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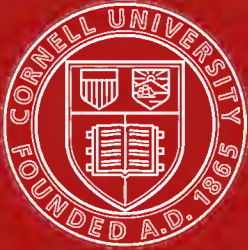
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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

ROYAL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME I.

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P R E F A C E.

THIS Collection of Cases is prepared for the convenience of students in the Law School of Harvard University.

The head-notes are always, and the arguments generally, omitted.

As one of the main objects in the study of cases is to acquire skill and confidence in extracting the *ratio decidendi*, the omission of head-notes from a collection like this is an essential part of the scheme. To thrust before the eyes of a student of law the answer to the problem contained in a case is like telling a student in arithmetic the answer to his sum before he does it, with the additional disadvantage that the answer in the head-note is often wrong.

On the other hand, the omission of the arguments is an evil, but a necessary one. To have retained them would either have compelled the exclusion of many valuable cases, or else have swollen the size and expense of volumes already larger and more costly than I could wish.

With the exception of the head-notes and arguments, and of a few passages the omission of which is duly noted, the cases are reprinted literally from the reports; but I have striven after some consistency in the use of capitals and italics, and where a citation was obviously wrong, I have corrected it.

The book is intended for study, not for practice. That one who has carefully read these cases will find the volumes of considerable aid in after professional life, I have no doubt; but by one who has not thus become acquainted with their contents, the want of head-notes will probably be felt an invincible obstacle to their use.

Further, the reading of these cases, it should be remembered, is intended to be accompanied by oral instruction, and therefore they are without the comments which would, on so difficult a subject, be desirable, if the cases were meant for solitary study.

As any one will find who attempts to compile a collection of cases, it is hard to make it small enough. I have tried to limit myself to the leading and illustrative authorities, and in the few notes no attempt has been made at a full collection of the decisions, — indeed, no case is ever referred to without a distinct reason for calling attention to it.

A special difficulty in dealing with the law of property, and particularly of real property, is to determine how much to dwell on parts of the law which have now become practically obsolete. No two persons would probably decide this question in exactly the same way. I have endeavored to bear in mind, on the one hand, that a real knowledge of the law as it is, requires a knowledge of the law as it has been; and, on the other, that I am working for men who are preparing themselves to be lawyers, and not merely for students of the history of institutions.

For the parts of the law of which he treats and for which it was impossible or undesirable to give cases, I have had recourse to the terse and exact sentences of Littleton.

I desire especially to acknowledge the aid I have received from Mr. Leake's Digest of the Law of Land. This excellent book (unfortunately not finished) has met with less appreciation than it deserves.

J. C. G.

AUGUST, 1888.

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SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF PROPERTY.

BOOK I.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

BRACON, Lib. 2, c. 9, fol. 27 a. If a gift be made for a term of years, although a very long one, which exceeds the lives of men, yet the donor will not have a freehold from it, since a term of years is certain and determined, and the term of life uncertain, and because although nothing is more certain than death, yet nothing is more uncertain than the hour of death.

BRACON, Lib. 4, c. 36, fol. 220 a. Now we must speak of the case when any one is ejected from the usufruct [*de usufructu vel usu et habitatione*] of any tenement which he holds for a term of years before the end of the term. For in one and the same tenement one may have the freehold, and another the usufruct [*usumfructum et usum et habitationem*]. Some are accustomed when they have been ejected during their term to seek their remedy by a writ of covenant. But because such writ had no place between any persons except only between the lessor and lessee, nor can the obligation of the covenant bind other persons, and because even between the lessor and lessee the affair could be determined hardly at all or only with difficulty, by the advice of the court provision was made for the lessee against ejectors of every kind by a writ like this. "The king to the sheriff greeting: Command A that he duly and without delay restore to B so much land with the appurtenances in such a vill, which the said A, who demised," &c. Or thus: "If such-a-one [A] gives you security, &c., [summon B] to show cause why he deforces such-a-one [A] from so much land with the appurtenances in such a vill which so-and-so [C] demised to the said such-a-one [A] for a term which has not yet expired, within which term the said so-and-so [C] has sold it to such-a-one [B], by reason of which sale the said such-a-one [B] afterwards ejected such-a-one [A] from the said land, as he says, and have there, &c. Witness," &c.

And if such a writ is available against a stranger on account of a sale, much more is it available against the lord himself who has demised and ejected without cause, than against a stranger who had some kind of reason, if because of the sale made to him the seller [*qu.* purchaser] has ejected the lessee, or otherwise if some one other than he who demised, has ejected; and then in this fashion: "Which C. of N. demised to him for a term which has not yet passed, within which term the said A or the said C has wrongfully ejected the said B from the said land (or his farm [*firma*]) as he says, and unless he does so, and the said B gives you security, then summon," &c. . . . No more can any one eject a lessee from his farm, than any tenant from his freehold. And if the lessor is the ejector, he shall restore the seisin with damages, because such a restitution [*qu.* ejectment] does not differ much from a disseisin. But if some one other than the lessor is the ejector, if he has done it with the authority and will of the lessor, both shall be held by the judgment, one on account of the act, and the other on account of having given the authority. But if it was without the will [of the lessor], then the ejector is held both to the lord of the property and to the lessee, to the lessee by the writ aforesaid, and to the lord of the property by an assise of novel disseisin, that the one may have again his term with damages, and the other his freehold without damages.¹

LIT. § 740. But where such lease or grant is made to a man and to his heirs for terme of yeares, in this case the heire of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattel reall, and chattels realls by the common law shall come to the executors of the grantee, or of the lessee, and not to the heire.

Co. LIT. 388 a. Here is a generall rule, that chattels reals as well as chattels personals shall goe to the executors or administrators of the lessee, and not to his heirs. For as estates of inheritance or freehold descendible shall go to the heire, so chattels, as wel reall as personall, shall goe to the executors or administrators.

2 BL. COM. 21. Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

AUBIN *v.* DALY.

KING'S BENCH. 1820.

[Reported 4 B. & Ald. 59.]

By letters patent under the great seal of England, dated July 19, 24 Car. II., as well in consideration of the surrender by the Earl of

¹ See Digby, Hist. Real Prop. c. 3, sect. 2, § 17 (in 1st ed. § 16).

Kinnoul, into the hands of the crown, of the Caribbee Islands and certain other islands, and possession therein referred to, and all his estate, claim, and demand in or to the same, as also for divers other good causes and considerations, his Majesty did, for himself, his heirs, and successors, give and grant unto the said earl one annuity of £600 of lawful money of England, to hold, enjoy, and receive the same, to him the said earl, his executors, administrators, and assigns, for the term of five years, from the feast of Saint Michael the Archangel, then last past. And the king also granted unto the Earl of Kinnoul and his heirs one other annuity of £1,000 of lawful money of England, to him the said earl, his heirs, and assigns; to the only proper use and behoof of the said earl, his heirs and assigns forever, from and immediately after the end and expiration of the said term of five years, without any account or other matter or thing to be rendered or given for the same; which said respective annuities the king appointed should from time to time be duly paid to the earl, his heirs, executors, administrators, and assigns, at the four most usual feasts and terms in the year, out of his Majesty's revenue of $4\frac{1}{2}$ per cent, at Barbadoes and the Leeward Islands as the same should come into the receipt of his Majesty's exchequer, or by levying tallies of assessments upon the farmers or collectors of the said revenue for the time being, notwithstanding any debt or debts charged or chargeable upon the said revenue, or any part thereof, the first payment to commence from the feast day of Saint Michael the Archangel; and if it should happen that the said revenue of $4\frac{1}{2}$ per cent should at any time or times after the expiration of five years fall short of the said annuities, then the king granted that the same should be fully made up to the said earl, his executors, administrators, and assigns, out of any other treasure of his majesty, his heirs, and successors, at any time being or remaining in the receipt of his exchequer; and his said Majesty did thereby authorize the commissioners of his treasury, &c., to give warrant for the levying tallies of assessment from time to time upon the farmers or collectors of the said revenue of $4\frac{1}{2}$ per cent, at Barbadoes and Leeward Islands aforesaid, for the time being, for the due payment of the said annuity of £1,000 to the said earl, his heirs, executors, administrators, and assigns respectively as aforesaid; and did declare, that the receipt of the said earl, his heirs, executors, administrators, and assigns respectively, unto the said farmers and collectors, should be sufficient discharge. By virtue of various subsequent conveyances and assurances, and ultimately by virtue of a certain indenture bearing date the 26th day of May, 1773, the annuity of £1,000 was granted, bargained, and sold unto William Stafford, to hold the same unto and to the use of him, his heirs, executors, administrators, and assigns respectively forever, subject, nevertheless, to a proviso in the said indenture contained, whereby it was declared that if the grantors, or such persons who for the time being should be entitled to the freehold or inheritance, or other beneficial interest of and in the same annuity, or any part thereof, or any or either of them, should pay or cause to be paid unto

the said William Stafford, his heirs, executors, administrators, and assigns, the principal sum of £12,381, 14s. 10d., with interest, at the rate of 4½ per cent, at certain times in the same indenture mentioned, and long since past, he the said William Stafford, his heirs or assigns, would at their request and at their charges re-grant the said annuity and all arrears thereof unto and to their use, or unto such person or persons as they should appoint in that behalf, freed and discharged from all mesne incumbrances. The said principal money was not paid to Mr. Stafford in his lifetime, and still remains due upon the said mortgage. The exchequer annuity, subject to the usual deductions, was regularly received up to Jan. 5, 1818. William Stafford, by his will duly attested, bearing date Oct. 22, 1777, gave all his real and personal estate whatsoever unto his wife, Alethea Maria Stafford, her heirs, executors, administrators, and assigns, and appointed her sole executrix thereof, and died in the year 1796 without issue. The said will was duly proved by his executrix on Sept. 7, 1796. Alethea Maria Stafford, by her will bearing date March 12, 1810, and attested by two witnesses, after directing that all her just debts, funeral, and testamentary expenses and the charges of proving her said will should be in the first place paid; and after giving sundry pecuniary and specific legacies, and divers annuities to several persons and several charitable institutions therein mentioned, bequeathed as follows; viz., "And all the rest, residue, and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof, unto John Aubin and Patrick Lewis, their executors, administrators, and assigns, upon trust, as soon as conveniently may be after my decease to get in and convert into money all such parts of my estate as shall not consist of money or of perpetual stocks or funds." And then, out of such moneys, &c., to pay the several pecuniary legacies, and to provide sufficient funds for the payment of the several annuities and other yearly payments, directed by her will to be made, and to set apart the annual sum of £200 to be paid forever to the treasurer, for the time being, of the Thatched House Society, for the sole uses of that institution. And after directing similar appropriations for the benefit of other charities, she bequeathed all the residue of her said personal estate and effects to be divided equally between and for the benefit of three charities therein named, to be paid in equal proportions, for the benefit of the same respectively. And she appointed the said John Aubin and Patrick Lewis her executors. The testatrix died on Sept. 29, 1810, and the said John Aubin and Patrick Lewis duly proved the said will. The exchequer annuity, under an order of the Court of Chancery made Feb. 17, 1817, in a cause of *Aubin v. Daly*, was sold to John Dearman Church, Esq., for the sum of £12,050. The question for the opinion of this court was, whether the legal estate and interest in the said exchequer annuity of £1,000 passed, by the will of Alethea Maria Stafford, to John Aubin and Patrick Lewis, the executors named in the will.

Denman, for the plaintiff. The question in this case is, whether this annuity duly passed by a will attested only by two witnesses. That depends on another question, whether this be personal or real property. In Co. Lit. 20 a, it is thus laid down: "And so it is if I, by my deed, for me and my heirs, grant an annuity to a man and the heirs of his body; for that this *only chargeth my person*, and concerneth no land, nor savoureth of the realtie." *Holderness v. Carmarthen*, 1 Bro. Ch. Ca. 377; *Buckeridge v. Ingram*, 2 Ves. jun. 652; and *Earl of Stafford v. Buckley*, 2 Ves. 170, are authorities to the same effect; and in the last case, which is upon the very will now in dispute, Lord Hardwicke decided this point on the authority cited from Co. Lit.

Richmond, contra. It is not necessary here to deny the principles of law laid down by the other side. For, admitting that this will is sufficiently executed, still there is an ulterior question, viz., whether this annuity passes by the will. It must pass by one of two modes. Either it vests in the executors *virtute officii*, or by the residuary bequest to them. An annuity of this sort is thus defined by Lord Coke, Co. Lit. 2 a: "And so it is if an annuitie be granted to a man and his heirs, it is a fee-simple personal." As such it will be descendible to his heirs. It was formerly doubted whether an annuity was assignable; but that doubt did not extend to annuities of inheritance. *Gerard v. Boden*, Hetley, 80; *Baker v. Broke*, Moore, 5. And in Brooke's Abr. Tit. Annuity, pl. 39, it is thus laid down: "It was doubted if he who has an annuitie in fee may grant it over, for it is a chose in action; yet *per alios* it is an inheritance; and therefore it may well be granted over, and that without attornment, for it charges the person; and yet the defendant was charged as parson of a church. And a debt cannot descend to the heir, but an annuity of inheritance may descend to the heir; therefore it is not merely personalty." And in Fitzh. Ab. Tit. Release, pl. 48: "Release of all actions personal is a good bar in a writ of annuity, notwithstanding he claim to him and his heirs; and a release of actions real is also good, because it is mixt." And in *Holderness v. Carmarthen*, 1 Bro. Ch. Ca. 376, an annuity granted by the letters patent of King William and Queen Mary was considered on the same footing as an annuity of inheritance, and assignable. And the point was also discussed in *Priddy v. Rose*, 3 Meriv. 86. In Nevil's Case, 7 Rep. 124 b, an annuity of inheritance was held forfeitable for treason by 26 H. 8, c. 13. And in *The Earl of Stafford v. Buckley*, Lord Hardwicke expressly says of this annuity: "All the rest of the personal estate that could pass to executors would go to them; but this is a kind of personalty which, according to Doctor and Student, would not be assets in executors, and, consequently, will not go to them by being named executors." These authorities, therefore, show that the executors did not take this annuity *virtute officii*. Then are the words in the bequest sufficient to give it to them? The testatrix bequeaths all the rest, residue, and remainder of her personal estate, of what nature or kind soever, and every part thereof, unto

J. A. and P. L., their executors, administrators, and assigns, upon certain trusts. Now, it is clear, by reference to Lord Hardwicke's judgment, that he entertained considerable doubts whether this annuity would pass by a sweeping bequest of this nature. Suppose a will bequeathed all the testator's hereditaments to A, and all his personal estate to B. It seems clear that A would take such an annuity as this, and the heir at law is not to be disinherited without express words, and that though general words are used. *Doe, dem. Spearing, v. Buckner*, 6 T. R. 610. [BAYLEY, J. There the devise was followed by words showing that the testator had only his personal estate in contemplation. The words of the trust in that case were very material, for the trustees were to add the interest to the principal, which showed that there the testator was only speaking of his personal estate.] Where the residuary clause is in favor of executors, it was held, *Shaw v. Bull*, 12 Mod. 593, that no more would pass by it than would go to executors *virtute officii*; and that is the case here. And the words "of what nature or kind soever" apply only to real and personal chattels, and do not extend to hereditaments. So in *Rose v. Bartlett*, Cro. Car. 292, a devise of all lands and tenements was held not to include terms for years. The court, therefore, are not bound by the literal sense of general words. He also cited *Ex parte Sergison*, 4 Ves. 147, *Ex parte Morgan*, 10 Ves. 103, and *Silberschildt v. Schiott*, 3 Ves. & B. 45. [BAYLEY, J. The argument would go the length of saying that property of this description could only pass by a special devise.]

Denman, in reply, contended that it was clear that this annuity passed by the residuary clause in Mrs. Stafford's will. Here there is nothing to restrain the general words of the devise. And the only question is, whether this is personal estate; whether it would pass to the executors *virtute officii* is a very different question from the present. This is the case of a specific bequest of the residue, and is quite sufficient to pass the annuity in question. *Cur. adv. vult.*

The following certificate was afterwards sent:—

This case has been argued before us by counsel, and we are of opinion that the legal estate and interest in the exchequer annuity of £1,000 passed by the will of Alethea Maria Stafford to John Aubin and Patrick Lewis, deceased.

C. ABBOTT, J. BAYLEY, G. S. HOLROYD, W. D. BEST.

BLIGH v. BRENT.

EXCHEQUER. IN EQUITY. 1837.

[*Reported 2 Y. & C. Ex. 268.*¹]

ALDERSON, B., delivered the judgment of the court: This was a bill praying in substance that the defendant Margaret Brent, widow and executrix of Timothy Brent, deceased, may account for certain shares of the Chelsea Waterworks, and that it may be declared by the court that the plaintiff as his heir at law became entitled to those shares, and that the other defendants, the Governor and Company of the Chelsea Waterworks, may be directed to insert in their transfer-books the plaintiff's name as proprietor thereof. There is no dispute as to the facts, and the only question for the court was, whether these shares were part of the real or personal estate of the testator. If the former, the plaintiff as heir at law is entitled to the decree he prays, because the will is attested by only two witnesses; and if the latter, his bill must be dismissed.

When this question originally came before me, I thought it one of so much difficulty, and involving such extensive consequences, that I was desirous the parties should have the benefit of having the opinion of my learned brethren also; and accordingly, in conformity to the practice here (which is a peculiar advantage in the frame of the Court of Equity in the Exchequer), I adjourned the case to be heard before the full court. The case was, in the course of last Michaelmas Term, very fully and ably argued before Lord Abinger, my brothers Parke and Gurney, and myself; and I am now to deliver the opinion of the whole court on the point.

The company of the Chelsea Waterworks was originally constituted under the provisions of the statute 8 Geo. I., 1723. By that act, certain persons named therein were constituted commissioners, undertakers, and trustees for carrying into effect the works then projected, and for afterwards maintaining them. For that purpose his Majesty was, by a subsequent clause, empowered to incorporate them, by the name of the Governor and Company of the Chelsea Waterworks. And they were to have the power of purchasing lands not exceeding £1,000 per annum, and to sell and dispose thereof at their pleasure, and to do all necessary works, and to be subject to such rules, qualifications, and appointments as his Majesty should think reasonable to be inserted in the charter; and might also be empowered to make by-laws from time to time for the good government of the corporation.

In pursuance of this power a charter of incorporation was granted almost immediately afterwards by George I. That charter followed the directions of the statute, and gave the corporation power to purchase lands, &c., so as they did not exceed in value £1,000 per annum,

¹ The opinion only is given. It sufficiently states the facts.

and also estates for life or lives, and for years, and goods and chattels of what nature or value soever, for the better carrying on and effecting the purposes of the company, not exceeding the value of the joint stock of the corporation thereafter mentioned and limited, and to be taken and computed as part thereof.

The twenty-third section empowered the corporation by subscription to raise a joint stock, not exceeding £40,000, and to manage the same from time to time, and to receive the benefit and advantage of the same to the use of them the said Governor and Company and their successors, according to such shares and proportions as they or any of them have or shall have therein. And then it provided that every person subscribing and contributing any sum or sums of money should, by virtue thereof, become members of the said corporation, and should be entitled to a share or shares in such joint stock (previously fixed at £20 each) equal to the sum or sums of money so by him actually contributed and paid in, and no greater; and should be enabled to sell, assign, and transfer the same or any part thereof (not being less than one whole share, as by a subsequent clause was provided), by transfers in the company's books, in such manner as should be by a general court directed, or by his last will and testament; and the person to whom such assignment or transfer, or disposition by last will and testament, should be made, should by virtue thereof become member of the said corporation.

What, then, is the intention of the crown and legislature to be collected from all these particulars as to the nature of the interest which each shareholder is to have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is intrusted. They have power of vesting it at their pleasure in real estate or in personal estate, limited only as to amount, and of altering from time to time the species of property which they may choose to hold; and in order to give them greater facilities and advantages, certain powers are intrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one decided test of this is, that they belong inalienably to the corporation, whereas all the joint stock is capable expressly of being sold, exchanged, varied, or disposed of at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted, — the powers that body has over it, and the purposes for which these powers are given. The property is money, — the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation who have an unlimited power of converting part of it into land, part into goods, and of changing and dis-

posing of each from time to time ; and the purpose of all this is the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors.

It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments — and those varying and temporary instruments — whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits : could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body ? And yet that is, in truth, this case ; for the individual members of a corporation are quite as distinct from the metaphysical body called “ the corporation,” as any others of his Majesty’s subjects are.

This case varies most materially from those which were cited in the argument. In the New River case, the individual corporators have the property ; the corporation have only the management of it. Lord Hardwicke, in the case in *Atkyns*,¹ expressly puts it on that ground. “ They have the legal right,” he says ; “ they may bring an ejectionment for so much land covered with water ; and the only difference between the shareholders of the king’s half and the others is that the corporation of management have as to these shares perhaps the legal estate in them, the equitable estate being in the individual proprietors.” In that case, too, the property given to the corporation was real property, which they are to manage for the good of all. They have no powers of converting it into any other sort of property, but must keep it and make a profit from it as it is ; viz., as real property.

The same observations apply to *Buckeridge v. Ingram*,² the Avon Navigation, with this addition, that there the undertakers do not appear to have been a corporation at all. And in both the shares are transferred to the shareholders and their heirs. But here the case is wholly different, — the property intrusted is money ; the corporation may do what they like with it, and may obtain their profit in any way they please from the employment of their capital stock. If they thought that they could with greater profit supply water by conveying it in carts or the like, they would have a perfect right so to do. It would be strange that the nature of these shares should continually fluctuate, and be sometimes real estate, and sometimes personal, according as the corporation in the course of their management should choose to hold real or personal property. Suppose a man made his will, attested by two persons, and at a time when the corporation held only personal estate. It is good. He becomes lunatic or is incapable from age, and then real property is bought by the corporation. Is his will to be set aside ? And yet he cannot make another.

¹ [*Townsend v. Ash*, 3 Atk. 336.]

[2 Ves. Jr. 652.]

Then, in what way has this property always been treated? If we look to the wording of the charter, the language is much more suitable to personal than to real estate. Indeed, on the latter supposition it is very inaccurate. Again, the form of transfer appointed by the legislature (for that which is done under the provisions of the charter is, in fact, done by the legislature, and is, indeed, subsequently recognized by it) is applicable to personal estate only. These shares are not transferred to A. B. and his heirs, but A. B., his executors, administrators, and assigns; and so they have always been. This form, indeed, may be considered as almost a contemporary exposition of the law on this point.

Lastly, in *Weekley v. Weekley*¹ this point came expressly under the consideration of Sir Thomas Sewell, Master of the Rolls, and he decided that these shares were personal property.

Upon the whole, therefore, we think that the principles of law, the usage of the company, and the distinct authority of one decided case are sufficient to warrant us in coming to the conclusion that these shares are personal property.

The result is, that the bill must be dismissed, with costs.

Decree accordingly.

Mr. Simpkinson, Mr. Creswell, and Mr. Toller, for the plaintiff.

The Attorney-General (Sir John Campbell), Mr. Boteler, and Mr. Prescott White, for the Governor and Company of the Chelsea Waterworks.

Mr. G. Richards and Mr. Stevens for the defendant Brent.

¹ [2 Y. & C. Ex. 281, note.]

NOTE. — So *Russell v. Temple*, 3 Dane, Ab. 108. In Connecticut, shares in turn-pike corporations, and in Kentucky, shares in railroad corporations, were once held to be real estate; but in both States the law has now been changed by statute.

BOOK II.

NATURE AND ACQUISITION OF RIGHTS IN PERSONAL
PROPERTY.

CHAPTER I.

INTRODUCTORY.

SUITS FOR THE RECOVERY OF PERSONAL PROPERTY.

NOTE. — The student cannot too soon observe the inseparable connection between substantive rights and the forms of remedies. In most suits which involve rights to personal property, only damages can be recovered. It seems desirable here to see when possession of the property itself may be obtained.

SECTION I.

DETINUE AND REPLEVIN.

PETERS v. HEYWARD.

COMMON BENCH. 1623.

[Reported Cro. Jac. 682.]

ERROR of a judgment in the Common Pleas in detinue of a bond. Upon *non detinet* pleaded, it was found for the plaintiff, and the damages assessed to seven pounds and costs sixpence; and if the bond cannot be restored, then they assessed for damages, besides the seven pounds, twenty pounds more; and it was thereupon adjudged that he should recover the said seven pounds and sixpence for the costs, and the said bond or twenty pounds: *et preceptum fuit vicecomiti distringere* for the said bond or twenty pounds.

And thereupon the error was assigned, for the judgment ought to be conditional; viz., the said bond, or if he cannot have the said bond, then the twenty pounds; and accordingly the *distringas* ought to have been to demand the bond, and if it cannot be delivered, then the twenty

pounds ; but these words, “ and if it cannot be delivered,” were omitted, — wherefore it was moved to be error.

And although Waller, the prothonotary of the Common Pleas, certified that there were divers precedents there in this manner, and it was said that in the Book of Entries, Co. Ent. 170, judgment is entered in this manner, and alleged that the judgment being that he shall recover the bond or twenty pounds tantamount, and is to be intended conditional that he shall have the bond, and if he cannot have it, then the twenty pounds ; yet upon consideration of many other precedents, and the books which mention that the judgment is and ought to be conditional in itself, and not by intendment, the court held that the judgment was erroneous ; for by that judgment and awarding of a *distringas* the sheriff might distrain for the one or the other at his choice, which ought not to be ; but he ought to distrain for the thing itself, and if he cannot have it, then for the twenty pounds ; and although the writ of *distringas* was well made, and in that manner as it was shown to the court, yet forasmuch as the judgment is otherwise, the awarding upon the roll, which is the warrant of the writ, was not good : wherefore rule was given that the judgment should be reversed.¹

MENNIE v. BLAKE.

QUEEN'S BENCH. 1856.

[Reported 6 E. & B. 842.]

REPLEVIN. Plea: *Non cepit*. Issue thereon.

The cause came on to be tried before Crowder, J., at the last Spring Assizes for Devon. The following account of the facts which then appeared in evidence is taken from the judgment of this court.

“ One Facey was indebted to the plaintiff. He brought him £15 towards payment of the debt, but requested and obtained permission to lay the money out in the purchase of a horse and cart, which were to be the property of the plaintiff, but of which Facey was to have the possession and the use, subject to such occasional use as plaintiff might require to have of them, and to their being given up to plaintiff when he should demand them. Accordingly Facey made the purchase. The possession and the use were substantially with him ; he fed, stabled, and took care of the horse ; there was some evidence that his name was on the front of the cart ; certainly plaintiff's was on the side, —

¹ In an action of detinue on a judgment that the plaintiff shall recover the goods or the value, there shall issue to the sheriff a *distringas* to the defendant *ad deliberanda bona*, and if he will not, the plaintiff shall have the value as it is taxed by the inquest ; and so it is in the election of the defendant to deliver to the plaintiff the goods themselves, or the value, &c. Per *Frowyk*, C. J., in *Anon.* (Cam. Scacc.), Keil. 61b, 64 b (1505).

under what circumstance placed there, the evidence was contradictory, the plaintiff alleging it to have been placed in the ordinary way as an evidence of property, the defendant insinuating that it was so placed in order to protect it from Facey's other creditors. It is not, however, material, because on the one hand the plaintiff's property we take to be indisputable, and on the other we do not think there is evidence enough to charge the defendant with fraud or collusion in the circumstances under which he obtained possession, and which we now proceed to state.

“Facey determined to emigrate; and the defendant knew of his intention, but the plaintiff did not. The horse and cart were used in transporting Facey's effects to the pier at which he was to embark; and the defendant, to whom he owed money for fodder supplied to the horse, went with him to procure payment if he could. At parting, Facey delivered the horse and cart to him, telling him to take them for the debt, but adding that he owed the plaintiff money also, and that if he would discharge the debt due to the defendant, which was much less than their value, he was to give them up to him. In this manner the defendant acquired his possession. The plaintiff for some time remained in ignorance of what had passed, and afterwards, coming to the knowledge of it, demanded them; but the defendant refused to deliver them unless his debt were paid: whereupon the plaintiff proceeded to replevy the goods, and so brought the present action.”

