in the report of *Procter* v. *Mallorie*, in *Rolle* (*b*), there is no instance since that of any other proceeding upon the stat. of *Ed.* 1. than by the writ of noctanter, nor of any proceeding under the statute of *Geo.* 1. It is a clear principle recognized in a modern case of *Russel* v. *The Men of Devon* (*c*), that no action lies against an indefinite body of men, not incorporated, unless given expressly by statute, or at least by necessary implication; as where a statute (such as that of *Winton*) gives damages *generally* to the party grieved, which can only be recovered by action. But the stat. 6 *Geo.* 1. does not give to the party grieved damages *generally;* it only gives to him specifically such remedy, satisfaction, and recompence, and enables him to recover such damages against the parish, &c. *in the same manner and form,* as for dikes and hedges overthrown in the night, &c. by the 13 *Ed.* 1. Then as that statute only directs that "the towns near adjoining shall be *distrained* to levy the hedge or dike at their own cost *and to yield damages*;" and as the mode of proceeding under it has always been by the writ of noctanter, on which the distringas issues to compel the inhabitants to levy the hedge, &c. and to yield damages to the party grieved; and as this mode of proceeding was the known course pursued at the time of passing the act of the 6 *Geo.* 1.

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it seems as if that were the remedy specifically intended by the legislature in framing the latter statute. It is also to be observed, that the particular remedy is pointed out by the same clause which gives the damages; which is always a material circumstance in the construction of statutes. For if a thing be prohibited, or damages given generally, in one clause, an indictment in the one case, and an action in the other, will

(*a*) *Rex* v. *St. Gregory*, in *Sudbury*, 1 *Stra.* 622. and *Rex* v. *Glascenby*, 2 *Stra.* 1069. and *Bull. N. P.* 217.

(*b*) P. 365. (*c*) 2 *Term Rep.* 667.

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lie upon the general clause, though a subsequent clause may give a particular remedy; if there be no words of exclusion of any other. It is no objection to this construction, that the remedy by the writ of noctanter and distringas is of a criminal nature; because it grows out of the neglect of a public duty, the not discovering and indicting the offenders; and the object of the proceeding is not only to recompence the party grieved, but to compel the repair of the fences, &c. thrown down, which could not be enforced by action. And there is this further advantage in proceeding upon the writ of noctanter, that the distringas issues against the very persons inhabiting in the adjoining parish at the time, who are guilty of the neglect: whereas the damages recovered in an action may be levied upon those who come to inhabit afterwards. [Lord *Ellenborough* C.J. The same objection would apply to an action against the hundred on the statute of hue and cry. But the distringas under the writ of noctantur would, I presume, go against the inhabitants generally, and would not be confined to such as were inhabiting at the time of the damage done. Have you any authority to shew that it ought to be so confined?] It should seem on principle to be confined to those who were guilty of the neglect. The writ of noctanter also directs the sheriff to inquire of the inhabitants of the neighbouring vills who are liable; and those being ascertained, the distringas issues against them accordingly: in some of the cases in *Cro. Car.* several townships are included. But, without this previous inquiry, how is the party grieved to know against whom he is to proceed in his action? Nor could it have been intended to leave it to his election to proceed against a larger or smaller district; for that would vary exceedingly the shares of the damage to be sustained by individuals. [*Bayley* J. The same difficulty occurs upon a distringas: though it be directed against all, yet it may be executed against any inhabitant.] But as the inquisition first returned by the sheriff under the writ of noctanter ascertains what vills are liable, the individual distrained upon knows against whom he may apply for contribution.

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Ainslie, in reply, observed that the difficulty suggested as to the change of inhabitants could not be avoided; for even the stat. 6 *Geo.* 1. postpones the remedy for six months, in order to give time to the parish, &c. to convict the offenders. He

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concluded by stating that other gentlemen at the bar had taken notes for a second argument.

The Court having consulted together for some time, Lord *Ellenborough* C. J. said that Lord *Coke*'s authority was so strong in support of the action, and as it was not probable that more light could be thrown upon the subject, there did not appear to be any necessity for hearing a further argument; the Court being of opinion upon that authority, that the action was well brought. But that if any thing occurred to them before the end of the term to raise a doubt upon the subject,

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they would hear it argued again. That the only other remedy suggested for the party grieved was an inconvenient and cumbrous mode of proceeding, which involved all the difficulties urged against the present action. And that as to the difficulty of ascertaining against whom the plaintiff was to bring his action, the plaintiff must at his peril take care to sue the proper persons, otherwise he would fail in his suit.

No further mention was made of the case in Court; and the postea was delivered to the plaintiff.

Tuesday, June 13th.

KEMP *against* FILEWOOD, Clerk.
The SAME *against* The SAME.

Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden, which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley on certain days between the 11th and 16th of *September*, a general notice on the 17th to the parson, to take away *all the tithes of his (the plaintiff's) lands* within two days, is sufficient whereon to found the like action.

THESE were two actions on the case; the one brought by the plaintiff, who in 1805 was the occupier of a garden in the parish of *Syble Hevingham* in *Essex*, against the rector of the parish, for not taking away the tithes of the garden,

which

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which the plaintiff had duly set out. In support of this, the plaintiff at the trial before *Heath* J. at *Chelmsford*, proved several notices given to the defendant in that year, that at the several times mentioned in such notices, the plaintiff would set out the tithes of fruits and vegetables growing in the said garden: and that the tithes of fruits and vegetables were accordingly set out, and were not taken away, but were suffered by the defendant to rot and perish on the ground. None of these notices, which were required by the custom of the parish, were given later than the 20th of *August* 1805. There was then proved a notice in writing, signed by the plaintiff, and dated 23d of *September* 1805, and served on the defendant, which was to the following effect.—To take the tithed fruit and vegetables from the plaintiff's garden on or before the 25th instant; or the plaintiff would commence an action against him. But *Heath* J. was of opinion, that this latter notice was nugatory; not having a subject to which it might refer: for the tithes set out in *August* must, before the 23d of *September*, be rotten and mixed with the mould of the garden, and consequently not capable of being removed. And in consequence of such opinion, the plaintiff's counsel, having first offered to prove other notices to take away the tithe nearer to the times of the notices to set them out; which were rejected; because as only one notice to take away was laid in the declaration, one only could be proved; submitted to be nonsuited, to avoid a verdict against him.

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The other was a like action on the case, brought against the rector, for not taking away the small tithes of the plaintiff's garden, duly set out; and also for not taking away the tithes of barley. And in this it was proved, that the tithes of the vegetables in the garden, and of the barley in the field, were duly set out by the plaintiff, and not taken away by the defendant. The notice given by the plaintiff to the defendant, to take the tithes away, was dated the 17th of *September* 1806, in order to entitle the plaintiff to maintain the action; and it required the defendant to take away *all the tithes of his* (the plaintiff's) *lands* on or before the 19th instant. It was agreed, that by the custom of the parish the occupiers of lands were bound to give a previous notice of setting out their tithes; and it was proved by the plaintiff, that he gave several notices of setting out tithes of vegetables growing in his garden on the 11th, 15th, and 16th of *September*, and of tithing barley

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at another day, before the 17th. But *Heath* J. nonsuited the plaintiff, because the notice to take away the tithes did not specify the tithes to be taken away, nor from what lands.

These nonsuits were moved to be set aside in the last term by *Marryat*, who stated the principal points ruled at the trial in the manner before mentioned, and his objections to the nonsuits upon the grounds on which they had passed; in which objections the Court appeared to acquiesce. Then with respect to the evidence of the other notices, to take away the tithes, which had been rejected in the first action, on the ground that one such notice only was in the declaration; and that one notice having been offered in proof, which the learned judge thought insufficient for the reason stated, no other could be proved; he observed, that even if the plaintiff were precluded from offering in evidence a sufficient notice, because he had before proved one which was deemed insufficient; (which he denied) still he submitted that the form of the declaration did not warrant the objection; for it was laid that on the several days on which the tithes were set out, the defendant had notice, &c. *viz.* on such a day, &c.

Best Serj. now opposed the rules, and insisted upon the objections taken at the trial; in the first action, because the notice of the tithe having been set out, and requiring it to be removed, came above a month after the fruit and other vegetables were proved to have been set out, and was therefore
[361] nugatory for the purpose for which such a notice is required, as the things must have been rotten long before. It would therefore be in vain to send the case down to a new trial, unless indeed evidence of some other notice nearer to the time of setting out the tithes could be given. Then with respect to the objection in the other action; the notice was too general; specifying neither the nature of the tithe, nor the place from whence it was to be taken; and every notice must have a reasonable certainty with respect to the subject matter.

Lord ELLENBOROUGH C. J. In the one case, the defendant had notice when the tithes would be set out; but a month and more passed, and he did not take them away. Then the notice of the 23d of *September* was given; the meaning of which plainly is, that the plaintiff had borne with the inconvenience long enough, and that if the defendant did not remove the nusance within two days, the plaintiff would bring his action against him. What objection can there be to that? The per-

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son who is the wrong-doer is to look to the subject of the notice. If it be still fruit or vegetables, he is to take away those; if they have become rotten mould, he is to take away that. His lordship also thought the notice in the other action sufficiently plain with reference to the prior notices recently given of setting out the tithes of the fruit, vegetables, and barley.

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GROSE J. agreed.

LE BLANC J. agreed, and added that the very object of giving the notice on the 23d of *September*, to take away the tithe, after it had been suffered by the defendant to continue on the ground for above a month, was that he might remove the inconvenience from the plaintiff.

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BAYLEY J. observed that the notices in the second action of setting out the tithes were given so recently as the 11th, 15th, and 16th of *September*, before the general notice on the 17th to take all the tithes away.

Rules absolute.

PARKER *against* STANILAND.

Tuesday, June 13th.

A contract by the owner of a close cropped with potatoes made on the 21st of *Nov.* to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground *immediately*; is not a contract for any *interest in land* within the 4th section of the statute of frauds, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by the defendant.

THE plaintiff declared that the defendant was, on the 1st of *January* 1809, indebted to him in 500*l.* for a certain crop of potatoes of the plaintiff before that time *bargained and sold* by the plaintiff to the defendant at his request, and by the defendant under that bargain and sale before that time accepted, gathered, dug up, taken, and carried away: and being so indebted the defendant promised to pay, &c. There was another similar count on a quantum meruit, and other general counts for goods sold and delivered, &c. The defendant pleaded the general issue, and paid 22*l.* 1*s.* 9*d.* into court. It appeared at the trial before *Bayley* J. at *Nottingham*, that the plaintiff, being the owner of a close of about two acres, which was cropped with potatoes, agreed with the defendant on the 21st of *November*, to sell him the potatoes at 4*s.* 6*d.* a sack. The defendant was to get them himself, and to get them

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diately. The defendant employed men to dig the potatoes on the 25th, 26th, and 27th of the same month, and got 21, 24, and 33 sacks full, and on the 4th of *December* he *got seven sacks more, and 14 about *Lady-day*, the value of which was covered by the money paid into court. But there remained about three roods of potatoes which were not dug up, and which were spoilt by the frost; and the action was brought to recover the value of these. The objection taken at the trial was, that this was an agreement for an interest in land, which not having been reduced to writing, was void by the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 4. But the learned Judge overruled the objection, and permitted the plaintiff to take a verdict for the amount; reserving leave to the defendant to move to enter a nonsuit, if the Court should think the objection well founded. The motion was accordingly made by

Balguy jun. in the last term, who referred to *Crosby* v. *Wadsworth*(*a*), where a contract for the purchase of a growing crop of grass in a close, for the purpose of being mown and made into hay by the vendee, was held to convey to him an interest in the land itself, and therefore avoided by the statute, if not reduced into writing.

Lord ELLENBOROUGH C. J. observed that there was this difference between the cases, that in *Crosby* v. *Wadiworth* the contract was made while the grass was then in a growing state, which was afterwards to be mown at maturity, and made into hay. Whereas here the contract was for the potatoes in a matured state of growth, which were then ready to be taken, and were agreed to be taken immediately. There was a delivery of the whole at the time, as much as the subject matter was then capable of delivery, and the defendant did actually take away a great part of them. However a rule nisi was granted for

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further consideration of this point. But with respect to another objection which was now started, that the money paid into court covered the value of all the potatoes which had been taken, and that the remainder, which were left in the plaintiff's ground, could not be recovered in value under counts, stating that they had been "bargained and sold, *gathered, dug up, taken and carried away*," or "sold *and delivered:*" his Lordship answered, that the objection had not been taken at the trial; and that, besides, it was enough to prove that they were

(*a*) 6 *East.* 602.

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bargained and sold, without proving that they were taken away.

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Clarke and *Hemming* now shewed cause against the rule, and contended that the potatoes were sold merely as goods in a warehouse ready for delivery at the time and to be taken immediately, though they were permitted to remain there till it suited the defendant's convenience to remove them. Potatoes are often kept in the ground. [*Grose* J. That is after they have been severed.] All benefit to them from the soil was at an end, nor was it contemplated by the contracting parties. This differs the case materially from *Waddsngton* v. *Bristow* (*a*), and *Crosby* v. *Wadsworth* (*b*), where the continuing growth and nourishment of the hops in the one case, and of the grass in the other, were in contemplation. The right to the soil continued all the time in the plaintiff, and the defendant would have been a trespasser if he had meddled with it otherwise than for the special purpose of taking up the potatoes. The nature of the contract shews this; for the contract was merely for the potatoes, and they were to be sold by the sack. The defendant could not have maintained trespass against any person going on the ground: he himself had only an easement to take the crop.

Balguy, and *Balguy* jun. in support of the rule, contended [365] that if the land had been devised in this state, the devisee would have taken the potatoes against the executor; which shews that the contract was for an interest in the land. Nor can this be distinguished in principle from *Crosby* v. *Wadsworth*, upon the presumption (probably not founded in fact) that the potatoes had done growing and had ceased to derive any nourishment from the land: but it is enough that they were not severed from it when the contract was made, and therefore did not exist separately as goods: that is the only distinction recognized in the books. Larceny could not have been committed of them. This case is even stronger in one respect; for the crop could not be taken up without breaking the soil, which was to be done by the defendant; and therefore it cannot be considered as a mere easement. The defendant was entitled to the possession of the close until the crop was taken; for without that the contract could not have been executed; and therefore

(*a*) 2 *Bos. & Pull.* 452. (*b*) 6 *East*, 602.

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he must have been entitled to all the possessory remedies against a wrong-doer invading his possession.

Lord ELLENBOROUH C. J. It does not follow that because the potatoes were not at the time of the contract in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the statute of frauds. The contract here was confined to the sale of the potatoes, and nothing else was in the contemplation of the parties. It is probable that in the course of nature the vegetation was at an end: but be
[366] that as it may, they were to be taken by the defendant *immediately*, and it was quite accidental if they derived any further advantage from being in the land. This differs the present case from those which have been cited. The lessee primæ vesturæ may maintain trespass quare clausum fregit, or ejectment for injuries to his possessory right: but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil. I am not disposed to extend the case of *Crosby* v. *Wadsworth* further, so as to bring such a contract as this within the statute of frauds, as passing an interest in land.

GROSE and LE BLANC, Justices, agreed.

BAYLEY J. I do not think that this contract passed an interest in the land within the meaning of the 4th section of the statute of frauds. In the cases of *Crosby* v. *Wadsworth*, and *Waddington* v. *Bristow*, the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were growing to maturity before they were gathered: but here the land was considered as a mere warehouse for the potatoes till the defendant could remove them, which he was to do immediately; and therefore I do not think that the case is within the statute.

Rule discharged.

OLIVER *against* COLLINGS.

Wednesday, June 14th.

GASELEE moved to make a rule absolute for an attachment for non-performance of an award which had been made a rule of Court.

East opposed it, on an affidavit, that by the bonds of submission *Rowe* and *Stephens* were appointed joint arbitrators, with a power to appoint an umpire, if they could not agree. That the arbitrators not agreeing, first appointed *Hambly* as umpire; who declining to act, they next appointed *Grigg* within the time limited. That as soon as *Grigg*'s appointment was made known to the defendant's attorney, he objected to it on the ground of *Grigg*'s being upon bad terms with the defendant, and therefore an improper umpire; to which the arbitrators assenting, each of them proposed a different person: and not agreeing upon either, the plaintiff's and defendant's attornies met, and the former named a new person as umpire, which was acceded to by the latter; but (no further appointment having been made by the two arbitrators) the plaintiff's attorney called on *Grigg*, before the time was out, to proceed with his umpirage; and then an appointment of him on stamp was signed by *Rowe* and tendered to *Stephens*, who refused to execute it; notwithstanding which *Grigg* made his award on the 30th of *January* 1808 within time, after notice given to him on the morning of that day by the defendant's attorney that his appointment had been objected to and* was agreed to be revoked. He therefore contended that, under these circumstances, the Court would not by granting this attachment preclude the defendant from disputing the authority of the umpire in an action by the plaintiff on the submission-bond, if he meant to insist upon the award. That by the general rule any power given to another may be revoked before execution; and here the arbitrators who had power to appoint an umpire, and had once appointed *Grigg*, had agreed to revoke that appointment before *Grigg* had executed the umpirage, though

After the time was out for moving to set aside an award made a rule of Court, the Court granted an attachment for non-performance of it, and would not drive the plaintiff to his action on the submission-bond, on an affidavit disclosing that the arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority; but that the defendant afterwards, and before the umpire had proceeded, having objected to his appointment, because of partiality, the

* arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attornies agreed on a third person; in consequence of which the umpire objected to was called on by the plaintiff's attorney to proceed, and made his award within time.

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they had not agreed in any new appointment; and that revocation was confirmed by the attornies for both parties, who had as far as lay in their power agreed to substitute another. That *Grigg* having been appointed umpire by parol, his appointment might be revoked by parol before execution of his power. That though it was now too late for the defendant to move to set aside the award on the merits, or to impeach it on the ground of partiality or prejudice in the umpire; yet the Court had before refused attachments in cases where an objection to the award appeared upon the face of it, even after the time limited by the statute was out, for moving to set aside the award; because they would not preclude the party grieved from availing himself of the objection if an action were brought against him upon his submission-bond for non-performance of the award. So here, for the same reason, where there is a serious question of law to try, and where there seems such probable ground for suspecting the justice of the award, the Court will not lend its summary assistance, but leave the plaintiff to bring his action, which will let the defendant in to insist on the nullity of the umpirage. He said
[369] it was even now vexata questio (*a*) whether arbitrators, having once executed their power in the appointment of an umpire, could afterwards appoint another: but supposing they could not, the objection would equally apply to the appointment of *Grigg*. [*Le Blanc* J. said, that the defendant ought to have applied in time (*b*) to set aside the award upon the special circumstances of the case: and the Court would not, after the laches of the defendant, drive the plaintiff to his action merely to try a doubtful question of law, supposing this to be so.] To which it was answered, that the Court would not grant an attachment to enforce an illegal award, if no action could be maintained upon it.

Lord ELLENBOROUGH C. J. We have lately held that if an authority be once executed, it cannot be executed again (*c*). Here the arbitrators had executed their authority by an effec-

(*a*) Vide *Trippet* v. *Eyre*, 3 *Lev.* 263. and 2 *Ventr.* 113. and *Reynolds* v. *Gray*, 1 *Salk.* 70. 1 *Ld. Ray.* 222. and 12 *Mod.* 120. And vide the reasoning on these cases in *Kyd* on *Awards*, 91, &c. It seems that the refusal of one umpire to accept the appointment does not preclude the arbitrators from naming another within time.

(*b*) This was prevented at the time it was intended by the illness of the defendant.

(*c*) Vide *Irvine* v. *Elmon*, 8 *East*, 54.

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tual appointment of an umpire, who accepted and acted upon the authority so conferred on him: the consent or dissent of the parties themselves afterwards to such appointment signifies nothing (*a*). So the subsequent tender of that appointment on stamp to one of the arbitrators was merely to serve as formal evidence of it. The arbitrators afterwards, in compliance with the wishes of the defendant, made an ineffectual attempt to appoint another umpire in the place of him they had appointed before; but they could not agree on the person to be substituted, and therefore the original appointment stood as before.

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Per Curiam, Rule absolute.

(*a*) Nor can even a parol agreement between parties to abandon an award made under bonds of submission be pleaded to an action on the bond. *Braddick* v. *Thompson*, 8 *East*, 344.

AMBROSE *against* REES.

Wednesday, June 14th.

MARRYAT opposed a rule for setting aside the verdict obtained in this cause, upon the ground of an irregularity in the trial. The venue was laid in *Glamorganshire*, and the cause was tried at *Monmouth*, as the next *English* county where the King's writ of venire runs (*b*); but it was objected that it ought to have been tried at *Hereford*, according to the general custom that all causes in which the venue is laid in any county in *South Wales* should be tried at *Hereford*. But the rule being that the cause should be tried in the next *English* county, and *Monmouth* being in fact the next *English* county to *Glamorganshire*, and more conveniently situated for the trial of the cause, there seems no solid ground for impeaching the validity of the trial; though the practice relied on is easily accounted for by the consideration that *Monmouthshire* was originally a *Welch* county, and till it became an *English* county in the 27th year of *Hen.* 8. *Herefordshire* was in fact the next *English* county to *Glamorgan*. And there is no reason for

Notice having been given for the trial of a cause at *Monmouth*, which arose in *Glamorgonshire*, as being in fact the next *English* county since the st. 27 *H.* 8. *c.* 26. *s.* 4. though *Hereford* be the common place of trial; the Court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record.

(*b*) Vide 1 *Term Rep.* 313.

setting

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setting aside this verdict on the ground of surprize; for the defendant had not merely a notice of trial in the next *English* county, generally, which might have misled him by the notoriety of the * practice, but a specific notice of trial at *Monmouth*, to which he made no objection at the time.

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Abbott, in support of the rule, relied on the known practice which had always prevailed, as well since as before the statute 27 *H.* 8.; and referred to *Morgan* v. *Morgan* (*a*), where the question arose in 1656, upon an ejectment for lands in *Brecknockshire*, which was tried at *Monmouth*; and afterwards judgment was arrested, on the ground of a mis-trial, as it ought to have been tried in *Herefordshire;* for that *Monmouthshire* was but made an *English* county by statute within time of memory; and that trials in the next *English* county of issues arising in *Wales* have been time out of mind and at the common law; so that a place newly made an *English* county cannot have such a trial. And he observed, that if this trial were good, all the judgments in causes out of *Glamorganshire* tried at *Hereford* have been erroneous.

Lord ELLENBOROUGH C. J. If the question appear on the record, then the defendant cannot apply in this summary manner. And as he did not object at the time, we shall not relieve him upon motion.

Per Curiam, Rule discharged.

(*a*) *Hard.* 66.

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Wednesday, *June* 14th.

DANIEL *against* NORTH.

Where lights had been put out and enjoyed without interruption for above 20 years during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant who was in possession under such landlord from building up against such encroaching lights.

THE plaintiff declared in case, upon his seisin in fee of a certain messuage or dwelling-house in *Stockport*, on one side of which there is and was and of right ought to be six windows; and stated that the defendant wrongfully erected a wall 60 feet high and 50 in length near the said house and

windows

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windows, and obstructed the light and air from entering the same, &c. At the trial before the Chief Justice of *Chester* it appeared that the plaintiff's premises, which adjoined those of the defendant, were in 1787 altered by the then occupier, and the windows in question, (though somewhat altered since,) were then put out towards the defendant's premises; and such windows then received the light and air freely over a low bake-house, which was before that time, and continued till within the last three years to be, tenanted by one *Ashgrove*, under Sir *George Warrender*, from whom the present defendant claimed; upon the scite of which bakehouse the defendant who succeeded *Ashgrove* built the erection complained of about two years ago, which was considerably higher than the old bake-house, and darkened some of the plaintiff's windows; but would have been no injury to the plaintiff's premises, if they had continued in their original state, before the alterations which took place while *Ashgrove* rented under Sir *Geo. Warrender* the premises now held by the defendant. There was other evidence given at the trial; but ultimately the question made then, and afterwards argued before this Court, was, whether Sir *Geo. Warrender*, the then reversioner of the premises occupied by *Ashgrove*, were bound by his tenant's acquiescence for above 20 years in the windows put out by the then occupier of the plaintiff's premises against the defendant's premises. It was insisted at the trial that the defendant, standing in the place of the reversioner, was not bound by such acquiescence of the former tenant; but this was overruled by the Court below, and the plaintiff recovered a verdict. [373]

Manley Serjt. in the last term obtained a rule nisi for a new trial, on the ground of the misdirection of the Court below: and before the case was argued by the plaintiff's counsel on this day, he referred to *Bradbury* v. *Grinsell* in this Court, *M.* 41 *Geo.* 3. (*a*), to shew that the possession of an easement for 20 years, in order to operate as a bar in an action on the case, must be with the acquiescence of him who was seised of an estate of inheritance; otherwise he who has the inheritance in remainder or reversion may, when it vests in possession, dispute the right to the easement. And he said that at any rate where the premises are in lease, the landlord ought not, without notice, to be prejudiced by the laches or

(*a*) 2 *Saund. Rep.* in the notes, 175. *d. e.*

acquiescence

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acquiescence of his tenant in that which is a prejudice to the inheritance.

Topping and *J. Williams* then shewed cause against the rule, and stated that it was left to the jury to presume a grant from the owner of the inheritance after 22 years uninterrupted possession of some of the lights by the plaintiff; it appearing that the steward of Sir *George Warrender*, the landlord, resided in the town of *Stockport*, and continually passed by these
[374] premises, where he must have seen the windows: and from thence they assumed the knowledge of Sir *George*, and presumed his acquiescence. [Lord *Ellenborough* C. J. How can such a presumption be raised against the landlord, without shewing that he knew of the fact, when he was not in possession, and received no immediate injury from it at the time. That point was not put to the jury. The impression on our minds is founded upon the general principle, that a grant will not be presumed against an ignorant man, not in possession at the time of that which is to give him knowledge of the fact, and from whence knowledge would be presumed.] There are many cases where presumptions are raised against owners of land without actual notice of the fact; as in cases of rights of way and rights of common. A tenant who is interested to resist the encroachment stands on the same interest as his landlord, and therefore the latter should be bound by his tenant's acquiescence, which may reasonably be presumed to have taken place with his knowledge and concurrence.

Lord ELLENBOROUGH C. J. The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of Sir *Geo. Warrender*, though for 20 years,
[375] without the knowledge of the landlord, will bind the latter. And there is no evidence stated in the report from whence his knowledge should be presumed.

GROSE J. of the same opinion.

LE BLANC J. The objection was taken at the trial, that the landlord was not bound by the acquiescence of his tenant, without his knowledge, though for 20 years; but that was overruled

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ruled, and it was considered as a rule of law that the landlord was so bound. It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake.

BAYLEY J. The tenant cannot bind the inheritance in this case, either by his own positive act or by his neglect. If indeed the landlord had known of these windows having been put out, and had acquiesced in it for 20 years; that would have bound him; but here there was no evidence that he knew of it till within the last two years.

Rule absolute. (*a*).

(*a*) A question of this kind once arose incidentally in a case before Lord *Kenyon*; but it was not necessary in the result to sift the fact as to the knowledge of the land owners. It was an action of trespass brought by the trustees of the *Rugby* charity against *Merryweather*, [376] at the Sittings in *Middlesex*, on the 26th of *May* 1790, to try a right of way in dispute between the plaintiffs and the governors of the Foundling Hospital. There were several pleas of justification on the record, amongst others, one stating that the locus in quo (which was *Lamb's Conduit-street*) was a common highway, and that the supposed trespass was committed in removing an obstruction there. The evidence was, that the right of the soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare, by reason of the houses at the end, for above 50 years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by shewing that the locus in quo had been in lease for a long term up to the year 1780. Lord *Kenyon* C. J. asked what the plaintiffs had to say to the time from 1780 till about two years ago, when they had put up a bar. In answer it was said that they had been in treaty with the Foundling Hospital, respecting the allowing them a right of way, which was finally broken off. Per Lord *Kenyon*. If this rested solely on the ground of a question of right between the plaintiffs and the Foundling Hospital, the former would certainly not have been barred by the time which elapsed from 1780 till the obstruction was put up, pending the

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treaty between them: but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thorough-fare, that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers. The Duke of *Bedford* preserves his right in *Southampton-street, Covent Garden*, by a bar set across the street, which is shut at pleasure, and shews the limited right of the public. The jury found a verdict for the defendant upon the issue on the common highway.

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Friday, June 15th.

DOE, on the Demise of TERRY, *against* COLLIER.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife and the overplus to his nephews; and after his wife's death to the *use* of his nephews and the survivor for their lives; remainder to the *use* of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases *in trust* for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the *use* of another in fee. Held that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee.

IN ejectment for certain messuages and lands at *Swanscombe* in *Kent*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

Henry Peers, clerk, being seised in fee of the premises in question, consisting of three undivided fourth-parts of two houses, farms, and woodlands, at *Swanscombe*, by his will of the 27th of *January* 1787, devised "all and every of my messuages, "lands, tenements, and hereditaments, or part and parcel of "lands, &c. at *Swanscombe*, to *Henry Vyvyan*, clerk, and his "heirs, in trust to and for the several uses, intents, and pur-"poses after mentioned; *viz.* that the said *H. Vyvyan*, his "heirs, &c. shall out of the rents and profits pay to my wife, "*Elizabeth Peers*, 50*l.* yearly during her life, being settled up-"on her by our marriage as a jointure; and to pay the over-

"plus

" plus of such rents and profits unto my two nephews, *John* " *Consett Peers*, and *Daniel Letsom Peers*, and their assigns, " and to the survivor of them and his assigns, during the life " of my wife; and from and after the death of my wife, then " to the use of the said *J. C. Peers* and *D. L. Peers*, during " their lives, and the life of the longest liver of them, without " impeachment of waste: and from and after the determina- " tion of that estate, to the use of the said *H. Vyvyan* and his " heirs, during the lives of the said *J. C. Peers* and *D. L. Peers*, " and the life of the longest liver of them, upon trust to pre- [378] " serve the contingent uses and estates, &c. but nevertheless " to permit the said *J. C. Peers* and *D. L. Peers* and the sur- " vivor of them during their lives, and the life of the longest " liver of them, to receive and take the rents and profits of " the said lands and premises for their own use: and from and " after the several deceases of the said *J. C. Peers* and *D. L.* " *Peers*, then *in trust* for the heirs male of the body and bodies " of the said *J. C. Peers* and *D. L. Peers:* and in default of such " issue, then to and for the use and behoof of my kinsman " *Joseph Terry* and his heirs." The testator died in 1793, leaving his widow and both his said nephews him surviving. The nephews entered into possession of the demised premises. The widow died shortly after the testator. *J. C. Peers*, one of the nephews, died in 1798, without issue; the other nephew *D. L. Peers*, survived him, and on his death entered into possession of all the premises, and had issue male one son only, who was born in 1792 and died in 1796, without issue. In *Easter* term 1805, *D. L. Peers* suffered a recovery of the premises, and in *April* 1807, he granted a lease of the premises to the defendant under which the defendant is in possession. *D. L. Peers*, by his will of the 15th of *April* 1807, devised the same premises to his daughter in tail general, and died before the date of the demise in this ejectment; leaving his daughter, and *Joseph Terry* the lessor of the plaintiff, and devisee in remainder under the will of the said *H. Peers*, him surviving. The question was, whether the lessor of the plaintiff were entitled to recover all or any part of the premises in question.

Marryat, for the plaintiff, contended that *D. L. Peers* had [379] not a sufficient estate in him at the time to give effect to the recovery suffered by him. The two nephews of *Henry Peers*, the testator, took joint estates for life with several inheritances in tail male, from whence the Court would infer cross

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remainders: and the only question is, whether the estates to the heirs male be of the same quality as the estates for life of the nephews, without which they could not unite, as was settled in *Shapland* v. *Smith* (*a*) and *Sylvester* v. *Wilson* (*b*), so as to enable *D. L. Peers*, the survivor of the two nephews, to bar the entail by suffering the recovery. The testator's manifest intention was to prefer the heirs male of his nephews, and in default of such, then his kinsman *Joseph Terry*, the lessor, before the daughters of his nephews: the Court therefore will give such a construction to the will as the words may bear, so as best to effectuate that intent. It is clear that the estates for lives of the nephews, and the survivor of them, are legal estates. The only question is, whether the devise to the trustee and his heirs *in trust* for the heirs male of the bodies of the nephews be executed, so as to make that also a legal estate; for otherwise it could not unite with the legal life-estate of the nephews. But to construe it so, would defeat the manifest intention of the testator; for he changes from legal to equitable and from equitable to legal estates, in carving out the several interests to the devisees, as it seems, for the express purpose of preventing the tenants for life from barring the entail by a union in them of the legal estate of inheritance. During the widow's life, the trustee, who
[380] was to pay her an annuity out of the rents and profits, took of course the legal estate. The next remainder is to the *use* of the nephews for their lives; that use was executed in them. The next limitation is to the use of the trustee to preserve contingent remainders, &c. which was of course executed in the trustee. Then the next is to him *in trust* for the heirs male of the bodies; which varies from the term made use of in limiting the legal estate for the lives of the nephews, which is to their *use*; and the last legal limitation to *Joseph Terry* is also to the *use* of him and his heirs.

J. Berens, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. The testator uses the words *trust* and *use* indifferently: both of them are within the operation of the statute; for a trust may be executed as well as an use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words

(*a*) 1 *Bro. Ch. Cas.* 74. (*b*) 2 *Term Rep.* 131.

of

of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail.

Per Curiam, Postea to the Defendant.

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DOE, on the Demise of TERRY, *against* COLLIER.

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The KING *against* The Inhabitants of HOLM, EAST WAVER Quarter, in the Parish of HOLM CULTRAM.

Saturday, June 17th.

An order of removal, merely adjudging that the person removed was *with child and unmarried*, without drawing the conclusion that she was *chargeable*, is bad; as the stat. 35 *G.* 3. *c.* 101. which first gives the general rule that no person shall be removed till actually chargeable, and then (*s.* 6.) says that an unmarried woman with child shall be deemed to be chargeable within the intent of the act, only makes the fact of such pregnancy presumptive or primâ facie evidence of her chargeability; which is open to be rebutted by evidence of her substance or the like; shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard.

AN order by two justices of the county of *Cumberland* for the removal of *Elizabeth Mitchinson*, single woman, from *Oulton Quarter* in the parish of *Wigton*, to *Holm East Waver Quarter* in the parish of *Holm Cultram*, having been confirmed on appeal to the sessions, was now removed into this court by certiorari, and after the usual direction, run thus: "upon the complaint of the churchwardens and overseers of the poor of *Oulton Quarter*, &c. unto us, &c. being two of his majesty's justices of the peace, &c. that *Elizabeth Mitchinson*, single woman, hath come to inhabit in the said *Oulton Quarter*, not having gained a legal settlement, nor produced any certificate owning her to be settled elsewhere, *and that the said E. Mitchinson is with child and unmarried;* we the said Justices, upon due proof thereof made, &c. and likewise upon due consideration had of the premises, *do adjudge the same to be true*; and we do likewise adjudge that the lawful settlement of the said *E. M.* is in the said *Holm East Waver Quarter*, &c." And so it proceeds to direct the removal of the pauper from the one *Quarter* to the other.

The objection taken to the order below, which *Topping* was now prepared to support, was that it was defective in not stating that the pauper was *actually chargeable*; and that it was not sufficient merely to state, as it did, that she was *with*

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child and unmarried; for that might still be true, and yet the woman might have sufficient* substance of her own, or ample security be given by others to preclude the least risk of her becoming an actual burthen to the parish: and the case of *The King* v. *Alveley* (*a*), was relied on, as having put a construction upon the statute of the 35 *Geo.* 3. *c.* 101. *s.* 6. that the mere fact of a single woman being with child did not *therefore*, as an inevitable conclusion of law, make her chargeable to the parish: that the act only meant to give the magistrates jurisdiction to remove a person so circumstanced, like one actually chargeable, if otherwise a proper object of removal within the spirit of the poor laws.

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Scarlett and *Paley*, in support of the orders, said that though the Court would not intend any thing to give jurisdiction to magistrates below; yet where they had jurisdiction of the subject matter, as here, every thing would be intended in support of their order. Now the justices below have stated on the face of the order all the facts necessary to shew that the pauper was a person of that description whom primâ facie at least the law deems to be chargeable, and therefore liable to be removed, if in their judgment she were a proper object of removal: then having in fact ordered her removal, they must necessarily have drawn the conclusion that she was chargeable within the meaning of the law, though they have omitted to state in express words that legal conclusion from the facts stated. But it never is necessary in judicial proceedings to state a mere conclusion of law which follows from what is stated. In *Rex* v. *Mathews* (*b*), the principle was carried further; for an order to maintain a bastard child, which did not state that the child was likely to become chargeable, was refused to be quashed on that objection; because it was self-evident that every bastard child was likely to become chargeable. In *Hobey* v. *Kingsbury*, parishes (*c*), it was held sufficient to state the husband as likely to become chargeable, without stating the same of his wife and child, who were removed with him; because it followed as a legal conclusion. In *The King* v. *Great Yarmouth* (*d*), it was thought that the words of the act were large enough to comprehend every single woman with child, though residing under a certificate, and consequently in a situation to exclude the

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(*a*) 3 *East*, 563.
(*b*) 2 *Salk.* 475.
(*c*) 1 *Stra.* 527.
(*d*) 8 *Term Rep.* 68.

possibility

possibility of her becoming chargeable to the certificated parish; and that it was not necessary in the order to negative her having a certificate. And as in *Rex* v. *Tibbenham* (*a*), the Court thought, upon a case stating the bare fact of a married woman whose husband had been absent from her for four years beyond sea, being pregnant of a child at the time of the removal, which had since been born a bastard, was sufficient to warrant the general allegation in the order, that she had become actually chargeable; because the presumption of her being chargeable was raised by the statute from the bare fact of being with child of a bastard, if no circumstances were stated to shew the contrary; in like manner ought the legal presumption to be made from the same fact in an order, without other controlling circumstances stated. And the Court seem to have come to this conclusion in *Rex* v. *Diddlebury* (*b*), where an order, stating that *A. E. single woman* was, *by being pregnant, deemed to have become chargeable*, was held good: the Court treating the latter as a legal conclusion from [384] the fact stated of a single woman being pregnant.

Lord ELLENBOROUGH C. J. If it were an irrefragable conclusion that, being a single woman, and with child, the party removed must be deemed to be chargeable within the meaning of the statute, then this order would be good: otherwise the justices ought to have drawn that conclusion, in order to shew that in their judgment she was a proper object of removal within the poor laws. But, consistently with this order, the party might have been a single woman with child worth 10,000*l.*, or she might have given the most ample security to the parish against any charge which could be thrown upon them. The statute in question first gives the general rule, that no persons shall be removed before they are actually chargeable. It then says, that single women with child shall be *deemed and taken* to be actually chargeable within the true intent of the act. But still the justices ought to draw the conclusion that she is within that general rule; otherwise it would come to this, that every single woman with child, whatever was her substance, might be removed by the parish officers. Being unmarried and with child, such a person is presumptively chargeable, from the strong probability of the fact that she must be so; but there may be circumstances,

(*a*) 9 *East*, 388. (*b*) *Ib.* 398.

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such as the substance of the party, or the giving a complete indemnity to the parish, which may exclude that presumption. Now every circumstance of that sort might have existed in this case, and yet the order, as it is framed, be true. In *The King* v. *Diddlebury* the justices *deemed* her to have become chargeable; but she could not have been *deemed* to be chargeable if * those circumstances had existed in her instance. It ought to appear by the order that the justices have exercised their judgment upon the matter and repelled the existence of such circumstances by their adjudication that she was chargeable, in order to shew that she was a proper object of removal within the meaning of the law.

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GROSE J. The Legislature never meant to say that at all events an unmarried woman with child should be removed as chargeable; bnt only to state the circumstance of such a person being with child as evidence that she was chargeable, unless repelled by other facts to shew that she was not. The justices therefore ought not to have barely stated the fact of her being with child, but to have drawn the conclusion that she was chargeable, to shew that she came within the meaning of the poor laws.

LE BLANC J. The order of removal is defective. The act of parliament only gives a power to remove persons who are actually chargeable; the justices therefore must find that the party is chargeable before they can remove her. But the act has made the circumstance of an unmarried woman being with child evidence of her being chargeable: the justices therefore should have adjudged upon that circumstance: instead of which, they have merely found the fact, but have not drawn the conclusion.

BAYLEY. J. Before the statute of the 35 *Geo.* 3. it was essential for the justices to have adjudged that the party removed was likely to become chargeable, in order to give them jurisdiction to remove her. But by this statute another rule is given, and it is not sufficient that the party is likely to become chargeable, but they must be actually chargeable before they can be removed. To avoid, however, the inconvenience likely to ensue from the application of the general rule to the case of a single woman with child, the act has made that circumstance primâ facie evidence of her being chargeable. But that only furnishes a rule of evidence, on which the justices are to decide; and many cases may exist, as those put by my Lord,

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of the substance of the party, or of an indemnity to the parish, which may rebut that presumption. Here the order only states the facts of the woman being a single woman and being with child; and does not go on further to draw the conclusion of her being chargeable. If then there may be cases where a woman, though single and with child, may not be removeable, as not being chargeable within the meaning of the law, the order is clearly not sufficient, but the justices ought to have gone on to draw the conclusion. In the cases of *Tibbenham* and *Diddlebury* the Court considered the 6th section of the act as giving a rule of evidence only.

Orders quashed.

Scarlett then observed that the magistrates had been misled by following the precedent stated in a new edition of *Burn*, published since the statute and since the author's death.

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BROOKE *against* BOOTH.

Friday, *June* 16th.

After judgment by default in debt on bond to secure an annuity payable quarterly; and scire facias thereon suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 *W.* 3. *c.* 11.; held that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings *on payment of future damages, costs and charges, toties quoties*; though the third section only gives costs in scire facias after *plea* or *demurrer*.

JUDGMENT by default was obtained above two years ago in debt on bond, conditioned to secure an annuity of 40*l.* a year, payable quarterly. On this a scire facias issued suggesting a breach on the non-payment of the last quarter; which was found for the plaintiff; and at the sittings after last *Hilary* term the damages were assessed at 10*l.* under the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 8. It had been the practice not to allow costs in this case, because the same statute (s. 3.) only gives costs in scire facias after *plea* or *demurrer*. But in *Easter* term last *Dampier* moved for a rule to shew cause why the plaintiff should not have his costs, on the words of the 8th section; which, after providing that the judgment shall remain as a further security to answer damages for further breach of covenant in the same deed or writing, upon which the plaintiff shall have a scire facias suggesting other breaches, &c. enacts "that upon payment or satisfaction in manner as aforesaid

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"aforesaid of such future damages, costs, and charges, as "aforesaid, all further proceedings on the judgment are again "to be stayed, and so toties quoties;" which he contended gave the plaintiff a right to his costs, though it was not a case mentioned in the third section. That the giving costs in certain cases in sect. 3. did not negative the plaintiff's right to costs in another case provided for by a subsequent section. He then argued that the 8th section clearly gave the plaintiff a right to his costs in the present case, because the judgment stood for the penalty; and the defendant by the words of that section could not redeem himself from that judgment and the

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execution consequent thereon but by payment of the costs as well as the damages.

The rule came on among the peremptories in this term, and no one appeared for the defendant; but as the motion went to alter the established practice, *Dampier* drew the attention of the Court to it, and repeated his former observations: when *the Court*, upon looking at the different clauses of the statute, made the

Rule absolute.

Saturday, June 17th.

The KING *against* The Inhabitants of CORSHAM.

An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order.

TWO magistrates, by an order, removed *Mary Bowler*, wife of *William Bowler*, and their two children, by name from *East Moulsey* in *Surry* to *Corsham* in *Wilts*. The Sessions, upon appeal, confirmed the order, subject to the opinion of this Court upon the following case.

William Bowler was settled by birth in the parish of *Garsdon* in *Wilts*, and at the age of 12 years acquired a settlement in *Corsham* by hiring and service; and subsequent thereto, in 1798, he married the pauper *Mary*, by whom he afterwards had the two children mentioned in the order. *Wm. Bowler* was, on the 9th of *April* 1807, by virtue of an order of justices duly made on that day, removed from *Charlton* in *Wilts* to *Garsdon*, against which last mentioned order no appeal was made by *Garsdon*. *W. Bowler* has done no act to gain a settlement in *Corsham* by hiring and service; but he has been from time to time relieved by *Garsdon* since the time he was re-

removed thither under the said order; having gained no settlement elsewhere since the said removal to *Garsdon*.

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* *Marryat* and *Lawes*, in support of the orders, argued that the order of removal unappealed against, from *Charlton* to *Garsdon*, was not conclusive that the settlement of the pauper was in *Garsdon*, upon the same question arising between *East Moulsey* and *Corsham*; and that *East Moulsey* was not estopped by the ignorance or laches of a third parish from shewing the truth of the case against *Corsham*. Estoppels are odious, and only bind parties or privies; but res inter alios acta can never be set up as an estoppel against strangers. In none of the cases has such an order been deemed conclusive, except against the parish to which the removal was made, whether appealing or not against it: and the phrase which occurs in some of the cases, that the order is conclusive as to all the world, must be understood with respect to the parish against whom the order is established. Then if the former order be not conclusive, the pauper's settlement is found to be in *Corsham*. They referred to the cases of *Harrow* and *Ryslip* parishes (*a*), and *Rex* v. *Sarratt*. (*b*)

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Nolan and *Cowley*, contrà, were stopped by the Court; but they afterwards mentioned the opinion of *Buller* J. in *Rex* v. *Kenilworth* (*c*), that there was no proposition in the law of settlements more clear than that an order of removal unappealed against, was conclusive against all the world; and that this was so clearly and so universally established, that it ought never to be impeached.

Lord ELLENBOROUGH C. J. If the pauper were settled in *Garsdon* at the time of the former order made, could not *Corsham* as well as all other parishes have taken advantage of that, upon a question of settlement? Now the order of removal to *Garsdon*, which was submitted to, is the most authentic proof of his settlement being there at the time of the order made; and we must intend every thing in support of that settlement so adjudged. It is in effect a statutable certificate, if I may so express myself, that the pauper was then settled at *Garsdon*: the statute (*d*) gives him a settlement there: and the fact

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(*a*) *Salk.* 524, 5. (*b*) *Burr. S. C.* 74. (*c*) 2 *Term Rep.* 599.

(*d*) The stat. 13 and 14 *Car.* 2. *c.* 12. gives authority to two justices of the peace by their warrant to remove paupers to the place where they were last legally settled.

stated

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stated by the Sessions of a prior settlement in *Corsham* is immaterial.

LE BLANC J. If the former order were not conclusive as to the settlement being in *Garsdon* at the time, *Garsdon* would escape the effect of it altogether; for this order would be conclusive upon *Corsham*, so as to prevent *Corsham* removing to *Garsdon*.

GROSE and BAYLEY, Justices, assenting,

Orders quashed.

Saturday, June 17th.

STEINMAN and Others *against* MAGNUS.

Where a debtor entered into an agreement with his creditors, whereby they agree to receive 20*l.* per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person (also a creditor,) which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed it, and it did not appear that he had actively induced any of the other creditors or the surety to sign it; and that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors.

THIS was an action upon a bill of exchange dated the 10th of *October* 1804, drawn by the defendant upon *G.* and *M. Isaacs*, payable six months after date to the plaintiffs or order for 400*l.*, which was dishonoured when due by the acceptors. There was also a like count* upon another bill drawn by the defendant for 376*l.* 4*s.* 1*d.* in favour of the plaintiffs; a count for goods sold and delivered, and the common money counts. The original consideration of these bills was goods sold and delivered by the plaintiffs to the defendant in 1804: and the defendant being afterwards in failing circumstances, the following agreement (not under seal) was entered into and signed by 17 creditors, the names of the plaintiffs being at the bottom of the lists. "We the undersigned, being respectively creditors of *Moses Magnus*, do hereby agree for ourselves respectively to take and accept 20*l.* per cent. in full payment and satisfaction for our several and respective debts due at the date hereof: and upon payment of the said 20*l.* per cent. we hereby release and for ever discharge the said *M. Magnus* for ever as to the remaining 80*l.* And it is hereby agreed to receive the said 20*l.* per cent. in manner following; *viz.* 10*l.* per cent. within one month after the execution of these presents; 5*l.* per cent. secured by the acceptance of Mr. *Garland*, payable in five

* [391] months

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months; and the remaining 5*l.* per cent. on the like acceptance payable in nine months. Dated this 11th of *November* 1806." *Garland*'s signature was amongst those of the creditors; and he paid the sums to the plaintiffs stipulated for by him on account of the defendant, and also certain collateral sums for expences of litigation, &c. which being taken at the trial in reduction of the original debt, the plaintiffs recovered a verdict for the balance amounting to 668*l.*; after an objection urged and overruled as to the whole of their demand. The ground of that objection was stated by

Garrow in moving for a new trial; that the agreement of the plaintiffs to compound with the defendant was an inducement [392] to the other creditors to execute the composition; and without that, *Garland* would not have given the securities which he did for part payment of the debt, and which have since been paid. That these were sufficient considerations for sustaining the agreement by the plaintiffs to release the residue of their demand upon the defendant; and the suing for it in this action was in fraud of *Garland*, and also of the creditors in general, who had compounded their respective debts on the basis of the agreement: on which ground he distinguished this from *Fitch* v. *Sutton* (*a*), where the composition moved from the debtor himself, and there was nothing to shew that there was any stipulation between the plaintiff and the other creditors, for remitting the rest of their demands upon any mutual consideration.

Lord ELLENBOROUGH C. J. then said that the validity of such an agreement, as it affected the surety and the other creditors, was not considered at the trial; but his opinion was governed by the case of *Fitch* v. *Sutton* (*b*), which was founded upon the authorities of *Heathcote* v. *Crookshanks* (*c*), *Comber* v. *Wane* (*d*), *Pinnel*'s case (*e*), *Adams* v. *Tapling* (*f*), and *Co. Litt.* 212. *b.* which went to shew that the agreement, not being by deed, to accept a less in satisfaction of a greater sum than was due was not binding as against the original debtor. But the present view of the case made it fit to be re-considered; and therefore the Court granted a rule, to set aside the verdict, &c.: against which

(*a*) 5 *East*. 230. (*b*) *Ibid.* (*c*) 2 *Term Rep.* 24.
(*d*) 1 *Stra.* 426. (*e*) 5 *Rep.* 117. (*f*) 4 *Mod.* 88.

Park

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Park and *Marryat* now shewed cause, and relied altogether upon the cases before cited, and the rule of law on which they were founded, that the taking of a less sum cannot be a satisfaction of a greater, unless it be by deed. [On which Lord *Ellenborough* observed, that the general doctrine of *Fitch* v. *Sutton*, would not be disputed, but that this would be distinguished from it, on the ground that it was a fraud upon *Garland*, and the other creditors, who were induced to sign the agreement with a view to liberate the defendant from any further demands, on payment of the proportion settled; as was said by Lord *Kenyon* in *Cockshot* v. *Bennett* (*a*): and his Lordship wished the case to be argued on that ground.] To this they answered, that in *Cockshot* v. *Bennett* and that class of cases (*b*), the compositions were by deed; and there was evidence that other creditors were induced by the plaintiffs to accept the compositions. But here there were no facts of that description: no evidence that *Garland* was induced to become surety by any undertaking of the plaintiffs, or that any of the other creditors were induced to sign by their example: on the contrary, the names of the plaintiffs were signed after all the others.

Garrow and *Comyn* were stopped by the Court.

Lord ELLENBOROUGH C. J. If the whole subject had been presented to my mind at the trial as fully as it is now, I should not have had any doubt upon the subject. It is true that if a
[394] creditor simply agree to accept less from his debtor than his just demand, that will not bind him: but if upon the faith of such an agreement a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder of his debts: and still more when, in addition to that, other creditors have been lured in by the agreement to relinquish their further demands, upon the same supposition; that makes all the difference in the case, and the agreement will be binding. In *Fitch* v. *Sutton*, our opinion proceeded upon the precise terms of the case as stated to us on the report of the evidence: if the evidence had gone but a very little further, it would have altered our decision.

(*a*) 2 *Term Rep.* 763-5.

(*b*) Vide *Jackson* v. *Duchaire*, 3 *Term Rep.* 551. *Jackson* v. *Lomas*, 4 *Term Rep.* 166. *Peise* v. *Randall*, 6 *Term Rep.* 146. and *Leicester* v. *Rose*, 4 *East*, 372.

But

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But on the case now presented to us, it would be a mixed question of law and fact to go to the jury, whether, after the plaintiffs had entered into this composition in conjunction with *Garland* and the other creditors, it were not a fraud upon those persons, within the principle of the case of *Cockshott* v. *Bennett*, to endeavour to obtain a further payment from the defendant, whom they all purposed to liberate upon the terms of that agreement.

The other Judges assented; and *Bayley* J. added that in *Fitch* v. *Sutton* the composition was probably paid out of *Sutton*'s own money: but here the plaintiffs bought *Garland*'s security for a part of the debt upon the terms of freeing the defendant from any further demand after payment of the sums agreed upon; which have been paid; and therefore it is a fraud upon *Garland* to sue the defendant afterwards.

Rule absolute.

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WINTERBOURNE *against* MORGAN and Others.

Saturday, June 17th.

Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for 15 days, during the 4 last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass quare clausum fregit for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law.

THE plaintiff declared in trespass, that the defendants on the 30th of *December* 1807 and on divers other days, &c. with force and arms broke and entered the dwelling-house of the plaintiff, and then and there disturbed him in his possession thereof, and remained there for a long time, to wit for ten days then next following, and then and there seized, took and carried away the plaintiff's goods, and converted the same to their own use, against the peace, &c. to the plaintiff's damage of 500*l*. Some of the defendants demurred specially; and the defendant *Morgan* pleaded not guilty; and at the trial before Lord *Ellenborough* C. J. at *Westminster*, gave in evidence, that the breaking and entry was made by virtue of a warrant of distress issued by the plaintiff's landlord against the plaintiff for 50*l*. rent in arrear, under which the goods in

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question were taken and sold: but it appeared that the defendants continued in possession of the goods upon the premises for eleven days before they began to remove them, and did not quit the premises till four days after that, during which four days they were employed in removing goods; after which they were sold in payment of the rent. A question was then raised on the part of the defendants, whether as their original entry and possession under the warrant of distress was lawful, and only their continuance in possession, after the time allowed by law (*a*), unlawful; and the stat. **11** *Geo.* **2.** *c.* **19.** *s.* **19.** having provided, that where any distress has been made for rent, "and any irregularity or unlawful act shall be afterwards "done by the party distraining, the distress itself shall not "therefore be deemed to be unlawful, nor the party making "it be deemed a *trespasser ab initio;* but the party aggrieved "by such unlawful act or irregularity, shall and may recover "full satisfaction for the *special damage* he shall have sustained "thereby and no more, in an action of *trespass*, or *on the case*, "at the election of the plaintiff:" whether the action of trespass vi et armis were the proper remedy; or whether it should not have been an action on the case? And as the point was admitted to be new (*b*), a verdict was found for the plaintiff, for damages, and leave was given to the defendants to move to set it aside and enter a nonsuit, if the Court should be of opinion that the objection was well founded. This was accordingly moved on a former day, and the case of *Wallace* v. *King* (*c*), was referred to in support of the objection; where it was held that trover would not lie for goods irregularly sold under a distress since the statute **11** *Geo.* **2.**; that statute having exempted the party making such irregular distress from being deemed a trespasser ab initio, and given an action on the case

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(*a*) The st. 2 *W.* & *M. st.* 1. *c.* 5. directs that goods distrained for rent may be appraised and sold, if not replevied within 5 days: and the st. 11 *G.* 2. *c.* 19. *s.* 10. provides that they may be secured and sold upon the premises, in like manner, and under the like directions, as under the 2 *W.* & *M.*

(*b*) The case of *Griffin* v. *Scott*, 2 *Ld. Ray.* 1424. where the landlord, keeping a distress on the premises for an unreasonable time after the 5 days allowed by the st. 2 *W.* & *M. st.* 1. *c.* 5., namely, for 8 days, was held to be a trespasser, was before the stat. 11 *Geo.* 2.

(*c*) 1 *H. Blac.* 13.

to

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WINTERBOURNE *against* MORGAN.

to the party grieved: the Court there considered trover the same in effect as trespass. And *Etherton* v. *Popplewell* (*a*), which * was also mentioned, where the action of trespass was maintained, was distinguished from this, on the ground that the defendant had, at the time of making the distress, turned the tenant's family out of possession; which was a distinct and substantive act of trespass, not within the scope or protection of the act; and had also continued in possession of the house after the rent was paid.

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Garrow and *Puller* shewed cause against the rule; and admitting that a mere irregularity, as to the manner of making the distress, would not make the entry and continuance of the party on the premises during the five days allowed by the law a trespass; contended that his continuing in possession after the time allowed by law, was in itself a distinct trespass, not depending on the previous regularity or irregularity of the distress, but altogether out of the protection of the act; which was not intended to cover subsequent trespasses, in continuing a wrongful possession for an indefinite period, but only to prevent the original entry, which was in fact lawful, from being deemed a trespass by relation and operation of law on account of any subsequent irregularity of the party distraining during the period allowed for his continuing on the premises, or afterwards in making sale of the distress; reserving however to the party grieved, his remedy in damages, for any act in itself unlawful or irregular, to be recovered either in an action of trespass, or on the case; that is, his action of trespass for acts in themselves unlawful, and trespasses; and his action on the case for consequential injuries. The 19th section of the statute 11 *G.* 2. recites the hardship upon landlords, against whom damages as trespassers ab initio had been recovered to the amount of the rent due for which the distress had been made, on account of some subsequent irregularity or tortious act in the disposition of the distress taken; and it was to relieve them from this conclusion of law only that the provision was made. The 21st section enables them, when sued in trespass or in case, to plead the general issue, and give the special matters in evidence: without that, the defendants must have justified their entry and continued in possession under the distress, by virtue of the statute; and consequently could not have

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(*a*) 1 *East*, 139.

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covered the trespass for any longer period than the law allowed for such continuance, which is for five days only. And though if a party enter by leave for a certain time, and continue longer, such mere continuance will not make him a trespasser; yet if he afterwards refuse to go out, the action must be by trespass and not case. The case of *Wallace* v. *King* (*a*), merely decided that trover would not lie by the original owner for goods which had been regularly distrained and regularly removed for the purpose of sale, though appraised afterwards by persons sworn before the constable of another parish: inasmuch as the statute protected the landlord from being deemed a trespasser ab initio by relation. In *Lynne* v. *Moody* (*b*), which was before the statute, the Court held that trespass would not lie merely for taking an excessive distress: the first taking being lawful, and there being nothing subsequent to make it a trespass, as there is where the distress was abused. The subsequent abuse therefore was considered as a substantive act of trespass, which before the statute was carried back by relation to the original taking: and the effect of the statute is only to save that relation, and not to alter the nature of the act itself; leaving it therefore a trespass, as committed at the time of the abuse. So in *Etherton* v. *Popplewell* (*c*), though the original entry to make the distress were lawful: yet Lord *Kenyon* said that no answer could be given to the action of trespass for the excess of the defendant's conduct in turning the plaintiff's wife out of possession. And Mr. Justice *Grose* relied also on the fact of the defendant's continuing in possession of the house after the rent was paid. They also relied on the general practice in the like cases to implead the wrong-doer in trespass, and not in case.

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Park, in support of the rule, said, that as the question had never before been raised, the practice of pleading in trespass could have little or no weight in the construction of the statute. If the party be still deemed a trespasser for continuing on the premises after the period allowed for removing the goods at the expiration of the five days, or for doing any other unlawful or irregular act there, arising out of his possession of the distress, it will not in effect be of any avail to him that he is not to be deemed a trespasser ab initio. There is nothing in the statute of *Geo.* 2. to confine the protection to

(*a*) 1 *H. Blac.* 13. (*b*) 2 *Str.* 851. (*c*) 1 *East*, 142.

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acts done within five days. It meant to put the entry of the landlord, and his possession of goods under a distress, on the same footing as if made and taken by leave of the tenant; leaving to the latter his remedy by trespass, or case, for any specific damage which he should sustain by the wrongful or irregular act of the other. But in order to make this option consistent with the general provision of the statute, it must be understood that the action of trespass was to be confined to distinct and independent acts of wrong, disconnected with the entry or continuance on the premises by the distrainors for the purpose of the distress, or the subsequent treatment of the distress; such as, in *Etherton* v. *Popplewell*, the expulsion of the tenant's wife from the house, or any wrongful act done after the distress was settled. But here there is nothing of that sort; in addition to the mere act of continuing on the premises beyond five days; for which, if the defendant had entered by leave of the plaintiff, trespass would not have lain at common law. And such continuance can only be made an act of trespass by considering that which is in fact all one continuance from the original entry as a distinct and original entry after the five days. By this form of declaring, the defendant has no notice for what specific act of trespass and damage he is sued; which the statute meant to give him. It treats him as a trespasser ab initio, beginning with his breaking and entering, which must be referred to the original breaking and entering, to which only it applies in fact. Then the 20th section, which provides "that no tenant shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends have been made by the party distraining, before such action brought," will be rendered nugatory; for the landlord cannot tell for what trespass the tenant seeks to recover, and therefore cannot apportion the amends to be tendered. The case of *Wallace* v. *King* (*a*) governs this.

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Lord ELLENBOROUGH C. J. I should have had great doubt in this case, whether upon the construction of the statute the action of trespass were well founded, if one of the trespasses charged and proved had not been the taking and removing of the goods from the premises, and the disturbance of the plaintiff's possession of his house after the time when by law they ought to have been removed; and the case had only rested upon the mere personal remaining of the party on the

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(*a*) 1 *H. Blac.* 13.

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premises without any act done by him after the time allowed by law. The statute provides, that where the entry for the distress is lawful, the distrainor shall not be deemed a trespasser ab initio by reason of any irregularity or unlawful act done by him afterwards; but the party grieved shall recover satisfaction for the special damage thereby sustained, and no more, in an action of *trespass*, or *on the case*, at the *election* of the plaintiffs. But I cannot consider this election as giving him the option of either of those remedies in every case of an unlawful act or irregularity, whether adapted to the nature of such act or not by the general rules of law. I cannot, for example, consider it as enabling him to maintain trespass against the distrainor either for an excessive distress, or for a detaining in his hands of the proceeds of the goods sold under the distress ultrà the rent and costs. I must therefore understand the option as given, according to the subject-matter of the grievance, i. e. to maintain trespass, where by the general rules of law trespass would be the proper remedy; and case, where case would be so. And in the instance I have last put, if the party grieved chose to wave his complaint for the tort, and to bring assumpsit to recover back the surplus money withheld from him, I see no reason why he may not do so. The statute, however, having said that the party whose entry was at first lawful shall not be deemed a trespasser ab initio for any subsequent irregularity or unlawful act, I should have had great doubt whether the mere act of remaining in possession of the goods on the premises after the time allowed by law, if the same had not been accompanied or followed by the act of removing them, must not

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have been referred to the original lawful entry by the operation of the statute; and thereby have assimulated this to the case of one who enters by leave of the owner, and does not quit at the time, or after the purpose satisfied, to which his leave extended; who according to the doctrine discussed in the *Six Carpenters'* case (*a*), *is not* by *merely not doing* what he should a *trespasser*. I would not be understood to say that in no case will a party be a trespasser by continuing in possession of another's property after the time allowed by law: such continuance may, and in many cases must be accompanied by a repetition of the same or different acts of trespass, with those which attended the original entry: but my doubt arises upon the particular

(*a*) 8 *Rep.* 146.

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provision of this statute, which says that he shall not be deemed a trespasser ab initio by reason of any subsequent unlawful act or irregularity, i. e. merely on such account; and from the difficulty of saying when and in what cases the mere continuance of a lawful entry and possession would by the general rules of law become a new substantive trespass. The true test, as it appears to me, by which it may be decided whether a *mere remaining* on the premises, without a new breaking and entering, be properly a trespass, where the original breaking and entering is protected from being so by the provision of the statute, is by considering whether a declaration in trespass that the defendant with *force and arms remained* on the premises for so many days, without more, would be good. I am not at present aware of any authority or principle of law which would warrant such a mode of declaring in trespass. In this case however, as I have said already, we are not driven to the necessity of deciding whether the mere act of remaining on the premises after the allowed time be a trespass in itself, [403] inasmuch as the act of removing the goods after such time appears to me to be a substantive trespass; and that notwithstanding the party removing may have acquired a lawful property in the goods themselves by means of a distress originally lawful. For it is not a necessary consequence of law from the circumstance of my having goods in another man's close, that I may remove them by my own act (*a*): and it appears to me to make no difference that I might once have removed those goods from the place where they now are, and have done all necessary acts for the purpose, without being a trespasser, when the authority which exempted me from being so has wholly ceased. After that period perhaps even a mere act of egress, but much more probably the active interference with goods antecedently on the premises, by changing their position there and removing them therefrom, may be deemed a trespass; and if the latter act be a trespass, it is sufficient for the purpose of the present action.

GROSE J. agreed on the same ground.

LE BLANC J. I think that this action is maintainable; and I wish not to be concluded in any subsequent case from saying that a party might be a trespasser by continuing on the premises wrongfully, even though he did not remove the goods therefrom after the time allowed by law. All that the act, as

(*a*) Vide *Cro. Eliz.* 246. and 2 *Rol. Rep.* 55.

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I conceive, meant to say, was that a party whose entry was lawful to take a distress on the premises should not be made a trespasser ab initio for any subsequent irregularity, as he was deemed to be * before that act. The object of it was to separate that which he had a right to do from that which was irregular and unlawful: and therefore it meant to say that the landlord should not be deemed a trespasser for entering and taking the goods in the first instance, or for continuing in the possession of them on the premises for so long time as the law allowed him to continue there: but that if he continued there after that time, he should be treated as a trespasser for that which was in law a trespass; or be liable to an action on the case for such injuries as would in law subject him to that remedy by the party grieved, according to the nature of the act done by him. I admit that if he did not continue on the premises after the time allowed by law, but were guilty of an irregularity during that time, he would not be liable in trespass quare clausum fregit, because his continuance there for the purpose of guarding the distress would be lawful: but here he remained there after that time; and that I think made him a trespasser, even if he had not taken away the goods afterwards.

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BAYLEY J. I am bound to say, upon what appears to me to be the true construction of the statute, that the defendant in this case was a trespasser; and that trespass is the proper remedy against a person who has made a distress continuing upon the premises after the time allowed by law; because I think his continuing there in possession of the goods after that time did not divest him of the property in those goods taken under the distress, or make him liable to an action of trespass for removing them after that time: and if not, this action would not be maintainable if he were not a trespasser by continuing on the premises after the time allowed by law for removing the goods. A continuation of every trespass is in law a new trespass, as a continuation of every imprisonment beyond the time allowed by law is a new imprisonment. I consider this declaration as imputing to the defendant that for every day's continuance on the premises after the time allowed by law, he was a trespasser, and therefore that he was a trespasser for nearly ten days of the time. The jury were not to give the plaintiff damages for the defendant's continuing

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upon the premises for the time, during which he was justified in remaining there by the act; but the defendant was to be considered a trespasser, and the plaintiff entitled to damages, for the time the defendant remained there afterwards.

Rule discharged. (*a*)

(*a*) WASHBORN *against* BLACK, Sittings at *Westminster* after *Michaelmas*, 1774. *Buller* J.'s MS.—Trespass for entering a house, and taking goods, &c. This was done in taking a distress for rent. After the distress was taken a man was left in possession till the fifth day, and then the goods were replevied. During the five days the person left in the house went into different parts of it. Mr. *Dunning* insisted that he was a trespasser; for he ought either to have put the goods all into one room, and kept possession of that only, or to have removed the goods out of the house. And he cited a case of *Thornton* v. *Cruther and Others*, *C. B. Mich. 9 G.* 3. before Lord Chief Justice *Wilmot*, where it was so holden.—Lord *Mansfield* C. J. said that the strict law was so; and that the man might if he pleased have stripped every room and put all the goods together, and by that means greatly damaged them: but instead of doing that, he acted for the benefit of the plaintiff, and left the goods as he found them: therefore he should leave it to the jury to consider whether the plaintiff did not consent. The only evidence of consent was that Mrs. *Washborn* had said how much she was obliged to Mr. *Mountfort*, who had acted like a gentleman. And on this his Lordship left it to the jury to consider, whether the plaintiff did not consent to an act which he said was clearly for his benefit.—Verdict for the defendant.

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Monday, June 19th.

CHAMBERS *against* JONES.

A plea to an action against the marshal, &c. for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore though the plea only stated that, after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c. under and by virtue of the said commitment, &c. and the replication traversed that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea and included in the traverse; and therefore the plea is negatived by shewing in evidence that after the prisoner's return he again escaped and died out of custody.

THIS was an action of debt against the marshal for an escape, in which the declaration alleged a recovery had against *H. Caulfield* for 2120*l.* damages in a certain action; that a writ of non omittas ca. sa. issued to the sheriff, upon which he took *H. C.* in execution for the damages; that *H. C.* was afterwards duly committed to the defendant's custody, there to remain in execution at the suit of the plaintiff until, &c.; and that the defendant afterwards and whilst *H. C.* remained in his custody as aforesaid, permitted him to escape; the plaintiff not being satisfied his damages, &c. The defendant pleaded, 1st, nil debet. 2dly, That after the commitment of *H. C.* in execution for the damages aforesaid, to wit, on the 1st of *January* 1808, *H. C.* wrongfully and without the privity or consent of the defendant escaped out of his custody; and that afterwards, and before the exhibiting of the plaintiff's bill, and before the defendant had notice of such escape of *H. C.*, to wit, on the 2d of *January*, *H. C.* returned back again into the defendant's custody, as such marshal; and that the defendant, as such marshal, did thereupon *then and afterwards keep and detain the said* H. C. *in his custody in execution* at the suit of the plaintiff for the said damages, under and by virtue of the said commitment, to wit, at *W.* &c.; which said escape of the said *H. C.* in this plea mentioned is *the same escape* whereof the plaintiff has above complained. And that *H. C.* after he had so returned, and after the exhibiting of the plaintiff's bill, to wit, on the 10th of *September* in the same year, died: and this the defendant is ready to verify. Replication on the 2d plea, That the defendant, as such marshal, did not, after the return of *H. C.* into his custody, as in that plea is stated, *keep and detain* him in his custody in execution at the suit of the plaintiff, *in manner and form* as the defendant hath in his plea alleged. On which there was issue.