Upon these facts the learned judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant, or a nonsuit if under such circumstances replevin did not lie.

Montague Smith, in the ensuing term, obtained a rule *nisi* accordingly.

Collier and *Karslake*, in last Hilary Term, showed cause.

Montague Smith and *Coleridge*, contra.

COLERIDGE, J., now delivered judgment. This was a rule to enter a nonsuit or verdict for the plaintiff on a plea of *Non cepit* to a declaration in replevin; and the facts were in substance these. His Lordship then stated the facts, and proceeded as follows:—

Upon these facts the question raised is, Whether there was any taking of the horse and cart from the plaintiff by the defendant? And we are of opinion, looking to the nature and purpose of the action of replevin, that there was no taking in the sense in which that word must be understood in this issue. The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things: that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary *ex parte* interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declar-

ing, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. Blackstone (3 Com. 146), after observing that the Mirror ascribes the invention of this proceeding to Glauvil, says that it "obtains only in one instance of an unlawful taking, that of a wrongful distress." If by this expression he only meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact. But there are not wanting authorities to show that the remedy by replevin was not so confined; and in the case of *Shannon v. Shannon*, 1 Sch. & Lef. 324, 327, Lord Redesdale finds fault with this passage, saying that the definition is "too narrow," and that "many old authorities will be found in the books of replevin being brought where there was no distress:" and the learned reporters, in a note to the passage, refer to Spelman's Glossary, 485 (tit. *Replegio*); *Doctrina Placitandi*, Replevin, 313; Com. Dig. Replevin (A); and Gilbert, Distress and Replevin, 58 (4th ed., p. 80).

There is no doubt that passages, such as those referred to, may be found stating the definition very broadly; yet we believe that when the authorities on which some of them rest are examined, and when due attention has been paid to the context in others, it will appear in the result questionable, at the least, whether the commentator's more qualified definition was not correct, — at least that replevin was instituted as a peculiar remedy, and under the Statute of Marlbridge by plaintiff as a *festinum remedium* for the injury of an unlawful distress.

Thus in 2 Roll. Abr. 430, Replevin (B) 2, it is said, if trespasser takes beasts, replevin lies of this taking at election; the authority for this is Yearb. Mich. 7 H. IV. fol. 28 B, where, the counsel or another judge alleging the contrary, Gascoigne, C. J. of K. B., says: "He may elect to have replevin or writ of trespass;" but he adds, or the reporter adds, "and some understand that he cannot," — for which last a reason is given.

Again, Com. Dig. Replevin (A): "Replevin lies of all goods and chattels unlawfully taken." For this no authority is cited; but the context shows that the Chief Baron was thinking, not so much of the circumstances under which taken, as of the things themselves, for he adds, "whether they be live cattle or dead chattels," or "a swarm of bees," or "iron of his mill," citing Fitzherbert's *Natura Brevium*, in whose chapter on Replevin we do not find the law so broadly laid down. As to the passage to which reference is made in Lord Chief Baron Gilbert, it should be remembered that the treatise is on the Law of Distresses and Replevins, and the passage occurs in a chapter in which replevin is treated of with reference to distress, as if the two formed parts of one subject-matter. Little, therefore, can be inferred

from the generality of the language in a single sentence. A *dictum* of Lord Ellenborough has also been referred to in *Dore v. Wilkinson*, 2 Stark. N. P. C. 287, from which the inference is that he thought replevin might conveniently be had recourse to more often than it was, instead of bringing trover; but it was an observation thrown out in the course of a cause, a recollection of what Mr. Wallace used to say, not ruling any point, nor deciding anything, in the cause. Much importance ought not to be attached to such casual observations, even of so great a judge at Nisi Prius. On the other hand, Lord Coke seems to be authority the other way. In Co. Lit. 145 b, is the following passage: "A *replegiare* lyeth, as Littleton here teacheth us, *where goods are distrained and impounded*; the owner of the goods may have a writ *de replegiari facias*, whereby the sheriff is commanded, taking sureties in that behalf, to re-deliver the goods distrained to the owner, or upon complaint made to the sheriff he ought to make a replevy in the county. *Replegiare* is compounded of *re* and *plegiare*; as much as to say, as to re-deliver upon pledges or sureties."

From a review of these and other authorities which might be added, it may appear not settled whether originally a replevy lay in case of other takings than by distress. Nor is it necessary to decide that question now; for at all events it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner. This stands upon authority and the reason of the thing. We have referred already to a *dictum* of Lord Redesdale. Three cases are to be found: *Ex parte Chamberlain*, 1 Sch. & Lef. 320; In *Re Wilsons*, 1 Sch. & Lef. 320, note (a); and *Shannon v. Shannon*, 1 Sch. & Lef. 324, in which the law is so laid down by Lord Redesdale. And these are cases of great authority; for that very learned judge found the practice in Ireland the other way. He felt the inconvenience and injustice of it; he consulted with the Lord Chief Justice, and obtained the opinion of the other judges; and then pronounced the true rule, which, in one of these cases, In *Re Wilsons*, he thus states: The writ of replevin "is merely meant to apply to this case, viz., where A takes goods wrongfully from B, and B applies to have them re-delivered to him upon giving security until it shall appear whether A has taken them rightfully. But if A be in possession of goods in which B claims a property, this is not the writ to try that right." In the course of these cases his Lordship points out how replevin proceeds against the general presumption of law in favor of possession; how it casts upon him who was in possession the burden of first proving his right; and he puts (*Ex parte Chamberlain*, 1 Sch. & Lef. 322), as a *reductio ad absurdum*, a case not unlike the present. "Suppose," says he, "the case of a person having a lien on goods in his possession, and who insists on being paid before he delivers them up: I do not see, *on the principles insisted on*, why a writ of replevin may not issue in that case." The reason of the thing is equally decisive: as a general rule it is just that a party in the

peaceable possession of land or goods should remain undisturbed, either by the party claiming adversely or by the officers of the law, until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried and the goods be forthcoming to abide the decision. Whatever may be thought of Lord Coke's etymology, what he says of *replegiare*, while it shows his understanding of the law, gives a true account of what replevin is, — a re-delivery to the former possessor on pledges found. But this is applicable clearly to exceptional cases only. If wherever a party asserts a right to goods in the peaceable possession of another he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result. Now, in the present case Facey was not the servant of the plaintiff, nor was his possession merely the possession of the plaintiff; he was the bailee of the plaintiff, and had a lawful possession from the delivery of the owner, which conferred on him a special property. This did not authorize him to transfer his possession to the defendant, nor could he give him a lien for his debt against the paramount right of the true owner, the bailor. After a demand and refusal, upon the admitted facts in this case, the plaintiff could clearly have maintained trover against the defendant; but yet there was nothing wrongful in his accepting the possession from Facey. He acquired that possession neither by fraud nor violence, — at least none is found, and we cannot presume either, — and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This, therefore, in our opinion was a case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue.

It appeared in this case that the sheriff's deputy for the issuing of replevins was the attorney for the plaintiff; and although we have no reason to believe that anything wrong was *here* intended, we think it right to notice this circumstance, because it is one which obviously might lead to much abuse and oppression. It is proper to be known that there are several cases to be found in the books in which attachments have issued where replevins have been thought to have been granted improperly and from improper motives.

The rule should be absolute, not to enter a verdict, but a nonsuit.

*Rule absolute for a nonsuit.*¹

¹ In *Mellor v. Leather*, 1 E. & B. 619 (1853), it had been said by the Court of Queen's Bench that replevin would lie where goods had been unlawfully taken, though not as a distress.

STOUGHTON v. RAPPALO.

SUPREME COURT OF PENNSYLVANIA. 1818.

[*Reported 3 S. & R. 559.*]

THIS was a replevin for 631 barrels of flour, tried before the Chief Justice, at Nisi Prius, in November, 1817, when the jury found a verdict for the plaintiff, subject to the opinion of the court in banc on a point reserved.

The plaintiff, on March 9th, 1813, contracted to ship 631 barrels of flour on board the *Minerva*, a Spanish vessel, of which the defendant was master, from Philadelphia to Havanna, at four dollars a barrel. The flour was accordingly put on board by March 16th, the ship then lying at the wharf in Philadelphia. On March 16th the bills of lading were signed, and the ship cleared out at the custom-house; and on the 17th she cleared out at the Spanish consul's. When the contract was made, both parties expected a blockade of the Delaware by the British, and, accordingly, notice was received in Philadelphia on March 16th that the blockade was instituted. Under these circumstances the plaintiff several times applied to the defendant either to proceed on his voyage, or to deliver up the flour; and the defendant, on the last application, refused to do either, unless the plaintiff, in case of the flour being delivered to him, would pay one half freight (two dollars a barrel), or, in case the vessel proceeded, would guarantee the ship and two thirds of the freight. The plaintiff, therefore, on April 29th, issued this replevin, on which the flour was delivered to him.

The defendant pleaded property, on which issue was joined, and a verdict taken for six cents damages and six cents costs, subject to the opinion of the court whether the property at the commencement of the action was in the plaintiff.

Chauncey and *Ingersoll* for the defendant.

J. R. Ingersoll, contra.

DUNCAN, J. However the law may be in England as to the action of replevin, whether it only lies in case of distress, as is held by some (3 Bl. 145), or whether, as held by others, it lies in all cases where the goods have been taken out of the actual possession of the owner, it is the established law of Pennsylvania that it lies in all cases where a man claims goods in the possession of another. 1 Dall. 156. 6 Binn. 8. It is a question of property. It is not like trover, which is an equitable action, and if the party has a legal or equitable lien on the property, it may be defalked in the damages assessed by the jury. But in a case where the claim of the defendant must be entirely uncertain, no fixed standard by which to ascertain it, the owner cannot know what sum to tender; and if a verdict passed against him in replevin, because he tendered too little, his property would be lost. Here the goods were delivered to the plaintiff. If there is a verdict for the defendant, it

must be a general one; in which case there would be judgment *de retorno habendo*, and the defendant might, for the value of the goods, and not for the amount of the lien claimed by him, proceed against the sheriff or the pledges. In the action the jury could not award damages to the defendant.

The taking here not being tortious, the plaintiff must prove property. If the taking were wrongful, this burden would lie on the defendant. The plaintiff has proved property. The defendant cannot claim a lien on the ground of freight, for no freight was earned; and it is impossible to say certainly that it would have been earned, had there been no blockade, for still the voyage might not have been safely performed. The plaintiff had done everything on his part. The defendant was not prevented from earning it by any breach of contract on the part of the plaintiff.

It is not necessary, as this case comes before the court, to decide whether the defendants were entitled to any compensation, and if to any, what. The occasion does not call for an opinion on the question whether the contract is dissolved or suspended. Although no direct decision has been produced, yet it appears from writers whose opinions are entitled to great respect, and such, too, would appear to be the reason of the thing, independently of direct precedents, that in case of a cargo such as this, perishable in its nature, which if kept on board during the continuance of the blockade would have been spoiled, or if secured on shore must be greatly deteriorated, that the owner had a right to have such cargo unladen, and to the possession of it, and the power to sell it, without giving any security to replace it. If this be so, the defendant could have no lien on the cargo. For the doctrine of lien is founded on the possessor's right to detain until the lien is discharged. When the possession is gone, the lien is gone. The remedy of the defendant for compensation, if he has any, is not by detaining the goods, nor action for recovery of freight, but an action for the recovery of damages for not being suffered to carry it.¹

New trial refused.

SECTION II.

BILL IN EQUITY.

SOMERSET v. COOKSON.

IN CHANCERY, BEFORE LORD TALBOT, C. 1735.

[Reported 3 P. Wms. 390.]

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late Earls of Northumber-

¹ The opinions of the other judges concurring are omitted. For the States which agree with the Pennsylvania doctrine, see Morris, Replevin (3d ed.) 52-54.

land), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His grace became entitled to it as treasure-trove within his said manor. This altar-piece had been sold by one who had got the possession of it to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought a bill in equity to compel the delivery of this altar-piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law by an action of trover or detinue, and ought not to bring his bill in equity; that it was true, for writings savoring of the realty a bill would lie, but not for anything merely personal, any more than it would for an horse or a cow. So a bill might lie for an heirloom, as in the case of *Pusey v. Pusey*, 1 Vern. 273. And though in trover the plaintiff could have only damages, yet in detinue the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in chancery.

On the other side it was urged that the thing here sued for was matter of curiosity and antiquity; and though at law only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it, — which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity or ornament, *volens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it. And though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer. That in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly.

WOOD *v.* ROWCLIFFE.

IN CHANCERY, BEFORE LORD COTTENHAM, C. 1847.

[*Reported 2 Phil. 382.*]

THE principal object of this suit was to restrain the sale of certain furniture by the defendant Rowcliffe, and to have it delivered up to the plaintiff as the rightful owner.

Rowcliffe claimed the furniture under a bill of sale, by way of mortgage, from the defendant Elizabeth Wright who was at the time in

possession of it as apparent owner, but who, as the plaintiff alleged, had no property in it, having been left in charge of it merely as his agent during his absence abroad. The bill represented that the furniture was still in the hands of Elizabeth Wright, and that Rowcliffe had advertised it for sale. His answer, however, stated, and it was proved, that he had taken possession of it soon after the execution of the bill of sale, and that he had ever since retained such possession by keeping a man in the house where it was, although Elizabeth Wright, who resided there, was allowed the use of it.

Elizabeth Wright, by her answer, disclaimed all interest in the furniture.

At the hearing of the cause before Vice-Chancellor Wigram, by whom an injunction had been previously granted, a decree was made, by which it was ordered, among other things, that the bill should be retained, with liberty to the plaintiff to bring an action of trover for the furniture, and the defendant was, on the trial, to admit conversion.

On the hearing of an appeal by Rowcliffe from that decree, the following two points, amongst others, were made by the counsel for the appellant: First, that the plaintiff's remedy was at law, and that a bill in equity did not lie to restrain the sale of specific chattels, unless they possessed some peculiar value which could not be compensated by damages, as in the case of the Pusey horn. 1 Vern. 273. Secondly, that admitting such a bill would have lain had the goods been still in the possession of Elizabeth Wright as the plaintiff's agent for their custody, yet at all events the equity was gone as soon as they had changed hands and passed into the possession of a stranger. And in support of this they referred to the doubt expressed by the Vice-Chancellor himself in overruling a demurrer to this very bill, as to whether his decision would have been the same if the bill had alleged that the goods were in the hands of Rowcliffe.

In reference to these points,

The LORD CHANCELLOR said: The cases which have been referred to are not the only class of cases in which this court will entertain a suit for delivery up of specific chattels; for where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee or a broker, or whether the subject-matter be stock or cargoes or chattels of whatever description, the court will interfere to prevent a sale either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power. In this case there is great reason to believe that Elizabeth Wright never had any right to the goods except as the plaintiff's agent, for she has disclaimed all interest in them by her answer, and there is nothing to show how she had acquired any property in them. But, says Rowcliffe, I purchased under circumstances which give me a legal right to the goods. If that be so, the equity of the plaintiff will be intercepted by a prior legal right. In such a case this court begins by putting the matter into a course of investigation to ascertain that legal right. That is what the Vice-Chan-

cellor has done. And in that respect I see no ground for impeaching the decree.

[His Lordship then proceeded to comment on some subordinate parts of the case, in the course of which he made the following observation]: I observe the decree gives the plaintiff liberty to bring an action, but gives no directions as to what is to be done if he does not proceed; whereas it ought to have directed that if he did not proceed within a certain time, the bill should be dismissed.

Mr. Parker and *Mr. H. Clarke* were for the appellant.

Mr. Romilly and *Mr. Southgate* for the respondent.

CHAPTER II.

ACQUISITION OF RIGHTS NOT UNDER FORMER OWNER.

NOTE. — In this chapter are considered the cases in which the chattel in question either had no former owner, or in which, if it had a former owner, the present claimant does not derive his title from him.

SECTION I.

CHATELS HAVING NO FORMER OWNER.

(*Inst.* II. 1, 12 & 13.)

12. WILD beasts, therefore, and birds and fishes, that is to say, all animals that live on the earth, in the sea or in the air, as soon as they are caught by any one, become his at once by virtue of the law of nations. For whatever has previously belonged to no one, is granted by natural reason to the first taker. Nor does it matter whether a man catches the wild beasts or birds on his own ground, or on another's; although a person purposing to enter on another's land for the purpose of hunting or fowling may of course be prohibited from entering by the owner, if he perceive him. Whatever, then, you have caught of this kind, is regarded as yours so long as it is kept in your custody; but when it has escaped from your custody and reverted to its natural freedom, it ceases to be yours, and again belongs to the first taker. And it is considered to have recovered its natural freedom when it has either escaped out of your sight, or is still in sight, but so situated that its pursuit is difficult.

13. It has been debated whether a wild beast is to be considered yours at once, if wounded in such manner as to be capable of capture; and some have held that it is yours at once, and is to be regarded as yours so long as you are pursuing it, but that if you desist from pursuit, it ceases to be yours, and again belongs to the first taker. Others have thought that it is not yours until you have actually caught it. And we adopt the latter opinion, because many things may happen to prevent your catching it.

THE CASE OF SWANS.

7 Co. 15 *b*, 17 *a* (1592). — And in the same case it is said that the truth of the matter was that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cignets between them; and for these cignets the owners did join in one action, for in such case by the general custom of the realm, which is the common law in such case, the cignets do belong to both the owners in common equally, *sc.* to the owner of the cock and the owner of the hen; and the cignets shall be divided betwixt them. And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the poet saith, —

Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, etc.

And therefore this case of the swan doth differ from the case of kine, or other brute beasts. *Vide* 7 Hen. IV. 9.

YOUNG v. HICHENS.

QUEEN'S BENCH. 1844.

[Reported 6 Q. B. 606.]

TRESPASS. — The first count charged that defendant, with force, &c., seized and disturbed a fishing sear and net of plaintiff, thrown into the sea for fish, wherein plaintiff had taken and inclosed, and then held inclosed in his own possession, a large number of fish, to wit, &c., and that defendant threw another fishing sear and net within and upon plaintiff's sear and net, and for a long time, to wit, &c., prevented plaintiff from taking the fish, so taken and inclosed, out of his sear and net, as he could otherwise have done; and drove, &c., the fish; whereby part of them died, part were injured, and part escaped; and the sear and net was injured. Second count, that defendant with force, &c. seized, took, and converted fish of plaintiff.

Pleas 1. Not guilty. Issue thereon.

2. To the first count, as to preventing plaintiff from taking the fish alleged to be inclosed in his possession, and driving, &c., the said fish: that the fish were not plaintiff's fish, and he was not possessed of them, in manner, &c. Conclusion to the country. Issue thereon.

3. To the second count, that the fish were not the plaintiff's fish, in manner, &c.: conclusion to the country. Issue thereon.

4 and 5. As to other parts of the declaration, raising defences under statutes 16 Geo. III. c. 36, and 4 & 5 Vict. c. lvii. (local and personal, public), relating to the St. Ives (Cornwall) pilchard fishery. Issues of fact were tendered and joined on those pleas.

On the trial, before Atcherley, Serjt., at the Cornwall Spring Assizes, 1843, it appeared that the plaintiff had drawn his net partially round the fish in question, leaving a space of about seven fathoms open, which he was about to close with a stop net; that two boats, belonging to the plaintiff, were stationed at the opening, and splashing the water about, for the purpose of terrifying the fish from passing through the opening; and that at this time the defendant rowed his boat up to the opening, and the disturbance, and taking of the fish, complained of, took place. The learned Serjeant left to the jury the question of fact whether the fish were at that time in the plaintiff's possession, and also other questions of fact on the other issues. Verdict for plaintiff on all the issues, with damages separately assessed; namely, £568 for the value of the fish, and £1 for the damage done to the net. Leave was given to move as after mentioned. In Easter term, 1843, Crowder obtained a rule *nisi* for entering a verdict for defendant on all the issues, or on the 2nd, 3rd, 4th, and 5th, or for reducing the damages to 20s. and entering a verdict for defendant on the 2nd and 3rd issues; or for a new trial; or for arresting the judgment. In Hilary vacation (Feb. 10th), 1844,

Cockburn and Montague Smith showed cause.

Crowder, contra.

LORD DENMAN, C. J. It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant; but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power; but that would only show a wrongful act, for which he might be liable in a proper form of action.

PATTESON, J. I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear; possibly there may be a remedy under the statutes.

WIGHTMAN, J. I am of the same opinion. If the property in the fish was vested in the plaintiff by his partially inclosing them, but leaving an opening in the nets, he would be entitled to maintain trover for fish which escaped through that very opening.

(COLERIDGE, J., was absent.)

Rule absolute for reducing the damages to 20s., and entering the verdict for defendant on the second and third issues.

BUSTER v. NEWKIRK.

SUPREME COURT OF NEW YORK. 1822.

[Reported 20 Johns. 75.]

IN ERROR, on *certiorari* to a justice's court.

Newkirk brought an action of trover against Buster for a deer skin. It appeared that N. was hunting deer on the 31st of December, 1819, and had wounded one, about six miles from B.'s house, which he pursued with his dogs. He followed the track of the deer, occasionally discovering blood, until night; and on the next morning resumed the pursuit, until he came to B.'s house, where the deer had been killed the evening before. The deer had been fired at by another person, just before he was killed by B., and fell, but rose again, and ran on, the dogs being in pursuit, and the plaintiff's dog laid hold of the deer about the same time, when B. cut the deer's throat. N. demanded the venison and skin of B., who gave him the venison, but refused to let him have the skin. The jury found a verdict for the plaintiff for seventy-five cents, on which the justice gave judgment.

PER CURIAM: The principles decided in the case of *Pierson v. Post* (3 Caines' Rep. 175) are applicable here. The authorities cited in that case establish the position that property can be acquired in animals *feræ naturæ* by *occupancy* only, and that in order to constitute such an occupancy it is sufficient if the animal is deprived of his natural liberty, by wounding or otherwise, so that he is brought within the power and control of the pursuer. In the present case the deer, though wounded, ran six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of N. He therefore cannot be said to have had a property in the animal so as to maintain the action. The judgment must be reversed.

Judgment reversed.

SWIFT v. GIFFORD.

UNITED STATES DISTRICT COURT FOR MASSACHUSETTS. 1872.

[Reported 2 Lowell, 110.]

LIBEL by the owners of the ship Hercules against the agent and managing owner of the Rainbow, both whale-ships of New Bedford, for the value of a whale killed in the Ochotsk Sea by the boats of the Hercules, and claimed by the master of the Rainbow, and taken and

appropriated by him, because one of his harpoons, with a line attached to it, was found fastened in the animal when he was killed. The evidence tended to show that the boats of the respondents raised and made fast to the whale, but he escaped, dragging the iron and line, and so far outran his pursuers that the boats' crews of the Hercules did not know that any one had attacked or was pursuing the whale when they, being to windward, met and captured him; that the master of the Rainbow was, in fact, pursuing, and came up before the whale had rolled over, and said that one of his irons would be found in it, which proved to be true; and he thereupon took the prize. The parties filed a written stipulation that witnesses of competent experience would testify that, during the whole time of memory of the oldest masters of whaling-ships, the usage had been uniform in the whale-fishery of Nantucket and New Bedford that a whale belonged to the vessel whose iron first remained in it, provided claim was made before cutting in. There were witnesses on the stand who confirmed the existence of the usage, and who extended it to all whalers in these seas; and there was nothing offered to oppose this testimony. The only disputed question of fact or opinion was concerning the reasonable probability that the whale would have been captured by the Rainbow if the boats of the Hercules had not come up. The value of the whale was said to be about \$3,000.

. *J. C. Dodge* and *C. T. Bonney*, for the libellants.

G. Marston and *W. W. Crapo*, for the respondent.

LOWELL, J.: The rule of the common law, borrowed probably from the Roman law, is that the property in a wild animal is not acquired by wounding him, but that nothing short of actual and complete possession will avail. This is recognized in all the cases concerning whales cited at the Bar, as well as in the authorities given under the first point. Whether the modern civil law has introduced the modification that a fresh pursuit with reasonable prospect of success shall give title to the pursuer, does not seem to be wholly free from doubt, though the ancient commentators rejected such a distinction, for the satisfactory reason that it would only introduce uncertainty and confusion into a rule that ought to be clear and unmistakable. See *Pandects*, by Pothier, vol. xvi. p. 550; lib. 41, tit. 1; *Gaius*, by Tompkins & Lemon, p. 270. I do not follow up this inquiry, because it would be impossible for me to say that the crew represented by the respondent, though continuing the chase, had more than a possibility of success.

The decision, therefore, must turn on the validity of the usage, without regard to the chances of success which the respondent's crew had when the others came up. It is not disputed that the whalers of this State, who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it.

The converse of the proposition is that a whale which is found adrift, though with an iron in it, belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalers in the Northern fishery, as shown by the cases, is, that the iron holds the whale only while the line remains fast to the boat; and the result is, that every loose whale, dead or alive, belongs to the finder or taker, if there be but one such.

The validity of the usage is denied by the libellants, as overturning a plain and well-settled rule of property. The cases cited in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law. Thus Story, J., in *The Reeside*, 2 Sumner, 569, says, "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law." Many similar remarks of eminent judges might be cited. But in the application of these general views it will be found difficult to ascertain what is considered a principle of law that cannot be interfered with. Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing; and some of them may be varied by usage, which, if general and long established, is equivalent to a contract. Thus in *Wigglesworth v. Dallison*, Doug. 201, which Mr. Smith has selected as a leading case, the law gave the crops of an outgoing tenant to his landlord; but the custom which made them the property of the tenant was held to be valid.

The rule of law invoked in this case is one of very limited application. The whale-fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception. Then the application of the rule of law itself is very difficult, and the necessity for greater precision is apparent. Suppose two or three boats from different ships make fast to a whale, how is it to be decided which was the first to kill it? Every judge who has dealt with this subject has felt the importance of upholding all reasonable usages of the fishermen, in order to prevent dangerous quarrels in the division of their spoils. In *Fennings v. Grenville*, 1 Taunt. 241, evidence was offered of a custom in the Southern fishery for the contending ships to divide the whale equally between

them. This custom, which differed entirely from that prevailing in the North Atlantic, was yet thought to be not unreasonable. *Chambre, J.*, said, "I remember the first case on the usage which was had before Lord Mansfield, who was clear that every person was bound by it, and who said that were it not for such a custom there would be a sort of warfare perpetually subsisting between the adventurers." The case went off upon a question of pleading, and the custom was not passed upon; but it is clear that it was thought to be valid. In the other cases cited, the usage first above mentioned was found to be valid. In the case of *Bartlett v. Budd*, 1 Lowell, 223, the respondents claimed title to a whale by reason of having found it, though it had been not only killed, but carefully anchored, by the libellants. I there intimated a doubt of the reasonableness of a usage in favor of the larceny of a whale under such circumstances, and I still think that some parts of the asserted usage could hardly be maintained. If it were proved that one vessel had become fully possessed of a whale, and had afterwards lost or left it, with a reasonable hope of recovery, it would seem unreasonable that the finder should acquire the title merely because he is able to cut in the animal before it is reclaimed. And, on the other hand, it would be difficult to admit that the mere presence of an iron should be full evidence of property, no matter when or under what circumstances it may have been affixed. But the usage being divisible in its nature, it seems to me that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale, and prescribes that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, it is reasonable, though merely conventional, and ought to be upheld. In *Bourne v. Ashley*, determined in June, 1863, but not printed, Judge Sprague, whose experience in this class of cases was very great, found the custom to be established, and decided the cause in favor of the libellants, because they owned the first iron, though the whale was killed by the crew of the other vessel, or by those of both together. Mr. Stetson, of counsel in that case, has kindly furnished me with a note of the opinion taken down by him at the time, and I have carefully compared it with the pleadings and depositions on file, and am satisfied that the precise point was in judgment. The learned judge is reported to have said that the usage for the first iron, whether attached to the boat or not, to hold the whale, was fully established, and that one witness carried it back to the year 1800. He added, that although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in that trade.

In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it. If the pursuit of the *Rainbow* had been clearly understood in the beginning, no doubt the other vessel would not have taken the trouble to join in it, and

the usage would have had its appropriate and beneficial effect. In the actual circumstances, it is a hard case for the libellants; but as they have not sustained their title, I must dismiss their cause, and, in consideration of the point being an old one in this court, with costs.

Libel dismissed, with costs.

SECTION II.

WRECK.

WILKINS, LEG. ANG.-SAX. 305. — Of Wreck of the Sea in the time of Henry I. and King Stephen. In these days (*i. e.*, A. D. 1139, in the fourth year of King Stephen), in a very great storm it happened that a certain ship loaded with a variety of goods from Rumenel, an estate of the Archbishop of Canterbury, was cast in a broken condition on land of the Church De Bello in the lathe of Shepway, a part of Wye (the men barely escaping). But it is to be known that this is to be observed for law from ancient times on the sea-coasts, that when a ship is broken by the waves, if those who escape shall not have repaired her, within the required term and time, the ship and whatever shall have come to shore shall belong without suit to that land and be held Wreck. But King Henry aforesaid, disapproving greatly this custom in his time, throughout the extent of his realm made an edict that if but one person should have escaped alive from the wrecked vessel, he should have all the goods. But a new King came in and a new law; For when he was dead, the chief lords of the realm, having overthrown the late edict, adopted for themselves the practice which had in ancient times been observed. Whence it happened that the men of the lathe of Shepway, according to the customs of the sea and the royal dignities, took by force the aforesaid Wreck of the Church De Bello. — *From the Chronicle of the Monastery De Bello.*

LETTER OF HEN. II. (1174), 1 RYM. FÆD. 36. — We will and firmly order for ourselves and our heirs that whenever it may happen in the future that any ship is cast away within our realm either on the coast of England, or on the coast of Picardy, or on the coast of the Island of Oleron, or on the coast of Gascony, and from the ship so cast away any man shall escape alive, and shall come to land, all the goods and chattels in that ship contained shall continue and be the property of those whose they were before, and shall not be lost to them under the name of Wreck. And if from a ship so cast away no man escapes alive, but it happens that some other [*sic*] beast escapes alive, or is found alive in that ship, then those goods and chattels, by the hands of the bailiffs of ourselves or of our heirs, or by the hands of the bailiffs

of those on whose land the ship shall have been cast away, shall be delivered to four good men, to be kept for the term of three months, so that if those whose those chattels were shall within that term come to demand those chattels and can prove that the chattels are theirs, then they shall be delivered them. But if within the said term no one shall come to demand those chattels, then they shall belong, under the name of Wreck, to us and our heirs or to such other person as may have the right of having Wreck. And if from that ship so cast away no man or other beast shall escape alive, as aforesaid, then the goods and chattels in that ship contained shall belong, by the name of Wreck, to us and our heirs, or to such other person where the ship was cast away, as shall have the privilege of having Wreck, as aforesaid.

BRACT. LIB. 3, c. 3, fol. 120. — And it should be known what can be called wreck, that is, derelict, so that if anything (for the sake of lighting a ship) shall have been thrown from the ship by any one, without the intention of keeping it, or of getting it back, that may properly be called wreck, since the thing thrown away may be held for derelict. And whether it may be held for derelict may appear by presumptions, — as if a book shall have been thrown away, whether it is found shut or opened, when it could conveniently and well be shut; and so of like things. Again, it may more properly be called wreck, if a ship is broken up, and from it no one has escaped alive, and especially if the owner of the things has been drowned; and whatever thence comes to land from it shall belong to our Lord the King, nor can any other person claim or have anything of it against our Lord the King, although he possesses an estate near the sea-shore, unless he enjoys a special privilege to have wreck. And that things of this sort ought to be called wreck is true, unless it be that the true owner, coming from elsewhere, by certain proofs and signs can show that things are his, — as if a dog is found alive, and it can be shown that he is the owner of the dog, it is presumed from this that he is the owner of the dog and of the goods. And in the same manner if certain marks have been placed on the merchandise and other things. And what has been said will have effect if the things are found on the sea-shore, and the same if near the shore or farther off in the sea; provided, nevertheless, it can in truth be shown that they are to be referred [*essent applicandæ*] to the shore. But if they are found in the sea farther off from the shore, so that it cannot be proved to what land or district they are to be referred, then whatever shall have been so found shall belong to the finder, because it may be said to be no man's goods [*nullius in bonis*], and is called by the sailors *lagan*, and is therefore given to the finder, because there is no one who can have any privilege in it, the King no more than a private person, on account of the uncertain result of the matter. But as to a sturgeon, the rule is that the King shall have the whole of it, by reason of his prerogative; but of a whale, it is enough, according to some, if the King has its head, and the Queen its tail.

ST. 3 EDW. I. c. 4. — Concerning Wrecks of the sea, it is agreed that where a man, a dog, or a cat escape quick out of the ship, that such Ship nor Barge, nor any thing within them, shall be adjudged Wreck; (2) but the goods shall be saved and kept by view of the sheriff, coroner, or the King's bailiff, and delivered into the hands of such as are of the town, where the goods were found; (3) so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the King, and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the Justices of the Wreck belonging to the King. (4) And where Wreck belongeth to another than to the King, he shall have it in like manner. (5) And he that otherwise doth, and thereof be attainted, shall be awarded to prison, and make fine at the King's will, and shall yield damages also. (6) And if a Bailiff do it, and it be disallowed by the Lord, and the Lord will not pretend any title thereunto, the bailiff shall answer, if he have whereof; and if he have not whereof, the Lord shall deliver his bailiff's body to the King.

ST. 17 EDW. II. c. 11. — Also he [the King] has wreck of the sea throughout the whole realm, whales and sturgeons taken in the sea or elsewhere within the realm, certain places privileged by the Kings excepted.¹

ST. 27 EDW. III. c. 13. — Item, we will and grant, That if any merchant, privy or stranger, be robbed of his goods upon the sea, and the goods so robbed come into any parts within our realm and lands, and he will sue for to recover the said goods, he shall be received to prove the said goods to be his own by his marks, or by his chart or cocket, or by good and lawful merchants, privy or strangers. (2) And by such proofs the same goods shall be delivered to the merchants, without making other suit at the common law. (3) And in case that any ships going out of the said realm and lands, or coming to the same, by tempest or other misfortune, break upon the sea-banks, and the goods come to the land, which may not be said wreck, they shall be presently without fraud or evil device delivered to the merchants to whom the goods be, or to their servants, by such proof as before is said, paying to them that have saved and kept the same, convenient for their travel; that is to say, by the discretion of the sheriffs and bailiffs, or other our ministers in places guiltable, where other lords have no franchise, and by the advice and assent of four or six of the best or most sufficient discreet men of the country (4) and if that be within the franchise of other lords, then it shall be done by the stewards and bailiff, or wardens of the same franchise, and by the advice of four or six discreet men of the country, as afore is said, without any delay.

¹ Of the sturgeon it is the rule that the king shall have the whole of it, on account of the royal privilege. But of the whale it is enough if the king has the head, and the queen the tail. — *FLETA*, lib. i. cc. 45, 46.

SIR HENRY CONSTABLE'S CASE.

KING'S BENCH. 1601.

[Reported 5 Co. 106 a.]

SIR HENRY CONSTABLE brought an action of trespass against Gamble, and declared that King Philip and Queen Mary were seised of the manor of Holderness in the county of York in their demesne as of fee, as in right of the crown of England; and by their letters patent granted the said manor and fee, with wreck of the sea within the said manor and fee, to Henry, Earl of Westmorland, in fee, who conveyed them to Sir John Constable, father of the plaintiff, whose heir he is, in fee; and further declared that certain goods, *scil.* twelve shirts and five cloaks, were wreck and cast on the land within the manor of Barnston, which is within the said fee of Holderness, and that the defendant took the said goods, &c. The defendant pleaded to issue, and thereupon a special verdict was found to this effect, *scil.* that the conveyance to the plaintiff of the manor and fee aforesaid was true as he had declared; and that the said manor of Barnston was within the said fee; and further that parcel of the said goods were wreck, and cast *super arenas aqua falsa minime coopertas manerii de Barneston infra fluxum et refluxum maris in manerio de Barneston*, and for other parcel of the goods that they were floating *super aquas maris refluxentes ex arenis ejusd' manerii de Barnest' infra fluxum & refluxum maris, &c.* And the defendant took all the said goods and seised them to the use of the Lord Admiral, &c., and assessed damages entirely for all; and *si super totam materiam, &c.* And this case was often well argued at bar and bench, and at last judgment was given against the plaintiff. And in this case five points were resolved: —

1. That nothing shall be said *wreccum maris*, but such goods only which are cast or left on the land by the sea; for *wreccum maris significat illa bona, quæ naufragio ad terram appelluntur: flotsam* is when a ship is sunk, or otherwise perished, and the goods float on the sea; *jetsam* is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perish. *Lagan (vel potius ligan)* is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again, & dicitur *lig. a ligando*; and none of these goods which are called *jetsam, flotsam, or ligan*, are called wreck so long as they remain in or upon the sea; but if any of them by the sea be put upon the

land, then they shall be said wreck. So *flots.*, *jetsam*, or *ligan*, being cast on the land, pass by the grant of wreck; and where it is provided by the stat. of 15 R. 2, c. 3, that the Court of Admiralty shall not have cognisance or jurisdiction of wreck of the sea, yet it shall have conusance and jurisdiction of *flots.*, *jets.*, and *ligan*; for wreck of sea is, when the goods are by the sea cast on the land, and so *infra comitat'*, whereof the common law takes conusance, but the other three are all on the sea, and therefore of them the Admiral has jurisdiction. Bracton, lib. 3, c. 3, fol. 120. *Item magis proprie dici poterit wreccum, si navis frangatur, & ex quâ nullus vivus evaserit, & maximè si domini rerum submersus fuerit, & quicquid inde ad terram* (note these words) *venit, erit domini Regis.* And that also appears by the Book of Entries, fol. 611, 612. Trespass in Wreck. Always when wreck is claimed by prescript. (as by law it may be) the plead. is *bona wreccata super mare, & ad terram project'*. And another prescript. is there *habere omnimod' wreccum maris infra præcinctum manerii, sive domini præd' project', & flotsam maris infra eund' præcinct' devenit'*; by which the difference between wreck and *flots.* appears. Vide 9 E. 4, 22. Wreck is when it is cast on the land. 11 H. 4, 16; 5 E. 3, 3, & 29; 21 H. 6; Prescript. 14 E. 2, in Trespass, 236; 5 H. 7, 36; (35) 39 H. 6, 37, & 9 H. 7, 20, acc'. Vide *Regist. int' brev. de transgress.* 102 b. the writ saith, *Ostensus quare cum idem Tho. dominus manerii, de Estombarent existat & ibidem habere debeat, ipseque & antecessores sui domini manerii præd' a tempore quo, &c. non existat memoria, hucusque habere consueverunt wrecc' maris infra præcinct' maner' præd', præd' Jocus & Robert. bona & catalla ad valenc' cent' solid. apud S. infra præcinct' ejusd' manerii ad terram project' & quæ ad ipsum Tho. tanquam wreccum pertinere deberent, vi & armis ceperunt & asportaverunt.* Also the stat. of 15 R. 2, c. 3, proves it also, where it is enacted and declared that wreck of the sea shall be tried and determined by the laws of the land, which cannot be extended to *flots.*, *jets.*, or *ligan*, for they are in or upon the sea, and therefore cannot be tried and determined by the common law (for there trial fails), but are to be determined before the Admiral.

2. In this case it was resolved by the whole court that the soil on which the sea flows and ebbs: *sc.* between the high water mark and low water mark, may be parcel of the manor of a subject, 16 El. Dy. 326, b, acc'. And so it was adjudged in Lacy's case, Trin. 25 El. in this court. And yet it was resolved that when the sea flows, and has *plenitudinem maris*, the Admiral shall have jurisdiction of every thing done on the water, between the high water mark and low water mark, by the ordinary and natural course of the sea; and so it was adjudged in the said case of Lacy that the felony committed on the sea *ad plenitud' maris*, between the high water mark and the low water mark, by the ordinary and natural course of the sea, the Admiral should have jurisdiction of; and yet when the sea ebbs, the land may belong to a

subject, and every thing done on the land when the sea is ebb'd shall be tried at the common law, for it is then parcel of the county, and *infra corp' comitat'*, and therewith agrees 8 E. 4, 19, a. So note that below the low water mark the Admiral has the sole and absolute jurisdiction; between the high water mark and low water mark, the common law and the Admiral have *divisum imperium*, interchangeably, as is aforesaid, *sc.* one *super aquam*, and the other *super terram*. And Sir J. Popham, Chief Justice, said that on a trial at Nisi Prius between the city of Bristol and the Lord Berkeley, it was held by the Justices of Assise that where the Lord Berkeley had a manor adjoining to the Severn, and prescribed to have wreck within his manor, and certain goods floated between the high water mark and low water, and the city of Bristol had *flotsam* there, that the said goods were not wreck as long as they were floating upon the water between the high water mark and low water mark. See the book in 5 E. 3, 3, a, in a replevin brought by William de Newport of London against Sir Henry Nevil, and declared that the defendant took 3 lasts of herrings, and a ship; the defendant pleaded that he was lord of the manor of Walring, and prescribed to have wreck within his manor *a tempore cujus, &c.*, and that the herrings and ship were wreck within his manor. To which the plaintiff said that they were our goods in the keep of our mariners which arrived by the sea, and we say that he took them out of their custody: judgment if he can claim as wreck? To which the defendant said that we took them as wreck, out of all custody; on which book I observe 3 things: 1. That wreck may be claimed by prescription. 2. That forasmuch as a ship cannot be wreck, *sc.* cast on the land, but between the high water and low water mark, thence it follows that that was parcel of the manor. 3. If the ship perishes, yet if any of the servants escape, the law saith that they have the custody of the goods, and they are not wreck, 39 E. 3, 35, a, b. One prescribed to have royal fish, as porpes, &c., found within his manor, which seems to be between the high water and low water mark.

3. It was resolved that the King should have *flotsam, jetsam, et ligan* when the ship perishes, or when the owner of the goods is not known, for in 46 E. 3, 15, it appears that goods cast into the sea for fear of tempest are not forfeited. *Vide* F. N. B. 112; c. 5 E. 3, 33; 9 E. 4, 22, that the ship ought to perish, which is called shipwreck: and that is also proved by the said act of West. 1, c. 4, where it is said, if a man, dog, or cat escape alive (which is to be intended when the ship perishes); and therewith agrees Bract. lib. 2, c. 18, fol. 41: *Item sine traditione res habita pro derelict', ubi dominus statim desinit esse dom', si autem causa navis alleviandæ, non sic, quia non eâ voluntate ejecit quis, ut desinat esse dom', &c.* And a man may have *flotsam* and *jetsam* by the King's grant, and may have *flotsam* within the high water and low water mark by prescription, as appears before. And those of the west country prescribe to have wreck in the sea so far as they may see a Humber barrel.

4. It was resolved that the stat. of West. 1, c. 4, by which it is enacted that of wreck of the sea it is agreed that where a man, a dog, or a cat, escape alive out of a ship, that such ship, nor barge, nor any thing within them shall be adjudged wreck, but the goods shall be saved and kept by view of the Sheriff, Coroner, or King's Bailiff, so that if any sue for those goods, and after can prove that they were his, or perished in his keeping within a year and a day, they shall be restored to him without delay, &c., was but a declaration of the common law; and therefore all that which is provided as to wreck, extends also to *flots.*, *jetsam*, and *lagan*. Bract., who wrote in the time of H. 3, before the making of the said act, speaking of wreck, saith, *et quod hujusm' dici debet wreccum, verum est, nisi sit, quod verus dom' aliunde veniens et certa indicia et signa donaverit res esse suas, ut si canis vivus inveniat', et constare poterit, quod talis sit dom' illius canis præsumptive, ex hoc illum esse dom' illius canis et illarum rerum; eodem modo si certa signa imposita fuerint mercibus*: by which it appears that the stat. of Westm. 1, which was made 3 E. 1, was but a declaration of the common law against the opinion in Dr. and Stud. lib. 2, fo. 118, and if the owner dies, his executors or administrators may make their proofs. And in many cases concerning time, the common law gives a year and a day for a convenient time; as in the case of a stray, if the owner (proclamation being made) do not claim it within a year and a day, it is forfeited. So a year and day is given in case of appeal, and in a case of descent after entry or claim; of nonclaim on a fine, or writ of right at the common law; of a villain dwelling in ancient demesne; of the death of a man who has a blow or wound; of protections, essoins of the King's service, and in many other cases: and the year and day in case of wreck shall be accounted from the taking or seizure of them as wreck; for although the property is in law vested in the lord before seiznre, yet until the lord seises, and takes it into his actual possession, it is not notorious who claims the wreck, nor to whom the owner shall repair to make his claim, and to show to him his proofs. And if the wreck belongs to the King, the party may have a commission to hear and determine the truth of it, and that by the verdict of 12 honourable men, for no proof is allowable by law but the verdict of 12 men: and if it belongs to other than the King, then if the owner cannot satisfy him who claims them as wreck by his mark or cocket, or by the book of customes, or by testimony of honest men, then the owner may have such commission or bring his action at the common law, and prove it by the verdict of a jury; and if the commission be awarded, or the action be brought within the year and day, although the verdict be given for him afterwards, it is sufficient. *Vide* Regist. and F. N. B. 12. For the commission *vide* stat. West. 1, c. 4; 4 E. 1, *de Offic. Coronat*; 15 R. 2, c. 3; 27 E. 3, c. 13; Britton, c. 17; 33 Stamf. *Prærog. Regis*. *Et nota* that the act *de Prærog. Regis* made in 17 E. 2, c. 11, enacts, *Quod Rex hab' wrecc. maris per tot regn' &c.*, is but a declaration

and an affirmation of the common law. For notwithstanding that stat. being made within time of memory, a man may prescribe to have wreck, as appears in 11 H. 4, 16, Stamford. 38; F. N. B. 91, d; 5 H. 7, 36; 5 E. 3, 3, & 59; 9 E. 4, 12, &c.

5. It was resolved in the case at bar that part of the goods passed by the name of wreck, and part of the goods were *flotsam* and did not pass by the grant of wreck, and damages were intirely assessed for all. And in trespass the plaintiff shall recover damages only for the value of the goods; wherefore here judgment was given against the plaintiff. And the book 21 H. 7, 34, b, was cited, where the case is, that in trespass the defendant justified as to one thing, and pleaded not guilty to another, and they were at issue, and the jury inquired of one thing only, and taxed the damages for both entirely. Fineux held the verdict good for the thing found, and of that he should have a writ of inquiry of damages, *Quod fuit negatu' per tot' cur.* Dy. 22, El. 269, in *eject. custod.* agrees with this judgment. And it was adjudged M. 14 & 15 El. in this court in trespass by Pooley against Osburn, for breaking his close and beating his servant, and doth not say, *per quod servitium amisit*, the defendant pleaded not guilty, and the jurors found him guilty and assessed damages entirely; and because the plaintiff had not cause of action for beating of his servant, because he had not averred that he lost his service, for that cause the plaintiff took nothing by his bill. And Catl. then Chief Justice, caused the reason and cause of the judgment to be noted in the margent of the record, 9 H. 7, 3, in *Rescous acc'*. And it was adjudged accordingly, M. 30 & 31 El. between More and Bedell, in an action on the case on Assumpsit, which began in the King's Bench, M. 28 & 29 El. Rot. 476, where the defendant promised to do divers things, and the plaintiff alleged two breaches, one whereof was insufficient, the defendant pleaded *Non assumpsit*, the jury gave damages generally. It was resolved, 1. That it should be intended that they gave damages for both. 2. That forasmuch as the plaintiff had no cause of damages for the one, for that cause the judgment given for the plaintiff in the King's Bench was reversed by a writ of error in the Exchequer-chamber.

Note, reader, at first the common law gave as well wreck, *jetsam*, *flotsam*, and *lagan* upon the sea, as estray (which Bracton calls *animalia vagantia*, or as others call them *animalia vacantia, quia domino vacari debent*), treasure-trove, and the like to the King, because by the rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative. And therefore Bract., lib. 3, cap. 3, saith, *Sunt alia quedam quæ in nullius bonis esse dicunt', sicut wreccum maris grossus piscis, sicut sturgio, et balæna, et alie res quæ dominum non habent, sicut animalia vagantia, quæ sunt dom. Regis propter privilegium.* So that it appears by Bracton that the King shall have wreck as he shall have great fish, &c., because they are *nullius in bonis*, or as he shall have *animalia vagantia, sive vacantia, scil.* estrays, because none claims the property. And note that wreck

is estray on the sea coming to land, as estray of beasts is on the land coming within any privileged place; and the law gives in both cases a year and a day to claim them. And Bracton *in eod' lib. 3, cap. 33, fol. (120) 135*, saith, *Navis, nec batellus, nec alia catalla de his qui submersi sunt mari, nec in salsa nec in dulci aqua, wreckum erit, cum sit qui catalla illa advocet, & hoc docere poterit*; and so he properly before resembled it to an estray: and if the goods of an infant, feme covert, executrix, man in prison or beyond sea, estray and are proclaimed according to the law, if none claim them within the year and the day, they shall be all bound. The same law of wreck of sea, for the law is strict and binding in both cases; but it appears by the opinion of Bract. and Britt. also, that *flotsam, jetsam, and lagan*, so long as they are in or upon the sea, do not belong to the King, *sed occupanti concedunt, quia non est aliquis qui inde privileg' habere possit, Rex non magis quam privata persona propter incert' rei eventum (& paulo ante reddit inde ration')* eo quod constare non possit ad quam regionem essent applicanda. And Britton, lib. 1, c. 17, of treasure hid in the ground, we will that it be ours; and if it be found in the sea, be it to the finder. But as it appears before by the resolution of the whole court, the King shall have *flotsam, jetsam, and lagan*, as is aforesaid, by his prerogative, although they be in or upon the sea; for the sea is of the King's allegiance, and parcel of his crown of England, as it is held 6 R. 2, Protect. 46, & Britt. c. 33, well agrees with the opinion of Bract., *sc.* that wreck is of a thing *in nullius bonis*; for there he saith, it is also purchased by franchise granted, by name of a thing found in no man's goods, as wreck of sea, and cattle estraying, coneys, hares, partridges, and other savage beasts, by franchise to have wreck found in his soil, and waif and stray found in his fee, warrens, and in his demesne lands.

HAMILTON v. DAVIS.

KING'S BENCH. 1771.

[Reported, 5 Burr. 2732.]

A MOTION had been made, last term, for a new trial. The cause had been tried before John Morton, Esq., Chief Justice of Chester, and Taylor White, Esq., the other judge of that circuit.

The report of the case and evidence was as follows (it came from Mr. Morton):—

Robert Hamilton and Thomas Smyth against John Davis. In trover. The plaintiffs declare that on December 20, 1770, they were possessed of three hogsheds of tallow, value £100. That the goods came into the possession of the defendant, which he converted to his own use,—to the plaintiff's damage £100.

Defendant pleaded “Not guilty.”

The plaintiffs claimed the goods in question as consignees thereof by Dennis Moylan of Cork; and to prove their case they called William Jackson, captain of an Irish trading vessel, who knew the vessel called the Hill-House, and Captain Penny, the master of her in her last voyage in November, 1770.

Is then shown the following bill of lading; and proves the name William Penny, subscribed thereto, to be the handwriting of the said Captain Perry.

The bill of lading read; and is as follows, viz.:—

CORK, November 27th, 1770.

Shipped by Dennis Moylan on the ship Hill-House, Master William Penny, and now lying in Cork, bound for Liverpoole, 20 hogsheads of tallow, for account and risque as per invoice marked D. M. No. I. A. 20, of tallow, branded on the head, D. Moylan.

To be delivered, &c., at the port of Liverpoole, to Messrs. Hamilton and Smith.

WILLIAM PENNY.

Weight unknown.

That the Hill-House sailed from Cork in November or December last, and has never since been heard of; and, as he believes, foundered and was totally lost.

John Stokes was next called, who said the plaintiffs were partners in Liverpoole on the 9th of December last.

That he was sent by the plaintiffs to enquire after the ship and goods.

That he made inquiry for some days in Cheshire, and then returned to the plaintiffs, and gave them account of divers of the goods being on shore, in the possession of different persons.

Returned with their orders to demand the goods and a proper salvage.

That all but Davis, the defendant, delivered up the goods on demand, on a salvage paid them.

That he saw in Davis's possession the three hogsheads of tallow, branded and marked as in the bill of lading, which Davis refused to agree to deliver on the terms the others had done.

That on the 19th day of December he saw Davis at Heylach in company with others who had got, in all, ten hogsheads of tallow in their possession.

That he then made a demand of all, and tendered them five guineas for their trouble and salvage.

Davis refused to deliver his part, which was the three hogsheads belonging to the plaintiffs.

On the next day a second demand was made on Davis; and if he refused the former offer, the witness offered to leave the salvage to be settled by any three justices of the peace of his own naming.

But Davis absolutely refused to deliver them unless he was compelled to do it.

That in pursuance of the order so received from Mr. Smith, one of

the plaintiffs, he did obtain several other hogsheads of the same mark, for the same salvage, as he had offered Davis, and carried them with him to Liverpoole, for the plaintiffs.

He said J. Blundell was with him at the time of the above transaction.

And Blundell, being called, confirmed Stokes's evidence in all particulars; and also proved the value of the tallow to be £30 per hogshead on an average.

The plaintiff rested his case on this evidence. The defendant called no witness, but objected to the plaintiff's right to recover on the case he had thus made; insisting by his counsel,

First, that it appearing the ship had been totally lost, and that no living creature had come alive from the ship to the shore, the ship and the goods therein were a *wreck*, and thereby became the property of the crown or its grantee (under whom Davis, the defendant, acted), by and under the provisions of the statute of the 3 Edw. I. c. 4th.

Secondly, that supposing the plaintiff not to have lost his property by the ship being a wreck, yet under all the circumstances of this case the plaintiffs ought not to recover in this action, as they had not shewed that they had *complied with the requisites* either of the statute 27 Edw. III. c. 13, or of the 12th Ann. c. 18.

But Mr. Justice White and I were of opinion, under the circumstances of this case, that the plaintiffs were intitled to recover in this action if the jury were satisfied with the proof made of their property in the goods; and that they had tendered a reasonable sum for the expense of salvage; and that under the circumstances of this case none of the provisions of the statutes, either of the 27th Edw. III., or the 12th Ann., were any bar to the plaintiff's having a verdict on the evidence he had laid before the jury.

The jury were satisfied with the proof of the plaintiff's property, and that he had tendered a reasonable salvage; and found a verdict for the plaintiff, with damages for £79 8s. 6d.

We allowed the defendant leave to move for a new trial, without costs, in case we were mistaken in our opinion with respect to the objections made by the defendant's counsel to the plaintiff's right to recover.

Mr. Wallace and *Mr. Davenport* shewed cause, on behalf of the plaintiffs, why there ought not to be a new trial.

Mr. Dunning, *Mr. Kenyon*, *Mr. Atherton*, and *Mr. Owen* argued on behalf of the defendant for a new trial.

LORD MANSFIELD. There is no sort of doubt concerning the true ownership of these goods, which were cast away in a storm and recently pursued. Everybody else restored to the true owner the proportions that they had got of them, upon a proper salvage offered; this defendant refused to deliver the share that he had got, being forfeited, according to his apprehension, as a *wreck*, because no *live* animal came ashore. He likewise objects to the plaintiff's recovering, because cer-

tain forms, which he says were requisite to be performed, have not, as he alledges, been properly performed.

The first question is "Whether these goods are forfeited."