It

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It appeared in evidence, at the trial before Lord *Ellenborough* at the sittings in *Middlesex*, that the prisoner, who had the benefit of the rules, did escape and return, as stated in the plea; and that after that return he was in the defendant's custody in execution at the plaintiff's suit: but that he again escaped and died out of custody; though the body was afterwards brought within the rules again. Whereupon it was objected that, upon the issue joined between these parties, the plaintiff was not entitled to recover, inasmuch as all the facts stated in the plea, and affirmed by the defendant, in the issue joined, were proved. That the first escape was effectually answered: and that if the plaintiff meant to rely upon a second escape, he should have new-assigned it. The objection however was overruled at the trial, and the plaintiff recovered a verdict for the amount of the debt; the point being reserved for further consideration upon a motion for a new trial. The case was accordingly moved; and the rule for setting aside the verdict and granting a new trial was supported on a former day in the last term by *The Attorney-General*, *Topping*, and *Marryat*; and was opposed by *Scarlett* and *Owen*. The grounds of the argument and the principal authorities were afterwards fully stated by the Court in delivering their judgment. And after consideration,

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Lord ELLENBOROUGH C. J. now delivered the opinion of the Court, (after stating the pleadings, and the facts of the case as before mentioned;) his Lordship proceeded.—Upon this evidence the point was taken at the trial, which has been insisted upon before the Court, that according to the issue joined between the parties, this evidence did not entitle the plaintiff to a verdict: that the first escape was effectually cured by the prisoner's return; and that to have recovered in respect of the second escape, there ought to have been a new assignment. The issue joined was, *whether the defendant kept and detained the prisoner after his return in manner and form* as the plea alleged: and the allegation in the plea is, that upon the prisoner's return, the defendant did then and afterwards keep and detain him. The plea therefore is altogether indefinite as to the period of detention; and the proof of any detention, even for a single moment, after the return, would satisfy the literal terms of it. It must be understood however that the defendant meant, that there had been such a detention as would make the return an answer to the action; i. e. that he had *so* kept

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kept and detained the prisoner as to be no longer liable for the first escape. And this brings us to the question, Whether upon a plea of subsequent return, it be necessary to state any and what detention? If it be not necessary to state any detention, or if it be sufficient to state some detention, without bringing it down to the period when the action was commenced, there ought to have been a new assignment: but if it be essential to
[409] state a detention, and to shew that it either continued when the action was commenced, or that something had intervened to put a legal termination to it; a detention to the time of the action must be considered as the detention properly in issue upon these pleadings; and as the evidence negatived such a detention, the verdict for the plaintiff is right. In *Griffiths* v. *Eyles*, 1 *Bos. & Pull.* 413. the plea of subsequent return alleged a detention to the commencement of the action; and *Eyre* C. J. seems to have thought that it would have been a good replication in such case to have stated, that the defendant had not kept the prisoner in custody from the time of the return: and that, upon such a replication, proof of an escape after the first return would have been admissible, and would have entitled the plaintiff to a verdict. This shews that in his opinion it was necessary to allege a detention in the plea, and to shew that it continued to the time of the action: and this opinion will appear corroborated by several authorities. The pleas of recaption or return (which for this purpose are the same in point of effect) always state a detention at the time of the action, or shew that it has been terminated by legal means. In *Whiting* v. *Reynell*, *Cro. Jac.* 657., the plea was, that the defendant had retaken the prisoner, and *yet hath him.* In *The Queen* v. *Briggs*, *Litt. Ent.* 151., the plea (which was signed by *Sir Edward Northey*) was, that the defendant had retaken the prisoner, and that he *yet detains him.* In *Clench* v. *Mullens*, *M.* 16 *Geo.* 2. 2 *Richardson's B. R. Practice*, 90. there is a similar plea signed by Mr. Serjt. *Draper*; and in *Chambers* v. *Gambier*, and *Gray* v. *Gambier*, *H.* 8 *G.* 2. similar pleas were signed by Mr. Serjt. *Hawkins.* Reference may also be
[410] made to 2 *Thomps. Entr.* 143. 151. *Read's Declarations*, 204. 5 *Wentworth's Pleadings*, 228. 241. and to *Bonafous* v. *Walker*, 2 *Term. Rep.* 127. In *Willis* v. *Gambier*, *Pract. Reg.* 199. the defendant pleaded a return, and a detention till the prisoner was discharged by the Court of Common Pleas, by virtue of the act for relief of debtors with respect to the imprisonment of their persons. To this plea there was a demurrer; and

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and the ground of objection was, that the plea ought to have shewn that all the proper previous steps had been taken to make the discharge legal. The Court overruled the demurrer; because the defendant was bound to obey the order of the Common Pleas, and could not question its validity. This case, however, shews that it was understood both at the bar and by the Bench, that it was essential in the plea to shew a detention; and to account for its not continuing down to the time of the action. If a momentary detention would have done, and the plea would equally have been a bar whether that detention were legally terminated or not, the counsel could never have taken the objection, that the discharge was not properly pleaded: nor can it be expected that the court would have decided upon it. But a more unequivocal case is *Meriton* v. *Briggs*, 1 *Ld. Raym.* 39.: the defendant there pleaded a recaption, without stating that he still detained the prisoner: the plaintiff traversed the recaption; but added in the traverse, quod adhuc detinet; so as to make the *then detention* parcel of the issue: the defendant demurred, and shewed for cause, that the plaintiff had included in his traverse matter not alleged in the plea, viz. quod adhuc detinet: and he insisted that if the defendant had suffered the prisoner to escape a month after the recaption, yet the plaintiff should be barred by the recaption for the old escape, and should have a new action for the new one: but this was denied by *Holt* C. J.; and judgment for the plaintiff. Now upon what principle could this judgment proceed but this, that the recaption was no protection to the sheriff, nor any answer to the action, unless there was a subsequent detention to the time of the action, or a legal discharge from that detention: that such a detention therefore was to be considered as being virtually implied in the plea, and that the plaintiff might therefore include it in his traverse. As the precedents, therefore, invariably shew a detention down to the commencement of the action, or a legal discharge from it; as the cases of *Griffiths* v. *Eyles*, *Willis* v. *Gambier*, and *Meriton* v. *Briggs*, import that this ought to be shewn, we are of opinion that the plea in this case ought to be considered as implying, that there had been from the time of the prisoner's return a valid and operative detention: and as such a detention was negatived by the evidence, the verdict was properly found for the plaintiff, and this rule ought to be discharged.

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Rule discharged.

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Monday, June 19th.

BINNS *against* MORGAN.

After declaration filed conditionally in a town cause until special bail should be put in and perfected, and notice thereof served, the defendant has only four days for pleading in abatement; and if he put in special bail on the 4th day, which are *excepted* to on the 5th, and not justified till the 9th, he is too late then to plead in abatement: and the plaintiff having demanded a plea, and none other being pleaded, is entitled to sign judgment as for want of a plea.

THIS was a rule for setting aside interlocutory judgment and subsequent proceedings for irregularity. The defendant was held to bail on process returnable on the 1st return of *Easter* term, 19th of *April*. On the 20th of *April* a declaration was filed conditionally until special *bail should be put in and perfected, and notice of such declaration served, in the name of *John Morgan*; to which the defendant was to plead in four days: and a rule to plead was given the next day. On the 24th special bail was put in for the defendant by the name of *Isaac Morgan*, sued by the name of *John Morgan*, and notice thereof was served at 9 o'clock that night. Exception to the bail was entered, and notice served, on the 25th. On the 27th the defendant gave notice of adding and justifying bail for the 29th; on which day the bail justified. The plaintiff demanded a plea on the 1st of *May*; and on the 2d of *May* the defendant took the declaration, which had been filed conditionally as above, out of the office, and filed a plea of misnomer, in abatement, that his Christian name was *Isaac*, and not *John*. And the question was, Whether he were out of time to plead in abatement? If he were, the interlocutory judgment, which was signed on the 16th of *May*, for want of a plea was irregular: otherwise, not.

Park shewed cause against the rule, and insisted that there was no distinction between the time for pleading in abatement to a declaration filed conditionally or absolutely; the defendant was equally bound to plead in four days. If he lose his opportunity, by not putting in and perfecting his bail in time, it is his own fault.

Lawes, contrà, said that the defendant cannot plead in abatement till he has put in and perfected his bail; except, as was held in *Dimsdall* v. *Neilson* (*a*), in a country cause, from

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(*a*) 2 *East*, 406. There the Court held, in the case of a country cause, that if the defendant put in special bail in time, he might plead in abatement, though the bail were not perfected till after the 4 days, if they were ultimately perfected within the time allowed by the practice of the Court. And the same point was ruled, on the authority of that case, in *Holland* v. *Sladen*, M. 47 G. 3. B. R., which was a town cause.

the

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the necessity of the case: but this was a town cause. The time for putting in bail did not expire till the 24th; and that falling on a *Sunday*, the defendant had till the 25th. Then came the exception, which postponed the perfecting bail; but the same bail were perfected on the 29th of *April*; and within 4 days after that, namely, on the 2d of *May*, (there being no demand of plea till the 1st) the plea in abatement was filed: which he contended to be in time; otherwise a defendant in this situation will be ousted of his plea in abatement.

BAYLEY J. The defendant might have put in bail within the four days, and given notice of justifying them, and then pleaded in abatement: and if the bail were afterwards perfected, the plea would have stood good.

Per Curiam. The plea in abatement was out of time, and therefore the judgment was regularly signed.

Rule discharged.

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PILL *against* TAYLOR.

Tuesday, June 20th.

THIS was an action of assumpsit for money had and received to the plaintiff's use by the defendant, and on the common money counts. The defendant pleaded a tender, before action brought, as to 2024*l.* 6*s.* 3*d.*; which he paid into court: and the general issue, as to the residue of the demand. The plaintiff, by his replication, admitted the tender, and accepted the

One who at the time of a prize taken by a custom-house cutter bore the commission of mate, but was *acting commander* on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to *the commander*'s share of the prize under the king's warrant of the 26th of *November* 1803, referring to his former warrant of the 4th of *July* 1803, which speaks generally of the share to be given to the *commander*, officers, and crew, *as a reward for their service:* and this, though the former commander, whose *commission as such* had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting the share of a *deputed mariner*, who at the time of such capture made was on board *acting* AS MATE by like authority.

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same tendered in satisfaction of so much of his demand; and then proceeded to recover the further extent of such demand; on which issue was joined. And at the trial a special verdict was found, stating in substance: That *J. M. Allan*, on the 26th of *March* 1803, was the commander of the *Hinde* cutter, in the service of the commissioners of the customs, by virtue of a commission from them, dated 20th of *October* 1801, (which was set out.) That on the 26th of *March* 1803 the commissioners, by their order of that date, directed to the comptroller and collector of the customs at *Falmouth*, after noticing certain charges which had been preferred against Mr. *Allan*, *commander* of the *Hinde* cutter, of inactivity and inattention to the service in which he was employed; of which charges, after reading the evidence against him and his answer thereto, he appeared to them to be guilty, "and consequently an unfit person to be any longer employed in the service of that revenue; they stated that they had "*dismissed* him therefrom;" and directed the comptroller and collector "*to call in his commission and instructions*, and transmit the same to the board *cancelled*." And they also enjoined those officers to take care that the cutter should be kept at sea "*under the command of the mate*, to the end that the service might not suffer, *until another commander should be appointed*;" and they were "to pay *the said mate* the usual allowance for victualling *during the time he should act as commander*." That in consequence of such order the said comptroller and collector called in *Allan*'s commission as such commander; and it was delivered up and cancelled on the 29th of *March* 1803, and transmitted to the commissioners in *London*; and on the next day *Allan* left the cutter and went on shore, and did not return again on board until a new commission was granted to him as after mentioned. That before and at the time of *Allan*'s dismission and of the cancelling of his commission, *Pill*, the plaintiff, was a *deputed mariner* of and belonging to the *Hinde* cutter, but *acting as mate*, and serving on board in that capacity; and on the said 29th of *March* 1803 he received from the comptroller and collector of the customs at *Falmouth* an order, stating that the commissioners having *dismissed* Mr. *Allan from the command* of the *Hinde* cutter, they (the comptroller and collector) thereby "directed and enjoined him (*Pill*) to take care that the cutter be kept at sea *under his command*, to the end that the service might not suffer, until *another commander* should be appointed:"

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and that they had "the board's directions to pay him the usual allowance for victualling during the time he might *act as commander.*" That on the 2d of *April* 1803 four of the commissioners of customs *executed a commission* appointing *Pill* to be *mate* of the said cutter. And on the 5th of the same month, they issued their order to the comptroller and collector at *Falmouth*, stating that, on referring to their report of the 17th ultimo, it did not appear "that *Captain Allan* was present at the charge" against him as required by their orders; to report to them forthwith as to that fact; "and to charge him *de novo*; and in the mean time *to suspend all proceedings as to his dismissal.*" That Captain *Allan* was not present at the hearing of the charges against him, though he had previous notice of the same. And the commissioners of the customs, having investigated the matter again on the 16th of *June* 1803, transmitted their order thereon in a letter of that date to the same officers at *Falmouth*, wherein they state that having considered the former charges and the renewed charge against Mr. *Allan*, "the *present commander* of the *Hinde* cutter," and read his answers thereto, and the evidence of the persons examined, &c. they deem his answer to the first charge satisfactory; and that he is guilty of the second charge; but that under all the circumstances of the case; and considering that the revenue had not been injured by the mode adopted by Captain *Allan*, though highly irregular and improper, for reimbursing himself the loss sustained in victualling his crew, for which it appeared that he had the example of his predecessors, &c.; and that he had shewn himself a meritorious officer for 15 years; they therefore direct the *Falmouth* officers to enjoin him to be particularly circumspect in his conduct in future: "and we therefore hereby *rescind our order of the* 26*th of* March *last for his dismission*, and direct you to deliver to him his commission and instructions in order that he may return to his duty." That the commissioners having before received the cancelled commission, made out a *new commission* for Captain *Allan* of the *same date* as his former commission, and transmitted the same to the *Falmouth* officers in a letter on the 23d of *June* 1803, with directions to deliver the same to Captain *Allan*. That in consequence of the before-mentioned order of the 29th of *March* 1803 the plaintiff *Pill* immediately took upon himself the command of the *Hinde* cutter, and continued in the exercise of such command from that time until the 29th of *June* following, when

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when the new commission was delivered to *Allan* as commander of the cutter, who thereupon resumed the command of her. That between the 29th of *March* 1803 and the granting of such new commission to *Allan*, and whilst *Pill* had the command of the cutter and was on board of the same, namely, in *May* 1803, the cutter captured certain vessels from the enemy. That on the 18th of *March* 1803 the commander-in-chief of the King's ships at *Plymouth* sent an order to *Allan* as commander of the cutter to receive on board her a lieutenant, four petty officers, and six seamen, with a month's provisions, and proceed therewith to the western ports in the neighbourhood, for the purpose of impressing men. That on the 26th of *March* 1803, before making the captures, Lieutenant *Senhouse* with the petty officers and seamen were sent on board the cutter, with directions to make reprisals on the *French*, and to detain *Dutch* vessels, *as stated in his majesty's warrant* after mentioned, and continued on board on such service till after making the captures. But *Allan* was not on board the cutter at the time of making the captures, nor at any time after he left the cutter, until he resumed the command as aforesaid; nor did any person act as commander on board at the time of making the captures except *Pill*, who from the time of his receipt of the order of the 29th of *March* 1803, until *Allan* was so restored to and resumed the command, had the command of and acted as commander of the said cutter and the officers and crew thereof, and from time to time victualled the same; and he was afterwards paid the usual *pay as mate*, and the usual allowance *in respect of victualling, as commander*. That the defendant *Taylor*, as prize agent to the cutters employed in the custom-house service, on the 9th of *November* 1804 presented a memorial to the treasury, in which he described *Allan* as commander of the *Hinde* cutter; and stated the fact of the captures of the 28th of *May* 1803, under the order stated; the condemnation in the Court of Admiralty; and the application for the prize-money amounting to 361*l.* to be paid to the memorialist for the use of the *officers and crew* of the said cutter, though she had not a letter of marque at the time. That this was followed by other memorials to the like purport from the prize agent, and by others from the admiral on the station, and on behalf of Lieutenant *Senhouse*; and on the 26th of *November* 1805 the King granted his warrant for the distribution of the prizes, in which it is stated that whereas Lieutenant *Sen-*

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Senhouse of the ship *Conqueror* was on the 26th of *May* 1803 appointed by the port admiral at *Plymouth* to the *Hinde* revenue cutter, with orders to make reprisals on the *French*, and to detain *Dutch* vessels, agreeable to the instructions he should receive from his Captain (*Louis*); that Captain *Louis* accordingly gave Lieutenant *Senhouse* further orders, &c. That the said revenue cutter *Hinde, under the command of Lieutenant* Senhouse, during the time she was in the service of the *Conqueror* as aforesaid, seized and detained certain *French* and *Dutch* vessels, which had been condemned as prize, and the proceeds were in the Admiralty Court: His Majesty then proceeded to direct 1-8th of the moiety of the proceeds to the Port Admiral; 3-8ths to the captain, officers, and crew of the [419] *Conqueror*, including Lieutenant *Senhouse* and the officers and men put on board the *Hinde* revenue cutter from the *Conqueror;* "and the remaining 4-8ths *to the commander, officers, and crew of the said* Hinde *revenue cutter*, or to *R. Taylor*, general prize agent for all captures made by custom-house cutters; to be distributed amongst them *conformably to our proclamation for the distribution of prizes*, and according to the sanctions and penalties of the existing prize act, &c.; and the proportion hereby granted to the *commander, officers, and crew* of the revenue cutter *Hinde, to be distributed amongst them conformably to our warrant dated 4th* July 1805, directing the distribution of the proceeds of prizes taken by custom-house vessels." That by the King's warrant lastly referred to the prize money is distributed into 32 parts, of which 14 parts are given to the commander, 7 to the mate, 3 to deputed mariner or mariners, if any, exclusive of their shares as mariners, and 8 to other mariners: or if there be no deputed mariners, one-half to the commander, 1-4th to the mate, and 1-4th to the mariners. And it is therein stated to have been recommended to his majesty, that these or some portions of prizes made by custom-house vessels "shall be distributed amongst the commanders, officers, and crew of the vessel making such capture, *as a reward for that service*," &c. That no memorial was presented to the King or to the Treasury by *Pill*, except as aforesaid; nor was it known to his majesty before or at the time of making his warrant or order of the 26th of *November* 1805, that *Allan* was not on board the *Hinde* cutter or in the actual command thereof at the time of making the captures, or that *Pill* at that time had the command or acted as commander of

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the said cutter. The special verdict then stated that on the 10th of *December* 1801 one *J. John* received a custom-house commission appointing him to be a *deputed* mariner on board the *Hinde*, by virtue of which he was acting as deputed mariner when *Pill* was appointed to the command of the cutter; but on such appointment of *Pill*, and during the time that *Pill* acted in such command, he ceased to act *as mate* of the cutter, and *John* during all that time acted as mate in the place of *Pill*, and not as deputed mariner, nor did any person act as deputed mariner during that time. That the captured vessels were duly condemned as prizes, and 1-4th of the proceeds was paid to the defendant as the general prize agent for custom-house captures, amounting to 9253*l.* 18*s.* 6*d.* That *Pill*'s share, if entitled to share *as commander*, without deduction of a deputed mariner's share, was 4626*l.* 19*s.* 3*d.*, or if subject to such deduction 4048*l.* 12*s.* 6*d.* But if *Pill* were only entitled to share *as mate*, then 2024*l.* 6*s.* 3*d.*; which latter sum was tendered to him by the defendant before the action brought, and a tender thereof being pleaded, the plaintiff took that sum out of court, and the remainder of the sum claimed continued in the defendant's hands.

This case was argued in the last term by *Lawes* for the plaintiff, and *Richardson* for the defendant. The argument turned principally on the terms of the King's warrants stated in the special verdict; but the counsel on both sides reasoned also by analogy to the decisions which had taken place on the prize proclamations in respect to claims by officers in the royal navy; and these cases were referred to; *Johnson* v. *Margetson*, 1 *H. Blac.* 261. *Taylor* v. *Ld. H. Pawlett*, *ib.* 264. *note*. *Lumley* v. *Sutton*, 8 *Term Rep.* 224. and *Ld. Vise. Nelson* v. *Tucker*, 4 *East*, 238. The case was directed to stand over for consideration; and in this term

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

The question upon this special verdict is, Whether the plaintiff, *Philip Pill*, who *acted as commander* of the *Hinde* cutter, in the service of the customs, at the time when the several captures mentioned in the special verdict were made, be or be not, upon the facts therein stated, under his majesty's warrant of the 26th of *November* 1805, referring to his former warrant of the 4th of *July* 1805, entitled to share *as commander* of that cutter, or as *mate* only? if in the latter character, he has

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has been already paid all that he is entitled to receive as mate by a payment into court upon the plea of tender. If he be entitled to share as commander, and there be no deputed mariner's share payable in this case, he must then recover the further sum of 260*l.* 13*s.*, in addition to what has deen already paid him as for a mate's share. The plaintiff's right, which is derived solely from his majesty's bounty, rests entirely on the terms of the king's warrant. That warrant is professedly granted on a recommendation of the Lords of the Treasury, "that the whole or some portion of the proceeds should be distributed amongst the commanders, officers, and crew, of the vessel making a capture, *as a reward for that service*:" and the warrant afterwards proceeds to make the distribution recommended, by giving to the *commander* 14-32 parts of the sum to be distributed, where there was a *deputed mariner*, and one half where there was no deputed mariner. As the declared objects of the distribution are "the commander, officers, and crew of the vessel making the capture," and as the declared inducement to the distribution is, "*a reward for that service*," it is clear that no persons were intended to share but such as united in themselves one of the described characters and functions on board the vessel, and also a claim to reward by actual service performed in such character at the time of making the capture; which intention clearly excludes the claim of *Allan;* inasmuch as he performed no actual service whatever in making the captures in question, and of course could have no claim to reward on that account; and also as clearly includes the claim of *Pill* to a certain extent, as he was certainly serving on board, under some one at least of the specified denominations of service, at the time of making the captures: but in respect of what particular character, and to what amount his claim should be admitted, is the question to be determined. The warrant supposes that there may or may not de a deputed mariner or mariners on board at the time of making any particular capture, and provides for that contingency by varying the distribution between the other persons entitled to share accordingly: but it assumes in general, for the purpose of distribution, that there always will be a commander, and a mate. And the question then will be, Whether a person filling at the time of the capture made either of those functions, under a temporary appointment thereto, made by the comptroller and collector of the customs at the port to which his cutter belongs,

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under an authority for that purpose from the Board, will satisfy the terms of the king's warrant; or whether it be necessary that he should have been appointed to that situation by an actual commission from the commissioners of the customs, under their hands and seal, in the usual form, determinable of course at the pleasure of the commissioners. The plaintiff was, in point of commission, only mate at the time of the capture made; his commission as mate bearing date the 2d of *April* 1803, and the captures in question having been made in the *May* following. The commissioners of the customs having, for the reasons by them assigned in their letter of the 26th of *March* 1803, addressed to the comptroller and collector of the port of *Falmouth*, to which the *Hinde* cutter belonged, thought fit to dismiss Mr. *Allan* from the command of that cutter; proceed to enjoin the comptroller and collector "to take care that "the cutter be kept at sea, and in constant motion, *under the* "*command of the mate*, to the end the service might not "suffer, until *another commander* should be appointed:" and they were "to pay the said mate the usual allowance for victualling during the time he should *act as commander*," &c. In obedience to which letter, the comptroller and collector, on the 29th of *March* 1803, proceed to execute the commands of the Board, by communicating to the plaintiff the fact of *Allan*'s dismission from the command of the *Hinde* cutter, and his own appointment, in these words: "We hereby direct and "enjoin you to take care that the said cutter be kept at sea "and in constant motion, *under your command*, to the end "that the service may not suffer, until *another commander* shall "be appointed. And we have the Board's directions to pay "you the usual allowance for victualling *during the time you* "*may act as commander*; but you are to take especial care, "the failure of which you will have to answer at your "peril, to render a just and true account of the number "of mariners really and truly victualled; and also a list
[424] "containing the names of those not victualled; distin-"guishing the particular times in each respective case; so "that the crown may not be defrauded." It will be observed that the duties cast upon him by this written order of the comptroller and collector, made under the express authority of the Board for that purpose, and which is in effect a commission from the Board, are those which were before required to be discharged by the preceding commander of the cutter,

under

under the several articles of his instructions referred to in the special verdict, and form no part of his prescribed duty under his commission as mate. The plaintiff is appointed expressly to the end, *that the service may not suffer*, (which imports an expectation at least that the service might by this means be prevented from suffering) until another commander should be appointed; and he is appointed under express notice of the responsibility of his situation, and a denunciation of the peril to which he would be liable, if he should fail in rendering a just and true account of the number of mariners really and truly victualled; and which was the very offence for which his predecessor in the command was dismissed. He is allowed the *usual allowance* for victualling during the time he should *act as commander*. The orders of the Board to the comptroller and collector, and of the collector to the plaintiff, are silent on the subject of the precise pay he was to receive; but as he was afterwards only in fact paid the pay of mate, he was (it may be supposed) meant from the first to receive no higher rate of pay. Under these orders he was clearly *acting commander* for all purposes in the interim, until another commander should be appointed in the room of *Allan*, who had been dismissed. He bore, therefore, pro tempore, that description and quality of office, with all the duties, risks, and [425] responsibility annexed to it, to which his majesty's warrant, according to its obvious and literal import, attaches the eventual advantages of a commander's share in the moiety of prize profits distributable under such warrant. If he were commander for all purposes of trust, responsibility, and danger; and during the period of his command had the good fortune to assist, in such his character of commander, in making those captures, a portion of which his majesty has specifically assigned to *the commander*, eo nomine as such, "*as a reward for that service*;" how can we say that a person, thus circumstanced, was not the intended object of his majesty's bounty, under the description of *commander?* The only argument against it is that the king meant by the term *commander* an officer bearing a regular permanent commission, under the hands and seal of the commissioners of customs, for that office: and as it is clear that the plaintiff bore no such commission, the consequence of this argument would be, that the sum claimed would not belong to the plaintiff; and as it could not belong to *Allan*, would remain the unappropriated peculium of his majesty. But upon

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what words is this argument built? In the first place, supposing the deputed mariners to be appointed by commission only, as probably is the case, it would have been natural for his majesty, when he mentioned them, if he had meant by *commanders* and *mates* persons duly appointed to those offices, in like manner as *deputed mariners* are to theirs, i. e. *by commission* only, to have so said: but he does not: he merely uses the words *commanders* and *mates*; and which words are satisfied by a situation of actual command, however uncertain the period of its duration might be. Indeed what certainty of
[426] tenure, beyond that of good pleasure, is there for any commander in that service, whether appointed by commission or otherwise; and what material difference is there between an appointment expressed or impliedly made during pleasure, and an appointment *until another commander should be appointed*; an event equally depending on the uncertain pleasure of the persons empowered to appoint? Supposing the plaintiff had been allowed, as he might have been, to continue in the undisturbed command of the cutter, under the comptroller and collector's appointment, down to the present time, the legal construction of the king's warrant, and his claims under it, would still have been exactly the same; though the hardship of excluding him from the share he claims would have appeared more striking in that case than in the present. But the doubt which has been cast over this case has arisen principally from the retrospective re-appointment of Captain *Allan* to the command; a person who, as having no concern in making the captures, can by no correct construction of the warrant possibly be allowed to take the share now in question; and from some supposed analogy to situations of superior command in the royal navy; to which the service in question bears no very near relation or resemblance. The rules for the gradual succession and appointment of officers in the naval service, the permanence of their rank, the quality of their duties, the remuneration of their services under the king's prize-proclamation, are all peculiar to that department of public service, and form no adequate rule for governing the construction of the king's grant in a case like this; that is, in respect to persons accidentally and occasionally filling situations of marine employment and command in a perfectly distinct branch of pub-
[427] lic service. But we do not conceive that any rules, drawn by any fair analogy from the regular course of the naval service

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service itself, nor any principles to be collected from any one of the naval prize cases cited in argument, will at all affect the claim of the plaintiff to a commander's share under the circumstances stated. Upon the whole, as the plaintiff was an actually appointed and then serving custom-house commander, under every responsibility belonging to that character, at the time of making the captures in question; and as in making such captures he performed that specific service, for which the moiety of the prize proceeds is, according to the declared purpose of his majesty's warrant, meant to be *a reward*; and as we cannot find any ground of objection to his title, from the mere want of a commission in form under the hands and seal of the commissioners of the customs, sufficient to countervail his claim as founded on the above circumstances; we are of opinion that such claim ought to prevail, and that the judgment on this special verdict ought to be for the plaintiff. And inasmuch as we are also of opinion that there was no *deputed mariner* in this case, entitled to share as such, independently of his superior character of mate, in which he is specifically entitled under the king's warrant; we are of opinion that the plaintiff is entitled to recover the sum of 2602*l.* 13*s.*, being the balance of the plaintiff's share of the prize-money in this case; and in which prize-money we are of opinion that he is entitled to share, as commander of the cutter, without being subject to any deduction on account of a deputed mariner's share.

Judgment for the Plaintiff to recover accordingly.

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Tuesday, June 20th.

ROUTH *against* THOMPSON.

After a proclamation by the king in council to detain and bring into port all *Danish* vessels, *a hired armed ship of his majesty* took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there towards defraying in part the expence of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day hostilities were declared against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight *by order and on account of the captors*. Held that a statement in a case reserved, that the insurance was *on account of the captors*, precluded the consideration whether a count in the declaration could be sustained averring the interest to be in the crown, and the insurance to be made *on account of his majesty*; and that the captors had no insurable interest, as they could claim nothing of right, but only ex gratiâ of the crown; the *Dane* having been seized and detained before any declaration of war against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court.

THIS was an action upon a policy of insurance tried before Lord *Ellenborough* C. J. at *Guildhall*, in which a verdict was taken for the plaintiff for 276*l.* 7*s.*; subject to the opinion of the Court on the following case.

That on the 2d of *September* 1807 an order by the king in council was made, of that date, which ordered that no subjects should be permitted to enter and clear out for any of the ports within the dominions of the king of *Denmark* until further orders; and that a general embargo should be made of all vessels belonging to the subjects of the King of *Denmark* then within or which should thereafter come into any of the ports, &c. of his majesty's dominions, together with all persons and effects on board such vessels; and directing the commanders of his majesty's ships of war and privateers to detain and bring into port all vessels belonging to the subjects, or bearing the flag, of the King of *Denmark*; but that the utmost care should be taken for the preservation of all and every part of the cargoes on board any of the said vessels; so that no damage or embezzlement whatever be sustained. And the Lords Commissioners of his majesty's treasury were to give the necessary directions therein, as to them might appertain. This order of council was gazetted on the 5th of *September*; and on the 10th the officers, crew, and soldiers on board * his majesty's hired armed ship called *The Duchess of Bedford*, in the pleadings mentioned, took and detained off the coast of *Lisbon* the *Danish* ship *Knud Terkelson*, loaded with salt, the property of *Danish* subjects, and sent her into *Lisbon*, being in a very

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leaky state, and requiring considerable repairs, which were then performed; and the salt was sold towards defraying the expence of such repairs, but was insufficient for that purpose: but no proceedings were instituted in any court of admiralty. The ship being repaired, and there being at the time a considerable demand at *Lisbon* for tonnage to convey *British* property to *England*, the captors by their agents took on board of her a cargo of wines and other merchandize to be carried to *London* on freight, which would have amounted in the event of the ship's arrival at *London* to 1510*l.* On the 3d of *November* 1807 another order of the king in council was published, reciting that the King of *Denmark* had issued a declaration of war against his majesty and his subjects; and ordering that general reprisals should be granted against the ships, goods and subjects of the King of *Denmark*, excepting any vessels to which his majesty's licence had been granted, &c.: so that as well his majesty's fleets and ships, as also all other ships and vessels that shall be commissioned by letters of marque, or general reprisals, or otherwise, by his majesty's commissioners for executing the office of lord high admiral of *Great Britain*, shall and may lawfully seize all ships, vessels, and goods belonging to the King of *Denmark* or his subjects, &c. and bring the same to judgment in any of the courts of admiralty within his majesty's dominions, &c. On the 3d of *November* 1807 the ship with her cargo of wines, &c. on board sailed with convoy from *Lisbon* on the voyage insured, and in *December* following was lost by the perils of the sea. The plaintiff on the 12th of *November, by order and on account of the captors*, effected the policy declared on *at and from* Lisbon *to* London, at a premium of 12 guineas per cent., to return 5*l.* per cent. for convoy: and the insurance was declared to be 3500*l.* on the ship *Knud Terkelson*, valued at 3500*l.* and on freight; but the freight was not valued in the policy; and the defendant subscribed the same for 300*l.* and received the premium thereon. None of the officers or crew of *The Duchess of Bedford* are owners of that ship; neither is his majesty the owner thereof, otherwise than as having hired the same as an armed ship, to be employed as such for a time in his majesty's service. The defendant has not paid the premium into court. If the Court were of opinion that the plaintiff was entitled to recover, the verdict was to be entered for him, on such counts, and for such sum as they should direct: if otherwise, a nonsuit was to be entered:

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entered ; and this case was to be turned into a special verdict, if the Court should so think fit.

The case was argued on a former day by *Richardson* for the plaintiff, and by *Carr* for the defendant: and the questions made were, whether the detainers or captors had an insurable interest in the ship and freight on their own account, founded upon a lawful possession, with the certain expectation, as it was called, of a grant from the crown on the condemnation of the prize. Or if they had no such insurable interest suo jure, whether they could sustain the action upon a count in the declaration alleging the interest to be in his majesty, and the insurance to have been made on his account.

[431] *Carr* denied that the crown had adopted the act of insurance in this case; on which ground principally he distinguished this case from *Lucena* v. *Crawfurd*. The subject has been so exhausted in the full report of the case of *Lucena* v. *Crawfurd* (*a*) in the House of Lords, that it is needless to repeat the arguments and authorities, all of which are there collected.

Lord ELLENBOROUGH C. J. said, that the case involved a question of considerable magnitude; and that the Court would consider of it. And at the end of the term his Lordship delivered their opinion.

This was an action on a policy of insurance upon ship and freight from *Lisbon* to *London*. The ship was a *Dane*, had been seized as such after his majesty's proclamation of 2d *September* 1807, by his majesty's armed ship the *Duchess of Bedford*, had received some repairs at *Lisbon*, and had taken in a cargo there for *London*. In one count the interest is averred to be in his majesty, and the insurance is stated to have been on his account; and in another, the interest is averred to be in the commander, officers, and crew of the *Duchess of Bedford*; and the insurance is stated to have been on their account. The case expressly states that the policy was effected on account of the captors; and that statement precludes us from considering it as effected on account of the crown. Had there been no such specific statement, it might have been open to us to consider, whether the policy were not referable to the interest of the crown : but after a distinct statement that it was effected

[432] (not on behalf of the crown, but) on account of the captors, it must be referred wholly to them, and the plaintiff must recover

(*a*) 2 *New Rep.* 269. and vide *Park on Insurance*, (6th edit.) 300.

or

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or fail according as they have or have not a right to aver an interest in themselves. This brings us to the question, Whether they had an insurable interest? Their right in this respect has been put upon two grounds; first, That they had a well-grounded expectation, warranted by the practice of the crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them: and, secondly, that they had the lawful possession, and were liable either to the crown or the foreign owner, for the safe custody of the vessel: and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing of the crown. Had the crown made the grant in their favour, it would have been altogether ex gratiâ, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize. Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole; had there been no danger or difficulty in them, the grant would probably have been smaller: and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty; and has a man a right to indemnity, because he has lost the chance of receiving a gift? Had the ship arrived in safety, the captors would have had the chance of a grant from the crown; but [433] can they, in respect of that chance, insure the ship's arrival? To what extent could they insure? Not to the whole value, because the grant might only have been of part: nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance, and how is that to be estimated? Is application to be made to the Crown, to know what it would have granted if the ship had arrived? And what is to be the case if the answer be, as it probably would be, that the crown never has considered, nor has occassion to consider that point. Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest

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interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the king's; the freight is altogether the king's; and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the king may be induced to give them something out of the produce of such ship and freight? In *Lecras* v. *Hughes*, which was cited in the argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided that the capture was within the prize-act, and the captors had therefore a right vested by that act. It is true that another question (which Lord *Mansfield* considered as by no means the strongest) was raised, whether possession and the expectation of future benefit, founded on the contingency of a future grant from the crown, but warranted by universal practice, amounted to an insurable interest? and the Court gave a decided opinion that it did. But what fell from Lord *Eldon* in *Lucena* v. *Crawford*, 2 *New Rep.* 323. is materially at variance with the decision of the Court of *K. B.* on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of *K. B.* in respect to a contingency of the nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the present. As to the second ground, that the captors had the lawful possession, and were responsible either to the crown or to the *Danish* owners for the safe custody of the vessel; is this a true representation of their situation? They certainly had the lawful possession; but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their own? The seizure was warranted by the king's proclamation: that made their possession lawful. The subsequent declaration of hostilities put an end to any claim by the *Danish* owners, and of course to all responsibility of the captors in respect to them. It then became their duty to act for the best, with a view to the safety of the ship, and the mere interest

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interest of the crown therein. They were bound to leave *Lisbon;* it was for the interest of the crown that they should make the ship instrumental in withdrawing from *Lisbon* as much property as she could properly carry: they acted, therefore, for the best, and were consequently justified in respect to the crown in what they did. The crown cannot call upon them for damages; and they have no right to ask for a sum, as an indemnity, when they have not been, and (under the circumstances stated) could not have been damnified. The consequence is that the plaintiff has no right to recover upon the policy. The question then arises, whether he has any right to recover back his premium? and as there was no fraud in the captors in effecting this policy; as there was no illegality in the voyage or insurance; and as the resistance of the underwriters to the claim upon the policy proceeds upon the ground that there was no risk; the plaintiff is entitled to his premium, and the verdict should be entered accordingly.

TREWHELLA and Another *against* ROWE.

Tuesday, June 13th.

The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were de-

THIS was an action of assumpsit, brought to recover a sum of about 200*l.* claimed to be due from the defendant as owner of a certain vessel to the plaintiffs, for furnishing the said vessel with sails, &c.: and the declaration consisted of the common counts for work and labour, goods sold and delivered, and the usual money counts; to which non assumpsit was pleaded. There were other actions brought against the same defendant by other tradesmen for different articles furnished for the * use of the vessel; which, by an order of the Court, were to abide the event of this; the amount of each demand

livered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered: held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him.

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being ascertained, if the plaintiffs were entitled to recover, and the whole amounting to about 700*l.* At the trial before *Chambre* J. at *Launceston* in *March* 1809, it appeared that the materials had been originally provided and the business done under the orders and directions of one *Christopher Parnall*, then the sole registered owner of the vessel, who had afterwards become a bankrupt, and of whom the defendant contended that he had purchased the vessel with all her apparel and equipment as furnished or to be furnished by the plaintiffs and the other tradesmen, after the contracts made by *Parnall* with them for that purpose: and that the goods had not been furnished nor the work performed upon his own credit. On the other hand it was contended by the plaintiffs that the defendant was before and at the time of the orders given by *Parnall* a secret partner with him for certain shares in the vessel; and that however the forms of a bill of sale and conveyance of the ship to him, and of a registration under the acts of parliament, might have been observed, they were only to colour the transaction. It appeared by the documentary proof of the ship's registers, and by the evidence in chief of *Parnall*, that the vessel, which had been purchased by him of the plaintiff *Trewhella*, and registered in *Parnall*'s name, as sole owner, on the 18th of *November* 1807, was not conveyed by him to the defendant till the 15th of *December* following, as was proved by the register of that date; and that the orders for furnishing her were given by *Parnall* to the plaintiffs and the other tradesmen in *October* 1807, before the purchase of her was made by the defendant, or any agree-

[437] ment entered into for that purpose with *Parnall*; though in fact the articles furnished by the plaintiffs were not put on board till shortly after the 15th of *December*. It also appeared that these goods were agreed to be furnished by the plaintiffs to *Parnall* at six months' credit, and that the plaintiffs actually delivered the bill for the amount to *Parnall* in *January* 1808; and *Parnall* negatived any partnership with the defendant in the vessel when the orders were given. Notwithstanding this evidence, however, upon the supposed bearing of certain expressions in letters which were admitted by *Parnall* upon cross-examination, and upon his admission that within a day or two after the sale of the vessel with her furniture, &c. to the defendant for 1200*l.*, he had taken a bill of sale from the defendant to himself for 2-16ths, and had also sold a quarter part to others for the defendant, and had retained the money

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to pay himself in part of the 1200*l.*, and also upon certain expressions in a letter of the defendant's to *Parnall*, dated the 23d of *November* 1807, in which he says, that as no commission would be granted in *Parnall*'s name, he (the defendant) had got the ship register indorsed as his property; and that if another person (named) would take half of the ship, it was well, but that he (the defendant) would not like to hold more than a quarter; and concluding with desiring *Parnall* to sign the register and return it to him; the plaintiff's counsel went to the jury upon the fact of there having existed a secret agreement for a share of or a partnership in the vessel, between *Parnall* and the defendant, prior to and at the time of the orders giving for furnishing her; and insisted on the liability of the defendant in that respect: and upon that ground the plaintiffs obtained a verdict for their whole demand. This verdict was moved to be set aside in the last term, upon the ground [438] of its being a verdict against evidence, and against law. In the latter respect, because by the ship registry acts (*a*) there could be no legal title in the ship conveyed to the defendant, in respect of which he could be made liable for articles furnished or work done upon it, before the 15th of *December*, when the bill of sale made to him was registered. That no equitable title to a ship, (even if there had been any agreement for that purpose, which was denied,) could be recognized since those statutes; and that the defendant having no legal title in the ship, could only become liable for articles furnished upon his personal credit; which was negatived by all the evidence in the case. The Court granted a rule nisi, upon the ground of the ship's registers having been given in evidence by the defendant at the trial, which Lord *Ellenborough* C. J. said raised a question of considerable importance, and that the defendant was entitled to the legal effect of that evidence.

Lens Serjt., *Pell* Serjt., and *Dampier* now shewed cause against the rule, which was to have been supported by *Jekyll*, *East*, and *Gaselee*; but

The Court made the rule absolute, without hearing the defendant's counsel, Lord *Ellenborough* C. J. saying that the verdict was against all the evidence. There was no evidence to show that any personal credit was given to the defendant; and the ship's registers were decisive to shew that he had no legal title in the ship before the 15th of *December*; and all

(*a*) Vide stats. 7 & 8 *W.* 3. c. 22. *s.* 21. 26 *G.* 3. c. 60. and 34 *G.* 3. c. 68.

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the goods were supplied upon the orders of *Parnall* given before that time.

*[439] *The cause was tried the second time in *August* last before *Graham* B. at *Bodmin*; when he was clearly of opinion that the defendant could not be fixed with the payment of any goods furnished by the plaintiffs upon the orders of *Parnall* before the defendant had any legal title in the ship conveyed to him. But the plaintiffs afterwards proving, for the first time, that certain goods to the amount of about 40*l.* had been delivered upon the order of the captain after the 15th of *December*, when the defendant became owner, and upon the defendant's credit, the learned Judge permitted the plaintiffs to recover a verdict for that sum only; and no new trial was moved for in this term on his direction to the jury to reject the rest of the demand.

Wednesday, June 21st.

A plaintiff who was attending from day to day at the Sittings, in expectation of his cause being tried, was privileged from arrest whilst waiting for that purpose at a coffee-house in the vicinity of the court before the actual day of trial.

CHILDERSTON *against* BARRETT.

THE plaintiff who resided in the country had come up to town to attend the trial of his cause against the defendant at the sittings at *Guildhall*, and had been in attendance for several days; and whilst waiting at *Guildhall* coffee-house for that purpose, was arrested at the suit of the defendant. *Lawes* moved on a former day for his discharge from the custody of the sheriff, on the ground of his being privileged from arrest eundo morando et redeundo upon such an occasion, and cited 4 *Com. Dig. Privilege*, A. 1. and *Lightfoot* v. *Cameron* (*a*). *Reader* now shewed cause; and admitting that within the principle of *decided cases (*b*) a party was protected in attending the trial of his own cause; endeavoured to distinguish this case from others, upon an affidavit stating, that the cause in question was not to be tried on that day, not having been included in a paper of some particular causes, which the Lord Chief Justice had given notice that he should try on that day; although it stood as a remanet from the last sittings; and therefore that the plaintiff's attendance in the Court or in its vicinity was purely voluntary.

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The Court however said that this was not sufficient to take the case out of the general rule, and made the rule absolute.

(*a*) 2 *Blac. Rep.* 1113.

(*b*) Vide *Meekins* v. *Smith*, 1. *H. Blac.* 636. and *Johannet* v. *Lloyd*, *Barnes*, 27.

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DOE, on the joint and several Demises of WM. BROWN and THOS. BLAND, *against* F. BROWN, WM. BLAND, and THOS. BLAND.

Wednesday, June 21st.

IN ejectment for a close of freehold land, called *The Least Ox Pasture Close*, at *North Collingham*, in the county of *Nottingham*, a verdict was found for the defendants, subject to the opinion of this Court on the following case.

Upon a devise to the testator's wife of all his wines, &c. for housekeeping, *in addition* to the *settlement* he had made her upon his *copyhold* estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow-pasture close in *North Collingham*, during the life of his wife; and then to two nephews all his *personal* estate, to be divided amongst certain nephews and nieces, and their sons and daughters: and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate &c. and "*all his* COPYHOLD *estates in* North *and* South Collingham," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.*, who, he declared, should be an equal sharer in this division of *his real* and personal estate: held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his *copyhold* estates in *North and South Collingham*," *after his wife's decease*, in trust to be divided, &c. the *freehold* close in question passed; as meant to include all his *real* estate *in settlement* upon his wife, and *which settlement was referred to* in the first devise to the wife.

And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. the rough draught of the settlement altered by the testator; 3. a book indorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and, 5. a rental kept in the same place, on which was indorsed by the testator, that "all the rents of the *copyhold* lands in *North* and *South Collingham*, &c. were settled on his wife for life."

For there is no ambiguity on the face of the will; the testator having *copyhold* estates in *North and South Collingham* to answer the description in it: nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connexion. Nor does it follow that the testator meant to devise the *same premises* under the name of *copyhold* to the trustees as were settled on his wife; or that he was under the same mistake, that the close in question was *copyhold*, when he made his will, as when he made the settlement or indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question.

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Henry Milnes being seised in fee of the close in question, together with another freehold close, called * the *Sudmarsh*, or *Cow Pasture Close*, in *North Collingham*, and of other freehold and copyhold premises in *North* and *South Collingham*, and having surrendered his copyhold to the use of his will, by his will, dated the 10th of *February* 1800, devised as follows: "I give unto my dear wife the house, with all the premises in which I now dwell, for her life. I give her also all my wines, liquors, and provision for housekeeping, in addition to the *settlement* I have made her *upon my copyhold estate*. I give to my niece *Mary*, the wife of *W. Lansdale*, the rents and profits of my new inclosed freehold *Cow Pasture Close*, in *North Collingham*, for her sole and separate use, during the life of my dear wife. And I give to my nephews *Thos. Bland* and *Wm. Brown*, their executors, &c. in trust, all my monies, securities for money, and personal estate, to be divided and paid amongst my nephews and nieces (mentioning them by name) and their sons and daughters, share and share alike. And *after the decease of my dear wife*, I give to my nephews *Thos. Bland* and *Wm. Brown*, their executors, &c. in trust, my dwelling-house in *Newark*, with all my household furniture, plate, pictures, brewing vessels, and all my *copyhold* estates in *North* and *South Collingham*, and my *freehold Cow Pasture Close* in *North Collingham*, and *all other my personal estate* of what nature or kind soever, to sell the whole by public auction, and to divide the money, when all expences are paid, amongst my nephews and nieces and their sons and daughters, (mentioning them by name,) share and share alike, with the addition of my nephew *Thomas Bland*, who it is my will should be an equal sharer in this division of my *real* and *personal* estate with the rest of them." And the testator appointed the said *Thos. Bland* and *Wm. Brown* joint executors. The testator died on the 17th of *October* 1800. The lessors of the plaintiff are his co-heirs at law. It was admitted by the defendants, that the plaintiff was entitled to recover possession of the close in question, unless it passed by the will to the devisees therein named: and in order to shew that it was the intention of the testator that it should pass, the following evidence was offered for the defendants, and received by the learned Judge, subject to the opinion of this Court upon its admissibility.

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1st, An indenture tripartite, dated the 1st of *February* 1792, between *H. Milnes* (the testator), *Mary Spragging* his intended wife,

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wife, and *T. Spragging*, a trustee, whereby, after reciting the intended marriage, and that for making a jointure for the said *Mary*, *Henry Milnes* had agreed that the copyhold messuage, homestead closes, lands, grounds, allotments, and hereditaments, thereinafter described and covenanted to be surrendered, should be settled to the uses thereinafter expressed; *H. Milnes* covenanted with the trustees, that after the marriage he would surrender all that *copyhold* messuage with the homestead and appurtenances in *North Collingham*, and all those several *copyhold* closes and parcels of land and grounds, allotments, and hereditaments, thereinafter described (enumerating the several closes, and amongst the rest *the close in question*,) to the uses in the indenture mentioned, and containing also a covenant from *Milnes* of his lawful seisin of the said *copyhold* hereditaments and premises, and of his authority to surrender the same to the uses aforesaid. This indenture was executed by the parties, and the marriage afterwards took effect. The whole of the real property in *North* and *South Collingham*, to which the testator was entitled at the time of making his will and of his death, was comprised in the above settlement, with the exception of the *Sudmarsh* or *Cow-Pasture* freehold close, [444] and he had no other real property except his freehold property at *Newark*, which was also devised by his will. The estate comprised in the settlement, therein described as of *copyhold* tenure, contains, besides the *freehold close in question*, several other parcels of land of *freehold* tenure; but neither the situation nor extent of these parcels can be precisely ascertained. 2d, A bond from the testator of the same date with the settlement, for 2000*l.*, conditioned to be void if he should permit *Mary Spragging* in case she survived him to take all his liquors and provisions for housekeeping, and enjoy for her life his dwelling-house in *Newark*, and all his household furniture, &c., *over and above* the provision intended to be made for her by *a settlement of his copyhold* estate in *Collingham*. 3d, The rough draft of the settlement, proved to have been perused and corrected by the testator's own hand, and an alteration made by him in the description of the very close in question, which had been named in the draft the *Little Ox Pasture Close*, and which he altered to *the least*. And the testator in giving his instructions to Mr. *Allen* his attorney for the above deeds, described the whole of the property contained in the settlement as *copyhold*. 4th, A book indorsed "*Collingham*

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Estate Survey," found in a box among the testator's title deeds and writings, containing the following particulars of his estate in his own hand-writing. "*Henry Milnes'* estate at *North* and *South Collingham*, taken since the inclosure." The list began with the house, buildings, and homstead, followed by the names of the several closes of the old inclosure, with the number of acres in each; in which the close in question, called, "*The Least Ox Pasture*," is enumerated amongst the
[445] rest, without distinction: but in the list of the new inclosures immediately following the other, one of the closes is mentioned as "*Sudmarsh freehold* close." And the same distinction occurred again in a 5th paper, also found among the testator's title deeds and writings and indorsed by him, containing the rental of the several closes. And at the bottom of this rental, the whole of which was in the hand-writing of the testator, is this: "All the rents of the *copyhold* land of *H. Milnes* in *North* and *South Collingham*, now in the tenure of *W. Lansdale*, *T. Pacy*, and *W. Rodall*, are settled on *Mary* my present wife for her life." The heirs at law took equal portions with the other devisees under the will of the testator. The verdict was to be entered for the plaintiff or the defendants, according to the opinion of the Court upon the case.

Balguy jun., for the defendants, contended that the evidence was properly admitted to explain the sense in which the testator had used the word *copyhold* in his will; 1st, because the property was misdescribed in the will; and, 2dly, because the will refers to the settlement, as including all which was settled on his wife, and by which settlement the misdescription may be corrected. 1st, by the devise of all his *copyhold* estates in *North* and *South Collingham*, &c. *after the decease of his wife*, in trust to his two nephews to sell and divide, it is plain that he meant the *whole* of that estate by him before mistakenly called *copyhold*, which was settled upon his wife; because he had first given to her all his wines, &c. "*in addition* to the *settlement* "I have made her upon my *copyhold* estate." The settlement explains the ground of the mistake; for it describes as *copyhold* the close in question, though in fact *freehold*: and it also con-
[446] veyed several other closes of freehold tenure, though the extent of them cannot now be ascertained, being so intermingled with the copyhold as no longer to be capable of being distinguished from it. It appears therefore that when the testator spoke of his *copyhold* estates which were settled on his wife, he did not merely

merely mean that part of the settled estates which was of copyhold tenure, but the whole of the settled estate, the greater part of which indeed was copyhold, but which also included some closes of freehold tenure intermingled and confused with the copyhold, and therefore designated by the same term, which is used merely as descriptive of the property, and not of the tenure. And to shew that property misdescribed may pass under such misdescription, if clearly ascertained, he referred to *Roe d. Conolly* v. *Vernon* (*a*), and *Doe d. Cook* v. *Danvers* (*b*). It is also apparent from the subsequent clause which speaks of the division he had made of his *real* and *personal* estate, that the testator meant to include the whole of his real estate in the description before used. He concluded by referring to other cases where evidence dehors the will had been admitted to explain it. *Pultney* v. *Ld. Darlington*, in 1773, cited from the Register, fo. 710. in *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves. jun.* 521. *Druce* v. *Denison*, 6 *Ves. jun.* 385. Lord *Cheney*'s case, 5 *Rep.* 68. *Beaumont* v. *Fell*, 2 *P. Wms.* 141. *Rivers'* case, 1 *Atk.* 410. *Thomas d. Evans* v. *Thomas*, 6 *Term Rep.* 671. and *Whitbread* v. *May*, 2 *Bos. & Pull.* 593.

Copley, contrà, contended that in this case where the testator had left property corresponding with the description in the will, extrinsic evidence was not admissible to shew that he meant to include other property not falling within that description: though he admitted that such evidence may be received to explain the testator's meaning in cases where he has no property answering the description in the will; as in *Day* v. *Trig* (*c*). This distinction, he said, was recognized in most of the cases cited; and also in *Denn d. Wilkins* v. *Kemys* (*d*), and *Knotsford* v. *Gardiner* (*e*). Then as there was copyhold to answer the description in this will, it cannot be said to be a *misdescription* of the testator's property. The cases in Chancery where the extrinsic evidence has been admitted do not apply; because they involve questions of trust, or election, or other considerations of equitable cognizance only. In *Hinchcliffe* v. *Hinchcliffe* (*f*) the Master of the Rolls expressly disclaimed receiving the extrinsic evidence to explain the will; and only received it to explain the circumstances in which the testator was at the time of the devise.

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(*a*) 5 *East*, 51. (*b*) 7 *East*, 299. (*c*) 1 *P. Wms.* 286.
(*d*) 9 *East*, 366. (*e*) 2 *Atk.* 450. (*f*) 3 *Ves. jun.* 522—530.

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And Lord *Eldon*, in *Druce* v. *Denison* (*a*), evidently disapproved of *Pulteney* v. *Lord Darlington* and other cases where extrinsic evidence was received in any degree to explain words in a will, which were unambiguous. Here in order to let in the evidence the word *copyhold* must in effect be expunged from the will. The settlement is indeed referred to in the first clause of the will, but not for the purpose of explaining the extent of the property bequeathed: the testator does not affect to devise all *the estate* comprised in the settlement; which would have let in the evidence of the settlement to shew what did pass by it: and there is no reference whatever to the settlement in the subsequent clause of the will by which the defendants claim. Neither does the confusion of the freehold with the copyhold closes bear upon the question as to the freehold in dispute, which is clearly defined, and requires no reference to the settlement to ascertain it.

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Balguy, in reply, said that in considering the meaning of a particular clause in the will, the Court was not restrained to look at that clause only, but might collect the intention of the testator, as to the property which he meant to devise by that particular clause, from the whole of the will. That the evidence went to shew that the particular freehold close was included in that portion of the testator's property which was called by the general name of *the copyhold estate*, because the greater part of it was of that description, and the small portions of freehold were intermingled and consolidated with it; and that all the evidence was admissible in this view of it, but particularly the settlement, which was referred to by the will itself.

Lord ELLENBOROUGH C. J. said that as the case appeared to involve a general question of extreme importance, the Court would look further into it before they delivered their opinion. And now his Lordship delivered judgment.

This was a special case, reserved at the trial of an ejectment for a close of *freehold* land, called *The least Ox Pasture Close*, in *North Collingham*, in the county of *Nottingham*. The question arose on the will of one *Henry Milnes*, whether such close passed by the devise in that will, of all the testator's *copyhold* estates in *North* and *South Collingham*, to his nephews *Thomas Bland* and *William Brown*: if it did, the lessors of

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(*a*) 6 *Ves. jun.* 400-3.

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the plaintiff had no title: if it did not pass by such devise, it descended to the lessors of the plaintiff, who are his heirs at law. [Then, after stating the words of the will as before set out, his Lordship proceeded.] The facts were that the testator had at the time of making his will, and also at the time of his death, besides the freehold close in question, another freehold close, called the *Sudmarsh* or *Cow-pasture Close*, situate in *North Collingham*, and was also seised of other freehold and copyhold premises in *North* and *South Collingham*, and had surrendered the copyhold to the use of his will. On the face of the will we find no ambiguity. The testator gives to his nephews *Thos. Bland* and *Wm. Brown*, their executors, administrators, heirs, or assigns, in trust, after the death of his wife, his dwelling-house at *Newark*, with all his household furniture, plate, &c. and all his *copyhold* estates in *North* and *South Collingham*, and all his *freehold* Cow-pasture close in *North Collingham*: and he had *copyhold* estates in *North* and *South Collingham*, and a *freehold* Cow-pasture close; which answer and satisfy the terms of that devise; which terms are definite and certain; and on this clause alone, it could not be contended for a moment, that evidence could be admitted to shew, that in this description of all his *copyhold* estates, the testator meant to include *freehold* property. But the argument on the part of the defendants is, that a prior clause of the will may be brought down to and connected with the devise of the copyhold to the trustees; and so open a door to let in the evidence of intent from matter dehors the will. That prior clause is at the beginning of the will, where the testator gives to his wife all his wines, liquors, and provisions, for housekeeping, *in addition to the settlement I have made her upon my copyhold estate*: and the argument is, we will shew that by the settlement made on his wife, the testator covenanted to surrender to the uses of that settlement certain *copyhold* premises, enumerating them, among which is the *freehold* close in question: and as he has by his will given her his wines and provisions of housekeeping, *in addition to the settlement made her on his copyhold estate*, his subsequent devise, after the death of his wife, of all his *copyhold estates* in *North* and *South Collingham*, must have been intended by him, and must be understood by the Court, as comprising *all that he had settled on his wife under the denomination of copyhold*, or

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rather that he *meant to settle* on her, under that denomination. But, independently of the other objections, we think the argument fails in connecting the two clauses, or in raising any ambiguity if they were connected. The only circumstance is, that in both clauses the testator uses the term *copyhold* estate; and in the latter clause he devises all his *copyhold* estates, with other property, after the death of his wife. But it does not necessarily follow that he meant to devise to the trustees the *same* premises which he had settled on his wife; or that when he made his will in the year 1800 he was under the same mistake, with respect to the tenure of this part of his estate, as he might have been under in 1792, when he made his settlement, or at the date of his rental in 1794. It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent, from extraneous circumstances, to extend plain and unequivocal words in a will. The terms used in both clauses are unambiguous.

[451] The testator *had settled copyhold* estates on his wife: so far the expression in the first clause is correct: and even if the settlement referred to were looked at, that would present no ambiguity as to the quality of the estates so settled. He had also copyhold estates to devise: here again he is correct. And therefore we do not feel ourselves at liberty to look beyond the will for circumstances from whence an intent may be collected to include property of a different description, and where nothing appears to require such a violation of the ordinary terms used in the description of property: and it would be, as we apprehended, most dangerous to allow ourselves that latitude. The postea therefore must be delivered to the plaintiff.

Thursday, June 20th.

BARNES *against* HUNT.

To a declaration for several trespasses on the plaintiff's land, on divers days, &c., the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses, &c.: held that evidence of a licence which covered some, but not all of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication.

THE declaration consisted of two counts in trespass, the first of which alleged that the defendant on the 1st of *September* 1808, and on *divers other days* and times between that day and

the

the day of exhibiting the plaintiff's bill, broke and entered the plaintiff's close at *Combe*, &c. and with dogs hunted and beat for game there, and committed other trespasses there, particularizing them: and the second count was similar, in respect of another close of the plaintiff at *Combe*, except that it omitted some of the trespasses particularized in the first. The defendant pleaded, 1st, the general issue; 2dly, as to the breaking and entering the close in the first count mentioned, and committing all the trespasses therein alleged, (except breaking locks of gates, &c.) *at the said several days and times*, &c.; and as to the trespasses in the last count mentioned at the several times, &c., the defendant averred the identity of the closes, and of the several days and times mentioned in the two counts; and then pleaded that *at the said several days and times* when, &c. he committed the said several trespasses in the introductory part of his plea mentioned *by the leave and licence* of the plaintiff. The plaintiff replied that the defendant of his own wrong, and *without the cause* by him in that behalf alleged, committed the said several trespasses, &c.; on which issue was joined. At the trial before *Chambre* J. at *Salisbury*, it appeared that the defendant, who had been warned by a prior notice from the plaintiff not to trespass upon his grounds, was seen trespassing thereon on the 1st, 2d, 13th, and 19th of *September*. That on the 2d, as the defendant was returning from shooting upon the plaintiff's land, he met the plaintiff, and after mutual salutation offered him some game, which the latter accepted and thanked him for. And the defendant having then asked whether a Mr. *H.* was to have all the game, (meaning on the plaintiff's land,) the plaintiff replied, "I do not care who has the game; you may kill as much as you like, or all if you please, so as you do not ride over my corn." On this evidence two questions arose; one upon the form of pleading; whether as the plaintiff had declared for trespasses committed on a particular day and on divers other days and times afterwards; and the defendant's plea alleged generally, that he had done all the acts complained of (except some trespasses, of which no evidence was given,) by the licence of the plaintiff; and the whole of that plea was put in issue; there was any necessity for the plaintiff to have made a new assignment, to enable him to recover for the trespasses committed prior to the licence. The other question was, whether the licence could by relation apply to the prior trespasses, viz. on the 1st and 2d of

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of *September:* but this was afterwards abandoned upon shewing cause. The plaintiff took a verdict for the first trespass, with nominal damages; and liberty was given to the defendant to move the Court to set aside that verdict, and enter a verdict for the defendant.

This was accordingly moved by *Burrough* in the last term, who contended that the *cause* only, namely the licence which went to the whole trespass, was put in issue by the replication; and there being no new assignment, and proof having been given of trespasses which were covered by the licence, the defendant was entitled to a verdict. And he said that it had been always understood, and the practice on the Western Circuit for many years had been in conformity with the general understanding, that if the plaintiff meant to dispute the application of the licence pleaded to the particular trespass declared for, it was necessary for him to new assign it.

Lord ELLENBOROUGH C. J. then said, that he did not feel the weight of the objection; but as such a practice had prevailed, the ground of it was fit to be considered upon a rule nisi. To him it appeared, at present, that the declaration alleging several trespasses, on divers days and times, the plea of licence to the whole should be understood as applying to each, reddendo singula singulis; and that it was necessary to prove a licence co-extensive with the trespasses proved at the several days and times included in the declaration: and here the licence proved did not cover all the trespasses.

[454] *Lens* Serjt., *Dampier*, and *Casberd* now shewed cause against the rule, and observed that though there were two counts, yet they were reduced in effect to one by the special plea which averred the identity of the respective trespasses in each. Then taking it as if there were but one count, still the plaintiff, having declared for several trespasses on divers days within the period stated, was at liberty to give in evidence as many trespasses as there were days included. And the defendant does not by his plea confine the generality of the count, by selecting one or more acts of trespass, and setting up a licence to cover those particular acts; which would have driven the plaintiff to new assign, if he meant to rely on other acts of trespass; but he says, as to the *trespasses* at the said *several days and times*, &c. he had the licence of the plaintiff: insisting, therefore, on a licence co-extensive with the number of trespasses which might be proved under the count. So a new assign-

assignment would not have carried the matter further, but must have been a mere repetition of the declaration. It would even have amounted to pleading double; because it would have been pleading again what had been answered by the plea. In *Cheasely* v. *Barnes* (*a*), a single trespass being laid in the count, and that being justified, and issue taken on such justification, the Court held that a new assignment was double.

Burrough (*Pell* Serjt. was with him) in support of the rule, contended that though upon the plea of not guilty the plaintiff might prove as many trespasses as he pleased within the period laid in his declaration; yet upon the plea of licence, the proof of which lay upon the defendant, the trespasses [455] were agreed upon, and nothing was in issue except *the cause of the justification*, namely, the licence; and if the defendant proved any trespass covered by his licence, the issue must be decided for him. [Lord *Ellenborough* C. J. The question is, what is *the cause* under the replication of de injuriâ suâ propriâ, absque tali causâ; is it *one*, or *several*, trespasses; and one, or several licences?] In *Sayre* v. *The Earl of Rochford* (*b*), *Blackstone* J. said that the words, de injuriâ suâ propriâ, were merely introductory; that the traverse was contained in the words, absque tali causâ; and whatever went to disprove that cause was admissible evidence, and nothing else: and *Crogate*'s case (*c*) explains what the cause is: which is the ground of the justification. Here the licence is the only cause, and it has always been so considered.

Lord ELLENBOROUGH C. J. *The cause* is one combined thing arising out of several facts; and I will venture to translate that word in this case into what it really means, and that is, *without the matter of excuse alleged*. Now what is the matter of excuse alleged? The defendant, in answer to a declaration complaining of several trespasses committed by him on the 1st of *September*, and on divers other days and times between that day and the day of exhibiting the bill, says that at the *said several days and times* when, &c. he had the licence of the plaintiff; not a licence to commit one or more trespasses, but a licence, as large as the declaration, to commit as many trespasses as the plaintiff has assigned and is able to prove. What then does the replication import when it alleges [456] that the defendant of his own wrong and without the cause

(*a*) 10 *East*. 73. (*b*) 2 *Bla. Rep*. 1170. (*c*) 8 *Rep*. 66. 7.

alleged

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alleged committed the several trespasses? It denies the defendant's justification to the extent pleaded by him: it denies that he had licence to commit the several injuries of which the plaintiff complained and is able to prove within the terms of his declaration. Whatever practice may have prevailed, this sense of the pleadings appears to me to be clear.

GROSE J. was of the same opinion.

LE BLANC J. The defendant having by his plea applied a licence to *all* the trespasses complained of, the plaintiff, intending to deny a licence co-extensive with those trespasses, could only reply as he has done.

BAYLEY J. The declaration is general, complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to shew as many licences. The replication states that the defendant at the said several days committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue but that the defendant had a licence to cover all those trespasses. Then, in common sense and understanding, we must take it that *the cause* put in issue by the replication is, that the defendant had not a licence co-extensive with the trespasses complained of: and a new assignment could have done no more than repeat the same thing.

Rule discharged.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fiftieth Year of the Reign of GEORGE III.

The KING *against* MORGAN. (*a*)

Nov. 15th.

PEMBROKESHIRE.—This was an information filed by *The Attorney General* against the defendant for assaulting and obstructing an officer of the excise in the due execution of his office; to which the defendant had suffered judgment to be signed by default. And on this day, when he came up to receive sentence, the affidavit upon which *The Attorney General* had filed the information was offered on the part of the crown to be read in aggravation; but was objected to by Mr. *Erskine*, for the defendant, as not having been sworn in the cause. But

The Court, after deliberation, permitted it to be read; the affidavit being entitled, "In the King's Bench," sworn before a Commissioner of the Court, and being the foundation of a proceeding in the Court; and the Court understanding that it had been the practice for such affidavits to be read on judgments by default.

Affidavit, entitled "In the King's Bench," upon which the Attorney General had filed an information ex officio against the defendant, permitted to [458] be read in aggravation after judgment by default.

(*a*) The note of this case which was decided in this court in *Mich.* 45 *Geo.* 3. 1804, was communincated to me lately by Mr. *Dealtry*; and involves a point of general practice.

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Friday, May 5th.

PHILIP THOMAS WYKHAM *against* SOPHIA ELIZABETH WYKHAM, an Infant, by her Guardian, and Others.

One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus and all his other lands, &c. to his 1st, 2d, 3d, and [459] other sons successively for life, with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised and possessed *to trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each such wife's natural life only*. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife *during her natural life only*; and charged the lands with portions for younger children, if any: which deed also contained a covenant for quiet enjoyment during the wife's life: Held that by such deed the trustees took a fee.

PHILIP Lord *Wenman* being seised in fee of divers real estates, and entitled in fee to the equity of redemption of certain other real estates then mortgaged in fee to *Agatha Child*, by his will dated the 4th of *May* 1758, and duly executed and attested, devised part of such his legal and part of his equitable estates to *Harvey* and *Basset* and *their heirs*, in trust that they should out of the rents, issues, and profits, or by sale, from time to time, and also by virtue of the power thereinafter given to them to cut and sell coppice woods, raise money sufficient to pay off the testator's debts and legacies, or so much thereof as his personal estate not specifically devised would not be sufficient to pay. And as for all such parts of the said lands, tenements, and hereditaments so given to the trustees which should remain after the said trusts were performed, he devised the same, and also all other his freehold manors, lands, &c. whereof he was seised or possessed, or wherein he was entitled to any estate in possession, reversion, remainder, or expectancy, in the counties of *Oxford*, *Kent*, *Bucks*, or elsewhere in *England*, to his eldest son *Philip Wenman*, for life, without impeachment of waste; remainder to trustees and their heirs to preserve subsequent estates; remainder to the first and other sons successively of the body of *Philip Wenman* in tail male; and for default of such issue,

with

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with like remainders to his youngest son *Thomas Francis Wenman* for life, &c.; to trustees and their heirs to support subsequent remainders; and to his first and other sons successively in tail male; remainder to the testator's third and other sons in tail male successively, &c.; and in default of all such issue male of the testator's body, if the testator should have any other daughters besides his daughter *Sophia Wenman*, to and amongst his said daughter *Sophia* and other such daughter or daughters in tail, as tenants in common; but if no other daughter than *Sophia*, then to her for life without impeachment of waste; remainder to trustees and their heirs to preserve contingent remainders; remainder to her first and other sons successively in tail male; with divers remainders over; with the ultimate remainder to the right heirs of the testator. The will also contained this proviso: "Provided "that it shall and may be lawful to and for each of my said "sons *P. Wenman* and *T. F. Wenman*, and every other son of "my body, when and as they shall respectively become en- "titled to the aforesaid manors, lands, or any part or parts "thereof, *in possession*, by virtue of the devises and limitations [460] "aforesaid, from time to time to grant, convey, limit, or ap- "point, all or any part or parts of the said manors, lands, &c. "whereof they shall respectively be so seised and possessed, "*to trustees*, upon trust by the rents and profits thereof to "raise and pay any yearly rent-charge not exceeding 1000*l.* "by equal quarterly payments, clear of all outgoings and re- "prises whatsoever, as and for a jointure to and for any wife "or wives, that he or they shall hereafter happen to marry, "for and during the term of each such wife's natural *life* "*only*. And further, that it shall and may be lawful for each "of my said sons, at any time or times after they shall re- "spectively come into the possession of the said manors, lands, "&c. by virtue of the aforesaid limitations, by *any deed or* "*deeds* executed in the presence of two or more credible "witnesses, or by his or their will or wills respectively, duly "signed, &c. and attested, &c. to charge all or any part or "parts of the said manors, lands, &c. whereof he or they shall "be so severally seised and possessed, with any sum or sums, "not exceeding the sums hereinafter mentioned, for portions "of their daughters and younger children; viz. for one such "daughter or younger child 5000*l.*, for two such, &c. 8000*l.*, "and for three or more such, &c. 10,000*l.*, with such "main-

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" maintenance in the mean-time not exceeding 4 per cent. in-
" terest of their respective portions as my said sons shall respec-
" tively by such deeds or wills appoint." And also this proviso;
" that it shall and may be lawful for my said sons, or such
" other person or persons who shall by virtue of the limi-
" tations aforesaid respectively, when and as they shall come
" into possession of the said manors, lands, &c. so devised
" to them for life as aforesaid, by indenture to demise and
[461] " lease all or any part or parts of the said manors, lands, &c.
" to any persons for any term or number of years not ex-
" ceeding 21 years in possession; so as in every such lease
" there be respectively reserved, &c. as great a yearly rent
" as can be reasonably obtained." *Philip* Lord *Wenman*, the testator, died in *August* 1760, leaving only two sons, namely, *Philip*, afterwards Lord *Wenman*, and *Thomas Francis Wenman*, and one daughter, *Sophia Wenman*, who afterwards married *William Humphrey Wykham*, the father of the plaintiff. The testator's eldest son, *Philip* Lord *Wenman*, attained his age of 21 years in *April* 1763, and was thereupon let into possession of all the testator's real estates, and held them till his death. And in 1766 he married Lady *Eleanor Bertie:* previous to which by indenture tripartite, properly attested, dated the 28th *June* 1766, reciting the said will of his late father, whereby he was entitled to make a jointure out of the said estates upon a wife, and to make provision for daughters and younger children; and reciting his intended marriage with Lady *Eleanor*, and for making such jointure on her in case she should survive him after the marriage as he was empowered to make by virtue of and according to the true intent and meaning of the said recited will; he *Philip* Ld. V. *Wenman*, pursuant to and by force and virtue of the said power and authority to him given for making and limiting such jointure, and of every other power and authority enabling him thereunto, did grant and appoint unto the Earl of *Abingdon* and *J. Morton* (trustees and parties to the deed) all and every the freehold manors, lands, &c. devised to him by his father, in the counties of *Oxford* and *Bucks*, or elsewhere in *England*, habendum to the trustees *and their heirs*, upon trusts by the rents and profits thereof to raise
[462] and pay to Lady *Eleanor Bertie* and her assigns, *during her natural life only*, the yearly-rent charge of 500*l.* by equal quarterly payments clear of all outgoings and reprises whatsoever, as and for a jointure for the said Lady *E. B.* in case the

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the marriage took effect, and she should survive the said *Philip* Ld. *W.*, and to be in bar and satisfaction of dower, &c. And by that indenture *Philip* Ld. *W.*, for making provision for the daughters and younger children of the marriage, as he was authorized and empowered to do by force and virtue of the recited will of his father, in pursuance of such power and of every other power enabling him thereunto, *charged* all the said manors, lands, &c. in the counties of *Oxford* and *Bucks*, subject to the jointure of Lady *Eleanor*, with the payment of the several sums therein mentioned. The deed also contained covenants by Ld. *Wenman* to the trustees, that he had good right and full power to make such grant, settlement, limitation, appointment, and charge, as were by him thereby made respectively, as aforesaid. And further, that the trustees, in case the marriage took effect, and Lady *Eleanor* survived him, should from time to time after his decease, *during the natural life only of the said Lady* Eleanor, peaceably and quietly enter, possess, and enjoy the said manors, lands, &c. before granted, &c. to them, and take as much of the profits thereof as should be sufficient to pay the said yearly rent charge of 500*l.*, without lawful let, eviction, or interruption, &c. of Ld. *Wenman*, his heirs, or asigns, or of any other person, &c. Then by another indenture of the 26th of *December* 1782. *Philip* Ld. *Wenman*, the son, made a further jointure of 300*l.* a year on *Eleanor* Lady *Wenman* his wife; reciting as before his power under his father's will, and granting and appointing to Lord *Abingdon* (one of the former trustees) and Sir *J. W. Gardiner* [463] and *their heirs*, such parts of the freehold manor, lands, &c. in the county of *Oxford* as were devised to him by his father, to hold to the trustees *and their heirs*, upon trust by the rents and profits to raise and pay to the said *Eleanor*, *during her natural life only*, such further rent-charge of 300*l.*, &c. in case she survived him; with the like covenants as before for his right to make such grant, and for quiet enjoyment *during her life only*. And by another similar indenture of the 1st of *Dec.* 1796, Lord *Wenman* granted and appointed to Sir *Wm. Henry Ashhurst* and the said Sir *J. W. Gardiner*, and their heirs, such parts of the said demised estates as lay in the county of *Oxford*, and in *Pounden*, in the parish of *Twyford*, in the county of *Bucks*, upon trust to raise and pay to *Eleanor* Lady *Wenman*, during her natural life only, a further jointure and rent-charge of 200*l.* in addition to the 500*l.* and 300*l.* before

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settled on her; with like covenants as before. In 1796 *Thomas Francis Wenman*, the second son of the testator *Philip* Lord *Wenman*, died unmarried and without issue, in the lifetime of his elder brother *Philip* Lord *Wenman*, who died on the 26th of *March* 1800, without issue, leaving *Eleanor* Lady *Wenman* him surviving. *Sophia*, the only daughter of the first-named Lord *Wenman*, having married and survived *Wm. Humphry Wykham*, died in *March* 1792, leaving issue *Wm. Rd. Wykham*, her eldest son, *Philip Thomas Wykham*, the plaintiff, and *Harriet Mary Wykham*, who married the defendant *Willoughby Bertie*. By indentures of lease and release of the 1st and 2d of *January* 1799, the said *Wm. Rd. Wykham* conveyed to *Wm. Walford* and his heirs his life-estate expectant on the death of *Philip* then Lord *Wenman*, in the said manors, lands, &c. in trust for certain uses, (the object and effect of which was only [464] to bar any wife of his from dower.) *Wm. Rd. Wykham* on the death of the last Lord *Wenman*, was let into possession of all the testator's real estates not sold by the trustees under the will, and enjoyed the same till his death: and by indenture of lease and release of the 20th and 21st of *June* 1800, all the said estates in *Oxfordshire*, *Bucks*, and *Kent*, were conveyed by *Walford* and *Wm. Rd. Wykham* to *W. Meyrick* in fee, to make him tenant to the præcipe; and recoveries were suffered of the same in *Trinity* term 1800, in which *Wm. Rd. Wykham* was the vouchee; at which time *Eleanor* Lady *Wenman* was still living. On the 1st of *July* 1800, after the recoveries suffered, *Wm. Rd. Wykham* died, leaving the defendant *Sophia Elizabeth* his heiress at law, and she is also the heiress at law of the testator *Philip* Lord *Wenman*. The mortgages are still unsatisfied and outstanding; and all Lord *Wenman* the testator's debts are not yet paid.

The complainant filed his bill in Chancery against the defendants, insisting that the estate in tail male, limited by the said will of *Philip* Lord *Wenman* to the first and other sons of the body of his daughter *Sophia*, was not bound by the said recovery; and praying that the plaintiff might be declared entitled to an estate tail in all the estates thereby devised, and that he might be let into possession, and for an account of the rents and profits from the death of *Wm. Rd. Wykham*; and that the Earl of *Abingdon* and Sir *Wm. H. Ashhurst*, the surviving trustees in the jointure deeds of *Eleanor* Lady *Wenman*, without prejudice to her who was then living, but is since dead, or any other

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other charges or incumbrances affecting the said estates, might be directed to convey to the plaintiff, to enable him to suffer a good recovery. And on the hearing before the Lord Chancellor, he directed this case to be * made for the opinion of this Court, and that the question should be,

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Whether the trustees named in the deed of appointment of the 28th of *June* 1766, and in the other deeds of the 26th of *December* 1782 and the 1st of *December* 1796, or any of them, took any and what estate and interest in the manors, lands, and hereditaments in question of which *Philip* Lord *Wenman*, the testator, was seised in fee-simple at the time of making his will, and which were thereby given to *Philip* his son, afterwards Lord *Wenman*, for life, or any of them?

The case was argued in last *Easter* term.

Holroyd, for the plaintiff, contended that the trustees in the jointure deeds of appointment did not take estates in fee, but only took estates *to them and their heirs for the life of the jointress Lady* Eleanor Bertie. First, he considered the construction of the power as given by the will of Lord *Wenman*, and next mode in which that power was executed. 1st, This being a power given by a will is to receive that construction which will best effectuate the apparent intention of the testator. The estates given by the will to the testator's two sons, for life, to the trustees to preserve contingent remainders, and to the first and other sons of the bodies of the elder and younger sons successively in tail male, are all legal estates, and the remainders to the two sons vested remainders. Then the remainder to the daughters of the testator, if morethan *Sophia*, as tenants in common in tail general; and if only *Sophia*, then to her for life, remainder to trustees, &c. remainder to her first and other sons successively in tail male: were also all legal estates: and it is clear that the testator's younger sons were to have the same power of jointuring as was given to his eldest son: and this power was given to be exercised from *time to time* by the several male tenants for life in succession, in favour of any number of wives they might severally have. It was a power given in addition to the estates of the several tenants for life, and co-existent with them, but was not meant to subvert and destroy those estates, and entirely to change their nature from legal to equitable. The power is to each of his sons when in possession by virtue

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of the limitations of his will to grant *to trustees* upon trust, &c.; but no words of limitation are added to the estate to be granted to the trustees; and therefore those words would not authorize a tenant for life to grant a fee or any greater estate to the trustees than was necessary to execute the power: though it may be admitted that if words of limitation were necessary to be added for the effectual execution of the power, the Court would imply them. The purpose of the trust, however, being to raise a jointure for the *life* of the wife only, the estate in the trustees must be limited to such life. But as the trustees, if the estate were limited to *them* only, might die before the wife, in which case there would be an end of her estate, it may be necessary to imply some words, and therefore the Court may imply that it was a power to limit *to trustees and their heirs during the life of the jointress.* And even if the power had been express to limit the estate to *trustees and their heirs*, yet as the object was only to execute the trust for the life of the jointress, the Court would have implied that the estate of the trustees was to be limited to her life: and so it was decreed by Lord C. *King* in the case of *Jones* v. *Ld. Saye and Sele* (*a*), which was affirmed in the House of Lords. And
[467] the like construction was put by this Court in *Doe d. Compere* v. *Hicks* (*b*) upon devises to trustees *and their heirs* to preserve contingent remainders interposed between the several estates for lives, and the remainders in tail; which trust estates being created for that particular purpose only, the Court thought should only enure for such respective lives; and that the several tenants for life in remainder took legal and not merely equitable estates. A fortiori, therefore, in this case, where the words, "and their heirs," are not added to the limitation to the trustees, the Court will not imply a power to devise the fee to the trustees; which would have the effect of converting all the subsequent estates to the first and other sons into equitable estates, when the testator meant them to take legal estates, and would preclude their remedy to enter and take possession except in equity. When a power is executed, it makes part of the instrument by which it is raised; and to hold that the trustees took the fee under this appointment would in effect be making the testator say, I give a legal

(*a*) 8 *Vin. Abr.* 262. and 1 *Eq. Cas. Abr.* 383. *pl.* 4.

(*b*) *Term Rep.* 433. and vide *Harton* v *Harton*, *ib.* 652.

estate

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estate to the first and other sons of the body of my eldest son *Philip* in tail male, &c. and yet I give a legal estate to trustees in fee, which will defeat all the legal estates which I have given. In *Doe d. White* v. *Simpson* (*a*) the general rule was laid down, that where the purposes of a trust (under a devise to trustees) can be answered by a less estate than a fee-simple, a greater interest than is sufficient to answer such purpose shall not pass to them, but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. Here therefore, if the Court will imply a power to appoint to trustees *and their heirs*, still they will limit the implication of such an estate to the duration of the life of the jointress, for whose use alone it was created. In *Curtis* v. *Price* (*b*), though a remainder in fee was limited by a deed of settlement to trustees, yet as the object of the trust terminated with the estate of a tenant for life, the Master of the Rolls confined the operation of the trust estate to the period of that life; and he relied upon the manifest intention of the parties so to confine it by limiting a subsequent remainder for a term of years to the same trustees upon the death of the tenant for life. So here the testator must be taken to have repeated the power after each limitation to a tenant for life, as he has in effect done by the relative terms used; and that shews that he only meant the trustees to take estates during the lives of the respective jointresses. If such be the true construction of the will, 2dly, the appointment must be taken to have been made in conformity to it, so far as it is capable of that construction. *Philip* the son of the testator in the indenture of *June* 1766 recites the will giving the power, and states that he doth grant and appoint the devised lands, pursuant to and by virtue of that power, to the trustees *and their heirs*, on trust to raise and pay to the jointress a certain yearly sum *during her natural life only*. The mere words would seem to pass a present estate and rent charge; but that certainly could not be meant: and to make him pass a fee would be contrary to his own recital of the estate, and power devised to him, from whence it appears that he had only power to grant to the trustees, (or to the trustees *and their heirs*, if the latter words can be implied,) pur autre vie; and to his covenants in the same deed for good

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(*a*) 5 *East*, 152—171. (*b*) 12 *Ves. jun.* 89.

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title and quiet enjoyment, which are confined to Lady *Wenman*'s life estate: the whole deed must be construed * together; and it would be repugnant to the latter covenant to give the trustees a fee. But if a greater estate than for Lady *Wenman*'s life has been granted to the trustees and their heirs, and the deed of appointment cannot receive the narrower construction contended for; then, 3dly, the estate granted to the trustees will be void for the excess, and good only pur autre vie. And he cited *Tomlinson* v. *Dighton* (*a*), *Peters* v. *Masham* (*b*), and *King* v. *Melling* (*c*); in the former of which it was held that a power might be executed by lease and release, though properly adapted only to pass an interest; and in the latter, that a covenant to stand seised was a good execution of a power; that both sorts of execution were good pro tanto, and void for the excess. But supposing the express appointment were entirely void on account of the excess, it may be rejected altogether; and then the covenant for quiet enjoyment, which is confined to the life of the wife, may be considered as an execution of the power. Such a covenant in a common law conveyance, if livery of seisin be given with it, will operate as a lease (*d*); but here livery of seisin was not necessary.

Dampier, contrà, after stating the real question between the parties to be, whether the recovery which had been suffered were good, either as a legal or as an equitable recovery; argued upon the question immediately before the Court, 1st, That the will creating the power only authorized the grant of a chattel interest to the trustees to secure the jointure. The testator having legal and equitable estates to devise meant to continue each kind of

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interest the same in the hands of the successive devisees. And if he meant the several tenants for life to have legal estates, he could never have meant to give such a power as, when executed by the first tenant for life, would convey the freehold and right of possession from the succeeding tenant for life, leaving him only a legal remainder during the subsistence of the trust-estate of the jointress: so that, though the tenant for life had a son of age, they could not join in suffering a recovery to bar the entail, without the consent of the trustees of the first jointress:

(*a*) 1 *P. Wms.* 149. (*b*) *Fitzg.* 156. (*c*) 1 *Ventr.* 228.
(*d*) 4 *Bac. Abr.* Leases, K. *p.* 161-2.

nor

nor would the second tenant for life have a legal right to enter into possession; and if he married and made a jointure, the trustees of the second jointress could have no legal remedy to enforce the payment of the second jointure during the subsisting estate of the first jointress, but must resort to equity. But if the jointuring power of the tenants for life be confined to the creation of chattel interests only in the trustees, the freehold will remain in the tenants for life, and the estate will devolve upon them with all the powers and enjoyments belonging to their legal estates, and they will not be cramped beyond the necessity of the thing. And this view of the case accounts for that which might otherwise seem an omission in not extending the power to convey "to trustees *and their heirs*;" but the latter words appear to have been purposely omitted. Admitting then, that the power, being general in the terms of it, may be moulded by the Court to answer the necessity of the charges; yet if the grant of a term of years will satisfy the charge, the Court will not imply more. The usual way indeed of executing these jointuring powers is by giving a term which will overreach the life of the jointress, and secure the [471] arrears at her death. A general charge for payment of debts is only considered as a chattel interest (*a*). The leasing power also shews that the trustees were not intended to take a freehold interest. Secondly, supposing the will only to authorize an appointment to the trustees of a chattel interest, a deed conveying an estate to them *and their heirs* cannot be an execution of such a power, so as to make it a good legal appointment pro tanto as of a chattel interest. This point was much pressed in *Roe d. Brune* v. *Prideaux* (*b*), where a power to lease for years not exceeding 21, or for life or lives, was held ill executed by a lease for 99 years determinable on lives. It was argued to be good at least pro tanto for 21 years, though void for the excess: but the Court held it void in toto at law, as conveying an interest of a different nature from that warranted by the power. A fortiori, therefore, a power to grant a chattel interest cannot be executed by granting a fee: and it is very distinguishable from a mere excess in the execution of a power;

(*a*) He cited *Cordal's* case, *Cro. Eliz.* 316. and 8 *Rep.* 96. *Co. Lit.* 42. *a.* *Carter* v. *Barnardiston*, 1 *P. Wms.* 509. and *Hilchins* v. *Hilchins*, 2 *Vern.* 404.

(*b*) 10 *East*, 158.

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as in *Tomlinson* v. *Dighton* (*a*), where a power to the wife to dispose of an estate amongst the children, being well executed by granting an estate tail to a daughter, with remainder in fee to the son, was held not to be avoided by the excess of appointing an intermediate estate for life without impeachment of waste to the wife herself. This is not the case of a general power; and to hold such an execution of it to be good would be contrary to the manifest intention of the testator, as the grant of the legal fee to the trustees would remove the successive tenants for life from the present legal estate and possession while any trust estate for a prior jointress subsisted. Neither could it have been intended to give an estate to the trustees merely for the life of the jointress; for then immediately on her death the estate would be at an end, and she would lose all her arrears then due; which was likely enough to happen on an estate heavily burthened. And it is not pretended that it was meant to give an estate for the lives of the trustees themselves: but if the estate were considered as intended to be limited to the trustees generally, that must be considered as a freehold. The only estate which will best answer all the purposes of the power, is a term of years in the trustees for the life of the jointress; which will protect her jointure during her life, and cover all the arrears due at her death, without encroaching upon the legal estate of the tenants for lives: but if that be put out of the question, the trustees must take the legal fee, from the insufficiency of any life estate, either of the trustees themselves or of the jointress, to answer completely the purposes of the trust; and if the nature of the trust requires a fee in the trustees, the appointment of a fee will be good. That will have the effect of converting all the subsequent remainders into equitable estates during the continuance of the trust estate: each subsequent tenant for life and in tail taking subject to the prior legal charge of the trustees; as in *Ren d. Hall* v. *Bulkeley* (*b*). In *Doe* v. *Hicks* (*c*) it was the evident intention of the testator to give the trustees an estate of freehold during the life of the particular tenant; and they were to permit the tenant for life to take the rents and profits: there was no contemplation of arrears after the death of cestui que vie: but here the trust would not be satisfied by giving the trustees only an estate

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(*a*) 1 *Pr. Wms.* 149. (*b*) *Dougl.* 292. (*c*) 7 *Term Rep.* 433.

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pur autre vie. In *Doe* v. *Simpson* (*a*) the Court indeed held that as an estate for the lives of the annuitants, and a term of years in remainder sufficient for raising the gross sum charged out of the rents and profits, would answer the purposes of the trust, they would not pass a greater estate to the trustees by implication. But there the estate was devised to the trustees and the survivor and his *executors*; which shewed an intention not to devise the *fee* to them. And there too the inconveniency of fettering the tenant for life and remainder-man in tail from suffering a recovery, and of there being no remedy for the arrears of the annuities after the deaths of the annuitants, were not adverted to in the argument. If these consequences had been pointed out, it is probable the Court would have considered, that giving a long term to the trustees would have answered all the purposes. [Lord *Ellenborough* C. J. observed, that that case had undergone much consideration, not only by this Court, but upon conference with others who were in the general habit of considering such questions. But the only object there was to get the legal estate out of the trustees after all the purposes of the trust were satisfied. But have you any cases for the implication of a chattel interest for an indefinite term? for that was the difficulty which pressed us in *Doe* v. *Simpson*.] Such is the case of a devise to trustees for payment of debts; as in *Cordell*'s case, 8 *Rep.* 96.; and even in *Doe* v. *Simpson*. But if this be not confined to a chattel interest, the habendum in the deed conveys a fee-simple to the trustees; which cannot be cut down to a life estate, even by a warranty (*b*); much less, therefore, by [474] the covenant for quiet enjoyment; to the operation of which, as contended for, there is also these objections, that it supposes all the prior parts of the deed to be cut out; that no provision is thereby made for the arrears of the annuity; and that the nature of the subsequent estate for life is altered pending the life of the jointress. And he referred to *Venables* v. *Morris* (*c*), where a limitation to the use of trustees and their heirs to preserve contingent remainders generally, was held to be a use executed in them in fee, in order to protect the subsequent equitable uses and contingent remainders; and observed that a similar use might be made here of a fee in the trustees, in order to protect the

(*a*) 5 *East*, 162.

(*b*) *Co. Lit.* 47. 384. *a.* & *b.*

(*c*) 7 *Term Rep.* 438.

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subsequent tenants for life in the equitable enjoyment of their estates, and enable an equitable recovery to be suffered.

Holroyd in reply denied that any construction of the power, which would enable the first tenant for life and the tenant in tail to suffer a recovery and defeat all the subsequent limitations, could be considered as furthering the intention of the testator. In *Mansell* v. *Mansell* (*a*) Sir *Eardley Wilmot* considered that the execution of such a power had only the effect of postponing the subsequent remainders after the life estate of the widow. And in *Doe* v. *Hicks* (*b*) Lord *Kenyon* said, that upon the same principle that it was necessary in *Venables* v. *Morris* that the trustees should have the legal estate to answer the intention of the parties, he thought it was not necessary in the case then in judgment that they should take the legal estate for a longer term than during the lives of the tenants for lives, since that construction would best answer the intention of the

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testator. The leasing power does not shew that the trustees were not to take the legal estate during the life of the jointress; for they would be obliged to execute it not merely for her benefit, but for the benefit of the tenants for life and of the inheritance; or it might still be executed by the tenant for life, as in *Ren* v. *Bulkeley* (*c*), though the legal estate were in the trustees. And this latter will also apply as an answer to the power to raise portions for younger children: a power to charge does not require the legal estate. There is no ground for saying that this is a chattel interest in the trustees: no such interest can be commensurate in legal contemplation with an estate for life. Debts and other incumbrances may be paid off long before any given life is spent, and then the trust immediately ceases. Whenever an estate is given generally to a person, the law says that it is an estate for life. This is equivalent then to an express estate of freehold given to the trustees; and the object being to pay the rents and profits during her life to the jointress, the law will construe that to be an estate for her life. It does not necessarily follow that there must be arrears at her death; but supposing a possible loss of a quarter or half a year, it would be too much to provide against it by giving to the trustees a fee by implication, which

(*a*) *Wilmot's Rep.* 55, 6. (*b*) 7 *Term Rep.* 437.
(*c*) *Dougl.* 291.

will

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will defeat the general purposes of the will. The trustees may guard against any eventual loss either by taking the rents and profits themselves, or by letting with a covenant from the lessees to secure all arrears to the jointress. And under the stat. 11 *Geo.* 2. *c.* 19. *s.* 15. persons entitled for life are enabled to recover the rents and profits up to the time of their deaths in proportion. Then as all powers when executed are referred to the instrument creating the power, the several [476] estates would be limited exactly as they stand in the will, only with the interposition (after the estate for life of the eldest son, with the remainder to trustees to preserve contingent remainders,) of a remainder to trustees for the life of the wife to secure her jointure, with an implied trust to pay the surplus to the person beneficially entitled; then a vested remainder in the first son, after the jointuring estate was satisfied, &c. [*Le Blanc* J. The succeeding tenants for life in possession would only take equitable estates during the continuance of the first jointuring trust estate: and that breaks in upon a great part of your argument, as to changing the nature of the estates which the testator meant to give them.] By interposing only an estate to the trustees and their heirs during the life of the jointress, all the other estates would remain the same as they were intended to be, except so far as is absolutely necessary to the execution of the trust: it does not divert any subsequent estates; it only interposes another legal estate; and the only effect of it is to prevent the estate tail from being defeated during the estate of the trustees, without their joining. [*Le Blanc* J. It still prevents the subsequent tenants for life from having a legal estate in possession during the continuance of the trust estate. What would be the effect, if, instead of *heirs*, an estate to the trustees and their *executors* were substituted?] The word *executors* must be rejected as surplusage if the estate were given to the trustees and their executors during the life of the jointress; for it would still be an estate of freehold, and not a chattel, and would go to their heirs as special occupants. And no term being granted here, it can only be taken to be an estate for the life of the jointress; and the putting in a term by the Court [477] would be doing that which the testator has not done. [*Bayley* J. Supposing the first jointress to be living when the second son came into possession, he would only have an equitable estate

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estate pur autre vie in the surplus of the rents and profits, with a legal estate in remainder; which would be a different estate from that which the first son took.]

Lord ELLENBOROUGH C. J. said, that the Court would consider the case, and certify their opinion: and afterwards the following certificate was sent:

THIS case has been argued before us by counsel. We have considered it, and are of opinion, that the trustees named in the deed of appointment of the 28th of *June* 1766 took an estate in fee in the manors, lands, and hereditaments in question, (being those which were not limited to *George Hervey* and *Francis Bassett* Esquires, for payment of debts and legacies,) of which the Right Hon. *Philip* Lord *Wenman*, the testator, was seised in fee-simple at the time of making his will, and which were thereby given to the Hon. *Philip Wenman* his son, afterwards *Philip* Lord *Wenman*, for life.

ELLENBOROUGH.
N. GROSE.
21st *June* 1809. S. LE BLANC.
J. BAYLEY.

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Tuesday, *Nov.* 7th.

DOE, on the Demise of J. GRAHAM, Clerk, *against* SCOTT, Clerk.

Proof of a curacy *augmented* is made by shewing an order for the augmentation of it, entered in a book and signed by the governors, according to st. 1 *G.* 1. *st.* 2. *c.* 10. *s.* 20.; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors of Queen *Anne*'s bounty to be annexed to the curacy, and that such deed was enrolled within six months after its execution according to st. 1 *G.* 1. *st.* 2. *c.* 10. *s.* 21. and 9 *G.* 2. *c.* 36.

Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage-settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was had of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage; held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it.

WILLIAMS Serjt. moved to set aside the verdict which had been given for the plaintiff at the trial of this cause at *Hereford* before *Thomson* B., and to enter a nonsuit. He stated that

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that this was an ejectment for the rectory of *Brampton Bryan* under 8*l.* a-year in the king's books, to which the defendant Mr. *Scott* had been presented by the Earl of *Oxford* in 1801, and which it was contended on the part of the plaintiff was voidable by the patron in consequence of Mr. *Scott*'s having in 1805 been collated by the bishop of the diocese to the *augmented curacy* of *Titley*; whereupon the lessor of the plaintiff Mr. *Graham* had been appointed to the rectory in question in *June* 1808, on the joint and several presentation of Lord *Oxford*, *Thomas Wood*, *J. R. Wood*, and *H. Smith*, the assignees of an old term of 1000 years after mentioned. By the stat. 1 *G.* 1. *st.* 2. *c.* 10. *s.* 4. all augmented curacies are made perpetual cures and benefices; and by *s.* 6. if they remain void for want of nomination for six months, they shall lapse to the bishop, &c. according to the course of law used in cases of presentative livings and benefices: but that statute says nothing of the acceptance of such an augmented curacy avoiding a former benefice. This however is supplied by the stat. 36 *G.* 3. *c.* 83. *s.* 3. which provides that such augmented curacies, &c. shall be considered in law as benefices presentative, so as that the licence [479] thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings in like manner as institution to the said benefices. It became therefore necessary for the plaintiff to prove two things; first, that the curacy of *Titley* had been augmented by Queen *Anne*'s bounty; in which case the rectory held by Mr. *Scott* at the time of his collation to such curacy was immediately voidable by the patron (*a*), and he might present thereto; secondly, that the lessor of the plaintiff was legally presented to the rectory. 1st, In order to prove that the curacy had been augmented, the plaintiff put in two orders of the governors of Queen *Anne*'s bounty, (who are a corporation created by letters patent of the crown under the stat. 2 & 3 *Ann.* *c.* 11. (*b*) dated the 3d of

(*a*) Benefices, says Dr. *Burn*, (1 vol. *Ecc. L.* 100. tit. Avoidance,) are voided by cession, or the acceptance of a benefice incompatible; in which case the benefice, if of the yearly value of 8*l.* or above, is void by statute, and no notice is needful: if under 8*l.* a-year, it is void by the common law, and the patron may either present immediately, or may sue in the Court Christian for sentence of deprivation, and wait for notice to be given thereupon, or the ordinary himself may ex mero officio proceed to deprivation, and then give notice.

(*b*) Vide 2 *Burn's Eccl. Law*, tit. First Fruits and Tenths, *s.* 4.

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Dec. 1717, and the 2d of *Dec.* 1734, directing the augmentation, but not signed by any of the governors. This evidence was objected to by the defendant's counsel, on the stat. 1 *G.* 1. *st.* 2. *c.* 10. *s.* 20. which enacts, that all the augmentations, certificates, agreements, and exchanges made in pursuance of the act shall be *entered* in a book to be kept by the governors for that purpose; and that the said entries being approved at a court of the said governors, and *attested* by the governors then present, shall be taken to be as records, and copies thereof or
[480] of the said entries proved by one witness shall be evidence in law touching the matters contained therein or relating thereto. The plaintiff then put in another order, dated 24th of *January* 1767, attested by the Archbishop of *York* and several other governors, wherein it was stated that the governors had agreed to augment the forty-two-livings following, amongst which the curacy of *Titley* is mentioned, and directed a certain sum to be appropriated for that purpose. To this it was objected, that by the charter of rules for the government of the corporation of Queen *Anne*'s bounty in force at that period, all money given to augment small livings must be laid out in land; and that this falls within the statute of mortmain 9 *Geo.* 2. *c.* 36. as was held by Lord *Camden* C. in *Midmore* v. *Woodroffe* (*a*), in the case of a legacy given for that purpose: and that statute enacts, that no lands, nor any sum of money, &c. to be laid out in the purchase of lands, shall be given or conveyed, &c. in trust for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement shall be made by deed indented, sealed and delivered, in the presence of two or more witnesses, twelve calendar months at least before the death of the donor or grantor, and be inrolled in Chancery within six months after the execution of it, &c.; and all such grants, appointments, &c. made otherwise are declared absolutely void. And the stat. 1 *Geo.* 1. *st.* 2. *c.* 10. *s.* 21. had before enacted, to the end that churches and chapels might be capable of receiving augmentations, that if the governors of Queen *Anne*'s bounty should by any deed or instrument in writing under their common seal allot to any church or chapel any lands, &c. arising from the Queen's bounty, or private benefaction, or from all or any of the ways aforesaid, and shall de-
[481] clare that the same shall be for ever annexed, &c., such

(*a*) *Ambl.* 639.

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augmentation so made shall be good and effectual to all intents and purposes; provided such deed or instrument be enrolled in Chancery within six months after the date. Therefore without shewing a compliance with the statutes in this respect, it was contended that the appropriation was invalid, and that the cure was not augmented, and consequently the collation to it worked no avoidance.

[Lord *Ellenborough* C.J. Is not the curacy *augmented* when the money is appropriated by the governors to that purpose, even before it is laid out in land, which may not be for some time afterwards? The words of the 36 *Geo.* 3. *c.* 83. are general, that all churches, &c. which shall be augmented by the governors of Q. *Anne*'s bounty, shall be benefices, so that the licence thereto shall render voidable other livings, &c.]

The next objection urged was to the proof of the lessor of the plaintiff's title to the rectory, to which he was presented by virtue of the joint and several presentation of the Earl of *Oxford*, and of Messrs. *Wood* and *Smith* before mentioned, all or one of whom it was contended should have the legal estate, in order to make it a valid presentation. As to this, it appeared that in 1727 the then Earl of *Oxford* executed a mortgage term of 1000 years, including the advowson of *Brampton Bryan*, to secure about 20,000*l.* to the mortgagees, which term had vested by several assignments in *T. Wood*, *J. R. Wood*, and *H. Smith*. The next mention of the term was in an indenture of 1751, being the marriage settlement of the late Lord *Oxford* with Miss *Archer*, wherein it was stated that 27,000*l.*, part of her fortune, was to be applied to the discharge of the mortgage; and since then no mention was made of it, nor was there any other evidence of its existence till in a mortgage deed of the 3d of *December* 1802, (which was after [482] Lord *Oxford* had presented Mr. *Scott* to the rectory of *Brampton Bryan*,) this term, together with another old outstanding term of 1709, comprising the manor of *Brampton Bryan*, was assigned to secure the mortgage-money. *Williams* Serjt. thereupon contended at the trial and now, that the term of 1727 ought to have been presumed to be surrendered; and then the legal estate would be out of the trustees of that term, and would have reverted to the Earl of *Oxford*, who after his presentation of Mr. *Scott*, had conveyed the legal interest in all his estates to other trustees for the payment of debts, in whom the legal estate of this rectory was vested at the time of

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of Mr. *Graham*'s presentation to it; and against any presentation by Lord *Oxford* himself, he stated that Mr. *Scott* had another and a decisive objection, the nature of which it was now unnecessary to state. The grounds for such presumption of a surrender of the term of 1727 he stated to be the recital in the indenture of 1751 of an adequate sum to be applied to the discharge of the mortgage; and no evidence of the term's having been acted upon or recognized from that period till 1802, when it was assigned as an outstanding term: and further, the possession of the deed itself by the Earl of *Oxford*, the owner of the inheritance, which could not have happened unless the mortgage money had been paid off. If under those circumstances an ejectment had been brought upon the demise of Ld. *Oxford* against any intruder upon his property, this term could never have been set up in bar of his possessory title, but any judge would have directed the jury to presume a surrender of the term as long before satisfied.

[488] Lord ELLENBOROUGH C. J. asked whether the learned Judge had been desired to leave that presumption to the jury? (and being answered, that he was of opinion at the time that there was no ground whatever for making such a presumption under these circumstances against the owner of the inheritance; but had afterwards expressed a doubt of that opinion; his Lordship continued,)—There was no purpose of justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have such a presumption made. It might have been his intention to keep alive the term, and to have it assigned to a trustee to attend the inheritance. At present we have no doubt upon either point: but if upon application to the learned Judge, which we will make, he should intimate any doubt of his own continuing on the latter point, in deference to that intimation we will hear the matter further discussed upon a rule to shew cause.

On the next day BAYLEY J. said, that he had seen Mr. Baron *Thomson*, who had mentioned to him, that though he had after the trial intimated to Mr. Serjt. *Williams* a wish to have the case moved in Court; yet having since had it under his consideration, he no longer had any doubt upon either of the points. That with respect to the latter of them, though no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited

recited that the term had not been surrendered; he thought that was sufficient to warrant him in the opinion which he had delivered at the trial.

* Lord ELLENBOROUGH C. J. then said, that as the Judge who tried the cause was satisfied, and this Court had no doubt upon either point, there was no necessity for any further discussion of the matter, and therefore they

Refused the Rule.

1809.

DOE, on the Demise of GRAHAM, *against* SCOTT.

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ROBINSON *against* POCOCK.

Wednesday, Nov. 8th.

THIS was an action of debt for the penalty given by the general turnpike act, 13 *Geo.* 3. *c.* 84. *s.* 13. against a farmer, for drawing his waggon along the turnpike road with more horses than are allowed by that clause, according to the relative breadth of the wheels. The fact was not disputed; and the only defence set up was under the 19th section of the act, by which, "if it shall appear upon the oaths of credible "witnesses to the satisfaction of any justice or justices of the "peace, (*i. e.* upon information before them for the penalty,) "or of any court of justice, (*i. e.* upon action brought,) au- "thorized to enforce the execution of this act, that any wag- "gon, &c. could not, by reason of deep snow or ice, be drawn "with the respective weights, and by the number of horses "hereby respectively allowed; then it shall and may be law- "ful for such justice, &c. or court respectively, and they are "hereby respectively required, *to stop all proceedings before* "*them* respectively, for the recovery of any penalty," &c. No instance being recollected of any proceeding upon this clause, and a doubt having occurred in what manner a defendant sued in an action for the penalty could avail himself of the defence there given, an application was made to this Court in the last term to stay the proceedings, on affidavits stating that the necessity of using the surplus number of horses arose in consequence

The general turnpike act, 13 *G.* 3. *c.* 84. *s.* 13. having given a penalty, to be recovered by information before justices of peace or by action, for using a greater number of horses than is thereby allowed for the draft of waggons, &c. on the roads; and the 19th section having provided that if it appear on oath to the satisfaction of any justice

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of the peace or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace or court may *stop all proceedings* before them respectively; held that such application for a stay of proceedings must be made to the court above in which the action was brought, and that the defence is not available at nisi prius.

1809.

ROBINSON *against* POCOCK.

sequence of the snow and frost having rendered the draft too great for the ordinary number allowed: but on cause being shewn founded on other affidavits contradicting the alleged necessity, the Court discharged the rule on account of such contradictory affidavits; without, as it was now said, deciding that the course then taken was the only one in which the defendant could avail himself of the defence set up. When, therefore, the cause went to trial, at the Lent *Berkshire* assizes, the same evidence was offered to be given on the part of the defendant as to the state of the road from the effects of the snow and frost; but *Thompson* B. was of opinion that the clause, directing the application to be to the Court for *a stay of proceedings*, did not apply to the Court of Nisi Prius, but to the Court out of which the record came, and therefore he rejected the evidence, and the plaintiff recovered a verdict.

Dauncey now moved for a new trial, and stated the preceding facts, in order to take the opinion of the Court upon the construction of the act. And being asked by the Court, whether he had tendered the evidence to the consideration of the Judge alone, as upon an application for a stay of proceedings, or as evidence for him to leave to the jury; he said that the distinction was not specifically pointed at in the mode of application; but the evidence was tendered generally, for the Judge
[486] to act upon it according to his judgment of the meaning of the clause, during the progress of the trial; but the learned Judge thought that as the legislature had pointed out a particular mode of making the defence before another Court, he could not take cognizance of it at nisi prius. It was now therefore urged that, as the matter now stood, the defendant had been shut out of making the defence which was given him by the legislature; for when the application was made here last term, this Court, not considering themselves competent to decide on which side the truth lay upon contradictory affidavits, refused to interfere; and yet when the question came before the ordinary tribunal for the decision of disputed facts, the Judge thought that the Court in which he sat could not take cognizance of a defence which the legislature had directed to be submitted to another tribunal in a different shape.

Lord ELLENBOROUGH C. J. The defendant did not satisfy the Court upon the application in the last term that he had the excuse which the statute allows of; and then he stood in the condition of a party not bringing himself within the protection

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tection of the law, and his application of course failed. But the function of the Judge at nisi prius is merely to try the issue joined; he cannot stay proceedings in the cause; and by the terms of the 19th section the only application to be made is for a stay of proceedings.

GROSE J. *The Court*, who are required by the clause to *stop all proceedings*, if the fact shall appear to their satisfaction upon the oaths of credible witnesses, must mean the Court which originates the proceedings, in like manner as it speaks of the justice or justices of the peace when the proceeding originates by information before them.

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LE BLANC J. From the terms made use of in this clause it could never be meant that the fact of the excuse allowed should be set up as a defence at the trial, but upon summary application in the first instance to the Court above.

BAYLEY J. I am not satisfied that if the fact appeared doubtful to the Court upon contradictory affidavits, the defendant might not, if he had applied for it, have obtained an issue to try the fact: but no such application was made; and the stay of proceedings must be by the Court above.

Rule refused.

1809.

Wednesday, Nov. 8th.

GOODTITLE, Lessee of PARKER, *against* BALDWIN.

A possession of crown land commencing at least 55 years ago by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it.

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THIS ejectment was brought to recover possession of a cottage and a small piece of land adjoining. And it appeared at the first trial before *Graham* B. on the last spring circuit at *Gloucester*, that part of the premises 55 years ago, at least, and the rest about 40 years ago, were taken by encroachment, in three several contiguous plots, out of the forest of *Dean* belonging to the crown, partly by the lessor of the plaintiff's father, and partly by other persons who had afterwards given them up to him, and he had thrown the whole into one close. The father continued to have quiet enjoyment of the premises till his death, which happened about 19 years ago; after which his widow continued in possession for two or three years; and then the defendant got into possession, but by what means did not at first appear. The widow is since dead, and the lessor of the plaintiff is their eldest son. The learned Judge being of opinion upon this evidence, that the lessor of the plaintiff, whose claim was only as heir to the former possessor, could have no title to the freehold, inasmuch

But it appearing upon a second trial, that by the stat. 20 *Car.* 2. *c.* 3. all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago; and by the st. 9 *G.* 3. *c.* 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: for from the death of the father 19 years ago the possession was adverse to his heir, the lessor of the plaintiff, or at least the defendant's possession for the last 17 years was adverse; and the act of *Geo.* 3. does not give *a title* to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them. And as it does not repeal the stat. 20 *Car.* 2. *c.* 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17 years, were both legally holden by the licence of the crown.

as

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GOODTITLE, on the Demise of PARKER, *against* BALDWIN.

as that appeared to be in the crown, against which the adverse possession of the father could not operate to give him even a possessory right, nonsuited the plaintiff.

Dauncey moved in *Easter* term to set aside the nonsuit, insisting on the long possession of the lessor of the plaintiff and of his father, for much above 20 years, which was sufficient title against a mere wrong-doer, though not against the crown. But the crown, he said, took no part in the defence. Having obtained a rule nisi;

Wyburgh shewed cause against it in *Trinity* term, and urged that the commencement of the lessor's title, being proved to be by wrong and trespass upon the crown, against which the length of possession which had occurred could not give even a possessory title, (for the king can only be ousted of his possession by matter of record (*a*); the lessor, who could only recover upon the strength of his own title, was upon his own shewing out of court. That it was always competent to a defendant in ejectment to avail himself of title in a third person, whether or not that person defended the cause; and here the title to the possession was shewn to be in the crown. And he referred to *Yates* v. *Dryden and others* (*b*), where it was resolved in a suit between third parties, that if a clear title and right appeared for the king, either confessed by the parties in pleading, or otherwise fully apparent, the Court were bound ex officio to take notice of it: and though the king's title appeared there upon the record, yet as in ejectment it can only appear in evidence, the Court must be [490] equally bound to notice it.

The Court having then suggested that, if it were necessary as between these parties, the crown not contesting the lessor of the plaintiff's right, the jury upon this length of possession might have been advised to presume a grant subsequent to the encroachment: *Wyburgh* adverted first to the stat. 1 *Ann. st.* 1. *c.* 7. *s.* 5. restraining the crown from granting its lands out for any term or estate exceeding 31 years or 3 lives, &c. But it being observed that a grant to the extent of 3 lives might cover the lessor's title: he lastly referred to the stat. 20 *Car.* 2. *c.* 3. for the regulation of *Dean* forest, which, he said, restrained the crown from making any such grant of the forest

(*a*) *Co. Litt.* 277. *a.* 4 *Com. Dig. Prerogative*, D, 71.
(*b*) *Cro. Car.* 592.

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land. But as this statute is not set forth in the common printed edition, and the terms of it were not fully brought before the Court upon that occasion; and, as it was further observed by *Dauncey* for the plaintiff, that the nonsuit did not proceed upon the ground of the incapacity of the crown to grant by that statute;

Lord *Ellenborough* C. J. said, that as the plaintiff was nonsuited upon the supposed impossibility of presuming any title which could be derived from the crown, notwithstanding so long a possession, commencing 55 years ago, and continuing to the death of the lessor's father within the last 20 years; and all this without any disturbance by the crown; and as the Court were of opinion that the jury might have presumed a grant from the crown under these circumstances to the lessor's father, unless there were any provision in the statute of *Car.* 2. to preclude such a grant as would cover the lessor's title, of which they were not at present distinctly informed,

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and certainly that point had never been made at the trial; they thought it right to send the case to a new trial, that it might undergo further consideration; and then the defendant might shew the statute to which he had referred, in order to preclude the presumption of any grant, if it would bear him out in the objection. But with respect to the general impossibility of presuming a grant against the crown, the courts were in the daily habit of presuming grants from the crown, as of markets and the like, upon an uninterrupted enjoyment of 20 years: and it was only a few days ago (*a*) that they had considered that the jury were warranted under the circumstances of the case in presuming a grant of enfranchisement of a copyhold from the crown. Thereupon the Court made the rule absolute for a new trial.

At the second trial before *Bayley* J. at the last assizes at *Gloucester*, evidence was given that one of the pieces of land held by the lessor of the plaintiff's father had been inclosed from *Dean* forest 60 years ago; and the father had been in possession of the whole for above 40 years; at whose death the lessor his eldest son being out of the way, the widow continued in possession for about two years, and then gave up the premises to the defendant about 17 years ago for a consideration of 2 or 3 guineas, without any conveyance. It appeared

(*a*) *Roe, Lessee of Johnson*, v. *Ireland*, ante, 280.

also

also that about 20 years ago there had been a survey of the forest, when all new inclosures and encroachments were levelled by the officers of the crown; but as they had received orders to confine their prostrations to inclosures made within 20 years, the parties were left in possession of the inclosures in question. The defendant's counsel objected at the trial to the lessor's title upon the stat. 20 *Car.* 2. *c.* 3. avoiding all future grants of the forest of *Dean* by the crown, of which any presumption could otherwise have been made in favour of the lessor's title; and insisted that the defendant, though not claiming under the crown, was entitled to take advantage of the defect. On the other hand, the counsel for the plaintiff relied principally on the stat. 9 *Geo.* 3. *c.* 16. as taking away all right of suit in the crown after an adverse possession of 60 years, which would at any rate cover part of the premises sought to be recovered; and as to the rest they relied on the possession of the lessor's father for above 20 years, as giving him and his son by descent a possessory right against all the world but the crown. But *Bayley* J. considering that no presumption of a grant from the crown could be made against the stat. 20 *Car.* 2. in favour of any title in the lessor of the plaintiff's father during his lifetime; and that when his possession ceased at his death, which was nearly 19 years ago, he had acquired no right of possession against the crown under the stat. 9 *Geo.* 3.; and that since that time the possession, first, of the lessor's mother for a short period, and afterwards of the defendant himself for the greater part of the time, had been adverse to the claim of the lessor as heir to his father; and therefore that the lessor's claim, so far as it was founded upon length of possession, stood in the same predicament as it did at the death of his father; left it to the jury to presume that the possession of the lessor's father up to the time of his death, and of his mother for two years afterwards, and that of the defendant for the last 17 years, were with the licence of the crown, as being the only way of accounting legally for these respective and adverse possessions: and the jury, adopting that presumption, found a verdict for the defendant.

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Wigley now moved to set aside that verdict and for a new trial; and after stating the general facts of the case, relied on the stats. 21 *Jac.* 1. *c.* 14. and 9 *Geo.* 3. *c.* 16. as giving title to the lessor of the plaintiff in this case for part of the premises even against the crown, and for the remainder also as against a

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GOODTITLE, on the Demise of PARKER, *against* BALDWIN.

wrong-doer. The first of these enacts, that whenever the king, his heirs, &c. and all others claiming under the same title shall be out of possession, or of the profits of any lands for 20 years before any information of intrusion brought to recover the same, the defendant may plead the general issue, and not be pressed to plead specially; and that in such case the defendant shall retain the possession he had at the time of such information exhibited until the title be tried, found, and adjudged for the king. The stat. 9 *Geo.* 3. *c.* 16. extending the principle of that statute, enacts, that the king shall not sue, impeach, question, or implead any person for any manors, lands, &c. or make any title, claim, &c. to the same, by reason of any right or title which shall not first accrue and grow within 60 years next before such action or suit, &c. for recovering the same; unless his majesty or some of his progenitors, &c. or some other person, &c. under whom his majesty, &c. claims, have or shall have been answered, by force and virtue of any such right or title to the same, the rents, issues, or profits thereof, or of any honor, manor, or other hereditament, whereof the premises in question shall be parcel within the said 60 years; or that the same have or shall have been duly in charge to his majesty or some of his progenitors, &c. or have or shall have stood insuper of record within the said 60 years. And that all persons, &c. and all claiming by, from, or under them,

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according to their several estates and interests, which they have or claim to have in the same, shall at all times hereafter quietly and freely have, hold, and enjoy against his majesty, his heirs and successors, claiming by any title which hath not first accrued and grown within the said 60 years, all manors, lands, &c. which they or their ancestors, &c. or those under whom they claim, shall have held or enjoyed for 60 years next before the commencing of every such suit or proceeding, &c. (with the same exceptions as before.) And then it enables all such possessors for 60 years, &c. and those claiming under them, (except as before excepted) quietly to hold and enjoy all such manors, lands, &c. against all persons, their heirs and assigns, claiming by force or colour of any letters patent or grants, &c.; and saving all other rights but those of the crown. This latter statute, he contended, so far repealed the stat. 20 *Car.* 2. *c.* 3. as to give *title* to the possessor of that part of *Dean* forest which had been held against the crown for 60 years; and the lessor of the plaintiff having established

established a possessory right to the parcel in question as deriving title from his father, against all the world but the crown, it was not competent for a wrong-doer to set up the title of the crown under the act of the 20 *Car.* 2. *c.* 3., when by the latter act of the 9 *Geo.* 3. *c.* 16. the crown was barred from suing after having been ousted of possession for 60 years, and quiet possession was insured to the possessors against the crown and all those claiming under it. And great inconvenience, he observed, would ensue, if, though the crown were barred, the persons whose possession was intended to be quieted against the crown could not maintain an ejectment against any wrong-doer who happened to get into possession. The statute itself gives a title after 60 years adverse possession against the crown.

1809.

GOODTITLE, on the Demise of PARKER, *against* BALDWIN.

Lord ELLENBOROUGH C. J. How can the lessor of the plaintiff make out any title in this case? No grant from the crown can be presumed, against the express provision of the stat. 20 *Car.* 2., to have been made to the lessor's father in his lifetime; and unless it had been competent to the crown to make such a grant, how can the lessor of the plaintiff, who claims under his father, and who has been out of possession since his father's death, have any title? No grant can be presumed in his favour. The statute of the 9 *Geo.* 3. does not give a title; it does not affect to repeal the statute 20 *Car.* 2.; it only takes away the right of suit of the crown or those claiming from the crown against such as have held an adverse possession against it for 60 years: but here the defendant, who has been in possession for the last 17 years, was a stranger both to the lessor and to his father; and the lessor of the plaintiff must recover against the defendant by the strength of his own title, and not by the weakness of the defendant's title: and the stat. 20 *Car.* 2. bars any presumption of title in favour of the lessor in this case.

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Per Curiam, Rule refused.

1809.

Thursday, Nov. 9th.

DOE, on the Demise of OSBORN and Another, *against* SPENCER.

Where a fine was levied of [496] *Michaelmas* term, relating to the 6th, though in fact levied on the 8th of *November*, it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor.

THE lessor of the plaintiff claimed as heir at law of the person last seised. The defendant, at the trial before *Heath* J. at *Derby*, set up a fine levied of the premises of *Michaelmas* term 38 *Geo.* 3., which was in fact levied on the 8th of *November*, but related to the 6th, being the first day of the term. The plaintiff's counsel then required proof that the party levying the fine was seised of an estate of freehold at the time; on which a receipt for rent of the premises, given to him by the tenant in possession, was put in, which was dated on the 8th of *November*; but in fact the rent was not received till the 17th of the same month, as for the antecedent half year. This was contended not to be sufficient, but that it was necessary either to shew that the cognizor was actually in possession at the time of the fine levied by him, or that he was in the receipt of the rent before. On this the defendant shewed that a writ of possession, after recovery in ejectment by the cognizor, was executed by the sheriff's officer who walked over the premises and claimed them on behalf of the cognizor on the evening of the 6th of *November*; but there was no previous entry by the cognizor shewn, nor any change of the tenant in consequence of the execution of the writ. The learned Judge, being of opinion that this was sufficient evidence of an actual seisin of the freehold to establish the fine, nonsuited the plaintiff.

Vaughan Serjt. now moved to set aside the nonsuit, on the ground that the seisin in fact of the cognizor at the time of the fine levied was not sufficiently established, either by the entry of the sheriff's officer under the writ of possession sued out by the cognizor, and which was not executed till the evening of the 6th of *November*, which was after the time when by relation of law to the first moment of the day, the fine must be taken to have been levied; nor by the actual receipt of rent after that day, and also after the 8th, when the fine was in

And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is primâ facie evidence, if no covin appear, of his possession during the period for which the rent is received.

fact

fact levied. And he cited *Lord Townsend* v. *Ash and his Wife* (*a*), where the defendants levied a fine of two shares of the *New River* water; and it was objected that they had no seisin at the time to warrant the fine. The fine was levied in *Hilary* term 1733; but no claim was set up, or any entry proved, only that a demand was made of the profits in the company's office in the name of the defendants on the 19th of *February*; and the first payment was made of the *Christmas* dividend before due on the 23d of *February*, after the fine levied; and no other seisin appeared. Lord *Hardwicke* C. said, that if a man enter on another's tenant, he does not gain such a possession as is sufficient to levy a fine thereon, unless he continue in possession: for a wrong-doer to gain a possession by disseisin must not step on the land, and withdraw and leave the rightful owner in possession; which would be sufficient to gain a seisin on a feoffment, but not to levy a fine. Then as to the perception of the rents and profits being a sufficient seisin; it was answered that there was in fact no receipt till after the fine levied: if they received the rents before the fine, it would have been a disseisin. The evidence of a receipt of rent would be sufficient possession to levy a fine. And in answer to the argument, that the company were stewards to receive and pay the proprietors; and that those profits were received by the company at the time of the fine levied; and that the payment by them after the fine, of profits due before, should have relation back, so as to be considered as a payment before the levying of the fine; he observed that the company received for the rightful owners, who were the plaintiffs, and therefore it could be no receipt for the defendants at the time of the fine levied. He therefore held that the fine had no operation.

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Lord ELLENBOROUGH C. J. The entry of the sheriff's officer under the writ of possession, on the 6th of *November*, on behalf of the party who levied the fine, was a lawful entry and possession, and will relate to the first period of that day on which such possession was taken, so as to give the party a sufficient seisin in fact to warrant the levying of the fine by relation of law on that day; and the receipt of rent afterwards by the same party shewed a continuance of that possession. I should also have thought that a receipt of rent after a fine levied, for a period of time antecedent to the fine,

(*a*) 3 *Atk.* 336-9.

was

1809.

DOE *against* SPENCER.

was primâ facie evidence of the party's possession of the premises by his tenant during the period for which the rent was received, unless fraud or contrivance appeared.

Per Curiam, Rule refused.

Thursday, Nov. 9th.

Where house and land are let together to be entered upon at different times, and it do not appear [499] from the terms of the demise from what time the whole is to be taken as let together, it is a question of fact for the jury, which is the principal and which the accessorial subject of demise, in order for the Judge to decide whether the notice to quit the whole were given in time.

DOE, on the Demise of HEAPY, *against* HOWARD.

THE lessor of the plaintiff had demised to the defendant a certain messuage with the appurtenances, then in the possession of the defendant, together with several closes of land described as *thereunto belonging,* containing 13 acres, for the term of 11 years, to hold the lands from the 2d of *February,* and the house and other premises from the 1st of *May* then next; and the rent, which was 24*l.* per annum, was made payable half yearly, at *Michaelmas* and *Lady-day,* the first half year's rent being payable at the *Michaelmas* ensuing the commencement of the term. The tenant held over the term for 4 years, and on the 31st of *October* 1808 he received from the lessor a notice to quit on the 1st of *May,* or whenever else his tenancy should expire. And not having quitted, this ejectment was brought, which came on to be tried before *Wood* B. at *Lancaster*; when it was objected, on behalf of the defendant, that the notice to quit was insufficient, as not having been given six calendar months before the 2d of *February (Candlemas)* when the land, which he contended was the principal object of the demise, was to be given up. On the other hand, the case of *Doe* v. *Spence* (*a*) was cited in support of the notice; where the terms of holding were, that the tenant of a farm was "to enter on the *tillage land* at *Candlemas* last past, and on the house and all other the premises at *Lady-day* following, and that when he left the farm, he should quit the same according to the times of entry as aforesaid; and the rent was reserved half yearly, at *Michaelmas* and *Lady-day.* There a notice to quit delivered half a year before *Lady-day,* but less than half a year before *Candlemas,* was held good; considering the taking as in substance from *Lady-day,* with a privilege for the incoming tenant to enter on the arable land at *Candlemas,* for the sake of ploughing. But after this came the case of *Doe d. Ld. Bradford*

(*a*) 6 *East,* 120.

v. *Wat-*

1809.

DOE, on the Demise of HEAPY, *against* HOWARD.

v. *Watkins* (*a*), which referred the time of giving notice to quit to the principal object of the demise; and there the demise being made in *January* of a dwelling-house and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, &c. for 35 years, * to commence as to the meadow from the 25th of *December* last; as to the pasture from the 25th of *March* next; and as to the housing, mills, and all the rest of the premises, from the 1st of *May*; reserving the first half year's rent on the day of *Pentecost*, the other at *Martinmas*: it was held that the substantial time of entry, to which the notice to quit ought to refer, was the 1st of *May*, when the house and manufacturing buildings were entered upon; and not the 25th of *December*, when the meadow, which was merely the auxiliary to the other and principal subject of demise, was entered upon. And the learned Judge, being of opinion that the *land* was the principal object of demise in this case, and that therefore the taking of the whole was to be reckoned from the 2d of *February*, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit; and after stating the above mentioned facts, and the late cases bearing upon the point, questioned the opinion of the learned Judge, as to the land being the principal subject of the demise rather than the house, which (in answer to a question from the Court as to its locality) he described as situated near the borough of *Newton* in *Lancashire*. He observed, that the relative value or importance of the house and of the land seemed to be rather a question of fact than of law, and must at least be nearly balanced in this instance, even if the value of the house did not preponderate, as it probably did, in the estimate of 24*l*. a year rent for that and only 13 acres of land. The uncertainty of such estimates made it extremely difficult to frame a precise notice to quit in these instances.

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Lord ELLENBOROUGH C. J. It must in all these cases depend upon the relative value and importance of the house and of the land let together, which is the principal, and which is the accessary. In this case the learned Judge, upon consideration of the whole subject-matter of the demise, thought that the land was the principal and the house the auxiliary; and it lies upon you who impeach his opinion to shew that the

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(*a*) 7 *East*, 551.

house

1809.

DOE, on the Demise of HEAPY, *against* HOWARD.

house was the principal. If you disputed the fact assumed by him, that the land was the principal, you should have desired the Judge to leave it to the jury to say which was in fact the principal; instead of which you acquiesced at the trial in the fact assumed by the learned Judge as the ground of the nonsuit; and we cannot say that he was wrong.

GROSE J. agreed.

LE BLANC J. When once the inquiry was let in, as to which was the principal and which the accessary in these cases, a question of fact was necessarily let in, which, if not agreed upon, the jury must decide.

BAYLEY J. If the plaintiff did not acquiesce in the opinion intimated by the learned Judge, he should have desired to go to the jury upon the fact, whether the house were not the principal subject of the demise.

Rule refused.

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Thursday, Nov. 9th.

PARKIN *against* DICK.

Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced a forfeiture of the ship; the policy was held to be avoided in toto.

THIS was an action on a policy of insurance from *London* to the *Brazils* on goods as should be thereafter specified to the value of 10,000*l.*: that specification was afterwards made, whereby it appeared that the goods consisted of hardware and naval stores belonging to the same person; and the object of shipping the naval stores, the value of which was less than 600*l.* of the whole sum, was principally, as it was stated, to supply our own ships on the coast of *Brazils*, if wanted by them; or if not, to supply our allies the *Portuguese*, pending the war with *France*. The vessel containing the goods soon after her sailing on the voyage was captured by the *French*, recaptured, and taken into *Barbadoes*, where she was condemned. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, no fraud was imputed to the assured; but an objection was taken upon the stat. 33 *Geo.* 3. *c.* 2. which enables His Majesty by proclamation or order in council, when he shall see cause, to prohibit the exportation of naval stores; and in case of any exportation contrary thereto, the stores and ship in which they are laden are declared to be forfeited,

and

and the offenders liable to pay treble the value of such stores. And a proclamation was shewn, founded upon this act, prohibiting the exportation of naval stores, which was issued in *November* 1807; and the insurance in question was made in *January* 1808. Whereupon it was insisted that the policy was void in toto, by reason of its having been made in part to cover the naval stores, the exportation of which was illegal, and subjected the ship itself, as well as the stores, to forfeiture. His Lordship being of this opinion nonsuited the plaintiff.

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Taddy now moved to set aside the nonsuit, and contended that the policy, though inoperative to cover the naval stores, was yet valid for the other goods insured. The act of the 33 *G.* 3., he observed, does not avoid the contract of insurance, but merely creates a forfeiture of the stores illegally exported, and punishes the exporter by making him pay treble the value: and the contract of insurance was not so entire, but that it might be severed according to the subject-matter; the different goods, though belonging to the same person, being distinct in their nature. And he likened this policy to a deed containing different covenants, some of which were illegal and void; and yet the deed would stand as to the other covenants which were legal.

Lord ELLENBOROUGH C. J. The statute having made the exportation of and trade in naval stores, contrary to the King's proclamation, illegal, impliedly avoids all contracts made for protecting the stores so exported. It is an illegal act to sail with such stores on board, and subjects the ship itself to forfeiture. The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured cannot alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract. It has been decided a hundred times that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void. But as this is only a nonsuit, the plaintiff, if he think there is any doubt, may bring another action, and put the question upon the record; but I do not like to grant a rule to shew cause, whatever the value at stake may be, as it might seem to imply that we entertained a doubt, when there is no doubt at all upon the point.

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The other Judges concurred; and BAYLEY J., in the course of the discussion observed, that the ship being liable to seizure in consequence of having the naval stores on board, was thereby subjected to an extra risk, which ought therefore to have been communicated to the underwriters; and the omission of such communication would alone have avoided the policy. But *Taddy* answered that no objection was taken at the trial on account of the want of notice to the underwriters; and if it had, notice could have been shewn to be given.

Rule refused.

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DOE, on the Demise of JOHNSON, *against* The Earl of PEMBROKE and Another.

A certain paper being found along with other [505] papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its having ever been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*; assuming the jury to be satisfied of the fact, that the paper so found was kept there by the person last seised, with a knowledge of its contents, and that no imposition was practised.

AT the trial of this ejectment before *Graham* B. at *Salisbury*, the lessor of the plaintiff traced his pedigree through a *William Johnson*, down to *John Johnson*, who purchased the land in question 40 years ago, and died seised, and left a son *John*, who also died seised. And the lessor of the plaintiff was entitled to recover the premises as heir at law to the person last seised, unless *William*, through whom he claimed, had an *elder brother Thomas*, from whom the defendants made title. There was much contradictory evidence as to this fact; and the balance was probably turned in favour of the defendants by the production of a paper purporting to be the will of one *Richard Johnson*, and to be signed by his mark, properly attested, and dated in 1738, which will had the seal torn off, and was found in this cancelled state by the attorney employed for the defendants, shortly after the death of the person last seised in a drawer in his house, where it was kept with several cancelled bonds of his and a current lease of his farm. It appeared by other evidence that *John Johnson*'s (the purchaser's)

father

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father was named *Richard*; and if he were the maker of the will which was found in the drawer of his grandson, the person last seised, then it did appear by the will of *Richard* the grandfather that he had an elder brother called *Thomas*, who was also the elder brother of *William*, through whom the plaintiff claimed; and then the title of the defendants, derived from that elder brother *Thomas*, was established. The production of this evidence so discovered and circumstanced was objected to by the plaintiff's counsel; but the objection was overruled, and the evidence received: after which the authenticity and genuineness of the supposed will was much controverted before the jury, and was submitted as a question for their consideration; but assuming it to be genuine, great stress was laid upon it by the learned Judge in summing up the evidence; and the jury found a verdict for the defendants.

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Dampier now moved to set aside the verdict, in order to take the opinion of the Court upon the admissibility of this evidence; and observed that it did not appear that the person last seised had any knowledge of the existence or contents of the paper in question; and some evidence ought to have been given that he had recognized it as the will of his grandfather. The mere circumstance of its having been found in the same drawer with other papers of the person last seised, on which alone his recognition of it was contended for by the defendants, was not sufficient: it might have been put there after his death for the purpose of being found there by the attorney. Or assuming the knowledge of it by the person last seised, he might have kept possession of it because it was a forgery: it was found *cancelled*, and there was no evidence of its having ever been acted upon, or any probate of it having been granted. It could not even be told that, if genuine, it was the will of *the Richard Johnson* who was grandfather to the person last seised, as the hand-writing of the supposed testator was not proved. He urged the danger of admitting evidence of this description.

Lord ELLENBOROUGH C. J. The difficulty is to shew the incompetency of the evidence: its relative consequence may be cut down to nothing by circumstances: but here we must take it that it was kept by the person last seised, (for the jury must have been satisfied of that,) with other family papers, as something relating to his family; and then it might be considered as recognizing that there was a person in the family of the

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name of *Thomas Johnson*, an elder brother of the *William* from whom the lessor claimed. I think the evidence was * admissible, and then the objection would go merely to the superstructure raised upon it in the learned Judge's observations to the jury; which would not be sufficient to impeach the verdict.

BAYLEY J. asked if there were any other *Richard Johnson* to whom the will could be ascribed; and was answered in the negative.

Per Curiam, Rule refused.

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WOODFORD, and MARY his Wife, *against* ASHLEY.

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THIS was an action for a malicious prosecution of the plaintiff *Mary*, for a supposed assault upon the defendant; in which the declaration stated that the defendant heretofore, to

In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff *in B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich.* term, and the joining of issue *in the same court*; and then it stated the venire facias juratores returnable in *Hilary* term, and the distringas juratores by which the sheriff is commanded to have the jury *before our said lord the king at* Westminster, *on* Wednesday *next after* 15 *days from* Easter, OR *before the Lord Chief Justice* if he should come *before that time*, i. e. *on* Tuesday *next after the end of the term* (Hilary,), *at* Westminster, &c. *in the great hall of pleas there*; and then after giving a day in Bank to the prosecutor and defendant, it proceeded—on which day, viz. *on* Wednesday *next after* 15 *days*, &c. *before our said lord the king, at W.*, came the parties; and the Chief Justice before whom the said jurors came to try, &c. sent here his record (which is the nisi prius record) *in these words*; (which are the words of the postea indorsed on that record;) viz. *afterwards, on the day, and at the place last within mentioned*, before the Chief Justice, &c. and so proceeds to set out the trial, and the verdict of not guilty; (which is the conclusion of the postea on the nisi prius record sent into the court in Bank by the Chief Justice;) and then the original roll proceeded —*Whereupon, all the premises being seen by the court of our said lord the king* now here, it is considered and adjudged *by the said court* now here, that *M. W.* (the now plaintiff) do depart here without day, &c.—

The form and component parts of the original roll, or record of acquittal, being thus understood; it follows that the words of the postea, "afterwards, *on the day and at the place last within mentioned*," stated in the indorsement on the nisi prius record, as sent by the Ld. Chief Justice into the court in Bank, refer to *the day and place last mentioned* in the *distringas juratores* set forth in that record; namely, to "*Tuesday* next after the end of the term, (*Hilary*) at *Westminster*, &c. "in the great hall of pleas there;" which was the day and place at nisi prius given; and not to the "*Wednesday* next after 15 days, &c. *before our said lord the King at W.*;" which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the distringas, and the statement of the postea indorsed on the nisi prius record as sent in by the Lord Chief Justice.—

And as by the roll it appeared that the trial was at nisi prius, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that "the defendant (the now plaintiff) *on Wednesday next* after 15 days, &c. "*in the court of our said lord the King, before the king himself, at W. before the* "*Lord Chief Justice* assigned to hold pleas before the king himself, &c. *W. J.* "being associated with him, &c. was in due manner and according to the due "course of law *by a jury* of the said county of *M. acquitted*, &c.;" which allegation supposed the trial to have been in Bank on the return day there given.