Now, no case is produced, either at common law, or on the construction of the statute of 3 Edw. I., c. 4, to prove that the goods were forfeited *because* no dog or cat or other animal came *alive* to shore. I will therefore presume that there *never was* any such determination, and that no case could have been determined so contrary to the principles of law, justice, and humanity. The very idea of it is shocking. And there is no ground for such a forfeiture upon the distinction that has been so much urged, between a man or other animal coming to shore *alive*, or not alive. The coming to shore of a dog or a cat alive can be no better proof than if they should come ashore dead; the escaping *alive* makes no sort of difference. If the owner of the dog or cat or other animal was known, the presumption of the goods belonging to the same person would be equally strong, whether the animal was alive or dead. If no owner could be discovered, the goods belonged to the king. But there ought to be a reasonable time allowed to the owner to come in and claim them; and it was proper that the time should be limited. The old limitation was a year and a day, which was the time limited in many other cases. The *mode* of proof was as it might happen. Goods are now generally marked; perhaps in ancient days it might not be so common, or so accurate; and then a dog or cat might be a presumption towards the ascertaining the owner of the goods. Bracton, who wrote in the time of H. III., says: *Magis proprie dici poterit wreccum, si navis frangatur &c.; nisi ita sit, quod verus dominus aliunde veniens, per certa indicia et signa docuerit res esse suas; ut si canis vivus inveniatur &c.; et eodem modo, si certa signa apposita fuerint mercibus et alijs rebus.* And Bracton's opinion has been recognized by later writers. Lord Coke, in his fifth Report, 107, says that it appears from Bracton that the statute of W. I. was but a declaration of the common law; and cites the same passage from Bracton. *Et quod hujusmodi dici debet wreccum, verum est, nisi sit quod verus dominus aliunde veniens, certa indicia et signa donaverit res esse suas; ut si canis vivus inveniatur, et constare poterit quod talis sit dominus illius canis; presumptivè ex hoc, illum esse dominum illius canis et illarum rerum; eodem modo, si certa signa imposita fuerint mercibus.* Thus it stands at the common law. Then, has the statute of 3 Edw. I. c. 4, altered the common law? No: quite otherwise. And this act was made in *favour* of the owner. It enacts (negatively) "That it shall *not* be wreck, if man, dog, or cat escape alive;" but it has no *contrary* (positive) provision, "That if neither man, dog, or cat &c., escape alive, it shall belong to the king." This statute has been recognized as declaratory of the common law. The words of it are: "Concerning wreck of the sea, it is agreed that where a man, a dog, or a cat escape quick out of the ship, that such ship, nor barge, nor any thing within them shall be adjudged wreck; but the goods shall be

saved and kept, &c., so that if any sue for those goods, and after prove that they were his or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king." Lord Coke says that "These three instances (of a man, dog, or cat) are put but for examples; for besides these two kinds of beasts, all other beasts, fowls, birds, hawks, and other living things are understood, *whereby the ownership or property of the goods may be known.*" And this is agreeable to the charter of King Henry the Second, which includes every animal whatsoever. And this escape of a dog, or cat, or other animal is considered as a *medium of proof*, whereby the ownership or property of the goods may be known. If this was a recent statute, it ought to be construed according to reason and justice. For the court ought not, unless they are absolutely obliged to it, to construe an act of parliament directly contrary to the plain and clear principles of justice and humanity, — which the construction urged on the part of the defendant in this case would undoubtedly be, in the highest degree. But this is a statute of very ancient standing, and was declaratory of the common law (as appears from Bracton, who wrote before the making of it), and has been since sufficiently recognized, and no case produced to the contrary, nor any authority in point. The other two statutes are out of the case; they do not relate to *this* matter. Besides, here the defendant has insisted upon property. I am very clear that the direction was right, and that the rule for a new trial ought to be discharged.

Mr. Justice ASTON and Mr. Justice ASHHURST concurred with his Lordship.

All the judges present being clear and unanimous, the rule to shew cause why there should not be a new trial was discharged.

SECTION III.

WAIFS, ESTRAYS, AND DEODANDS.

1 BL. COM. 297. — Waifs, *bona waviata*, are goods stolen, and waved or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him. Cro. Eliz. 694. And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again. Finch. L. 212. Waved goods do also not belong to the king till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them.

Finch. L. 212. If the goods are hid by the thief, or left any where by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight, these also are not *bona waviata*, but the owner may have them again when he pleases. 5 Rep. 109. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (Fitz., *Abr.*, tit. *Estray*, l. 3 Bulstr. 19); the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein; and they now most commonly belong to the lord of the manor, by special grant from the crown. But in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towus next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption (Mirr. c. 3, § 19), even though the owner were a minor, or under any other legal incapacity. 5 Rep. 108. Bro., *Abr.*, tit. *Estray*. Cro. Eliz. 716. A provision similar to which obtained in the old Gothic constitution with regard to all things that were found, which were to be thrice proclaimed: *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago, postremo coram ecclesia vel judicio*; and the space of a year was allowed for the owner to reclaim his property. Stiernh., *De jur. Gothor.*, l. 3, c. 5. If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. Dalt. Sh. 79. The king or lord has no property till the year and day passed; for if a lord keepeth an estray three-quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again. Finch. L. 177. Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta (L. 1, c. 43) defines them *pecus vagans, quod nullus petit, sequitur, vel advocat*. For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl (7 Rep. 17, 19); whence they are said to be royal fowl. The reason of which distinction seems to be that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage (1 Roll.

Abr. 889) ; and may not use it by way of labor, but is liable to an action for so doing. Cro. Jac. 147. Yet he may milk a cow, or the like ; for that tends to the preservation, and is for the benefit of the animal. Cro. Jac. 148. Noy. 119.

1 Bl. Com. 300. — By this [a deodand] is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature ; which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner (1 Hal. P. C. 419. Fleta, l. 1, c. 25) ; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death ; and for that purpose ought properly to have been given to holy church (Fitzh., *Abr.*, tit. *Enditement*, pl. 27. Staunf. P. C. 20, 21) ; in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion, (3 Inst. 57. 1 Hal. P. C. 422) ; whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by Sir Matthew Hale seems to be very inadequate, viz., because an infant is not able to take care of himself ; for why should the owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief ? The true ground of this rule seems rather to have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses ; but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

Thus stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands ;¹ which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaical law (Exod. xxi. 28) : “ If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten.” And, among the Athenians,² whatever was the cause of a man’s death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing not in motion is the occasion of a man’s death, that part only which is the immediate cause is forfeited ; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a

¹ *Omnia, quæ movent ad mortem, sunt Deo danda.*— Bracton, l. 3, c. 5.

² *Æschin. cont. Ctesiph.* Thus too by our ancient law a well in which a person was drowned was ordered to be filled up, under the inspection of the coroner. Flet., l. 1, c. 25, § 10 ; Fitzh., *Abr.*, t. *corone*, 416.

deodand (1 Hal. P. C. 422) ; but, wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel, which runs over his body), but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited. 1 Hawk. P. C. c. 26. It matters not whether the owner were concerned in the killing or not ; for if a man kills another with my sword, the sword is forfeited¹ as an accursed thing. Dr. and St., d. 2, c. 51. And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence), that the king or his grantee may claim the deodand ; for it is no deodand, unless it be presented as such by a jury of twelve men. 3 Inst. 57. No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law ; but if a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand. 3 Inst. 58. 1 Hal. P. C. 423. Molloy, *de Jur. Maritim.* 2, 225. But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury be hardly warrantable by law, the court of King's Bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim. Foster of Homicide, 266.²

¹ A similar rule obtained among the ancient Goths : *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur ; vel ex adibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua multa plectar ; ut in parte infelicitatis mee numeretur, habuisse vel edificasse aliquod quo homo periret.* Stiernhook *de jure Goth.* l. 3, c. 4.

² See Stimson, Am. Statute Law, §§ 145, 1162. — ED.

SECTION IV.

JUDGMENTS.

HUGHES v. CORNELIUS.

KING'S BENCH, 1680.

[*Reported 2 Show. 232.*]

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the admiralty court in France, which was with the defendant.

And now *per Curiam* agreed and adjudged, that as we are to take notice of a sentence in the admiralty here, see *Ladbroke v. Crickett*, 2 Term Rep. 649, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council; it being a matter of government, he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.¹

Judgment for the defendants.

¹ The special verdict was, that one William Gault, a denizen of England, was owner of the ship at the time she was taken; that the master of the ship was a native of Holland, but made a denizen of England; that two of the sailors were Dutchmen, and the mate, with the eight other mariners, Englishmen; that the ship was Dutch-built, and taken during the war between Holland and France, and condemned as a Dutch prize in the court of admiralty in France, and sold to the plaintiff Hughes under that sentence; and that on her arrival in England, the defendant Cornelius and others, as the servants of William Gault, took and converted the ship to their own use. s. c. Raym. 473. The sentence of the admiralty was produced under seal. 2 Ld. Raym. 893. But the court would not suffer this verdict to be argued, but ordered judgment to be entered for the plaintiff; for sentence in a court of admiralty ought to bind generally, according to *jus gentium*, s. c. Skinner, 59, although the facts found by the special verdict were contrary to, and falsified the sentence in, the admiralty court. s. c. cited by Holt, C. J., who was counsel for the plaintiff, 2 Ld. Raym. 893, for the property is thereby altered, though the sentence be unjust. s. c. cited *Ever v. Jones*, 2 Ld. Raym. 936. Carth. 225. 9 Mod. 66. Bull. N. P. 244, 245. It has, however, been determined that a sentence of condemnation in a foreign court of admiralty is not conclusive evidence that a ship was not neutral, unless it appear that the condemnation went upon that ground, *Bernarde v. Motteux*, Dougl. 54; but such a sentence is *conclusive* as to every thing that appears on the face of it, *Barzillay v. Lewis*, Park.

GRIFFITH *v.* FOWLER.

SUPREME COURT OF VERMONT. 1846.

[Reported 18 *Vt.* 390.]

TRESPASS for taking a shearing machine. The case was submitted upon a statement of facts, agreed to by the parties, from which it appeared, that in 1836 the defendant, being the owner of the machine in question, lent it to one Freeman, to use in his business as a clothier, who was to pay a yearly rent therefor, and in whose possession it remained until the year 1841, when it was sold at sheriff's sale, on execution, as the property of Freeman, and one Richmond became the purchaser; that Richmond, in January, 1842, sold the machine to the plaintiff, who at the same time purchased of Freeman the building, in which the machine was situated, and took possession thereof; and that the defendant, in February, 1842, took the machine from the plaintiff's possession, claiming it as his property. The value of the machine was admitted to be fifty dollars.

Upon these facts the county court, — HEBARD, J., presiding, — rendered judgment for the defendant. Exceptions by plaintiff.

Ins. 359; so, where no special ground is stated in the sentence, but the ship is condemned generally as good and lawful prize, *Saloucci v. Woodhouse*, Park. 362; unless manifestly, upon the face of it, against law and justice, *Saloucci v. Johnston*, Park. Ins. 364; or contradictory to itself, *Mayne v. Walter*, Park. 363. And see the case of *Burton v. Fitzgerald*, Stra. 1078. — *Note by Thomas Leach.*

NOTE. — “When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties; and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *feri facias* against A, has sold a particular chattel, B may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows, of course, that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

“It is not essential that there should be an actual adjudication on the status of the thing. Our courts of admiralty, when property is attached and in their hands, on a proper case being shown that it is perishable, order that it shall be sold and the proceeds paid into court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.” Per BLACKBURN, J., in *Castrigue v. Imrie*, L. R. 4 H. L. 414, 427, 428 (1870).

See *Megee v. Beirne*, 39 Pa. 50.

Tracy and Converse, for plaintiff.

J. S. Marcy, for defendant.

The opinion of the court was delivered by

REDFIELD, J. The only question reserved in this case is, whether a title to personal property, acquired by purchase at sheriff's sale, is absolute and indefeasible against all the world, or whether such sale only conveys the title of the debtor.

There has long been an opinion, very general, I think, in this state, not only among the profession, but the people, that a purchaser at sheriff's sale acquires a good title, without reference to that of the debtor, that such a sale, like one in market overt in England, conveys an absolute title. But, upon examination, I am satisfied that this opinion acts upon no good basis.

So far as can now be ascertained, this opinion, in this state, rests mainly upon a *dictum* in the case of *Heacock v. Walker*, 1 Tyl. 338. There are many reasons, why this *dictum* should not be regarded, if the matter were strictly *res integra*. It was a declaration of the chief justice in charging the jury. Cases were then tried by the jury at the bar of this court, as matter of right, and in course, and before the law of the case had been discussed and settled by the court. In all these respects these trials differed essentially from jury trials at the bar of the higher courts in Westminster Hall. Such trials, there, being only matter of favor, granted in the most important cases, and after the law of the cases has been fully discussed, and settled by the court.

The law given to the jury, in the two cases, will of course partake something of the character of the respective form and deliberation of the trials. Under our former practice, law laid down in the course of a jury trial, unless when questions were reserved and farther discussed upon motions for new trials, was not much esteemed, even when it was upon the very point in dispute. But especially, the *dicta* of the judge, who tried the case, and who must, of necessity, somewhat amplify the bare text of the law, in order to show the jury the reason upon which it was based, could not be esteemed, as any thing more than the hastily formed opinion of the judge — mere argument, to satisfy some possible, or apprehended, doubt of the jury in regard to the soundness of the main proposition laid down. Such was the *dictum* referred to. That, which was said of Chief Justice Tilghman, of Pennsylvania, is undoubtedly good praise, when said of any judge; — “He made no *dicta*, and he regarded none.” There are sufficient reasons, why the *dictum* should not be regarded, if the thing were new. And we do not esteem the long standing of the *dictum* of any importance, unless it can be shown, that it has thus grown into a generally received and established law, or usage; which, we think, is not the case in regard to this. For this court has, within the last ten years, repeatedly held, that a sheriff's sale was of no validity to pass any but the title of the debtor, *when no actual delivery of the thing sold was made by the sheriff, at the time of sale.* *Austin v. Tilden et al.*, 14 Vt. 325; *Boynton v. Kelsey*,

Caledonia County, 1836; s. p. Lamoille County, 1841. Since the first of these cases was decided, the main question, involved in this case, has been considered doubtful in this state, and we now feel at liberty to decide it, as we think the law should be, that is, as it is settled at common law.

But the idea, that some analogy existed between a sheriff's sale and a sale in market overt is certainly not peculiar to the late Chief Justice Tyler. This opinion seems at one time to have prevailed in Westminster Hall, to some extent, at least; for in the case of *Farrant v. Thompson*, 5 B. & A. 826, which was decided in the King's Bench in 1822, nearly twenty years later than that of *Heacock v. Walker*, one of the points raised in the trial of the case before Chief Justice Abbott was, that the title of the purchaser, being acquired at sheriff's sale, was good against all the world, *the same as that of a purchaser in market overt*. This point was overruled, and a verdict passed for the plaintiff, but with leave to move to set it aside, and to enter a nonsuit, upon this same ground, with one other. This point was expressly argued by Sir James Scarlett, — who was certainly one of the most eminent counsel, and one of the most discriminating men of modern times, — in the King's Bench, and was decided by the court not to be well taken. Since that time I do not find, that the question has been raised there.

It seems to be considered in Massachusetts, and in New York, and in many of the other states, that nothing analogous to markets overt in England, exists in this country. *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. DePeyster*, 1 Johns. 480; 2 Kent, 324, and cases there cited. Nothing of that kind, surely, exists in this state, unless it be a sheriff's sale. And if the practice of holding sales in market overt conclusive upon the title existed in any of the states, it would be readily known. I conclude, therefore, that Chancellor Kent is well founded in his opinion, when he affirms, that the law of markets overt does not exist in this country. Ib.

It seems probable to me, that the idea of the conclusiveness of a sheriff's sale upon the title is derived from the effect of sales under condemnations in the exchequer, for violations of the excise or revenue laws, and sales in prize cases, in the Admiralty courts, either provisionally, or after condemnation. But these cases bear but a slight analogy to sheriff's sales in this country, or in England. Those sales are strictly judicial, and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world.

Something very similar to this exists, in practice, in those countries, which are governed by the civil law; which is the fact in one of the American states, and in the provinces of Canada, and in most, if not all, the continental states of Europe. The property, or what is claimed to be the property, of the debtor is seized and libelled for sale, and a general monition served, notifying all having adversary claims to

interpose them before the court, by a certain day limited. In this respect the proceedings are similar to proceedings in prize courts, and in all other courts proceeding *in rem*. If no claim is interposed, the property is condemned, by default, and sold; if such claims are made they are contested, and settled by the judgment of the court, and the rights of property in the thing are thus conclusively settled *before the sale*.

But with us nothing of this character exists in regard to sheriff's sales. Even the right to summon a jury to inquire into conflicting claims *de bene esse*, as it is called in England, and in the American states, where it exists, has never been resorted to in this state. And in England, where such a proceeding is common,—Impey, 153; Dalton, 146; *Farr et al. v. Newman et al.*, 4 T. R. 621,—it does not avail the sheriff, even, except to excuse him from exemplary damages. *Latkow v. Eamer*, 2 H. Bl. 437; *Glassop v. Poole*, 3 M. & S. 175. It is plain, then, that a sheriff's sale is not a judicial sale. If it were, no action could be brought against the sheriff, for selling upon execution property not belonging to the debtor.

With us an execution is defined to be the putting one in possession of that, which he has already acquired by judgment of law. Co. Lit. 154 a. (Thomas' Ed. 405.) But the judgment is of a sum *in gross* "to be levied of the goods and chattels of the debtor," which the sheriff is to find *at his peril*. The sale upon the execution is only a transfer, by operation of law, of what the debtor might himself transfer. It is a principle of the law of property, as old as the Institutes of Justinian, *Ut nemo plus juris in alium transferre potest, quam ipse habet*.

The comparison of sheriff's sales to the sale of goods lost, or estrays, in pursuance of statutory provisions, which exist in many of the states, does not, in my opinion, at all hold good. Those sales undoubtedly transfer the title to the thing, as against all claims of antecedent property in any one, if the statutory provisions are strictly complied with; but that is in the nature of a forfeiture, and is strictly a proceeding *in rem*, wherein the finder of the lost goods is constituted the *tribunal of condemnation*.

There being, then, no ground, upon which we think we shall be justified in giving to a sheriff's sale the effect to convey to the purchaser any greater title, than that of the debtor, the judgment of the court below is affirmed.

SECTION V.

SALE IN MARKET-OVERT.

THE CASE OF MARKET-OVERT.

NEWGATE SESSIONS. 1595.

[*Reported 5 Co. 83 b.*]

At the sessions of Newgate now last past, it was resolved by Popham, Chief Justice of England, Anderson, Chief Justice of the Common Pleas, Sir Thomas Egerton, Master of the Rolls, the Attorney-General, and the court, that if plate be stolen and sold openly in a scrivener's shop on the market-day (as every day is a market-day in London except Sunday) that this sale should not change the property, but the party should have restitution; for a scrivener's shop is not a market-overt for plate; for none would search there for such a thing; & *sic. de similibus, &c.* But if the sale had been openly in a goldsmith's shop in London, so that any one who stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property: so if the sale be not in the shop, but in the warehouse, or other place of the house, it would not change the property, for that is not in market-overt, and none would search there for his goods. So every shop in London is a market-overt for such things only which, by the trade of the owner, are put there to sale; and when I was Recorder of London, I certified the custom of London accordingly. Note, reader, the reason of this case extends to all markets-overt in England.¹

SECTION VI.

STATUTE OF LIMITATIONS.

BRENT *v.* CHAPMAN.

SUPREME COURT OF THE UNITED STATES. 1809.

[*Reported 5 Cr. 358.*]

ERROR to the circuit court for the District of Columbia, sitting at Alexandria, in an action of trespass brought by Chapman against

¹ In the United States there are no markets-overt, *Dame v. Baldwin*, 8 Mass. 518, 521; *Griffith v. Fowler*, 18 Vt. 390.

Brent, marshal of the District of Columbia, for taking in execution, on a *fi. fu.* against the estate of Robert Alexander, deceased, a slave named Ben, who was claimed by Chapman as his property.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon a statement of facts agreed by the parties, which was in substance as follows:—

The slave was the property, and in possession of the late Robert Alexander the elder, at the time of his death. His sons, Robert Alexander, and Walter S. Alexander, were named executors of his will, but never qualified as such. On the 17th of December, 1803, Walter S. Alexander took out letters of administration with the will annexed. No division was ever made, by the order of any court, of the personal estate of the deceased among his representatives; but previous to August, 1800, a parol division of the slaves was made between Robert Alexander the younger, and his brother, Walter S. Alexander, the latter being then under the age of twenty-one years. Robert Alexander the younger being possessed of the slave, and being taken upon an execution for a debt or debts due from himself in his individual character, in August, 1800, took the oath of insolvency under the laws of Virginia, and delivered up to the sheriff of Fairfax county in that state, the slave as a part of his property included in his schedule. The sheriff sold him at public sale, and the plaintiff, knowing the slave to belong to the estate of the deceased Robert Alexander as aforesaid, became the purchaser for a valuable consideration, and took possession of the slave, and continued possessed of him under the sale and purchase until July, 1806. The plaintiff in the winter usually resided in Maryland, and in the summer in Virginia on his farm where he kept the slave, and has never resided in the District of Columbia.

Dunlop & Co. obtained judgment against Robert Alexander the younger, as executor of his father, Robert Alexander, and upon a *fi. fieri facias* issued upon that judgment, the marshal seized and took the slave as part of the estate of the testator, Robert Alexander, there being no other property belonging to his estate in the county which could have been levied except what Robert Alexander the younger had sold and disposed of for the purpose of paying his own debts. The agent of the creditors, Dunlop & Co., as well as the marshal, had notice, prior to the sale, that the plaintiff claimed the slave.

Upon this state of the case the court below rendered judgment for the plaintiff according to the verdict. And the defendant brought his writ of error.

C. Lee, for the plaintiff in error, contended that, under the circumstances of this case, five years' possession did not give a good title to Chapman. The possession was not adverse, for there was no administration upon the estate of Robert Alexander, senior, consequently no person legally competent to claim the possession. Besides, Chapman knew that the slave belonged to the estate of the testator.

This debt was a legal lien on the slave.

Robert Alexander, jun., could only transfer *his right* to the sheriff of Fairfax. The goods of the testator cannot be taken in execution for the debt of the executor. *Farr v. Newman*, 4 T. R. 625. Chapman could therefore only purchase the right of Robert Alexander, jun., in the slave.

The parol partition was void for the infancy of one of the parties. There was no executor qualified to assent to the legacy. By the law of Virginia an executor cannot act until he has given bond. *Fenwick v. Sears*, 1 Cranch, 259; *Ramsay v. Dixon*, 3 Cranch, 319.

It is very doubtful whether five years' possession of a slave in Virginia is itself a good title for a plaintiff. It may protect the possession of a defendant; and that is the only effect of the statute.

Swann, contra.

Robert Alexander the younger did not hold the slave as executor of his father's will, but under the legacy.

It is immaterial whether Chapman did or did not know that the slave belonged to the estate of the testator. Five years' possession by Chapman was a good title against all the world.

In England twenty years' possession is a good bar in ejectment, and it is also a good positive title in itself, upon which an ejectment may be maintained.

MARSHALL, Ch. J. Can an executor distribute the estate before he has qualified and obtained letters testamentary?

LIVINGSTON, J. In England, an executor, before probate, can do everything but *declare*.

WASHINGTON, J., mentioned the case of *Burnley v. Lambert*, 1 Wash. 308, in which it was decided by the Court of Appeals of Virginia that "after the assent of the executor, the legal property is completely vested in the legatee, and cannot be divested by the creditors."

MARCH 13.

MARSHALL, Ch. J., delivered the opinion of the court to the following effect:—

This court is of opinion that the possession of Chapman was a bar to the seizure of the slave by the marshal under the execution stated in this case. The only objection of any weight was, that there was no administration upon the estate of Robert Alexander, sen., and consequently, that the possession of Chapman was not an *adverse* possession.

But there was an executor competent to assent, and who did assent, to the legacy, and to the partition between the legatees, and who could not afterwards refuse to execute the will. *Judgment affirmed.*

BRYAN v. WEEMS.

SUPREME COURT OF ALABAMA, 1856.

[Reported 29 Ala. 423.]

APPEAL from the chancery court of Dallas.

Heard before the Hon. James B. Clark.

The case made by the record may be thus stated: In December, 1831, Simmons Harrison, of the county of Jones in North Carolina, there executed a deed of gift, conveying certain slaves to one William H. Green, his heirs, executors, and administrators, in trust for the sole and separate use, benefit, and behoof of Mrs. Mary R. Bush, who was the daughter of said Harrison and the wife of Nathan B. Bush, during her life; and after her death, for the use, benefit, and behoof of her children by the said Nathan B. Bush, and their heirs forever. Soon after the execution of this deed, Bush and his wife removed to this State, and brought with them the slaves conveyed by the deed. Mrs. Bush died in 1837, leaving three children, Holland, Mary, and Penelope. The slaves remained in the possession of said Nathan B. Bush until his death which happened in 1844, at which time he had acquired several others by his industry and economy, and by the services of the slaves conveyed by the deed. By his last will and testament, which was duly admitted to probate, and of which one Alexander Sledge was the executor, said Bush bequeathed all the slaves then in his possession, including those conveyed by the deed, with the increase of the females, to his three daughters, but not in equal portions — the bequest to Penelope being larger than the others. The executor proved the will, took possession of all the property, proceeded to a settlement of the estate, and delivered the slaves to the respective legatees. After the death of said Bush, his daughter Holland married Frederic B. Bryan; Mary married Thomas J. McQueen; and Penelope, the youngest, married Samuel W. Weems. In August, 1850, Mrs. Weems died, having bequeathed all her property to her said husband, who afterwards proved her will, and took possession of all her slaves and other property.

In December, 1850, Mr. and Mrs. Bryan, with Mary Bush, who was then unmarried, filed their bill against said Green, Weems and Sledge; alleging their ignorance of the deed from Simmons Harrison until a short time previous to the filing of the bill; and asking that the said Sledge, as executor of Bush, might be made to account for the hire and services of the slaves during the life of his testator, and that the slaves might be divided between Mrs. Bryan and Mrs. McQueen.

The defendant Weems answered the bill, demurring for want of equity, and setting up the statute of limitations in defense of the suit. The answer also contains other matter, which is not deemed material.

On final hearing, the chancellor held the statute of limitations a bar

to the relief sought, and therefore dismissed the bill; and his decree is now assigned as error.

Wm. M. Byrd, for the appellants.

A. R. Manning, contra.

STONE, J. We are fully satisfied with the views of the chancellor, and the result which he attains on all the points necessary to a decision of this case.

1. However the rule might be, if the trustee in this case were appointed by will (Hill on Trustees, 239), his estate and interest did not terminate with the life of Mrs. Bush. The deed of Simmons Harrison conveyed the property to the trustee, "his heirs, executors, and administrators," . . . "in trust and for the following uses, interests, and purposes; viz., in trust and for the separate and exclusive use and benefit of the said Mary R. Bush during her natural life, and in no wise or manner to be subject or liable to or for the contracts or debts of the said husband, Nathan B. Bush; and after her death, for the use, benefit and behoof of the children of the said Mary R. Bush by her present husband, the said Nathan B. Bush, and their heirs forever." There are no words in this deed, indicating an intention that the estate in fee, which the deed creates in the trustee, shall be cut down into a less estate. The estate of the trustee continued after the death of both Mrs. and Mr. Bush. *Wykham v. Wykham*, 18 Vesey, 395; *Coleman v. Tindall*, Y. & J. 605; *Jones v. Strong*, 6 Ired. 367; *Murritt v. Wendley*, 3 Dev. 399; *Martin v. Prage*, 4 B. Monroe, 524; *Fry v. Smith*, 2 Dana, 38.

Our own decisions are not in conflict with this. In *Smith v. Ruddele*, 15 Ala. 28, the deed directed that at the death of the said Elizabeth H., the property, both real and personal, was to go to and be equally divided between the children. Elizabeth H. was dead; and of course the estate of the trustee was an end.

In *Comby v. McMichael*, 19 Ala. 747, the deed directed the trustee to "convey the property to such of the issue" of the *cestui que trust*, as should be living *at her death*. Mrs. McMichael was dead; and Ch. J. Dargan held, that the legal title of the trustee had determined, because the deed clearly contemplated that result.