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WOODFORD *against* ASHLEY.

wit, on the 30th of *June* 1801, *in the court of our lord the king, before the king himself, at* Westminster, in the county of *Middlesex*, maliciously and without any reasonable cause indicted the said *Mary*, &c. Then, after setting forth the indictment, it proceeded to state, that the defendant maliciously

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and without reasonable or probable cause prosecuted the said indictment against the said *Mary*, until the said *Mary* afterwards, to wit, *on Wednesday* next after 15 days from the feast-day of *Easter* in the 48th year of the reign, &c. *in the court of our said lord the king, before the king himself*, at *Westminster* aforesaid, in the county aforesaid, *before* the Right Hon. *Edward* Lord *Ellenborough*, Chief Justice of our said lord the king, assigned to hold pleas before the king himself, *Wm. Jones*, Gent. being associated with the said *Edw.* Lord *E.*, according to the form of the statute, &c. was in due manner, and according to the due course of law, *by a jury* of the said county of *Middlesex, acquitted* of the premises in the said indictment charged upon her; and the said *Mary* was discharged therefrom *by the said Court*, to wit, at, &c.

At the trial of this cause before Lord *Ellenborough* C. J. the copy of the roll or record of the indictment and acquittal given in evidence stated the original finding of the bill of indictment by a jury against the said *Mary* "*in the court of our said lord the king, before the king himself, at* Westminster," &c.: the indictment: the venire or process to bring the party in to answer, and her appearance "now on *Monday* next after the morrow of *All Souls* in this same term (*a*), before our said lord the king at *Westminster*;" her pleading not guilty, &c. and the joining of issue by *James Templer*, the coroner and attorney of the king. The record then proceeded thus: "Therefore let a jury thereupon come before our said lord the king at *Westminster*, on *Monday* next after the octave of *St. Hilary*, &c. to try, &c.; on which day, to wit, on *Mon-*

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day next after the octave of *St. Hilary* aforesaid, before our said lord the king at *Westminster*, come as well the said *James Templer*, &c. as the said *Mary Woodford*," &c. And then it stated the default of jurors, and the non omittas distringas to the sheriff, commanding him to have the jury "*before our said* "*lord the king*, at *Westminster, on Wednesday* next after 15

(*a*) The roll was entitled "Pleas before our Lord the king at *Westminster* in *Mich.* 49 *Geo.* 3." &c. The rolls are always entitled of the term in which the pleas are entered.

"days

" days from the feast-day of *Easter*, OR before *Edw.* Lord " *Ellenborough*, Lord Chief Justice of our said lord the king " assigned to hold pleas before the king himself, if he shall " come before that time, that is to say, *on Tuesday next after* " *the end of the term at* Westminster *in the county of* Middle- " sex, *in the great hall of pleas there*, according to the form of " the statute, &c. to try, &c. Therefore let the sheriff, &c. " have the bodies of the jurors aforesaid accordingly, to try in " form aforesaid. The same day is given as well to the said " *James Templer*, who, &c. as to the said *Mary Woodford*. " *On which day*, to wit, *on* Wednesday *next after* 15 *days* from " the feast-day of *Easter* aforesaid, *before our said lord the* " *king at* Westminster, come as well the said *J. T.* &c. as the " said *M. W.* &c.; and the aforesaid Chief Justice, before " whom the said jurors came to try in form aforesaid, sent " here his record had before him, in these words, that is to " say,—*afterwards, on the day and at the place last within* " *mentioned*(*a*), before the within-named *Edw.* Lord *E.*, Chief " Justice of our said lord the king, assigned to hold pleas " before the king himself, *Wm. Jones*, Gent. being associated, " &c. come as well the within-named *J. T.* who, &c. as the " within-named *M. W.* &c. And the jurors, &c. come and [511] " are sworn upon the said jury." And then the indorsement on the nisi prius record (still reciting,) after stating further the proclamation made in court, and none appearing to prosecute proceeded, " Whereupon the Court here proceedeth to the " taking of the inquest aforesaid by the jurors aforesaid now " here appearing for that purpose aforesaid, who being chosen, " tried, and sworn, &c. say upon their oath, that the said " *Mary Woodford* is not guilty," &c. Then the original roll proceeds thus—" *Whereupon* all and singular the premises " being seen and fully understood *by the Court of our said* " *lord the king now here*, it is considered *and adjudged by the* " *said Court now here*, that the said *Mary Woodford* do depart " hence without day in this behalf." Upon this it was objected that the record of acquittal given in evidence, shewing the *trial and verdict of acquittal* to have been before the Lord Chief Justice *at nisi prius*, did not sustain the allegation in the

(*a*) The day and place *last within* mentioned in the *nisi prius record*, to which these words of the postea refer, are the day and place of nisi prius given in the distringas juratores.

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declaration, that the plaintiff *Mary* was *acquitted by a jury* of the county "*in the Court of our said lord the king, before the* "*king himself*," which was the description of the Court of King's Bench sitting in Bank, by which Court only the *judgment* of discharge could be pronounced: and upon that objection the plaintiff was nonsuited.

Puller now moved to set aside the nonsuit; and urged, first, that the allegation in the declaration, that the said *Mary* "on "*Wednesday* next, &c. *in the Court of our said lord the king* "*before the king himself at Wesminster*," &c. "before Lord "*Ellenborough* C. J. assigned to hold pleas before the king "himself," was by a jury of the county acquitted, &c. was merely descriptive of the *place* in which, and not of the *Court* [512] before which, the trial was had. It is not alleged with a *prout patet*, &c.; which according to *Purcell* v. *Macnamara*(*a*) would have been deemed descriptive of the record, and must have been strictly proved; but the substance of the averment is, that the trial was had in a certain *place* so designated, before Lord *Ellenborough* C. J. who is himself described as "assigned to hold pleas *before the king himself*:" and the trial being proved to have been before him, a misdescription in the style of the court in which he sat cannot be more material than that in *Rex* v. *Lookup*(*b*), where an indictment for perjury stating a bill in Chancery to have been directed to "*Robert* Lord *Henley*," &c., instead of "Sir *Robert Henley*, Knt." &c. was held to be no objection; it being sufficient that the complainant had preferred his bill before the person holding the great seal, whether he were styled by the one name or by the other. 2dly, He urged that at all events this was not a ground of nonsuit, but of demurrer to the declaration; as the misdescription of the place of trial, supposing it to be such, was contained in the record itself given in evidence; which after stating the jury process, commanding the sheriff to have the jury "*before our said lord the king*, at *Westminster*, *on* Wednesday *next*, &c., or before Lord *Ellenborough*, &c. if he should come before that time, i. e. *on* Tuesday *next*," &c., and after stating the same day given to the prosecutor and to the then defendant; proceeds—"*on which day*, to wit, *on* Wednesday *next*, &c. *before our said lord the king* at *Westminster*

(*a*) 9 *East*, 160.

(*b*) T. 7 *Geo.* 3. *B. R.* cited in *King* v. *Pippet*, 1 *Term Rep.* 240.

come,"

come," &c. And then it states that the Chief Justice, before whom the jurors came to try, &c. sent his record had before him in these words—"Afterwards *on the day and* * *at the place last mentioned*," before Lord *E.*, and then proceeds to state the trial and acquittal. Now the *place last mentioned* in the record of acquittal being "*before our said lord the king at* Westminster," which is the style of the Court in Bank, it appears by this mode of drawing up the record as if the trial had been had there: and therefore there was properly no variance between the declaration and the record proved on which the nonsuit can be sustained. But then it may be objected that the latter allegation in the declaration, after stating the acquittal, that "the said *Mary* was discharged from the indictment *by the said Court*," &c. would not be proved by the record, and that no such judgment could have been given by the court of nisi prius. To which he answered, 3dly, That either "*the* SAID *Court*" refers to the Court of K. B. mentioned in the beginning of the declaration, (for *prædictus* does not necessarily refer to the next antecedent as *idem* does (*a*);) and then it is correct: or if applied to the court of nisi prius, it is immaterial and may be rejected, as the allegation of *acquittal* by the jury was sufficient to sustain the action; by the opinion of *Buller* J. in *Morgan* v. *Hughes* (*b*). In *Hunter* v. *French* (*c*), the only allegation was that "at the sessions of oyer and terminer held at the castle of *York*, &c. before, &c. the plaintiff *by a jury of the said county of* York *was duely and in a lawful manner acquitted* of the premises in the said indictment specified," &c.: and by the record of acquittal it appeared that the *jury* found the plaintiff *not guilty;* and upon that verdict the *judgment* of the *Court* was entered that he should *go thereof acquitted:* and this was held sufficient (*d*). The redundancy thereof in this case may be rejected where the substance of the acquittal is stated.

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(*a*) He cited *Regina* v. *Rhodes*, 2 *Ld. Ray.* 888. *Weekly* v. *Wildman*, 1 *Ld. Ray.* 407. and *Fitzhugh* v. *Dennington*, 2 *Ld. Ray.* 1094. and *Sutton* v. *Fern*, 3 *Wils.* 339.

(*b*) 2 *Term Rep.* 231. (*c*) *Willes' Rep.* 517.

(*d*) It was held sufficient by construing the words reddendo singula singulis, that the plaintiff was *duly acquitted by the jury*, i. e. found not guilty of the facts alleged against him; and *in a lawful manner acquitted* of the premises, &c. *i. e.* by the judgment of acquittal pronounced by the Court.

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Lord ELLENBOROUGH C. J. It is a substantial allegation in the declaration, that the trial which is one thing, and the acquittal which is another thing, both took place "in the Court of our lord the king before the king himself:" whereas by the record it appeared that the trial was before me in the court of nisi prius, and the acquittal was by the judgment of the Court in Bank: and indeed it is impossible that there could have been a judgment of acquittal at nisi prius.

The other Judges concurred; and in the course of the argument *Bayley* J. observed that the words "*afterwards on* "*the day and at the place last within mentioned,* before the "within-named *Edward* Ld. *E.* &c." was the statement of the postea indorsed on the Nisi Prius record, and had reference to the time and place of trial last mentioned in that record in the distringas; that is, "on *Tuesday* next after the end of the term *at* Westminster in the co. of *M.* in the Great Hall of Pleas there." The intermediate day stated is the return-day given in Bank; which is after the trial had, and when the judgment of acquittal is given. And this was said by Mr. *Dealtry* to be the invariable manner of making up the records in the Crown Office.

Rule refused.

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Friday, *Nov.* 10th.

WRIGHT *against* SHIFFNER.

A ship being insured at and from *Surinam*, *and* all or any of the *West India* islands to *London*, a warranty to sail on or before the 1st of *August* is satisfied by the ship sailing from *Surinam*, her last port of loading, before the 1st of *August*, and going into *Tortola* on the 4th to seek convoy, though she did not sail from *Tortola*, which is one of the *West India* islands, direct for *London* till afterwards.

THIS was an action upon a policy of insurance on freight of the *Bellona* "at and from *Surinam, and* all or any of the *West India* islands (except *Jamaica*) to *London*, warranted to sail on or before the 1st of *August* 1807." In fact, the vessel did sail before the 1st of *August* from *Surinam*, where she had taken in her homeward cargo, and arrived at *Tortola*, one of the *West India* islands, on the 4th, to find the convoy; but the proper convoy having before that time sailed with the trade, she afterwards took sailing instructions from another ship as convoy, and was lost in her voyage home. The underwriters

contended,

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contended, that by the terms of the policy the vessel ought to have sailed from the last of the *West India* islands at which she meant to touch on or before the 1st of *August*; and that her sailing from *Surinam* for *Tortola* so as not to arrive there in the ordinary course till the 4th, and consequently not being able to sail from *Tortola* till after the first, was a breach of the warranty, and precluded the plaintiff from recovering. The jury, however, under the direction of Lord *Ellenborough* C. J. at the trial, being of opinion that there was a bonâ fide compliance with the terms of the warranty, according to the meaning of the parties, found a verdict for the plaintiff; which

The Attorney General now moved to set aside, upon the ground of misconstruction of the warranty; considering the object of it to have been to secure the final departure of the ship from the last of the *West India* islands at which she meant to touch on or before the first of *August*; otherwise, by going from one to another after that period, her stay might have been protracted to an indefinite period.

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Lord ELLENBOROUGH C. J. Is it not the same in substance as if the ship were warranted to sail from her last loading port on or before the 1st of *August*? I considered that the warranty was satisfied by her sailing from *Surinam*, which was her last loading port, before the 1st of *August*; and that the introduction of "*all or any* of the *West India* islands" was merely for the benefit of the assured in case the ship should have been taking in cargo at any of those islands where her homeward-bound voyage was to commence.

BAYLEY J. asked whether *Tortola* lay in the course of her voyage home from *Surinam*; and being answered that it was usual to seek the convoy there; he observed, that the vessel might then be said to have sailed on her voyage homewards before the 1st of *August*.

Per Curiam, Rule refused.

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Friday, Nov. 10th.

PHILLIPSON and Another *against* MANGLES.

An allegation in a declaration, with a prout patet, &c. that the [517] plaintiffs *by the judgment of the Court recovered* against the bail, is not proved by the production of the recognizance of bail and the scire facias roll, which latter concluded in the common form.—Therefore it is considered that the plaintiffs *have their execution* thereupon against the bail: for this is *an award of execution*, or at most a judgment *of execution*, and not a *judgment to recover*.

IN an action for a false return to a testatum fieri facias against the bail, the declaration stated that the plaintiffs in the 48 *G.* 3. in B. R. by the consideration and *judgment* of the same Court *recovered* against *E. N.* and *J. C.*, bail of *P. N.*, 54*l.* 10*s.*, which was *adjudged* to the plaintiffs in and by the said Court for their damages by them sustained as well for not performing certain promises made by the said *P. N.* unto the plaintiffs, as for their costs and charges, &c. whereof the said *E. N.* and *J. C.* were convicted; prout patet per recordum. The proof of this averment was an office copy of the recognizance of the bail, and an office copy of the scire facias roll, which concluded in the common form.—Therefore it is considered that the said plaintiffs have their execution thereupon against the bail. And no other judgment is given. Upon this variance the plaintiffs were nonsuited at the trial before Lord *Ellenborough* C. J. at the last sittings; and *Garrow* now took the opinion of the Court upon the conformity of the proof with the allegation, by moving to set aside the nonsuit, on the ground that an award of execution is in effect a judgment or adjudication of the Court. But the Court were all of opinion that the objection was well founded. And

Lord ELLENBOROUGH C. J. said, it is *an award of execution* and not *a judgment* properly so called: the allegation therefore that it was a *judgment* was not proved. But making the most of the argument, and admitting that it may be called *a judgment*, as being an award of something by the Court, still it is not a judgment *to recover*, as alleged, but a judgment *of execution*.

LE BLANC J. The allegation is, that by the *judgment* of the Court the plaintiffs *recovered*, &c.; that is, that the plaintiffs had *judgment to recover*: but the record only proved that they had *judgment of execution*; or more properly speaking, it is an award by the Court of execution.

Per Curiam, Rule refused.

1809.

DOE, on the Demise of the Baroness Lady DACRE, *against* ROPER.

Friday, Nov. 10th.

A devise to the testator's wife, of "all his property both personal and real for ever," passes the fee in the real estate: and the devisor's intent to use them in a more restricted sense is not shewn by a subsequent clause of the will, whereby *after her decease* he gave *an additional annuity* to a person to whom he had before given a smaller annuity preceding the devise to the wife.

IN this ejectment for an undivided fifth part of certain lands in the county of *Denbigh*, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

Lord *Dacre* being seised in fee of the premises in question, by his will dated the 25th of *August* 1790 devised thus: "I *Trevor Charles* Ld. *Dacre*, being desirous to settle my worldly affairs, &c. do make this my last will, &c. Item, I give and bequeath to *G. Pickering*, my coachman, an annuity of 40*l.* per annum to be paid him quarterly, and to commence the quarter before my decease, provided he lives with me at my decease; if not, this annuity to be void. Item, I give and bequeath to *Eliz. Simons*, if living in my service at the time of my decease, an annuity of 20*l.* per annum, to commence the quarter day before my decease. If she has left my service, the annuity to be void. Item, I give and bequeath to my cousin *Blayney Roper* an annuity of 400*l.* per annum, to be paid him quarterly, and to commence the quarter day before my decease. Item, I give and bequeath to my dear wife *Mary Jane Dacre all my property both personal and real* that I am possessed of now, or may be possessed of at my decease, *either in land, houses, or any other description of property, for ever. After her decease* I give and bequeath to my cousin *Blayney Roper an additional annuity* of 1000*l.* per annum. I do constitute and appoint my dear wife *Mary Jane Dacre* my whole and sole executrix." Lord *Dacre* died on the 3d of *July* 1794, leaving *Mary Jane* Lady *Dacre*, his wife, and also *Gertrude* Baroness *Dacre*, the lessor of the plaintiff, his only sister and heir at law, him surviving. Upon Ld. *Dacre*'s death, *Mary Jane Dacre* his widow entered upon the premises, and continued in possession thereof until her death, on the 11th of *September* 1808, without issue; at which time the defendant, claiming as devisee under her will whereby she devised the same to him, took possession thereof. The question for the opinion of the Court was, whether *Mary Jane* Lady *Dacre*, the widow of the testator, took under his will an estate for life, or in fee, in the premises in question. If she took for life only, the verdict was to stand; if in fee, the

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the verdict was to be entered for the defendant. And either party were to be at liberty to turn this case into a special verdict if they wished to bring a writ of error.

Hargrave, for the plaintiff, admitted that by the devise to *Mary* Lady *Dacre* of "all the testator's property both personal and real, &c. for ever," without more, she would have taken a fee: but he contended that the subsequent devise, *after her decease*, of an additional annuity of 1000*l.* per annum to *Blayney Roper*, shewed the intention of the testator that his widow should only take an estate for life; such devise over, *after her decease*, of a part of the property before given to her, shewing that her estate in it was to determine on that event; and those words being equivalent in the experience of all conveyancers to the words "from and after the determination of that estate." And though this be only a *partial* devise over, yet it equally evinces that the testator by having first given her "all his property, both personal and real, for ever," without adding words
[520] of limitation to the devise of the realty, did not mean that she should take an absolute estate in the realty, but only in the personalty. And there was no necessity for the testator to devise over the fee to the heir, in order to found this construction of the will; for the law gives the estate which is not devised away to the heir, charged with the partial devise over. Neither is it any argument for the defendant to say that this is a mixed devise of real and personal estate, and that the devise of the personalty being absolute, it ought for conformity sake to be taken as conclusive of the testator's intention to pass the realty also absolutely; for the disposition of the two species of property is governed by different rules; and it is only in indulgence to the presumed ignorance of testators, that a latitude of disposition in the case of real property has been allowed to them in wills, by which they have been permitted to pass the fee by general words of devise, expressing by necessary implication such an intention, without adding words of limitation or inheritance. But that indulgence, which has grown up by degrees in the law, is still limited to cases where from the plain meaning of the words no doubt can be entertained of a testator's intention to pass the fee: and if such intention be at all doubtful, either from the words of the particular devise, or from other provisions in the will which indicate a different intent, the rule of the common law will prevail, which requires words of limitation and inheritance to pass the fee from the heir. The word

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property, it must be admitted, is a potent word in a will to pass the testator's interest in the land as well as the land itself: and so it was considered by Lord *Mansfield* in *Hogan* v. *Jackson* (*a*); but still it has never yet been * determined of itself to carry a fee, like the word *estate* (*b*), or as the words "all I am worth," which were held in a late case (*c*) to carry real estate, notwithstanding a contrary decision in *Bowman* v. *Milbank* (*d*), upon the words "all to my mother." Here, however, it is not left to implication or construction to include the realty in the word *property*, as the words *personal* and *real* are added; and here are also the words "*for ever*" added, from whence, though they would not be sufficient to pass the fee in a deed (*e*), it may be admitted that an implication would arise upon a will (*f*) of the testator's intent to pass the fee, unless there be other words to repel that inference. In the 15 *H.* 7. *fo.* 11 & 12. the question arose upon a testamentary declaration of uses by one who had before enfeoffed trustees for that purpose; and *Fineux* Chief Justice said, incidentally, that if one make a will that *J. S.* shall have his land *for ever during his life*, he shall only take for life, because the latter abridged the interest given by the preceding words. And *Perkins* (*g*), *s.* 557. says, that if lands be devised to *J. S.* to have and to hold to him *for ever*, it seems that by these words the devisee shall only have an estate for life; for the words *for ever* cannot extend further than to the devisee himself, because no other persons are named. But the point seems not to have been then settled, for he adds a quære. And at that time it appears by the same book to have been considered, that a devise of land to *J. S.* to have and to hold to him *and his assigns* would pass the fee: so to *J. S.* and

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(*a*) *Cowp.* 304. and vide *Doe* v. *Lainchbury*, ante, 290.

(*b*) Upon the force of the word *estate* to carry a fee in a devise, he referred to *Wilkinson* v. *Merryland*, *Cro. Car.* 447. *Kerman* v. *Johnson*, *Sty.* 281. 293. *Reeves* v. *Winnington*, 3 *Mod.* 45. *Lane* v. *Hawkins*, 2 *Show.* 395. *Barry* v. *Edgeworth*, 2 *P. Wms.* 524. and *Barnes* v. *Patch*, 8 *Ves. jun.* 604.

(*c*) *Huxtep* v. *Brooman*, 1 *Bro. Ch. Cas.* 437.

(*d*) 1 *Eq. Cas. Abr.* 208.

(*e*) *Lit. s.* 1.

(*f*) *Co. Lit. s.* 585, 586. *Fitz. Abr.* Devise, *pl.* 20. and 15 *H.* 7. *fo.* 11, 12.

(*g*) The learned Counsel observed that Lord *Coke* spoke well of *Perkins*'s Treatise, in the preface to his 10th Report, p. xix.

his

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his assigns for ever: assigns there might have been taken to mean assigns in law. But Ld. *Coke* in his Comment on *Littleton* (*a*), which was published after *Perkins*, says, that a devise to a man and his assigns, without saying *for ever*, gives but an estate for life. Here, however, the constructive intent to pass a fee by the words *for ever* is rebutted by the subsequent charge upon the same lands of an additional annuity to *Blayney Roper*, to take place *after the decease* of the devisee *Mary* Lady *Dacre*. [Lord *Ellenborough* C. J. If you can establish that a further charge on the estate, in case the annuitant survived the devisee of the land, is the same thing as a devise over of the land itself, you will advance the argument in favour of the lessor.] It equally shews that the testator did not mean to pass the fee by the former words of devise. But it is sufficient, according to *Wild*'s case (*b*), if it only render his intent doubtful, to turn the scale in favour of the heir at law, who according to *the judgment of the law* will take the fee, if it be not passed to another by words of limitation or inheritance: a rule which applies to the devisees of the several annuities in this will, which being given to them generally, without saying for life, the charges only enure for their respective lives. The case which comes nearest to this is *Chycke*'s case (*c*); which was a devise of "*the fee-simple* of my house in *S.* to *Alice Ludlam*, and, *after her decease*, to *William* her son," which *William* was her heir: and according to the reports in *Benloe* and *Anderson*, it was held that *Alice* took but an estate for life, with remainder in fee to her son. *Dyer*'s report however states, that *Alice* was held to take only a present life estate, with remainder to her son also for life, remainder to herself in fee. If the two first-named reporters be right, the case bears strongly in favour of the heir at law; and it will not bear against her, if the latter be right, by reason that the *fee-simple* was there expressly devised.

Wigley contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. From the first moment of my reading this case, until the conclusion of the argument, which has exhibited all the learning which could be brought into the field, I have not entertained the least doubt as to the construction of the will before us, nor is there any reasonable ground

(*a*) *Co. Lit.* 9. *b.* (*b*) 6 *Rep.* 16. *b.* 17.

(*c*) This case is properly entitled *Baker* v. *Raymond*, *Benloe*, 300. S. C. *Dyer*, 357. *a.* and 1 *And.* 51.

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on which the meaning of it can be doubted. The testator certainly meant to give the fee in his real estate to his wife Lady *Dacre*, subject to particular charges of certain annuities, amongst the rest, to an annuity of 400*l.* per ann. to his cousin *Blayney Roper*, to be extended to 1000*l.* per ann. more, if he survived Lady *Dacre*. He meant only to saddle the estate with the charges first mentioned during the lifetime of his wife, but if she happened to die before his relation *Blayney Roper*, he meant to charge it with an additional annuity of 1000*l.* more for the life of *B. R.* But subject to these charges, whether greater or less according to the event, he gives to his wife "all his property both personal and real, &c. either in land, houses, or any other description of property *for ever*." How can words be stronger to shew an intention to pass the fee? He might, indeed, have spared himself the labour of particularizing the several species of his property, to shew that he meant to include landed property; for a devise of all his property *for ever* would have carried the fee. That a devise of land to a man *for ever* would carry a fee has been settled without question from the 22 *Ed.* 3. (*a*) to the present day, with the single exception of the doubt expressed by *Perkins* in the passage cited. The same law is recognized in *Littleton*, *s.* 586. and in Lord *Coke*'s Comment on that section, and upon *s.* 1. in *Co. Lit.* 9. *b.*, where he says, that "if a man devise land to another in perpetuum, a fee-simple doth pass by the intent of the devisor." But as this is only a constructive intention to pass the fee, if the meaning of those words be abridged or restrained by other words in the will, shewing an intention to use them in a qualified sense, the construction of them would be qualified accordingly. The question then is, Whether there be any such qualifying words in this will? The only thing relied on is the additional annuity given to *Blayney Roper* after the decease of the devisor's wife, which is said to be a partial devise over, and to be equivalent to a remainder over, after the determination of her estate, in so many words. But taking the whole together, the will imports no more than this; (and though if the words had been transposed it might perhaps have been expressed more clearly, but still the words as they stand are sufficiently clear;) I give all

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(*a*) *Fitz. Abr.* Devise, *pl.* 20. states the law to be so from the Year-book of *M.* 22 *Ed.* 3. 16. and *Bro. Abr.* Devise, *pl.* 33. states the same from *Fitzherbert*, and refers also to the same Year-book.

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my property to my wife for ever, subject to such and such annuities, one of which is an annuity of 400*l.* to *Blayney Roper*; and if *B. R.* survive my wife, I give him an annuity of 1000*l.* more. How then can the giving of this additional annuity be said to shew an intention in the devisor to retract the devise of the fee before made to his wife? He undoubtedly meant to give her the fee, subject to the charges of all these annuities.

*[525] GROSE J. This is a question of construction, depending on the intention of the testator, as it is to be collected from the words of the will. He begins by giving annuities to three persons severally: subject to these, he then gives all his property, both personal and real, for ever, to Lady *Dacre*, his wife; but if one of the annuitants survive her, he gives him an additional annuity. If he had given all his estate, real and personal, to Lady *Dacre*, charged with these annuities, it is not disputed but that the fee would have passed: then is it not the same thing when he gives her all his property, real and personal, for ever, subject to these annuities?

LE BLANC J. The Court has had all the assistance in the construction of this will that the ingenuity and ability of an advocate can afford in favour of the heir at law, and therefore it is not necessary to let the case stand over to another day, in order to hear the defendant's counsel, when the Court have no doubt upon the subject. The question depends on the intention of the testator, to be collected from the will. And it has never been doubted that a devise of a man's "estate for ever" would carry the fee; and that I consider as the judgment of the law upon the construction of such words in a will: and the only question in such a case could be, Whether any thing ap-

[526] peared in the will to shew that the testator meant to give less than the fee. Now here, Lord *Dacre* having given annuities to several persons, devises to his wife, in the most general words, "all his property, both personal and real, for ever." This shews his intention to give her the fee as clearly as if the devise had been in so many words to her *and her heirs*. It is not indeed denied that the words of devise to her, first used, would carry the fee; but the argument in favour of the heir at law is built upon the subsequent words giving an additional annuity to *Blaney Roper after her decease*, as shewing, it is said, an intention in the devisor to limit the general meaning of the former words: and if there had been any such intention expressed in the subsequent part of the will to limit the extent

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of the first devise to her, and to shew that the words were used in a more contracted sense, though the first limitation had been to her and her heirs, we should have given effect to the intention so expressed. It is argued that the giving of the additional annuity, *after the decease* of Lady *Dacre*, is a partial devise over, which shews that he did not mean to give her the fee: but it is only an additional charge on the estate before given to her, in case the annuitant should survive her, and is not at all inconsistent with the former devise to her of the fee. It rather shews, that during the life of his wife he was desirous that she should enjoy the estate incumbered with a smaller annuity that what he meant the annuitant to have in case he survived her. But this can never be considered as a *remainder;* for the testator does not give *Blayney Roper* any portion of the *estate* after the decease of his wife, but merely an increased annuity or charge upon it. No doubt, therefore, can be entertained of the intention of the testator to give his wife the fee: though if there had been any doubt of that, I agree [527] that the heir at law would have been entitled to the benefit of it.

BAYLEY J. If the case could have admitted of any doubt, I should have wished to have heard the argument on the part of the defendant and the reply; but every argument having been urged by the plaintiff's counsel which ingenuity can devise, and the Court having no doubt, it would answer no good purpose to delay giving our judgment. It has been settled for centuries that a devise of land to a man *for ever* will give him the fee by the intent of the devisor: but the meaning of those words may be qualified, if a different intention appear from other words of the will. No such different intention, however, is to be collected from the subsequent devise of the additional annuity to *Blayney Roper* after the decease of Lady *Dacre;* but the whole intent to be collected from all the words of the will may be carried into effect by giving the devisee, Lady *Dacre*, the fee, subject to the several annuities. It is said, however, that these annuities, though given in general terms, only operate for life; and that the devise to Lady *Dacre* being also to her, generally, without words of inheritance, should have the same construction: but there is an essential distinction between the two; the word *annuity* alone imports that it is only to enure for the life of the annuitant; but the words of devise to the wife, *for ever*, import a fee-simple. Then it is said that the additional charge on

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the estate is given *after the wife's decease*; but that does not vary the legal interest which the testator had before given her in the estate. He does not give to *Blayney Roper* any part of the property itself, but only a charge upon it; and it amounts to no more than if he had given in express * words to *Blayney Roper* a charge upon his estate of 400*l.* a-year during the life of his wife; and if he survived her, an increased charge of 1400*l.* a year. There appears, therefore, a plain and manifest intent to give the wife a fee by the words of devise to her, and there is nothing to control the meaning of those words in the subsequent part of the will.

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Postea to the Defendant.

Thursday, Nov. 16th.

SEDLEY *against* WHITE.

Where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, his describing himself bonâ fide in an affidavit in court as *late* of such prison, is sufficient to satisfy the rule of Court of *M.* 15 *Car.* 2. ordering the true place of abode of every person making affidavit in *B. R.* to be inserted. But a deponent who had left one place of residence, and resided in another, would not satisfy the rule by describing himself as *late* of the former.

LAWES had obtained a rule upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on the defendant's entering a common appearance; which was founded upon an objection to the affidavit for holding the defendant to bail, wherein the defendant described himself as "*late* in the *Compter prison* of *Giltspur-street* in the "city of *London*." And it now appeared upon affidavits that the plaintiff for some time prior to the 28th of *January* last was a prisoner there, but had been discharged on that day, and having no particular place of residence in town was, by the curtesy of the gaoler, permitted to lodge at night in the prison, and had done so up to the 31st, on which day the affidavit in question was made. It was thereupon objected that "*late* of the *Compter* prison" was not a proper addition of the place of residence of a deponent as required in every affidavit by the rule of court of *M.* 15 *Car.* 2. (*a*), by which it is ordered that the true place of abode, and the true addition of every person who shall make affidavit in court here, shall be inserted in such affidavit. And he now contended that the

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(*a*) Vide *Cooke's R. & O. of B. R.*

deponent

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deponent stating himself to be *late* of such a place was not a compliance with the rule, which required him to state his place of abode at the time of making the affidavit; the word *late* might, he said, be used at any time after the party has changed his abode to avoid being traced.

Reader was now to shew cause. But

The Court thought the description applied well enough to the peculiar situation of the deponent at the time; he having then recently been discharged out of the custody of the keeper of the prison, and therefore having ceased to be a prisoner, though by permission of the keeper he had, up to the day of making the affidavit, lodged at night within the prison, and had acquired no other determined place of residence: there appearing to be no intention to mislead. But Lord *Ellenborough* C. J. observed in answer to *Lawes*, that when a party had left one residence and resided in another at the time of making the affidavit, his describing himself as *late* of the place where he had ceased to reside, would be considered as an evasion, and would not satisfy the rule.

Rule discharged.

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SARGEAUNT and Another *against* WHITE.

Friday, *Nov.* 17th.

By the post-horse duty act of the 44 *Geo.* 3. *c.* 98. schedule B. if the hiring be by the day, and the distance be ascertained, as where the hiring is to go from one certain place to another, the duty is payable by the mile; if the distance be not ascertained, it is then payable by the day; and the postmaster letting the horses, and not accounting for the duty accordingly in the stamp-office weekly account is liable to a penalty of 10*l.* under the stat. 48 *G.* 3. *c.* 98. *s.* 7.

IN debt to recover a penalty of 10*l.* under the post-horse duty acts of the 44 *Geo.* 3. *c.* 98. and the 48 *Geo.* 3. *c.* 98. *s.* 7. the declaration stated, that the defendant at the time of committing the offence after mentioned was a postmaster usually letting horses to hire, and duly licensed for that purpose, and the plaintiffs were the farmers and collectors of the duties on horses let to hire for travelling post or by time within the county of *Middlesex*; and that the defendant after the passing of the stat. 48 *Geo.* 3. *c.* 98. and within six calendar months before the commencement of this suit, viz. on the 15th of *March* 1809, did let to hire for a period less than 28 successive days, viz. for one day only, two horses to be used

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in drawing a post-chaise upon a public road from *Bishopgate-street* in *Middlesex* to *Rumford* in *Essex*, and back again, from *Rumford* to *Bishopgate-street*, being a distance in the whole of 24 miles; and which distance was ascertained at the time of such letting to hire; and the said horses were, on the day and year aforesaid, used in going, and did go such distance in pursuance of such letting to hire; by reason whereof there became due to the plaintiffs, as such farmers, for the duty payable on such letting to hire, &c. 6*s*. And then it averred, that though the defendant afterwards, on the 8th of *April* 1809, made out an account as and for the stamp-office weekly account required of him as such postmaster and licensed person, including the day on which the said horses were so let to hire, &c., and delivered the same to the plaintiffs as such farmers, &c. as and for the stamp-office weekly account; yet the defendant did not

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insert therein, or in any stamp-office weekly account of his, the amount of the duty payable in respect of the same horses upon the said hiring, but neglected and omitted so to do: and on the contrary thereof inserted in the said account so carried in and delivered by him as aforesaid 3*s*. 6*d*. as and for the duty payable on the aforesaid occasion of the letting to hire the said horses; the said sum of 3*s*. 6*d*. being less than the defendant ought to have inserted in the said stamp-office weekly account as and for the duty aforesaid; contrary to the statute, &c. by force of which the defendant forfeited for his said offence 10*l*. &c., for which the plaintiffs sue for the King and for themselves. To this there was a general demurrer and joinder.

The stat. 44 *Geo*. 3. *c*. 98. schedule B. (page 209.) imposes a duty on every horse, hired *by the mile or stage* to be used in travelling in *Great Britain*, 1½*d*: and on every horse hired for a less time than 28 successive days for drawing on any public road any carriage used in travelling post or otherwise, (if the distance at the time of hiring such horse shall be ascertained,) for every mile such horse shall be hired to travel, 1½*d*. and for every horse, so hired as last mentioned, in any case where the distance shall not, at the time of such hiring, be ascertained, for each day for which such horse shall be so hired, 1*s*. 9*d*. Then the stat. 48 *Geo*. 3. *c*. 98., which extends the period for letting to farm these duties, requires by *s*. 7. that persons licensed to let horses to hire shall keep one account of those let by the mile or stage, and a separate account of those

let

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let for any period of time less than 28 days, and the number of miles the same shall be hired to go where the distance shall be ascertained; under pain of forfeiting 10*l.* in case of refusal or neglect so to do.

In the present case the hiring was *for the day*, but *the distance was ascertained*, being from one certain place to another and back again: and the question made in argument was, [532] whether though the postmaster did not charge the traveller by the mile, but by the day, he were still bound to account for the duty by the mile?

Richardson for the defendant contended in the negative, and relied principally on the stat. 25 *Geo.* 3. *c.* 51. *s.* 4. which imposed the same duties as the latter statute, distinguishing between a hiring by the mile or stage, and a hiring for a day or less, where the distance was ascertained, and where it was not ascertained: yet by *s.* 12. of that act, only two species of tickets are issuable, one denoting a hiring *by the mile*, and the other a hiring *for the day*, according to which the stamp-office weekly returns were to be made. And by the stat. 48 *G.* 3. *c.* 98. *s.* 7. all the regulations, directions, forfeitures and penalties contained in the 25 *G.* 3. relative to the stamp-office weekly accounts, not thereby altered, are to remain in force. He also referred to *s.* 23. of the 25 *G.* 3., whereby to prevent evasions in filling up tickets where the horses are hired to return in less time than two days, and the distance shall be ascertained, it is enacted, that where any licensed person shall let to hire any horse to return in less than two days, *and the number of miles*, instead of the words, *for a day, shall be inserted in such ticket*, every licensed person shall fill up the name of the place to which the horses are hired to go, and the true number of miles, &c. on pain of forfeiting 10*l.*, &c. From whence he said it seemed to be left in the discretion of the collector issuing the ticket, in cases where the hiring was for less than two days, either to issue a mile ticket or a day ticket. And he argued that the legislature had not provided for the case of hiring by the day when a day ticket is issued, if, because the distance was ascertained, a mile ticket may be demanded by turnpike-gate-keepers; for each of these may [533] demand either the day ticket, or an exchange ticket in lieu of the mile ticket, which is left with the first gatekeeper; but where a day ticket is given, there is no exchange ticket.

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Abbott was to have argued for the plaintiffs; but

The Court (*Grose* J. absent) were all satisfied that where the distance was ascertained, though the hiring were for a day, the duty was payable by the mile, by the express words of the act of the 44 *Geo.* 3. And if the hiring were by the day, and the distance were not ascertained, the duty was then payable by the day. No argument, they said, could make it plainer. And if there were defective provisions in other parts of these acts, the legislature must apply the remedy; but the words of the provision in question were quite plain and express.

Judgment for the Plaintiffs.

Friday, Nov. 17th.

BLACKETT and Another *against* SMITH.

The stat. 39 *G.* 3. c. 69. *s.* 137. giving to *West India* ships which [534] have discharged their homeward-bound cargoes in the Docks of the *West India* Company "the use of the Light Dock for a time not exceeding six months from the time of unloading," on payment of the tonnage duty of 6*s.* 8*d.*, payable on the entrance of such ships into the Import Dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharfs of the Light Dock, without payment of wharfage and porterage, as in case of other goods shipped by way of merchandize on the outward-bound voyage; aliter, as to necessaries intended for the present use of such ships while lying in the Dock during the time allowed by the act.

THIS was an action for money had and received against the treasurer of the *West India* Dock Company, which was tried before Lord *Ellenborough* C. J. in *Middlesex*, when a verdict was taken for the plaintiffs, for 8*d.* damages, subject to the opinion of this Court upon the following case:

The ship *Speculator*, of which the plaintiffs are owners, on the 17th of *January* 1809 arrived in the *West India* Docks with a cargo from the *West Indies*, and the plaintiffs duly paid to the *West India* Dock Company the rate or duty of 6*s.* 8*d.* per ton of the ship's burthen, pursuant to the directions of the stat. 39 *Geo.* 3. *c.* 69. *s.* 137. The cargo having been unloaded, the ship on the 28th of *February* last entered the Company's Dock for light ships; and on the 11th and 13th of *March*, while she remained there, and within six months from her unloading, one coil of rope and one barrel of tar were sent by the plaintiffs to the *West India* Docks, for the use of the ship, and placed by them on the Company's wharf, (which is a legal wharf and quay within the meaning of the said act,) at the ship's side, from whence they were put on board by the plain-

tiffs,

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tiffs, by means of the ship's tackle, and without any assistance from the Company's servants: but those servants were ready and willing, and offered to assist in shipping the said stores, but the plaintiffs objected to their interference. The rope and tar were intended for the use of the ship, and were applied to that purpose. Previous to the rope and tar being shipped, demands of 2*d.* for wharfage and porterage in respect of the rope, and of 6*d.* for wharfage and porterage in respect of the tar, were made by the Company; being the usual charges made and paid for similar goods shipped as merchandize on freight from the legal quays and wharfs within the port of *London*: and if wharfage and porterage be liable to be paid for the stores of ships in the said Docks, such charges are reasonable. These demands however were then objected to by the plaintiffs; but the Company refusing to permit the rope and tar to be shipped, (although they were informed the same were intended for the use of the ship, unless those sums were paid [535] respectively, the plaintiffs paid the money, and at the same time gave notice that an action would be brought to recover back the same. The question was, whether the plaintiffs were entitled to recover the said sums of 2*d.* and 6*d.*, or either of them?

Harrison, for the plaintiffs, contended that stores intended, as these were, for the use of the ship, and not for merchandize, were not chargeable with wharfage or porterage to the Company. The Company cannot impose charges at their own discretion for the use and accommodation of their wharfs, like common wharfingers, but are only entitled to receive that which the legislature has given them as the reward of their monopoly. By the st. 39 *Geo.* 3. *c.* 69. *s.* 86. the Company's quays and wharfs are declared to be legal quays and wharfs for the landing, relanding, discharging, *lading and shipping* of any goods whatsoever within the port of *London*; and such goods are declared by *s.* 85. to be liable to the like tolls, duties, &c. and to the like regulations, as if landed on or shipped from the then legal quays or wharfs, except in the cases afterwards specified. And then *s.* 137. ascertains the rates which are to be paid to the Company: and these are, first, a duty of 6*s.* 8*d.* per ton for every vessel entering the Docks with a cargo from the *West Indies*; and this, it is declared, shall be accepted "in satisfaction of the use and conveniency of the "said Docks, and all charges of navigating, &c. from her "arrival at the entrance into the Docks at *Blackwall* until "she shall be unloaded and moored in the Dock for light

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" ships, &c.; *together with the use of the Light Dock for any* " *time not exceeding six months from the time of unloading such* * " *ship.*" Now the owners cannot be said to have the use of the Light Dock for their ship, which is part of the consideration for the payment of the 6*s.* 8*d.* per ton rate, if they be liable to be charged under the name of wharfage and porterage for all the necessary stores passed over the quays and wharfs for the use of the ship, without which she could not be kept in repair or fitted out for any other voyage. The use of the Light Dock for so long a time as six months is given to her for the very purpose of enabling her to be fitted out there more conveniently for her next voyage, than if she were lying in the body of the river, where of course she would not be liable for any such demands. This construction is confirmed, as far as it goes, by the st. 42 *Geo.* 3. *c.* 113. *s.* 26., which, speaking of the rate appointed to be paid to the Company for new vessels using the Dock to be set apart for light vessels which had not first brought in a cargo from the *West Indies*, and consequently had not paid the 6*s.* 8*d.* rate, recites that, under the former act, vessels which had unloaded there, and paid that rate, would be entitled to go into and remain in the Light Dock, *without incurring any additional charge*; and that inasmuch as new or other vessels might come into the Dock *to take in their outward cargo*, or for their greater safety and accommodation, without being *so as aforesaid entitled to the use of the Dock*, free from additional charge; it proceeds to put such new vessels on the same footing as the others on payment of a 2*s.* per ton rate. The case of goods shipped over the wharfs as merchandize falls under a different consideration, as not being for the use of the ship, and the charge of wharfage and porterage for such goods has never been disputed. But as the Company's quays and wharfs are put upon the same footing as

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the old legal quays and wharfs of the port of *London*, it is at all events incumbent upon them, if they claim any remuneration for the use of their wharfs beyond that which is specifically given to them by the act, to shew that the old legal quays were accustomed to charge wharfage and porterage for ships' stores; a fact which is denied by the plaintiffs; and the case only states that similar charges have been paid for similar goods *shipped as merchandize or freight*. The st. 1 *Eliz.* *c.* 11. *s.* 2 & 3. for appointing and regulating legal quays within the

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the port of *London* and other ports, relates only to goods *by way of merchandize.*

East, for the Company, said, that in the consideration of the question, for what uses and services the rates given to them by the act of the 39 *Geo.* 3. were intended, it was necessary always to bear in mind, that they had only a monopoly of the *import* trade from the *West Indies*; but that with respect to the *export* trade, it was still optional for any ship to fit out and load her outward-bound cargo either in the Docks, or in any part of the river below the *Blackwall* entrance (*a*). So far as the monopoly extended, and it was compulsory on ships to use the Docks, so far it was reasonable and necessary, for the sake of the public, to limit the compensations to be paid to the Company; but where there was no monopoly or compulsion, there could be no necessity for any such protection; but the Company stood in the same situation as any individual dock owner or wharfinger, a candidate for the custom of the merchants, upon the general principle of open competition, by offering better security and accommodation, upon more advantageous terms, than any other persons. In estimating, therefore, the amount of the rates, it was reasonable to be inferred that nothing was [538] included in the calculation but such uses and services as the public were under the necessity of adopting, on the one hand, and the Company were compelled to afford on the other. No use or service but what was compulsory could, indeed, properly enter into such a calculation; for if the use of the thing were optional on the one side, there could be no reciprocity or justice in limiting the compensation on the other. It follows that for every service performed by the Company, or use made of their premises, for which no special remuneration is directed by the act, they are at liberty to charge what is reasonable and fair, like any other dock owner or wharfinger. From the very nature of the case, and the design of their institution, this must apply to the whole of the export trade, of which they have no monopoly; and therefore it is of no importance to the Company whether *the tolls, dues*, &c. mentioned in the 85th section of the 39 *Geo.* 3. *c.* 69. as attaching upon their quays and wharfs in common with the old legal quays, relate to tolls and dues payable to themselves, or to such as are of a public nature; [*The Court* seemed to be satisfied that they regarded the latter only;] for they would, without any

(*a*) Stat. 39 *Geo.* 3. *c.* 69. *s.* 91.

legis-

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legislative declaration, be entitled to charge for the use of their wharfs like every other wharfinger, unless where restrained by the act: which brings the question to the construction of the 137th clause. Now the 6*s.* 8*d.* per ton rate is throughout confined to the *import* trade. It is to be paid to the Company for every ship *entering into and using* the Docks, &c. It is to be accepted in satisfaction of the use and conveniency of the Docks, and all charges of navigating, &c. such ship *from her arrival at the entrance into the Docks* at *Blackwall until*
[539] she shall be *unloaded* and moored in the Dock for *light* ships, and also of the *unloading or unshipping* of her cargo within the Docks, &c., and the cooperage which the cargo may require in the course of such *unlading* thereof; and this enumeration concludes with giving also the use of the *Light* Dock for a time not exceeding six months *from the time of unloading such ship.* Though all these services and uses are plainly descriptive of the *import* trade, it is now contended that the use of the *Light Dock* for those six months includes also the use of the *quays and wharfs* there for *exportation.* For though, for the purpose of this argument, a distinction is attempted to be made between stores shipped from the wharfs for the use of the ship itself, and stores shipped by way of merchandize, yet no such distinction is to be found in these acts of parliament, or can have any foundation with respect to wharfingers; nor could the Company possibly discriminate, in many instances, between goods of the one sort or the other. And no local or accidental usage of that sort (the existence of which however, as applied to the legal wharfs in general, is denied and could have been disproved) can found any legal right on the part of the public in this case: but the very particularity of the clause repels the argument: for as it is plain from the specification of these two, that the legislature did not consider the *unloading* and *unshipping* the cargo to be included in "the use and conveniency of the Docks," which was first mentioned; it is much less likely that under the still more general description of "the use of the *Light* Dock" not exceeding six months, they should have meant to include the loading and shipping of goods for another voyage, which it was in the option of the owner to load there or elsewhere. And this ap-
[540] pears still less likely to have been contemplated from the subsequent part of the same clause, whereby it appears that a different rate is payable to the Company upon the unshipping or importation of goods; which rate, it is declared, shall be accepted

accepted "in respect of the use and conveniency of the Docks, "*and the quays, wharfs, and cranes*, and other machines which "shall belong thereto, &c. and *all charges and expences of* "*wharfage*," &c. after such goods are *unshipped*. And this also shews that the legislature considered that the exemption from "all charges and expences of wharfage," &c. which would otherwise have been payable for the transit of goods over the wharfs, was an item of benefit quite distinct from the *use of the Docks*, with respect to the ship itself. An argument also arises from the term of "*Light Dock*," made use of in the very part of the clause relied on by the plaintiff. By this is evidently meant the Dock for *empty or light vessels:* it is so described in the clause referred to, 42 *Geo.* 3. *c.* 113. *s.* 26. The privilege, therefore, must be taken in the strict terms and obvious meaning in which it is granted, which is the use of the *Dock* for the *ship* (not of the *quays and wharfs* for *goods*) and for the ship as a *light or empty ship:* in other words, it was meant for the accommodation of keeping the ship, while in her light or empty state, afloat in a more secure state than if she were left swimming in the mid-stream of the river, or grounding with the fall of every tide on the banks of it. Then the clause in the act last referred to, so far from impugning, strengthens this construction, not only in the description of the vessels entitled to use the Light Dock; but by the description of the services to which the payment of the 2*s.* rate entitles them; which rate, it is admitted, puts them upon the same footing as vessels entering the Light Dock after payment of the 6*s.* 8*d.* rate. The 2*s.* rate is to be taken "in satisfaction [524] "of the use and conveniency of the said Dock, not exceeding "six months, *and* all charges of the *navigating, mooring, un-* "*mooring, removing, and management of* such ship from her "arrival at the entrance of such Dock until she shall depart "therefrom." Then as expressio unius est exclusio alterius, this clause puts an express negative upon the right now claimed of shipping goods over the wharf without payment of wharfage. And the recital in the former part of the clause, that vessels may frequently come in to take in their outward-bound cargoes, *or* for their greater safety and accommodation, without being so *entitled to the use of the Dock* free from additional charge, (i. e. as ships were entitled which had paid the 6*s.* 8*d.* rate,) merely alludes to the *purposes* for which they might wish to be there; but it only speaks of the ships which had paid the 6*s.* 8*d.* rate being *entitled* to the *use of the Dock*, that

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that is in the manner before described, for the use of the ship in her character of an *empty or light ship*; but it does not recite that such a ship was entitled to the use of the *wharfs* for *shipping goods*. Then if the Company were entitled to wharfage, and to porterage for the employment of their own servants in their own business, (and the whole scope of all the *West India* Dock Acts is to put the employment of labourers and servants within the Docks under their appointment and control, for public as well as private purposes,) the plaintiffs cannot deprive them of their reasonable reward, as it is stated to be, by refusing to suffer the Company's servants to assist in shipping the goods. The Company must still retain and pay their own servants for these and the like purposes.

[542] *Harrison* was then heard in reply. In the course of which *The Court* inquired whether the stores in question were necessaries shipped for the present use and security of the ship while lying in the Dock, or only for her future use as part of her outfit; for they thought there was a material difference between stores taken in for the one purpose or the other. To this it was answered by the Company's counsel, that it was understood at the time when the case was settled, that the question meant to be tried was, Whether the plaintiffs had a right to ship the stores, as part of the outfit of the vessel, without paying the wharfage and porterage in like manner as for goods shipped by way of merchandize. The plaintiff's counsel said that he was not apprised how the fact was, as to the particular stores; but he was certainly instructed to contend that "the use of the Light Dock" for six months, given to those who had paid the 6*s*. 8*d*. tonnage rate for their vessel, included a right to the use of the Company's wharfs in the Light Dock for the purpose of shipping stores for the use of the ship as part of her outfit on her outward-bound voyage, without paying wharfage or porterage.

Lord ELLENBOROUGH C.J. then said, That if the stores in question were intended as part of the outfit of the ship, the Court were all satisfied that the Company were not restrained from charging wharfage and porterage as for other merchandize shipped for the outward-bound voyage. If indeed the stores were intended for the necessary use or security of the ship,

[543] during the time that she was lying in the Dock, he thought, within the fair meaning of the words, giving her the use of the Dock, she would be entitled to receive them on board free from there-

any additional charge beyond the tonnage rate. The Court, therefore, gave judgment nisi for the delivery of the postea to the defendant, unless it were agreed before the end of the term to introduce as a fact into the case, that the stores in question were intended for the immediate use of the ship while lying in the Dock, and not as a part of her outfit. The rule for judgment for the defendant ultimately stood confirmed.

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WILLIAMS *against* BRICKENDEN, Clerk.

Monday, Nov. 20th.

Claim of conusance made by the Vice-Chancellor of the university of *Oxford*, in the vacancy of the office of Chancellor by death, on behalf of the University, allowed in a plea of trespass.

THIS came on upon a rule moved for by *The Attorney-General* and *W. E. Taunton*, calling upon the plaintiff to shew cause why the claim of conusance by the Vice-Chancellor of the university of *Oxford* should not be allowed, and in the mean time proceedings be stayed.

The defendant was served with a writ of latitat issued out of this court to answer the plaintiff in a plea of trespass, to which he appeared by attorney on the first day of this term; and thereupon the following claim of conusance was entered.

"And hereupon cometh also into court the Rev. *John Parsons, Commissary or Vice-Chancellor* of the university of *Oxford*, [*the office of Chancellor of the said university being now vacant by and in consequence of the death* of the most noble *William Henry Cavendish* Duke of *Portland*, late Chancellor thereof, *and the authority of Chancellor of the said university having in this behalf for and during such vacancy of the said office of Chancellor devolved upon him the said* John Parsons, *as such Commissary or Vice-Chancellor:*] by *J. W.* his attorney above named (*a*), to ask, to claim, prosecute, and defend all and singular the liberties and privileges of him the said Commissary or Vice-Chancellor; and thereupon he the said Commissary or Vice-Chancellor prays his liberty; that is to say, to have the consuance of the plea aforesaid before the said Chancellor, his Commissary, or the deputy of the said Commissary, to be held at *Oxford:* because he saith," &c. The claim of conusance then proceeded in the same form as set forth in the case of *Welles* v. *Traherne* in *Willes'* Reports, 234., setting forth the letters patent of *Hen.* 8th, the statute of confirmation 13 *Eliz. c.* 29. and the

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(*a*) By a power of attorney before entered on the record, as in *Willes' Rep.* 233. *n.*

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allowance of the claim of conusance in *E.* 9 *Ann.* in a plea of trespass then depending in *B. R.* between *Riley* and *Appleby* v. *Stovell.* And then it proceeded, "and the said Commissary or V.C. prays that the said record of the said *Easter* term may be seen and inspected, and that his said liberty and conusance of the said plea in the said court here depending by virtue of the letters patent aforesaid and by force of the said statute and the allowance aforesaid, may be allowed to him, &c. with this, that the said Commissary or V.C. doth aver that the said *F. H. Brickenden* mentioned in the said writ or process, and the said *F. H. Brickenden* mentioned in the said warrant of attorney and claim above specified, are the same person. And the said Commissary or V. C. brings here into court the said letters patent of *H.* 8th, under his great seal, dated 1st of *April*, in the 14th year, &c., and also brings into court the
[545] exemplification of the said act of parliament under the great seal of the said Lady *Elizabeth* Queen of *England.* Dated at *Westminster* the 7th of *June*, in the 13th year, &c."

The seal of the office of Chancellor of the university was affixed to this claim of conusance, and also to the power of attorney before referred to; and the affixing of the seal was in each instance verified by an affidavit of the registrar of the university. The claim itself was also verified by affidavits, one from the defendant, stating that he is now and for five years last past has been a constant resident member of the university of *Oxford*, and for the whole of that period and several years before one of the fellows of *Worcester* college aforesaid. And that before and at the time of the supposed trespass he was, and from thence has been and now is, a resident master of arts, and is now and was at the time of the supposed cause of action one of the proctors of the university actually resident and abiding there, and one of the tutors and fellows of *Worcester* college; and that the supposed trespass for which the action is brought was for an act done by him on the 23d of *May* last in discharge of his duty as one of the proctors. That the courts of the Chancellor of the university are regularly holden weekly during term for the trial of all suits and causes within the conusance and jurisdiction of the said court, and that he is liable to be called upon there to answer the plaintiff. That the plaintiff was at the time of the supposed trespass an under-graduate and matriculated member of the university and resident therein. The matriculations of the plaintiff and defendant

fendant, and the residence of the latter in the university, were also verified by the affidavit of the registrar of the university, and by extracts from the matriculation book.

* *Williams* Serjt. and *Abbott* opposed the rule, and took objection to the claim of conusance being made by the Vice-Chancellor, in the vacancy of the office of Chancellor of the university, who though he states in his claim that during such vacancy the authority of Chancellor in this behalf devolves upon the Commissary or Vice-Chancellor, yet does not shew any charter or other authority to that purpose, as he ought to have done. There is not even any affidavit of the fact of the vacancy. [The Court having asked by whom the Vice-Chancellor was appointed; it was answered, by the Chancellor: but that such appointment must be confirmed by the convocation.] They observed, that the trial in the university court, not being by a jury at common law, but by the civil law, the courts at *Westminster* have always been very jealous of the jurisdiction, and strict in requiring the claim of conusance to be made in due time and form; as in *Welles* v. *Traherne* (*a*), and *Leasingby* v. *Smith*. (*b*) *[546]

The Attorney General, contrà, was stopped by the Court, after observing that the privilege was granted, not to the Chancellor, or to the Vice-Chancellor, but to the university; and that in the vacancy of the office of Chancellor, it necessarily devolved on the Vice-Chancellor, as the head officer of the university for the time being, to claim its privilege: and referring to *Castle* v. *Lichfield* (*c*), where the conusance was allowed on the claim of the Vice-Chancellor's deputy. [547]

(*a*) *Willes' Rep.* 233. (*b*) 2 *Wils.* 406.

(*c*) *Hardr.* 505. 8. 10. Lord C. J. *Wilmot* said, in *Leasingby* v. *Smith*, 2 *Wils.* 412. that the record of *Castle* v. *Lichfield* had been diligently searched for, but could not be found. He also observed that that case, which was in *Easter* 21 *Car.* 2. seemed to be almost the first claim of conusance allowed to the university of *Oxford*. Yet in *Magdalen* College case, *M.* 25 *Car.* 2. 1 *Mod.* 164. Lord C. J. *Vaughan* said that the university had enjoyed these privileges some hundred years ago. And this claim of jurisdiction is noticed in 40 *Ed.* 3. 17. 8 *H.* 6. 18. *Bro. Abr.* Conusance, *pl.* 27. It is said there have been two other instances in which the claim of conusance has been made by the Vice-Chancellor; one of *Raymond* v. *Willis*, 19 *Eliz. C. B. Rot.* 128.; another where the claim was made on behalf of *Wm. Jackson*, in *C. B.* 20 *Jac.* 1. *Rot.* 2009.; both which claims were allowed: in each of these cases the Chancellor was living.

Lord

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Lord ELLENBOROUGH C. J. The claim of conusance is on behalf of the body of the university, by a person who appears to us upon the face of the proceeding to be the principal organ of the university by whom the claim is to be made. The university seal is affixed to the claim, which gives it authenticity, and nothing appears to us to negative the authority of the Vice-Chancellor to prefer it.

Per Curiam, Let the claim of conusance be allowed.

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Tuesday, Nov. 21st.

DOE, Lessee of ALBEMARLE Earl of LINDSEY, *against* COLYEAR.

Under a devise to *A.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *A.* successively in tail-male; with like remainders to *B.* and his sons; with remainder to *the right heirs male of A. for ever;* these last words are words of limitation, and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification, particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of *A.*, who might be excluded from taking under the prior limitations to his first and other sons in tail male. And such ultimate limitation to the heirs male of *A.* to whom a precedent estate for life was given, operating to give him an estate tail in remainder, such devise lapses by his death before the testator.

THIS was an ejectment for the manors of *Uffington* and *Tallington,* with certain lands, &c. in the county of *Lincoln,* in which a verdict was taken for the plaintiff at the trial, subject to the opinion of the Court on the following case.

Charles Bertie of *Uffington* in the county of *Lincoln,* Esq., being seised in fee of the premises in question, by his will dated 9th of *Nov.* 1759, duly executed and attested, devised to trustees and their heirs the manors of *Uffington* and *Tallington,* and all his freehold messuages, lands, &c. in the county of *Lincoln* or elsewhere, with all rights, royalties, &c. advowsons, and appurtenants thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, to the uses following; viz. to the use of the testator's brother, *Montague Bertie,* for life, without impeachment of waste; remainder to the use of the trustees during the life of *M. B.* to preserve contingent remainders; remainder to the use of the first and other sons of *Montague Bertie* successively in tail male; and for default of such issue, to the use of *Peregrine*

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Duke of *Ancaster* for life, without impeachment of waste; remainder to the use of the said trustees during the Duke's life, to preserve contingent remainders; remainder to the use of the first and other sons of the said Duke successively in tail male; and for * default of such issue male, to the use of Lord *Brownlow Bertie* for life; remainder to the use of the trustees during Lord *B. B.*'s life to preserve contingent remainders; remainder to the use of the first and other sons of Lord *B. Bertie* successively in tail male; and for default of such issue, to the use of *the right heirs male of the said Duke of* Ancaster *for ever.* The testator died on the 21st of *February* 1780. His brother *Montague Bertie* died without issue in the lifetime of the testator. *Peregrine* Duke of *Ancaster* also died in the lifetime of the testator, leaving one son, *Robert,* who became Duke of *Ancaster* on his father's death and also died in the testator's lifetime. Lord *Brownlow Bertie,* who became Duke of *Ancaster* on the death of Duke *Robert,* survived the testator, and on his death entered into possession of the premises in question, and continued in such possession until his death on the 8th of *February* 1809; having never had any male issue. The Earl of *Lindsey,* the lessor of the plaintiff, is the nephew and heir at law of *Charles Bertie* the testator: and *Brownlow Colyear,* the defendant, is heir at law to the Duke of *Ancaster* lately deceased, being the eldest son of his only daughter, who is also deceased. The pedigree annexed is found by the jury as a part of the case submitted to the opinion of this Court. If the Court should be of opinion that the premises in question descended to the lessor of the plaintiff as heir at law to the testator *Charles Bertie,* they find a verdict for the plaintiff: if not, they find a verdict for the defendant.

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Denman, for the plaintiff, on the ground that there was no valid devise of the ultimate remainder to any person who was capable of taking it, under the description of *right heir male* of *Peregrine* Duke of *Ancaster*, contended that the reversion necessarily descended to the lessor of the plaintiff, as heir at law of the testator. The only persons who could pretend to claim against the heir are *Peregrine* Duke of *Ancaster*, or some of his male descendants; but he and his son *Robert* took estates of inheritance as purchasers under the will, which lapsed by their deaths before the testator, according to *Brett* v. *Rigden*(*a*), *Goodright* v. *Wright* (*b*), and *Hodgson* v. *Ambrose* (*c*). [Lord *Ellenborough* C. J. mentioned also *White* v. *Warner*, lessee of *White*, as a leading case which went to the House of Lords (*d*), to

(*a*) *Plowd.* 240. (*b*) 1 *P. Wms.* 597. (*c*) *Doug.* 323. 337.

(*d*) This came on in *B. R.* in *Tr.* 21 *Geo.* 3. upon a writ of error from *Ireland*, and was decided in *M.* 22 *Geo.* 3. Vide a short note of the point in *Dougl.* 344. *n.* 4. The following report of the arguments and judgment I had from Mr. Justice *Buller*; the statement of the case is abridged from the appeal papers of the House of Lords.

HAMILTON WHITE *against* WARNER, Lessee of RICHARD WHITE. *B. R.* M. 22 *Geo.* 3. in Error from *B. R.* in *Ireland*, upon a special verdict.—The special verdict stated that *Richard White*, being seised in fee of the manor of *Bantry*, and of certain lands in the barony of *Beer* and *Bantry*, by indentures of lease and release of the 24th and 25th of *September* 1766, being the settlement made on the marriage of his eldest son *Simon White*, conveyed these lands, &c. to trustees and their heirs, as to part of them, to the use of *Simon* for life, remainder to his first and other sons of the marriage in tail male, remainder to *Simon* in tail male; with remainder to *Richard* himself in fee; and as to other parts of the lands, to the use of *Simon* in tail male, with remainder to *Richard* himself in fee. *Richard White* being so seised of these remainders, and being also seised in fee of other lands, and having issue the said *Simon*, his eldest son, and *Hamilton White*, his second son, (the defendant below,) and a daughter, *Margaret*, by his will of the 1st of *January* 1775, after some pecuniary bequests, devised to his grandson *Richard White*, (the lessor of the plaintiff below,) and the heirs of his body, certain lands; and if he should die without issue before 21, then to his grandson *Simon White* and the heirs of his body; with like remainders over to his grandsons *Hamilton* and *Edward*; with remainder to his own right heirs. He

A devise of all the rest and residue of the testator's estate in the manor and lands of *Bantry*, &c. not already settled on his eldest son *Simon*'s marriage, (except those parts of it before devised to his (second) son *Hamilton*,) together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon* and the heirs of his body; and for default of issue of *Simon*, then he devised his said *entire* estate of *Bantry* to his son *Hamilton* in tail, with remainders over; lapses by the death of *Simon* in the lifetime of the testator, and the residue passes to *Hamilton* immediately on the death of the testator, though *Simon* left issue.

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to the same purpose.] Duke *Peregrine* took under the will either a fee or an estate tail. If the estate had been limited to him and his heirs male by deed, he would have taken a fee, by

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devised other lands to his grandson *Hamilton White* in tail, with like remainders over to his grandson *Edward*, and to his own right heirs. He then devised to his younger son *Hamilton White*, (the defendant below,) and the heirs of his body certain other unsettled lands; and for default of issue of his son *Hamilton*, he devised over the same to his eldest son *Simon* and the heirs of body, remainder to his daughter *Margaret* for life, and after her decease to the heirs of her body; with remainder to his own right heirs. He devised other lands to his son *Hamilton* for life, and 1000*l.* to be paid him by his executor *Simon White*. And then followed the devise immediately in question, by which he devised all the rest and residue of his estate in the manor and lands of *Bantry*, &c. not already settled on his eldest son *Simon*'s marriage, (except those parts before devised to his son *Hamilton*,) together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon White*, and the heirs of his body; and for default of issue of his son *Simon*, then he devised his *said entire estate* of *Bantry* to his second son *Hamilton*, and the heirs of his body; and for default of issue of *Hamilton*, then he devised his said entire estate of *Bantry* to his daughter *Margaret* for life, and after her decease to the heirs of her body; remainder to his own right heirs. He then appointed his eldest son *Simon White*, his sole executor, and devised to him all the residue of his estate, real, personal, and mixed, not before devised, subject to his debts and legacies.

The special verdict then stated that *Simon White*, the son, died on the 2d of *September* 1776, in the lifetime of the testator, leaving issue of the marriage *Richard White*, the lessor of the plaintiff, his eldest son, and three other sons and four daughters, all infants. That the testator, who had been a barrister, knew of the death of his son *Simon*, and died on the 27th of the same *September*. On the testator's death the defendant, *Hamilton White*, his son, took possession of the lands devised to him, and of all the other estates of the testator not comprised in the settlement of the 24th and 25th of *September* 1766, claiming them under his *father's will*; being the lands in question, for which this ejectment was brought.

In *Hilary* term 1780 judgment was given for the lessor of the plaintiff; on which this writ of error was brought; and the case was argued in *Trinity* term 21 *Geo.* 3. by *Davenport* for the plaintiff in error, and *Bower* for the defendant; and again in *M.* 22 *Geo.* 3. by *Wallace*, Attorney-General, for the plaintiff, and *J. Wilson* for the defendant. The question was, Whether by the death of *Simon* in the life-

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by *Lit. s.* 31.; but according to Lord *Coke*'s Comment, the law, in the case of a devise, will supply the words "*of the* "*body*, and give him an estate tail: and then according to the

lifetime of his father the testator, the residuary devise to *Simon* of the lands in *Bantry* were lapsed, and whether the remainder to *Hamilton* did then immediately take place?