Couthway v. Berghaus, 25 Ala. 393-406, simply decides that a tender in that case to the *cestui que trust* was sufficient. The trustee lived out of the State, and was a mere naked trustee without interest. The *cestui que trust* had himself made the purchase of the property, taking the title in the name of his sister; while he, the beneficiary, was in possession of the property, receiving the rents and profits. The court rightly held, that the money was due to Berghaus, and that the tender to him was sufficient.

2. While Mr. Bush held the possession of the slaves, he must be regarded as holding in subordination to the title of the trustee. His declarations to Mr. Green, and to Mr. Whitfield, shortly before his death, would establish this proposition, if it needed confirmation. A short time before the death of Mr. Bush, he expressed to the trustee an incli-

nation and wish to make a will, and to make more ample provision for Penelope, who afterwards married Mr. Weems; speaking of her as his "poor afflicted daughter." The testimony of Mr. Green, the trustee, who was examined as a witness, satisfies us that he, Green, knew of the making of a will by Bush, and its "general character," before such will was admitted to probate. This was, at least, enough to put him on inquiry; and is equivalent to notice. *Smith v. Zurcher*, 9 Ala. 208, and authorities cited. The bill, after stating that Mr. Bush executed his will and died in June, 1844, proceeds as follows: "Whereupon Alexander Sledge, the executor named in said will, caused the same to be duly admitted to probate in the Orphans' Court of said county; obtained letters testamentary upon said estate, from the same court; undertook the execution of said will, and possessed himself as such executor as aforesaid of all the slaves and other personal property mentioned therein." The will mentions all the slaves in controversy, except some children born since the probate, of females bequeathed by the will; a part of which children are with their mothers in the possession of each legatee. The answer admits these averments, but states that the executor possessed himself of the property before the will was probated. These several facts constituted the executor an adverse holder, from and after the probate of the will, and possession of the property under it by him. From that time the statute commenced running against Green, the trustee. *Findley v. Patterson*, 2 B. Monroe, 76; *Den, ex dem.*, v. *Shanklin*, 4 Dev. & Bat. Law, 289.

3. Between the time of the probate of the will of Mr. Bush, and the commencement of this suit, more than six years elapsed. The trustee was then barred of his action of detinue. The rule is certainly well settled, that if a trustee delay the assertion of his rights until the statute perfects a bar against him, the *cestui que trust* will also be barred. *Colburn v. Broughton*, 9 Ala. 351-363; *Hovenden v. Lord Amesley*, 2 Sch. & Lef. 628-629; Angell on Limitation, 514, § 6; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Freeman v. Perry*, 2 Dev. Eq. 243; *Couch v. Couch*, 9 B. Monroe, 160; *Falls v. Torrence*. 4 Hawks' Law & Eq. 412.

4. It will be seen that we have assimilated the complainant's right to relief in this case to the trustee's right to maintain detinue. If, at the time the bill in this case was filed, Green, the trustee, had instituted his action of detinue or trover for the slaves, against Sledge, the executor, the six years statute, if pleaded, would have barred either action, not only as to the slaves bequeathed by the will, but also as to the offspring of the females, born after the adverse holding. *Morris v. Perregay*, 7 Gratt. 373; *White v. Martin*, 1 Porter, 215.

When defendant's right to property is established by a successful interposition of the plea of the statute of limitations, it relates back to the time of the first taking, and carries with it all the intermediate profits, and the increase of the females while in the adverse possession of such defendant, unless, as to such increase, some act be done before the bar

against recovery of the mother is perfected, which prevents the operation of this rule. *Partus sequitur ventrem*. To hold otherwise, would lead to strange results in the case of female slaves. An adverse holding of six years would vest the title in the holder. During the time she was adversely held, she may, at intervals, have given birth to children; she and the children all the time remaining together, out of the possession of the claimant. She may have given birth to an infant within a very short time before the completion of the six years. According to the argument, all claim to the mother would be forfeited, while to bar the right to recover her child would require another period of near six years.

Another illustration may serve to present this argument in a stronger light. Suppose the property adversely held consist of domestic animals, who multiply at an early age, and rapidly. Before the six years expire, the females, in all probability, will have increased abundantly; and perhaps at no point of coming time, will there be a female that has reached the age of six years, without yielding her increase. If the offspring do not follow the mother as an incident, but each successive scion must itself be adversely held for the term of six years before the statute runs, unless, before its birth, the parent stock had existed and been adversely held for a like period, the entire interest of the former owner would not probably be extinguished in any conceivable number of years. This point was not raised in argument; but we have felt it our duty to notice it, as the court is not unanimous.

The claim for hire, and for profits of the labor of the slaves, while in the possession of Mr. Bush, is barred both by lapse of time, and by the statute of non-claim.

Under these principles, the right of complainants is barred. Whether Mr. Bush, or those claiming under him, can set up fraud in the original deed to Mr. Harrison, and from him to Mr. Green in trust, we need not inquire. See *Walton v. Bonham*, 24 Ala. 513; *Twine's Case*, 3 Rep. 83; Roberts on Conveyances, 10-11.

The decree of the chancellor is affirmed.

CHAPIN *v.* FREELAND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[Reported 142 Mass. 383.]

REPLEVIN of two counters. Writ dated November 14, 1881. Trial in the Superior Court, without a jury, before Blodgett, J., who allowed a bill of exceptions, in substance as follows:—

There was evidence tending to show, and the judge found, that in 1867, one Daniel Warner built a building upon his land in Oxford, and fitted up the same with shelving and counters, and designed the

same for use as a store for the sale of general merchandise; that the counters in controversy were put into the store by him, and were arranged for convenient use therein; that the same were nailed to the floor, and were used in said building; that on January 2, 1871, Warner mortgaged the premises to Alexander DeWitt; that DeWitt died in 1879, and Charles A. Angell and William Newton were appointed executors of his will; that in April, 1879, said executors foreclosed said mortgage by sale, under the power contained therein, and became the purchasers of the premises; that, soon after such sale, Warner removed the counters from the building, and the executors regained possession of them, and put them back upon the premises, but did not nail or fasten them to the premises; that afterwards the executors sold the premises to the plaintiffs, but did not make mention of the counters in their deed, nor speak of them in the sale; and that the defendant took the counters from the premises occupied by the plaintiffs in 1881.

The defendant offered evidence tending to show, and the judge found, that she purchased these counters, with two others, in 1861; that they were built in Worcester and sent to her complete at Oxford, and placed in her store; that they were heavy counters with black-walnut tops and heavy bases, with panelled front, supported by standards standing upon the floor, and were not fastened to the floor, but were kept in position by their own weight, and were used there until some time in 1866, when, the store being then occupied by a tenant, they were set on one side as not being adapted to the business for which such store was then used, and finally, with the knowledge and consent of DeWitt, were moved out of the building on to the street, and placed one upon the other; that Warner took the counters from their place in the street, and put them in his store, as aforesaid; that there were two mortgages on the defendant's store premises given some time previously to November 26, 1866, which were assigned to DeWitt on that day; that from that date, by agreement with the defendant, DeWitt, who was the defendant's brother, had charge of said estate and of said counters for the defendant; that she never authorized him or any other person to dispose of the counters, and never herself parted with her property in them; that soon after the counters were removed from her store, she missed them and made inquiries for them, but failed to find them; and that when she learned that they were upon the plaintiff's premises, she took them away.

There was no other evidence than as above stated as to the means of the defendant of obtaining information as to where the counters were after they were taken from her store, or as to any concealment of the taking of the counters by Warner. It was in evidence, however, that the defendant, after 1861, resided some of the time in Oxford and some of the time in Sutton.

There was no evidence, except as before stated, tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter; and

there was no other material evidence in the case applying to the rulings made or asked for at the trial.

The plaintiffs asked the judge to rule as follows: "1. Upon the evidence, the counters, though attached to the store by one who had no title to them, became fixtures and a part of the realty, and passed to the mortgagee, and to the purchasers at the foreclosure sale, and came rightfully into the possession of the plaintiffs when they purchased the premises, as belonging thereto, though not then nailed to the building. 2. The defendant had lost the right to take the counters, if Warner had no right or title to them when he so took and attached them to the store building, such taking being a tort, and, as a cause of action, barred by the statute of limitations long before the defendant removed them in 1881, and therefore having no right to recover them, and nothing appearing sufficient to take the case out of the statute. 3. Upon the evidence and facts, as before stated, the plaintiffs, as matter of law, were entitled to maintain their action, and the facts in the case would not warrant a finding for the defendant."

The judge declined to rule as requested; and found for the defendant. The plaintiffs alleged exceptions.

A. J. Bartholomew, for the plaintiffs.

J. Hopkins, for the defendant.

HOLMES, J. This is an action of replevin for two counters. There was evidence that they belonged to the defendant in 1867, when one Warner built a shop, put the counters in, nailed them to the floor, and afterwards, on January 2, 1871, mortgaged the premises to one DeWitt. In April, 1879, DeWitt's executors foreclosed, and sold the premises to the plaintiffs. The defendant took the counters from the plaintiffs' possession in 1881. The court found for the defendant. Considering the bill of exceptions as a whole, we do not understand this general finding to have gone on the ground either of a special finding that the counters remained chattels for all purposes, and were not covered by the mortgage, *Carpenter v. Walker*, 140 Mass. 416, or that there was a fraudulent concealment of the cause of action, within the Gen. Sts. c. 155, § 12 (Pub. Sts. c. 197, § 14). But we understand the court to have ruled or assumed that, although the statute should have run in favor of Warner or DeWitt before the transfer to the plaintiffs, that circumstance would not prevent the defendant from taking possession if she could, or entitle the plaintiffs to sue her for doing so, if she was the original owner.

A majority of the court are of opinion that this is not the law, and that there must be a new trial. We do not forget all that has been said and decided as to the statute of limitations going only to the remedy, especially in cases of contract. We do not even find it necessary to express an opinion as to what would be the effect of a statute like ours, if a chattel, after having been held adversely for six years, were taken into another jurisdiction by the originally wrongful possessor, although all the decisions and dicta, so far as we know, agree

that the title would be deemed to have passed. *Cockfield v. Hudson*, 1 Brev. 311; *Howell v. Hair*, 15 Ala. 194; *Jones v. Jones*, 18 Ala. 248, 253; *Clark v. Slaughter*, 34 Miss. 65; *Winburn v. Cochran*, 9 Tex. 123; *Preston v. Briggs*, 16 Vt. 124, 130; *Baker v. Chase*, 55 N. H. 61, 63; *Campbell v. Holt*, 115 U. S. 620, 623. What we do decide is, that where the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

It is true that the statute, in terms, only limits the bringing of an action. But whatever importance may be attached to that ancient form of words, the principle we lay down seems to us a necessary consequence of the enactment. And a similar doctrine has been applied to the statute of frauds. *Carrington v. Roots*, 2 M. & W. 248. See *King v. Welcome*, 5 Gray, 41.

As we understand the statutory period to have run before the plaintiffs acquired the counters, we do not deem it necessary to consider what would be the law if the plaintiffs had purchased or taken the counters, within six years of the original conversion, from the person who first converted them, and the defendant had taken them after the action against the first taker had been barred, but within six years of the plaintiffs' acquiring them. We regard a purchaser from one against whom the remedy is already barred as entitled to stand in as good a position as his vendor. Whether a second wrongful taker would stand differently, because not privy in title, we need not discuss. See *Leonard v. Leonard*, 7 Allen, 277; *Sawyer v. Kendall*, 10 Cush. 241; *Norcross v. James*, 140 Mass. 188, 189; Co. Lit. 114 b, 121 b.

Exceptions sustained.

FIELD, J. I am unable to assent to the opinion of the court. As the case was tried without a jury, and the court found generally for the defendant, the only questions of law are those raised by the plaintiffs' requests for rulings, which were refused. The plaintiffs must prevail, if at all, upon their own title or right of possession. There was evidence that the defendant purchased the counters in 1861, and placed them in her store, where they were used until some time in 1866, when with the knowledge and consent of DeWitt, the defendant's brother, they were moved out of the building to the street; that DeWitt, from November 26, 1866, held a mortgage upon the defendant's "store premises," and "from that date, by agreement with the defendant, had charge of said estate and of said counters;" that in 1867, Daniel Warner took the counters without the defendant's knowledge or authority, and put them into his store, and nailed them to the floor, and mortgaged his premises to DeWitt on January 2, 1871; that DeWitt died in 1879, and this mortgage was foreclosed by a sale made by the executors of DeWitt's estate to themselves in April, 1879, and they

afterwards "sold the premises to the plaintiffs," not mentioning the counters in their deed; that the defendant, "soon after the counters were removed from her store, missed them, and made inquiries for them, but failed to find them; and that when she learned that they were upon the plaintiffs' premises, she took them away," in 1881, and retained possession until the plaintiffs replevied them. "There was no evidence, except as before stated [in the exceptions], tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter." From the time Warner took the counters until he mortgaged his premises to DeWitt, six years had not expired; but if it be assumed that Warner remained in possession until the mortgage given by him was foreclosed by a sale, he held possession more than six years. The possession of the plaintiffs could not have been for a longer time than about two years. If DeWitt was in possession from the date of the mortgage to him until his death, this was more than six years; but there was evidence that he was the agent of the defendant to take charge of the counters. The terms of the mortgage and conveyance under which the plaintiffs claim are not set out, but it has been assumed that they conveyed whatever title, if any, Warner had in the counters. It is manifest that, as between landlord and tenant, these counters would have been either furniture or trade fixtures, and that if they were taken by Warner and affixed to his store tortiously, without the consent of the defendant, she could have retaken them. *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; *Guthrie v. Jones*, 108 Mass. 191.

The rule that the title of personal property is lost by a wrongful conversion of it into some other species of property, or by making it a part of real estate, has its foundation in the impossibility or impracticability of tracing the property, or of severing it from the real estate; and when personal chattels are, without the consent of the owner, and without right, taken by another and affixed to real property, the title of the owner is not lost unless the identity of the chattels has been destroyed, or they have been so affixed to the real property that it is impracticable to sever them. See *Wetherbee v. Green*, 22 Mich. 311; *Jewett v. Dringer*, 3 Stew. (N. J.) 291. I think that the first request, therefore, ought not to have been given.

As the plaintiffs first took possession of the counters as their own some time after the foreclosure of the mortgage in 1879, the statute of limitations would have been no defence to them if the defendant had brought trover against them in 1881, when she took possession of the counters; their only defence would have been title in themselves derived from their vendors, and this title rests ultimately upon the possession of Warner. The second request, as applicable to the case, is in effect that, if Warner took the counters tortiously, and kept them attached to his building more than six years, the defendant lost her right of property in the counters. It is not stated in the request, that

Warner's possession to effect a change of title must have been either known to the defendant or open and notorious, and must have been under a claim of right; and that his possession was of this character is not necessarily to be inferred from the evidence. The effect of the statute of limitations of real actions upon the acquisition of title to real property is carefully discussed in Langdell on Eq. Pl. §§ 119 *et seq.* Our statute of limitations of real actions provides that "no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims, have been seised or possessed of the premises except as is hereinafter provided." Pub. Sts. c. 196, § 1; Gen. Sts. c. 154, § 1; Rev. Sts. c. 119, § 1; Sts. 1786, c. 13; 1807, c. 75; Commissioners' Notes to the Rev. Sts. c. 119. As writs of right and of formedon, and all writs of entry except those provided by the Pub. Sts. c. 134, were abolished by the Rev. Sts. c. 101, § 51, it follows that, with certain exceptions not necessary to be noticed, after a disseisin continued for twenty years, or in other words after twenty years from the time when the right to bring a writ of entry or to enter upon the land first accrued, the former owner of a freehold can neither maintain any action to recover possession, nor enter upon the land, nor, without an entry, convey it; and as all remedy, either by action or by taking possession, is gone, his title is held to have been lost. The effect of the statute has been to extinguish the right, as well as to bar the remedy; and this is the construction given to the English St. of 3 & 4 Wm. IV. c. 27. Our statute of limitations of personal actions was taken from the St. of 21 Jac. I. c. 16, and this statute has been held not to extinguish the right, but only to bar the remedy. *Owen v. De Beauvoir*, 16 M. & W. 547; 5 Exch. 166; *Dawkins v. Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51; *Dundee Harbour v. Dougall*, 1 Macq. 317, 321; *In Re Alison*, 11 Ch. D. 284.

Section 1 of the Pub. Sts. c. 197, declares: "The following actions shall be commenced within six years next after the cause of action accrues, and not afterwards . . . actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels." There is no statute, and no law, prohibiting the owner of personal chattels from peaceably taking possession of them whenever he may find them, and the technical law of seisin and disseisin was never applied to personal chattels. It is established in this Commonwealth that a debt barred by the statute of limitations of the place of the contract is not extinguished. The statute only bars the remedy by action within the jurisdiction where the defendant has resided during the statutory period. *Bulger v. Roche*, 11 Pick. 36. It was formerly contended that if the parties to a contract had resided within the same jurisdiction so long a time that, under the statute of limitations there, the remedy by action was barred, this ought to be held everywhere to have extinguished the right of action, and thus to have extinguished the debt,

especially if the residence was that of the place where the contract was made; and the courts of some jurisdictions so held. *Brown v. Parker*, 28 Wis. 21, 30; *Goodman v. Munks*, 8 Port. 84, which is overruled in *Jones v. Jones*, 18 Ala. 248. See *LeRoy v. Crowninshield*, 2 Mason, 151, 168. This view was, however, generally abandoned, and was never the law of this Commonwealth, of the English courts, of the Supreme Court of the United States, or of the courts of most of the States. A distinction was made in some of the Southern States between debts and chattels; and in suits for the recovery of slaves, it was held that adverse possession for the statutory period of limitations of personal actions created a title. In some of the decisions it is said that the possession must be *bona fide*, and acquired without force or fraud, and must be peaceable and adverse. It was held, however, that where there had been successive purchases of a slave, the possession of the successive purchasers could not be tacked, so as to create a title by adverse possession, because each purchase, if the purchaser took possession, was a new conversion; but such a title acquired by one person could be transferred to another. In some of these States, at the time of these decisions, it was also held that the statute of limitations of personal actions extinguished debts. *Cockfield v. Hudson*, 1 Brev. 311; *Howell v. Hair*, 15 Ala. 194; *Clark v. Slaughter*, 34 Miss. 65; *Winburn v. Cochran*, 9 Tex. 123; *Wells v. Ragland*, 1 Swan, 501; *Bryan v. Weems*, 29 Ala. 423; *Seay v. Bacon*, 4 Sneed, 99; *Bernard v. Chiles*, 7 Dana, 18; *Moffatt v. Buchanan*, 11 Humph. 369; *Newby v. Blakey*, 3 Hen. & M. 57; *Beadle v. Hunter*, 3 Strob. 331. See *Goodman v. Munks*, *ubi supra*.

In *Preston v. Briggs*, 16 Vt. 124, and *Baker v. Chase*, 55 N. H. 61, it was suggested that adverse possession of a chattel for six years transferred the title; but the cases did not require a determination of the question. In *Campbell v. Holt*, 115 U. S. 620, 623, there is an express declaration that "the weight of authority is in favor of the proposition that where one has had the peaceable, undisturbed, and open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title, a title superior to the latter, whose neglect to avail himself of his legal rights has lost him his title." The cases there cited are two of the slave cases which have been mentioned, and decisions of the Supreme Court of the United States relating to real property.

The law of the Supreme Court of the United States in regard to contracts was carefully stated in *Townsend v. Jemison*, 9 How. 407; and it was there held that, when the statute extinguished the right or title, and created a new one, this new right or title would be recognized by courts in other jurisdictions; but if the statute only affected the remedy, the courts would afford the remedies provided by their own laws. Our decisions upon the effect of our statute of limitations upon debts or contracts uniformly hold that it affects only the remedy by

action. *Bulger v. Roche*, ubi supra; *Thayer v. Mann*, 19 Pick. 535; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

There is nothing in the statute which suggests any distinction between actions to recover chattels and actions to recover debts, and it does not purport to be a statute relating to the acquisition of title to property, but a statute prescribing the time within which certain actions shall be brought. There is not a trace to be found in our reports of the doctrine that possession of chattels for the statutory period of limitations for personal actions creates a title, and I can find no such doctrine in the English reports, or in the reports of a majority of the courts of the States of this country. The law concerning the acquisition of easements in real property by prescription, in its modern form, was established by the courts by adopting in part the Roman law, and by limiting the period of enjoyment necessary to create the right to the time required by statute for bringing actions for the recovery of land. *Edson v. Munsell*, 10 Allen, 557.

A right of way may be acquired by repeated trespasses, if they are openly made under a claim of right, and are uninterrupted; but twenty years' user is required, although the limitation for actions of tort in the nature of trespass *quare clausum* is six years. It was inevitable, perhaps, that if a title to land could be acquired by adverse possession, a privilege or easement in land should be acquired by adverse use. By the Pub. Sts. c. 197, § 14, if a person liable to an action "fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action." This section has been construed strictly. *Nudd v. Hamblin*, 8 Allen, 130. Under this section, if one man stole another man's watch and carried it on his person as watches are usually carried, it might be held that the thief fraudulently concealed the cause of action from the owner; but if the thief sold the watch to one who purchased it in good faith, and he carried it in his pocket, this could not be held to be a fraudulent concealment; and if the statute of limitations transfers the title, the owner at the end of six years would lose the title to his watch, although he may not have known or been able to discover who had it. The possession of personal chattels, even although honestly held, is not always open and notorious, and if title to such chattels is to be acquired by possession, it ought to be by an adverse possession *bona fide* held under a claim of right which was known to the owner, or so open and notorious that the owner ought to have known it. The second request does not assume, and it has not been found as a fact, that such was the nature of Warner's possession.

Lamb v. Clark, 5 Pick. 193, was assumpsit by an executor to recover money paid to the defendant by the makers of certain promissory notes which had been delivered more than six years before the action was brought to the defendant as his property, by the plaintiff's testator as the consideration of a conveyance of land by the defendant to the

testator's wife. The plaintiff contended that there was a fraudulent combination between the defendant and the wife of the testator, whereby the testator had been defrauded of his property. It was conceded by the court, that an action of trover might have been brought at any time within six years after the defendant received the notes, and that such an action was barred by the statute of limitations. The plaintiff, however, was permitted to recover all sums of money received by the defendant from the makers of the notes within six years before the commencement of the action. If the expiration of the six years had transferred the title of the notes to the defendant, it is difficult to see how the action could have been maintained.

Wilkinson v. Verity, L. R. 6 C. P. 206, was detinue by the church wardens of All Saints against the vicar, who in 1859, having the custody of the communion plate, sold it for old silver. The church wardens discovered this in 1870, and then made a demand. The defence was the statute of limitations, and that the conversion occurred when the defendant sold the plate. The court say: "If this had been an action for damages for the conversion of the plate, in which the demand and refusal would have been only evidence of a conversion, it would have been impossible to contend that the date of the conversion could be excluded, or to deny that the defence upon the statute was sustained. Nor could the ignorance of the plaintiffs or their predecessors have prevented its operation." But the court held that the plaintiffs could elect to sue the defendant in detinue upon his contract as bailee to deliver the plate on demand, and that "it is no answer for the bailee to say that he has incapacitated himself from complying with the lawful demand of the bailor."

These cases show that the statute of limitations of personal actions is construed with reference to the particular action brought, and indicate that there is no change of title in property, although the time for bringing an action of trover has expired. I think that the subject of the acquisition of title to personal chattels by adverse possession can best be dealt with by the Legislature, if it is thought necessary to establish such a rule of law; and that it was not the intention of our statute of limitations of personal actions to extinguish rights or titles.

There is much force in the suggestion, that if the defendant could not have recovered the counters by action at the time she took possession, she ought not to be permitted to take them from the possession of the plaintiffs by force or fraud; but it is not found in the case that she took them by force or fraud, and the request does not assume this; and I think that the defendant, at the time she took possession, could have recovered these counters of the plaintiffs by action, as the statute of limitations did not begin to run in favor of the plaintiffs until they took possession, which was at least as late as 1879; and it is not found that the plaintiffs' vendors had any title which they could convey to the plaintiffs. I think the second and third requests ought not to have been given.

SECTION VII.

ACCESSION.

INST. 2, 1 (25, 26, 33, 34). When any one has converted another person's property into a new form, the question is often asked, which of them is the owner thereof on natural principles; whether the man who made the thing, or rather he who was previously the owner of the substance: for example, when any one has made wine or oil or corn from the grapes or olives or ears of another, or made any vessel of another's gold or silver or copper, or compounded mead of another's wine or honey, or made a plaster or eye-salve of another's drugs, or a garment of another's wool, or a ship or chest or seat out of another's planks. And after many controversies between the Sabinians and Proculians, the middle view has been approved, held by those who think that if the new form can be reconverted into its materials, that man is to be regarded as owner who was originally owner of the materials; but that if it cannot be reconverted, the other who made it is to be regarded as owner: for example, a vessel made by casting can be reconverted into the rough mass of copper or silver or gold; but wine or oil or corn cannot be returned into grapes or olives or ears, neither can mead be resolved into wine and honey. But when a man has created a new form out of materials partly his own and partly another's, for instance, when he has compounded mead out of his own wine and another person's honey, or a plaster or eye-salve out of his own drugs and those of other people, or a garment out of wool partly his and partly another's, in such a case there is no doubt that the maker is the owner; since he has not only given his labour, but provided also a portion of the materials of the article.

If, however, any one has interwoven with his own garment purple thread which belongs to another person, the purple thread, though the more valuable, accrues to the garment as an accessory; and the former owner of the purple thread has an action of theft and a condemnation against the man who stole it, whether the latter or another person be the maker of the garment: for although things that have ceased to exist cannot be recovered by vindication, yet a condemnation lies for them against thieves and certain other possessors.

Writing too, even if of gold, is as much an accessory to the paper or parchment, as buildings or crops are an accessory to the soil: and therefore, if Titius have written on your paper a poem, a history, or an oration, you, and not Titius, are regarded as the owner of the substance. But if you claim from Titius your books or parchments, and do not offer to pay the expense of the writing, Titius can defend himself by plea of fraud, at any rate if he obtained possession of the paper or parchment in good faith.

If any man have painted upon another's tablet, some think that the tablet is an accessory to the picture: whilst others hold that the picture, however valuable it may be, is an accessory to the tablet. But to us it seems better that the tablet should be an accessory to the picture; for it is absurd that a picture by Apelles or Parrhasius should go as an accessory to a paltry tablet. Hence, if the owner of the tablet be in possession of the picture, and the painter claim it from him, but refuse to pay the price of the tablet, he can be met by the plea of fraud. But if the painter be in possession, it follows that the owner of the tablet will be allowed an *utilis actio* against him: although in such case, unless he pay the expense of the painting, he can be met by the plea of fraud, at any rate if the painter took possession in good faith. For it is clear that if the painter or any one else stole the tablet, the owner thereof has an action of theft.

 ANONYMOUS.

1489.

[*Reported Year-Book, 5 Hen. VII. 15, pl. 6.*]

A WRIT of trespass was brought for the taking of so many slippers and shoes, and the defendant said that he was possessed of so many dickers of leather, and delivered them to one J. S., who gave them to the plaintiff; and afterwards the plaintiff made the slippers and shoes and boots, and the defendant came and took them as he well might. Judgment if the action lay. . . .¹

[The plaintiff] moved the court that this plea, that the defendant could take them back, was not good; but by the making of shoes and boots, &c., the property was altered, because they were now of another nature. As if one takes barley or grain and makes malt of it, he from whom the grain was taken cannot take the malt, because the chattel is changed into another nature. And so it is if trees are taken, and out of them a house is made, he from whom the trees were taken cannot tear down the house and take them back, and so other chattels are joined together with it. For where a chattel is taken with force, and no other chattel is joined or mixed with it, and it is not altered into another nature, the party can take it. So if one takes a tree, and squares it with an axe, now the party can take it, because it is not altered into another nature, nor is any other chattel mixed with it or joined to it; but if a man takes silver, and then makes a piece of it, or takes a piece of silver and has it gilt with gold, in this case the party cannot take it; and so here the leather is mixed with thread, and therefore the party cannot take it; and so it seems that the plea is not good. And the court holds the contrary clearly. And as to the cases of grain

¹ A part of the case relating to a point of pleading is omitted.

taken and malt made from it, the party cannot take it, because the grain cannot be known. And so it is with pennies or groats, and a piece made of them, it cannot be taken, because of the pennies one cannot be known from another. And so if one takes a piece, and strikes pennies from it at the mint, the party cannot take the pennies, because the pennies cannot be known one from another; and so in all like cases. And also in the case of the building of a house, now the timber is altered, for now it is freehold, and for this reason he cannot take it; but in every case where the chattels themselves can be known, there the party can take them, notwithstanding that some chattel is joined or mixed with them. As if one takes a piece of cloth and makes a coat for himself, the party can take it back well enough, because it is the same chattel and not at all altered; and so it is in the case put, if one cuts a tree and squares it, the party can take it well enough, because the tree can be known well enough notwithstanding. And so it is of iron, where a smith makes of it a bar, &c. And so it was held by all the court. Wherefore the plaintiff replied, for that matter appeared.