For the defendants in error they insisted on the intention of the testator, and from the words "*entire* estate," that the time at which the limitation to *Hamilton* should take place was not till the estates in settlement on *Simon* and his issue should fall in, and the whole pass to *Hamilton*. *Holmes* v. *Maynell*, *T. Jones*, 172. That there is a distinction between the case where the first devisee in tail is heir at law to the testator, and where he is a stranger: a stranger can only claim under the will, and must shew his interest expressly described therein; but the heir looks not for what he takes by the will, but for what is not expressly given away. The presumption is strongly in favour of the heir where he claims against a remainder-man. They denied that the heir at law was first devisee in tail in any of the cases where the remainder-man had taken immediately upon the lapse. The case of *Brett* v. *Rigden*, *Plow.* 341. was a devise in fee; and if given to the heir would be without effect, as he would take by descent. In *Hartopp*'s case, *Cro. Eliz.* 243. it was only ruled that neither the daughter nor the posthumous son of the first devisee, who died before the testatrix, should take: but the Court of Wards made no final determination; but because the office was not fully found, they directed a melius inquirendum; which could only be to inquire, whether the first devisee were heir at law to the testatrix; for it would have been absurd to direct it, if in no event either could have taken. In *Fuller* v. *Fuller*, *Cro. Eliz.* 422.*, ejectment was brought by the heir [554] at law; and the only resolution was that he was disinherited. But *Popham*, C.J. held clearly that if one devise land to his eldest son in tail, remainder to the second son in tail, remainder to the third in fee; and the eldest son die, leaving issue, in his father's lifetime; his issue would have it, without a new publication; because the intent of the

* In that case the testator, having issue *John*, *Richard*, *Edward*, and *Henry*, devised lands to *Richard*, the second son, in tail: and, after his death without issue, to *Edward* in tail; then to *John*, the eldest in tail; remainder to his own right heirs. *Richard* died in the lifetime of the testator, leaving an eldest son, *Thomas*, who the testator then *said* should have the land devised to his father, *Richard*, as if *Richard* had died after him, the testator: then the testator died; and *Thomas*, the son of *Richard*, being in possession, *John* the eldest son of the testator, after entry and ouster, brought trespass.

devisor

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the rule in *Shelley*'s case (*a*), there being a devise to him for life, and afterwards, in the same instrument, a devise to his heirs male; or as it is here to be understood, to the heirs male

(*a*) 1 *Rep.* 104.

devisor was not to disinherit any of his sons: but otherwise in case of a devise to a stranger; for there the devisee being dead, the intent of the devisor does not appear to carry it from his own heir to the heir of a stranger. This distinction has never been contradicted; but it has been confirmed by Lord C. J. *Parker* in *Goodright* v. *Wright*, 1 *Str.* 32.; and the reason is adopted, "That the heir of the eldest son is also heir to the devisor, and there appears no intention to disinherit any of his sons." This indeed is omitted in the report in 1 *P. Wms.* 397. In *Hutton* v. *Simpson*, 2 *Vern.* 722. called *Sympson* v. *Hornsby*, in *Prec. in Chan.* 439. 452. the first devisee was not heir at law; for one of two co-heirs is not the same as an heir. On a devise of the whole to one of two co-heirs, she takes by purchase. *Rawston* v. *Reading*, *Prec. in Chan.* 222. *Goodright* v. *Wright*, before mentioned, was the case of a stranger, and the decision was in favour of the heir. So must have been *Busby* v. *Greenslate*, 1 *Str.* 445. *Hodgson* v. *Ambrose*, *Dougl.* 337. was also a devise to a stranger; and the words "for want of such issue," will not postpone the remainder man. As to any difficulty supposed in saying what estate the heirs of the devisee shall take; some part of the testator's intention must be frustrated; but his primary intent ought to prevail, and the heir shall take a fee: or if this be too much, the idea of a descent to the heir till subsequent estates take place is not new in law. *Shelly*'s case, 1 *Co.* 89.; or perhaps they may take an estate tail by implication from the words "*entire* estate," which mark the time when the testator intended the limitation to *Hamilton* should take place.

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For the plaintiff in error it was said, that where there are clear words of devise, there can be no room for construction. The words are the most technical description of an estate tail. The rule was laid down in *Brett* v. *Rigden*, "that the devise lapses if the devisee dies in "the lifetime of the testator." In *Hartopp*'s case no distinction was made between a fee and an estate tail; and the word "*heirs*" was holden merely to express the quantity of estate given to the first devisee, through whom they meant to claim as heirs. In *Fuller* v. *Fuller* it was agreed that the remainder-man should take presently. The Chancellor thought himself bound by it in *Simpson* v. *Hutton*. The last case is *Hodgson* v. *Ambrose*, in this court, *Dougl.* 337. This proves the two rules, 1st, that the words *heirs* or *heirs of the body* express the quantity of estate given to the first devisee, upon whose death,

male of his body; the word *heirs* is to be considered as a word of limitation, and not of purchase; the latter limitation operating with the former to give the first taker an estate in tail

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death, before the testator, the devise lapses. 2dly, That the next remainder takes effect presently. As to the distinction where the devise is to the *heir* at law or a *stranger*, this is grounded on the dictum of Lord C. J. *Popham* in *Fuller* v. *Fuller*; but the question could not arise there, and stands as his own idea. It is not confirmed in *Goodright* v. *Wright*. But can the Court make the issue of the eldest son take by purchase, and determine differently as to the issue of the others? The case of *Hartopp* has been pushed very far by the other side. If any material fact had been the object of the melius inquirendum, it would have appeared in some report. It must rather have been as to the value. *Hodgson* v. *Ambrose* was determined with out any consideration whether the devisee were heir at law. They said that *coheirs* stood exactly on the same ground as *heirs*: where the same estate is devised to either, which would descend by law, it goes by descent. The words "*entire* estate" in this will were used merely to avoid repetition.

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Lord MANSFIELD C. J., after stating the case, ut supra. To support the judgment of the *K. B.* in *Ireland*, we must suppose them to have gone upon ground like this; that it is to be implied, though not expressed, in the will, that the testator meant to provide for the contingency of the son's dying in his lifetime, and then that the grandson should take as a purchaser. For when any of the other ways are considered, it will appear utterly impossible to support them. I have a strong wish to support the claim of the plaintiff in ejectment, and have put it in every possible light to distinguish it from the letter or reason of the cases: for no one can doubt that the intent of the testator is otherwise defeated. If the matter were entire, this might have weight; but it is so settled, and the letter and reason of the authorities are so clear, that it would be impossible to shake them, even if more erroneous than any one can suppose they are. The case of the devisee's dying before the testator happens every day; and many titles depend upon it. It is proper, therefore, to see what is the established law. At common law lands were not deviseable; and though they were deviseable in some places by custom, very little is to be found in the books as to real estates before the statute of Wills. But in personal bequests it is settled that the legacy is lapsed, because the legatee had nothing; and no representation can take place, where the principal himself had nothing. The first case after the statute is that of *Brett* v. *Rigden*, which was a devise to *A.* and his heirs: the Court held this lapsed by the death of *A.* in the lifetime of the testator;

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tail male. And this rule is not to be departed from, unless, as Lord *Hardwicke* said in *Garth* v. *Baldwin* (*a*) the intent of the testator appears otherwise by plain expression, or neces-

(*a*) 2 *Ves.* 646.

sary

tator; because the heir was no object of the testator's bounty, but this was only a mode of giving a fee to the principal. The next is *Hartopp*'s case: this was an estate tail, with remainder over. Originally there might have been a distinction between *Brett* and *Rigden*, and the case of an estate tail with remainders over: for the issue in tail is clearly part of the object of the testator's bounty: he claims per formam doni: but the authorities put them on the same footing. And the reasoning is material to attend to. It is said there is no difference, because every one claiming under a will claims as a purchaser. There are authorities to the same effect so late as last year. Therefore the [557] cause must turn on the distinction taken at bar, between the case of a devise in tail to the heir with remainders over, and that where the first devisee is a stranger; and it is said that there is no case of such a devise to an heir. I doubt that assertion. *Hutton* v. *Simpson* seems to be the case of an heir; for there is no distinction between a *coheir* and a *sole heir*: a coheir is equally entitled to her share. And there is another old case of *Packman* v. *Cole*, 2 *Sid.* 53. 78. In *Hodgson* v. *Ambrose*, it did not appear to the Court who was heir. If this distinction were admitted, how is the heir to take? Is it under the will, by implication that *B.* is not to take till the failure of issue of *A.*? This would be just the same in the case of a stranger; and there is an end of the heirship if he take by the will. Or is he to take by descent quosque? This too is the same in the case of a stranger. The last way, and perhaps the best, is that the event overturns the whole, and the heir shall take, not being disinherited by express words. But this begs the question: he is disinherited by express words: giving him an estate tail excludes any descent. There is really no distinction between the heir and a stranger. The dictum of Lord C. J. *Popham* was upon a point not in the case; and he puts it in a way not attempted to be supported by Mr. *Wilson*; for he would have none of the sons disinherited. There is likewise another dictum of his there, which is certainly wrong, viz. that if lands be given to *A.* and the heirs of his body, and *A.* is dead, that the heir shall take. Upon every ground, therefore, judgment must be reversed.

WILLES and ASHHURST, Justices, agreed.

BULLER J. The event was not provided for. In *Goodright* v. *Wright* it was fully settled that the words "heirs," &c. are a description of the estate of the first taker. I am inclined to think that *Hartopp*'s case

was

sary implication. Mr. Justice *Blackstone* in delivering his judgment in the case of *Perrin* v. *Blake* (*a*), states four exceptions * under which all the cases may be classed which break in upon the general rule in *Shelley's* case: 1. Where no estate of freehold is devised to the ancestor; 2. Where no estate of *inheritance* is devised to the *heir*; 3. Where words of explanation are annexed by the devisor to the word *heirs*, to shew that he did not mean it in its legal sense; and 4. Heirs of the body have been held to be words of purchase where the devisor has superadded fresh limitations and grafted other words of inheritance upon the heirs to whom he gives the estate, shewing that he meant them to be the stock of a new descent. None of those exceptions will be found to apply here. But it may be said, that as the testator had previously given estates in tail male to the sons of *Peregrine* Duke of *A.*, therefore, to give effect to the residuary devise, and to prevent it from being inoperative, it must be considered that the description of *heirs male* of the Duke was meant to designate the person who might come under that description at

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(*a*) This was cited from the learned Judge's argument on delivering judgment in the Exchequer-chamber, in *Hil.* 13 *Geo.* 3. published by Mr. *Hargrave* in his *Law Tracts*, vol. 1. p. 489—504, &c., where a general account of the proceedings in this celebrated case is to be found.

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was the case of an heir, for it was a brother to the testator. And if there was any distinction between the heir and a stranger, the Court could not have given the judgment they did, without first knowing whether he were actually heir. Lord *Macclesfield* did not intend to confirm Lord C. J. *Popham's* dictum; he only meant to say, that allowing it, it did not extend to the case then before the Court. As to the intent, no intent not to disinherit the heir appears on the will: for the testator has preferred the remainder-man to the issue of the first taker. The Court cannot imply a devise where there is one to the contrary. Nor is the will to be altered by the event, but every part shall take effect which can. I doubt whether Mr. *Wilson* is correct in the case he put: for a devise on failure of issue and not till then, would still be a remainder, and take effect immediately if the prior devise were removed.

Judgment reversed.

This judgment of reversal was afterwards affirmed in the House of Lords, *May* 6th, 1782.

the

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the time when that remainder was to attach in possession. But those words are not inoperative, if construed according * to their strict legal signification, as giving the Duke a fee simple (*a*): and it is more likely that the testator should have meant the Duke himself, whom he knew, to take the fee, than a remote stranger, who, after an indefinite failure of the Duke's issue male, might answer the description of his heir male. And to shew that the fee ultimately limited to the heirs male of the Duke was executed in him, he relied on *Lewis Bowles*'s case (*b*), and *Shelley*'s case (*c*); in which latter the same argument as to the inoperation of subsequent words of limitation, unless taken as words of purchase, was urged, without effect. But even if the ultimate remainder had been to such person as should be heir male to Duke *Peregrine*, it would not have helped the defendant: for he is not *heir male*, as he claims through a female (*d*); nor is he *heir general*; for Lady *Willoughby* and Lady *Cholmondeley* are the heirs general of the Duke. The authority of *Lit. s.* 23. 24. and of Ld. *Coke*'s Comment is express, that, under a gift in tail to heirs male, the descent must be wholly by heirs male, and the son of a daughter cannot inherit. And it is a general rule established by a current of authorities (*e*), that whoever claims as heir male by purchase must be general heir as well as nearest male descendant. The only contradictory

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authority is that of Lord *Cowper* C. in *Brown* v. *Barkham* (*f*), who held that a younger brother was capable of taking as heir male, under a devise to the heirs male of the body of the testator's great grandfather, though the daughter of an elder brother was heir general: but though that decree was ultimately established on special circumstances, yet the general doctrine of Ld. *Cowper* against the opinion of Ld. *Coke* was overruled by Ld. *Hardwicke* (*g*) upon a bill of review.

(*a*) Vide *Lit. s.* 31. (*b*) 11 *Rep.* 79. *b.* (*c*) 1 *Rep.* 93. *b.*

(*d*) *Co. Lit.* 24. *b.* 25. 25. *b.* and vide Mr. *Hargrave*'s Note, 3. to page 24. *b.* continued through subsequent pages, and citing a variety of authorities to the same purpose.

(*e*) All the authorities are collected in Mr. *Hargrave*'s Note, 3. to *Co. Lit.* 24. *b.* and subsequent pages.

(*f*) *Preced. in Chan.* 442. 461. *Gilb. Rep.* 116. 131. and 1 *Stra.* 35.

(*g*) Vide Lord *Hardwicke*'s words, as collected from a MS. Note in the same Note on *Co. Lit.* continued in p. 33. *b.*

Copley

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Copley argued for the defendant, that *Brownlow* Duke of *Ancaster* took a fee in the remainder by purchase, under the description of *heir male* of Duke *Peregrine*; which fee descended to the defendant from Duke *Brownlow*. The words "right heirs male of the said Duke of *Ancaster*" are either words of limitation or of purchase: if words of limitation, the Duke, it is said, either took in fee simple, or in tail: but he did not take in fee simple, by reason of the word *male*, which limits the course of descent; and the passage cited from *Co. Lit.* has always been considered as applied only to deeds, and not to wills. He could not therefore take in fee simple, without rejecting the word *male*; and that point was not much insisted on. Neither did he take an estate tail; for though it be true in general that a devise to one and his heirs male will give him an estate in tail male, yet that is by substituting the words "*of the body*" by implication, in order to effectuate the intention of the testator; which is the reason given in the same passage as that cited from *Co. Lit.*, and is also to be found in other books, as in *Bro. Abr. Devise, pl.* 1. referring to 27 *H.* 8. 27. *a.* and in *Baker* v. *Wall* (*a*). But here there could have been no such [561] intention in this part of the will, and therefore there can be no such implication; for the testator had before given estates in tail male to the first and other sons of Duke *Peregrine*, and had interposed trustees to preserve the contingent remainders to those sons during the life of the Duke, with the like devise over to *Brownlow Bertie*, and the like limitations to his sons: the ultimate remainder therefore to the right heirs male of Duke *Peregrine* was certainly not intended to take effect till after failure of his sons and their male descendants. [*Bayley* J. Suppose *Peregrine* Duke of *Ancaster* had had a son who had died in the lifetime of the testator, leaving a son, the latter could only have taken as heir male of the Duke.] He would have taken, according to my argument, as a purchaser. [*Bayley* J. But he would also have taken by descent.] Still the different limitations in the order of the will shew that the testator could not have intended to give Duke *Peregrine* an immediate estate either in fee or in tail male: for this would have been to render nugatory the many intervening remainders. Then if these words neither gave a fee or an estate tail to Duke *Peregrine*, as words of limitation, they must be construed to be words of purchase:

(*a*) 1 *Ld. Ray.* 185.

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purchase: and then the only question is, at what period the devise is to attach on the person answering the description of *heir male* of Duke *Peregrine?* It could not be in the life-time of the testator, nor during the life of Duke *Peregrine*, who could have no heir during his life: it must therefore of necessity be fixed at the death of the testator who survived the Duke: there could be no necessity for deferring it to the time when *Brownlow* Duke of *Ancaster* should die without [562] issue male. In *Jobson*'s case (*a*) it was considered, that if the devisee had at the time of the devise and at the death of the testator answered the description of "next of his kin of his *name*," she would have been entitled to take in remainder, under that description, after a previous devise to another in tail, who, after the death of the testator, entered and died without issue: but because she had then lost her name by marriage, she was held not to be entitled. Lord *Hardwicke* indeed in *Pyot* v. *Pyot* (*b*) said that he was not quite satisfied with that case, on the ground that the devise had no regard to the continuance of the *name*, but regarded only the *stock:* but he considered it as a vested remainder, and not depending on the contingency, who should answer the description at the determination of the prior estate tail. And in *Doe* v. *Over* (*c*) a devise of land, after a life estate to the wife, to be divided at her decease amongst *the relations on his side*, was held to vest in such of the testator's relations as answered the description at the time of his death. So here the testator meant by the ultimate limitation to the heirs male of Duke *Peregrine*, that after failure of the heirs male *of his body*, to whom the estate was before limited, the person who at the testator's death was the Duke's next heir male should take a vested remainder in fee. *Brownlow* Duke of *Ancaster* was that person; and there can be no doubt that the testator's object was, that the person who should succeed to the dukedom should take the property. Admitting therefore the general rule, that under the description of *heir male* the person who takes must be heir *general* as well as heir *male;* yet if it appear that by such description the testator meant to designate a particular class of heirs, the Court will give it that effect. And nothing can turn on the word "heirs" being used in [563] the plural; because it was applied to a class of persons, one

(*a*) *Cro. Eliz.* 576. (*b*) 1 *Ves.* 337, 8. (*c*) 1 *Taunton*, 263.

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of whom was to take at the particular time to which the devise referred.

Lord ELLENBOROUGH C.J. It does not appear that there is any such particular intention expressed on the face of the will as to vary the legal technical meaning of the words used in it. The words themselves are plain. The testator gives an estate for life to *Peregrine* Duke of *Ancaster*, and then after giving estates in tail male to the first and other sons successively of the Duke, with remainders to Lord *Brownlow Bertie* for life, and to his first and other sons successively in tail male, he gives the ultimate remainder to the right heirs male of the said Duke of *Ancaster* for ever, which necessarily means Duke *Peregrine*. Then by the known rule of law this last limitation to the heirs male of Duke *Peregrine* operates, with the estate for life before devised to him, to give him an estate of inheritance either in fee or in tail male; it is immaterial to consider which, as he died before the testator. If this had been a gift by deed, according to the passage cited from *Co. Lit.* it would have been a fee; but being by will, according to the case cited from the year book in *Bro. Devise*, it would be an estate in tail male. But whether the one or the other, by the rule in *Shelley*'s case, acted upon in *White* v. *Warner*, and a long string of cases, the devise to *Peregrine* Duke of *Ancaster* lapsed by his death before the testator, and therefore the lessor of the plaintiff, as heir at law to the testator, is now entitled to recover.

LE BLANC J. (*a*) This is a clear case on the part of the heir at law. The rule in *Shelly's* case is established, and must govern the present, unless we can find a manifest intention of the testator to the contrary. Having given an estate for life to Duke *Peregrine*, with remainder to his first and other sons successively in tail male, with other remainders, the testator concludes with a limitation to the right heirs male of the Duke for ever. Those words, as they are used in a will, would have given the Duke an estate in tail male in remainder. But the reason of their giving such an estate, it is said, is because the words "*of the body*" are supplied by implication; and that no such implication can be made here, because the testator had before given estates in tail male to each of the sons of the Duke in succession. This argument would perhaps prevail if these

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(*a*) *Grose* J. was indisposed and absent.

words

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words could be construed to be words of purchase; but we can see no such manifest intention to use them as such, so as to control the general rule of law, that where an estate of freehold is given to the ancestor, and there is a subsequent limitation in the same instrument to the heirs or heirs male of the same ancestor, that gives him an estate of inheritance.

BAYLEY J. I am of the same opinion. Where the words of the subsequent devise do not refer to a particular individual or individuals of the family of the same person to whom an estate for life is first given, but to a class of persons, comprehending all of that class who could claim from or through him, there they are considered as words of limitation, and not of purchase. But it is argued that they cannot be considered as words of limitation in this instance, because the estates before given in succession to all the sons of Duke *Peregrine* in tail male, would comprehend all the *heirs male* of the body of Duke *Peregrine*, and therefore that the ultimate remainder to his heirs male would be inoperative. But that [565] does not follow; for cases may be put where persons would have taken as "heirs male" of the body of the Duke, and yet would not have taken under the limitation to his first and other sons in tail male; as if the Duke had had an eldest son who died in the lifetime of the testator, leaving a son. Again, suppose *Brownlow* Duke of *Ancaster* had had three sons by three wives, each of those sons would have taken in succession under the description of sons of *Brownlow:* but if his eldest son had died leaving only a daughter, after a remainder in fee had vested in *Brownlow* as heir male of Duke *Peregrine* by purchase, which is contended for; such remainder would have descended to the daughter of the eldest son; which would certainly have been contrary to the testator's intention; but the ultimate remainder being to the heirs male of Duke *Peregrine* confines the descent to the male line.

Postea to the plaintiff.

POWDICK *against* LYON, one, &c.

Tuesday, Nov. 21st.

THE plaintiff declared in scire facias, and set forth the writ to the sheriff, reciting that whereas the plaintiff had sued by bill in *B. R.* and by the judgment of this Court had recovered against the defendant 216*l.* 10*s.* for his damages, as well for non-performance of promises made to him by the defendant, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, *as appears of record*; and *also* 13*l.* 10*s.* *adjudged* to the plaintiff in the Exchequer-Chamber according to the form of the statute, &c. for his damages, costs, and charges which he had sustained on occasion of the delay of execution of the judgment aforesaid, on pretence of prosecuting a writ of error prosecuted by the defendant against the plaintiff in the Exchequer-Chamber before the Justices of C. B. and Barons of the Exchequer, &c. according to the form of the statute: and though judgment was thereupon given and affirmed in form aforesaid, yet execution of that judgment still remained to be made to the plaintiff: whereupon the sheriff was required to make known to the defendant that he at, &c. on, &c. should shew cause why the plaintiff ought not to have his execution against him of the damages, costs and charges aforesaid, according to the form and effect of the recovery and adjudication aforesaid, &c. And then he set forth the sheriff's return of scire feci, and the defendant's appearance, and then prayed execution of the damages aforesaid according to the form and effect of the said recovery.

The defendant demurred to the whole declaration and stated as special cause, that it was not alleged therein, that there was any record of the supposed recovery of the said sum of 13*l.* 10*s.* for the damages, costs and charges of the plaintiff, sustained by the delay of execution of the said judgment on pretence of prosecuting the writ of error by the defendant against the plaintiff in the Exchequer-Chamber; and because there was no reference in the declaration to any such record.

Where a plaintiff in scire facias demanded execution for a certain sum recovered by judgment of *B. R.* for damages and costs, with a [566] prout patet per recordum, *and also* a certain other sum adjudged to him in the Exchequer-Chamber, for his damages and costs of a writ of error, without a prout patet &c. held that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the whole declaration was bad, and the plaintiff was entitled to judgment generally on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer.

Barnes,

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Barnes, in support of the demurrer, began by urging the objection taken to the declaration, that where matter of record was the foundation of the plaintiff's suit, or of the substance of the plea, it ought to be certainly and truly alleged with a prout patet per recordum: otherwise, where it is but conveyance (*a*) or inducement. But

Lord ELLENBOROUGH C. J. interposed, by observing that the demurrer was too large: it went to the whole of the plaintiff's demand in the declaration, when it was clear that he was entitled to recover part of it, namely, the 216*l.* 10*s.* To which *Barnes* answered, admitting the general rule, as laid down in *Pinkney* v. *The Inhabitants of Rutland* (*b*), that where a declaration is good in part and bad in part, and the defendant demurs to the whole, the plaintiff shall have judgment for that part which is good: yet this, he said, only applied to cases where there was an ulterior proceeding, as a writ of inquiry to assess the damages on that part which was good. But here the plaintiff will be entitled if he succeed to take out execution for the sum recovered and the costs.

BAYLEY J. If the sum demanded be divisible on the record, as it appears to be, and there be no objection to one part of it, the demurrer, which goes to the whole, is bad.

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And here the objection is merely formal (*c*), and the plaintiff is substantially entitled to the whole of his demand.

Lord ELLENBOROUGH C. J. The two sums are clearly divisible: the plaintiff demands 216*l.* 10*s.* recovered by judg-

(*a*) *Co. Lit.* 303. *a.* and vide in support of the particular objection *Corbet* v. *Cook*, *Cro. Eliz.* 466. *May* v. *Spencer*, *T. Ray*, 50. *Guiliam* v. *Hardy*, 1 *Ld. Ray.* 216. *Alanson* v. *Butler*, 1 *Lev.* 211. and *Lill. Entr.* 644, 5.

(*b*) 2 *Saund.* 379.

(*c*) By the st. 4 *Ann. c.* 16. *s.* 1., for the amendment of the law, and the better advancement of justice, the Judges are required, upon any demurrer joined, to give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any defect in the pleading or process, &c. except such as shall be especially set down as cause of demurrer; and no exception shall be taken (amongst other things) for not alleging *prout patet per recordum*, unless specially shewn for cause of demurrer. Here then the demurrer being informal, it was the same as if there had not been any demurrer specially assigning this defect; and then the plaintiff would have been entitled to judgment for the whole sum.

ment

ment of this Court for his damages and costs, as appears of record, *and also* 13*l.* 10*s.* adjudged to him in the Exchequer-Chamber, &c. Then the demurrer being too large, and therefore bad, we must give judgment for the plaintiff generally: for we cannot give a judgment that the demurrer is in part good.

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Abbott was to have argued against the demurrer.

VERE *against* Lord CAWDOR, and KING.

Tuesday, Nov. 21st.

THIS was an action of trespass for shooting and killing a certain dog of the plaintiff. The defendants pleaded the general issue: and the defendant *King* also pleaded specially, that before and at the time when, &c. Lord *Cawdor* was and still is possessed of a certain close within and part and parcel of the manor of *Kidwelly* in the county of *Carmarthen*, of which he was lord, and the defendant *King* before and at the said time when, &c. was the gamekeeper of the said manor, duly deputed and appointed by the said lord to preserve the game upon the said manor; and because the plaintiff's dog at the said time, when, &c. was in the said close of the said lord, so being part and parcel of the said manor, *running after, chasing, and hunting* divers hares there, the defendant *King* as such gamekeeper, &c. and within the said close, &c. *for the preservation of the said hares*, shot and killed the said dog. To this there was a general demurrer.

A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act by stating that the lord of [569] the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close for the preservation of the hares; such plea not even stating that it was *necessary* to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person.

Marryat in support of the demurrer, after stating the question to be, whether a gamekeeper of a manor had a right to shoot every dog which he found following game within the boundaries of the manor, and that too in a case where the dog is not stated to have belonged to an unqualified person (*a*), or to have been encouraged by the owner to pursue the game; was stopped by the Court, who were clearly satisfied that the plea was bad; and observed to the plaintiff's counsel that it

(*a*) By st. 22 & 23 *Car.* 2. c. 25. lords of manors may appoint gamekeepers who may take and seize all guns, dogs, &c. to kill game, used by any person who by that act is prohibited from keeping the same.

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did not even state that the killing of the dog was *necessary* for the preservation of the game.

Scarlett, for the defendant, relied upon the cases of *Wadhurst* v. *Damme* (*a*), and *Barrington* v. *Turner* (*b*), as shewing that the justification need not allege that the killing of the dog was a *necessary* means of preserving the game; but only, as in the first case, that the dog was divers times killing conies in the warren, and therefore the warrener finding it there [570] at the time when, &c. running at the conies there, killed it. And in the second, that the greyhounds chased a deer in the defendant's park, and there killed her, on which to prevent more mischief by them, the defendant took the greyhounds and killed them. In which latter case there could have been no necessity for killing the dogs after the defendant had taken them. The cases on this subject, he observed, were collected by Mr. Serjt. *Williams*, in a note to the case of *Wright* v. *Ramscot* (*c*), who refers to a similar precedent of such a plea in 2 *Rich. Prac. C. P.* 435. (*4th ed.*) justifying the killing of a greyhound for coursing deer in a park. [*Le Blanc* J. To make these cases bear upon the present, you must assimilate the hare to rabbits in a warren, or deer in a park, which are the subjects of property.] In *Keeble* v. *Hickeringill* (*d*), *Powell* J. says, every man has a property in animals feræ naturæ while they are upon his own land ratione soli: and in *Sutton* v. *Moody* (*e*), the Court say, that "a warren is but a franchise to keep the conies; and the owner has no more property in the conies themselves than any man that has them in his own land. If one start a hare in my close, and kill her there, it is my hare: otherwise if he hunt her into the ground of a third person; then it is the hunter's."

Lord ELLENBOROUGH C. J. The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. There is no question here as to the right to the game. The gamekeeper had no right to kill the [571] plaintiff's dog for following it. The plea does not even state

(*a*) *Cro. Jac.* 45. (*b*) 3 *Lev.* 28. (*c*) 1 *Saund.* 84.
(*d*) 11 *Mod.* 75. (*e*) *Salk.* 556. 1 *Ld. Ray.* 250. *and Com. Rep.* 34.

that

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that the hare was put in peril, so as to induce any necessity for killing the dog in order to save the hare.

Per Curiam, Judgment for the Plaintiff.

CARRINGTON *against* TAYLOR.

Friday, Nov. 10th.

Firing at wildfowl to kill and make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, [572] which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of and of damage to the decoy, for which an action on the case is maintainable by the owner.

THIS was an action on the case in which the plaintiff declared, that whereas he before and at the time of the grievance after mentioned, and from thence hitherto hath been and still is lawfully possessed of and in a certain place prepared with suitable and proper conveniences for decoying, taking, and catching of wild fowl, commonly called a decoy, situate and being at the parish of *Beaumont-cum-More* in the county of *Essex*, and by means of such decoy during all the time aforesaid, until the committing of the grievance after mentioned, had been and was used and accustomed to decoy, take, and catch divers great quantities of wild fowl, to wit, wild ducks, mallards, teal, and widgeon, by reason whereof great profits and advantages had accrued, and still ought to accrue to him; yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff, and to deprive him of a great part of the profits and advantages arising from his said decoy, afterwards and whilst the plaintiff was so as aforesaid possessed thereof on the 1st of *January* 1809, and on divers days, &c. shot off and discharged divers guns and other engines, and made and caused to be made divers violent and loud noises so near to the said decoy of the plaintiff as thereby then and there greatly to disturb and frighten divers wild fowl then being at or near the said decoy; insomuch that divers wild fowl, to wit, 500 wild ducks, &c. then and there flew away and wholly quitted the said decoy, and divers other wild fowl, to wit, &c. which were then and there about to enter the said decoy, were thereby then and there prevented from entering the same; and by means thereof the plaintiff was prevented from decoying, catching and taking the said wild fowl in such

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plenty as he otherwise might and would have done, to wit, at, &c. and thereby the plaintiff lost and was deprived of the profits, &c. which might and otherwise would have accrued to him from his said decoy, to wit, at, &c. Wherefore, &c.

At the trial of this case before the Lord C. B. *Macdonald* at *Chelmsford*, the plaintiff's right to the decoy, which was an ancient decoy, was proved; and it also appeared that the defendant sought his livelihood in part by shooting wild fowl from his boat on the water, for which boat with small arms he had a licence from the Admiralty for fishing and coasting along the shores of *Essex*; on one of the salt creeks of which county, called the *Blackwater* river, where the tide ebbs and flows, near *Walton*, the decoy in question was situated. The only proof of the disturbance by the defendant was, that he, being out in his boat shooting wild fowl in a part of the open creek, first fired his fowling piece within about a quarter of a mile of the plaintiff's decoy, when 2 or 300 wild fowl came out; and afterwards approached nearer, and fired again at wild fowl on the wing at the distance of about 200 yards and upwards from the decoy pond, when he killed several widgeons, and immediately on the noise of the gun 4 or 500 wild fowl took flight from the pond; but it did not appear that he fired into the decoy. The learned Judge left this as evidence
[573] to the jury of a wilful disturbance of the plaintiff's decoy by the defendant, for which this action would lie; and the jury found their verdict for the plaintiff with 40*s.* damages.

Garrow now moved to set aside the verdict, as being against law and evidence; the defendant having a right, he said, to shoot at the wild fowl in the place where he was, which was an open creek or arm of the sea, where the tide flowed and reflowed; and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there.

The Court however said, that they saw no ground for disturbing the verdict in point of law: and *Le Blanc* J. referred to an old precedent of such an action (*a*), which had been

(*a*) The case alluded to is cited in *Bull. Ni. Pri.* 79. as *Hickeringal's* case, *Hil.* 5 *Ann.*; which is reported by the name of *Keeble* v. *Hickeringall*, in 11 *Mod.* 74. 130. 3 *Salk.* 9. and *Holt's Rep.* 14. 17. 19. From these it appears to have been an action on the case for disturbing the plaintiff's decoy; and after a verdict for the plaintiff, it was moved to

been followed by one or two others within his own remembrance on the *Norfolk* circuit. And the evidence they observed was proper to be left to the jury who had decided upon it.

Rule refused.

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to arrest the judgment for the insufficiency in law of the declaration. The case appears to have been twice argued, first in *Hil. 5 Ann.*; and afterwards in *Easter 5 Ann.*: the arguments are best reported in *Holt's Rep.* 14. and 17. And in p. 14. the facts are stated thus, " that the defendant was lord of a manor and had a decoy; and the plaintiff had also made a decoy upon his own ground, which was next adjoining to the defendant's ground, and pretty near also to the defendant's decoy; and therein the plaintiff had decoy and other ducks, whereof he made considerable profit;" and declares, &c. It does not appear how the facts first mentioned were before the Court upon the motion in arrest of judgment, as they did not appear upon the face of the declaration; nor did the fact there appear which is afterwards (p. 17.) stated, that the defendant was upon his own close when he shot off the gun: but these facts were probably assumed arguendo, as consistent with the allegations of the declaration*. Not that perhaps the introduction of these facts would have varied the question; as the declaration proceeded to charge that the defendant fired the guns which made the disturbance *with design to damnify the plaintiff and to frighten away the wildfowl from his decoy;* which consequently precluded, after verdict, any consideration of the question, whether he had not a right to do these acts on his own ground as a mean of taking the birds for his own benefit. In the report of the case in 11 *Mod.* 75. Lord C. J. *Holt* says, " Suppose the defendant had shot in his own ground; if " he had occasion to shoot, it would have been one thing; but to " shoot on purpose to damage the plaintiff is another thing, and a " wrong." It should seem to be the same thing if he fired for the porpose of disturbing the wildfowl in his neighbour's decoy, that he might take the chance of benefitting himself by shooting them when on the wing in consequence of such disturbance. The following statement of the declaration and judgment in that case, which is taken from a copy of Lord C. J. *Holt's* own MS. in my possession, shews the true nature of the action, and of the grounds on which it was decided.

KEEBLE *against* HICKERINGILL. *Trin. 5 Ann.*

ACTION upon the case. Plaintiff declares that he was, 8th *November* in the second year of the Queen, lawfully possessed of a close near the decoy pond of another, with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away and the owner damnified.

An action on the case lies for discharging guns

* *Vide* what is said by *Holt* C. J. at the beginning of p. 576.

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of land called *Minott's Meadow*, et de quodam vivario *, vicato *a decoy pond*, to which divers wildfowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them: the defendant, knowing which, and *intending to damnify the plaintiff in his vivary*, and *to fright and drive away the wildfowl used to resort thither, and deprive him of his profit*, did, on the 8th of *November*, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond: and on the 11th and 12th days of *November* the defendant, *with design to damnify the plaintiff, and fright away the wildfowl*, did place himself with a gun near the
[575] vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frighted away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages.

Holt C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischevious in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 *Roll.* 60. 1.; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employ-

* 2 *Inst.* 100. Vivarium is a word of large extent, and ex vi termini signifieth a place in land or water where living things are kept.

ment,

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ment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 *H.*6. 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. *Hickeringill* had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 *H.* 4. 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. *Hickeringill* should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 *E.*3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 *H.*7.8. 21 *H.*6. 31. 9 *H.*7.7. 14 *Ed.* 4. 7. Vide *Rastal.* 662. 2 *Cro.* 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, thongh not the loss of his service. There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frighted away by the defendant's shooting. As in 5 *Rep.* 34. *Playter's* case. Trespass quare clausum suum fregit, et pisces suos cepit. After a verdict for the plaintiff, and entire damages, it was moved in arrest of judgment, that the declaration was not good, because it was not said of what nature, nor of what number the fishes were; which was held to be a fatal exception, not helped after verdict by the statute of jeofails. Resp. But indeed here is not the number stated. Now considering the nature of the case, it is not possible to declare of the number that were frighted away; because the plaintiff had not possession of them, to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. This is plain by several authorities. 2 *Cro.* 123. *Dent* v. *Oliver.* Trespass

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for beating and hindering his servant from taking and collecting his toll: objection that it is not said what quantity of toll he was to take: but that could not be known. *Owen Rep.* 109. *Escott* v. *Laurenny.* Action upon the case because the defendant hindered him from taking toll of divers pieces of wool, and sheweth not how many; yet the declaration was good. 2 *Cro.* 435. *Johns* v. *Wilson.* Trespass quare clausum fregit, et spinas suas ad valentiam succidit. Exception was taken to the declaration because the number of the thorns was not mentioned: yet held not to be a good exception. *Alleyn*, 22. *Lodge* v. *Weedon.* Action upon the case; the plaintiff declared that the defendant killed divers cattle infected with the murrain, and threw the entrails into the plaintiff's field, per quod diversa averia of the plaintiff's interierunt. After verdict, exception was taken in arrest of judgment, because it did not appear how many cattle of the plaintiff's did thereby perish: yet judgment was given for the plaintiff, because there need not such certainty in an action upon the case, because the plaintiff is only to recover damages for them. 9 *Rep.* 43, 44. *Earl of Salop's* case. Action on the case for hindering the plaintiff in taking the profits of his stewardship of such a manor; not shewing what the profits were, or how much they amounted to: it was never questioned but the declaration was good. The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill, that he uses thereby. Secondly, says Mr. Solicitor, here is not the nature of the wildfowl stated; for wildfowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wildfowl. Resp. It is true in the large signification of the word they are so: and also the word *fowl* comprehends all birds and poultry: but *wildfowl* are taken in a more restrained sense; pheasants and partridges are not thereby understood, for they are fowl of warren. *Manwood's Forest Law, cap.* 4. *sec.* 3. 1 *Register* 93. 96. *F.N.B.* 86. *Rastal*, 585. Wildfowl are known in the law, and described by the statute of 25 *H.* 8. c. 11., which doth take notice of wildfowl." The title of the statute is "against destroying of wildfowl." It recites that there hath been within this realm great quantities of wildfowl, as ducks, mallards, widgeons, teals, wildgeese, and divers other kind of wildfowl, which is reasonable to be understood of that sort that do get their prey in that manner. The stat. of 3 & 4 *Ed.* 6. *c.* 7., which repeals that of the 25 *H.* 8., takes notice of wildfowl, and hath the general word *wildfowl*, without coming to particulars. Therefore when the declaration is of wildfowl, it is not to be understood that sparrows, wrens, or robin-redbreasts can be thereby included. Besides Fluminiæ Volucres in *Littleton's* Dictionary, are understood *wildfowl*, as being the only words in Latin that we have to express it. *Litt. Dict.* tit. *Wild Fowl.* And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticin

ing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expence of servants, *engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason is that this action is not brought to recover damage for the loss of the fowl, but for the disturbance; as 2 *Cro.* 604. *Dawney* v. *Dee.* So is the usual and common way of declaring.

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The KING *against* the Inhabitants of HARDWICK.

Wednesday, Nov. 22d.

A rated parishioner not being bound, upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which [579] must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances.

AN appeal against an order for the removal of *Joseph Vipond*, *Mary* his wife, and their children, by name, was entered at the sessions in the name of "The Churchwardens and Overseers of the Poor of the Parish of *Hardwick*, in the County of *Norfolk*, Appellants, and the Churchwardens and Overseers of the Poor of the Parish of *Fulham Saint Mary the Virgin*, in the same County, Respondents." And upon the hearing of the appeal, the Sessions confirmed the order, subject to the opinion of this Court upon a case which stated,

That *John Vipond*, the father of the pauper *Joseph* was a settled inhabitant of the parish of *Forncett St. Mary*, in *Norfolk*, and about 40 years ago came to reside in the parish of *Hardwick*, in the same county, on a tenement at the rent of 5*l.* 10*s.* per annum. The pauper, *Joseph Vipond*, who is now 37 years of age, was born in that parish; and when he was 15 years old, and during his father's residence on the tenement at the above rent, he was bound apprentice to *S. Warren*, of *Besthorpe* in *Norfolk*, cordwainer, by indenture, for four years, which time he regularly served with his master, who resided in *Besthorpe* under a certificate from the parish of *Bunwell*, in

A son apprenticed out by his father to a master living under a certificate in another parish, and not thereby acquiring any settlement of his own, but receiving cloaths from his father, and visiting him from time to time, and returning home to him after the expiration of his apprenticeship, before he was of age; though he went out to service again in two days after receiving more cloaths; is not emancipated from his father's family, and therefore follows a settlement gained by the father while he was so serving as an apprentice.

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the same county. During the first year of the son's apprenticeship *John Vipond*, the father, purchased the tenement on which he resided at *Hardwick*, for 87*l*. Whilst the pauper was in the service of *Warren*, he was cloathed by his father, whom he occasionally visited on holidays, and at other times with his master's leave. At the expiration of the apprenticeship, the pauper, being then 19 years of age, returned to his father's house in *Hardwick*, where he staid two days, and received some new cloaths. He then went back to his former master *Warren*, with whom he made an engagement to work by the piece; and he continued working under such engagement in *Besthorpe* for a year and a quarter. The pauper afterwards worked by the piece with another cordwainer of the name of *Burn*; and with both *Warren* and *Burn* he made his own agreements, but never let himself for a year to either of them, or to any other person. The respondents, in order to prove the pauper's settlement in *Hardwick*, called the father, who being a settled (*a*) inhabitant of that parish refused to be examined. They then called the pauper himself, who proved from his knowledge, that his father had resided on the tenement at *Hardwick* for 25 years, and that it was now worth more than 10*l*. per annum. And the Court admitted the pauper to give
[580] evidence of his father's declarations to him, that he (the father) had purchased the house when the pauper was 16 years of age for 87*l*. and that he had about 10 years ago laid out above 100*l*. on the premises. The Court were of opinion, that the pauper was not emancipated by his residing in *Besthorpe* under the indenture of apprenticeship, nor by any other act subsequent to it; and therefore confirmed the order.

Alderson, in support of the orders, said that it had been repeatedly decided, that a pauper under age, who has been put out by his father as an apprentice with a certificated person in another parish, by which no settlement could be gained, returning again to his father's family, is not emancipated, but follows his father's settlement; as in *R.* v. *Halifax* (*b*), *R.* v. *Witton cum Twambrooke* (*c*), *R.* v. *Collingbourn Ducis* (*d*), *R.* v.

(*a*) He was in fact a *rated* as well as settled inhabitant; though by mistake, as it seemed, that was not stated in the case; but the fact was assumed in the course of the argument, and it was the ground of the objection taken at the Quarter Sessions.

(*b*) *Burr. S. C.* 806. (*c*) 3 *T. R.* 355. (*d*) 4 *T. R.* 199.

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Ingworth (*a*). And in *Rex* v. *Roach* (*b*), which was the case of an adult leaving her father's house and going into service, *Lawrence* J. took the distinction, that if the daughter had gone out to service and returned to her father's house before she was of age, she would have continued to be part of his family. The question then results to this, Whether the pauper's father had acquired a settlement in *Hardwick?* This was sufficiently proved by the pauper's evidence that his father had actually resided for 25 years on an estate now worth above 10*l.* a-year for which no rent appears to have been paid; which was sufficient for the Sessions to presume that it was his own, and that the original purchase-money was above 30*l.* But if that were not enough, the declarations of the father, that this [581] estate was his own by purchase for 87*l.*, would be let in, upon the authority of *The King* v. *Woburn* (*c*), as the declaration of one of the parties to the cause; objection having been made on that ground to his examination by the adverse party; and the letting in such evidence being, as *Le Blanc* J. observed in that case, a necessary consequence of the principal point there decided, that one who was a rated inhabitant of one of the litigant parishes could not be compelled by the other to give evidence against his own parish, being in effect a party to the cause. [Lord *Ellenborough* C. J. observed that the point was not directly raised in that case; though he did not mean to suggest that there was any difficulty in the point itself, or any desire in the Court to get rid of it upon the present occasion. At the same time he observed that there was evidence enough stated in this case for the Sessions to have founded their judgment upon, without having recourse to the evidence of the father's declarations. The mere occupation of land for 25 years without payment of rent was evidence enough of the father's seisin; and the rent of 5*l.* 10*s.* paid for it 40 years ago was evidence of the purchase-money being above 30*l.*]

Garrow and *Frere* Serjt., contrà, contended that without the evidence of the father's declarations as to the time when the purchase was made, for above 30*l.* the respondents could not make out their case; for it did not appear that the annual value of the estate was 10*l.* at the time when the pauper

(*a*) 8 *Term Rep.* 399. (*b*) 6 *Term Rep.* 247.
(*c*) 10 *East*, 395. 402.

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returned under age to his father's family; and he afterwards went out to service with different persons after he came of age. It is therefore* material to the respondent's case, 1st, to sustain the evidence of those declarations, in order to shew that the father had gained a settlement in *Hardwick* at the last period when it appears with certainty that the pauper continued part of his father's family, which was on his return to his father's house when he was 19, or at furthest within two years after that when he came of age; for he is stated to be now 37 years old, and it does not appear that he has ever resided with his father since he came of age: and, 2dly, the respondents must shew that the son was not emancipated at the time when the father acquired the settlement in *Hardwick*.

With respect to the last question; as the relevancy of the cases cited was indisputable, supposing the pauper to have returned home to his father's, after the expiration of his apprenticeship, before his coming of age; and supposing the father's settlement in *Hardwick* to have been then gained, which was clear if his declarations were evidence; this part of the case was not much debated; though it was at first insisted, that if the father's settlement were not gained till after the son was apprenticed out under the control of his master, which was incompatible with the continuing authority of the father; and if the son were never afterwards regularly domiciled with his father, before he came of age; which was contended to be the case here; the occasional visits on holidays, and for two days after his apprenticeship expired, would not make the father's house the home or domicile of the son: and it did not appear that the pauper so considered it, as in some of the cases cited. On this point

Lord ELLENBOROUGH C. J. observed that what the pauper

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considered does not signify, but what he did. Here he went to his father's house after his apprenticeship, as to his home; he treated it as his home; and was received and treated as one of his father's family. When he returned there he was in the same plight as when he left it. His father continued cloathed with all his rights over him; and he betook himself to his father's house with all the rights belonging to a member of his father's family.

On the principal point the appellant's counsel submitted that it did not necessarily follow from the determination in

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The King v. *Woburn* (*a*) that because a payer of the parish might refuse to answer as a witness when called by the adverse party, therefore his declarations upon the subject might be given in evidence: for nothing would be more easy, if such a rule were laid down, than to fabricate evidence upon parish appeals. The father, naturally wishing his son to be settled in the same parish with himself, would make declarations to him not upon oath, which the son might truly swear to have heard from his father, though the facts so declared might be wholly unfounded. This point was not in judgment before the Court in *Rex* v. *Woburn*; and though one of the learned Judges intimated that opinion in the course of the argument, no opinion upon it was ultimately delivered by the Court after taking time to consider of their judgment. The common case, where declarations of parties have been given in evidence is where they are parties on the record; whereas the nominal parties to an appeal of this sort are the parish officers. The rule was considered to be so technical in *Bauerman* v. *Radenius* (*b*), that the declaration of a trustee who was the nominal plaintiff on the record, was admitted, to defeat the action of his cestui que trust, the real party. [*Bayley* J. That case only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence (*c*)]. Then, taking the inhabitants of the parish to be the real parties to the appeal, still they are not such parties whose declarations are admissible within the true meaning and sense of the rule; which is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth; but the interest of all aggregate bodies, such as corporators, hundreds, parishioners and the like, upon a matter effecting the whole community alike, is too minute to insure an accurate attention to declare nothing but the truth. Upon this ground of the minuteness

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(*a*) 10 *East*, 395. (*b*) 7 *Term Rep.* 663.

(*c*) In *Bauerman* v. *Radenius*, 7 *T. R.* 665. a case was cited in argument of *Duke* v. *Aldridge*, before Lord *Mansfield*, where one of the parties was a sheriff, who was indemnified by a third person; and Lord *Mansfield* permitted the declarations of that third person to be given in evidence against the sheriff.

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of their interest, they have in some cases (*a*) been held to be witnesses. [*Le Blanc* J. In *The King* v. *Woburn* the parishioner was not rejected as a witness on the ground of interest; for his interest was opposed to * that of the party who wished to call him: but he was held to be privileged from answering, on the ground of his being one of the real parties to the suit.] The objection was there made to the party proposed to be called as a witness, on the ground of his being rated and paying to the poor-rates. [*Le Blanc* J. The objection to the witness, because he was a rated inhabitant, has always been made where he was called as a witness to support the case of the parish in which he was inhabiting, and the objection has been made by the adverse party against whom he had an interest.] Considering him as a party, yet as the interest of each inhabitant is several, his declarations would not be evidence to charge the others; as an admission made by one of the defendants in trespass is no evidence against the others. The inconvenience of letting in this evidence will be very great in practice.

Lord ELLENBOROUGH C.J. Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. With respect to the case at the bar, two questions have been made; but that which has been argued most at length, and is considered to be of most importance, is, Whether the declaration of the father, as proved by the son, were admissible evidence? If, from the occupation of this estate by the father for 25 years, within the

(*a*) *Frere* referred in particular to the city of *London* case, 1 *Ventr.* 350., and generally to 12 *Vin. Abr.*, Evidence, Y, where cases on this subject are collected; but the current of them tend rather to establish the objection against such witnesses, unless where it has appeared that the particular individual, called to give evidence on behalf of the general body suing or being sued, could not derive any benefit to himself or suffer any detriment, however small, by the event. And in the particular case cited, that of a corporator, there was one Judge against three, and a bill of exceptions was tendered; but it became unnecessary to consider the matter further, as the disputed witnesses were withdrawn, and the plaintiff's case proved by others.

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knowledge of the son, now only 37 years old, during the greater part of that time as it would appear without any payment of rent, added * to the facts that 40 years ago the estate was rented at 5*l.* 10*s.* per annum, and is now worth above 10*l.* a-year, the Justices at the Session had drawn the inference, which they might fairly have done, that the father had purchased it before the son came of age for above 30*l.*, we might have been saved this discussion: but as it is, the question becomes material to be decided. The question then is, Whether the declaration of a parishioner respecting the circumstances of a settlement, of which he could not be compelled to give evidence as a party to the appeal depending, be admissible in evidence? I consider all appeals against orders of removal, though technically carried on in the names of the church-wardens and overseers of the respective parishes, yet in substance and effect to be the suits of the parishioners themselves, who are to contribute to the expence of maintaining the paupers. The parishioner, therefore, being a party, could not be called upon as a witness. Then what is there to differ this from other cases of aggregate bodies, who are parties to a suit? In general cases it cannot be questioned that the declarations of the parties to a suit are evidence against them; and how is this case distinguishable from those upon principle? What credit is due to such evidence is another consideration: his declaration does not conclude the parish; but will be more or less weighty according to his means of knowledge, the genuineness of the declaration, and other circumstances of which the Court would judge. A declaration made by such a party loosely, and without competent grounds of knowledge of the fact, would not be entitled to weight; but the credibility of such evidence is quite a different question from its competency; and it is always open to contradiction like other evidence. Here, however, the father had very competent means of knowledge as to the fact declared by him: but it is sufficient for us to say, that the evidence was competent to be received. The other point made is as to the emancipation of the son, who having gone from his father at the age of 15, and served as an apprentice under indentures for four years to a certificated master in another parish during the residence of his father in *Hardwick*, and not having thereby acquired any settlement of his own; and having returned to his father again at the expiration of his apprentice-

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apprenticeship, and requiring and receiving the further assistance of his father; must be considered as re-incorporated on his return into his father's family, and entitled to all the rights of one of its members; and therefore he followed the settlement which his father had in the mean time acquired in the parish of *Hardwick*. None of the cases of emancipation which have been decided on the ground of the children's marriage, or obtaining a settlement of their own in another parish, or being under a different control incompatible with that of their parents till after the age of 21, apply to this case. The consequence is that the order of Sessions must be confirmed.

LE BLANC J. (*a*) The facts of the case are shortly these: The father of the pauper, being originally settled in another parish, about 40 years ago came to reside in *Hardwick* upon a tenement under 10*l.* a-year, which at first he rented, and during his residence there, and while his settlement continued in the parish to which he originally belonged, he put his son, [588] then 15 years of age, out apprentice to a person residing in the parish of *Bunwell* under a certificate. About a year afterwards, while the son was residing with his master in *Bunwell*, the father acquired a settlement in *Hardwick*, by purchase, for above 30*l.* of the tenement which he before rented; and then the first question is, whether that settlement were communicable to the son; and that depends upon whether the son continued a part of his father's family, or, in the language of the books, were emancipated. Now, during all the time that he lived with his master he was cloathed by his father, whom he occasionally visited on holidays, and at other times with his master's leave; and at the expiration of his apprenticeship he returned to his father's house in *Hardwick*, and staid there two days, and received new cloaths from his father. The question is, Whether, being then only 19 years of age, he continued under the control and as part of his father's family? When he left his master he went to his father's house as to his home, and his father supplied him with cloaths as he had done before: and none of the circumstances occur in this case which in other cases have been held to constitute an emancipation. The father's settlement, therefore, was of course communicated to the pauper his son. The next question is, Whether the Sessions have received evidence of these facts which was not admissible? On reading the case it ap-

(*a*) *Grose* J. was indisposed and absent.

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pears as if it had not been necessary for the Sessions to raise this question; for the evidence was sufficient, without the hearsay of the father, for them to have found the true state and condition of the father's property in the parish, sufficient to establish his settlement there. But it appears that they received the evidence of his declaration in consequence of his having refused, on the ground of his being a party to the appeal, to be examined when called as a witness by the opposite party. And as we do not know that they founded their decision upon the other circumstances of the case, independent of his declaration, though they might well have done so, we must now decide whether they did right in admitting that evidence. In the case of *The King* v. *Woburn* (*a*), we considered that such an appeal, whether entered in the names of the churchwardens and overseers of the poor, or of the inhabitants of the parish, was in effect the suit of the inhabitants paying to the rates; they being the parties really interested in the suit touching the settlement of a pauper in the parish; and that such an inhabitant of one of the litigant parishes in that case could not, as a party to the suit, be compelled by the other parish to give evidence against his own parish. The Court did not decide that the declaration of such an inhabitant could be given in evidence against his parish; and it has been truly said at the bar, that the opinion thrown out by me upon that point was not the decision of the Court; for the point did not necessarily arise in that case; and therefore it comes now to be judicially considered, for the first time, whether such a declaration be receivable in evidence: whether, when a suit be pending against a great number of persons who have a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge be evidence against him and all the others parties with him to the suit? And it still seems to me to follow as a corollary from the decision of the Court in the former case, that such a person, not being liable to be called upon to give evidence upon oath of the fact, as being a party to the suit, his declaration of it must be evidence for the opposite party. And though I am sorry that so important a point of evidence, as to its general consequences, comes to be decided in a settlement case, where our decision cannot be revised; yet being obliged to decide

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(*a*) 10 *East*, 395.

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it, we must do so according to what appears to us to be the conclusion of law upon principle.

BAYLEY J. I consider that the pauper was not emancipated when the settlement was gained by his father in *Hardwick*. The pauper had not gained a settlement elsewhere, nor been married and become the head of another family, nor was he out of the control of his father, at the time that the latter gained a settlement in *Hardwick:* he therefore followed his father's settlement. I also consider that every rated inhabitant of a parish is a party to the suit upon an appeal against an order of removal, between his parish and another; and that every such rated inhabitant may refuse to give evidence in such suit when called upon by the opposite parish. I also think it follows from thence, that the declaration of every such rated inhabitant, as to the matters in question, made at the time he was a rated inhabitant, is evidence. But unless the opposite party first offered to call such inhabitant as a witness, which was objected to, I do not think that in ordinary cases the magistrates should give any weight to mere declarations of that kind; though there may be occasions when the declarations of such a party would have great weight.

Orders confirmed.

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Thursday, Nov. 23d.

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The sheriff having been served in proper time with a rule to return the writ of test. fi. fa. which expired on the last day of term, is attachable at the rising of the Court on that day if no return be made before; and the rule for the attachment is regular, though he make his return on a subsequent day in vacation before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage.

ON the 15th of last *June* the sheriff was served, in the cause of *Martin and Another* v. *Hobbs*, with a rule to return the writ of testatum fieri facias, which expired on the 21st, the last day of *Trinity* term; and no return being made, the plaintiff moved for an attachment at the rising of the Court. The sheriff, however, returned the writ on the 27th, and afterwards, on the same day, having been served with the rule for the attachment, he tendered the amount of the sum levied, deducting his poundage, and also served the plaintiff's attorney with notice of moving the Court, on the first day of the ensuing term, to set aside the rule for the attachment for irregularity;

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gularity; which notice was given before the attachment issued, but it afterwards issued on the same day. The Court was accordingly moved in this term for a rule to set aside the attachment for irregularity, which was now opposed by

The Attorney-General and *Comyn*, who relied on the practice in support of the attachment in this case. The rule of Court of *M.* 32 *G.* 3. (*a*) directs that all writs shall be returned by the sheriff on the day on which the rule for returning the same shall expire: and in default thereof, it says that the plaintiff is to be at liberty to move for an attachment on the next day: but as the latter part of the rule is inapplicable to cases where the writ is returnable on the last day of the term, since no attachment can be moved for out of term, it has been the common practice, they said, to move for the attachment in such cases on the rising of the Court on the last day of the term; the contempt being then incurred. And this practice, they observed, had been expressly confirmed in *C. B.* by a rule of Court (*b*) made for that purpose.

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Garrow and *Bolland*, contrà, contended, that as the writ was not returnable till the last day of the term, and the sheriff had the whole of that day to the very last moment of the rising of the Court to make the return, no attachment could be moved for on that day; and that therefore the sheriff had till the first day of the ensuing term to make his return, and was in time if he returned the writ before the attachment was moved for on that day. And this they said was the true construction of the rule of Court of *M.* 32 *G.* 3.; which concluded with saying, that in case of default made by the sheriff in not returning the writ on the day on which it was returnable, the plaintiff should be at liberty to move for the attachment on the *next* day; which must mean the next day on which the Court sat. And in *The King* v. *The Sheriff of Berks* (*c*), where the sheriff was only served two days before the end of the term with a six days' rule to return a writ of fieri facias, the Court held that he had the whole of the first day of the ensuing term to file his return: and they also declared, on inspection of the rule of Court of *M.* 32 *G.* 3., that it only applied to writs returnable within the term, where an attachment could be moved for on the *next* day within the term. And they observed

(*a*) 4 *Term Rep.* 496. (*b*) 1 *Bos. & Pull.* 312.
(*c*) 5 *East*, 386.

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that the practice in *C. B.* stood upon a special rule of that Court for the regulation of their own practice.

* *The Court*, however, after consulting the Master as to the practice in this respect, said that it had prevailed in this Court with sufficient notoriety, in conformity to what had been more formally declared by the rule of Court in the same respect in *C. B.*: and therefore they declared the attachment to have been regularly issued, and discharged the rule for setting it aside.

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THOMAS FOSTER, T. USHER, and ELIZA DEBORAH, his Wife, MARIA CATHERINE FOSTER, VALERIA DOROTHY FERGUS, Widow (late FOSTER), EMMA LOUISA KEITH FOSTER, JOHN FOSTER, T. SMITH, and CHARLES FOSTER, *against* The Earl of ROMNEY, JOHN FOSTER, GEORGE FOSTER, HENRY FOSTER, FREDERICK WILLIAM FOSTER, JOHN FREDERICK FOSTER, an Infant, and JOSEPH FOSTER BARHAM.

Friday, Nov. 24th.

A testator devised one of three estates to trustees and their heirs, until his nephew *Thomas* [595] son of his brother *William*

THIS was a case directed by the Lord Chancellor for the opinion of this Court, the facts of which were these:

Thomas Foster, being seised in fee of plantations called *Elim*, *Waterford*, *Lancaster*, and *Two-Mile-Wood*, and of other real estates in *Jamaica* and elsewhere, by his will dated the 8th of *April* 1762, duly executed and attested, devised his estates of *Elim*, *Waterford*, *Lancaster*, and *Two-Mile-Wood*, and all other his estates in *Jamaica*, and also all his lands, &c. in *Great Britain*, to Lord *Romney* and Sir *Edward Hawke*, and their heirs, should attain 21 or die, and on his attaining 21, to the said *Thomas* for life, sans waste; and after the determination of that estate, to the trustees during *Thomas*'s life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every the *son and sons* of the body of *Thomas*, *severally and successively* one after another in priority of birth, &c.: and *for default of* SUCH *issue*, to the trustees until his nephew *John*, son of his brother *Samuel*, should attain 21 or die; and in case *John* attained 21, then to him for life, sans waste; and after the determination of that estate to the trustees during *John*'s life to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of *John* severally and successively one after another in priority of birth, &c.; and after the determination of that estate (or, as it stood here in the limitation of one of the other estates "and for default of *such* issue,") to the trustees until his nephew *S. W.* should attain 21 or die, &c. and so repeating all the former limitations as to *S. W.* and his sons; and the like with respect to a fourth nephew *F. W.* and his sons; concluding —and *for default of* SUCH *issue* to the testator's brother *Joseph* for life, sans waste; and after his death to his son *Joseph* and his heirs. The testator repeated the same set of limitations twice more, with respect to two other estates, only varying the priority of his four first-named nephews in the disposition of them, but concluding after each set of limitations to those four nephews, with the same devises to his brother *Joseph* for life, and to *Joseph*'s son in fee.

The nephews *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime. Held that the four first-mentioned nephews and their sons only took estates for life respectively, for want of words of limitation or other tantamount words; the words, "*for default of* SUCH *issue*," meaning for default of *son or sons*, &c.

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FOSTER and Others *against* Lord ROMNEY.

heirs, to the use of *R. Drake* and *B. Long*, their executors, &c. for a term of 99 years, if his, the testator's wife, should so long live, without impeachment of waste, upon the trusts therein mentioned: and after the expiration, or other sooner determination by the death of his wife, of that term, he devised the same plantations, lands, &c. in case he should leave a child living at the time of his death by his wife, or his wife should be then ensient of a child to be afterwards born, to the use of Lord *Romney* and Sir *E. Hawke* and their heirs, until such child should attain his or her age of 21 years, or be married; and on such child's attaining 21 or marriage, to the use of such only child *for life*, without impeachment of waste; and from and after the determination of that estate, to the use of the trustees to support the contingent remainders hereinafter limited. And from and after the decease of such child, he devised the said estates as follows: "As touching "and concerning my said estates of *Elim*, and *Waterford*, to "the use of Lord *R.* and Sir *E. H.* until my nephew *Thomas* "*Foster*, son of my brother *William Foster*, shall attain the "age of 21 years, or die. And on my said nephew, *Thomas* "*Foster*, attaining his said age of 21 years, to the use of the "said *T. F.* for his natural life, without impeachment of "waste. And from and after the determination of that "estate, to the use of Lord *R.* and Sir *E. H.* and their heirs "during the life of the said *T. F.* in trust to preserve con- "tingent remainders, &c.; and for that purpose to make "entries, &c., but nevertheless to permit the said *T. F.* and
[596] "his assigns to receive and take the rents, issues and profits "thereof during his natural life. And from and after the "decease of the said *T. F.* to the use of all and every the "son and sons of the body of the said *T. F.* lawfully to be "begotten, severally and successively one after another, "as they and every of them shall be in priority of birth and "seniority of age. *And for default of such issue*, to the use "of Lord *R.* and Sir *E. H.* and their heirs, until my nephew "*John*, son of my brother *Samuel Foster*, shall attain the "age of 21 years or die. And in case my said nephew, "*John Foster*, shall live to attain his said age of 21 years, "to the use of my said nephew *J. F.* for his natural life, "without impeachment of waste. And from and after the "determination of that estate, to the use of the said Lord *R.* "and Sir *E. H.* and their heirs, during the natural life of "the said *J. F.* in trust to preserve the contingent uses, &c. "(follow-

" (following the usual terms as in the prior limitation.) And " from and after his (*John Foster*'s) decease, to the use of all " and every the son and sons of the body of the said *J. F.* " lawfully to be begotten, severally and successively one after " another, as they and every of them shall be in priority of " birth and seniority of age. And from and after the deter- " mination of that estate (*a*), to the use of Lord *R.* and Sir " *E. H.* and their heirs, until my nephew, *Samuel Warren* " *Foster*, shall attain the age of 21 years or die: and on the " said *Samuel Warren Foster*'s attaining his age of 21 years, " to the use of the said *S. W. F.* for his natural life, without " impeachment of waste. And from and after the determi- " nation of that estate, to the use of Lord *R.* and Sir *E. H.* " and their heirs during the natural life of the said *S. W. F.* [597] " in trust to preserve the contingent uses, (following the usual " terms as in the first limitation). And from and after his " (*S. W. Foster*'s) decease, to the use of all and every son and " sons of the said *S. W. F.* lawfully to be begotten, severally " and successively one after another, as they and every of " them shall be in priority of birth and seniority of age. " And for default of such issue, to the use of Lord *R.* and " Sir *E. H.* and their heirs until my nephew *Frederick William* " *Foster* shall attain the age of 21 years or die. And on the " said *F. W. Foster*'s attaining his said age of 21 years, to the " use of the said *F. W. F.* for his natural life, without impeach- " ment of waste. And after the determination of that estate, " to the use of Lord *R.* and Sir *E. H.* and their heirs, during " the natural life of the said *F. W. F.* in trust to preserve the " contingent remainders, &c. (following the usual terms as in " the first limitation). And from and after his (*F. W. Foster*'s) " decease, to the use of all and every the son and sons of the " said *F. W. F.* lawfully to be begotten, severally and suc- " cessively one after another, as they and every of them shall " be in priority of birth and seniority of age. And for de- " fault of such issue, to the use of my brother *Joseph Foster* " *Barham* for the term of his natural life, without impeach- " ment of waste; and after his death, to the use of his son " *Joseph Foster Barham*, his heirs and assigns for ever."

(*a*) Instead of these words, " and from and after the determination of that estate," the words here introduced in the limitation of the *Lancaster* estate after mentioned were " and for default of such issue."

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"And as touching all my estates in *England*, and also my "estate or plantation called *Two-Mile-Wood*, and also a tract "of land called *Horse Savanna Pen*, &c." the testator devised the same in precisely the same terms, with all the same limitations as he had before devised in respect * to his estates of *Elim* and *Waterford:* with this difference only, that in the devise of his estates in *England*, and of *Two-Mile-Wood*, and *Horse Savanna Pen* in *Jamaica*, the nephew first named was *John Foster*, (who was secondly named in the limitations of the former estates;) then *Samuel Warren Foster*, (who was thirdly named in the first set of limitations;) then *Thomas Foster*, who was first named in the first set of limitations; then *Frederick William Foster*, (who preserved the same place in this as in the first set of limitations;) and then the ultimate limitations of these estates concluded in the same terms: "To the use of "my brother *Joseph Foster Barham* for the term of his na- "tural life, without impeachment of waste. And after his "death, to the use of his son *Joseph Foster Barham*, his heirs "and assigns for ever."

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"And as touching my said estate or plantation called "*Lancaster*, &c." the testator here repeated all the same limitations in totidem verbis (*a*), excepting that the nephew first named was *Samuel Warren Foster*, (who was thirdly named in the first, and secondly named in the second set of limitations;) then *John Foster*, (who was secondly named in the first, and first named in the second set of limitations;) then *Thomas Foster*, (who was first named in the first, and thirdly named in the second set of limitations;) then *Frederick William*, who preserved the same place in the order of the limitations as before: and then there followed the same concluding limitations as to this estate, "to the use of my brother "*Joseph Foster Barham* for the term of his natural life: and "after his decease, to the use of his son *Joseph Foster Bar-* "*ham*, his heirs and assigns for ever."

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The case also stated another clause in the will wherein the testator stated, that "having myself experienced great inconveniences from the condition annexed by my father's will to the three estates called *Elim*, *Dawkins*, and *Lancaster*, which he devised to me and my brothers, *William* and *John Foster*, since dead, the last of which estates did upon my brother's death

(*a*) With the variation before noticed in note (*a*) of p. 596.

vest

vest in me as his eldest brother and heir under my father's will: the condition was, that the heirs of the devisee of each particular estate should, upon the death of such devisee succeeding to this estate, pay to the surviving brothers and sisters an additional legacy of 1000*l.* a-piece; I have therefore, in order to exonerate my estate of *Elim* and all such other estates as were devised to me by my father from so great an incumbrance, duly barred the entail and the devise of such last-mentioned estates by proper deeds, &c.: and in conformity thereto I do hereby expressly direct that no such additional legacies shall be charged upon or paid out of my estate real or personal. And it is my express will that all and every the limitations and devises hereinbefore given of my real estate in manner and form aforesaid to my several nephews are upon this further condition, that if any or either of my said nephews shall refuse to comply with this my will, with respect to the non-payment of the said additional legacies, or in any other respect whatsoever, or shall directly or indirectly oppose the execution thereof according to the plain intent of the same, my will is that the devise of the whole estate and estates to the person or persons, so refusing to comply with the directions of this my will, &c. shall cease and be void. And it shall be lawful for such person or persons who by virtue of this my will shall be next in remainder of the premises to enter into and enjoy the same, as if the person or persons making or guilty of such opposition, &c. was or were naturally dead."

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The testator died soon after making his will, without leaving any issue either born in his lifetime, or after his decease; and leaving the said *Thomas Foster*, the devisee, his nephew and heir at law, and *John Foster*, *Samuel Warren Foster*, and *Frederic William Foster* his nephews in the will named, and also the said *Joseph Foster Barham* the elder, (long since dead,) and *Joseph Foster Barham* the younger, and the said *Mary Foster*, his widow, him surviving. And soon after his decease *Beeston Long* (who survived *Drake*) took possession of all the said estates comprised in the term of 99 years, and continued in the receipts of the rents and profits until the death of *Mary Foster* in 1776. The testator's nephews *Thomas Foster*, and *Samuel Warren Foster* now dead, had each issue male since the death of the testator; and *Thomas Foster* the younger (since dead) was the eldest son, and *William Smalling Foster* (also dead) was the only other son of *Thomas Foster*, the nephew; and

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and *Charles Foster* is the only son of *Samuel Warren Foster*; but neither of the testator's nephews, *Thomas, John, Samuel Warren*, or *Frederic William Foster*, had any son born at the time of making the testator's will or at his death.