 ANONYMOUS.

1560.

[Reported Moore 19, pl. 67.]

IN a writ of trespass, the defendant justifies by reason that one I. S. was seised of an acre of land and let it to him for a term of ten years, and afterwards one A. entered into the said land so leased and cut down certain trees there growing, and from them made timber, and afterwards carried it on to the land where the trespass is alleged, and afterwards gave the timber to the plaintiff, wherefore the defendant entered on the said land and retook his timber as well he might. And the writ was *quare clausum fregit et mearemium cepit*.

Benlows. It seems to me that the plea is not good for two reasons: the one because when he took the trees and made timber of them, now he has lost the notice [*le notice*] of them, and so the property in them is altered. The other is because the defendant has confessed an entry which he cannot justify.

And as to the first point, the judges think the plea good enough, for by the seizure of the trees the notice is not cut off, but the property yet remains. In all cases where a thing is taken tortiously and altered in form, if yet that which remains is the principal part of the substance, then is not the notice lost, as if a man takes my cloak and makes a doublet of it, yet I can retake it. So if a man takes from me a piece of cloth, and then he sews on to it a piece of gold, yet I can retake it. And if a man takes certain trees and afterwards he makes boards of them, yet the owner can retake them, *quia major pars substantiæ remanet*. But if the trees are fixed on the land, or if a house be made of the timber, it is otherwise. *Quære.* The house now is the principal substance.

WOOD *v.* MOREWOOD.

DERBY SUMMER ASSIZES. 1841.

[*Reported 3 Q. B. 440, note.*]

THIS was an action by the plaintiff for an injury to his reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals. There were pleas of leave and licence, and that the defendant was seised as of freehold in the mines of coal, on which issue was joined. The defendant claimed under Sir John Zouch, who was seised of the closes, with others, and the beds of coal under the same, temp. Eliz., and conveyed all the coals belonging to him to one under whom the defendant proved his title. The plaintiff claimed the closes in question by a prior conveyance of them, without the exception of coals, from Zouch. The defendant had won the coals under the closes, *bona fide* supposing that these were his own under his title from Zouch. Whether they passed or not depended upon the question whether an ancient settlement by another Zouch, temp. Eliz., which existed at the time of the conveyance of the plaintiff's closes for value, was voluntary or not. There was also some evidence of licence as to part. The plaintiff claimed damages on the principle laid down in the case of *Martin v. Porter*, 5 M. & W. 351, which amounted to about £10,000, or £11,000.

Sir W. W. Follett, for the defendant.

PARKE, B., told the jury that, if they found for the plaintiff, they were to determine what damages should be given: that, if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff.

The jury adopted the latter estimate, and found for the plaintiff, damages £210 per acre; £2310.

No motion for a new trial was made.

MORGAN v. POWELL.

QUEEN'S BENCH. 1842.

[Reported 3 Q. B. 278.]

TRESPASS for breaking and entering plaintiff's coal mine and strata, and digging and getting plaintiff's coal, to wit 20,000 tons, &c., out of the said mine and strata; also for digging and making levels in certain strata, &c., of plaintiff, and carrying away and converting the materials, to wit 10,000 cart loads of coal; and for carrying coals with horses, trams, &c., through the said levels; and by the several means aforesaid damaging the strata, &c., and causing loss of plaintiff's coal, &c. Judgment by default.

An inquiry of damages was executed, before Coleridge, J., at the Monmouthshire Spring assizes, 1841; when it appeared that the plaintiff and defendant were proprietors of adjoining coal mines, the defendant holding two, and the plaintiff a third, partly situate between them. The defendant had, from one of his own mines, entered that of the plaintiff, and had there worked coal belonging to the plaintiff, carried it away, and brought it up to the mouth of his own pit, and had also carried coal from one of his own mines (held under Lord Dynevor) through the workings so made in the plaintiff's mine. Compensation was claimed: 1. For the value of plaintiff's coal worked and taken away by defendant; 2. For the injury which plaintiff's unworked coal had sustained by the mode in which defendant had made the headings or workings; 3. In respect of the coal from Lord Dynevor's mine which defendant had conveyed through the workings of plaintiff's mine. On the last two heads damages were assessed,¹ as to which no subsequent question arose. On the first, the plaintiff demanded compensation at the rate per ton which a purchaser would pay for the coal at the pit's mouth, and which was proved to be 5*s.* 8*d.* For the defendant it was urged that he ought not to pay more than the value of the coal after deducting the expenses of cutting and bringing it to the pit's mouth, which were estimated at 3*s.* 10*d.* per ton. *Martin v. Porter*, 5 M. & W. 351, was cited for the plaintiff; and the learned judge, considering himself bound by the decision as stated, though he expressed a doubt of its correctness,² advised the jury to give their verdict on the principle of the plaintiff's estimate, but reserved leave to move to reduce the damages by the difference between the values at the pit's mouth and

¹ 1*s.* and 20*l.*

² By a short-hand writer's note, his Lordship appears to have said: "But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been, to put him in the same position as he would have been if the coal had never been stirred."

in the ground. The jury found their verdict as directed; damages, on this head of claim, £1400.

Sir J. Campbell, Attorney-General, in Easter term, 1841, obtained a rule to shew cause why the verdict should not be reduced "by the amount of the expense of getting the coals and bringing them to the pit's mouth." Cause was shewn in Easter term, 1842.¹

Ludlow, Serjt., for the plaintiff.

Sir W. W. Follett, Solicitor-General, *Talfourd*, Serjt., and *Keating*, in support of the rule.

Ludlow, Serjt., and *R. V. Richards* were then called upon to shew cause.

LORD DENMAN, C. J., in this term (June 9th), delivered the judgment of the court.

This was an action for breaking a mine, digging coal, carrying it unlawfully along the plaintiff's adit, and taking and converting it to the defendant's use. Judgment was suffered by default, and a writ of inquiry executed before my brother Coleridge.

The question was, how the value of the coal taken was to be estimated; and the learned judge directed the jury to act on the rule laid down in *Martin v. Porter*, 5 M. & W. 351. The rule, however, was misstated at the trial; and the calculation has been accordingly taken without making certain allowances which that rule provides for. The direction of the learned judge in that case was, that the plaintiff was entitled to the value of the coal as a chattel, "at the time when the defendant began to take it away," that is (as there stated), as soon as it existed as a chattel; which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth; and this direction the Court of Exchequer has affirmed. In the present case the rule was taken to be absolute, and without the deduction.

We are of opinion that the rule in *Martin v. Porter*, 5 M. & W. 351, is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit; and the estimate of that loss depends on the value of the coal when severed; that is, the price at which the plaintiff could have sold it. This plainly was the value of the coal itself at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal; nor can he, properly speaking, bring any charge against the plaintiff for labour expended upon it. But it could have no value as a saleable article without being taken from the pit; any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be sup-

¹ May 2d. Before Lord Denman. C. J., Patteson, Williams, and Coleridge, JJ.

posed where particular circumstances would vary this mode of calculating the damage; but none such appear here. We do not find that the cost incurred by the defendant in bringing the coal to the pit's mouth is greater by a single farthing than that which the plaintiff must have incurred for the same purpose.

The damages found by the verdict must therefore be reduced by the amount of this charge, which may be ascertained by reference to the judge's note; or there must be a new execution of the writ.

*Rule absolute for reduction as above.*¹

¹ "Now, my Lords, there was a technical rule in the English courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

"Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron Parke put this qualification on it, as far as I am aware for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal-field. *Wood v. Morewood*, 4 Q. B. n. 440. That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon v. Vivian*, Law Rep. 6 Ch. 742, which has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoing the point that is to be made out for the damages is, as was expressed in the minutes of the decree: 'The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district;' that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil." Per LORD BLACKBURN, in *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 39.

SILSBURY v. McCOON.

SUPREME COURT OF NEW YORK. 1844, 1847. COURT FOR THE CORRECTION OF ERRORS. 1850.

[Reported 6 Hill, 425; 4 Denio, 332; 3 Comst. 379.]

TROVER for a quantity of whisky, tried at the Montgomery circuit in May, 1843, before Willard, C. Judge. The facts proved by the plaintiffs to establish their title to the whisky were as follows: On the 18th of February, 1842, the sheriff of Montgomery levied on five hundred bushels of grain by virtue of a *fi. fa.* against one Wood in favor of Eldert Tymason. The grain was in Wood's distillery at the time, having been purchased by him with a view of manufacturing it into whisky, and the sheriff did not remove it. Shortly after the levy, the plaintiffs, who it seems succeeded Wood in the possession of the distillery, converted the grain into whisky. When the sheriff went to the distillery for the purpose of selling, he was informed by Silsbury, one of the plaintiffs, that they had converted the grain into whisky, and were willing to pay for it; but no terms were then agreed upon. On the 10th of March, 1842, the plaintiffs gave their note to the sheriff for the grain, allowing him fifty cents per bushel; and Tymason afterwards accepted the note as so much paid upon the *fi. fa.* The whisky in question was a part of that which the plaintiffs had manufactured from the grain levied on by the sheriff.

The defence was as follows: On the 25th of February, 1842, after the whisky in question had been manufactured by the plaintiffs, it was seized by one of the deputies of the sheriff of Montgomery, by virtue of a *fi. fa.* issued against Wood, in favor of the defendants. The deputy sold the whisky on the 23d of March following, and it was bid in by the defendants. It appeared that the sheriff was informed of the levy made under the defendants' *fi. fa.*, before he settled with the plaintiffs for the grain.

The defendants moved for a nonsuit, insisting that the plaintiffs acquired no title to the whisky by their compromise with the sheriff. The circuit judge ordered a nonsuit, and the plaintiffs now moved for a new trial on a bill of exceptions.

S. Wilkeson, Jr., for the plaintiffs.

N. Hill, Jr., for the defendants.

By the Court, NELSON, Ch. J. Even conceding that the settlement with the sheriff for the taking and conversion of the grain was inoperative, (which I should not be willing to admit, if made in good faith,) still, a decisive answer to the defence is, that the identity of the grain was destroyed by the act of manufacturing it into whisky, and the property in the new article vested in the plaintiffs. The doctrine on this subject is stated by Blackstone as follows: "By the Roman law, if any given corporeal substance received afterwards an accession by

natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. But if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts." 2 Bl. Com. 404; and see Bro. Ab. tit. Property, 23; Moore, 20; Poph. 38; Vin. Ab. tit. Trespass, (H. a. 3,) pl. 8; Id. tit. Property (E.) pl. 5; *Betts v. Lee*, 5 Johns. Rep. 348; 2 Kent's Com. 364. The same doctrine was laid down in *Brown v. Sax*, 7 Cowen, 95. The court there said: "The rule, in case of a wrongful taking is, that the taker cannot, by any act of his own, acquire title, unless he either destroy the identity of the thing; as by changing money into a cup, or grain into malt; or annexing it to and making it a part of some other thing, which is the principal; or changing its nature from personal to real property; as where it is worked into a dwelling-house."

In the present case, the nature and species of the commodity was entirely changed and its identity destroyed; as effectually, it seems to me, as by "making wine, oil, or bread, out of another's grapes, olives, or wheat." I think the circuit judge erred in nonsuiting the plaintiffs, and that they are entitled to a new trial. *New trial granted.*

On the second trial it was proved that one Hackney, a deputy of the sheriff of Montgomery county, on the 22d day of March, 1842, by virtue of a *fi. fa.* on a judgment in this court in favor of the defendants, against one Uriah Wood, sold the whiskey in question, being about twelve hundred gallons, and worth \$277.68, he having previously levied upon it; and that upon the sale the defendants became the purchasers, and afterwards converted it to their own use. The whiskey was levied on and sold at the plaintiffs' distillery, and they forbade the sale. The plaintiffs having rested, the defendants offered to prove in their defence that the whiskey was manufactured from corn belonging to Wood, the defendant in the execution; that the plaintiffs had taken the corn and manufactured it into whiskey, without any authority from Wood; and that they knew at the time they took it that it belonged to him. The plaintiffs' counsel objected to this evidence, insisting that Wood's title to the corn was extinguished by the conversion of it into whiskey. The judge sustained the objection and rejected the evidence, and the defendants' counsel excepted. Verdict for the plaintiffs. A motion is now made for a new trial, on a bill of exceptions.

N. Hill, Jr., for the defendants.

D. Cady, for the plaintiffs.

BRONSON, C. J. It is undoubtedly a general rule in every civilized state, that a man can only lose his title to property by the operation of law, or his own voluntary act. But this, like most other general rules, has its exceptions. If one wrongfully take the chattel of another, and merely change its form and value by bestowing his labor and skill upon it, without destroying its identity, the property still remains in the original owner, and he may either retake it, or recover the value in its state of improvement. Thus, where leather is made into boots and shoes, cloth into a garment, trees into square timber, iron into bars, or timber into boards, shingles, or coal, the title remains in the owner of the original materials, and he may either retake the chattel in its improved state, or recover its enhanced value. But if the thing be changed into a different species, so that it cannot be reduced to its former rude materials, it then belongs to the new operator; and he is only to make satisfaction to the former owner for the materials converted. Examples of this kind are, where grapes are made into wine, olives into oil, wheat into bread, milk into cheese, grain into malt, or corn into whiskey. In such cases the property is changed, and the original proprietor only has an action to recover his damages. Thus far our lawyers have followed the rule of the civil law. It will be sufficient to refer to the report of this case when it was before us on a former occasion, and the learned note of the reporter for the authorities on this subject. *Silsbury v. McCoon*, 6 Hill, 425. We there held, that when corn is wrongfully taken and manufactured into whiskey, by which the nature and species of the commodity is entirely changed, and its identity destroyed, the property is also changed, and the new product belongs to the manufacturer. The case has come back again upon an offer to show that the corn was taken with the knowledge that it belonged to another; and we are referred to the further teaching of the civilians, who hold that where the property was taken by a wilful trespass, the title is not changed, however great may be the change which has been wrought in the original materials. But I do not find that this doctrine has ever been adopted into our law by any adjudication either here or in England. It was mentioned in *Betts v. Lee*, 5 John. 348, and again in *Curtis v. Groat*, 6 Id. 168; but although the judge who wrote the *per curiam* opinions in those cases evidently had a strong leaning to the doctrine of the civilians, the decisions turned upon other grounds. The changes had been from timber into shingles and coal: but the property had never been out of the possession of the original owner; and it was held in both cases that the identity of the original materials was sufficiently established. And where the change was from timber to coal, the only point necessarily decided was the one on which the case was put at the outset, that the matter in litigation was *res adjudicata*. The reasons for those judgments were, I presume, assigned by the learned commentator upon American law, who in his treatise still retained his former opinion. 2 Kent, 363. But Blackstone, 2 Com. 404, 405, lays down the rule,

without any qualification, that when the thing is changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belongs to the new operator; who is only to make satisfaction to the former proprietor for the materials converted. The decisions on the general subject commenced as early as the Year-Book, 5 H. 7, fol. 15; and if the distinction of the civilians between a wilful and an innocent trespass had ever been adopted into our law, we should be able to find the evidence of it in some reported adjudication. But none seems to have been known to Blackstone; none is cited by Chancellor Kent in his Commentaries; nor was any such decision produced by the counsel who argued this case.

The question is not, as it has been sometimes artfully put, whether the common law will allow the owner to be unjustly deprived of his property, or will give encouragement to a wilful trespasser. It will do neither. But in protecting the owner, and punishing the wrongdoer, our law gives such rules as are capable of practical application, and are best calculated to render exact justice to both parties. The proper inquiry is, in what manner and to what extent should the trespasser be punished, and what should be the kind and measure of redress to the injured party. A trespasser who takes iron ore and converts it into watch-springs, by which its value is increased a thousand fold, should not be hanged, nor should he lose the whole of the new product. Either punishment would be too great. Nor should the owner of the ore have the watch-springs; for it would be more than a just measure of redress. Our law has therefore wisely provided other remedies and punishments. The owner may retake his ore, either with or without process, so long as its identity remains, and may also recover damages for the tortious taking. Or without repossessing himself of the property, he may have an action of trespass, in which the jury will not fail to give the proper damages. But the law will not allow the owner to wait until the ore has been converted into a different species of property, and then to seize the new product, either with or without process. Nor is the value of the new product the proper measure of damages, if he bring an action of trespass or trover.

Although there will not be many cases where the difference between the value of the rude material and the new product will be so striking as in the case which has been mentioned, yet in almost every instance where the chattel taken has been converted into a different species of property, the value of the new product will be more than the trespasser ought to pay, or the owner of the chattel ought to receive.

The common law not only has regard to the proper measure of redress and punishment, but its rules are such as can be successfully applied and administered. Before the thing has been transformed into a different species, its identity can be easily established; the owner can know what to retake, and his title can be proved in a court of justice. But after iron ore has been changed into watch-springs or nee-

dles, grapes into wine, or corn into whiskey, it is nearly or quite impossible to trace the connection between the new products and the original rude materials.

In conceding for all the purposes of this case that the owner may follow the property until it is changed into a different species, I must not be understood as expressing the opinion that such is the proper rule. As an original question, I think the owner should either reclaim the property before the new possessor has greatly increased its value, either by bestowing his labor and skill upon it, or by joining it to other materials of his own; or else that he should be restricted to a remedy by action for the damages which he has sustained. But the question may not be open to consideration upon principle; and for the present I only mean to say that we have followed the civil law far enough, without taking another step, and holding that in the case of a wilful trespass the owner can never lose his title to the property. And it comes to that; for if he may trace his title from corn to whiskey, he may follow it so long as matter endures.

BEARDSLEY, J., concurred.

JEWETT, J., dissented.¹

After judgment the defendants brought error to this Court [for the Correction of Errors], where the cause was first argued by Mr. *Hill*, for the plaintiffs in error, and Mr. *Reynolds*, for the defendants in error, in September, 1848. The judges being divided in opinion, a re-argument was ordered, which came on in January last.

N. Hill, Jr., for the plaintiffs in error.

M. T. Reynolds for the defendants in error.

RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if

¹ This dissenting opinion is omitted.

put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel wrongfully taken, afterwards come into the hands of *an innocent holder* who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case, (5 Hen. 7, fol. 15,) it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it can not be reclaimed by the owner because it can not be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly can not be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case, (Moore's Rep. 20,) trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it can not be reduced from its new form, to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, &c. There is therefore no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor; it presents no difficulty where he seeks to obtain it from the wrongdoer; provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

These principles are to be found in the digest of Justinian. (Lib. 10, tit. 4, leg. 12, § 3.) "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, *knowing they are not his own*, he shall be compelled by action to produce the said wine, oil or garments." So in Vinnius' Institutes, tit. 1, pl. 25. "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations, (b. 4, ch. 7, § 10) and in Wood's Institutes of the Civil Law, p. 92, which are cited at large in the opinion of Jewett J. delivered in this case in the Supreme Court. (4 Denio, 338,) and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species however must be incapable of being restored to its ancient form; *and the materials must have been taken in ignorance of their being the property of another.*

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrongdoer hereinbefore mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrongdoer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimate that on the point in question there is any difference between the civil and the common law.

The authorities referred to by Blackstone in support of his text are three only. The first in Brooks' Abridgment, tit. *Property* 23, is the case from the Year Book, 5 H. 7, fol. 15, (translated in a note to 4 Denio, 335,) in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S. who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's Reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alledged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's Reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share, (Just. Inst. lib. 2, tit. 1, § 28;) and the common law in this particular appears to be more rigorous than the civil: and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent, seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law if A obtain by fraud the parchment of B, and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture. (Just. Inst. lib. 2, tit. 1, §§ 23, 24.) Neither Braeton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product can not be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again. The court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrongdoer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy; while the rule adopted by the court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article: the owner of the ore may recover its value, in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, 5 John. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. The property could neither be identified by inspection, nor restored to its original form; but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, 6 John. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser can not acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries, (Vol. 2, p. 363,) declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser: and that it was settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. *Snyder v. Vaux*, 2 Rawle, 427. And in Maine and Massachusetts it has been applied to a wilful intermixture of goods. *Ryder v. Hathaway*, 21 Pick. 304, 5; *Wingate v. Smith*, 7 Shep. 287; *Willard v. Rice*, 11 Mete. 493.

We are therefore of opinion that if the plaintiffs below in converting the corn into whisky knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the Supreme Court should be reversed and a new trial ordered.

GARDINER, JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, Ch. J. Two very able arguments here, against the opinion which I delivered when the case was before the Supreme Court, (4 Denio, 332,) have only served to confirm me in the conclusion at which I then arrived. I shall add but little now to what I said on the former occasion.

The owner may, as a general rule, follow and retake the property of which he has been wrongfully deprived so long as the same thing remains, though it may have been changed in form and value by the labor and skill of the wrong-doer. But when, as in this case, the identity of the thing has been destroyed by a chemical process, so that the senses can no longer take cognizance of it—when it has not only changed its form and appearance, but has so combined with other elements that it has ceased to be the same thing, and become something else, the owner can, I think, follow it no longer: his remedy is an action for damages. Such I take to be the rule of the common law; and that is our law.

The rule for which the defendants contend, that in the case of a wilful trespass, the owner may follow and retake his property after it has been changed into a thing of a different species—that he may trace corn into whisky, and take the new product—is open to several objections. First: it would be nearly or quite impossible to administer such a rule in trials by jury. Second: the rule would often work injustice, by going beyond the proper measure of either redress or punishment; while an action for damages would render exact justice to both parties. It is very true that a wilful trespasser should be punished: but that proves nothing. All agree that he should be made to suffer; but the mode and measure of punishment are questions which still remain. If one has knowingly taken six pence worth of his neighbor's goods as a trespasser, he should neither be imprisoned for life, nor should he forfeit a thousand dollars. We should not lose sight of the fact, that the rule now to be established is one for future, as well as present use; and it may work much greater injustice in other cases than it can in this. Third: there is no authority at the common law for following and retaking the new product in a case like this. I make the remark with the more confidence, because the very diligent counsel for the defendants, after having had several years, pending this controversy, for research, has only been able to produce some *dicta* of a single jurist, without so much as one common law adjudication in support of the rule for which he contends. He is driven to the civil law; and then the argument is, that because we, in common with the civilians, allow the owner to retake his property in certain cases, we must be deemed to have adopted the rule of the civil law on this subject in its whole extent. But that is a *non sequitur*. It often happens that our laws and those of the Romans—and, indeed, of all civilized nations—are found to agree in

some particulars, while they are widely different in others; and this is true of laws relating to a single subject. There is no force, therefore, in the argument, that because our law touching this matter is to some extent like the civil law, it may be presumed that the two systems are alike in every particular. And clearly, the burden of showing that the Roman law is our law, lies on those who affirm that fact. There is not only the absence of any common law adjudication in favor of the rule for which the defendants contend, but in one of the earliest cases on the subject to be found in our books, (Year Book, 5 H. 7, fo. 15, 4 Denio, 335, note,) the court plainly recognized the distinction which has been mentioned, and admitted that the owner could not retake the property after its identity had been destroyed; and "grain taken and malt made of it" was given as an example.

There are many cases where the title to a personal chattel may be turned into a mere right of action, without the consent of the owner, although the thing was taken by a wilful trespasser, or even by a thief. If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner can not retake his goods, but is put to his action for damages; and this is so in the civil, as well as at the common law. If a thief take water from another's cistern, and use it in making beer; or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose no one will say, that the owner of the water, the salt, or the fuel may seize the beer, the pork or the hams. And there is no better reason for giving him the new product, where sand is made into glass, malt into beer, coal into gas, or grain into whisky. In the case now before us, the civilians would not go so far as to say, that the owner of the grain might take the swine which were fattened on the refuse of the grain after it had gone through the process of distillation. And yet that would hardly be more unjust or absurd than it would be to give him the whisky. There must be a limit somewhere; and I know of none which is more safe, practical and just than that which allows the owner to follow a chattel until it has either been changed into a different species, or been adjoined to something else, which is the principal thing; and stops there. Thus far our courts have gone, and there they have stopped. We have neither precedent nor reason in favor of taking another step; and I can not take it.

Judge HARRIS agrees with me in the opinion that the judgment of the Supreme Court is right, and should be affirmed.

TAYLOR, J. did not hear the argument, and gave no opinion.

Judgment reversed.

PULCIFER v. PAGE.

SUPREME COURT OF MAINE. 1851.

[Reported 32 Me. 404.]

TRESPASS for an iron chain, which each of the parties claimed to own.

The evidence tended to show, that each of the parties had a chain ; — that each chain had been broken into several pieces ; that the plaintiff, without the consent or knowledge of the defendant, carried all the pieces to a blacksmith, and had them made up into two chains ; — and that the defendant carried away one of them into which some part of his own chain had been incorporated. It was for this chain, that this suit is brought.

The judge instructed the jury that if the plaintiff had only incorporated into this chain some small portion of the defendant's chain without his consent, not exceeding two or three links, it would not thereby become the property of the defendant. To this ruling the defendant excepted.

Woodman, for the defendant.

Goodwin, for the plaintiff.

HOWARD, J. This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession. This was a rule of the Roman, and of the English law, and has been adopted, as it is understood, in the United States, generally. Dig. 6, 1, 61 ; *Bracton de acq. rerum dom.* B. 2, c. 2, § 3, 4 ; *Molloy*, B. 2, c. 1, § 7 ; *Pothier, Trait du droit de propriété*, L. 1, c. 2, art. 3, No. 169–180 ; 2 *Black. Com.* 404 ; 1 *Bro. Civil Law*, 241 ; *Glover v. Austin*, 6 *Pick.* 209 ; *Sumner v. Hamlet*, 12 *Pick.* 83 ; *Merritt v. Johnson*, 7 *Johns.* 474 ; 2 *Kent's Com.* 361.

The distinctions and qualifications, that may be appropriate and necessary in the application of this doctrine to a variety of cases that may arise, do not require consideration, in determining this case. The first instruction stated was favorable to the defendant, and forms no ground of exceptions for him ; and the plaintiff does not complain of it. The second instruction, that “ if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incor-

poration of such small portion, become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

Exceptions overruled, judgment on the verdict.

WETHERBEE v. GREEN.

SUPREME COURT OF MICHIGAN. 1871.

[Reported 22 Mich. 311.]

ERROR to Bay Circuit.

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the Circuit Court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel hoops, alleged to be of the value of eight hundred dollars. The hoops were cut upon a tract of land which Green, one of the plaintiffs, and one Thomas Sumner had owned as tenants in common. Green, by parol, had authorized Sumner to sell timber from off the land. Afterwards, Sumner being indebted to Camp and Brooks, the other plaintiffs, conveyed to them, by warranty deed, his undivided half of the land, they agreeing orally to re-convey upon payment. Sumner after his conveyance to Camp and Brooks, sold a quantity of timber growing upon the land to Wetherbee, who cut and manufactured the same into hoops, — for the possession of which this action is brought.

On the trial, the circuit judge excluded the testimony offered by the defendant, to show the character of the transaction between Sumner and Camp and Brooks, and the license derived from Sumner to cut the timber; and under the charge of the court the jury found for plaintiffs. The judgment entered upon the verdict comes into this court by writ of error.

Marston and Hatch, for plaintiff in error.

Clark and Day, for defendants in error.

COOLEY, J. The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest in the land to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parol evidence, that the sole purpose of this conveyance was to secure a pre-

existing debt from Sumner to Camp and Brooks, and that consequently it amounted to a mortgage only, leaving in Sumner, under our statute, the usual right of a mortgagor to occupy and control the land until foreclosure. He also claimed that the authority given by Green to Sumner had never been revoked, and that consequently the license given would be good against Green, and constitute an effectual bar to the suit in replevin, which must fail if any one of the plaintiffs was precluded from maintaining it.

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also, that at the time of obtaining the license from Sumner he had no knowledge of the sale of Sumner's interest, but, on the other hand, had obtained an abstract of the title to the premises from a firm of land agents at the county seat, who kept an abstract book of titles to land in that county, which abstract showed the title to be in Green and Sumner, and that he then purchased the timber, relying upon the abstract, and upon Sumner's statement that he was authorized by Green to make the sale. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, wilfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the

property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Com., 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a wilful appropriation, no extent of conversion can give to the wilful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition. 2 Kent. 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in wilful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; and *Chandler v. Edson*, 9 Johns. 362, were all cases where the wilful trespasser was held to have acquired no property by a very radical conversion, and in *Silsbury v. McCoon*, 3 Comstock, 378, 385, the whole subject is very fully examined, and Ruggles, J., in delivering the opinion of the court, says that the common law and the civil law agree "that if the chattel wrongfully taken come into the hands of an *innocent holder* who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change

in the species of the chattel is not an intentional wrong to the original owner. It is, therefore, regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace the identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place," and further on he says of the civil law, with which the common law is supposed by him to harmonize: "The acknowledged principle of the civil law is that a wilful wrong-doer acquires no property in the goods of another either by the wrongful taking, or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to be made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property." In further illustration of the same views we refer to *Hyde v. Cookson*, 21 Barb. 104; *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 M. & W. 672; *Baker v. Wheeler*, 8 Wend. 508; *Snyder v. Vaux*, 2 Rawle, 427; *Riddle v. Driver*, 12 Ala. 590.

It does not become necessary for us to consider whether the case of *Silisbury v. McCoon*, 3 Comstock, 378, which overruled the prior decisions of the supreme court (reported in 4 Denio, 425, and 6 Hill, 332), has not recognized a right in the owner of the original materials to follow them under circumstances when it would not be permitted by the rule as recognized by the authorities generally. That was the case where a wilful trespasser had converted corn into whisky, and the owner of the corn was held entitled to the manufactured article. The rule as given by Blackstone would confine the owner, in such case, to his remedy to recover damages for the original taking. But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a wilful trespasser, since the authorities agree in holding, that when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was wilfully made without mutual consent, . . . the

common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. Popham's Rep. 38, pl. 2. If A will wilfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. Popham's Rep. *ub. supra*; *Warde v. Ayre*, 2 Bulst. 323, 2 Kent, 364, 365; and see 2 Bl. Com. 404; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Gordon v. Jenney*, 16 Mass. 465; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N. H. 561; *Roth v. Wells*, 29 N. Y. 486; *Willard v. Rice*, 11 Met. 493; *Jenkins v. Steanka*, 19 Wis. 128; *Hesseltine v. Stockwell*, 30 Me. 237. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law. Morton, J., in *Ryder v. Hathaway*, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable. Story on Bailm. § 40; Sedg. on Dams. 483.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. Bro. tit. Property, pl. 23;" 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape. Sedg. on Dams. 484; *Snyder v. Vaux*, 2 Rawle, 427; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 95; *Silbury v. McCoon*, 4 Denio, 333, per Bronson, J.; *Ibid.*, 6 Hill, 426, per Nelson, Ch. J.; *Ibid.*, 3 Comstock, 386, per Ruggles, J. Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. Year Book 5, H. 7, fo. 15, pl. 6; 4 Denio, 335 note. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the pur-

pose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice.

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house ; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ, or other equally valuable article ; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it, — not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced ; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article ; but in the present case, where the defendant's labor — if he shall succeed in sustaining his offer of testimony — will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

This view will dispose of the case upon the present record. Upon the other points we are not prepared to assent entirely to the views of the plaintiff in error. It does not appear to us important that the deed from Sumner to Camp and Brooks was intended as a mere security. Under such a deed Sumner would have had a right of redemption, but it does not follow that he would have been entitled to possession, and to all the other rights of mortgagor in the courts of law. When a deed absolute in form is given to secure a debt, the purpose generally is to vest in the grantee a larger power of control and disposition than he would have by statute under an ordinary mortgage; and we are not prepared to say that the statute — Comp. L. § 4614 — which forbids ejectment by mortgagees before foreclosure was intended to reach a case of that description. We think, however, that the mere circumstance of the sale of Sumner's interest did not operate in law as a revocation of the authority previously given to Sumner to sell the timber. It is quite possible that Green would not have given his authority had Sumner not been tenant in common of the land with him; but there is no absolute presumption of the law to that effect; and we cannot say that Green would have revoked the authority had he been aware of Sumner's conveyance. Nor was it necessary that the license given by Sumner to Wetherbee should have been in any particular form. A mere license to enter upon land and cut timber does not confer a legal right to do so; but it nevertheless protects the licensee so far as he has acted under it before revocation, and the protection does not depend upon its form, but upon what has been done having proceeded by consent. However informal the consent may have been, the land owner cannot be allowed, by afterwards recalling it, to make the licensee a trespasser for what he has done in reliance upon it.

For the reasons given, the judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

ISLE ROYALE MINING COMPANY *v.* HERTIN.

SUPREME COURT OF MICHIGAN.

[Reported 37 Mich. 332.]

ERROR to Houghton. Submitted June 14. Decided Oct. 16.

Trover and indebitatus assumpsit. The facts are in the opinion.

T. L. Chadbourne and *S. F. Seager*, for plaintiff in error.*Chandler & Grant* and *G. V. N. Lothrop*, for defendant in error.

COOLEY, C. J. The parties to this suit were owners of adjoining tracts of timbered lands. In the winter of 1873-74 defendants in error, who were plaintiffs in the court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth \$2.87½ per cord, and the value of the labor expended by plaintiffs in cutting and placing it there was \$1.87½ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. The declaration contains two special counts, the first of which appears to be a count in trover for the conversion of the wood. The second is as follows: —

“And for that whereas also, the said plaintiff, Michael Hertin, was in the year 1874 and 1875, the owner in fee simple of certain lands in said county of Houghton, adjoining the lands of the said defendant, and the said plaintiffs were, during the years last aforesaid, engaged as co-partners in cutting, hauling and selling wood from said lands of said Michael Hertin, and by mistake entered upon the lands of the said defendant, which lands adjoined the lands of the said plaintiff, Michael Hertin, and under the belief that said lands were the lands of the said plaintiff, Michael Hertin, cut and carried away therefrom a large amount of wood, to wit: one thousand cords, and piled the same upon the shore of Portage Lake, in said county of Houghton, and incurred great expense, and paid, laid out and expended a large amount of money in and about cutting and splitting, hauling and piling said wood, to wit: the sum of two thousand dollars, and afterwards, to wit: on the first day of June, A. D. 1875, in the county of Houghton aforesaid, the said defendant, with force and arms, and without any notice to or consent of said plaintiffs, seized the said wood and took the same from their possession and kept, used and disposed of the same for its own use and purposes, and the said plaintiffs aver that the labor so as aforesaid done and performed by them, and the expense so as aforesaid incurred, laid out and expended by them in cutting, splitting, hauling

and piling said wood, amounting as aforesaid to the value of two thousand dollars, increased the value of said wood ten times and constituted the chief value thereof, by reason whereof the said defendant then and there became liable to pay to the said plaintiff, the value of the labor so as aforesaid expended by them upon said wood and the expense so as aforesaid incurred, laid out and expended by them in cutting, splitting, hauling and piling said wood, to wit: the said sum of two thousand dollars, and being so liable, the said defendant in consideration thereof, afterwards to wit: on the same day and year last aforesaid and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay unto the said plaintiffs the said sum of two thousand dollars, and the interest thereon."

The circuit judge instructed the jury as follows:—

"If you find that the plaintiffs cut the wood from defendant's land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling and piling the same." This presents the only question it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the circuit judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obligation to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: whether, where one in an honest mistake regarding his rights in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, the taking possession of the wood afterwards by the mining company, and its value in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law when one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can he establish in himself any affirmative

rights, based upon his unlawful, though unintentional encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another, where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor. The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form of distilled liquors. *Silsbury v. McCoon*, 3 N. Y. 379. See *Riddle v. Driver*, 12 Ala. 590. And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than *Wetherbee v. Green*, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of \$25, and converted them into hoops worth \$700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in *Wetherbee v. Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against any thing being accidentally improved by another at his cost and to his ruin.

The judgment of the Circuit Court must be reversed, with costs, and a new trial ordered.

The other justices concurred.

RAILWAY COMPANY *v.* HUTCHINS.
SUPREME COURT COMMISSION OF OHIO. 1877.

[*Reported 32 Ohio St. 571.*]

ERROR to the District Court of Cuyahoga County.

The petition in this case avers that the said minors Joseph and Edward Barbour are owners in fee simple of a certain tract of land in Lake County, and then proceeds as follows:—

Said land, when owned by said minors, was thickly wooded with excellent timber, and was very valuable on that account; that all, or nearly all, of said timber, while said land was owned by said minors, was cut down and removed by persons now to this plaintiff unknown, without any authority whatever, and the same taken, used, and possessed for its own benefit, without any authority whatever, by the Cleveland, Painesville, and Ashtabula Railroad Company, which was, on or about the 1st day of April, 1869, consolidated with certain other railroad companies under the name and style of the Lake Shore and Michigan Southern Railway Company, which last named company is made the defendant in this action.

By reason of said timber being taken from said land and converted to its own use by the Cleveland, Painesville, and Ashtabula Railroad Company, said minor children were damaged in the amount of four thousand six hundred and fifty dollars (\$4,650), for which sum, by reason of the premises, plaintiff asks judgment against the defendant, the Lake Shore and Michigan Southern Railway Company.

It is denied in the answer, that plaintiffs were owners in fee simple of the land in question.

A large quantity of wood and railroad ties was cut, upon this land, by persons who were trespassers, acting without legal right. There is some attempt in the evidence to show that these trespassers had some lawful claim, by virtue of a tax title, to part of the premises. But for the purposes of the case, this claim is ignored, and it is assumed that the timber was actually stolen. Having been thus unlawfully appropriated, it was sold by the parties who took it to the railroad company, but it is admitted that the company purchased and paid for the wood, trees, and ties, in good faith, without notice of plaintiffs' rights, or that any wrong had been or was done his woods.

The fair value of the timber standing upon plaintiffs' land, and before cut into cord wood, and hauled to the defendant's railroad, was about \$1 per cord—after being so cut and hauled it was worth about \$3 per cord. There was the same difference as to the relative value of standing timber and that cut into ties and hauled.

The railroad company claimed, as the rule of damages, that it was liable only for the value of the timber as it stood upon the ground, say

\$1 per cord. Plaintiffs claim that the company was liable for the wood, as it was increased in value by the labor of the trespasser, cutting and hauling it, say \$3 per cord. Defendant, the railroad company, asked the court to charge:—

“2. That if the jury find the fact to be that the defendant cut no timber upon the land of plaintiff’s said wards, and employed no person to do so, but purchased all the wood and timber of all sorts that it is charged with the conversion of from persons who did cut and remove it from the land and sold it to the defendant; that the defendant would not be liable to the plaintiff for the value of the timber, wood, and ties purchased, at the time of the purchase, but only for the value of the timber before it was cut into wood and ties and sold to defendant. That the measure of damages if the defendant purchased said property in good faith was the fair value of the timber standing on the plaintiffs’ woodland, and, before it was cut into wood or ties and hauled onto defendant’s railway and sold to it.”

This charge was refused, and the court did charge as follows:—

“Judge Foot in a former trial of this case settled the rule of damages to be the value of the timber, in the condition it was in at the time it was received and converted by the defendant. This I also say to you should be the rule you should adopt in ascertaining the amount of your verdict.

“I have found it much easier to repose confidence in the court, and adopt its consideration in this question of damages than reconcile myself to its correctness. But you will take it as the law of the case.”

The refusal to charge as requested, and the charge as given was excepted to.

On the first trial to the court, November term, 1871, plaintiff recovered a judgment of \$2,500. On the second trial to a jury, February term, 1872, the verdict was \$3,843.72. This judgment was reversed in the District Court. At the third trial, November term, 1873, the verdict for plaintiff was \$5,680, which was reduced by the court to \$3,412.72, and judgment was rendered for that amount.

The principal errors assigned are, in the charge as to the matter of title, and the rule of damages.

The District Court having affirmed the judgment of the Common Pleas, a petition in error was filed in the Supreme Court.

J. Mason, Estep & Burke, and *W. J. Boardman*, for plaintiffs in error.

J. E. Ingersoll, for defendant in error.

WRIGHT, J. We have not deemed it necessary to solve all the nice and difficult questions that relate to the plaintiffs’ (Barbours’) title to this land. Whether or not they had the legal, they did also claim an equitable title, and there was some evidence to sustain the claim. This question of fact was left to the jury, who found upon it for plaintiffs below. We are not clear that this finding was so palpably against the weight of evidence as to justify interference by us. We therefore

assume that plaintiffs had title sufficient to maintain the action in that respect, and proceed to the second point, the rule of damages.

The petition, it will be noticed, is not as for a trespass to real estate, but to recover the value of the wood and timber stolen; the action throughout was treated as one to recover that value, and the case is so treated here.

Upon the point now to be determined, the case is thus: A large amount of wood was cut down upon plaintiffs' land, and stolen. The thieves worked it up into cord wood and ties, thus increasing its value threefold. The depredators then sell it to the railroad company, who is entirely innocent in the whole matter. The real owner now sues the railroad company for the property taken from his land. Shall he recover one dollar or three?

It is said upon the one hand to be an universal rule of law that a man's property cannot be taken from him without his consent, unless by law, and that stealing can convey no title to the thief. In *Silsbury v. McCoon*, 3 Comst. 381, it is said: "It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking." It is then argued that the thief, having none himself, could convey no title to any other person taking it however innocently. Hence when the railroad company obtained the property they obtained what was the plaintiffs', and they could have replevied it, increased in value as it was, by the labor of the thief. If this were so, then it is argued that the company were liable for the value of the wood in its improved condition, enhanced to the extent of threefold.

If the owners were bringing this action against the thieves, perhaps it might be conceded that the full amount could be recovered. This we understand to be upon the principle *in odium spoliatoris*. The thief will not be allowed to have anything by virtue of his own wrong, and if he has spent his labor upon stolen goods, he shall not profit by it. It is his own loss.

"The English law will not allow one man to gain a title to the property of another, upon the principle of accession, if he took the other's property willfully as a trespasser." 2 Kent, 363.

But it seems to be well understood that the rights of the parties are made to depend, to a great extent, upon the intent with which the conversion of property has been brought about. If it was taken *mala fide*, by theft, or with a wilful purpose to do wrong, the consequences are different from those which follow upon the act done under an honest mistake, and perhaps it is as wise to punish the robber as to protect the innocent.

In treating of confusion of goods, Blackstone speaks of the difference between cases where admixture is by consent of both parties, and where it is by the wilful act of one, and in regard to the latter the

author says: "Our law, to guard against fraud, gives the entire property, without any account to him whose original dominion is invaded." In case of the confusion by consent, it is otherwise, and each party retains his interest.

Mr. Cooley, in his note to page 404, book 2, recognizes the same distinction between a fraudulent purpose, and an innocent mistake. The same distinction is made in 2 Kent, 363; Sedg. Dam. 484.

Field on Damages, section 818, says: "There should certainly be a distinction between a case of mere technical conversion, when, perhaps, the defendant acts in good faith, and that of a wilful conversion and wrong done by the defendant."

The cases as to what is the proper rule of damages, where property has been taken and by the taker improved in condition or enhanced in value, are numerous, but a reference to some will show some of the difficulties attending the subject.

In *Silsbury v. McCoon*, the corn of one Wood had been manufactured into whiskey by plaintiff. The defendants, as judgment creditors of Wood, took it, and plaintiff sued for the value of the whiskey. The case is first reported 6 Hill, 425. Here it is decided that the change from corn to whiskey was a change of identity, and transferred the property to plaintiffs, who were the manufacturers producing the change. This decision goes wholly upon the question of identity.

There is a learned note to this case, which discusses the question of innocent and wrongful conversion, and the citations there given from Puffendorf, Justinian, and Wood's Institutes are apposite.

This case is again reported in 4 Denio, 332. Here the idea that the rights of the parties depend upon motive or intention is flatly repudiated, the court holding that as long as the owner can trace his property, he may regain it; thus again making identity the criterion.

The case is reversed in 3 Comstock, 381, upon the ground that the *animus* with which the corn was converted was an important element, and that if plaintiffs, when they took it, knew that they had no right to it, they could obtain no title, although by the manufacture into whiskey they had changed the identity.

The simple fact, therefore, that the property can be traced into its improved state is not always sufficient to insure a recovery of the improved article or its value.

It must be remarked, however, that the text books do assert that the proposition of identity is the controlling one. Kent says: "It was a principle settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to it in its state of improvement, if he could prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber." 2 Kent, 363; *Betts v. Lee*, 5 Johns. 348; 2 Bl. Com. 404. It will, however, appear that other considerations enter into the solution of the question.

In *Hyde v. Corkson*, 21 Barb. 92, it is held that, "in acquiring title to property by accession, the law makes a distinction between a wilful and an involuntary wrong-doer. The former can never acquire the title, however great the change wrought in the original article may be, while the latter may."

"Where a manufacturer has expended his money and labor, in good faith, upon property, in pursuance of a contract with the owner, he can not be regarded as a wrong-doer, or deprived of the enhanced value which he has given to the property, in an action by the owner, sounding in damages."

It is said, in the course of the opinion, that the "distinction between a wilful and an involuntary wrong-doer runs through the authorities, and stands upon the principle that a party can obtain no right by his own wrong" (p. 105).

Martin v. Porter, 5 M. & W. 351, was a case where defendant, in working his coal mine, broke through the barrier, and took the coal under the land belonging to plaintiff. Plaintiff recovered the full value, without any deduction to defendant for his expenses in getting the coal. But in *Hilton v. Woods*, L. R. 4 Eq. 440, the rule in *Martin v. Porter* is limited to cases of fraudulent conduct. And such is the effect of the case of *Morgan v. Powell*, 3 Ad. & El. (N. S.) 278; and in *Wood v. Morewood*, 3 Ad. & El. (N. S.) 441, Parke, B., told the jury that "if there was fraud or negligence on the part of defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought the defendant not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had the right to do what he did, they might give the fair value of the coals, as if the coal-fields had been purchased from the plaintiff."

In *Hilton v. Woods*, L. R. 4 Eq. 432, the head-note is: "In assessing compensation for coal already gotten by defendant, the court being of opinion that he had worked it inadvertently, and not fraudulently, held that he was to pay only the fair value of such coal, as if he had purchased the mine from defendant"

Malins, V. C., says: "There is much difficulty as to the mode of assessing the compensation to an owner of coal which has been improperly worked by the owner of an adjoining mine. It is clear upon the authorities that a different principle is applicable when the coal is taken inadvertently, or, as in the present case, under a *bona fide* belief of title, and when it is taken fraudulently, with a full knowledge on the part of the taker that he is doing wrong, or, in other words, committing a robbery."

In these English cases, the right of plaintiff to recover the increased value of the coal — that is, the value occasioned by the expense of mining, is made to depend on the *animus* of the party committing the trespass. If he stole, he loses his labor and money. If he made an

honest mistake, he does not incur that loss, and the owner only recovers the value of the coal without its accession. There would seem to be a very short way out of these difficulties, if the question of identity was the only one. There was no trouble in the owner identifying his coal, but this does not entitle him to recover its value, increased by being mined, except in case of bad faith. It should be noted that *Jegon v. Fivian*, L. R. 6 Ch. App. 742, seems disposed to limit this rule of damage to cases at law, not applying it in equity. There are a number of coal cases in Pennsylvania. In *Forsyth v. Wells*, 41 Penn. St. 291, Lowrie, C. J., after discussing the conflict in the cases, says: "We prefer the rule in *Wood v. Morewood*, where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-field had been purchased from the plaintiffs."

"Where the defendant's conduct, measured by the ordinary standard of morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence, or wrong, the value of the property taken and converted is the just measure of compensation. If raw material has, after appropriation and without such using, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, fur into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article.

"Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action, so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal, after he had been at the expense of mining it, but only with its value in *place*, and with such other damage to the land as its mining may have caused."

This case also holds that no change in the form of action can vary the rule of damages.

In *Herdie v. Young*, 55 Penn. St. 176, the defendant had been cutting timber on his own tract, and by mistake cut some upon an adjoining tract of plaintiff. The trespass was not wilful or wanton, but was in a *bona fide* belief of title. The logs had been driven to the boom, and plaintiff sought to recover their value at that place, which was of course enhanced by the labor and expense defendant had put upon them. But it was held that the rule of damages was the value of the timber in the stump when the trees were cut.

Agnew, C. J., says: If defendant "denies that his trespass was wilful or wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadver-

tent trespass, or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom, less the cost of cutting, hauling, and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable, and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property, growing out of other circumstances, such as a rise in the market price, a difference in price between localities, or other adventitious causes." *Coleman's Appeal*, 62 Penn. St. 252-278.

In the case of *Barton Coal Co. v. Walter Cox*, 39 Md. 1, the question is much discussed and the authorities reviewed.

In *Heard v. James*, 49 Miss. 236, the rule of damages in case of conversion is said to be determined by the *animus* of the party trespassing. If the act was in good faith, upon some supposed right or claim, or error, the rule is the value of the property when taken; but if the taking be characterized by malice or oppression, damages may be punitive, and in an action no allowance will be made the defendant for any increased value bestowed on the property by his skill and labor.

In this case trees had been cut down on plaintiff's land and made into staves, and the question was whether plaintiff should recover as damages the value of the staves, or only of the trees as they stood on his ground. The plaintiff was allowed to recover the full value, allowing defendants nothing for their labor in working up the timber into staves, and upon the principle stated. The court says, "The conduct of defendant was wilful, utterly regardless of the rights of the plaintiff."

That the intent of the defendant is material in regard to damages has always been recognized in our law. Upon this is founded the whole idea of exemplary damages. We know it has been strenuously urged in what has been called "the speculative notions of fanciful writers" (*McBride v. McLaughlin*, 5 Watts, 375; Sedgw. 463), that punishment belongs only to the administration of criminal law, and has no proper place in that civil procedure which adjusts only the rights of parties; but the principle is too firmly settled to be controverted now. *Pratt v. Pond*, 42 Conn. 318; *Walker v. Fuller*, 29 Ark. 448; *Grund v. Van Vleck*, 69 Ill. 478. And yet the rule should be carefully applied, as it may leave to courts and juries to determine the extent of punishment unrestricted by the well-defined limits of statutory enactment. Therefore it is that there are authorities holding that even in cases of wilful trespass, if the trespasser has made a large increase in the value of the property by his labor, it will not be allowed that it shall all go to the original owner, because it is said to be unjust.

The fact that the trespasser is to lose the labor and expense he has put upon property he has wrongfully taken, results as a punishment to him for what he has done; on this ground the original owner recovers the increased value, not because of any rights in him, but because the

law gives this infliction as a terror to offenders. Yet the punishment must be proportioned in some way to the circumstances of the case, and a proper inquiry is, in what manner and to what extent should the trespasser suffer, and conversely what should be the kind and measure of redress to the injured party.

Brown, J., puts this case (*Silsbury v. McCoon*, 4 Den. 337): A trespasser who takes iron ore and converts it into watch-springs, by which its value is increased a thousand-fold, should not be hanged; nor should he lose the whole of the new product. Either punishment would be too great. Nor should the owner of the ore have the watch-springs, for it would be more than a just measure of redress.

The Supreme Court of Wisconsin adopts the same idea. The case of *Single v. Schneider*, 30 Wis. 570, is a case where logs were wilfully cut from the premises of another, they say it is unnecessarily severe that defendant should lose the value of all their labor. s. c. 24 Wis. 299; *Weymouth v. C. & N. W. R.R.*, 17 Wis. 550; *Hungerford v. Redford*, 29 Wis. 345. An interesting discussion of the question of damages by Judge Cooley is to be found in *Wetherbee v. Green*, 22 Mich. 311, the syllabus of which is: "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels, by accession, unless it keeps in view the circumstances of relative values. The purpose of the law will not be gained by establishing arbitrary distinctions based upon physical reasons; but its object must be to adjust the redress afforded to one party and the penalty inflicted on the other, as near as the circumstances will permit, to rules of substantial justice, if very great increase in value in the change of property from one form to another, is of more importance in determining the rights of parties in it, than any inexpensive chemical change of mechanical transformation, however radical. And where timber of the value of \$25 had been, in the exercise of what was supposed to be proper authority, converted into hoops, of the value of \$700, the title to the property, in its converted form, passed to the party by whose labor, in good faith, the change had been wrought." In this case it was a conceded fact that the taking of the timber was in good faith, defendant supposing that he had a license so to do from the owner of the land. In this, however, it appears he was mistaken. Judge Cooley discusses very fully the distinction between cases where property is taken innocently, and where it is taken dishonestly, and recognizes the proposition that the rule of damages is varied accordingly. He also discusses the rule already so frequently spoken of, that when the owner can trace the identity of his property, he may reclaim it however it may be increased in value. But this he seems to think an unsatisfactory test, the purpose of the law being to adjust the redress afforded to the one party, and the penalty inflicted upon the other, as near as the circumstances will permit, to the rules of substantial justice. If one had a stick of timber stolen, and could distinctly trace it into a house being newly

built, the identification might be beyond peradventure, yet no one would claim that the owner of the stick could recover the whole house, either in ejectment or its value in damages. Or a particular piece of wood might be followed into an organ, but the owner of the wood could not replevy the organ. Where the right to the improved article is the point in issue, certainly the question should be considered, how much the property or labor of each has contributed to make it what it is, at least in those cases where no bad faith exists.

It can not therefore be true, in every instance, that because a man can trace his property, he can always recover it, regardless of the circumstances under which it has come into the hands of the present holder, regardless of its improved condition, and regardless of the injury an absolute and unconditional recaption may occasion. The law as Judge Cooley says, endeavors to do what is right and just between the parties, and while it will seek to compensate the real owner, will not occasion outrage to one who has been innocent.

It may be that if these owners had found their wood in the hands of the trespassers, it might have been retaken, or its value as cord wood recovered; but if so it would be upon the principle *in odium spoliatoris*; the thief could gain nothing by his own wrong, and therefore the results of his labor go to the owner of the property. But this principle can not apply where an innocent purchaser comes into the case, for the simple reason that he has done no wrong.

It is very true that the wilful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. But the question right here is, what does "title" in this connection mean? The original owner has the "title" to his timber, and, *as against the thief*, the title to the results of the thief's labor. The wrong-doer, as it were, being estopped from setting up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief, the original owner still has the "title" to his timber, but by virtue of what does he now have "title" to the thief's labor? The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not, and while it is effectual against the wrong-doer, the reason of it does not exist as against the innocent man, as to whom it therefore fails. As Judge Cooley says, it does not comport with notions of justice and equity, that against those who have done no wrong, these owners should recover three times the value of what they have lost. They have never spent one cent of money, nor one hour of labor, in changing this timber worth one dollar into cord wood worth three. All this was done by some one else, and why should the owners recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully paid. *Woolsey v. Seeley*, Wright, 360. And this is all they should be allowed to recover.

For this error, in the charge on the subject of damages, the judgment is reversed.

SECTION VIII.

CONFUSION.

A. *Lawful or Accidental.*

SPENCE v. UNION MARINE INSURANCE COMPANY.