The question submitted by the case was, What estate the plaintiff *Thomas Foster*, the nephew, and his eldest son *Thomas Foster* the younger, deceased, and *Samuel Warren Foster* deceased, and his only son *Charles Foster* the plaintiff, respectively took under the will of *Thomas Foster*, dated the 8th of *April* 1762, in the estates or plantations in *Jamaica*?

[601] *Abbott*, for the plaintiffs, contended either that the unborn sons of the nephews took estates tail, or that the nephews themselves took such estates. The ultimate limitation in fee is not to the heir at law, and therefore the question is to be decided, without prejudice to the plaintiffs in that respect, between different classes of devisees. The testator had considerable property, and having divided his estates into three parts, meant to distribute those parts in certain interests, present and future, amongst his four nephews, who were the principal objects of his bounty; and providing, in case of the failure of issue of all those four nephews, that the whole should center in his brother *Joseph Foster Barham* and his son. It seems evident from the whole scope of the will that he must have intended in some way or other to give estates tail to the families of his four nephews in the order appointed in the will, and that each estate should not go over to another nephew till failure of the issue of the nephew to whom it was before given. The limitations are repeated twelve times over with little or no variation. When the testator meant to give a life estate, he does so in express terms. After each life estate to the nephews, he interposes trustees to preserve contingent remainders, as is usually done when estates of inheritance are afterwards given to the children of the first takers. He also gives over the next limitation "from and after the decease of the respective nephews." It also appears that he knew how to give a fee by appropriate words of inheritance. From the whole order and disposition of the will he appears to have intended to give estates tail to the families of his nephews; and on the first reading of the will he appears to have done so. The limitation is to the first and other sons *of the body*

[602] of *Thomas Foster*, &c. And it is matter of surprize not to find those words followed immediately by words of limitation to the heirs of the bodies of such sons. The limitation is to the

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the sons *severally and successively*, &c., which are usual words of limitation in tail. Lord *Hardwicke* laid stress on the word *successively* in *Lomax* v. *Holmden* (*a*), as being a word of large meaning when applied to an estate in a family, from whence to imply an estate tail; though the case was decided on another ground. But if the words of the will (for want of words of limitation) be not sufficient to give estates tail to the unborn sons of the nephews; then, secondly, as it is evident that the general intent of the testator was to give estates tail to the families of the nephews, the Court must give such estates to the nephews themselves, in furtherance of such general intent, though it may defeat the particular intent expressed, to give them only estates for life: and this will be warranted by construing the words, "*and for default of such issue*," after the limitation to the unborn sons of the body, with reference to *issue male* of the nephews; taking the words "first and other sons" to mean *issue male*. And then the will may be read as if it had been a limitation to his nephew *Thomas* for life, and if *Thomas* should have issue male, then that he should take an estate in tail male; but if he should have no issue male, or for default of such issue; then it should be limited in like manner to his nephew *John*, &c. [Lord *Ellenborough* C. J. observed, that by this reading the word *such* was rejected; and that Lord *Mansfield* in *Denne d. Briddon* v. *Page* (*b*) had said that "if, after the limitation to the

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(*a*) 1 *Ves.* 296.

(*b*) DENNE on the Demise of RD. BRIDDON and MARY his wife, *against* PAGE and BOWLER. *Mich.* 24 *Geo.* 3. *Nov.* 14th, 1783. MS. *Buller. J.*

A devise to *S. N*, the son of *T. N.*, for life; remainder to trustees, &c.; remainder to the first and other sons of the body of *S. N.* and the heirs male of their respective bodies; and for default of *such issue*, to the use of all and every the *daughters* of the body of *T. N.* begotten or to be begotten; and for default of *such issue*, to the right heirs of *T. N.* for ever. *T. N.* died leaving issue *S. N.* and two daughters. held that the daughters took only estates for their lives.

In an ejectment for an estate, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

Mary Trollope, being seised in fee of the premises in question, on the 18th of *December* 1734 devised as follows. After directing a certain sum to be expended on her funeral: And as touching the rest of my temporal estate, I give and devise all my lands, &c. at *W.* and elsewhere to *J. T.* (a trustee) to the use of *Thomas Nash* and *Mary* his wife, for a term of 99 years, if they or either of them shall so long live; remainder to the use of *Samuel*, son of the said *Tho. Nash*, for life; remainder to trustees to preserve contingent remainders; remainder to the use of the first son of the body of the said *S. Nash*,

and

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the daughters of *T. Nash*, the words had been 'and if they die *without issue*,' *generally, the Court would have implied an estate tail: but, he adds, that there the words were, 'and for

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and of the heirs male of the body of such first son; and for default of such issue, to the use of the second and every other son and sons of the body of the said *S. N.* severally and successively and in remainder one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies: and *for default of such issue*, to the use of the second and every other son and sons of the body of the said *Thomas Nash* upon the body of the said *Mary* his wife begotten or to be begotten, severally and successively, and in remainder one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies lawfully issuing: and *for default of such issue*, to the use of all and every the daughter and daughters of the body of the said *Tho. Nash* on the body of the said *Mary* his wife begotten or to be begotten; and *for default of such issue*, to the right heirs of the said *Tho. Nash* for ever. After the death of the testatrix, *Tho. Nash* and *Mary* his wife entered upon and enjoyed the estate during their several lives, and died, leaving issue *Samuel*, and two daughters, *Mary* and *Jane*. *Samuel* entered and was seised of the premises, and died in the life-time of his sisters, *Mary* and *Jane*; leaving no issue male, and only one daughter *Mary*, one of the lessors of the plaintiff. *Jane* upon the death of her sister *Mary*, daughter of *Thomas Nash*, suffered a recovery; and the defendants claim under her. The question reserved was, Whether *Jane* took an estate for life, or in tail? If she took only for life, then the verdict was to stand; if in tail, it was to be entered for the defendants.

Balguy for the plaintiff. As to the testatrix's professed intention of disposing of the rest of her temporal estate, that will not supply the defect, if she has not in fact done so. *Right* v. *Sidebotham*, *Dougl.* 730. It will be contended that the words, "for default of such issue," will give the daughter an estate tail; but it cannot be contended that the same words will give an estate tail in the former part of the sentence; for there they evidently mean only "for default of *such sons*." No estate raised by implication in a will can destroy an express estate. *Bamfield* v. *Popham*, 1 *P. Wms.* 54. is in point, *Blackborn* v. *Edgeley*, *Ib.* 605. If an estate tail were to be implied in this case, shall it be a general estate tail, or an estate in tail male? If the first, it would be giving a greater estate then is given to the sons: and as to the second, the words will not warrant it.

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for default of *such* issue,' which must mean the issue before mentioned, namely, *sons*."] He then said he should endeavour to shew that this case was distinguishable from that, and

Hill Serjt. contrà. The intention of the testatrix was to give an estate in tail general. The words, " for default of issue," after the limitation to the sons, cannot be confined to a failure of *sons*, but must extend to the sons of those sons. The words, " for want of *such issue*," hath been often held to enlarge the preceding estate and give an estate in tail general; and that too in cases where particular issue had before been designated; as in *Wyld* v. *Lewis*, 1 *Atk.* 432., where *R. W.* devised all his lands, not in jointure, to his wife, generally; and if it shall happen that she shall have no son nor daughter by me, and *for want of such issue*, then over; decreed to be an estate tail in the wife. He also cited *Evans d. Brooke* v. *Astley*, 3 *Burr.* 1570, where words like the present were held to give an estate tail, though no issue were before expressly mentioned; and *Power* v. *Campbell*, *Tr.* 1773.

Balguy, in reply. There is no question between us, supposing the intention to be plain; but the question is, Whether that intention be plain on the will? The case in *Burrow* went on the word " descendants," who were to take the name and arms. If the words " for default of such issue," in the first part of the will, do not enlarge the former limitation, they shall not enlarge the after limitation in question.

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Lord MANSFIELD C. J. This case does not admit of argument: it does not admit of any cases to be quoted: every case on a will must depend on its own circumstances. The rule of law is clear, that a grant of an estate by words of purchase only, without words of limitation, enures for life only. When wills came in vogue, it pleased the Judges to consider them with analogy to the rules of law in the construction of deeds, and not as the *Roman* appointment*; therefore in those cases the estate is for life only. But indeed there is hardly an instance where the words of a devise are restrained to carry a life estate only, (*i. e.* according to another MS. " for want of words of limitation,") but such a construction is against the intention of the testator; for common men do not know the difference between a devise of land and of money. Such, however, being the general settled rule, Courts have been astute to find out, if possible, from other parts of a will, what the testator really intended; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention. The question then comes to this, Whether there be enough upon the face of the will to say

* Vide *Comp.* 305.

certainly

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and also from *Hay* v. *Ld. Coventry* (*a*). But first he referred to *Milliner* v. *Robinson* (*b*) where the devise was to his brother *John*, and if he died having no son, that the land should remain to *William* for life; and if he died without issue, having no son, it should remain to the right heirs of the devisor: and it was held that the first brother took an estate in tail mail. And to *Richardson* v. *Yardley* (*c*), where *Popham* C. J. said that a devise to one and the children of his body makes a good entail: and he referred to a case, as in *Benloe's Rep.* 4th of *Eliz.* which was a devise to one for life, and after his death to the men children of his body, which was held to be an entail male in the father. And also to *Sonday*'s case (*d*) where the devise was of a house to his wife for life, and after her decease his son *William* to have it; and if his son *William* have any male issue lawfully begotten of his body, then his son to have it; if he have no male issue lawfully begotten of his body, then his son *Samuel* to have the house; if *Samuel* have issue male of his body lawfully begotten, that then his son to have the house after his decease; if no issue male then his son *Thomas* to have the house, and so on, in totidem verbis with the devise to *Samuel:* and like devises to *Richard* and *Daniel* and other sons. And it was resolved that the sons had several estates in tail male, for three reasons; the first of which was, because the testator further saith, "If he (*Thomas*) hath no issue male, his son *Richard* to have it:" which is as much as to say, if *Thomas* die without

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certainly what his intention was? for we must not go upon conjecture. I conjecture, indeed, that this was a blunder, or, slip, and that another limitation was intended; but I do not know what limitation; whether to the heirs general, or special. Is there any authority which will enable us to supply the defect, and make another will? If after the limitation to the daughters of *T. N.* the words had been "and if they die *without issue*," we would have implied an estate tail; but here the words are "for default of *such issue*," which can only mean the issue mentioned before. The Court have no power to strike out the word *such:* and if they did, what are they to supply it with; tail general, or tail male? That shews there is no intention apparent on the will for the Court to go upon.

Per Curiam, Postea to the Plaintiff.

(*a*) 3 *Term Rep.* 83. (*b*) *Moor*, 682.

(*c*) *Ib.* 397. which is the same as *Wild*'s case, 6 *Rep.* 16. b.

(*d*) 9 *Rep.* 127.

issue

issue male; which words are sufficient to create an estate tail in him. He also * referred to the comments of Lord *Hale* on *Wild*'s case in *King* v. *Melling* (*a*), where the devise being to *Wild* and his wife, and after their decease to their children, it was adjudged only an estate for life in *Wild* and his wife; first, because having before limited a remainder in tail to the prior taker by the express and usual words, (viz. to him and the heirs of his body,) if he had meant the same estate in the second remainder, it is like he would have used the same words. 2dly, The devise was not after their decease "to the children *of their bodies*;" for then there would have been an eye of an estate tail. But 3dly, the main reason was, *because there were children at the time of the devise*; and this he says was the only reason the resolution in the Exchequer-Chamber went upon. None of those reasons apply in the present case; and here there were in fact no children of the nephews at the time of the devise; which Lord *Hale* seemed to think made all the difference in *Wild*'s case. He observed, however, that here the words were not, for *default of issue*, generally, but for default of *such* issue; to which word, *such*, effect was given in *Denne d. Briddon* v. *Page* (*b*), and in *Hay* v. *Lord Coventry* (*c*). But he endeavoured to distinguish this from them, by observing that in those cases there were express estates in tail male given to the first and other sons of the parent stock; which were omitted to be given to the daughters. And as the remainder over, for default of *such* issue, i. e. the daughters, was to the right heirs of the parent in fee, there was nothing improbable, as Lord *Kenyon* observed in *Dacre* v. *Doe* (*d*), in supposing that the testator, having provided for the sons of the heirs male of the family, who were the principal objects of his bounty, by giving them estates tail, should next provide life estates for the living generation of the daughters of the parent stock, before the daughters of the sons: who in default of issue male of the sons would take under the ultimate limitation to the right heirs of the parent.

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Holroyd, contrà, contended that no estates were given to the four nephews or their sons beyond estates for their lives. The words themselves of the devising clauses carry no greater estate, and there are no words in any other part of the will to

(*a*) 1 *Vent.* 231. (*b*) *Ante*, 603.
(*c*) 3 *Term Rep.* 83. (*d*) 8 *Term Rep.* 116.

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shew that the testator intended to give them any greater estates than the words of the devising clauses import. And it would be strange to raise such an implication from the situation of the testator's family, and the conjecture of what might have been his intention, when, in the first part of the will, where he is even devising all his estates to his own child, if he had any, he expressly gives that child only a life estate. After the devise to the first and other sons of the several nephews in succession, without words of inheritance, the limitation over is "for default of *such* issue," not for default of *issue*, generally; which must be confined to the first and other *sons*, the only issue spoken of, and is the same in grammatical construction as if he had said, "in default of such first and other sons." There is nothing in the whole will to shew that the testator did not intend what he has said, according to the plain and grammatical import of the words. For he makes present provision for three of his nephews and for their sons, for their lives, and gives the fourth nephew and his sons a chance of succeeding to the three estates; and it is only after the death of those four nephews and their sons, that he limits the whole ultimately to his brother *Joseph* for life, with
[609] remainder in fee to his nephew *Joseph*, the son of that brother. It is rather to be inferred from the whole will that the testator knew how to give estates for life and in fee; that he also knew how to create estates tail if he had intended to do so: and the whole of the will is very artificially drawn. Upon the whole he contended that looking to the words of the will, and collecting the intention of the testator from them, and not from conjecture, nothing appeared to shew an intention to give the four nephews estates tail; but if such an intention could be conjectured, it was sufficient to say with Lord *Kenyon*, in *Hay* v. *Lord Coventry* (*a*), *voluit sed non dixit*. [Lord *Ellenborough* C. J. You contend that nec voluit nec dixit.] He also cited an opinion delivered a few days before by the Lord Chancellor in *Wild* v. *Crisp*, that the Courts were bound to construe a will according to the words of it, unless an implication absolutely necessary to give effect to the testator's intention required a construction different from the ordinary sense of the words: and referred to what was said by Ld. Ch. J. *Vaughan* in *Gardner* v. *Sheldon* (*b*) to the same purpose; and also to *Beveston* v. *Hussey* (*c*).

(*a*) 3 *Term Rep.* 86. (*b*) *Vaugh.* 261-3. (*c*) *Skin.* 385, 562.

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And though this, he observed, was not a question between a devisee and the heir at law; yet being between the devisee and the hæres factus, it must receive the same construction. But he relied principally upon the cases of *Denne d. Briddon* v. *Page* (*a*), and *Hay* v. *The Earl of Coventry* (*b*), as being very closely in point: and denied that this had been distinguished in principle from them, because there the issue of the sons were provided for; as the questions had arisen upon the limitations to the daughters, which were the same as those to the sons in the present case. And here, to make the nephews take estates tail would manifestly enable them to defeat the testator's intention, as they might cut off the entail and prevent the sons from taking, who it was clear the testator meant should take as purchasers: besides, that express estates for life only were given to the nephews by the will. And as to the cases or dicta where a devise to one and the children, or men children of his body, had been held to give him an estate tail or in tail male; that was by reading *children* of the body as *issue* of the body, where there were no children in being at the time of the devise. And in *Sonday*'s case the limitations over were if the preceding taker had no *issue* male: which altogether distinguishes it from the present.

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Abbott was heard in reply, in the course of which he principally endeavoured to distinguish this from the cases of *Denne* v. *Page* and *Hay* v. *Ld. Coventry*, by saying that he was not precluded from arguing that "in default of *such issue*" meant *issue* of the nephews, as the counsel in those cases were by reason of the previous provision there made for the issue of the sons. But he admitted that he could not succeed, unless he could satisfy the Court that there was a general intention of the testator to give estates of inheritance to the respective families of his nephews. And having again urged that the Court could have no leaning in this case against such a construction of the will as would favour the general intent, against one who was himself only a devisee, and not the heir at law, who was always favoured in the construction of wills; *Bayley* J. said, that he knew of no favourites in courts of law; but the Court would give the estate to those to whom the testator had given it; and if he had not disposed of it, the heir at law took it of course. And

(*a*) *Ante*, 603. (*b*) 3 *Term Rep.* 83.

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Lord ELLENBOROUGH C. J. said, that the heir at law, or the hæres factus, would equally take that which the testator had not given away to any other. And it having been intimated that the property in dispute was of great value, and that gentlemen had taken notes on both sides for a second argument if the Court entertained any doubt; His Lordship added, that the learned counsel who had argued the case had made the best of their materials; but that the arguments urged for the plaintiffs had not raised any doubt in the mind of the Court, nor were the Court likely to feel any doubt before the time of sending their certificate to the Lord Chancellor. There was not only no necessary implication, as there must be to warrant giving to the sons of the nephews a larger estate than for life; but it did not appear that there was even a probable intention in the testator that they should take larger estates.

The following certificate was afterwards sent to the Lord Chancellor.

THIS case has been argued before us by counsel: we have considered it, and are of opinion that the plaintiff *Thomas Foster*, the nephew, *Thomas Foster* the younger, deceased, the eldest son of the said *Thomas Foster* the plaintiff, the said *Samuel Warren Foster*, and the plaintiff *Charles Foster* his only son, respectively took estates for life only, under the above-mentioned will of the testator *Thomas Foster*, in the said estates or plantations in the island of *Jamaica*.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Nov. 28, 1809.

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BOLDERO and Another, surviving Partners, &c. *against* JACKSON.

Friday, Nov. 24th.

The defendant, being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds, (a considerable part of which was advanced by them when stocks were below 50*l.*,) agreed with them that they should place 25,000*l.* to [613] his credit in account; for which he was to purchase 50,000*l.* stock, (then at 51¼) in their names, and account to them for the dividends upon such stock as from the last dividend day: after which agreement the plaintiffs, acting upon the basis of it, (though the defendant never purchased the stock so agreed upon,) *entered in their books* the sum of 25,000*l.*, *to the credit* of the defendant, and continued to honor his drafts from time to time, crediting him also with other sums actually paid by him, and wrote off the amount of his bonds to his credit, and delivered them up to him.

THIS was an action brought under the order of the Lord Chancellor, and tried before Lord *Ellenborough* C. J. at *Guildhall*, in which a verdict was found for the plaintiffs, with such damages as the Court should direct to be entered in manner hereinafter mentioned upon the following case.

The declaration was in covenant, and contained two counts; the first on a deed dated the 1st of *September* 1794, between the defendant and the plaintiffs and their late partners; whereby the defendant, after reciting that he was considerably indebted to the plaintiffs and their late partners, for monies advanced by them to him, the amount whereof could not then be exactly ascertained, covenanted with the plaintiffs to pay all such sums as he was then indebted to them for monies advanced by them to or for his use or on any other account whatsoever, and also all such further and other sums which they or any of them should thereafter lend or advance to him, with interest. A breach was then assigned in not paying the money then due, money advanced during the lives of each of the deceased partners, and since their deaths. The second count was on a deed made on the 4th of *March* 1797, between the defendant and *Alexander Shaw*, and the plaintiffs and their late partners; whereby, after reciting that the defendant was then indebted to the plaintiffs and their late partners, upon bond, and for monies advanced, lent, and paid by them for

Held that this agreement to repay the *new credit* of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.*, *credited* under that agreement by the plaintiffs *to the defendant in his banking account*, was to be reckoned against them upon balancing the account of debtor and creditor between them.

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his use and on his account, in 30,000*l.* and upwards; the defendant covenanted with the plaintiffs and their late partners, that he would from time to time, within a calendar month next after request made to him, pay to the plaintiffs, &c. or the survivor, *all money already due, with interest*, and all such money as they or any of them should *at any time or times hereafter advance, lend, and pay to and for the use or on the account of the defendant*, with interest from the respective times of the advance. A breach was then assigned as in the first count.

The pleas, as far as they relate to the question before the Court, were, first, payment generally; and, secondly, as to 25,000*l.* part of the money in the second count mentioned to have been advanced after the making of the deed in that count mentioned, an usurious agreement made on the 16th of *October* 1798, that the plaintiffs and their late partners should advance, lend, and pay to the use of the defendant the said 25,000*l.*, in consideration whereof the defendant should purchase in the names and for the use of the plaintiffs and their late partners 50,000*l.* Bank 3 per cent. cons. ann. and in the meantime, and until such stock should be purchased, should account to the plaintiffs and their late partners for the dividends thereon from *Midsummer-day* then last past; and that for the purpose of securing to the plaintiffs, &c. and realizing the said purchase, the defendant should deposit in their hands certain bills of exchange to the amount of 18,000*l.* drawn upon *Beckford* and
[614] *Keighley*, and accepted by them, together with other bills of lading and policies of insurance equal to the sum required to purchase the said 50,000*l.* stock, as soon as the same should come to the hands of the defendant. That the sum required to purchase the said 50,000*l.* stock exceeds 25,000*l.* by a large sum, and that the dividends on the said 50,000*l.* stock amounted to 1500*l.* a-year, which exceeds 5*l.* per cent. on the 25,000*l.* advanced. Thirdly, a similar plea as to 25,000*l.* part of the sums mentioned in the first and second counts. The replication denied the corrupt agreement dated in each of the two last pleas, and concluded to the country.

It was proved that the defendant had in 1780 opened an account with the plaintiff's house. Between that time and the 20th of *May* 1794, very large advances were made by the house to the defendant. On that day he gave them a bond for 10,000*l.*, and on the 22d of *May* 1794 he gave them a bond for 10,900*l.* When these two bonds were carried to the defend-

defendant's *credit*, there remained a balance in his favour of 35*l.* 19*s.* 3*d.*, and a new account was opened, in which he was credited for that sum. On the 1st of *September* 1794 the deed mentioned in the first count was executed. The defendant's debt continued to increase, and further security was demanded: upon which the deed of the 4th *March* 1797 mentioned in the second count was executed. On the 30th of *June* 1798 the defendant was indebted to the house, exclusive of the two bonds, in 8534*l.* 6*s.* 2*d.*, making, with the sums for which those two bonds were given, 29,434*l.* 6*s.* 2*d.* After some negociation, an agreement was made, the purport of which was stated in the following letter, which it was also agreed should be written and signed by the defendant:— "*London, October* 16th, 1796. Messrs. *Boldero, Adey, Lushington*, and *Boldero*. Gentlemen, In consequence of your having placed to the credit of my account with your house the sum of 25,000*l.*, I hereby engage to purchase into your names the sum of 50,000*l.* Bank 3 per cent. consolidated annuities, and to account to you for the dividends thereon from *Midsummer-day* last. And for the purpose of securing to you and realizing the above said purchase, I promise to deposit in your hands certain bills of exchange to the amount of 18,000*l.* sterling, drawn upon the firm of *Beckford* and *Keighley*, accepted by them, together with other bills of lading and policies of insurance, equal to the amount of the sum required to purchase the said 50,000*l.* Bank 3 per cents., as soon as the same shall come to my hands: and which sum of 25,000*l.* has been thus applied by you, at my desire, for my accommodation. (Signed) *Henry Jackson.*" The 3 per cents. were on that day 51¼. They had for some time before, and when large advances had been made by the house of the defendant, been lower than 50*l.* In pursuance of the above agreement the 25,000*l.* was put in figures to the defendant's credit in his running cash account, although no money was paid to the house by him. On the same 16th of *October* 1798 the house debited the defendant with 2568*l.* 16*s.* as for the purchase of 5000*l.* stock, at the price of the day, 51¼. The house continued as before to honour his drafts, and to make and receive payments on his account: the balance of which payments, subsequent to the date of the letter, and up to the time of his bankruptcy, which took place in *October* 1803, amounted to a sum exceeding 25,000*l.* A regular interest account was kept. Before the bankruptcy of the de-

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fendant, credit was given to him in account for the amount of the bonds before mentioned, and they were delivered up to him by the plaintiffs. No stock has ever been purchased in pursuance of the agreement. The question was, Whether in stating the balance due by the defendant to the plaintiffs upon the covenant in the declaration, he were entitled to credit for the 25,000*l.* and interest, for which he had credit in account on the 16th of *October* 1798? If he were, then the balance due to the plaintiffs will be 26,991*l.* 2*s.* 6*d.*; for which the verdict in that case is to be entered: if he were not, then the balance due to the plaintiffs will be 58,241*l.* 2*s.* 6*d.*, for which the verdict in that case is to be entered.

Dampier for the plaintiffs. It appears upon the case that the plaintiffs have really advanced to the defendant in principal and interest sums equal to the larger balance now claimed by them; and the defendant attempts to reduce that balance by considering the fictitious credit of 25,000*l.* with the interest thereon, agreed to be carried to his account by the plaintiffs as a real payment made by him under the circumstances of the case, and principally under the agreement of the 16th of *October* 1798. It must be admitted that this agreement, made when the stock to be purchased by the defendant was above 50*l.* stipulating for such purchase to be made at the rate of the stock at 50*l.* was illegal and invalid; though it were made to reimburse the plaintiffs' house for advances made by them by the sale of stock when it was under 50*l.* If the agreement then cannot stand in their favour, it ought to be set aside, in toto, and the account should be taken between the parties upon the real advances and payments which have taken place; that is by debiting the defendant
[617] with the money actually received by him from the house, with legal interest thereon, and crediting him only with the sums actually paid by him. The whole account, as it new stands upon paper, is unreal: the credit of 25,000*l.* agreed to be given to him, with the interest thereon, is merely fictitious; and it is by means of that fictitious credit only that the defendant now seeks to liquidate the principal sums and interest due on his bonds, as if that amount in cash had been paid to the house. The plaintiffs do not claim this 25,000*l.* as an advance: they say that it was not advanced: it is the defendant who says it was an advance: though he insists that he is not to be charged with it by reason of the usurious

agreement.

agreement: and yet he claims to have the benefit of the payments made by means of this fictitious advance. An invalid agreement has been entered into upon the basis of a fictitious advance, which in truth was not made; but upon the assumption of such fictitious advance the sums really due upon legal securities have been given up: and the defendant now insists on giving effect to the illegal agreement, so far as he is to be benefitted by the surrender of those securities; while he endeavours to avoid it in respect to the consideration agreed to be paid by him for the benefit he has received. [Lord *Ellenborough* C. J. Would not this argument apply as a cure for usurious contracts in general? It may be said that there was no contract for a loan, because the contract was illegal. If the parties agreed to consider this creditas a sum paid in hand at the time upon a new agreement, why should it not be so considered in a court of justice?] If a payment in money had actually been made, the legal consequences arising upon the facts must have attached: in that case the house would at [618] least have had the benefit of the payment in money, instead of putting down so many figures upon paper, which was all that passed upon the occasion: but the plaintiffs have derived no benefit from the agreement: it has never been carried into effect: they have given up good securities for that which turns out to be waste paper, and they only desire that the credit for 25,000*l.* which has been carried in figures to the defendant's account without any actual payment or value for it, may be struck out, and each party be put in the same condition as before this void agreement.

Scarlet, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. How can it be said that this agreement has not been carried into effect? The transaction is treated as an imaginary one, and the credit given to the defendant for the 25,000*l.* agreed upon is said to be a fictitious credit; but I cannot call it so: it is a real credit. On the one hand the plaintiffs carried that sum to the credit of the defendant in their account with him, as if it were so much money paid by him into his banking account: on the other hand he drew upon them in consequence of such credit for different sums as he wanted them; it can make no difference in this respect whether he drew for a part or for the whole.

GROSE J. agreed.

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LE BLANC J. The 25,000*l.* was entered in the plaintiffs' books as an article of credit to the defendant's account, and he drew for it as he wanted it. The credit cannot therefore be said to be fictitious.

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BAYLEY J. If the plaintiffs had advanced the money to the defendant with one hand and received it back with the other in discharge of the bonds, no objection could have been made to it as a fictitious credit. But this is in effect the same thing: the plaintiffs, upon the faith of the agreement stated in the case, have given the defendant credit for the 25,000*l.* as so much money paid by him into his account; and they have given him credit for the amount of the bonds, which were delivered up to him: and now they would throw these items of credit out of their books as fictitious.

Verdict to be entered for 26,991*l.* 2*s.* 6*d.*

Saturday, Nov. 25th.

Sir WALTER STIRLING and Others *against* VAUGHAN.

A prize taken by the navy and army conjointly is insurable on account of the interest of the captors, under stat. 45 *G.* 3. c. 72. *s.* 3., which grants prize so taken to the conjoint captors after condemnation,

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subject only to the apportionment of the crown as to the respective shares.

THIS was an action on a policy of insurance effected by the plaintiffs, as agents, upon a ship called the *Prize*, No. 3. and her cargo from *Monte Video* to *London*. The subject of insurance was a prize taken from the *Spaniards* by the conjoint forces of the army and navy upon the expedition to the river *Plata*: and the interest was averred by the first count to be in the King; by the second to be in the captors; and the third count, without averring any interest, alleged that it was not in His Majesty or in any of his subjects. The loss was alleged to be by the perils of the sea on the voyage home. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, Admiral *Murray* was called as a witness to shew on whose account the insurance was effected; and he deposed, that after the capture of this and other prizes by the conjoint forces employed on the expedition, a Mr. *Blacker* was appointed prize agent for ships by the naval and military commanders, to act *on behalf of all interested in the capture*; and from him orders were received at home to insure every thing in which the captors were interested: but it did not appear that *Blacker* had received any appointment or direction from the Treasury

or

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or any other department of government authorizing him specifically to insure or take care of the interests of the crown, further than as such an authority might by law be inferred from his appointment as prize agent by the captors, and the directions received by him from them *to act on behalf of all interested in the capture.* Neither was there any evidence of the King's having repudiated such an authority. The prize was lost by the perils of the sea in her voyage homewards, and before any condemnation of her in the Court of Admiralty. Under these circumstances Lord *Ellenborough* C. J. left it to the jury to infer an authority from the crown to the captors to cause insurance to be made, or an adoption of it when made on behalf of its interest in the prize, in which the captors themselves had at least an eventual interest: and considering that the plaintiffs were entitled to recover either on the first or second count; though he relied principally at the time upon the former; His Lordship advised the jury to find a verdict for the plaintiffs, which they did accordingly.

A new trial was moved for in this term upon two grounds; 1st, That, admitting the King to have an insurable interest in a prize before condemnation, yet that there was no evidence to shew that the insurance was authorized by or in fact made on account of His Majesty, so as to warrant the verdict for the plaintiff on the first count. That the direction given by the captors to their prize agent, to insure on behalf of *all* [621] *interested in the capture,* was evidently meant only to express the interest of the captors themselves, which in the event of condemnation would have been vested in them: and there was no contemplation at the time of the separate interest of the crown. 2dly, That the verdict could not be sustained on the second count, which averred the interest to be in the captors; for before condemnation they had no insurable interest: they had not even a right to call for an adjudication in the Admiralty Court; for the crown might release the capture at any time before condemnation; as was established in the case of the *Elsebe* (*a*); and the captors could not then proceed further to call for an adjudication.

The Attorney-General, Garrow, and *Taddy* now shewed cause against the rule for a new trial, and insisted strongly

(*a*) 5 *Rob. Adm. Rep.* 173.

upon

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upon the plaintiffs' right to sustain the verdict upon the second count, alleging the interest to be in the captors. This point, they said, was decided in the *Omoa* case (*a*): the prize there insured was made by the joint capture of the army and navy, and one of the counts averred the interest to be in the captors; and the Court expressly decided that they had an insurable interest before condemnation. And though that decision has been questioned by individual judges of great respect and authority (*b*), supposing it to have been decided upon the ground that a mere expectation of a grant from the

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crown after condemnation was insurable; yet that case is not denied to be supportable on other grounds; and it has never been over-ruled by the judgment of any court. And now, since the stat. 45 *Geo.* 3. *c.* 72. *s.* 3. vesting the property of all prizes, taken by the conjoint force of the army and navy, in the conjoint captors, after condemnation; the doubt, which was suggested against that decision, that part of the captors there, namely, the army, had no interest in the prize, even after condemnation, and could only have been entitled to share by the mere grace of the crown, is done away. It is true that the crown may still release the prize before condemnation; but that grows out of its prerogative of making peace or war, and has no relation to the question of property. For, since the act in question, though the property is still condemned in point of form to the crown, yet the joint captors, (as the navy before had under the naval prize act and the King's proclamation,) have the absolute interest in the property immediately upon condemnation: and this was held in *Morrough* v. *Comyns* (*c*), to relate back to the time of the capture. [Lord *Ellenborough* C. J. said that the right of releasing before condemnation was an implied exception in the grant of prize by the crown. The grant of the subject-matter must be understood with this proviso, that it remains in the crown to grant up to the time of condemnation: for the crown cannot do any thing in disparagement of its own grant any more than a subject.] At all events the captors had in the meantime a lawful possession, authorized by the King's

(*a*) *Le Cras* v. *Hughes*, *Park on Ins.* (6th edit.) 358.

(*b*) See the sum of all the opinions in the report of *Luccna* v. *Craufurd*, in Dom. Proc. 2 *New Rep.* 269. where the whole subject of insurable interests is very amply discussed.

(*c*) 1 *Wils.* 211.

command

command to seize the property of the enemy, which gave them a special property in the prize, subject to vest absolutely upon condemnation; and this was sufficient to give the captors an insurable interest. The power of the crown to release * the prize to be captured before condemnation is only a qualification of the right of the captors; the crown can no longer take the prize to its own use, or give it to another. But supposing there were any technical objection to considering this as an insurable interest, against the plain understanding of mankind upon the subject, and the long established practice of insuring captures made by the King's ships or by privateers at sea, it seems to be admitted on all hands, that the crown has an insurable interest in prizes made by its own officers, and which are ever proceeded against and condemned in the name of the crown. Then, in furtherance of the interest of the crown in the prize, the captors, who are acting by the command and for the benefit of the crown, may well be considered as having an implied authority to insure the captured property. The insurance was directed to be made for all interests. The King might, if he pleased, have repudiated the insurance so far as his separate interest was concerned: but, without an express renunciation, it may fairly be assumed that the captors had his authority for doing every thing usual and proper for the preservation of the captured property, and among other things for insuring. [Lord *Ellenborough* C. J. The law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit. And here it is for the benefit of the crown to preserve the prize, if it were only for the purpose of securing to the captors the reward which its bounty had provided for them in the event of condemnation. Besides, the de facto captors have a special property in the thing captured, founded upon a lawful possession, which they hold for those who are ultimately found to be interested in it: and unless it be shewn to be a mere tortious capture, it must be taken to be a lawful capture and possession by them. That view of the subject relieves it from all question, whether a mere expectation of a subsequent grant from the crown be insurable as an interest in the subject matter.] Insurances are constantly effected by the orders of a supercargo, and no inquiry is ever made at the trial as to his authority: it is taken to arise from the nature of his employment, which is to superintend and

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and preserve the property of his employer committed to his charge. So here, it is equally the duty of the captors to preserve by all reasonable care the property, when captured from the enemy, as to make the capture; and insurance is one of the most ordinary means of preserving naval capture.

Park, *Marryat*, and *Carr*, on behalf of the defendant, the underwriter, argued, First, that the evidence did not support the first count, averring the interest to be in the King; for the policy refers to *Blacker*'s letter; stating that the vessel was "valued at 6000l. as per *W. Blacker*'s letter of the 10th of *September*; and in that letter *Blacker* requires the insurance to be made *on account of the captors*. And though Admiral *Murray* said at the trial, that *Blacker* was appointed agent of the prizes for the benefit of *all interested*, that must be understood in the sense in which the parties themselves meant it at the time, which was evidently intended only to apply to the captors themselves, without any contemplation of the interest of the crown. Then, though every person may be presumed to ratify that which is done for his benefit: yet it must first be shewn that the thing done was intended for the benefit of the party whose ratification is implied. And the cases of *Lucena* v. [625] *Craufurd* (*a*) and *Routh* v. *Thompson* (*b*) shew that where the insurance is effected with another view, the assured cannot secure themselves by averring an interest in the crown, whose benefit was not intended at the time, though the crown had an insurable interest. [Lord *Ellenborough* C.J. observed that in the latter case it was specifically found as a fact, that the insurance was made *on account of the captors*; and it appeared that they had no insurable interest in the subject-matter at the time of the capture made.] In *Lucena* v. *Craufurd* evidence was given, by Mr. *Rose* of the Treasury, to shew the adoption of the insurance by the crown. At any rate, they added, the crown could not be entitled to the benefit of the insurance as upon an implied authority, if it would not have been liable also to the expence of the premiums; which liability they denied in the absence of any proof that the crown had adopted the act of the agent. And it would be strange to imply an authority from the crown to insure prize ships in its name for the benefit of the captors, when it never insured its own ships. It may even

(*a*) 2 *New Rep.* 269, &c. (*b*) *Ante*, 428.

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be questioned whether, à priori, it be for the benefit of the crown to insure in general; though it may happen to be so in a particular case in the event. Secondly, they argued that the captors had no insurable interest, as well on the general ground, which has been so often before discussed, as on the recent statute 45 *Geo.* 3. *c.*72. *s.*3., which they observed only gave the interest and property in any prize, taken by the conjoint forces of the navy and army, to the captors, "after a final adjudication thereof as lawful prize" in the Court of Admiralty; and that too, subject to the King's apportionment as to the shares; and till condemnation the interest remains entirely in the crown, because, as it appears by the case of the *Elsebe* (*a*), [626] the crown may release it. With respect to the captors having an insurable interest on account of their having a lawful possession, it was, they said, begging the question; for till condemnation, it could never be ascertained whether the possession were lawful or not: and the liability over of the captors for costs and damages, applied rather to an illegal than to a legal capture. [*Bayley* J. Lord *Eldon*, in the case of *Lucena* v. *Craufurd* (*b*), did not deny that captors might have an insurable interest, grounded upon a lawful possession, coupled with the liability to answer for it. [Lord *Ellenborough* C. J. They might maintain trespass or trover against a wrongdoer upon that possession.] It was doubted in *Lucena* v. *Craufurd* whether the commissioners could have maintained such actions. [Lord *Ellenborough* C.J. The doubt there arose upon the particular circumstances of the case; because the commissioners had not the possession, nor any right to the possession, of the prize till it was brought into port: and that was the great difficulty of the case. But I cannot consider this as a mere expectative interest.] It is a sufficient answer to the second count, that the captors had no property in the goods, by the late act, before condemnation; and without property (*c*) they had no insurable interest in them. And as to the first count, if it were a matter of fact, whether the captors had an authority from the king to insure and did insure on his account, and it were not necessarily to be presumed from the relation in which they stood to the crown; then the defendant was entitled to have that fact found in the negative upon the evidence laid before the jury at the trial.

(*a*) 5 *Rob. Adm. Rep.* 173. (*b*) 2 *New Rep.* 323.
(*c*) Vide 2 *New Rep.* 397.

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Lord ELLENBOROUGH C. J. A general verdict has been given for the plaintiff upon the declaration in this case, which contains three different averments of interest in so many counts; one of them averring the interest to be in the King; another in the captors; and a third in some person other than His Majesty or any of his subjects. The latter count is out of the question; no evidence having been given of any authority from such other person to insure: the verdict, therefore, must be sustained, if at all, either upon the first or second count. The subject-matter of the insurance was a prize taken by the army and navy conjointly; and the words in which the authority is stated to have been given to *Blacker* to insure were, that he was appointed prize agent for ships by the naval and military commanders, *to act on behalf of all interested in the capture*; and under that authority he directed the insurance in question to be made. The inclination of my mind at the trial was, that this might be considered as a specific authority to act on behalf of the King as well as of the immediate captors; but I would not rely altogether on that, when, according to the more obvious and probable meaning of the words, the authority was meant to be given for the benefit of the captors, under the appropriation of the crown by virtue of the prize act of the 45 *Geo.* 3. That brings it to the question of interest in the captors under that statute; Whether before condemnation they have such a vested interest in the subject-matter as is by law capable of being insured? And therefore my opinion will not clash with any opinion delivered in any other case, nor with the letter or spirit of the stat. 19 *Geo.* 2. (*c.* 37.) against gambling or wagering policies. But though the verdict would be sustainable upon this short
[628] ground, yet I wish to consider the case more at large. For all valuable purposes the captors, as such, must be taken to represent the crown: and in the case of *Lucena* v. *Craufurd* it was considered by the same noble and learned person (*a*) whose opinion has been adverted to, that the King has an insurable interest in a prize before condemnation: and yet that till condemnation there remains something wanting to complete the vesting of the full property in the crown (*b*), and to enable the crown to grant it to others as against the original owners. It is the sentence of a Court of Admiralty upon the question of

(*a*) *Ld. Eldon*, 2 *New Rep.* 323. (*b*) Vide *ib.* 319, 320.

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prize which concludes the question of property against the original owners, according to the case of *Hughes* v. *Cornelius*(*a*). Then by the act of the 45 *Geo.* 3. the crown gives up its right in the prize to the captors, subject, however, as before, to the final adjudication of the property, as prize, by the Court of Admiralty. But it is said that the crown may still release the prize to the captured before condemnation, and therefore the captors cannot have an insurable interest in the property. But that right of the crown trenches no more upon the insurable interest of the captors under the statute than upon that of the King himself. It is then objected that the property in the prize may never become vested in the captors. It is vested, however, as far as the crown has any right to vest it, defeasible no doubt by an adjudication of the Court of Admiralty against the captors to restore the prize to the former owners: but is it not in common experience that a defeasible interest is insurable? It is the case of every consignee of goods under a bill of lading: the goods on their passage home are liable to be stopped in transitu, and his interest defeated: yet can it be [629] said that the property is not so far vested in the consignee as to entitle him to insure? The indefeasibility of the property therefore is not the criterion of an insurable interest. Again, what is the case of an executor? Probate is necessary to complete his title: yet before probate he has title sufficient to enable him to insure. The captors have the actual possession of the subject-matter of insurance by the grant of the King, the only person in the kingdom who could contest the title with them. They have the possession, with a partial right of disposing of the thing immediately, liable indeed to have their right devested by a sentence of restoration. But what difference is there between the right of the captors and of the crown itself in these respects? The assignees of the crown, as they may be styled, must stand in the same situation in this respect as the crown itself. This is not like insuring a mere expectation, nor like the case of the *Dutch* commissioners, who had no interest in the ships insured till they came within the ports of the realm. But these captors had a present possession and a right to maintain trespass against any person attempting to take the prize from them. Even with respect to captors in general; supposing the prize not to have been acquired

(*a*) 2 *Show.* 232. *T. Ray.* 473, and *Skin.* 59.

tortiously,

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tortiously, but jure belli, I should think that in respect of such their lawful possession and special property, they might insure; but it is not necessary in this case to decide that general point, because here the captors had a more perfect right; they had not only a right of possession but a right of property as far as the crown had the power of granting it, liable only to be dispossessed by the release of the crown before condemnation, or by sentence of restoration.

[630] GROSE J. The plaintiffs stand in the situation of captors in actual possession of the prize insured, and having every right of property which the crown could confer upon them; I have, therefore, no doubt that they had an insurable interest.

LE BLANC J. The interest is first averred to be in the King, and secondly, in the captors. The verdict is general for the plaintiffs. And it does not appear to me to be material, for the purpose of disposing of the rule for a new trial, to consider how far the verdict might be supported upon the first count, because it may certainly be supported on the second, which avers the interest to be in the captors. The case has been argued first as if this had been a naval capture solely; and next upon the stat. 42 *Geo.* 3. as a capture by the navy and army conjointly. But though the terms of this act and of the former act for the distribution of naval capture be somewhat different, yet there is no material variation in the meaning of them: the latter statute meant to give the property of the prize to the joint captors in the same manner as the former statute had done to the naval captors; subject only to an appropriation by the crown of the respective proportions, but reserving no part of the property to the crown itself. So that now the joint military and naval captors have as much a vested interest in the prize, as the sole naval captors had before. The question then is, whether that interest be insurable? Now it never was contended that an absolute indefeasible vested interest in the subject-matter was the only interest insurable. The case of a consignee of goods is decisive to the contrary.

[631] And in the case of *Wolfe* v. *Horncastle* (*a*) not the original consignee, but one who agreed, on the refusal of the other, to take the cargo, and who accepted a bill drawn by the consignor, was held to have an insurable interest in the cargo to the extent of his acceptance. Is this then a mere expectation? I

(*a*) 1 *Bos. & Pull.* 316.

cannot

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cannot consider that to be a mere expectation which is a right vested by act of parliament, no longer subject to the absolute will of the crown, but only subject to its power of releasing to the captured before condemnation. It seems to me that the captors, under this act of parliament, have a better right to insure, in respect of their interest in the prize, than the consignee in the case of *Wolfe* v. *Horncastle:* they had the absolute possession of the property, and their right to retain it was only subject to the release of the property by the crown to the original owners before condemnation.

BAYLEY J. I agree entirely with my Lord and my Brothers that there was an insurable interest in the captors. And when one applies common sense to the subject, and excludes technical reasoning, it is clear that they had a right to the property insured. They had this right, unless the crown released to the captured before, or did not think proper to proceed to condemnation; but the faith of the crown was pledged to proceed to condemnation, and not to release the prize, except under special circumstances involving the interest of the public. It is said that the legal interest remains in the King; and so it does, because he may release before condemnation, and he may also change the proportions; but the King can take nothing for himself, nor give it to any third persons; and when it is condemned, it must go to the captors. The captors have the possession of it, and they [632] are liable in damages to the original owners if the capture has been irregularly made: and there have been many cases where, though the capture was properly made under the circumtances, yet the captors were decreed to restore the ship and cargo, in whole or in part: they, therefore, ought to be in a condition to restore the value in case of loss, if ultimately they should be directed by the Court of Admiralty so to do. The interest in the prize is so far vested in the captors, that in case of the death of any of them before condemnation, his share when condemned goes to his representatives. The case of a consignee of goods is not so strong as that of a captor in favour of an insurable interest. He has no present possession of, he may have no beneficial interest in, the goods; and in case of his death, his lien on the consignment is lost. On reading the note of what fell from Lord *Eldon* in the House of Lords upon the case of *Lucena* v. *Crauford,*

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Craufurd, it appears to me that His Lordship considered that captors would have an insurable interest upon the ground on which he put their claim.

Rule discharged.

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Monday, *Nov.* 27th.

HOWELL *against* THOMAS RICHARDS.

Releasors covenanted that *for and notwithstanding any act, &c. by them or any or either of them done to the contrary*, they had good title to convey certain lands in fee; *and also*, that they or some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, had good right and full power to grant, &c.; *and likewise* that the Releasee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the Releasors or their heirs or assigns*, or *for or by any other person or persons whatsoever*, and that the Releasee should be kept harmless and indemnified by the Releasors and their heirs against all other titles, charges, &c. *save and except the chief rent* issuing and payable out of the premises to the lord of the fee. Held that the generality of the covenant for *quiet enjoyment* against the Releasors and their heirs, *and any other person or persons whatsoever*, was not restrained by the qualified covenants for *good title* and *right to convey, for and notwithstanding any act done by the Releasors to the contrary*. But if the covenant for quiet enjoyment were to be restrained to the acts of the Releasors by any qualifying context, then the declaration in covenant, stating it by itself in its own absolute terms, without such qualifying context belonging to it, seems to be an untrue statement of the deed *in substance and effect*, which the defendant may take advantage of upon the general issue of non est factum, as a variance and ground of nonsuit or of a verdict for him.

THE plaintiff declared, as heir of one *Rd. Howell*, upon a covenant in an indenture of the 30th of *May* 1783, made by the defendant, and also by *Joseph Richards*, *Anne* his wife, and *D. Richards*, to the said *Rd. Howell*, for the quiet enjoyment of a certain tenement, which was thereby conveyed to the said *Rd. Howell* and his heirs; upon which covenant the defendant was thus impleaded. And the defendant did by the said indenture above brought into court here *covenant in manner following*, viz. that he, the said *Rd. Howell*, his heirs and assigns, should and might from time to time and at all times thereafter peaceably and quietly enter into, hold, occupy, possess, and enjoy the premises thereby granted, &c. without the lawful let, suit, trouble, denial, claim, or demand, entry, eviction, &c. interruption, or disturbance whatsoever of or by the said *J. Richards*, *Anne* his wife, the defendant, and *D. Richards*, or any or either of them, their or any or either of their heirs or assigns, *or of or by any other person or persons whatsoever*; and that freely and clearly and absolutely acquitted, exonerated, released, and discharged, or otherwise by the said *Jos. Richards*, *Anne* his wife, the defendant, and *D. Richards*, and each of them, their and each of their heirs, &c. well and sufficiently

saved.

saved, defended, and kept harmless and indemnified of, from, and against all former and other gifts, grants, &c. jointures, dowers, right and title of dower, &c. uses, trusts, &c. wills, statutes merchant, of the staple, recognizances, judgments, executions, &c. rents, arrears of rent, annuities, &c. forfeitures, re-entries, cause of forfeiture and re-entry, debts, &c. and of, from, and against all other estates, titles, troubles, charges, and incumbrances whatsoever, *save and except the chief rent* issuing out of or payable for the said premises to the lord of the fee of the same, if any such should be due. The plaintiff then proceeded to assign a breach, that since the death of *Rd. Howell*, whose heir he was, he had not been permitted nor was able to hold, occupy, possess, and enjoy the premises, &c.; but that after the death of *Rd. Howell* he was evicted upon an ejectment brought by one *Mary Howell*, widow, who at the time of making the said indenture, and continually from thence until and at the time of the eviction after mentioned, had and still has lawful right and title to the premises.

The defendant pleaded that the indenture in the declaration mentioned was *not his deed*; and also pleaded several special pleas, not material to the question; which arose upon the production of the deed in evidence; whether the variance between that and the covenant declared on were so material in substance and legal effect, as to be available for the defendant upon the plea of non est factum. The covenants in question in the deed ran thus: And the said *Joseph Richards* doth for himself and for the said *Anne* his wife, and for their and each of their heirs, &c. and the said *Thomas Richards* (the defendant) and *D. Richards*, for themselves severally and respectively and for their several and respective heirs, &c. do covenant with the said *Rd. Howell*, his heirs, &c. in manner following, viz. that they the said *Joseph*, *Anne*, *Thomas*, and *D. Richards, for and notwithstanding any act, matter, or thing by them or any or either of them done to the contrary*, now at the time of the sealing, &c. are, or some or one of them is or are lawfully, rightfully, and absolutely seized of and in, or well and sufficiently entitled to the premises hereinbefore mentioned to be granted, &c. of an absolute and indefeasible estate of inheritance in fee simple, &c. without any manner of condition, trust, &c. or any other matter, restraint, cause, or thing whatsoever, to defeat, &c. or incumber the same estate; and also that they the said *Joseph*, *Anne*, *Thomas*,

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and *D. Richards*, some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, now have, or some of them hath, at the time of the sealing, &c. in himself, herself, or themselves, good right, full power, and lawful and absolute right and authority to grant, &c. the said premises unto and to the use of the said *Richard Howell*, his heirs, &c. in manner aforesaid, and according to the true intent and meaning of these presents; *and likewise* that he the said *Rd. Howell*, his heirs, &c. shall and may from time to time and at all times for ever hereafter peaceably and quietly enter into, hold, occupy, possess, and enjoy the premises hereby granted, &c. without the lawful let, suit, trouble, denial, claim, or demand, entry, eviction, &c. or disturbance whatsoever, of or by the said *J. Richards*, *Anne* his wife, *T. Richards*, and *D. Richards*, or any or either of them, their, any or either of their heirs or assigns, *or for or by any other person or persons whatsoever*; concluding as stated in the declaration.

Whereupon it was objected at the trial at *Westminster*, before Lord *Ellenborough* C. J. that the deed proved did not support
[637] the issue on the non est factum, inasmuch as it shewed, by comparing the part of the covenant declared on with the antecedent paragraphs, which it was said made but one entire covenant, that it was, in effect, not a covenant for quiet enjoyment *generally* against the title of *all* persons, but only a covenant against the acts of *the covenantors themselves and those claiming under them*, by reason of their prior words, "*for and notwithstanding any act, matter, or thing by them or any or either of them done to the contrary*," &c. which pervaded the whole covenant. Lord *Ellenborough* C.J., however, was then of opinion, that the defendant could not take advantage of this objection on the plea of non est factum; but that if he meant to insist on any other covenants in the deed as varying the legal effect and true import of the covenant declared on, he ought to have craved over of the indenture, and set out such other covenants on the record, in order that the Court might judge of their application to the covenant set forth in the declaration, and their effect upon its construction. Though he agreed that if any material part of the same integral covenant were omitted, which varied the sense and meaning of the other part declared on, on proof of such variance, it would negative the fact of its being the deed of the defendant. But his Lordship

ship gave the defendant's counsel leave to move to enter a nonsuit, if the Court should think the objection well founded. 1809.

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Abbott moved accordingly in the last term, and renewed the objection to the variance made at the trial, and cited *Sands* v. *Ledger* (*a*), the case of an indenture set out imperfectly, to shew that advantage might be taken of the variance, upon the plea of the general issue, at nisi prius. And he also [637] referred, amongst other cases, to *Browning* v. *Wright* (*b*) where a covenant in general terms, that the covenantor had *full power*, &c. *to convey*, was held to be qualified by all the other special covenants being against the acts of the party himself and his heirs. And he adverted to the general rule, that deeds were to be pleaded according to their legal effect, and not merely in the words used.

The Attorney-General, *Peake*, and *Lord*, shewed cause against the rule in the same term, and contended that from the true construction of the terms of the deed, compared with the particular covenant for quiet enjoyment declared on, the latter was properly pleaded, as a general covenant, according to its true sense and legal effect, and was not qualified by the terms of the covenants for title and for the right to convey: and if the whole had been set out, the construction must have been the same. That, therefore, there was no foundation in substance for the objection. And they observed the difference between the words of the covenant in *Browning* v. *Wright* (*b*) and in this case; for there *Wright* covenanted that he, *for and notwithstanding any thing by him done to the contrary*, was seised of the premises in fee, and had good right to convey; which marked that he was covenanting against his own acts: and that covenant did not contain the large words which are to be found in the covenant in question; namely, where the releasors covenant against eviction or disturbance by themselves or their heirs, or by *any other person or persons whatsoever*. The *saving* as to the *chief rent* also shews that the parties did not mean to confine the covenant for quiet enjoyment merely to their own acts. The [638] words of every covenant are to be taken most strongly against the covenantor. And in *Gainsford* v. *Griffith* (*c*), a covenant in a lease, that it was good and indefeasible, was held to be general, and not restrained by the subsequent covenant for

(*a*) 2 *Ld. Ray.* 792. (*b*) 2 *Bos. & Pull.* 13. (*c*) 1 *Saund.* 59.

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quiet enjoyment *without any let or disturbance of the defendant*. But supposing that the generality of one covenant were controlled by the particularity of others, they urged that objection could only be taken of it by setting out the deed upon oyer, and demurring; as in *Browning* v. *Wright*, *Smith* v. *Yeomans* (*a*), *Sacheverell* v. *Froggatt* (*b*), and other cases referred to in the notes to the two last cases. And they said there was no case where the objection of such a constructive variance had prevailed upon the plea of the general issue; in *Eliot* v. *Blake* (*c*), such an objection was over-ruled: and in *Ball* v. *Squarry* (*d*) it is said that "you cannot take advantage of any covenant omitted in the plaintiff's declaration, on an action of covenant, without craving oyer."

Park and *Abbott*, in support of the rule, argued first upon the words of the respective covenants; that, taking the whole together, the meaning of the covenanters was only to covenant against their own acts, by reason of the preliminary words "*for and notwithstanding any act, matter, or thing by them*, &c. *done to the contrary*," &c. which extended, they said, to the latter covenant for quiet enjoyment by the connecting words, "*and likewise*," which made it all one sentence. And as to the words "*or for or by any other person or persons whatsoever*," they were to be understood, according to the whole context,
[639] of any persons *claiming from the covenanters*. As in *Broughton* v. *Conway* (*e*) where a condition in an obligation by the vendor of a lease for years, that he would not do, nor had done, any act to disturb the plaintiff in his possession, but that the plaintiff should hold and enjoy peaceably, without the disturbance of the defendant *or any other person*, was held to be restrained to the disturbance of other persons through any act of the defendant himself. It was nugatory to restrain the former covenants to the covenanters' own acts, if the covenant for quiet enjoyment were meant to be general. They also relied on *Browning* v. *Wright* (*f*), as being the stronger case against the objection, because there was a separate covenant interposed between the qualifying and qualified covenants. And *Gainsforth* v. *Griffith* was distinguished as being a case of leasehold. Then if the covenant for quiet enjoyment were in legal construction

(*a*) 1 *Saund.* 316.
(*b*) 2 *Saund.* 366.
(*c*) 1 *Lev.* 88. and *T. Ray.* 65.
(*d*) *Fortes*, 354.
(*e*) *Moore*, 58.
(*f*) 2 *Bos. & Pull.* 13.

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a qualified covenant, the rule is clear, as laid down in *Penny* v. *Porter* (*a*), and *Miles* v. *Sheward* (*b*), that it is a fatal variance to state it as a general covenant: in this respect there can be no difference in principle between contracts under seal, and other contracts: and the case of *Sands* v. *Ledger* (*c*) shews that advantage may be taken of this upon the general issue in an action on the deed.

Lord ELLENBOROUGH C. J. said that the question raised was of general importance sufficient to require the Court to look into the cases before they delivered their opinion. The case accordingly stood over for consideration till this term, when His Lordship delivered the opinion of the Court.

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This was a motion made last term for leave to enter a nonsuit, upon the ground of a supposed variance between the covenant declared upon, and the covenant proved at the trial, upon the plea of non est factum. It was an action of covenant brought by the plaintiff, as heir of one *Richard Howell*, against the defendant as a several covenanting party in a deed of release, whereby one *Joseph Richards* and *Anne* his wife, the defendant *Thomas Richards* and one *David Richards* released a messuage and lands in the county of *Carmarthen* to the said *Richard Howell*, the ancestor of the plaintiff, and his heirs. The covenant, for the breach of which the action was brought, was the covenant for quiet enjoyment: the breach was alleged to be by the eviction, by due course of law, of the plaintiff, the heir, after the death of his ancestor, the immediate covenantee *Richard Howell*, by one *Mary Howell*, who was a stranger. The covenant for quiet enjoyment was, that *Rd. Howell*, the grantee, and his heirs, should enjoy, "without the lawful let, suit, trouble, denial, claim or de-"mand, entry, eviction, ejection, molestation, hindrance, "interruption, or disturbance whatsoever, of or by the said "*Joseph Richards*, *Anne* his wife, the defendant, and *David* "*Richards*, (the several releasors,) or any or either of them, "or any or either of their heirs or assigns, *or for or by any* "*other person or persons whatsoever*," &c. The covenant to indemnify and save harmless, which follows, is in the most comprehensive terms, and concludes thus: "Of, from, and "*against all other estates, titles, troubles*, charges, and incum-"brances whatsoever;" with this single saving, viz. "Save

(*a*) 2 *East*, 2. (*b*) 8 *East*, 8. (*c*) 2 *Ld. Raym.* 792.

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"and except *the chief rent issuing out of or payable for the said* "*premises to the lord or lords of the fee of the same, if any such* "*should be due.*" This covenant for quiet *enjoyment, it may be observed, is special and particular in its terms, as well as general: it is against the disturbance of the defendant and others, the releasors by name, their heirs, &c. *and also* against the disturbance of *any other person whatsoever.* It was contended at nisi prius, that the general language of this covenant for quiet enjoyment was in fair construction to be qualified and restrained by reference to the antecedent covenants for title, and for the right to convey, which were special and limited, and run in the terms following: "that *they* the said "defendant, and others, (the releasors,) for and notwithstand- "ing any act, matter, or thing, *by them or any or either of* "*them,* done to the contrary," then were or stood, or some one of them was and stood lawfully, rightfully, and absolutely, seised of an indefeasible estate of inheritance in fee simple in the premises granted and released: and that they, the several releasors, or some or one of them, "*for or notwithstanding* "*any such matter or thing as aforesaid,*" (i. e. notwithstanding any act, matter, or thing, done *by them or any of them* to the contrary,) then had in them or some of them "good right, "full power, and lawful and absolute right and authority, to "grant, bargain, sell, alien, remise, release, and confirm the "premises thereby granted and released," &c. And the question is, whether the general words of the latter covenant *for quiet enjoyment* are in necessary construction to be restrained by the language of the antecedent covenants *for title* and *right to convey,* and which certainly are covenants of a limited kind, and provide only against the acts of the releasors themselves? If the words of this latter covenant are to be so restrained, then the stating of this covenant *for quiet enjoyment,* by itself, in its own absolute terms, without the qualifying context which belongs to it, would be (it may for the purpose of this argument be admitted) an untrue statement, in point of substance and effect, of the deed in that respect, and would have therefore entitled the defendant to a nonsuit, on the ground of a variance, or to a verdict, on the plea of non est factum.

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The covenant *for title,* and the covenant *for right to convey,* are indeed what is somewhat improperly called synonimous covenants; they are however connected covenants generally of the same import and effect, and directed to one and the same

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same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is in strictness of law in some degree imperfect; but he may at the same time know, that it has not become so by any act of his own; and he may likewise know that the im- [643]
perfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chuses to avoid a responsibility for the strict legal perfection to his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death or the like: but these imperfections though cured, so as to obviate any risk of disturbance to the grantees, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence therefore which might require the qualification of one of these covenants might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object. And indeed in looking at the case of *Browning* v. *Wright*, 2 *Bos. & Pull.*

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& Pull. 19., in which almost all the cases on the subject are collected and considered, I do not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by *Hobart* C.J. *Winch. Rep.* 93. Sir *Geo. Trenchard* v. *Hoskins*) is to be construed according to the "intention of
[644] "the parties, and the intents ought to be adjudged of the "several parts of the deed, as a general issue out of the "evidence; and intent ought to be picked out of every part, "and not out of one word only." Consistently therefore with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbers by the grantors themselves: and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favor of implied words of narrower import which occur in another separate covenant, addressed, as has been before said, to a distinct object. It appears to us, therefore, that the covenant for quiet enjoyment is not in point of necessary construction to be restrained in the manner contended for on the part of the defendant; and that it is therefore truly stated in substance and effect, when it is stated, as it is in the declaration, by itself, and without the other covenants which have been argued to be necessary to be stated on
[645] the record along with it, in order to its due construction: and consequently that there is no ground for a nonsuit in this case, on the supposition of a variance in this respect between the declaration and the instrument declared upon.

Rule discharged.

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LEES and Others *against* The Company of Proprietors of the Canal Navigation from MANCHESTER to ASHTON-UNDER-LINE and OLDHAM.

Monday, Nov. 27th.

THE plaintiffs declared in covenant upon an indenture under seal, made the 30th of *July* 1795, between themselves and the company, whereby; reciting that the plaintiffs were the owners of collieries within the townships of *Oldham* and *Chadderton* in *Lancashire*, and that the company were desirous that the water to be raised by engines erected or to be erected for draining the said collieries should be conveyed into their canal for the better supplying it with water; and that the plaintiffs had contracted with the company that all the plaintiffs' coal, raised after the canal should be made navigable from *Stake Leach* to *Manchester*, should be navigated on the said canal and on no other; and that for that purpose they should make a navigable cut from their collieries to join the company's canal at *Stake Leach*, through which cut the water from the collieries was to be conveyed into the canal: it was witnessed that in consideration of the payments and allowances thereinafter covenanted to be made by the company to the plaintiffs, the latter covenanted that before the canal should be made navigable from *Stake Leach* to *Manchester*, they would

Where by a statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1*d.* &c. per ton, per mile, [646] upon coal; and they were also empowered to reduce the rates at a general assembly

held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby in consideration that those individuals would make a navigable cut to convey water from their collieries through land, not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal, for 1*s.* per ton, *the company paying back* 6*d.* per ton, is illegal and void; 1st, As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2dly, As extending in effect the power of the company to purchase land beyond the limits assigned by the act. 3dly, as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken up on mortgage. 4thly, Because the tolls could in no instance be reduced but at a general assembly, &c.; and this in fact operates as a reduction of the tolls pro tanto. Also quære, 5thly, Whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper, for the benefit of the public?

at

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at their own charge purchase so much land as should be wanted for the navigable cut to communicate with the canal, and would cause such land so to be purchased and all the works belonging thereto *to be well and effectually conveyed to and vested in the company, their successors and assigns, for ever, or to some person to be nominated by or in trust for them, free from all incumbrances whatsoever*; and that *the plaintiffs would make and finish the navigable cut*, (before described, in the manner therein mentioned,) and make certain works (therein mentioned) according to plans furnished by the company: and that the plaintiffs should at all times during the continuance of their estate in the said collieries turn the water raised and drained thereout into the intended cut, and from thence into the canal, for the better supplying it with water; and would navigate all their coal on the canal; and would always have at some wharf at or near *Pease Green* (on the canal) 1000 tons at least of coals for sale; and *also would pay to the company, their successors or assigns*, 1*s. per ton* for all their coals put on board any boat on the *cut* or on the *canal*, whether the coals were navigated the whole length of the cut and of the canal, or any of its branches, or only on part or parts thereof; such payments to be made half-yearly; and also would for that purpose, when required by the company, deliver to them a true account in writing of the quantities of the coal raised and put on board, &c. And

[647] it was further witnessed by the indenture, that *in consideration of the covenants and agreements* before mentioned on the part of the plaintiffs, the company covenanted, that they, their successors and assigns, would pay to the plaintiffs for the cutting, &c. and completing the intended navigable cut, and erecting the said buildings and works, &c. 4000*l.*, when and as such works should be from time to time well and sufficiently completed by instalments of 200*l.* from time to time; but 500*l.* thereof to be always retained by the company until the whole of the works should be completed, and then to be paid. And that the company, their successors and assigns, would permit all the coals raised from the plaintiffs' collieries, after the intended cut and the works thereof were completed, to be navigated on the said cut and canal, or any part thereof, on payment of the tonnage before mentioned. And *also that the company, their successors, and assigns, would in consideration of the charges which the plaintiffs might be put to in raising up the water from the said collieries, and conveying the same into the cut and from thence into the canal as aforesaid,*

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aforesaid, and also in consideration of the extra expence which the plaintiffs might be put to in the execution of the said works, pay to the plaintiffs 6d. per ton for coals put on board any boat on the cuton or the canal, and for which the tonnage of 1s. *per ton shall be paid as aforesaid.* And it was mutually covenanted that the cut should be public and open to all persons, and be navigated by all perssns (except the plaintiffs in respect of the coal out of the said collieries) on the same terms and conditions as the said canal from *Manchester* to *Ashton*, &c.: and that the cut should be considered as part of the canal, and be repaired by and subject to the management of the company, and that the tolls collected on the cut should be the property of the company: and that as between these parties all the rules, [648] orders, penalties, and forfeitures, &c. contained in the acts for making the canal and its branches, should be applicable to the cut and the works thereof, and the vessels and goods navigated thereon, as fully as if they had been mentioned in such acts. The plaintiff then, after averring general performance of their covenants, alleged that afterwards, on the 1st of *January* 1796, the canal was made navigable from *Stake Leach* to *Manchester*, and the navigable cut and works thereof were completed *and conveyed to the company* in manner and form as covenanted by the plaintiffs. And although the plaintiffs in execution of the said works were put to an extra expence, (beyond the said 4000*l.*, of 3800*l.*,) and though they have always conveyed the water rsised by the engines, &c. into the cut, and from thence into the canal, for better supplying the canal with water; part of such water being raised by engines within 2000 yards of the canal, and other part by engines raised at a greater distance, &c.; and in so doing the plaintiffs were put to great charges, viz. 1000*l.*: and though the company did from the time of the canal being navigable, and from the completion of the navigable cut until the 5th of *August* 1806, permit the plaintiffs to navigate their coal from their said collieries on payment of 1s. per ton, and during the same time did pay to the plaintiffs 6*d.* per ton for all such coals, for which 1*s.* per ton was paid as aforesaid: and although the plaintiffs from the said 5th of *August* 1806 have been ready and willing to convey other large quantities of coal raised from the said collieries, &c. on the said cut and canal, and to pay 1*s.* per ton *Breaches.* for the same, &c.; yet (1st) the company, though requested, would not permit any of the said coals to be navigated on the cut

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cut or canal on payment of the 1*s.* per ton; but refused so to do, and demanded and took more, viz. 5*s.* per ton, &c. (2dly) The company would not allow, and refused to pay the plaintiffs 6*d.* per ton on a large quantity of their coals raised from their said collieries and navigated on the cut and canal, for which the plaintiffs had paid to them not less than 1*s.* per ton; to the plaintiffs' damage of 5000*l.*

Pleas.

To this the defendants pleaded, 1st, That the said land purchased according to the covenant, and all the works thereto belonging, *were not well and effectually conveyed to the company*, &c. (in the words of the covenant) free from all incumbrances whatsoever, in manner and form, &c. 2. That the lands and works so covenanted to be conveyed to and vested in the company and their successors, &c. are *not the lands and works* which the company had at the time of making the said indenture, or at any time since, *power and authority to purchase* by virtue of the statute in that case made and provided, *without incurring the penalties and forfeitures of the statute of mortmain*; but are other and different lands and works; and that neither the king nor any of his predecessors at the time, &c. granted to the company any licence to purchase or hold in mortmain in perpetuity or otherwise the said lands or works. 3. That by the statute in that case made and provided it was enacted, that it should be lawful for the company from time to time and at all times thereafter to demand, take, and recover for their own use, for tonnage of all goods navigated or conveyed on the said navigation, such rates as should be fixed by the company at any general assembly not exceeding, viz. for every ton of coal, &c. not passing through locks 1*d.* per mile; and for every ton of coal, &c. passing through locks
[650] 1½*d.* per mile: and that it should be lawful for the company from time to time at any general assembly to be held for that purpose, on notice, &c. to lessen or reduce all or any of the rates thereby granted as they should think proper; and afterwards from time to time at any general assembly, of which such notice should be given, to advance and raise all or any of the said duties so lessened to any sum not exceeding the respective rates thereinbefore granted: and *no reduction of the said rates should be made without the consent of* the major part in value of the proprietors, &c. for the time being. And then the defendants averred, that the canal was 20 miles long, and contained 20 locks; and that the tolls so granted for navigating

of the canal amounted to 2*s.* 6*d.*, which is more than 1*s.* per ton, subject to the re-payment of 6*d.* per ton, as by the said indenture is agreed. That the rates are by the said agreement reduced, and that such reduction was not made at any general assembly of the proprietors, &c. as provided by the statute. 4. That the tolls were reduced as stated in the former plea, without consent of the major part in value of the proprietors of shares. 5. That the reduction of the rates so made in manner before mentioned, was so made as to concern only the parties to the said indenture, and for their benefit only, and did not concern any other persons using the canal or navigation, and was contrary to the statute. 6. That after making the said indenture, viz. on the 25th of *July* 1806, at a general assembly of the company held for that purpose, pursuant to the statute, it was ordered that the rate of 1*s.* per ton mentioned in the indenture should be no longer taken, and that for the tonnage of all coal, &c. thenceforth navigated on the canal there should be taken, without exception, for every ton not passing through locks 1*d.* per mile; and for every ton passing through locks 1½*d.* per mile; and that the 6*d.* per ton [651] mentioned in the said indenture should thenceforth be no longer paid by the company to the plaintiffs; and thereby that agreement and rate of tonnage was rescinded, and the tolls for the same were raised according to the form of the statute, &c.; whereupon the company during the time mentioned in the breaches of covenant assigned, have refused to permit the plaintiffs to navigate on the canal the coal there mentioned on payment of the tonnage of 1*s.* per ton, and have refused to pay them the 6*d.* per ton, &c. 7. That the plaintiffs were not, on the execution of the works in the indenture mentioned, put to any extra expence beyond the 4000*l.* covenanted to be paid by the company. 8. That no part of the water in the declaration mentioned was drained by means of any engine, &c. or level erected or made on lands or mines not within 2000 yards of the canal. And 9. That no part of the water was raised for supplying the canal with water to a greater height than was necessary for draining the coal mines. To these pleas there was a general demurrer.

This case was argued in the last term; and the questions made in argument by *Richardson* for the plaintiffs, and *Yates* for the defendants, were, first, on the 1st, 7th, 8th, and 9th pleas, whether the matters therein respectively alleged were dependent

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dependent covenants, or conditions precedent to the plaintiffs' right of action, as they were contended to be by the defendants; or mutual and independant covenants, as the plaintiffs insisted that they were. Secondly, upon the second plea, whether the contract were illegal and void, as exceeding the powers given to the company by the canal acts; or as violating any of the statutes of mortmain; with respect to which it *was insisted by the plaintiffs that at any rate, as the matter rested at present entirely in covenant, and no conveyance was actually made to the company, the time for raising the objection was not arrived, and a licence from the crown might be obtained before the conveyance was executed. Thirdly, which was the principal point, arising upon the 3d, 4th, 5th, and 6th pleas, whether the contract in question were lawful within the provisions and spirit of the canal acts respecting the reduction of tolls; or whether it were void, as not having been agreed to at a general meeting of the proprietors held upon due notice, or by the major part in value of the proprietors of shares; or as being a *partial* reduction of the tolls for the benefit of *particular individuals* only, and not of the public; or as having been rescinded at a general meeting of the proprietors lawfully convened.

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The Court considered at the time that there was great weight in the last class of objections urged on the part of the defendants, and directed the case to stand over for consideration on those grounds. And now

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

This was an action of covenant. By indenture of the 30th of *July* 1795, the plaintiffs contracted with the company to make a given cut, to communicate with the company's canal, and to do certain other works, and to send by the canal, and by no other conveyance, all the coals they should raise from certain collieries of which they were owners, or so much as could be disposed of at *Manchester*, or at or near the line of the canal: and the company covenanted that the plaintiffs should be permitted to carry their coals along the whole or any part of the canal, on payment of 1*s.* per ton, and that the company would pay back to them 6*d.* per ton. This is the substance of the contract, and as much of it as is necessary to state for the purpose of understanding the question now in judgment before the Court. And for the not allowing them to carry at 1*s.* per

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1*s.* per ton, and not paying back the 6*d.* per ton, the plaintiffs have assigned breaches. The company having pleaded amongst others, the following pleas, 1st, (which is the substance of third plea,) That by their canal act they were empowered to take such rates as should be fixed by the company at any general assembly, not exceeding 1*d.* per ton, per mile, upon coal not passing through any lock; and 1½*d.* upon what did pass locks. That they were also *empowered to reduce* the said rates *at a general assembly to be held at three months' notice*; but that *no reduction was to be made without the consent of the major part in value of the proprietors.* That the canal is of great length, &c.; that the tolls so granted for passing the whole length of the canal amount to more than 1*s.* per ton, viz. to 2*s.* 6*d.*: that the rates are therefore reduced by this indenture, and that such reduction was not made at any general assembly held upon a three months' notice. 2dly, (by their 4th plea,) That the reduction by this indenture was made without the consent of the major part in value of the proprietors. 3dly, (by their 5th plea,) That this reduction was made, so as to relate to the plaintiffs only, and not to other persons using the canal. 4thly, (by their 6th plea,) That before the times in the plaintiffs' breaches the company made an order, at a general assembly held for that purpose, that the 1*s.* per ton mentioned in this indenture should be no longer taken, nor the 6*d.* per ton returned; but that the tonnage should be 1*d.* per mile for what did not pass through locks, and 1½*d.* for what did. To these pleas the plaintiffs have demurred generally; and the question for the consideration of the Court is, whether the company could bind itself by the bargain which this indenture contains? Other points were raised upon the argument upon certain other pleas; but they were disposed of at the time; and this is the only one which stands now reserved for the judgment of the Court.

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The bargain between the parties in effect is, that in consideration of what the plaintiffs contracted to do for the company, and of their sending all their coals by the canal, they should be at liberty to send at 6*d.* per ton, what, but for this bargain, might be chargeable with a much higher tonnage. The bargain might be highly advantageous to the company, if the expence of what they were to do was large, and if from the state, &c. of their collieries, the quantity of coal they should be able to send should be small; but upon the reverse of these

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positions, it would be advantageous to the plaintiffs, and might be prejudicial to the company. It was a speculation, which might benefit either the one party, or the other, according to events. But has such a company a power so to speculate? Or if it have, were the checks imposed upon this company in this instance complied with? Under every canal act the proprietors have rights, the public has rights, and mortgagees, if there be any, have rights. The acts under which this company was established limit the extent of the canal to be made: the company, therefore, could not purchase land, or extend their canal beyond the limits prescribed by the act. They could not, therefore contract with any persons to make for them and on their account an extension of the line of their canal beyond the limits prescribed by the several acts, so as to vest in the company the canal so extended, and subject it to the rates and control imposed by the act. Again, by the several acts, the company are restricted as to the money to be raised, which is to be employed for the purposes of the canal; and beyond the sum so prescribed they are prohibited to raise any money. But by paying for any works to be done, in cutting the canal, or extending it, by a total or partial sale or mortgage of the tolls, or any reduction of them, the company in effect indirectly raise more money than they are authorized by parliament to do. And the rates and tolls being made by the act a security for the money raised or subscribed, a grant of any partial diminution or exemption from toll is a prejudice to the security of the proprietors and mortgagees. Again, by the acts (*a*) relating to these canals the company is entitled to take for the tonnage of *all* goods such rates, not exceeding the sums now claimed, as shall be fixed by the company at any general assembly; and they have no right again to reduce them but at a general assembly held upon three months' notice; nor then, without the consent of the major part in value of the proprietors. The proprietors therefore had a right originally to have upon *all* goods such tonnage, within the limits prescribed by the act, as a general assembly should fix; and nothing but a general assembly could abridge or vary that right. This bargain had not the sanction of any general assembly; and it does abridge the right of the proprietors to have the tonnage which the acts specify upon the goods of the

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(*a*) 32 G. 3. c. 81. s. 64. 33 G. 3. c. 21. s. 11. 38 G. 3. 40 G. 3. 15 G. 3.

plaintiffs:

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plaintiffs: it takes away, therefore, the rights of the proprietors in a way which the acts * have not authorized, and on that account is not binding upon the proprietors. If this bargain could stand, others might be made in the same way with the different individuals using the canal: and instead of the security of one general rate, to the extent the acts allow, upon *all* the goods carried on the canal, the proprietors might have nothing upon *any* but the partial rates agreed upon by the different individuals and the keepers of the seal of the company. To say that the company shall pay for their works in money is only requiring them to do what was expected would be done when the act passed; is keeping them within the powers of the act; and securing to the proprietors the benefit of the check they were intended to have. On the other hand, to allow them to sell an indefinite right of carriage, without the consent of the proprietors, would be doing what was never intended, and what might ruin the concern. This argument seems equally to apply when the rights of the public are considered. The public have an interest that the canal shall be kept up, and whatever has a tendency to bring it into hazard is an encroachment upon their right in it. They have also an interest that the tolls should be equal upon *all*; for if *any* are favoured, the inducement to the company to reduce the tolls, *generally*, below the statute rate is diminished. But as it is sufficient in this case to say that this bargain is not binding upon the company of proprietors, inasmuch as it abridges their rights in a way the statutes do not warrant, it is unnecessary to give an opinion whether it so interferes with the rights of the public, as to be on that ground also void.

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Judgment for the Defendants.

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Monday, Nov. 27th.

DOE, on the several Demises of RICHARD HENRY KENRICK and Others, *against* Lord WILLIAM BEAUCLERK and Others.

Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatsoever person should by virtue of the will become possessed of or entitled to the estate should from the time he became so possessed, take upon himself the surname of *Thelwall, and* [658] *make the mansion his usual and common place of abode and residence;* held that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe.

THIS case was removed into this Court by a writ of error from the Court of Great Session for the county of *Denbigh*. The ejectment was brought to recover certain messuages and lands in that county; the lessors of the plaintiffs laid their demises on the 2d of *May* 1803; and at the trial before the Chief Justice of *Chester* a special verdict was found, which stated in substance as follows:

Thelwall Price, of *Bathafern Park* in the county of *Denbigh*, being seised in fee of the premises in question, on the 5th of *January* 1767 duly made his will, whereby, after charging all his real and personal estates with his debts and funeral expences, he devised his said estates, lands, &c. in the several counties of *Denbigh*, *Flint*, &c. and also all his personal estate, to *J. Moyston* and *Owen Wynn*, and their heirs, upon trust, in the first place, to apply his personal estate to the payment of his debts, funeral expences, and legacies. And as to all his real estates, subject to his debts and charges, he devised the same to his cousin *Richard Price*, only son of *Wm. Price* of *Rhiwla*, for life; remainders to the first and other sons of the body of the said *Richard Price* in tail male; and in default of such issue, to the first and every other daughter of the body of the said *R. Price* in tail general; remainder to the Rev. *Robert Carter* for life; remainder to the first and other son and sons of the body of the said *R. Carter* in tail male; remainder to the first and every other daughter and daughters of the said *R. Carter* in tail general; remainder to *Richard Kenrick* for life; remainder to his first and other sons in tail male; remainder to his first and other daughters in tail general. Then followed

this

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this proviso, on which the questioned turned, "Provided always and I do hereby expressly declare that it is my will and purpose, that the said *Rd. Price*, or whatsoever other person or persons shall, by virtue of this or any other will or wills to be by me at any time made, become possessed of or entitled to my said estates in manner hereinbefore mentioned, shall, from the time he, she, or they, become so possessed, take upon himself, herself, or themselves, the surname of *Thelwall, and shall make the mansion of* Bathafern Park *aforesaid their usual and common place of abode and residence:* and in case the said *Rd. Price* shall *refuse or neglect* to reside at and make use of *Bathafern Park* as his usual place of residence, and to take upon himself the name of *Thelwall*, then and in such case I do hereby declare this my will to be void to all intents, in respect to him, and every other person and persons claiming under him, who shall *so* refuse to comply with such direction: and in like manner I direct and my will is, that the same be utterly void in respect to the said *Robert Carter* and *Rd. Kenrick*, and every other person and persons claiming under them by virtue of this or any other will or wills to be by me at any time made, in case he or they shall refuse to take the surname of *Thelwall*, and reside at *Bathafern Park* as aforesaid. And in *such case of refusal*, or for want of issue by the said *Rd. Price*, or *Robert Carter*, or the said *Rd. Kenrick*; then my mind and will is, and I do hereby devise all my said real estates whatsoever to my own right heirs for ever." The testator died seised on the 28th of *December* in the same year, leaving the said *Wm. Price* of *Rhiwlas* his heir at law. On the death of the testator, *Rd. Price*, the son of the said *Wm. Price* of *Rhiwlas*, entered by virtue of the will, as the first devisee, and was seized thereof for his life, and complied with the conditions of the will, and died seised on the 21st of *March* 1775, without issue; upon whose death the said Rev. *Robert Carter*, the next devisee, who had become and then was the heir at law of the testator, entered and was possessed thereof, and enjoyed the premises until the 18th of *October* 1807, when he died at the said mansion house of *Bathafern Park*, leaving issue of his body *Charlotte Carter Thelwall*, his only child, born on the 20th of *April* 1769. *Robert Carter* and his daughter *Charlotte Carter* assumed and used the surname of *Thelwall*. Upon the death of *Robert Carter Thelwall*, *Charlotte Carter Thelwall*, who then was the heir at law of the testator, and also a devisee described in the will, entered upon the devised pre-

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mises, and was possessed thereof and enjoyed the same; and on the 19th of *October* 1787 left the mansion house of *Bathafern Park*, and resided during her minority with Sir *John Nelthorpe*, her guardian, in *Lincolnshire*. After she came of age, on the 20th of *April* 1790, she resided partly in *London*, and partly at *Redbourne* in *Lincolnshire*, where she had an establishment suitable to her rank and fortune, and did not make the mansion house of *Bathafern Park* the usual or common place of her abode and residence. By indentures of the 1st and 2d of *July* 1790 she, by her name of *Charlotte*
[660] *Carter Thelwall*, made a tenant to the præcipe; and afterwards a writ of quod ei deforciat was sued out, and a common recovery with double voucher was in due form suffered at the Great Session of the county of *Denbigh*, on the 14th of *August* in the same year. On the 21st of *July* 1791 *Charlotte Carter Thelwall*, being still in possession and enjoyment of the premises, married the defendant, Lord *Wm. Beauclerk*, and had issue by him one child, who died an infant in the lifetime of the said *Charlotte*, and she herself died without issue on the 15th of *September* 1797. *Rd. Kenrick*, named in the will, died on the 20th of *December* 1802, leaving issue *Rd. Hen. Kenrick*, his eldest son, *G. W. Kenrick*, and *C. G. Kenrick*, his other sons, the three several lessors of the plaintiff. Upon this special verdict judgment was given below for the defendant: to reverse which this writ of error was brought.

This case was argued in last *Trinity* term by *Manley* Serjt. for the plaintiff, and *Williams* Serjt. for the defendant. By the former it was contended that the proviso in the will of *Thelwall Price* as to residence, though containing words in themselves of strict condition, yet by reason of the limitation over, particularly where the person taking was heir, amounted to a *conditional limitation*; and that by the non-residence of *Charlotte Carter Thelwall* in the mansion of *Bathafern Park*, even before she came of age, but certainly afterwards and before the recovery suffered by her, the estate conditionally limited to her ceased, and thereupon the limitation over to *Richard Kenrick* took effect; of which the lessors of the plaintiff might take advantage; the assumption of the name being only necessary upon entering into possession of the property. And he denied that notice of the will and condition was necessary to be given to *Charlotte*
[661] *Carter Thelwall*, in order to induce a forfeiture of her estate; she being entitled to take as tenant in tail under the will,

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will, although she was also heir at law of the testator, at the time when she entered on the estate. On the other hand it was contended, that the proviso amounted to a *condition* only, and that too a *condition subsequent*, and not a *conditional limitation*: and that not *Charlotte Carter Thelwall* or her father, but *Wm. Price* was heir at law at the death of the testator, to which period the consideration of the question was in this respect to be referred. That the estate vested in her on the death of her father; and there could be no breach of condition or forfeiture before she came of age; and there was not time sufficient to incur any in the very short period between her coming of age and the suffering of the recovery; the law always allowing reasonable time to do every act: and that only the heir at law of the testator could take advantage of a condition broken. That *Charlotte C. T.* being entitled as heir at law at the time of her entry, could not incur any forfeiture without express notice of and refusal to perform the condition. But that even if a forfeiture were incurred, the lessors of the plaintiff were not entitled to take advantage of it, by reason that they had not taken the name as they ought to have done if the estate by her forfeiture were immediately vested in them.

These points, except the last, which was not much insisted on, were argued at great length; but as the Court in giving judgment only went on the ground of want of notice of the condition to the heir, it is unnecessary to enter at large upon the other points. After taking time to consider the case,

Lord ELLENBOROUGH C. J. now delivered judgment, [662] (after stating the substance of the special verdict.)

Upon these facts the Court of Great Session has given judgment for the defendant; and we are of opinion that that judgment is right, and ought to be affirmed. Many questions were discussed upon the argument: but the point, upon which our opinion is formed, is this; that as *Charlotte Carter Thelwall* was heir at law to the testator, and was therefore entitled by descent, if the testator had made no will, she was not bound to residence until she had notice that there was a will, and could not lose the estate by non-residence, without such notice. The verdict does not find that this lady ever had notice of this will: and as nothing can be presumed upon a special verdict, the case must be taken as if she never had any. The first case in which the necessity of notice to an heir or to a person having an independent title, was considered, was *France's* case,

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8 *Co.* 89. *b.* There *R. F.* was seised in fee, and devised to his eldest son and heir for 60 years: he afterwards made a feoffment to the use of himself for life; remainder to his eldest son for 60 years; with a proviso, that if his eldest son disturbed *F. F.* in the enjoyment of certain other lands and certain goods, the use to him should cease. The eldest son did disturb *F. F.*; but he had no previous notice of the feoffment. And it was resolved, that as he had no notice of the feoffment, his disturbance of *F. F.* did not put an end to his term: for had there been no feoffment, he would have had title either under the will, or as heir; and it would be against reason to bind him by a condition of which he was not apprised, where he would have a title, if there were no such deed as that which contained the
[663] condition. This case, though rather differently put, is adopted in *Steph. Touchstone* 148. The passage there is this—"If a man "make a lease for years on condition; *and the lessee doth not* "*know of it*; and after the lessor doth by will give the land to "the lessee, without condition, and the lessee doth such an "act as is a breach of the condition; in this case the condition "is not broken: for the lessee must have notice of the condi-"tion ere he can break it." The learned author therefore of that work must have thought, that a party who would have title, if there were no such deed as that which contains the condition, is not answerable or liable to lose his estate by a breach of the condition, unless he has notice of the deed which contains it. In *Porter* v. *Fry*, 1 *Vent.* 199., reported also 1 *Mod.* 300. and Sir *Thos. Raym.* 236. the distinction is taken between persons who would have no title, if there were no such instrument as that which contains the condition, and those who would have title without such instrument; and notice is considered necessary to subject the latter to the consequences of a breach of the condition. In that case there was a devise to *A. K.* in tail, upon condition that if she married without consent, the estate should go over to the lessor of the plaintiff: she did marry without consent; and upon an ejectment and special verdict, one question was, Whether the want of express notice of the devise would save the forfeiture? She was not the testator's heir; and *Rainsford* Justice said, I take a difference where the devisee who is to perform the condition is heir at law, and where a stranger: *the heir must have notice*; because he, having title by descent, need not take notice of any devise, unless it be signified to him: and so is *France's* case, 8 *Co.* And per *Hale*

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Hale C. J. "In *France*'s case there had been no need of "notice, had *not the devise been to the *heir*; which is the only "thing wherein it materially differs from this case." Judgment was given for the plaintiff, because *A. K.* was not heir, and had therefore no title but under the devise. A bill had been filed for relief; and Lord Keeper *Bridgeman*, who was assisted by Ld. C. J. *Keeling*, and *Vaughan*, and Lord C. B. *Hale* said, *[664] (1 *Mod.* 314.) had *A. K.* been *heir*, it might have made a great difference. This case, therefore, though not an adjudication that notice was necessary in case of an heir, is a strong authority, as far as the dicta of the Judges go upon that point. The case however of *Malloon* v. *Fitzgerald*, 3 *Mod.* 28. and *Skinn.* 125. is a decision upon the point. In that case *Fitzgerald* conveyed to the use of himself for life; remainder to *Catherine*, his only daughter and heir, in tail; with a proviso that if she married without consent, &c., the estate was to go over to the lessor of the plaintiff. She married, contrary to the condition; but had no proper notice of the settlement. Judgment was given in *Ireland* for *Catherine:* and on error brought here, the case was twice argued. *France*'s case, and *Porter* v. *Fry*, were cited, and the difference was insisted on between the case of a stranger and that of the heir; "for the heir "having title by descent, if there be any conveyance by the "ancestor to defeat that title, and to which the heir is a "stranger, he ought by the rules of law and reason to have "notice of it." And after time to consider, the Court were unanimous that *Catherine*'s estate was not determined for want of notice, according to the resolution in *France*'s case, from which they said they could not distinguish this; and judgment was affirmed. There are, therefore, two express decisions upon the very point, besides the dicta in *Porter* v. *Fry*. There is however one authority the other way, that of *Rundall* v. *Eeley*, *Cart.* 92. 170. In that case the testator [665] had four sons, *John*, *Robert*, *William*, and *Matthew*; and he devised to *John* in tail male; remainder to each of the others *successively* in tail male; with a proviso, that if *John* married a woman with less than 1000*l.* portion, the lands should go to the three younger sons and their heirs, as before was limited, *equally*. *John* married a woman with less than 1000*l.* portion, and died leaving two daughters only; so that his estate tail ended. *Robert* and *Matthew* died without issue; and then *William* levied a fine of the whole, and devised to the plaintiff's

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plaintiff's lessor, and died without issue. *John*'s daughters entered; and ejectment was brought against them; and upon a special verdict found, *Bridgeman* C. J. delivered the opinion of the Court; and after noticing that the words created a limitation, and not a condition, he says, "the next thing is that "notice should have been given; *John* being heir at law should "have had notice of this will and limitation; but yet I say, it "is not necessary notice should have been given, though he "was heir. And the estate in *John* having ceased, the ques- "tion is, What estate *Robert*, *William*, and *Matthew* had af- "terwards?" And after discussing that point, he concluded that the estates limited to them in succession ceased; that they took under the proviso, "if *John* married," &c., an estate tail in common, leaving the fee in the testator's heir. That when *Robert* and *Matthew* respectively died, their respective thirds passed to the defendants as the testator's heirs, and the defendants became tenants in common with *William:* that his fine, therefore, did not affect their two thirds, but his own only: and as to those two thirds, judgment was given for the defendants; and as to the other third, judgment was given for the
[666] plaintiff. This, therefore, was a solemn decision upon a special verdict on the very point: for unless it had been considered that the estate passed immediately upon *John*'s marriage to the other three brothers in common, *William* would have been entitled to the whole at the time he levied the fine under the limitation to the brothers in succession; and then the fine would have operated upon the whole; whereas it was adjudged to operate upon a third only. It is singular indeed if Lord C. J. *Bridgeman* delivered this opinion in *Hil.* 18 & 19 *Car.* 2.; as the report supposes, that he should have used the expression ascribed to him in 1 *Mod.* 314. "that if *A. K.* had been heir, it might have made a great difference." It is singular that this decision should not have been referred to either at the bar or by the bench, either in *Porter* v. *Fry*, which was decided *Pasch.* 24 *Car.* 2., or in *Walloon* v. *Fitzgerald*, which was decided *Pasch.* 36 *Car.* 2. It is observable too that in *Rundall* v. *Exley* the rights of the heir were not in question: *John*'s right had clearly ceased, because he was dead without issue male; and the question was, how the estate was afterwards to go over; whether in succession, as it had at first been limited: or in common, according to the limitation, if *John* married a woman with less than the specified fortune. Without questioning, however.

however, the report of *Rundall* v. *Eeley*, and admitting the decision to have been as *Carter* reports, it is clearly inconsistent with *France*'s case, with *Porter* v. *Fry*, and *Walloon* v. *Fitzgerald*; and the reason of the thing is so decidedly with those cases, that we have no hesitation in abiding by them, and holding *Rundall* v. *Eeley* not to be law. Where a party is really ignorant of the existence of the instrument in which the condition is contained, and where he would have good title if there were no such instrument, it seems unreasonable to hold that a neglect of the terms of that condition should subject him to a loss of the estate: it would encourage the concealing of the instrument till a breach were incurred, so to decide: and no substantial inconvenience can result from holding that the person entitled to avail himself of a breach should take care that the condition was known to the person who was to comply with it. Upon this ground, therefore, that *Charlotte Carter Thelwall* never had notice of *Thelwall Price*'s will, or of the condition it contained, we are of opinion that the judgment below was right, and ought to be affirmed. If it were necessary, we might lay some stress upon the wording of the proviso, which speaks of a *refusal* to reside, &c. *by Robert Carter or those claiming under him*, not of a mere *neglect*; and a refusal imports that the thing refused was proposed to the *refusing* party. But our opinion is founded on the broad ground, that neither neglect or refusal will subject the heir, &c. to lose the estate, unless he has notice of the condition. Without, therefore, discussing the several other arguments which have been used, which appear to us to make strongly against the claim of the plaintiff on other points; we are perfectly satisfied that, on this point, the judgment which has been given for the defendant is right, and must be affirmed.

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Monday, *Nov.* 27th.

DOE, on the joint and several Demises of SARAH STRONG and Others, *against* WM. GOFF.

A testator devised one estate to his wife for life, and after her decease to his daughter *Mary* and to the *heirs of her body* begotten or to be begotten, *as tenants in common*, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then he devised another estate to his wife for life, remainder to his son *Joseph* and to *the heirs of his body* begotten or to be [669] begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter *Mary and the heirs of her body* begotten or to be begotten; such issue, if more than one, to take *as tenants in common*: held that the daughter *Mary only* took an estate for life in the first estate, with remainder to all her children equally as purchasers.

IN ejectment for certain messuages and tenements at *Henley-upon-Thames*, a verdict was found for the plaintiff for four undivided fifth parts of the premises, and for the defendant for the other undivided fifth, subject to the opinion of the Court upon the following case.

William Matthews being seised in fee of these and other premises, by his will dated the 18th of *Sept.* 1773 devised the premises in question thus:—I give and devise unto my wife, *Mary Matthews*, and her assigns during the term of her life, all those my messuages and tenements, &c. and from and immediately after the decease of my said wife, then I give and devise the same messuages and tenements unto my daughter *Mary*, the wife of *Wm. Goff*, and to the *heirs of her body* lawfully begotten or to be begotten, *as tenants in common, and not as joint tenants*. But if such issue should depart this life before he, she, or they, shall respectively attain their age or ages of 21 years, then I give and devise the same premises unto my son *Joseph Matthews*, his heirs and assigns for ever. And by another clause of the will he devised the said other premises thus—I also give and devise unto my said wife and her assigns during the term of her natural life all and singular my messuages or tenements, lands, &c. in *Hart-street* and *Duck-street* in *Henley*: and from and immediately after her decease, then I give and devise the said last-mentioned premises unto my said son *Joseph Matthews*, and to the *heirs of his body* lawfully begotten or to be begotten. But if my said son *Joseph* shall happen to depart this life without issue, or such issue shall all die before he or they shall attain their age of 21 years, then and in such case I hereby give and devise the said mentioned premises unto my said daughter *Mary*, the wife of the said *Wm. Goff*, and to the *heirs of her body* lawfully begotten, or to be begotten; such issue, if more than one, to take *as tenants in common*, and not as joint tenants.

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The testator died seised in 1778, leaving his said widow and his daughter *Mary Goff*, him surviving. *Mary* the widow of the testator proved his will, and entered upon and enjoyed the premises in question during her life; and upon her decease *Mary Goff* entered upon and enjoyed the same until about five years ago, when she died, leaving issue *Sarah Strong*, *Mary* the wife of *Robert Mears*, *Elizabeth* the wife of *James Reeves*, and *Sophia Goff*, (the lessors of the plaintiff,) and the defendant *Wm. Goff*, her surviving: and the defendant thereupon possessed himself of the entirety of the premises. If the lessors of the plaintiff were adjudged entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Abbott argued the case for the plaintiff on a former day of this term; and contended upon the intention of the testator, as collected from the will, that *Mary Goff* took only an estate for life, and that all her children under the description of *heirs of her body*, took equal shares as purchasers, in remainder, by reason principally of the limitation to them *as tenants in common*: and he cited *Doe* v. *Laming* (*a*), *Bagshaw* v. *Spencer* (*b*), and *Lisle* v. *Gray* (*c*); and also *Robinson* v. *Grey* (*d*), and *Doe d. Wight* v. *Cundall* (*e*), where all the cases bearing upon the construction of this will were collected.

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Preston for the defendant argued for the necessity of giving *Mary Goff* an estate tail, as well upon the legal effect of the subsequent limitation to the *heirs of her body*, as to effectuate what he said was the general intent of the testator, that no part of the estate devised to *Mary Goff* and the heirs of her body should go over to her brother so long as any of her issue were in being: to which the particular intent, that her children should take as tenants in common, must give way. And he relied principally upon *Doe d. Candler* v. *Smith* (*f*); confirmed by *Doe d. Cock* v. *Cooper* (*g*), *Pierson* v. *Vickers* (*h*), and *Poole* v. *Poole* (*i*). The principal arguments, as to the intention of the testator, were afterwards noticed in the judgment of the Court; which after consideration was now delivered by

Lord ELLENBOROUGH C. J. This was an ejectment for premises in the county of *Oxford*; and the question arose

(*a*) 2 *Burr.* 1100. (*b*) 1 *Ves.* 142. (*c*) *T. Jones*, 119.
(*d*) 9 *East*, 1. (*e*) *Ib.* 400. (*f*) 7 *Term. Rep.* 531.
(*g*) 1 *East*, 229. (*h*) 5 *East*, 548. (*i*) 3 *Bos & Pull.* 620.

upon

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upon the will of *Wm. Matthews*. The testator, as appears by his will, had a wife, a son, and a daughter; and he demised the premises in question to his wife for life, and immediately after her decease to his daughter "*Mary Goff*, and to the "*heirs of her body* lawfully begotten, or to be begotten, *as te-* "*nants in common*, and not as joint tenants: but if *such issue* "should depart this life *before he, she, or they should respec-* "*tively attain their age or ages of* 21 *years*, then he devised "those premises to his son in fee." By another part of his will he devised certain other premises to his wife for life; and, after her decease, to his son and to the heirs of his body lawfully begotten, or to be begotten: but if his said son should
[671] happen to depart this life without issue, or such issue should all die before he or they should attain their age of 21 years, then he devised those premises also to his said daughter *Mary Goff*, and to the heirs of her body lawfully begotten, or to be begotten; *such issue, if more than one, to take as tenants in common, and not as joint tenants.* The testator died; his widow entered and died; *Mary Goff*, his daughter, entered and died; and the lessors of the plaintiff are the four daughters of *Mary Goff*, and the defendant is her son. The lessors of the plaintiff, therefore, contend, that *Mary Goff* took an estate for life only in the premises in question, and that each of her children took a fifth by purchase. The defendant contends that *Mary Goff* took an estate tail; and that upon her death the whole vested in him as heir in tail by descent. This will is certainly a singular one, and it is very probable the testator might not know the exact meaning of all the terms he used: but upon attending to all the provisions of the will, we think his intention must be taken to have been, that *Mary Goff* should take for life only, and that her children should take as tenants in common by purchase. The words "*heirs of the body*" are undoubtedly primâ facie words of limitation, but they may be construed to be words of purchase where it is clearly so intended; and we think that in this case such intention is clear. The provision, that they should take *as tenants in common, and not as joint tenants*, shews very distinctly that the testator was contemplating something very different from an estate tail; because an estate tail, if there were sons, would vest wholly in the eldest son to the exclusion of all the rest; and upon an estate tail there would be neither joint tenancy nor tenancy in common. And the words which follow put it past all doubt that
[672] the testator used the words, "*heirs of the body*," not as words of limi-

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limitation, to give *Mary Goff* an estate tail, but as equivalent to *children* or *issue of her body*, to give such children a distinct and independent interest. The words are, "but if such issue should depart this life before he, she, or they should respectively attain 21, then he devised to his son in fee." Whom does he mean then by "*such issue*" but the persons to whom he had before referred, by the description of the "*heirs of his daughter's body?*" And when he is contemplating the possibility that he, she, or they may depart this life before 21, to whom can he be referring but the immediate children of his daughter? The obvious intention, therefore, of this part of the will clearly is to give *Mary Goff* an estate for life, and her children a distinct and independent interest, as tenants in common. In the devise to the son of the estate given to him, the words "*heirs of the body*" are perhaps used in a different sense; at least there are no new words importing that they are to take as tenants in common: but it is observable that in the limitation over to the daughter, upon failure of issue of the son, the testator again uses the terms, "*heirs of her body,*" when he is clearly speaking of her children; and again provides that they shall take as tenants in common and not as joint tenants. There is a particular intent, therefore, fully and distinctly expressed upon the will, that the persons designated by the terms, "*heirs of the body*" of *Mary Goff*, should take as tenants in common; which they could not do if she took an estate tail. But however strongly this intent is expressed, it would not be permitted to prevail, if it were inconsistent with any other paramount general intent of the testator; and it has been urged, that in this case there is such paramount intent: not indeed that any such paramount intent is expressed, or that it is inconsistent with any express devise in the will, that this particular intent should prevail; but it is assumed that the testator never could have intended that any part of the estate in question should go over to the son, so long as there was any descendant of the daughter; and that to prevent this effect, and thereby to effectuate what he must have intended, the daughter must be held to take in tail; and that every word in the will importing that her children were to take as purchasers and as tenants in common, ought to be rejected. But how can the Court say what was the testator's intention upon a point upon which he has expressed no intention at all, and which point perhaps never entered

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entered into his contemplation? Had the question been proposed to him, whether upon the death of any of his daughter's children under 21, that child's share should go over to *Joseph*, or be divided among the daughter's other children, it is perhaps most probable the latter would have been his choice: but it is a probability only, not a certainty; and where one intention is plainly expressed upon the will, it must not be defeated by a mere conjecture that the testator might have another paramount intention inconsistent therewith. Admitting, however, that it ought to be inferred, that the testator could not have intended that any part should go over to his son, so long as there was any issue of his daughter in being, does it follow that the daughter must be held to have taken an estate tail? It might perhaps afford a reason for implying cross remainders between her children; (though it is not necessary to decide whether cross remainders are to be implied upon this will;) but it affords none for introducing so important a difference, as converting into an estate tail in the
[674] mother what would otherwise be separate and distinct interests in her children. It would be a singular conclusion, where each child was equally an object of the testator's bounty, and was to have an equal share, to hold that every child's share should be given up in the first instance to the eldest son, and that he and his issue, so long as he had any, should hold it to the exclusion of all the rest, lest the single share of a child dying under 21 should go over to the testator's son before all the other issue of the testator's daughter were extinct! The argument would stand thus: *Mary Goff* may have 10 children; one may die under 21; the testator could not have intended that child's 10th part to go over to his son *Joseph*; ergo, to prevent that consequence, though the testator has said that all his daughters' children shall take *equally*, that part of his intention must be wholly sacrificed, and the estate shall go intire to the daughter's eldest son; and no one of the eight other children shall have any thing, unless such eldest son dies without suffering a recovery and without issue! Fortunately for the intention of the testator, and for the objects of his bounty, we are not bound down by any case to adopt such a decision. We have looked through the cases which have been cited, and do not feel that we shall break in upon any of them, by holding that the children of *Mary Goff* took estates in common by purchase: this is distinctly and unequivocally expressed by the testator to be his intention: no contrary

contrary intention is expressed in any part of his will; nor is there any provision contained in the will inconsistent with this intention, nor from which a contrary intention can fairly be implied. We are of opinion, therefore, that we are bound to give effect to this intention of the testator, so plainly expressed in his will; and that we do, by holding that the plaintiff is entitled to recover.

Judgment for the plaintiff.

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GILDART *against* GLADSTONE and GLADSTONE, in Error.

Monday, Nov. 27th.

THE *Gladstones* brought assumpsit in *C. B.* against *Gildart* for money had and received by him to their use, and on other common money counts; to which the general issue was pleaded; and at the trial a special verdict was found, stating in substance that a ship called the *Kelton* was built in the county of *Devon*, in 1800, for *Gladstone* and others, then and still residing at *Liverpool*, and on the 7th of *November* in that year was registered in their names at the port of *Liverpool*, and soon afterwards was cleared out by them from *Bristol* to *St. Vincent's* in the *West Indies*, and arrived from thence at the port of *Liverpool* in *August* 1801, being her first arrival in that port; and on her arrival, her owners paid to the collectors of the dock duty the duty inwards then payable; and the ship afterwards sailed from *Liverpool* without paying any dock duty outwards. The ship afterwards performed several other

By the *Liverpool* dock acts of 8 *Ann.* and 2 *Geo.* 3. certain tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards* so as no ship shall be liable to pay more than once *for the same voyage out and home.* This is one entire duty imposed upon *one entire voyage out and home*, if there be either an outward or an inward cargo in such voyage, but without making any advance if there should be both. Thus, a *Liverpool* ship, carrying a cargo out to the *West Indies*, and bringing another home to *Liverpool*, is only liable to pay one duty, namely, the duty *outwards*; and a foreign ship bringing a cargo to *Liverpool*, and carrying another cargo out, is only liable to pay the duty *inwards*. But where a ship was built in another port, on account of the owner residing at *Liverpool*, where she was registered, and sailed to the *West Indies*, without first coming to *Liverpool*, but brought her return cargo there as to her home; this was held to be one entire and distinct voyage within the meaning of the acts, for which the duty *inwards* was payable, and did not privilege the ship from payment of the duties again when next she sailed with another cargo upon her outward voyage to the *West Indies*, though in fact she only used the dock *inwards* on her first voyage: for the privilege of using the docks with an outward and inward cargo, upon one payment of duty, is confined to *the same voyage out and home*.

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voyages from and to *Liverpool*, and always paid the dock duty inwards, and not outwards, until the 7th of *January* 1807. On the 16th of *December* 1802, by the transfer of other shares to the *Gladstones*, they became the sole owners of the ship, and registered her in the port of *Liverpool* in their names. * In *May* 1806 the ship cleared out from *Liverpool* with a cargo of goods to *Demerara*, and no duty outwards was then demanded or paid. In *November* 1806 the ship arrived at *Liverpool* from *Demerara* with a cargo of goods, when the *Gladstones*, as owners of her, paid to *Gildart* as collector of the dock duties 33*l.* 15*s.* 3*d.* being at the rate of 3*s.* per ton for the dock duty payable for the ship on her said arrival inwards at *Liverpool*. The ship, having discharged her then cargo, was afterwards, on the 7th of *January* 1807, by her said owners, cleared outwards from *Liverpool* with a cargo of goods for *Madeira* and *Jamaica*, and sailed accordingly; and upon such clearing out *Gildart*, as collector, demanded from the *Gladstones*, as owners, payment of the further sum of 33*l.* 15*s.* 3*d.* for the dock duty, and refused to permit the ship to sail until it should be paid: whereupon the owners paid the same, in order to enable the ship to clear out, having first protested against the validity of the demand. In *September* 1807, the ship arrived with a cargo of goods at *Liverpool* from *Jamaica*, and no dock duty was demanded from or paid by the owners upon such arrival inwards; and having discharged her cargo, she again cleared out and sailed in *September* 1807 from the port of *Liverpool* aforesaid with another cargo of goods to *Halifax*, when a further dock duty of 33*l.* 15*s.* 3*d.* was demanded by and paid to the collector by the owners. Since the passing of the act of the 2 *Geo.* 3. until the beginning of 1807, the *Liverpool* dock duties payable upon all ships using that port have been demanded and paid upon their respective arrivals *inwards*, and not otherwise. But whether, upon the whole matter, the *Gladstones* ought to recover the said sum of 33*l.* 15*s.* 3*d.* from *Gildart*, the jurors prayed the advice of the Court.

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[677] This case was argued in the last term by *Js. Clarke* for the plaintiff in error, and *Richardson* for the defendants. The argument turned upon the construction of two acts of parliament for granting and regulating the dock duties in the port of *Liverpool*; one of the 8 *Ann.* *c.* 12., and the other of the 2 *Geo.* 3. *c.* 86. By the first of these certain duties were given to the corporation of *Liverpool*, which are directed to be "paid

" paid for every ship, &c. (those in the service of the crown excepted) " *trading or coming into or out of* the said port *with* " *any goods or merchandize*," by the master or owners, " viz. " for every vessel so trading between the said port and *St.* " *David's Head* or *Carlisle*, 2*d.* per ton: and for every vessel " trading between *St. David's Head* and the *Land's End*, or " beyond *Carlisle* to any part in or on this side the *Shetlands*, " or to and from the *Isle of Man*, 3*d.* per ton: and for every " vessel trading to any port of *Ireland*, 4*d.* per ton: and for " every vessel trading to and from *Norway*, &c. 8*d.* per ton: " and for every vessel trading to and from *Newfoundland*, " &c. 12*d.* per ton: and for every vessel trading to and from " the *West Indies*, &c. 1*s.* 6*d.* per ton." " Such duties to be " paid at the time of such ship's discharge either *inwards or* " *outwards*, at the custom-house in the said port: *so as no ship* " *shall be subject or liable to pay the duty but once for the same* " *voyage both out and home, notwithstanding such ship may go* " *out and return back with a lading of any goods or merchandize.*" This act was continued by various other acts, amongst others, by the 2 *Geo.* 3. *c.* 86. which enacts (*s.* 7.) " that all and " every the said tonnage duties to be hereafter paid or made " payable by any of the said former acts or this act, upon " every ship, &c. coming into or arriving in the said port of " *Liverpool*, shall be made due, payable, and be paid at the [678] " dock office in *Liverpool* to the collector, &c. upon the arrival " of every such ship, &c. or other vessel *inwards* at *Liverpool*, " and before such ship or other vessel shall be discharged or " cleared inwards at the custom-house, &c. any thing in the " said acts or this act, or any of them, to the contrary not- " withstanding." And by another section, " to the intent " that the said duties may be truly paid, the collector of the " customs, &c. within the port of *Liverpool*, shall not receive " any entry or cocquet, or other discharge or clearance, or " take any report inwards for any vessel, &c. liable to the pay- " ment of the said duties, until the same duties shall be paid " to the said collector or receiver, and until such master, " owner, &c. of such vessel, subject and liable to the pay- " ment thereof, shall shew to such officer a receipt under the " hand of such collector for the same, under the penalty of " 20*l.*"

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

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GILDART *a ainst* GLADSTONE and Another, in Error.

This case came before the Court upon a writ of error from the Common Pleas; and as it depends upon the construction of two acts of parliament, the provisions of which have appeared to that Court in a different point of view than what they have appeared to us, we have taken time to consider of it to the present term. It was an action brought there for money had and received; and the question in it was, whether the collector of the *Liverpool* dock duties were warranted in insisting upon payment of dock duties on the clearing outwards of the ship *Kelton* on the 7th of *January* 1807. A special verdict was found, and the substance of it was this; that the ship
[679] *Kelton* was built for the plaintiffs and certain other persons residing in *Liverpool* in the year 1800. That she was built in *Devonshire*, and registered at *Liverpool* on the 7th of *November* 1800. That she was afterwards cleared out from *Bristol* to *St. Vincent*'s, and arrived from thence in the port of *Liverpool* in *August* 1801. That this was her first arrival at that port: that she then paid the *Liverpool* dock duties upon her arrival *inwards*. That she sailed again, without paying any dock duties outwards. Then she performed several other voyages from and to *Liverpool*, and always paid the dock duty *inwards*, and not outwards, till the 7th of *January* 1807. That in *December* 1802 the other part owners transferred their shares to the plaintiffs in the cause below; and that they registered the ship at *Liverpool* in their own names. That in *May* 1806 the ship cleared outwards with a cargo for *Demerara*, but paid no duty outwards; and that she returned in *November* 1806 with another cargo, and paid the duty on her arrival *inwards*. That on the 7th of *January* 1807 she cleared *outwards* with a cargo for *Madeira* and *Jamaica*, and the defendant below, as collector of the dock duties, *insisted upon payment of duty on her so clearing*, and refused to permit her sailing till it was paid; and that the plaintiffs below paid it accordingly, under protest. That the ship returned with a cargo in *September*, when no duty was demanded, and sailed again for *Halifax* with another cargo, when duty was again demanded and paid. That until the beginning of 1807 the dock duties payable on ships using that port were demanded and paid on their arrivals *inwards*, and not otherwise. The action was brought to recover back this money: the Court of Common Pleas thought the collector not warranted in demanding it, and gave judgment for the plaintiffs below.

The

The statutes affecting the case are the *Liverpool* dock acts of the 8 *Ann.* and 2 *G.* 3. *c.* 86. By 8 *Ann. s.* 3. a duty is to be paid for every ship trading or coming into or out of the port of *Liverpool* with any goods or merchandize, and the rate of duty varies according to the different ports between which the vessel trades. If she trade between *Liverpool* and certain neighbouring ports in this kingdom, the duty is 2*d.* or 3*d.* a ton: if she trade to *Ireland* and certain other specified places, 4*d.*: if she trade to and from *Norway*, *Denmark*, and certain other places, in some cases it is 8*d.*, in some 1*s.*, and in some 1*s.* 6*d.* By *s.* 4. the duties are to be paid at the time of the ships' discharge either inwards or outwards, so as no ship shall be subject or liable to pay the duty but once for the same voyage, both out and home, notwithstanding such ship may go out and return back with a lading of any goods or merchandize. By *s.* 8. no officer shall give any cocquet or other discharge, or take any *report outwards* for any ship as aforesaid, or in the said dock or limits, until the duties are paid and a receipt for them produced. By stat. 2 *G.* 3. *c.* 86. *s.* 6. one third part of the former duties are to be paid, and they are to be collected and levied in the manner, &c. prescribed by the former acts. By *s.* 7. the tonnage duties payable upon any ship coming into or arriving in the port shall be payable upon the arrival of such ship *inwards* at *Liverpool*, and before such ship shall be cleared inwards at the custom-house: and by *s.* 8. the officer shall receive no entry or cocquet, or other discharge or clearance, or take any report inwards for any ship, &c. *British* or foreign, subject to the duties, until the duties are paid and a receipt for them produced.

These are the provisions which bear upon this case, and the questions raised upon them are two; 1st, Whether the duty be payable in any case, except upon ships coming inwards? And 2dly, Whether the voyage out, upon which this ship sailed on the 7th of *January* 1807, were not under the stat. 8 *Ann. s.* 4. to be united with her last preceding voyage inwards; and whether the two did not constitute, within the meaning of that clause, *the same voyage?* The first question originates from the 7th and 8th sections of the stat. 2 *G.* 3.; and because those clauses introduce provisions for enforcing payment *inwards*, it is contended that payment can never be demanded upon an outward-bound vessel. When it is considered, however, how the case stood under the stat. 8 *Ann.* when those provisions

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were made, it will be found that the collecting *outwards* in cases which would admit of it was intended to be left as before; and the only alteration meant to be introduced was to give an additional security for collecting *inwards* in cases which admitted of an inward collection. The previous provision for collecting on *outward*-bound vessels was considered sufficient; that for collecting on *inward*-bound vessels, defective; the former were therefore to be left as they were, and the latter to be remedied. By stat. 8 *Ann. s.* 3. the duty was to be paid upon every ship bringing a cargo into the port of *Liverpool*, or taking a cargo out of it; and by *s.* 4. it was to be payable at the time of the ship's discharge either inwards *or outwards*, so as the ship paid only once for the same voyage. The company, therefore, had a clear right upon ships *taking out* a cargo, though they had never brought one *in*, and had a right [682] to demand it upon the ship's sailing outwards. By *s.* 8. a provision was made to secure the payment upon ships sailing outwards, by forbidding the officer from giving her a discharge till she had paid the duties, and produced a receipt for it; but no similar provision was made in respect of ships sailing *inwards*. The stat. 2 *G.* 3. remedied this defect, by introducing a similar provision as to ships liable to pay the duty on sailing *inwards*, with that which had before been made with respect to ships sailing *outwards*, and so made the system complete. If the duty were payable on her sailing outwards, the officer could not let her clear outwards (under stat. 8 *Ann.*) unless she produced a receipt for the duty: and, if the duty were payable on her sailing inwards, the officer would not let her clear inwards (under the stat. 2 *G.* 3.) without similar proof that the duty was paid. It was to remedy this defect, therefore, in the system alone, that the provision alluded to in the stat. 2 *G.* 3. was made; to extend the rights of the company, not to narrow them: to give them additional aid in collecting the duties, not to take away any previous powers. To hold that the duty could never be collected but upon an inward cargo, might subject the port to great losses. If a ship sailed in ballast, nothing would be payable for her sailing in: if she sailed out with a cargo, she might be lost, or might wilfully avoid returning to that port. It may be true that in the latter case the company might have a remedy for their duties; but it would be a less immediate and operative remedy than the legislature meant to give them. We are therefore of opinion, that

that the duty is payable upon ships which sail with cargoes *outwards*, except in cases in which they paid the duty on sailing *inwards*, and where such sailing outwards can be connected with the previous sailing inwards,* so as to constitute under the stat. 8 *Ann. s.* 4. *the same voyage.*

And this brings us to the second question, Whether the sailing out on the 7th of *January* 1807 could be connected with the previous inward voyage? The words of the proviso which raise the point are these: "so as no ship shall be subject or liable to pay the duty but once *for the same voyage out and home.*" What then is meant by "the same voyage out and home?" It may mean that upon each voyage from the port to which the ship belongs and back there shall be only one payment; that a *Liverpool* ship may carry a cargo out and bring another home, and that other ships may bring a cargo in and take a cargo out: and this seems the natural meaning of the words. The whole of this constitutes part of the same voyage, out and home. But can the words fairly be carried to such an extent as to unite the voyages in question? This ship belonged to *Liverpool*; she was registered there, and that was her home. Upon her first voyage she sailed, not from *Liverpool*, but from *Bristol*; but when she came back, she came to *Liverpool* as her home; and there ended what would be considered in common parlance as her first voyage out and home. When she sailed again, she sailed upon what, in the common understanding of mankind, would be called a new voyage; with new stores, and probably with a different crew: her contract with her former crew would of course have ceased, and so would her charter-party, and the insurances upon her, if made in the ordinary way, for the voyage out and home. And if this were a new voyage, each of her voyages out and home ended at *Liverpool*; and when she sailed on the 7th of *January* 1807, she commenced a new voyage. It is true that by this computation she pays whole duties upon one voyage, though she only used the dock on that voyage *inwards*; whereas if she had used it both outwards and inwards, no larger duties would have been payable. This, however, arises from the wording of the act. The act does not impose distinct duties upon an inward and outward cargo, but *one entire duty* upon each voyage, if there be either an inward cargo or an outward one in such voyage; but without making any advance if there should be both; and if the ship, instead of having both, has only one,

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the whole duty is still payable. It may be singular indeed to be paying as much for once using the dock, as would be payable if twice used; but if the ship owner have the option of using it twice, and use it once only, and be apprized by the act that if the ship do not use it the second time, the full duty will still be payable, he has no right to complain. Suppose a ship comes to *Liverpool* in ballast, carries out an outward cargo, and makes several other voyages without touching at *Liverpool*, and then comes into *Liverpool* with a cargo inwards; would there be an exemption from payment for the latter cargo, because the whole duty had been paid for the former? The ship owner would say, that he had in fact had no greater use of the docks than he would have been entitled to have had upon one payment; that is, that one payment would have entitled him to land an inward cargo, and carry back on outward one; or, vice versa, to carry out an outward one, and bring another home. But would not the answer have have been, that you have no right under these acts of parliament for both an outward and an inward cargo, unless they be upon the same voyage? And is not that the answer here, that the two cargoes must be upon the same voyage, out and and home? The act of *Ann.* has said in direct terms that they must. Was then the voyage out, when the ship sailed on the 7th of *January* 1807, part of the *same* voyage *out and home* upon which the ship had returned in the preceding *November* 1806? The special verdict has not found that it was, as a matter of fact; and can we say it was, as matter of law? If it were, it was a voyage *out from* Demerara, and *home to* Madeira and *Jamaica*; and her next voyage was a voyage *out from* Jamaica, and *home to* Halifax! To call these parts of the same voyage *out and home* does not fall in with what has hitherto been understood by "a voyage out and home;" and must we not suppose that the legislature intended to use these words in the sense in which they are commonly understood; that is, as descriptive of a voyage commencing from and terminating in the country to which the ship belongs, or (as here) in some particular port of such country. If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, and most against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive;

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and

and because the public ought not to be charged unless it be clear that it was so intended; but when plain words are used, their ordinary sense must be given to them; and we think the words here used are plain. Upon these grounds it appears to us that the collector, the defendant below, was warranted in demanding, and having received it, is entitled to retain the money in question, and of course that the judgment of the Common Pleas in favour of the Plaintiffs in the original action, and against the Defendant below, now the Plaintiff in error, must be reversed.

Judgment of reversal accordingly.

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PRINCIPAL MATTERS.

ABATEMENT.

AFTER declaration filed conditionally in a town cause until special bail should be put in and perfected, and notice thereof served, the defendant has only four days for pleading in abatement: and if he put in special bail on the 4th day, which are excepted to on the 5th, and not justified till the 9th, he is too late then to plead in abatement: and the plaintiff having demanded a plea, and none other being pleaded, is entitled to sign judgment as for want of a plea. *Binns* v. *Morgan*, T. 49 *G.* 3. Page 411

ACTION ON THE CASE.

See COPYRIGHT.

1. Damages, ultrà the mere loss of service, having been given against the defendant for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition. *Irwin* v. *Dearman*, *E.* 49 *G.* 3. 23
2. One who is injured by an obstruction in a highway, against which he fell, cannot maintain an action on the case for the damage, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. *Butterfield* v. *Forrester*, *E.* 49 *G.* 3. Page 60
3. An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature: and if the declaration, after describing the house as situate in a certain street called A. street, in the parish of O. A. (there being no such parish) afterwards state the nusance to be *erected and placed in the parish aforesaid*; it will be ascribed to *venue*, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies* v. *Duncombe*, *E.* 49 *G.* 3. 226
4. In case against a judgment creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa. held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the

the consent of the now plaintiff, were primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford* v. *Woodgate*, *T.* 49 *G.* 3. Page 297

5. An action on the case lies upon the stat. 6. *G.* 1. *c.* 16. *s.* 1. by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover his damages "*in the same manner and form* as given by the stat. 13 *Ed.* 1. *st.* 1. *c.* 46. for dikes and hedges overthrown by persons in the night;" upon which the usual course of proceeding has been by the writ of noctantur. *Thornhill* v. *The Township of Huddersfield*, *T.* 49 *G.* 3. 349

6. Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between the 11th and 16th of *September*, a general notice on the 17th to the parson, to take away *all the tithes of his* (the plaintiff's) *lands* within two days, is sufficient whereon to found the like action. *Kemp* v. *Filewood*, Clerk, *T.* 49 *G.* 3. Page 358

7. Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights. *Daniel* v. *North*, *T.* 49 *G.* 3. Page 372

8. Firing at wild fowl to kill and make profit of them by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of and damage to the decoy, for which an action on the case is maintainable by the owner. *Carrington* v. *Taylor*, *M.* 50 *G.* 3. 571

9. An action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away and the owner damnified. *Keeble* v. *Hickeringill*, *T.* 5 *Ann.* 575

ADDITION.

See AFFIDAVIT, 2.

AFFIDAVIT.

1. Affidavit, intitled "In the King's Bench," upon which the Attorney General had filed an information ex officio against the defendant, permitted to be read in aggravation, after judgment by default. *The King* v. *Morgan*, *M.* 45 *G.* 3. 457

2. Where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence; his describing

scribing himself bonâ fide in an affidavit in court as *late* of such prison, is sufficient to satisfy the rule of Court of *M.* 15 *Car.* 2. ordering the true place of abode of every person making affidavit in *B. R.* to be inserted. But a deponent who had left one place of residence, and resided in another, would not satisfy the rule by describing himself as *late* of the former. *Sedley* v. *White*, *M.* 50 *G.* 3. Page 528

AFFIDAVIT, *to hold to Bail.*

Affidavit of debt, stating that the defendant was indebted to the plaintiff in so much for goods sold and delivered (not saying *by the plaintiff*) to the defendant, is insufficient. *Taylor* v. *Forbes*, *T.* 49 *G.* 3. 315

AGENT.

See VENDOR AND VENDEE, 2.

AGREEMENT.

See PAYMENT, 1. VENDOR AND VENDEE.

1. If it appear to have been the understanding of the parties to a contract at the time, that it was not to be *completed* within a year, though it might be and was in fact *in part performed* within that time, it is within the 4th clause of the statute of frauds 29 *Car.* 2. *c.* 3.; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intitled "*Shakespeare* subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Boydell* v. *Drummond*, *E.* 49 *G.* 3. 142

2. A contract by the owner of a close cropped with potatoes, made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack: the defendant to get them out of the ground *immediately*; is not a contract for any *interest in land* within the 4th section of the statute of frauds, but the same as if the potatoes which had done growing and were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by the defendant. *Parker* v. *Staniland*, *T.* 49 *G.* 3. Page 362

3. Where a debtor entered into an agreement with his creditors, whereby they agreed to receive 20*l.* per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person, (also a creditor,) which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed it, and it did not appear that he had actively induced any of the other creditors or the surety to sign it. And that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors. *Steinman* v. *Magnus*, *T.* 44 *G.* 3. 390

3. The defendant being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds, (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l.* *to his credit in account*; for which he was to purchase 50,000*l.* stock, (then at 51¼) in their names, and account to them for the dividends upon such stock as from the last dividend-day: after which agreement, the plaintiffs, acting upon the basis of it, (though the defendant never purchased the stock so agreed upon,) *entered in their books* the sum of

of 25,000*l.* *to the credit* of the defendant, and continued to honour his drafts from time to time; crediting him also with other sums actually paid by him; and wrote off the amount of his bonds to his credit, and delivered them up to him.

Held that this agreement to repay *the new credit* of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.*, *credited* under that agreement by the plaintiffs *to the defendant in his banking account*, was to be reckoned against them upon balancing the account of debtor and creditor between them. *Boldero and Another* v. *Jackson*, *M.* 50 *G.* 3. Page 612

ANNUITY.

Where a party gave a bond to secure an annuity, whereby he bound himself, his *heirs*, executors, &c.; a memorial describing such security, generally, as *a bond from A.* to *B.* in such a sum, &c. is defective and void under the annuity act 17 *G.* 3. *c.* 26. But the Court only set aside the judgment entered up by warrant of attorney on such bond, and directed the warrant of attorney which was in court to be deposited with the proper officer of the court. *Denne* v. *Dupuis*, *E.* 49 *G.* 3. 134

APPRENTICE.

See SETTLEMENT BY APPRENTICESHIP.

ARREST.

See ASSUMPSIT, 2.

A plaintiff who was attending from day to day at the Sittings, in expectation of his cause being tried, was privileged from arrest whilst waiting for that purpose at a coffee-house in the vicinity of the court before the actual day of trial. *Childerton* v. *Barrett*, *T.* 49 *G.* 3. Page 439

ASSUMPSIT.

See PAYMENT, 1.

1. An undertenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for *money paid* to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was *the money* of the *undertenant*. *Moore* v. *Pyrke*, *E.* 49 *G.* 3. 52
2. Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an assumpsit, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months, to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hull* v. *Odber*, *E.* 49 *G.* 3. 118
3. A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise office as *a dealer* in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a *dealer* in tobacco within

within the meaning of the stat. 29 *Geo.* 3. *c.* 68. *s.* 70., which requires every person, who shall *deal* in tobacco, first to take out a licence under a penalty. *Johnson* v. *Hudson*, *E.* 49 *G.* 3. Page 180

4. An attorney not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of stat. 2 *Geo.* 2. *c.* 23. *s.* 23. requiring a bill to be delivered a month before the action brought. *Mowbray, One, &c.* v. *Fleming, T* 49 *G.* 3. 285

5. The stat. 17 *G.* 3. *c.* 42. which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. *Law* v. *Hodson*, *T.* 49 *G.* 3. 300

6. A contract by the owner of a close cropped with potatoes made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the statute of frauds, but the same as if the potatoes which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. *Parker* v. *Staniland*, *T.* 49 *G.* 3. 362

7. The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered: held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesman: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the ship after the legal title was transferred to him. *Trewhella* v. *Rowe*, *T.* 49 *G.* 3. Page 435

ATTORNEY.

An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the stat. 2 *G.* 2. *c.* 23. *s.* 23., requiring a bill to be delivered a month before the action brought. *Mowbray, One, &c.* v. *Fleming*, *T.* 49 *G.* 3. 285

AUGMENTED CURACY.

Proof of a curacy *augmented* is made by shewing an order for the augmentation of it, entered in a book and signed by the governors of Queen *Anne*'s bounty, according to stat. 1 *G.* 1. *st.* 2. *c.* 10. *s.* 20.; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation

poration seal of the governors to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute, *s.* 21. and 9 *G.* 2. *c.* 36. *Doe, Lessee of Graham*, v. *Scott*, *M.* 50 *G.* 3. Page 478

AWARD.

1. Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award; rejoinder, stating the whole award; (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission:) and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher* v. *Pimbley*, *E.* 49 *G.* 3. 188
2. Under a submission of all matters in difference between *A.* and *B.*, an award on matters in difference between *A.* and *B.* *C.* and *D.* jointly; directing *A.* to pay *B.* a certain sum, as a compensation for coals gotten by *A.* belonging to *B.* or to *B.* and others; and directing *B.* to give *A.* a bond to indemnify him against the claims of *C.* and *D.*; is bad. *ibid.*
3. After the time was out for moving to set aside an award, made a rule of court, the Court granted an attachment for non-performance of it, and would not drive the plaintiff to his action on the submission bond, on an affidavit disclosing that the arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority; but that the defendant afterwards, and before the umpire had proceeded, having objected to his appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attornies agreed on a third person; in consequence of which the umpire objected to was called on by the plaintiff's attorney to proceed, and made his award within time. *Oliver* v. *Collings*, *T.* 49 *G.* 3. Page 367

BAIL.

See SCIRE FACIAS.

1. Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, *or* to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang* v. *Monprivat*, *T.* 49 *G.* 3. 316
2. If bail to the sheriff be put in above and exception taken before an assignment of the bail bond, they are bound to justify notwithstanding such assignment *Hill* v. *Jones*, *T.* 49 *G.* 3. 321

BANKRUPT.

1. The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt, (though before the date of the commission,) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half-yearly, given for the balance of an account consisting, amongst other articles, of *money lent* by the defendant to the bankrupt; such note not being given *in the usual and ordinary course of trade and dealing*, so as to be protected by the stat. 19 *G.* 2. *c.* 30. even supposing a *promissory note* to be within that statute, which only mentions *bills of exchange*. *Har-*

Harwood, &c. Assignees of Odell, a Bankrupt, v. *Lomas*, *E.* 49 *G.* 3. Page 127

2. Where the act of delivering goods by a trader, to secure the defendant who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him,) it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time. Nor will the transaction, being *bonâ fide* and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world. *Crosby, &c. Assignees of Boucher, a Bankrupt*, v. *Crouch*, *E.* 49 *G.* 3. 256

3. A *farmer and grazier*, exercising also the business of a *drover* by buying and selling cattle from time to time beyond the occasions of his farms, is exempted from the operation of the bankrupt laws by stat. 5 *G.* 2. *c.* 30. *s.* 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader. *Bolton* v. *Sowerby*, *T.* 49 *G.* 3. 274

BASTARDS.

See MARRIAGE, I.

BILLS OF EXCHANGE, &c.

1. A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10*s.* per cent., but the broker was not to advance the money himself, nor was his name on the bills: held that a bill accepted by the defendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 *Ann. c.* 16. *Dagnall* v. *Wigley*, *E.* 49 *G.* 3. Page 43

2. A promissory note for the amount of the fair expences of the prosecution, agreed to be given at the recommendation of the Court of Quarter Sessions by a defendant who stood convicted before them of a misdemeanor in ill treating his parish apprentice; for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 *G.* 3. *c.* 57.; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal, and may be enforced by action. *Beeley* v. *Wingfield*, *E.* 49 *G.* 3. 46

3. Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor, before and at the time when the bill became due; and within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders, communicating such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill, and who had transmitted it to the holders in *London*; yet that did not dispense with such holders giving notice of the dishonour in due time to the indorsers, *Esdaile* v. *Sowerby*, *E.* 49 *G.* 3. 114

4. The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt, (though before the date of the commission,) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half-yearly, given for the balance of an account consisting, amongst other articles, of *money lent* by the defend-

ant to the bankrupt; such note not being given *in the usual and ordinary course of trade and dealing*, so as to be protected by the stat. 19 *G.* 2. *c.* 32. even supposing *a promissory note* to be within that statute, which only mentions *bills of exchange*. *Harwood, &c. Assignees of Odell, a Bankrupt*, v. *Lomas*, *E.* 49 *G.* 3. Page 127

5. A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *London* on *Lisbon*, upon evidence that the enemy were in possession of *Portugal* when the bill became due, and *Lisbon* was then blockaded by a *British* squandron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances been negotiated between them through *Hamburgh* and *America* about that period; the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tastet* v. *Baring*, *E.* 49 *G.* 3. 265

BRICKS.

The stat. 17 *G.* 3. *c.* 42., which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size, unknown to the buyer the seller cannot recover the value of them. *Law* v. *Hodgson*, *T.* 49 *G.* 3. 300

BROKER.

1. Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *bought* and *sold* notes, (delivered over to the respective parties by the broker,) of "*payment in one month, money*," may be paid for by the buyer to the broker *within the month*, and that *by a bill of exchange* accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, *generally*, which was larger than the amount of either demand, but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer, *Favenc* v. *Bennett*, *E.* 49 *G.* 3. Page 36

2. A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10*s.* per cent.; but the broker was not to advance the money himself, nor was his name on the bills: held that a bill accepted by the defendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 *Ann. c.* 16. *Dagnall* v. *Wigley*, *E.* 49 *G.* 3. 43

BURNING WOODS.

An action on the case lies upon the stat. 6 *G.* 1. *c.* 16. *s.* 1. by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover

recover the damages *in the same manner and form* as given by the stat. 13 *Ed.* 1. *st.* 1. *c.* 46. "for dikes and hedges overthrown by persons in the night;" upon which the usual course of proceeding has been by the writ of noctanter. *Thornhill* v. *The Township of Huddersfield*, *T.* 49 *G.* 3. Page 349

CANAL COMPANY.

Where by statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1*d.* &c. per ton per mile, upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through land not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1*s.* per ton, *the company paying back* 6*d. per ton*, is illegal and void; 1st, As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2dly, As extending in effect the power of the company to purchase lands beyond the limits assigned by the act. 3dly, As enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage. 4thly, Because the tolls could in no instance be reduced but at a general assembly, &c. and this in fact operates as a reduction of the tolls pro tanto. Also Quære, 5thly, Whether such a contract be not void, as diminishing the inducement (by favouring individuals, to a general reduction of the tolls, when proper, for the benefit of the public. *Lees and Others* v. *The Company of Proprietors of the Canal Navigation from Manchester to Ashton-under-Line and Oldham*, *M.* 50 *G.* 3. Page 645

CERTIFICATE *of the Speaker of the House of Commons, as to Costs of Election Committee.*

See COSTS, 2.

COMPOUNDING DEBTS.

See DEBTOR AND CREDITOR.

CONDITION.

Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatsoever person should, by virtue of the will, become possessed of or entitled to the estate should, from the time he became so possessed, take upon himself the surname of *Thelwall, and make the mansion his usual and common place of abode and residence:* held that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainderman over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe. *Doe, d. Kenrick and Others*, v. *Lord Wm. Beauclerk*, *M.* 50 *G.* 3. 657

CONDITION PRECEDENT.

See FREIGHT, 4.

CONSPIRACY.

See NEW TRIAL, 1.

CONSTABLE.

See CORPORATION, 3.

CONUZANCE.

Claim of conuzance made by the vice-chancellor of the university of *Oxford*, in the vacancy of the office of chancellor by death, on behalf of the university, allowed in a plea of trespass. *Williams* v. *Brickenden*, *M.* 50 *G.* 3. Page 543

CONVEYANCE.

See EXECUTORS. 2.

COPYHOLD.

1. Where copyholder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut bonâ fide for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant, *Doe, Lessee of Foley*, v. *Wilson*, *E.* 49 *G.* 3. 56

2. An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *ibid.*

3. A copyholder surrenders "his copyhold cottage, *with a croft adjoining*," and a common right, &c. belonging to the same; "*all which premises* (as the surrender describes it) *were then in his own possession:*" and on the same day he devises "all his copyhold c*ottage and premises then in his own possession.*" In fact *the croft*, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet held, that the whole passed under the description of "all his copyhold *cottage and premises*;" the words, "*then in his own possession*," being merely a mistaken description, following the mistake of the surrender, which mentions *the croft* with the rest as then being in his possession. *Goodright, Lessee of Lamb*, v. *Pears*. *E.* 49 *G.* 3. Page 58

4. Devises of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe, Lessee of Blackscll and Others*, v. *Tomkins*, *E.* 49 *G.* 3. 185

5. A surrender out of court to the use of his will, made by the surrenderee of a copyhold before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittances. *Doe, Lessee of Tofield*, v. *Tofield*, *E.* 49 *G.* 3. 246

6. The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent; but in 1649 *the parliamentary survey* charged the churchwardens with 6*d.* rent, under the head of "*freehold* rents;" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: held that this was evidence to be submitted

mitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it. *Roe, Lessee of Johnson*, v. *Ireland*, *T.* 49 *G.* 3. Page 280

COPYRIGHT.

An action is maintainable on the stat. 8 *An. c.* 19., for pirating a single sheet of music. *Clementi* v. *Goulding*, *E.* 49 *G.* 3. 244

CORONER.

A mandamus to the justices in sessions, to allow an item of charge in the coroner's account refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and this Court seeing no reason for interfering with that judgment. *The King* v. *The Justices of Kent*, *E.* 49 *G.* 3. 229

CORPORATION.

1. Assuming that under the stat. 11 *G.* 1. *c.* 4. an election began at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote; and thereupon, the remaining votes being equal, he declared the same, and that no election could be made; and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election; held that such election was void even under the statute, as a surprize and fraud on the other electors. *The King* v. *Gaborian*, *E.* 49 *G.* 3. Page 77
2. The mayor having summoned the corporation to meet and elect a new mayor on the usual day, a majority, when met, cannot, against the consent of the mayor, nor, (as it seems, without the unanimous consent of the whole body,) proceed to any other business, such as that of filling up vacancies in the common council; there being no certain day fixed for this purpose; though the general custom had been to fill up all vacant offices on the day of electing the new mayor. *Machell* v. *Nevinson*, *E.* 10 *G.* 1. MS. cited. 84
3. A high constable may be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county in itself, by virtue of the stat. 13 *G.* 2. *c.* 18.; though no such officer had been appointed or such rate levied before; the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purpose. *Weatherhead* v. *Drewry*, *E.* 49 *G.* 3. 168
4. Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances which had always been appropriated to the several use and residence of

the four vicars; and by ancient custom upon every vacancy the vicars, according to seniority, made their option of taking in severalty any one of such vicarial houses, with the appurtenances; of which option an entry was made in the corporation-act book and signed by the vicars: held that a new vicar having made an option, which was entered in the act-book and signed by all, to take one of the vicarial houses, *with certain appurtenances*, then in the possession of *J. S.*; which were *not all the appurtenances* formerly annexed to and enjoyed with the same house by his predecessors therein; could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the act-book, as against the corporation; yet no such option having been made and entered in the book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle, Lessee of Miller, Clerk*, v. *Wilson, T.* 49 *G.* 3. Page 334

COSTS.

1. The plaintiff, in trespass for breaking his close, who recovers less than 40*s.* is not entitled to costs of increase merely because a view was granted before trial, though upon the application of the defendant. *Flint* v. *Hill, E.* 49 *G.* 3. 184
2. Where an election committee had, under the stat. 28 *G.* 3. *c.* 52., reported to the House of Commons, that *two several* petitions against the return of members to serve in parliament for *East Grimstead* were frivolous and vexatious; whereupon the then Speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions *jointly*, and had first granted a certificate of the amount of such *joint* taxation, and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition *separately*, and how much *jointly*: held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed *separately* on each distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new parliament; the act mentioning *the Speaker* generally. *Strachey, Bart.* v. *Turley, E.* 49 *G.* 3. Page 194
3. Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.*; plea, 1. Not guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription. Held that on verdict for the plaintiff on the general issue, and for the defendant on the prescription; the latter going to the whole declaration, the plaintiff is not entitled to costs. *Vivian* v. *Blake, E.* 49 *G.* 3. 263
4. After judgment by default in debt on bond to secure an annuity payable quarterly; and scire facias thereon, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 *W.* 3. *c.* 11.; held that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings *on payment of future damages, costs, and charges, toties quoties*; though the 3d section only gives costs in scire facias after *plea* or *demurrer*. *Brooke* v. *Booth, T.* 49 *G.* 3. 387

COUNTY RATE.

See RATE *for Town corporate.*

COVENANT.

1. A distinct covenant in a lease, whereby the tenant bound himself to pay the *property tax*, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 *G.* 3. *c.* 65. *s.* 115. will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell* v. *King*, *E.* 49 *G.* 3. Page 165

2. Releasors covenanted that, *for and notwithstanding any act, &c. by them, or any or either of them done to the contrary*, they had good title to convey certain lands in fee; *and also* that they or some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, had good right and full power to grant, &c.; *and likewise* that the releasee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever;* and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. *save and except the chief rent* issuing and payable out of the premises to the lord of the fee. Held that the *generality* of the covenant for *quiet enjoyment* against the releasors and their heirs, *and any other person or persons whatsoever*, was not restrained by the *qualified* covenants for *good title* and *right to convey* for and notwithstanding *any act done by the releasors to the contrary.*

But if the covenant for *quiet enjoyment* were to be restrained to the acts of the releasors by any qualifying context, then the declaration in covenant, stating it by itself in its own absolute terms, without such qualifying context belonging to it, seems to be an untrue statement of the deed *in substance and effect*, which the defendant may take advantage of on the general issue of non est factum, as a variance and ground of nonsuit or of a verdict for him. *Howell* v. *Richards*, *M.* 50 *G.* 3. Page 633

COVERTURE.

See HUSBAND AND WIFE, 2.

CURACY.

See AUGMENTED CURACY.

CUSTOM.

Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and, by ancient custom, upon every vacancy the vicars according to seniority made their option of taking in severalty any one of such vicarial houses with the appurtenances; of which option an entry was made in the corporation act book and signed by the vicars: held that a new vicar, having made an option, which was entered in the act book and signed by all, to take one of the vicarial houses, *with certain appurtenances*, then in the possession of *J. S.*, which were *not all the appurtenances* formerly annexed to and enjoyed with the same house by his predecessors therein; could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the act book, as against the corporation; yet no such option having been made and entered in the book, according to the custom, he had no separate legal title to the premises in

question, on which he could maintain an ejectment. *Goodtitle, Lessee of Miller, Clerk*, v. *Wilson*, T. 49 G. 3. Page 334

CUSTOM-HOUSE CAPTURE.

See PRIZE, 1.

DEALER IN TOBACCO.

See ASSUMPSIT, 3.

DEBT.

See PLEADING, 2.

DEBTOR AND CREDITOR.

Where a debtor entered into an agreement with his creditors, whereby they agreed to receive 20*l.* per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person (also a creditor,) which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed it, and it did not appear that he had actively induced any of the other creditors or the surety to sign it. And that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors. *Steinman* v. *Magnus*, T. 49 G. 3. 390

DEVISE.

1. One having power to appoint lands by will amongst children; and having other lands; by his will (not referring to the power) gives legacies to his several children; and then devises all the rest, residue, and remainder of his lands, &c. and personal estate, *after payment of his debts, legacies, and funeral expences*, to his eldest son: held that the power was not thereby executed. *Doe, Lessee of Hellings and Wife*, v. *Bird*, E. 49 G. 3. 49

2. A copyholder surrenders "his copyhold cottage, *with a croft adjoining*," and a common right, &c. belonging to the same: "*all which premises* (as the surrender describes it) *were then in his own possession*:" and on the same day he devises "all his copyhold *cottage and premises then in his own possession*." In fact *the croft*, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet held that the whole passed under the description of "all his copyhold *cottage and premises*;" the words "*then in his own possession*" being merely a mistaken description following the mistake of the surrender, which mentions *the croft*, with the rest, as then being in his possession. *Goodright, Lessee of Lamb*, v. *Pears*, E. 49 G. 3. Page 58

3. Two being seized of undivided moieties, as tenants in common, in fee, quære whether a devise by the one of *his half part* to the other will carry the fee? But at any rate the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, *ordered* the lease of his house, with his furniture, to be sold, and *all the rest and residue* to be divided amongst other persons; and appointed executors: for such division of the *rest and residue* must be intended to be made *by the executors* as such, and therefore confined to *personal* property. *Bebb* v. *Penoyre*, E. 49 G. 3. 160

4. After introductory words, "as touching" the testator's "wordly *estate*," &c. he devised a cottage house, &c. to *A.* and his heirs, and also gave to *B.*, whom he made his executrix, "all and singular his lands, messuages, and tenements *by her freely to be possessed and enjoyed*:" held that the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispunishable of waste; and that the word *estate*, in the introductory clause, could not be brought down into

into the latter distinct clause. *Goodright, Lessee of Drewry*, v. *Barron*, *E.* 49 *G.* 3. Page 220

5. Real property may pass under the description of "*personal* estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention. *Doe, Lessee of Tofield*, v. *Tofield*, *E.* 49 *G.* 3. 246

6. Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land *as executors*, but as *devisees in trust* and *joint tenants*. *Denne, Lessee of Bowyer*, v. *Judge*, *T.* 49 *G.* 3. 288

See further EXECUTORS, 2.

7. A devise of all the residue of the testator's "money, stock, *property*, "and *effects*, of what nature or kind "soever," to *A.* and *B.* "to be "divided equally between them, "share and share alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating, "as to my money and *effects*, I dispose thereof as follows," &c.: and then proceeded to dispose of parts of his *real* estate. And again, having lands interlying with another's lands, he directed the purchase of the latter, if offered for sale, to be added to his *other adjoining property*. *Doe, Lessee of Andrew*, v. *Lainchbury*, *T.* 49 *G.* 3. 290

8. A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator, having before devised certain other real estates in strict settlement, and given annuities for life to *A.*, *B.*, and *C.*; which annuities he charged upon "all and singular his manors, lands, tenements, and hereditaments, &c. not before disposed of;" devised "all and singular his said manors, lands, &c. and other his real estate *so charged with and subject to the said three several annuities as aforesaid*; although one of the annuitants had a prior life estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly or by necessary implication excluded from its operation; and no intention of the testator to exclude the reversion is necessarily to be implied from the circumstance, that the charge of one of the annuities could not attach upon this reversion, as the other two might; and the clause will be construed reddendo singula singulis. *Doe, Lessee of Earl and Countess Cholmondeley*, v. *Weatherby*, *T.* 49 *G.* 3. Page 322

9. Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death, to the *use* of his nephews and the survivor for their lives: remainder to the *use* of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases *in trust* for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the *use* of another in fee: held that the limitation *in trust* for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior *use* executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe, Lessee of Terry*, v. *Collier*, *T.* 49 *G.* 3. 377

10. Upon a devise to the testator's wife of all his wines, &c. for housekeeping, *in addition* to the *settlement* he had made her upon his *copyhold* estate;

estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow pasture close in *North Collingham*, during the life of his wife; and to two nephews all his *personal* estate, to be divided between certain nephews and nieces, and their sons and daughters: and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate, &c. and "*all his* COPYHOLD *estates in* North *and* South Collingham," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.*, who, he declared, should be an equal sharer in this division of *his real* and personal estate: held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his *copyhold* estates in *North and South Collingham*," *after his wife's decease*, in trust to be divided, &c. the *freehold* close in question passed; as meant to include all his *real* estate *in settlement* upon his wife, and *which settlement was referred to* in the first devise to the wife.—

And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. The rough draught of the settlement altered by the testator; 3. A book indorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and, 5. A rental kept in the same place, on which was indorsed by the testator, that "all the rents "of the *copyhold* lands in *North* and "*South Collingham*, &c. were settled "on his wife for life."—

For there is no ambiguity on the face of the will; the testator having *copyhold* estates in *North and South Collingham* to answer the description in it: nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connexion. Nor does it follow that the testator meant to devise the *same premises* under the name of *copyhold* to the trustees as were settled on his wife; or that he was under the same mistake, that the close in question was *copyhold*, when he made his will, as when he made the settlement or indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question. *Doe, Lessee of Brown* v. *Brown*, *T.* 49 *G.* 3. Page 441

11. One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons, successively, for life; with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised and

and possessed *to trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each such wife's natural life only.* There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife *during her natural life only;* and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment *during the wife's life:* held that by such deed the *trustees* took a *fee*. *Wykham* v. *Wykham*, *M.* 50 *G.* 3. Page 458

12. A devise to the testator's wife, of "all his property both personal and real for ever," passes the fee in the real estate: and the devisor's intent to use the words in a more restricted sense is not shewn by a subsequent clause of the will, whereby, *after her decease*, he gave *an additional annuity* to a person to whom he had before given a smaller annuity preceding the devise to the wife. *Doe, Lessee of the Baroness Lady Dacre*, v. *Roper*, *M.* 50 *G.* 3. 518

13. Under a devise to *A.* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *A.* successively in tail male; with like remainders to *B.* and his sons; with remainder to *the right heirs male of A. for ever;* these last words are words of limitation, and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification; particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of *A.*, who might be excluded from taking under the prior limitations to his first and other sons in tail made. And such ultimate limitation to the heirs male of *A.*, to whom a precedent estate for life was given, operating to give him an estate in tail male in remainder, such devise lapses by his death before the testator. *Doe, Lessee of Albemarle Earl of Lindsey.* v. *Colyear*, *M.* 50 *G.* 3. Page 548

14. A devise of all the rest and residue of the testator's estate in the manor and lands of *Bantry*, &c. not already settled on his eldest son *Simon's* marriage, (except those parts of it before devised to his (second) son *Hamilton*,) together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon* and the heirs of his body; and for default of issue of *Simon*, then he devised his said *entire* estate of *Bantry* to his son *Hamilton* in tail, with remainders over; lapses by the death of *Simon* in the lifetime of the testator, and the residue passes to *Hamilton* immediately on the death of the testator, though *Simon* left issue, *Hamilton White* v. *Warner*, *Lessee of Richard White*, *M.* 22 *G.* 3. 551

15. A testator devised one of three estates to trustees and their heirs, until his nephew *Thomas*, son of his brother *William*, should attain 21 or die; and on his attaining 21, to the said *Thomas* for life sans waste; and after the determination of that estate, to the trustees during *Thomas's* life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every *the son and sons* of the body of *Thomas*, *severally and successively*, one after another, in priority of birth, &c.: and *for default of* SUCH *issue*, to the trustees until his nephew *John*, son of his brother *Samuel* should attain 21 or die; and in case *John* attained 21, then to him for life, sans waste; and after the determination of that estate, to the trustees,

trustees, during *John*'s life, to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of *John*, severally and successively one after another, in priority of birth, &c.; and after the determination of that estate, (or, as it stood here in the limitation of one of the other estates "and for default of *such* issue,") to the trustees, until his nephew *S. W.* should attain 21 or die, &c.: and so repeating all the former limitations as to *S. W.* and his sons; and the like with respect to a fourth nephew, *F. W.* and his sons; concluding—and *for default of* SUCH *issue*, to the testator's brother *Joseph* for life, sans waste; and after his death, to his son *Joseph* and his heirs. The testator repeated the same set of limitations twice more, with respect to two other estates, only varying the priority of his four first named nephews in the disposition of them; but concluding after each set of limitations to those four nephews, with the same devises to his brother *Joseph* for life, and to *Joseph*'s son in fee.

The nephew *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime. Held that the four first mentioned nephews and their sons only took estates for life respectively, for want of words of limitation or other tantamount words; the words, "*for default of* SUCH *issue*," meaning for default of *son or sons*, &c. *Foster and Others* v. *Lord Romney*, *M.* 50 *G.* 3. Page 594

16. A devise to *S. N.*, the son of *T. N.*, for life; remainder to trustees, &c.; remainder to the first and other sons of the body of *S. N.*, and the heirs male of their respective bodies; and for default of *such issue*, to the use of all and every the *daughters* of the body of *S. N.* begotten or to be begotten; and for default of *such issue*, to the right heirs of *T. N.* for ever. *T. N.* died leaving issue *S. N.* and two daughters. Held that the daughters took only estates for their lives, *Denne, Lessee of Briddon, and Mary his Wife*, v. *Page*, *M.* 24 *G.* 3. Page 603

17. Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatever person should, by virtue of the will become possessed of or entitled to the estate should, from the time he became so possessed, take upon himself the surname of *Thelwall, and make the mansion his usual and common place of abode and residence:* held that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe. *Doe, d. Kenrick and Others*, v. *Ld. Wm. Beauclerk*, *M.* 50 *G.* 3. 657

18. A testator devised one estate to his wife for life, and after her decease to his daughter *Mary* and the *heirs of her body* begotten or to be begotten, *as tenants in common*, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then he devised another estate to his wife for life, remainder to his son *Joseph* and to the *heirs of his body* begotten or to be begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter *Mary* and the *heirs of her body* begotten or to be begotten; such issue, if more than one, to take *as tenants in common:* held

held that the daughter *Mary* only took an estate for life in the first estate, with remainder to all her children equally as purchasers. *Doe d. Strong and Others*, v. *Goff*, *M.* 50 *G.* 3. Page 668

DISTRESS.

See LANDLORD AND TENANT.

Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass quare clausum fregit for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne* v. *Morgan*, *T.* 49 *G.* 3. 395

ECCLESIASTICAL CORPORATION.

See CORPORATION, 4.

EFFECTS.

See DEVISE, 7.

EJECTMENT.

1. An inclosure made from the lord's waste by a copyholder 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment, if so presumed, lies not against the tenant as a trespasser, without previous notice to throw it up. *Doe, Lessee of Foley*, v. *Wilson*, *E.* 49 *G.* 3. 56

2. A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer*, v. *Lee*, *T.* 49 *G.* 3. Page 312

3. Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking *in severalty* any one of such vicarial houses with the appurtenances; of which option an entry was made in the corporation-act book and signed by the vicars: held that a new vicar, having made an option, which was entered in the book and signed by all, to take one of the vicarial houses, *with certain appurtenances*, then in the possession of *J. S.*, which were *not all the appurtenances* formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the the act book, as against the corporation; yet no such option having been made and entered in the act book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle, Lessee of Miller, Clerk*, v. *Wilson*, *T.* 49 *G.* 3. 334

4. Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that

that the term was still subsisting, conveyed it to others to secure a mortgage; held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe, Lessee of Graham*, v. *Scott, M.* 50 *G.* 3. Page 478

5. A possession of crown land commencing at least 55 years ago by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death, 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant; in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it.

But it appearing, upon a second trial, that by the stat. 20 *Car.* 2. *c.* 3. all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago: and by the stat. 9 *G.* 3. *c.* 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: for from the death of the father 19 years ago, the possession was adverse to his heir, the lessor of the plaintiff; or at least the defendant's possession for the last 17 years was adverse; and the act of *Geo.* 3. does not give *a title* to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them; and as it does not repeal the stat. 20 *Car.* 2. *c.* 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against the statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17, were both legally holden by the licence of the crown. *Goodtitle, Lessee of Parker*, v. *Baldwin, M.* 50. *G.* 3. Page 488

6. Where house and land are let together to be entered upon at different times; and it do not appear from the terms of the demise from what time the whole is to be taken as let together; it is a question of fact for the jury, which is the principal, and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time. *Doe, on the demise of Heapy*, v. *Howard M.* 50 *G.* 3. 488

ELECTION COMMITTEE.

See Costs, 2.

EMANCIPATION.

See Settlement from Parents, 2.

ESCAPE.

1. Action lies upon the stat. 44 *Geo.* 3. *c.* 23. *s.* 4. by a common informer suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff, in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he afterwards was bailed, instead of delivering him over to the charge of a proper naval officer: the

the statute, which speaks of sheriffs, gaolers, or *other officers* arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "*other officers*" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for wrongfully and wilfully permitting the escape. *Sturmy q. t.* v. *Smith*, *E.* 49 *G.* 3. Page 25

2. A plea to an action against the marshal for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore though the plea only stated that, after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, under and by virtue of the said commitment, &c.; and the replication traversed, that after the prisoner's return, the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea, and included in the traverse; and therefore the plea is negatived by shewing in evidence, that after the prisoner's return he again escaped and died out of custody. *Chambers* v. *Jones*, *T.* 49 *G.* 3. 406

ESTOPPEL.

Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe*, *Lessee of Blacksell and Others*, v. *Tomkins*, *E.* 49 *G.* 3. Page 185

EVIDENCE.

See AUGMENTED CURACY, 1. TRESPASS, 7. VENUE, 1. WITNESS.

1. Notice of the delivering out to subscribers the numbers of the *Boydell Shakespeare*, through the medium of a newspaper, was held not to be brought home to a subscriber, without shewing that he was in the habit of taking in such newspaper. By Lord *Ellenborough* C. J. *Boydell* v. *Drummond*, *E.* 49 *G.* 3. 144

2. In trespass for distraining goods in satisfaction of a rate in nature of a county rate, made by corporate justices with an exclusive commission of the peace, by virtue of stat. 13 *G.* 2. *c.* 18. the court will not inquire into the necessity of making such a rate, nor as to the application of corporate funds sufficient for that purpose. *Weatherhead* v. *Drewry*, *E.* 49 *G.* 3. 168

3. The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens, and their successors in 1636, without naming any rent; but in 1649 *the parliamentary survey* charged the churchwarden with 6*d.* rent, under the head of "*freehold rent;*" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement; although the manor had continued out in lease from before 1636 to 1804: and though a tablet of parochial benefactions, at least, as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender

der, but did not notice any enfranchisement of it. *Roe, Lessee of Johnson*, v. *Ireland*, T. 49 G. 3. Page 280

4. In case against a judgment creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa., held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford* v. *Woodgate*, *T.* 49 *G.* 3. 297

5. Where a witness admitted herself to have been connected with different men, and the judge thought it immaterial to hear witnesses tendered by the defendant to shew her connexion with other persons; as leading merely to the same conclusion as to her character; the court being satisfied that this could have had no influence on the verdict, refused a new trial on that account. *The King* v. *Teal*, *T.* 49 *G.* 3. 311

6. A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas:* and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer*, v. *Lea*, *T.* 49 *G.* 3. 312

7. An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order. *The King* v. *The Inhabitants of Corsham*, *T.* 49 *G.* 3. 388

8. Upon a devise to the testator's wife of all his wines, &c. for housekeeping, *in addition to the settlement* he had made her upon his *copyhold* estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow pasture in *North Collingham*, during the life of his wife; and then to two nephews all his *personal* estate, to be divided between certain nephews and nieces, and their sons and daughters: and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate, &c. and "*all his* COPYHOLD *estates in* North *and* South Collingham," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.*, who, he declared, should be an equal sharer in this division of *his real* and personal estate: held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his *copyhold* estates in *North and South Collingham*," *after his wife's decease*, in trust to be divided, &c. the *freehold* close in question passed; as meant to include all his *real* estate *in settlement* upon his wife, and *which settlement was referred to* in the first devise to the wife.

And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. The rough draught of the settlement altered by the testator; 3. A book indorsed "*Collingham* estate survey," kept with the muni-

ments

ments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and 5. A rental kept in the same place, and on which was indorsed by the testator, that "all the "rents of the *copyhold* lands in *North* "and *South Collingham*, &c. were "settled on his wife for life."

For there is no ambiguity on the face of the will; the testator having *copyhold* estates *in North and South Collingham* to answer the description in it. Nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connexion. Nor does it follow that the testator meant to devise the *same premises* under the name of *copyhold*, to the trustees, as were settled on his wife; or that he was under the same mistake that the close in question was copyhold when he made his will, as when he made the settlement or indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question. *Doe, Lessee of Brown*, v. *Brown*, *T.* 49 *G.* 3. Page 441

9. Under what circumstances a grant or licence from the crown to hold or occupy crown land may be presumed. See EJECTMENT. 5.

10. Evidence of *Seisin*, see FINE, 1.

11. A certain paper being found along with other papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its ever having been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*; assuming the jury to be satisfied of the fact, that the paper so found was kept there by the person last seised, with a knowledge of its contents, and that no imposition was practised. *Doe, Lessee of Johnson*, v. *The Earl of Pembroke*, *M.* 50 *G.* 3. Page 504

12. In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff *in B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich.* term, and the joining of issue *in the same court*; and then it stated the venire facias juratores returnable in *Hilary* term, and the distringas juratores, by which the sheriff is commanded to have the jury *before our said lord the king at* Westminster, *on* Wednesday *next after* 15 *days from* Easter, OR *before the Lord Chief Justice* if he should come *before that time*, i. e. *on* Tuesday *next after the end of the term* (Hilary,), *at* Westminster, &c. *in the great hall of pleas there*; and then after giving a day in bank to the prosecutor and defendant, it proceeded—on which day, viz. *on* Wednesday *next after* 15 *days, &c. before our said lord the king, at W.*, came the parties; and the Chief Justice before whom the said jurors came to try, &c. sent here his record (which is the nisi prius record) *in these words*; (which are the words of the postea indorsed on the nisi prius record;) viz. *afterwards, on the day, and at the place last within mentioned*, before the Chief Justice, &c. and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the postea on the nisi prius record sent into the court in bank by the Chief Justice;) and then the original roll proceeded—*Whereupon, all the premises being seen by the court of our said lord the king* now here, it is con-

considered and adjudged *by the said court* now here, that *M. W.* (the now plaintiff) do depart here without day, &c.—

The form and component parts of the original roll, or record of acquittal, being thus understood; it follows that the words of the postea, "afterwards, *on the day and at the place last within mentioned*," stated in the indorsement on the nisi prius record, as sent by the Ld. Chief Justice into the court in bank, refer to *the day and place last mentioned* in the *distrangas juratores* set forth in that record; namely, to "*Tuesday* next "after the end of the term, (*Hilary*) at *Westminster*, &c. in the "great hall of pleas there;" which was the day and place at nisi prius given; and not to the "*Wednesday* next after 15 days, &c. *before our said lord the King at W.*;" which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the distringas, and the statement of the postea indorsed on the nisi prius record as sent in by the Lord Chief Justice.—

And as by the roll it appeared that the trial was at nisi prius, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that "the defendant (the now plaintiff) "*on Wednesday next* after 15 days, "&c. *in the court of our said lord the* "*King, before the king himself at* W. "*before the Lord Chief Justice* as-"signed to hold pleas before the "king himself, &c. *W. J.* being as-"sociated with him, &c. was in due "manner and according to the due "course of law *by a jury* of the said "county of *M. acquitted*, &c.;" which allegation supposed the trial to have been *in bank* on the return-day there given. *Woodford and Mary his Wife* v. *Ashley*, *M.* 50 *G.* 3. Page 508

13. A rated parishoner not being bound, upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances. *The King* v. *The Inhabitants of Hardwick*, *M.* 50 *G.* 3. Page 578

14. Where the plaintiff declares on a covenant in a deed, stating such covenant by itself in its own absolute terms, it seems that the defendant may give in evidence on non est factum, that other parts of the deed in their legal effect qualified the generality of the covenant declared on. *Howell* v. *Richards*, *M.* 50 *G.* 3. 633

EXECUTORS.

1. A fee does not pass by a residuary clause, in a will, whereby the testator, after several pecuniary bequests, *ordered* the lease of his house, with his furniture, to be sold, and *all the rest and residue to be divided* amongst certain persons; and appointed executors: for such division of the *rest and residue* must be intended to be made *by the executors as such*, and therefore confined to personal property. *Bebb* v. *Penoyre*, *E.* 49 *G.* 3. 160

2. Where one devises land to five trustees to sell, and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land *as executors*, but as *devisees in trust* and *joint tenants*. And at any rate the case is not helped by the statute 21 *H.* 8. *c.* 4. so as to pass the whole estate upon production of conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy and convey 3-5ths of the estate to be held

held in common with the two remaining parts. *Denne, Lessee of Bowyer*, v. *Judge, T.* 49 *G.* 3. Page 288

FINE.

Where a fine was levied of *Michaelmas* term, relating to the 6th of *November*, though in fact levied on the 8th; it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is primâ facie evidence, if no covin appear, of his possession during the period for which the rent is received. *Doe, Lessee of Osborn*, v. *Spencer, M.* 50 *G.* 3. 495

FOREIGN JUDGMENT.

Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an assumpsit, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hall* v. *Odber, E.* 49 *G.* 3. 118

FRAUDS, *Statute of*, 29 *Car.* 2. *c.* 3.

1. If it appear to have been the understanding of the parties to a contract, that it was not to be *completed* within a year, though it might be and was in fact *in part performed* within that time, it is within the 4th clause of the statute of frauds; and if not in writing signed by the party to be charged, &c., it cannot be enforced against him. And his signature in a book intitled "*Shakespeare* subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Boydell* v. *Drummond, E.* 49 *G.* 3. Page 142

2. A contract by the owner of a close cropped with potatoes, made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack; the defendant, to get them out of the ground *immediately*; is not a contract for any *interest in land* within the 4th section of the statute of frauds; but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. *Parker* v. *Staniland, T.* 49 *G.* 3. 362

FREIGHT.

1. Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburgh*, and to load a cargo there and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, *or discharging the outward cargo*, the freighters might detain the ship at *St. P.* for 40 running days: and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, *the master should be at liberty to return to* London, and *the freighters should pay him* 2500*l. immediately upon the arrival of the ship at* London. The freighters then procured a policy of insurance, whereby the underwriters agreed *to pay a total loss in case the*

ship was not allowed by the Russian *Government to load a cargo at* St. P. *on the chartered voyage.* In fact the *Russian* Government, when the ship arrived at *St. P. presuming that the outward cargo was* British, *refused permission to unload her*, and consequently she could not take in a *Russian* cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a *Swedish* cargo to *London*, and earned freight thereon. Held,

1st, That the insurance was legal in the terms of it.

2dly, That the refusal of the *Russian* government to permit the ship to unload her outward cargo, was, in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. P.*; and consequently that a total loss within the policy was incurred.

3dly, That the proceeding directly from *St. P.* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2500*l.*; but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,

4thly, That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm* to *London*, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity. *Paller* v. *Staniforth*, *E.* 49 *G.* 3. Page 232

GAME.

See WILDFOWL.

A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant as his gamekeeper killed the dog when running after hares in that close, for the preservation of the hares; such plea not even stating that it was *necessary* to kill the dog for the preservation of the hares: nor stating that it was the dog of an unqualified person. *Vere* v. *Lord Cawdor*, *M.* 50 *G.* 3. Page 568

HIGHWAY.

1. One who is injured by an obstruction in the highway, against which he fell, cannot maintain an action on the case for the injury, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. *Butterfield* v. *Forrester*, *E.* 49 *G.* 3. 60
2. To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted was within the township of *G. B.* &c. and that the residue, &c. was within the township of *L. B.*, &c.; and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c., is bad; without specifying *what part* of the highway lay within one township, and what part within the other. *The King* v. *The Inhabitants of Bridekirk*, *T.* 49 *G.* 3. 304
3. The owners of land suffering the public to have the free passage of a street in *London*, though not a thoroughfare,

roughfare, for eight years, without any impediment, such as a bar shut at times to denote the limited dereliction of the soil for the purpose, is sufficient for presuming a general dereliction of it to the public: and six years has been held sufficient. *The Trustees of the Rugby Charity* v. *Merryweather*, *Middlesex Sittings*, *26th of May* 1790, *cor. Lord Kenyon* C. J. Page 376

4. But if the land had been out in lease all the time, or even for much longer, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge sufficient to presume a grant from him.

HUSBAND AND WIFE.

1. A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King* v. *The Inhabitant of Kea*, *E.* 49 *G.* 3. 132

2. A wife cannot, as a feme sole, maintain trespass for breaking and entering her house and seizing goods in her possesssion, by replying, in answer to a plea of coverture, that her husband had four years before deserted her and gone beyond seas, without leaving her any means of support, and that he had not since returned, nor been heard of by her: and that during all the time she had lived separate from him, and had traded and contracted as a sole trader and single woman, and as such was lawfully possessed, &c.; the defendant rejoining that the husband was a natural-born subject, &c. and had not abjured the realm, or been exiled, or banished, or religated therefrom. *Bogget* v. *Frier*, *T.* 49 *G.* 3. 301

INCLOSURE.

An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *Doe*, *Lessee of Foley* v. *Wilson*, *E.* 49 *G.* 3. Page 56

INDICTMENT.

See Highway, 2. New Trial, 1.

INSOLVENT DEBTOR.

A defendant in custody under a writ de excommunicato capiendo, for contumacy in not paying a sum *for alimony*, and also for *costs*, in the ecclesiastical court, is not entitled to his discharge as an insolvent debtor under the stat. 33 *G.* 3. *c.* 5. *s.* 4., which extends only to persons in custody on such writ for non-payment of *costs and expences only*. *The King* v. *Sampson*, *E.* 49 *G.* 3. 231

INSURANCE.

A policy of insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* commander there, (the enemy having before gotten possession of every other port in the river;) will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs. *Parkin* v. *Tunno*, *E.* 49 *G.* 3. 22

2. Insurance on provisions "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either;" which provisions were intended for the supply of the *British* fleet and army then engaged

engaged in the expedition against *Copenhagen*, (of which they were then in possession, but were about to evacuate it,) and were consigned to merchants there, and at *Elsineur*; held good; although in consequence of expected hostilities with *Denmark*, an order of the king in council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg*, a *Swedish* and neutral port in the neighbourhood of *Denmark;* the adventure being legal, and not contravening the spirit of the order of council. *Atkinson* v. *Abbott*, *E.* 49 *G.* 3. Page 135

3. A *British* ship insured from *Hull* to *St. Petersburgh*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a king's ship in the *Baltic*, from an apprehension of hostilities, for eleven days; and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on *British* ships at *St. Petersburgh*, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull*: held that this loss of the voyage was not attributable to *the arrest or detainment of kings*, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy: though if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at *St. Petersburgh* to have delivered her cargo before the embargo. *Forster* v. *Christie*, *E.* 49 *G.* 3. 205

4. Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburgh*, and to load a cargo there and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, *or discharging the outward cargo*, the freighters might detain the ship at *St. P.* for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, *the master should be at liberty to return to* London, and *the freighters should pay him* 2500*l. immediately upon the arrival* of the ship at *London*. The freighters then procured a policy of insurance, whereby the underwriters agreed *to pay a total loss in case the ship was not allowed by the* Russian *Government to load a cargo at* St. P. *on the chartered voyage*. In fact the *Russian* Government, when the ship arrived at *St. P. presuming that the outward cargo was* British, *refused permission to unload her*, and consequently she could not take in a *Russian* cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a *Swedish* cargo to *London*, and earned freight thereon. Held,

1st, That the insurance was legal in the terms of it.

2dly, That the refusal of the *Russian* government to permit the ship to unload her outward cargo, was, in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. P.;* and consequently that a total loss within the policy was incurred.

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the amount of the freight received by him on the cargo from *Stockholm* to *London*, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity. *Puller* v. *Staniforth*, *E.* 49 *G.* 3. Page 232

5. A ship from *Stockholm* to *New York* was by the course of the voyage to touch at *Elsineur* for convoy, and to pay the *Sound* dues; and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elsineur* before the *Sound* dues could be paid: held that the voyage not being thereby delayed; though the occurrence was foreseen and intended; the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea. *Cormack* v. *Gladstone*, *T.* 49 *G.* 3. 347

6. After a proclamation by the king in council to *detain* and bring into port all *Danish* vessels, *a hired armed ship of his majesty* took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there towards defraying in part the expence of necessary repairs, but without the authority of a Court of Admiralty; and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day *hostilities were declared* against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight by order and *on account of the captors*: held that a statement in a case reserved, that the insurance was *on account of the captors*, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made *on account of his majesty*: and that the captors had no insurable interest, as they could claim nothing of right, but only ex gratia of the crown; the *Dane* having been seized and detained *before any declaration of war* against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court. *Routh* v. *Thompson*, *T.* 49 *G.* 3. Page 428

7. Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced a forfeiture of the ship; the policy was held to be avoided in toto. *Parkin* v. *Dick*, *M.* 50 *G.* 3. 502

8. A ship being insured at and from *Surinam*, *and* all or any of the *West India* islands, to *London*; a warranty to sail on or before the 1st of *August* is satisfied by the ship sailing from *Surinam*, her last port of loading, before the 1st of *August*, and going into *Tortola* on the 4th to seek convoy; though she did not sail from *Tortola*, which is one of the *West India* islands, direct for *London*, till afterwards. *Wright* v. *Shiffner*, *M.* 50 *G.* 3. 515

9. As to what shall be deemed one entire and distinct voyage, see LIVERPOOL DOCK DUTY, 1.

10. A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors, under the stat. 45 *G.* 3. *c.* 72. *s.* 3., which grants the prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the crown as to the respective

shares. *Stirling, Bart.* v. *Vaughan, M.* 50 *G.*3. Page 619

JOINT TENANTS AND TENANTS IN COMMON.

Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors, they do not take the land as *executors*, but as *devisees in trust* and *joint tenants*. And at any rate the case is not helped by the stat. 21 *H.* 8. *c.* 4, so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy and convey 3-5ths of the estate, to be held in common with the two remaining parts. *Denne, Lessee of Bowyer*, v. *Judge, T.* 49 *G.* 3. 288

JUDGE'S ORDER.

A judge's order, "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only *conditional* on the defendant. *Fricker* v. *Eastman, T.* 49 *G.* 3. 319

JUDGMENT.

See BANKRUPT, 1. FOREIGN JUDGMENT. PLEADING, 8.

LANDLORD AND TENANT.

See DISTRESS, 1. WASTE, 1.

1. An undertenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for *money paid* to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was *the money* of the *undertenant*. *Moore* v. *Pyrke, E.* 49 *G.* 3. 52
2. An inclosure made by a copyholder from the lord's waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and if presumed, ejectment does not lie against the tenant as a trespasser, without previous notice to throw it up. *Doe, Lessee of Foley*, v. *Wilson, E.* 49 *G.* 3. Page 56

LEASE.

A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas;* and a notcie to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer*, v. *Lea, T.* 49 *G.* 3. 312

LICENCE, *Evidence of, see* TRESPASS, 7.

LIGHTS.

Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact; which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant who was in possession under such landlord, from building up against such encroaching lights. *Daniel* v. *North, T.* 49 *G.* 3. 372

LIMITATION, STATUTES OF.

A possession of crown land commencing at least 55 years ago by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence

for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it.

But it appearing upon a second trial, that by the stat. 20 *Car.* 2. c. 3. all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago; and by the stat. 9 *G.* 3. c. 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: for from the death of the father 19 years ago the possession was adverse to his heir, the lessor of plaintiff, or at least the defendant's possession for the last 17 years was adverse; and the act of *Geo.* 3. does not give *a title* to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them. And as it does not repeal the stat. 20 *Car.* 2. c. 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17 years, were both legally holden by the licence of the crown. *Goodtitle, Lessee of Parker*, v. *Baldwin*, *M.* 50 *G.* 3. Page 488

LIVERPOOL DOCK DUTY.

By the *Liverpool* dock acts of 8 *Ann.* and 2 *Geo.* 3. certain tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*, so as no vessel shall be liable to pay more than once *for the same voyage out and home.* This is one entire duty imposed upon *one entire voyage out and home*, if there be either an outward or an inward cargo in such voyage, but without making any advance if there should be both. Thus, a *Liverpool* ship carrying a cargo out to the *West Indies*, and returning with another cargo to *Liverpool*, is only liable to pay one duty, namely, the duty inwards: and a foreign ship bringing a cargo to *Liverpool*, and carrying another cargo out, is only liable to pay the duty inwards. But where a ship was built in another port, on account of the owner residing at *Liverpool*, where she was registered, and sailed to the *West Indies*, without first coming to *Liverpool*, but brought her return cargo there, as to her home; this was held to be one entire and distinct voyage, within the meaning of the acts, for which the duty inwards was payable, and did not privilege the ship from payment of the duty again when next she sailed with another cargo upon her outward voyage to the *West Indies*, though in fact she had only used the dock inwards on her first voyage: for the privilege of using the dock with an outward and inward cargo, upon one payment of duty, is confined to *the same voyage out and home.* *Gildart* v. *Gladstone*, *in Error*, *M.* 50 *G.* 3. 675

MANDAMUS.

See CORONER, 1.

MAR-

MARRIAGE.

All marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act 26 *G.* 2. *c.* 33. which requires all marriages to be by banns or licence: and, by three judges, a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents: by one judge, it is casus omissus in the act, and the marriage good. *Priestley* v. *Hughes*, *E.* 49 *G.* 3. Page 1

MASTER AND SERVANT.

Damages, ultrà the mere loss of service, having been given against the defendant, for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition. *Irwin* v. *Dearman*. *E.* 49 *G.* 3. 25

MISDEMEANOR.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 *G.* 3. *c.* 57.; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal. *Beeley* v. *Wingfield*, *E.* 49 *G.* 3. 46

MUSIC.

See COPYRIGHT.

NEWSPAPERS.

See EVIDENCE, 1.

NEW STILE.

A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*. *Doe, Lessee of Spicer*, v. *Lea*, *T.* 49 *G.* 3. Page 312

NEW TRIAL.

1. All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them. *The King* v. *Teal and Others*, *T.* 49 *G.* 3. 307
2. Where a witness on such trial admitted herself to have been connected with different men, and the judge thought it immaterial to hear witnesses tendered by the defendant to shew her connexion with other men, as leading to the same conclusion as to her character of being a common woman; the Court being satisfied that this could have had no influence on the verdict, refused a new trial on that account. *Ib.* 311

NON EST FACTUM—*Evidence thereon.*

See COVENANT, 2.

NUSANCE.

See ACTION ON THE CASE, 2, 3.
HIGHWAY.

OFFICERS.

See SHERIFF, 1.

ORDER OF COUNCIL.

See INSURANCE, 2.

ORDER OF REMOVAL.

See POOR-REMOVAL.

OUTSTANDING TERM.

See TERM OUTSTANDING.

OXFORD.

Claim of conusance made by the vice-chancellor of the university, in the vacancy of the office of chancellor by death, on behalf of the university, allowed in a plea of trespass. *Williams* v. *Brickenden*, *M.* 50 *G.* 3. Page 543

PARENTS.

See MARRIAGE, 1.

PARISHIONER.

See EVIDENCE, 13.

PARLIAMENT.

Where an election committee had, under the stat. 28 *G.* 3. *c.* 52. reported to the House of Commons that two several petitions against the return of members to serve in parliament for *East Grimstead* were frivolous and vexatious; whereupon the then speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions jointly, and had first granted a certificate of the amount of such joint taxation, and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition separately, and how much jointly; held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed separately on each distinct petition, a new and valid certificate, ascertaining the several costs incurred on each petition might be granted by the speaker of a new parliament; the act mentioning *the speaker* generally. *Strachey, Bart.* v. *Turley*, *E.* 49 *G.* 3. 194

PATENT.

1. One having obtained a patent for a certain manufacturing machine, of which he duly enrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in which the grant of the former patent was recited; and the latter patent contained the usual condition, that it should be void, if the patentee did not within one month inroll a specification *particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed:* held that a specification containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise the as the second patent recited the first, was a performance of that condition. *Harmar* v. *Playne*, *E.* 49 *G.* 3. Page 101

2. Where a patent was granted for a new invented lace called *French* or *ground* lace, and the specification went generally to the mixing silk and cotton thread upon the same frame; proof that silk and cotton had been before mixed up on the same frame for lace, though not in the particular mode practised by the patentee, was held to avoid the patent. *Rex* v. *Else*, *Sittings at Westminster after Michaelmas* 1785, *cor. Buller* J. cited. 109

PAYMENT.

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *bought* and *sold* notes, (delivered over to the respective parties by the broker,) of "*payment in one month, money*," may be paid for by the buyer to the broker *within the month*; and that, *by a bill of exchange* accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, *generally*, which was larger than the amount of either demand,

mand, but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc* v. *Bennett*, *E.* 49 *G.* 3. Page 36

PEDIGREE.

See EVIDENCE, 11.

PENAL ACTION.

See SHERIFF, 1.

PERMIT.

See ASSUMPSIT, 3.

PLEADING.

See CONUSANCE. SHERIFF, 1. TRESPASS, *per tot.*

1. Where the plaintiff had lands abutting on one side of a public highway, called *Shepherd's Lane*, (which is primâ facie evidence that the nearest half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property. *Stevens* v. *Whistler*, *E.* 49 *G.* 3. 51

2. In debt, by bill, the declaration is good, though the sums demanded in the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected. *Lord* v. *Houstoun*, *E.* 49 *G.* 3. 62

3. In trespass quare clausum fregit, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers* v. *Donaldson*, *E.* 49 *G.* 3. 65

4. Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award; rejoinder, stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission;) and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher* v. *Pimbley*, *E.* 49 *G.* 3. Page 188

5. To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted was within the township of *G. B.* &c., and that the residue, &c. was within the township of *L. B.*, &c., and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying *what part* of the highway lay within one township, and what part within the other. *Rex* v. *The Inhabitants of Bridekirk*, *T.* 49 *G.* 3. 304

6. A plea to an action against the marshall for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c., ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention; and therefore, though the plea only stated, that after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c. under and by virtue of the commitment, &c.; and the replication traversed that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea;

plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea and included in the traverse; and therefore the plea is negatived by shewing in evidence, that after the prisoner's return he again escaped and died out of custody. *Chambers* v. *Jones*, *T.* 49 *G.* 3. Page 406

7. To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff; and the latter replied that the defendant of his own wrong, and *without the cause alleged*, committed the said several trespasses, &c.: held that evidence of a licence which covered *some*, but *not all* of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. *Barnes* v. *Hunt*, *T.* 49 *G.* 3. 451

8. Where a plaintiff in scire facias demanded execution for a certain sum recovered by judgment of *B. R.* for damages and costs, with a prout patit per recordum, *and also* a certain other sum adjudged to him in the Exchequer-chamber for his damages and costs of a writ of error, *without a prout patet*, &c.: held that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the *whole* declaration was bad, and the plaintiff was entitled to *judgment*, *generally*, on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer. *Powdick* v. *Lyon*, *M.* 50 *G.* 3. 565

9. Every deed should be pleaded according to its legal effect; and therefore if the plaintiff declare in covenant, and set forth the particular covenant in its own absolute terms; and there be other parts of the deed, the legal effect of which is to qualify the generality of the part declared on; it seems the defendant may take advantage of the variance on non est factum. *Howell* v. *Richards*, *M.* 50 *G.* 3. Page 633

POOR REMOVAL.

1. An order of removal, merely adjudging that the person removed was *with child and unmarried*, without drawing the conclusion that she was *chargeable*, is bad; as the statute 35 *G.* 3. *c.* 101. which first gives the general rule, that no person shall be removed till actually chargeable; and then (s. 6.) says, that an unmarried woman with child shall be deemed to be chargeable within the intent of the act, only makes the fact of such pregnancy presumptive or primâ facie evidence of her chargeability; which is open to be rebutted by evidence of her substance or the like: shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard. *The King* v. *The Inhabitants of Holm East Wayer Quarter*, *in Holm Cultram*, *T.* 49 *G.* 3. 381

2. An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order. *The King* v. *The Inhabitants of Corsham*, *T.* 49 *G.* 3. 388

PORTERAGE.

See West India Dock, 2.

POST HORSE DUTY.

By the post horse duty act of the 44 *G.* 3. *c.* 98. schedule B, if the hiring be by the day, and the distance be ascertained; as where the hiring is to go from one certain place to another; the duty is payable by the mile; if the distance be not ascertained, it is then payable by the day; and the postmaster letting the horses, and not accounting

counting for the duty accordingly in the stamp-office weekly account, is liable to a penalty of 10*l*. *Sargeaunt* v. *White*, *M.* 45 *G.* 3. Page 530

POWER.

1. One having power to appoint lands by will amongst children, and having other lands, by his will, not referring to the power) gives legacies to his several children; and then devises all the rest, residue, and remainder of his lands, &c. and personal estate, *after payment of his debts, legacies, and funeral expences*, to his eldest son: held that the power was not thereby executed. *Doe, Lessee of Hellings and Wife*, v. *Bird*, *E.* 49 *G.* 3. 49
2. One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus and all his other lands, &c. to his 1st, 2d, 3d, and other sons successively for life; with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders, successively, to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised and possessed *to trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each such wife's natural life only*. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife *during her natural life only*; and charged the lands with portions for younger children, if any: which deed also contained a covenant for quiet enjoyment during the wife's life: held that by such deed *the trustees* took a *fee*. *Wykham* v. *Wykham*, *M.* 50 *G.* 3. Page 458

PRACTICE.

1. The rule to declare in replevin may be served at any day before the time in the rule is expired; and the plaintiff must declare within four days after such service. *Edwards* v. *Dunch*, *E.* 49 *G.* 3. 183
2. If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E.*, *sued by the name of W.*, nor declare against him de bene esse in that form: and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea. *Dring* v. *Dickenson*, *E.* 49 *G.* 3. 225
3. On a four-day rule for bail in scire facias to appear and plead, in term, *Sunday*, though an intermediate day, is not to be reckoned. *Wathen* v. *Beaumont*, *E.* 49 *G.* 3. 271

But this mode of computation does not extend to rules for pleading in actions in general. *Roberts* v. *Quickenden*, *M.* 50 *G.* 3. 272

The practice appears to be this: in rules to plead in actions in general, a *Sunday*, or a holiday, reckons as a day, except it be the last: but in rules for judgment, and in proceedings in scire facias against bail, a *Sunday*, or a holiday, does not reckon, though it be not the last day.

4. Rules for changing the venue to be drawn up on reading the declaration. *Regula Generalis*, *T.* 49 *G.* 3. 273
5. An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for

for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the stat. 2 *Geo.* 2. c. 23. *s.* 23., requiring a bill to be delivered a month before the action brought. *Mowbray, One, &c.* v. *Fleming, T.* 49 *G.* 3. Page 285

6. Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, *or* to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang* v. *Monprivatt, T.* 49 *G.* 3. 316

7. A judge's order, " that upon payment of debt and costs by a certain day all proceedings should be stayed" is only *conditional* on the defendant. *Fricker* v. *Eastman, T.* 49 *G.* 3. 319

8. If bail to the sheriff be put in above, and exception taken before an assignment of the bail bond, they are bound to justify notwithstanding such assignment. *Hill* v. *Jones, T.* 49 *G.* 3. 321

9. After declaration filed conditionally in a town cause until special bail should be put in and perfected, and has only four days for pleading in notice thereof proved, the defendant abatement: and if he put in special bail on the 4th day, which are excepted to on the 5th, and not justified till the 9th, he is too late then to plead in abatement: and the plaintiff having demanded a plea, and none other being pleaded, is entitled to sign judgment as for want of a plea. *Binns* v. *Morgan, T.* 49 *G.* 3. 411

10. Affidavit, intitled " In the King's Bench," upon which the Attorney-General had filed an information ex officio against the defendant, permitted to be read in aggravation, after judgment by default. *The King* v. *Morgan, M.* 50 *G.* 3. Page 457

11. The sheriff having been served in proper time with a rule to return the writ of test. fi. fa. which expired on the last day of term, is attachable at the rising of the Court on that day if no return be made before. And the rule for the attachment is regular, though he make his return on a subsequent day in vacation, before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage. *The King* v. *The Sheriff of Surry, M.* 50 *G.* 3. 591

PREROGATIVE—*Order of the King in Council as to Matters of Trade.*

See INSURANCE, 2.

PRESUMPTION OF TITLE *for or against the Crown.*

See EVIDENCE, 3. EJECTMENT, 5. —*Against others. See* LIGHTS, 1.

PRINCIPAL AND AGENT.

See VENDOR AND VENDEE, 2.

PRIVILEGE FROM ARREST.

See ARREST, 1.

PRIZE.

1. One who at the time of a prize taken by a custom-house cutter bore the commission of mate, but was *acting commander* on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to *the commander's* share of the prize under the king's warrant of the 26th of *November* 1803, referring to his former warrant of the 4th of *July* 1803; which speaks generally of the share to be given to the *commander*, officers, and crew,

crew, *as a reward for their service*: and this, though the former commander, *whose commission, as such,* had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting the share of a *deputed mariner*, who at the time of such capture made was on board *acting as mate* by like authority. *Pill* v. *Taylor*, *T.* 49 *G.* 3. Page 414

2. After a proclamation by the king in council, to *detain* and bring into port all *Danish* vessels, *a hired armed ship of his majesty* took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there, towards defraying in part the expence of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day hostilities were declared against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight *by order and on account of the captors.* Held that a statement in a case reserved, that the insurance was *on account of the captors*, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made *on account of his majesty;* and that the captors had no insurable interest, as they could claim nothing of right, but only ex gratiâ of the crown; the *Dane* having been seized and detained before any declaration of war against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court. *Routh* v. *Thompson*, *T.* 49 *G.* 3. Page 428

3. A prize taken by the navy and army conjointly is insurable on account of the interest of the captors, under the stat. 45 *G.* 3. *c.* 72. *s.* 3. which grants prize so taken to the conjoint captors, after condemnation, subject only to the apportionment of the crown as to the respective shares. *Stirling, Bart.* v. *Vaughan*, *M.* 50 *G.* 3. 619

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PROMOTIONS.

Mr. *Peckwell* and Mr. *Frere* called Serjeants. *E.* 49 *G.* 3. 272

PROPERTY.

See DEVISE, 7.

PROPERTY TAX.

A distinct covenant in a lease, whereby the tenant bound himself to pay the *property* tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 *G.* 3. *c.* 65. *s.* 115., will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c., generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell* v. *King*, *E.* 49 *G.* 3. 165

PUBLIC COMPANIES, *how strictly confined to the spirit and letter of their institution, see* CANAL COMPANY.

QUEEN ANNE'S BOUNTY.

See AUGMENTED CURACY.

QUO WARRANTO.

See CORPORATION.

RATE—*for a town Corporate.*

A high constable may be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county of itself, by virtue of the stat. 13 *G.* 2. *c.* 18.; though no such officer had been appointed or such rate levied before; the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate, the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purpose. *Weatherhead* v. *Drewry*, *E.* 49 *G.* 3. Page 168

RECORD.

See EVIDENCE, 12.

RECOVERY.

See CONDITION, 1. USES AND TRUSTS EXECUTED.

RE-EXCHANGE.

See BILLS OF EXCHANGE, 5.

REMOVAL.

See POOR-REMOVAL.

REPLEVIN.

See PRACTICE, 1.

SALE.

See VENDOR AND VENDEE.

SCIRE FACIAS.

See PRACTICE. 3.

An allegation in a declaration, with a prout patet, &c. that the plaintiffs by *the judgment of the Court recovered* against the bail, is not proved by the production of the recognizance of bail, and the scire facias roll, which latter concluded in the common form. —Therefore it is considered that the plaintiffs *have their execution* thereupon against the bail: for this is an *award of execution*, or at most *a judgment of execution*, and not a *judgment to recover*. *Phillipson* v. *Mangles*, *M.* 50 *G.* 3. Page 516

SECURITY.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 *G.* 3. *c.* 57.; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal. *Beeley* v. *Wingfield*, *E.* 49 *G.* 3. 46

SEDUCTION.

See ACTION ON THE CASE, 1.

SEISIN, *Evidence of.*

See FINE.

SETTLEMENT—*by Apprenticeship.*

1. A parish apprentice who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture; this being only evidence of the first master's consent to the service with the second under a new and distinct contract of apprenticeship. *The King* v. *The Inhabitants of Christowe*, *E.* 49 *G.* 3. 95

2. An apprentice who went to lodge at his mother's, in an adjoining parish to that of his master, for the purpose of getting cured of a dis-

order, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged. *The King* v. *The Inhabitants of Stratford-upon-Avon*, E. 49 G. 3. Page 176

SETTLEMENT—*derived from Parents.*

1. A woman cannot give evidence of the non-access of her husband, to bastardize her issue; though the husband be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King* v. *The Inhabitants of Kea*, E. 49 G. 3. 132
2. A son apprenticed out by his father to a master living under a certificate in another parish, and not thereby acquiring any settlement of his own, but receiving cloaths from his father, and visiting him from time to time, and returning home to him after the expiration of his apprenticeship, before he was of age; though he went out to service again in two days, after receiving more cloaths; is not emancipated from his father's family; and therefore follows a settlement gained by the father while he was so serving as an apprentice. *The King* v. *The Inhabitants of Hardwick*, M. 50 G. 3. 578

SETTLEMENT—*by taking a Tenement.*

A person renting the tolls and residing in the turnpike house erected by order of the commissioners appointed by the stat. 30 G. 3. c. 67. for paving, lighting, and regulating, the streets of *Durham*, and for other local objects, cannot gain a settlement in the parish, by the general turnpike act 18 G. 3. c. 84. s. 56. *The King* v. *The Inhabitants of Elvet*, E. 49 G. 3. 93

SHERIFF.

See ESCAPE.

1. Debt lies upon the stat. 44 G. 3. c. 13. s. 4. by a common informer suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of *sheriffs, gaolers, or other officers* arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "*other officers*," such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully* and *wilfully* permitting the escape. *Sturmy q. t.* v. *Smith and Another, Sheriff of Middlesex*, E. 49 G. 3. Page 25
2. In case against a judgment-creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa.: held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gutford* v. *Woodgate*, T. 49 G. 3. 297

SHIP.

The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered. Held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trewhella* v. *Rowe*, *T.* 49 *G.* 3. Page 435

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TAXES.

See Post Horse Duty. Property Tax.

TENANTS IN COMMON.

See Joint Tenants.

A demand of possession by one tenant in common, and a refusal by the other, stating that *he claimed the whole*, is evidence of an actual ouster of his companion. *Doe, Lessee of Hellings and Wife*, v. *Bird, E.* 49 *G.* 3. 49

TERM OUTSTANDING.

Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage; held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe, Lessee of Graham*, v. *Scott, M.* 50 *G.* 3. 478

TITHES.

Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between the 11th and 16th of *September*, a general notice on the 17th to the parson, to take away *all the tithes of his* (the plaintiff's) *lands* within two days, is sufficient whereon to found the like action. *Kemp* v. *Filewood*, Clerk, *T.* 49 *G.* 3. Page 358

TITLE.

See Covenant, 2. Power, 2. Presumption of Title.

TOBACCO—*Dealing in.*

See Vendor and Vendee.

TOLLS.

See Canal Company.

TRESPASS.

See Evidence, 2.

1. Where the plaintiff had lands abutting on one side of a public highway called *Shepherd's Lane*, (which is primâ facie evidence that the nearest half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane;* and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property. *Stevens* v. *Whistler, E.* 49 *G.* 3. 51
2. In trespass quare clausum fregit, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers* v. *Donaldson, E.* 49 *G.* 3. 65
3. So in trespass for breaking and entering the plaintiff's cellar, if the defendant plead that the place where, &c. is copyhold, and that the lord, at a court, &c. granted to the defendant

fendant a messuage, of which the cellar is parcel; and so justifies the entry: the plaintiff may reply that the defendant entered of his own wrong, and traverse that the cellar, at the time when, &c. was parcel of the customary messuage; without shewing a title in himself. *Cary* v. *Holt*, *M.* 19 *G.* 2. Page 70 *n.*

4. A feme covert, though deserted by her husband, who had gone abroad, trading as a feme sole, cannot maintain trespass for breaking and entering *her* dwelling house. *Boggett* v. *Frier*, *T.* 49 *G.* 3. 301

5. Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass quare clausum fregit for continuing on the premises and disturbing the plaintiff in the possession of his house after the time allowed by law. *Winterbourne* v. *Morgan*, *T.* 49 *G.* 3. 395

6. Where goods were distrained in a house, and the person, left in possession during the 5 days till the goods were replevied, left them dispersed as he found them all over the house, and went into all parts of it himself; no objection being made at the time; Ld. *Mansfield* left it to the jury, in an action of trespass, as evidence of the owner's consent. *Washborn* v. *Black*, *Westminster Sittings after Mich.* 1774. 405

7. To a declaration for several trespasses on the plaintiff's land on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses, &c.: held that evidence of a licence which covered *some*, but *not all*, of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. *Barnes* v. *Hunt*, T. 49 *G.* 3. Page 451

8. A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close for the preservation of the hares; such plea not even stating that it was *necessary* to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person. *Vere* v. *Lord Cawdor*, *M.* 50 *G.* 3. 568

TRIAL.

Notice having been given for the trial of a cause at *Monmouth*, which arose in *Glamorganshire*, as being in fact the next *English* county since the stat. 27 *H.* 8. *c.* 26. *s.* 4. though *Hereford* be the common place of trial; the Court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record. *Ambrose* v. *Rees*, *T.* 49 *G.* 3. 370

TRUST.

See CANAL COMPANY. USES AND TRUSTS EXECUTED.

TURNPIKE ACT.

The general turnpike act 13 *G.* 3. *c.* 84 *s.* 13., having given a penalty, to be recovered by information before justices of peace, or by action, for using a greater number of horses than is thereby allowed for the draft of waggons, &c. on the road; and the 19th section having provided, that if it appear on oath to the satisfaction of any justice of the peace or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace or

court may *stop all proceedings* before them respectively; held that such application for a stay of proceedings must be made to the court above in which the action was brought, and that the defence is not available at nisi prius. *Robinson* v. *Pocock*, *M.* 50 *G.* 3. Page 484

USES AND TRUSTS EXECUTED.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death to the *use* of his nephews and the survivor for their lives; remainder to the *use* of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases *in trust* for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the *use* of another in fee: held that the limitation *in trust* for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior *use* executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews, after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe*, *Lessee of Terry*, v. *Collier*, *T.* 49 *G.* 3. 377

USURY.

1. A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10*s.* per cent.; but the broker was not to advance the money himself, nor was his name on the bills: held that a bill accepted by the defendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 *Ann. c.* 16. *Dagnall* v. *Wigley*, *E.* 49. *G.* 3. Page 43

2. The defendant being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l. to his credit in account*; for which he was to purchase 50,000*l.* stock, (then at 51¼) in their names, and account to them for the dividends upon such stock as from the last dividend-day: after which agreement the plaintiffs acting upon the basis of it, (though the defendant never purchased the stock so agreed upon,) *entered in their books* the sum of 25,000*l. to the credit* of the defendant, and continued to honor his drafts from time to time; crediting him also with other sums actually paid by him; and wrote off the amount of his bonds to his credit, and delivered them up to him.

Held that this agreement to repay *the new credit* of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.*, *credited* under that agreement by the plaintiffs *to the defendant in his banking account*, was to be reckoned against them upon balancing the account of debtor and creditor between them. *Boldero and Another* v. *Jackson*, *M.* 50 *G.* 3. 612

VARIANCE.

1. An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house is not local in its nature: and if the declaration, after describing the house as situate in a certain

certain street called *A.* street, in the parish of *O. A.* (there being no such parish,) afterwards state the nusance so be *erected and placed in the parish aforesaid*, it will be ascribed to *venue*, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies* v. *Duncombe*, *E.* 49 *G.* 3. Page 226

2. In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff *in B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich.* term, and the joining of issue *in the same court*; and then it stated the venire facias juratores returnable in *Hilary* term, and the distringas juratores by which the sheriff is commanded to have the jury *before our said lord the king at* Westminster, *on* Wednesday *next after* 15 *days from* Easter, OR *before the Lord Chief Justice* if he should come *before that time*, i. e. *on* Tuesday *next after the end of the term* (Hilary,) *at* Westminster, &c. *in the great hall of pleas there*; and then after giving a day in Bank to the prosecutor and defendant, it proceeded—on which day, viz. *on* Wednesday *next after* 15 *days*, *&c. before our said lord the king, at W.*, came the parties; and the Chief Justice before whom the said jurors came to try, &c. sent here his record (which is the nisi prius record) *in these words*; (which are the words of the postea indorsed on the nisi prius record;) viz. *afterwards, on the day, and at the place last within mentioned*, before the Chief Justice, &c. and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the postea on the nisi prius record sent into the court in Bank by the Chief Justice:) and then the original roll proceeded —*Whereupon, all the premises being seen by the court of our said lord the king* now here, it is considered and adjudged *by the said court* now here, that *M. W.* (the now plaintiff) do depart here without day, &c.

The form and component parts of the original roll, or record of acquittal, being thus understood; it follows that the words of the postea, " afterwards *on the day and at the place last within mentioned*," stated in the indorsement on the nisi prius record, as sent by the Lord Chief Justice into the court in Bank, refer to *the day and place last mentioned* in the *distringas juratores* set forth in that record; namely, to " *Tuesday* next " after the end of the term, (*Hi-* " *lary*) at *Westminster*, &c. in the " great hall of pleas there;" which was the day and place at nisi prius given; and not to the " *Wednesday* " next after 15 days, &c. *before our* " *said lord the King at W.*;" which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the distringas, and the statement of the postea indorsed on the nisi prius record as sent in by the Lord Chief Justice.

And as by the roll it appeared that the trial was at nisi prius, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that " the de- " fendant (the now plaintiff) *on* Wed- " nesday *next* after 15 days, &c. *in* " *the court of our said lord the King*, " *before the king himself, at* W. *be-* " *fore the Lord Chief Justice* assigned " to hold pleas before the king him- " self, &c. *W. J.* being associated " with him, &c. was in due manner " and according to the due course " of law *by a jury* of the said county " of *M. acquitted*, &c.;" which allegation supposed the trial to have been in Bank on the return day there given. *Woodford and Mary his Wife* v. *Ashley*, *M.* 50 *G.* 3. Page 508

3. An allegation in a declaration, with a prout patet, &c. that the plaintiffs

by the judgment of the court recovered against the bail is not proved by the production of the recognizance of bail, and the scire facias roll, which latter concluded in the common form. —Therefore it is considered that the plaintiffs *have their execution* thereupon against the bail: for this is *an award of execution*; or at most *a judgment of execution*, and not *a judgment to recover*. *Phillipson* v. *Mangles*, *M.* 50 *G.* 3. Page 516

4. For variance between the words of a covenant in a deed as declared on, and the substance and legal effect of such words as qualified by other covenants in such deed; *see* COVENANT, 2.

VENDOR AND VENDEE.

1. A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise office as *a dealer* in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a *dealer* in tobacco within the meaning of the stat. 29 *Geo.* 3. *c.* 68. *s.* 70., which requires every person, who shall *deal* in tobacco, first to take out a licence under a penalty. *Johnson* v. *Hudson*, *E.* 49 *G.* 3. 180

2. Where turpentine in casks were sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchaser; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be made by the buyers at the time of the sale, and the remainder within 30 days on the goods being delivered: and the buyers had the option of keeping the goods in the warehouse at the charge of the seller for those 30 days, after which they were to pay the rent: and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to guage them; but, before he could fill up the rest, a fire consumed the whole in the warehouse within the 30 days: held that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller: for it was the business of the buyers to get them gauged, without which they could not have been removed: and the act of the warehouseman in leaving them unbunged, after filling them up, which was for the purpose of the guaging, must be taken to have been done as agent for the buyers, whose concern the guaging was: but the property in the casks not filled up remained in the seller, at whose risk they continued. *Rugg* v. *Minett*, *E.* 49 *G.* 3. Page 210

3. The stat. 17 *G.* 3. *c.* 42. which requires bricks for sale to be of certain dimensions, and gives a penalty for a breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. *Law* v. *Hodson*, *T.* 49 *G.* 3. 300

4. The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board he conveyed the vessel, with all its furniture,

ture, to another by a bill of sale, which was duly registered: held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesman: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the ship after the legal title was transferred to him. *Trewhella* v. *Rowe*, *T.* 49 *G.* 3. Page 435

VENUE.

1. An action on the case for setting up a mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature: and if the declaration, after describing the house as situate in a certain street called *A. St. in the parish of O. A.* (there being no such parish) afterwards state the nusance to be *erected and placed in the parish aforesaid*; it will be ascribed to *venue*, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies* v. *Duncombe*, *E.* 49 *G.* 3. 226
2. Rule for changing the venue to be drawn up on reading the declaration. *Reg. Gen. T.* 49 *G.* 3. 273

VOYAGE ENTIRE.

See Liverpool Dock Duty.

WALES.

See Trial, 1.

WASTE.

Where copyholder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut bonâ fide for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant. *Doe. Lessee of Foley*, v. *Wilson*, *E.* 49 *G.* 3. Page 56

WAY.

See Highway.

WEST INDIA DOCK.

1. The stat. 39 *G.* 3. *c.* 69. *s.* 137. giving to *West India* ships, which have discharged their homeward-bound cargoes in the docks of the *West India* Company, "the use of the light dock for a time not exceeding six months from the time of unloading, on payment of the tonnage duty of 6*s.* 8*d.*, payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharfs of the light dock, without payment of wharfage and porterage, as in case of other goods shipped by way of merchandize on the outward-bound voyage: aliter, as to necessaries intended for the immediate use of such ships while lying in the dock during the time allowed by the act. *Blackett* v. *Smith*, *M.* 50 *G.* 3. 532
2. And the company were held entitled to retain such porterage as well as wharfage, though the plaintiff had refused the assistance of the company's servants, and had employed his own. *ib.*

WHARFAGE AND PORTERAGE.

See West India Dock, 2.

WILD-

WILD-FOWL.

See ACTION ON THE CASE, 8, 9.

WITNESS.

See EVIDENCE.

1. A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness: and therefore an order of session, stated by that court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King* v. *The Inhabitants of Kea*, *E.* 49 *G.* 3. Page 132
2. A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is not an *incompetent* witness against him on an indictment for a conspiracy; but the objection goes strongly to her *credit*. *The King* v. *Teal*, *T.* 49 *G.* 3. 309

WOODS.

See BURNING WOODS.

END OF THE ELEVENTH VOLUME.

J. Rogers, 66, Red-Lion-Street, Clerkenwell, London.