COURT OF COMMON PLEAS. 1868.

[*Reported L. R. 3 C. P. 427.*]

DECLARATION on a policy of marine insurance, averring a total loss.

Pleas: 1. Payment into court of £122. 2. Except as to £122, payment before action.

The plaintiffs took the £122 out of court, and joined issue on the second plea.

The cause was tried before Shee, J., at the Liverpool summer assizes, 1867. The facts were as follows: The plaintiffs are merchants at Liverpool. The defendants are a marine insurance company also carrying on business at Liverpool. The action was brought to recover a total or salvage loss on a policy of insurance at and from Mobile to Liverpool, on forty-three bales of cotton, marked and numbered as therein mentioned, in the ship called the *Caroline Nasmyth*.

The defendants paid the plaintiffs before action £1150, being 50 per cent on the policy.

On the 10th of October, 1865, the *Caroline Nasmyth* sailed from Mobile with a cargo of cotton consisting of 2493 bales belonging to various owners, and shipped under separate bills of lading; 532 bales (including the 43 for the loss of which the action was brought) belonged to the plaintiffs, who effected insurances with the defendants thereon under six different policies, one of which was the policy sued upon. The vessel on the 23d of October, 1865, after having been at sea thirteen days, took the ground on the Florida reef, about eighty miles from Key West, and became a total wreck. The cargo was landed at Key West, all more or less damaged, and many of the bales broken, the marks and numbers on others entirely obliterated. Some bales were lost, and some were so damaged that they had to be sold at Key West. The remainder of the cotton was forwarded to Liverpool in a vessel chartered by the master at Key West.

Of the 2493 bales which were on board the *Caroline Nasmyth* when she sailed on her voyage, 617 bales arrived in Liverpool in such a state that they could be identified, and they were delivered to the different consignees, but more or less damaged; 1645 bales were sold at Liverpool, the marks being so obliterated by sea-water that they could not

be identified as belonging to any particular consignee, and 231 bales were either lost on the reef or sold at Key West. Of the plaintiff's 43 bales, two only (of the value of £59 12s. 11*d.*) could be identified at Liverpool, and these were delivered to the plaintiffs.

Due notice of the abandonment of the 41 bales had been given by the plaintiffs.

Subject to a question as to the correctness of the calculation, the underwriters had paid the plaintiffs their share (in the proportion of 43 to 2493) on the value of the cotton which was actually lost, and also (under an arrangement which was made for the sale of the cotton without prejudice to the rights of the parties) in the same proportion for the damage to the cotton which arrived at Liverpool but could not be identified.

It was contended on the part of the plaintiffs, that, as no one of their remaining 41 bales arrived in Liverpool in such a state that it could be identified, they were entitled to treat the loss as a total loss with benefit of salvage. It was conceded that, if it were an average loss only, the £122 paid into court, plus the sum paid before action, would cover the plaintiffs' claim.

The defendants contended that they were entitled to assume that, of the plaintiffs' remaining 41 bales, part were among those lost at Key West and part amongst those which arrived at Liverpool; and that, upon that assumption, the loss would be an average loss, and covered by the payment into court.

A verdict was entered for the plaintiffs for £460, subject to leave reserved to the defendants to move to enter the verdict for them.

E. James, Q. C., in Easter Term, accordingly obtained a rule *nisi* to enter a verdict for the defendants or a nonsuit.

Brett, Q. C., *Quain*, Q. C., and *R. G. Williams*, shewed cause.

Cohen and *C. Russell* (*Mellish*, Q. C., with them).

BOVILL, C. J. This case was argued before us last term, with great learning and ability on both sides; and we are much indebted to the learned counsel for the assistance they have rendered to the Court.

The plaintiffs claimed to recover against the defendants as for a total loss of forty-one bales of cotton. The defendants paid a sum of money into court upon the principle of there having been a total loss of a small portion of the cotton and a partial loss only of the remainder, according to a calculation of the proportion that would be applicable to the plaintiffs' cotton with reference to the 231 bales which were actually lost, and the 1645 bales which arrived, but without any marks or the means of distinguishing the respective owners to whom those bales belonged. The principal question in the case was, whether there was a total loss of the whole of the plaintiffs' forty-one bales which were not delivered.

The ground upon which the plaintiffs contended for such a total loss was, that the whole forty-one bales must be considered as included in

the 231 bales, or that, by the perils of the seas, the marks on the plaintiffs' bales, as well as upon other bales of cotton in the same ship, and which reached this country, had become obliterated, so that it was impossible to distinguish one person's cotton from that of another, and therefore impossible for the plaintiffs to obtain the identical bales which they had insured.

Subject to a subordinate question as to the correctness of the calculation, the plaintiffs had been paid their proportion of the cotton that was actually lost, and had been offered what would be their proportion of the cotton which was saved, or, rather, its equivalent in money was paid to them under the arrangement that was made for sale of the cotton without prejudice to the rights of the parties; but, the price of cotton having fallen very materially in the market, the plaintiffs endeavored to treat the obliteration of the marks, and the consequent impossibility of identifying any of the bales except the two which were delivered to them, as a total loss, and contended that, as the impossibility of the ship-owner delivering to them their identical bales of cotton had been caused by the perils of the seas, it was a total loss, either actual or constructive, within the meaning of the policy.

It is manifest that the plaintiffs' argument would equally apply if not a single bale of cotton had been lost or damaged out of the whole cargo, and if the marks only had been obliterated from this and other cotton by the same vessel; and it would lead to the strange anomaly that, although all the goods which had been put on board arrived safely at their destination, there would, according to the plaintiffs' contention, be a total loss, for the purpose of insurance law, of the whole of them. Indeed, in every case of the accidental confusion of goods on board a ship, so that they could not be identified, where it arose from the perils of the seas, if the principle contended for by the plaintiffs be correct, it might be said that the ship-owner was absolved from any liability to deliver the goods, and this strange conclusion would also follow, that, if the cargo all belonged to one owner, it might be said to be entirely safe and uninjured, under circumstances in which, if there were two owners, however small the proportion of one of them, it must be said to be totally lost; so that, if one shipper owned ninety-nine bales, and another, one, of the same description, and by reason of the stranding of the vessel all were transhipped with the loss of the marks, after which the cargo arrived safe, each owner would have wholly lost all he had, because neither could affirm as to any given bale that it belonged to him. Practically, in such a case, the owner of the one bale would receive one of the bales, either by delivery of the ship-owner or by agreement, and probably be content, and this ought to operate as a partition, so as to vest the residue in the owner of the larger share.

We must, thus, necessarily consider what is the effect of the obliteration of marks upon various goods of the same description which are shipped in one vessel, and which without any fault of the owners be-

come so mixed that one part is undistinguishable from another ; and it seems to us not altogether immaterial to inquire in whom the property in the goods is vested under such circumstances, or whether they become *bona vacantia*, and pass to the first finder or to the Crown. In endeavoring to arrive at a conclusion upon that subject, we should be guided by any direct authorities as well as by analogous cases in our own law, and by the principles of law which have been laid down and established in our courts ; and, as the rules and principles of our mercantile and maritime law are in a large measure derived from foreign sources, we gladly avail ourselves of the codes and laws of other countries, and especially of the Roman Civil Law, to see what amongst civilized nations has usually in like cases been considered reasonable and just.

In our own law there are not many authorities to be found upon this subject ; but, as far as they go, they are in favor of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect. *Buckley v. Gross*, 3 B. & S. 574. And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship, in *Jones v. Moore*, 4 Y. & C. 351.

It has been long settled in our law, that, where goods are mixed so as to become undistinguishable, by the *wrongful act or default* of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner : but no authority has been cited to show that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners ; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*.

The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners ; and, as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk.

This is the rule of the Roman Law as stated in Mackeldey's Modern Civil Law, under the title *Commixtio et Confusio*, in the special part, Book 1, s. 270. In the English edition of 1845, at p. 285, the passage is as follows : " The mixing together of things solid or dry (*commixtio*) or of things liquid (*confusio*) which belong to different owners, has no effect upon their rights in the things, if the latter can be separated.

If, on the other hand, such separation is not practicable, then the former proprietors of the things now connected will be joint owners of the whole, whenever the mixture has been made with the consent of both parties, or by accident."

We need not discuss the distinction sometimes made between *com-mixtio* and *confusio*, apparently upon the ground that it is possible to separate the individual solid particles, but not the liquid; because, in cases like the present, it is impracticable, and for all business purposes therefore impossible, to distinguish the particles, in respect of ownership.

The passages in Mr. Justice Story's work on Bailments, s. 40, and in the 9th volume of Pothier, "De La Confusion," as well as the French and various other codes, are to the same effect.

We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting the conclusion that, by our own law, the property in the cotton of which the marks were obliterated did not cease to belong to the respective owners; and that, by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without the fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, after the adoption of all reasonable means and exertions to identify or separate the goods, it was found impracticable to do so.

We cannot assume that the whole of the plaintiffs' forty-one bales were amongst those that were destroyed, any more than we can assume that they all formed part of the 1645 which were brought home; and we see no means of determining the extent of the interest of the several owners, except by adopting a principle of proportion, and which would, we think, be equally applicable in determining the plaintiff's portion of the 231 bales that were totally lost as of the 1645 which arrived in this country, though without the marks.

The principle of proportion is that which was applied by Lord Ellenborough, where one gross sum was paid to a broker in respect of two debts due to different principals without distinguishing how much was paid in respect of each. *Flavenc v. Bennett*, 11 East, at p. 41. It is also the principle adopted in cases of general average, and of jettison, where it is not known whose goods are sacrificed, as stated by Cassaregis and Emerigon in the passages that were quoted in the argument; and we think it is the proper principle to apply to this case.

Upon the main question, therefore, that was argued before us, we think that there was not an actual total loss of the plaintiffs' forty-one bales of cotton. We think also there was not a constructive total loss of those bales. We adopt the principle upon which the defendants have paid money into court; and our decision upon this question is in their favor.

It was attempted to show by calculations what was the probability of

the plaintiffs' bales being included or not in the quantity totally lost; but, in the absence of information as to the part of the vessel in which those bales were stowed, so as to show whether they were exposed, and to what extent, to the perils which caused the total loss of the bales that perished, it is obvious that such calculations can result only in dry formulæ of combinations, subject to be disturbed by the missing element of extent of exposure to danger, and that they furnish no practical assistance upon the one side or upon the other.

It was upon a calculation of this description that Mr. Griffith Williams, on behalf of the plaintiffs, for the first time, at a very late stage of the argument, contended that, assuming the defendants' principle to be correct, yet that it had not been correctly applied. Mr. Williams has, however, failed to satisfy us that the calculation was incorrect. It seems to us that, so far as it is practicable, and without entering into every minute circumstance and probability connected with the state of the weather and of the vessel, the position of the different parts of the cargo, and the effects of the sea and weather upon the vessel and cargo, upon which there was no evidence, the amount paid into court, together with the other payments, is sufficient to cover the plaintiffs' claim, so far as it was proved, for an average loss.

Upon the remaining question which was raised, as to whether, if there were a total loss, it was a loss proximately by the perils of the seas, it is not necessary to pronounce any opinion.

Our judgment is in favor of the defendants; and the rule to enter the verdict for them, or a nonsuit, will therefore, at the election of the plaintiffs as to the alternative, be made absolute.

Rule absolute accordingly.

SMITH *v.* CLARK.

SUPREME COURT OF NEW YORK. 1839.

[Reported 21 *Wend.* 83.]

THIS was an action of replevin tried at the Yates circuit in June, 1838, before the Hon. Daniel Moseley, one of the circuit judges.

The plaintiffs declared for the *taking* and *detaining* of 75 barrels of wheat flour. The defendant pleaded *non cepit* and *property* in himself. On the trial the following facts appeared: Charles Hubbard owned a flouring and custom mill on the outlet of the Crooked Lake. In December, 1834, the plaintiffs made an agreement with him to deliver wheat at his mill, and he agreed that for every 4 bushels and 55 pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection in Albany or New York. The plaintiffs purchased from farmers and others nearly 2,000 bushels of wheat, which was from time to time delivered at the mill,

and put into a bin with other wheat which Hubbard purchased on his own account, and with the *toll wheat* taken by him from time to time. Hubbard delivered 230 barrels of flour to the plaintiffs, but that was not enough to satisfy his contract. On the 25th March, 1835, he sold 100 barrels of flour to the defendant, and in May following delivered him the 75 barrels of flour in question, in pursuance of the contract of sale. The plaintiffs brought this action and arrested the property on board a canal boat, in which the defendant had caused it to be shipped for market. Hubbard also sold between 30 and 50 barrels of flour at retail, and took 10 or 12 bushels of wheat for his own use. All the wheat manufactured and used by Hubbard was taken from the same bin. The plaintiffs attempted to prove that the 75 barrels of flour in question had been delivered to them by Hubbard.

The defendant moved for a non-suit, which was refused, and raised other questions on the charge of the judge, which are noticed in the opinion of the court. The jury, under the charge of the judge, found a verdict for the plaintiffs, and the defendant now moved for a new trial.

H. Welles and *S. Stevens*, for defendant.

S. Cheever, for plaintiffs.

By the Court, BRONSON, J. The contract between the plaintiffs and Hubbard was, in effect, one of sale, — not of bailment. The property in the wheat passed from the plaintiffs at the time it was delivered at the mill, and Hubbard became a debtor, and was bound to pay for the grain in flour, of the specified description and quantity. There was no agreement or understanding that the wheat delivered by the plaintiffs should be kept separate from other grain, or that this identical wheat should be returned in the form of flour. Hubbard was only to deliver flour of a particular quality, and it was wholly unimportant whether it was manufactured from this or other grain. *Jones on Bail*, 102, 64. A different doctrine was laid down in *Seymour v. Brown*, 19 Johns. R. 44; but the authority of that case has often been questioned. 2 Kent, 589; *Story on Bail*, 193–194, 285; *Buffum v. Merry*, 3 Mason, 478; and the decision was virtually overruled in *Hurd v. West*, 7 Cow. 752, and see p. 756, *note*. The case of *Slaughter v. Green*, 1 Rand. (Va.) R. 3, is much like *Seymour v. Brown*. They were both hard cases, and have made bad precedents.

There was, I think, no evidence which would authorize the jury to find that the flour in question had been delivered by Hubbard to the plaintiffs. There certainly was no direct evidence of that fact, and Hubbard himself testified expressly that there had been no delivery. The proof given by the plaintiffs of what Hubbard had said to others about the flour in the mill was not necessarily inconsistent with his testimony.

But if there had been a delivery, so that the property in the flour passed to the plaintiffs, they still labor under a difficulty in relation to the form of the remedy. Notwithstanding the transfer, the property

was left in the possession and under the care of Hubbard. He was a bailee of the goods, and as such would have been answerable to the plaintiffs for any loss happening through gross negligence on his part. The defendant took the flour by delivery from the bailee, who had a special property in it. Such a taking is not *tortious*. *Marshall v. Davis*, 1 Wend. 109; *Earll v. Camp*, 16 Wend. 570. The plaintiffs should have counted on the *detention*, not on the *taking* of the goods. *Randall v. Cook*, 17 Wend. 57; 10 Wend. 629. There must be a new trial. *New trial granted.*

CHASE *v.* WASHBURN.

SUPREME COURT OF OHIO. 1853.

[*Reported 1 Ohio St. 244.*]

ERROR to the Common Pleas, reserved in the District Court of Huron County for decision by the Supreme Court.

The original action was *assumpsit*, in which the plaintiff, Washburn, sought to recover the value of a quantity of wheat, which had been delivered by him to the defendants, Chase & Co., as warehousemen, engaged in the produce business, at the village of Milan, in said county.

It appears from the bill of exceptions taken in the case that on the trial of the cause in the Common Pleas, Washburn offered in evidence sundry warehouse receipts, given him by Chase & Co. for wheat delivered at various times, between the month of October, 1847, and the month of August, 1849, amounting in the aggregate to six hundred bushels and more. The receipts are similar in form and effect, and the first in date, which may be taken as a sample of the others, is as follows:—

“MILAN, O., Nov. 5, 1847.

Received in store from J. C. Washburn (by son), the following articles to wit: Thirty bushels of wheat. H. CHASE & Co.”

It further appears that the agent of Washburn was introduced as a witness, who testified that he had been instructed by Washburn, the defendant in error, when he delivered the first load of the wheat, not to sell the wheat for less than one dollar per bushel, and if he could not get that, to leave it in store with Chase & Co., the plaintiffs in error, and that he told Chase that Washburn had five or six hundred bushels to draw, and that Chase at the time told the agent, when he left the first load, that they (Chase & Co.) would pay the highest price when Washburn should call for it. The wheat was accordingly from time to time delivered, and in May, 1850, a demand was made for either the wheat or the money, and both refused.

Chase then offered evidence tending to prove that his warehouse was burnt on the night of the 26th of October, 1849, and that there was then consumed in it sufficient wheat to answer all his outstanding receipts. He also offered evidence tending to prove that the custom at Milan was to store all wheat received in a common mass and to ship from the same as occasion required, and that this custom was understood by Washburn; also that the custom was, when parties called for their pay, either to pay the highest market price, or deliver wheat to the holder of the receipts.

Washburn then offered rebutting evidence, tending to prove that Chase had not sufficient wheat in his warehouse, at the time of the fire, to answer all his outstanding receipts, and also that the warehouse was emptied of all wheat between the date of the last receipt given Washburn and the time of the fire.

Upon this state of facts the counsel for Chase asked the court to charge the jury, "that the customs at Milan, if known to Washburn, in the absence of an express contract, became a part of the contract between the parties, and if the jury should find that Chase had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, that he was not liable in this action, and that neither the mingling of the wheat nor the shipment of it would make Chase liable, if he had a sufficient amount on hand at the time of the fire to answer his outstanding receipts."

The court, however, refused to charge as requested. The bill of exceptions sets out the charge of the court in full, to which the counsel for the defendants below excepted. The verdict and judgment was in favor of the plaintiff below, to reverse which this writ of error is brought.

It is alleged for error that the court of Common Pleas erred in their charge as follows, to wit:—

1st. Because that court charged the jury, "that if they should find that the wheat was received and put in mass, with other wheat of defendant, and that received of other persons, with the understanding that the wheat was to be at the disposal of the defendant, either to retain or to ship it, and with the agreement that when the receipts were presented the defendant would either pay the market price therefor or re-deliver the wheat or other wheat equal in amount and quality; then, if the jury should further find that the wheat thus left prior to the fire had all been shipped and disposed of, the defendant cannot be excused unless there was an agreement between the parties that the wheat subsequently purchased by defendant was to be substituted in place of that left by plaintiff, and to be his property."

2nd. Because the court charged the jury "that where a warehouseman receives grain on deposit with an understanding that he may if he choose dispose of it, and that he will, when demanded, return other grain or pay for it, in case of such a disposition he is bound to do the one or the other. A subsequent purchase of grain by the warehouse-

man, for the purpose of meeting the demand for grain thus received, would not be sufficient to vest the property in the plaintiff.”

3rd. Because that court refused to charge the jury that the custom at Milan, as proved by defendants if known to plaintiff, was a part of the contract between the parties.

Osborne and Taylor, for plaintiff.

Worcester and Pennewell, for defendant.

BARTLEY, J. To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby. It was either a contract of sale, a *mutuum*, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a *mutuum*, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use; he being bound to restore not the same thing, but other things of the same kind. Thus, it is held, that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases, the general rule is *ejus est periculum, cujus est dominium*. Story on Bailments, § 283; Jones on Bailments, 64; 2 Ld. Raym. 916. But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract, in so doing. But if the bailee shipped the wheat and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What then was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat, to the owner, upon its being received into a warehouse, for temporary safe-keeping, and to be re-delivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman, on the face of such a receipt, would be, that he should use due diligence, in the care of the property, and that he should re-deliver it to the owner, or to his order, on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should, without the consent of the owner, mix the wheat with other wheat, belonging to himself or other persons, and ship the same to market, for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the *time* the wheat was to be kept, the *price* to be paid for its custody, *when* or *how* to be paid, *whose property* it was to be after delivery into the warehouse, and what dis-

position was to be made of it. But it is claimed that, inasmuch as written receipts, whether for money or other property, are always subject to explanation by parol, that the terms on which this wheat was delivered can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan; and that, by such explanation it is shown that the real transaction was that the wheat was received, and, with the consent of the depositor, put in mass with other wheat of the warehouseman, and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or ship it, and that when the receipts should be presented by the depositor the warehouseman should either pay the market price therefor or re-deliver the wheat, or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract, they could not have excused the liability of the warehouseman in this case. The distinction between an irregular deposit, or a *mutuum*, and a sale, is sometimes drawn with great nicety, but it is clearly marked, and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or *mutuum*, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says, "It may be proper to mention the distinction between an obligation to restore the *specific things*, and a *power or necessity of returning others of equal value*. In the first case, it is a regular bailment; in the second it becomes a debt." In the latter case, he considers the whole property transferred.

Judge Story, in his commentaries on the law of bailment, says, "The distinction between the obligation to restore the specific things, and the obligation to restore other things of the like kind and equal in value, holds in cases of hiring, as well as in cases of deposits and gratuitous loans. In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract. Thus, according to the famous laws of Alfenus, in the Digest, "if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver and none other shall be wrought up in the urn." Story on Bailments, § 439.

In all this class of cases, the risk of loss by unavoidable accident attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain or to ship it on their own account, the property passed, and the risk of loss by accident followed the dominion over it.

The doctrine here adopted was at one time somewhat obscured by the opinion of Chief Justice Spencer, in the case of *Seymours v. Brown*, 19 John. Rep. 44, in which the court decided that where the plaintiff delivered wheat to the defendants, on an agreement that for every five bushels of wheat the plaintiffs should deliver at the defendants' mill, they, the defendants, would deliver in exchange one barrel of flour, was a bailment, *locatio operis faciendi*; and the wheat having been consumed by fire, through accident, the defendants were not liable on their agreement to deliver the flour. This decision, however, was disapproved of by Chancellor Kent, as not being conformable to the true and settled doctrine laid down by Sir William Jones, who has been styled the great oracle of the law of bailment. 2 Kent's Com. 464. And the decision has been distinctly overruled by repeated subsequent adjudications in the State of New York. *Hurd v. West*, 7 Cowen, 752; *Smith v. Clark*, 21 Wend. 83; *Norton v. Woodruff*, 2 Comstock, 153; *Mal-lory v. Willis*, 4 Comstock, 77; and *Pierce v. Skenck*, 3 Hill, 28.

The same doctrine has been affirmed in the case of *Baker v. Roberts*, 8 Greenleaf's R. 101, and also *Ewing v. French*, 1 Blackford, 354. In the latter case, a quantity of wheat having been delivered by the plaintiff to the defendants, at their mill, to be exchanged for flour, and the defendants having put the wheat into their common stock of wheat, the mill, with the wheat, was afterwards casually destroyed by fire. The court held that the defendants were liable for a refusal to deliver the flour. If in that case the agreement of the parties had been that the flour to be furnished should be the flour which should be manufactured from the specific wheat delivered, instead of an exchange of wheat for flour, it would have been a bailment, and the loss would have fallen upon the plaintiff.

In the case of *Buffum v. Merry*, 3 Mason, 478, where the plaintiff had delivered to the defendant cotton yarn on a contract to manufacture the same into cotton plaids, and the defendant was to find filling, and to weave so many yards of plaids, at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per pound, it was held to be a sale of the yarn; and that, by the delivery of it to the defendant, it became his property, and he was responsible for the delivery of the plaid, notwithstanding the loss of the yarn by an accidental fire. But had the plaintiff and the defendant agreed to have the particular yarn, with filling to be found by the defendant, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials; but, before the division, the plaids had been destroyed by accident, the loss, in the opinion of Judge Story, would have been mutual, each losing the materials furnished by himself.

The case of *Slaughter v. Green*, 1 Randolph, 3, and also the case of *Inglebright v. Hammond*, 19 Ohio Rep. 337, are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymours v. Brown*, above referred to

in 19 Johns. Rep. On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case, the written receipts given for the wheat expressly provided, "*that it is received to be ground,*" which excludes the idea of passing the ownership to the miller. And in the latter case, it was also expressly provided by the agreement, that the flour in controversy was "*to be made out of the wheat furnished by Hammond,*" and "*the flour made therefrom was to be delivered at Steubenville for said Hammond's use.*" In both these cases, therefore, the limitation in the agreement of the parties imported a bailment, and not an exchange for flour. And this character of the transaction is not lost either because the custom of the country in reference to which the wheat was received, warranted the mixing of it with the wheat of others, received on like terms; or because, by the express consent of the parties, the wheat was mixed with other wheat in the mill, belonging to the miller himself. When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner in common with others, of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have, if the wheat of each one was kept separate and apart. If the wheat, thus thrown into a common mass, be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper quantity or proportion in the common stock. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment; and such a breach of his engagement could not be cured by his procuring other wheat, to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement, that the person receiving it, may take from it at pleasure and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment.

It is claimed that the court of Common Pleas erred in refusing to charge the jury, as requested, that the custom among warehousemen at Milan, in the absence of an express contract, if known to Washburn, became a part of the contract.

A custom, it is true, is not admissible, either to contradict or alter the terms or legal import of a contract, or to change the title to property by varying a general rule of law. But a custom, when fully established, becomes the law of the trade in reference to which it exists; and the presumption is that the parties intended to conform to it, when they have been silent on the subject. Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contract, arising not from express stipulations, but

from mere implications and presumptions, and of acts of doubtful and equivocal character. I am not prepared to say that the *customs at Milan*, if fully established, and known to both the parties to a contract, for the delivery of wheat to a warehouseman, may not be regarded as law, as well as the customs of London, or of Kent. But, unfortunately for the plaintiffs in error, the customs of Milan, as the evidence tended to prove, according to the bill of exceptions, very clearly showed the transaction between the parties in this case, to be a contract of sale, and not a bailment. Had the court, therefore, charged as requested upon this point, it could not have aided the defence set up against the action. So that if the court did err in this particular, no injury was therefore done to the plaintiffs in error. *Judgment affirmed.*

NELSON *v.* BROWN, DOTY & CO.

SUPREME COURT OF IOWA. 1876.

[*Reported 44 Iowa, 455.*]

THE plaintiff claims as the assignee of seven contracts, executed by defendants, of one of which a copy is as follows: —

“Received of C. C. Cowell, for Thompson in store for account and risk of C. C. Cowell, one hundred and eighty-three bushels No. 3 wheat, loss by fire, heating and the elements at owner’s risk. Wheat of equal test and value, but not the identical wheat, may be returned.” The other six contracts are the same, except as to amount of wheat delivered, and the parties named as delivering the same. The petition alleges that defendants have failed and refused to perform their contract.

The answer alleges, “That at the time of the execution of the contracts set forth in said petition, the defendants were engaged in the business of buying, selling, and storing for hire, grain at Dysart, Tama County, and in their said business owned and used an elevator building at the place aforesaid; that in their said business it was impossible to store and keep in separate parcels the grain delivered to them by their various customers, but it was necessary to mix the grain of different parties by placing the same in common bins, and it was and is the custom of warehousemen at said place, receiving grain belonging to different parties, to so place the same in common bins, and that the customers of the defendants, including the plaintiff and all the parties to whom the said receipts were issued, had full knowledge of said facts and of said custom, and consented that their wheat should be so stored by the defendants; that, with a full knowledge of such facts and of said custom, the plaintiff and the other parties named in the receipts sued on herein stored and caused to be stored, in the aforesaid elevator of the defendants, the grain mentioned in said receipts therefor, copies of which are set forth in the petition.

“ And the said grain was, in accordance with said custom, stored in common bins with the wheat of other parties of equal test or value, at the risk of the respective owners mentioned in said receipts, storing the same, as to loss by fire, heating, etc. And that thereafter, and while said wheat was so in store in said elevator and before any demand therefor, and while the same was being housed and cared for by the defendants with all reasonable diligence, and without any fault or negligence on their part, the said building with the wheat therein, including that sued for herein, was destroyed by fire.”

The plaintiff demurred to this answer. The demurrer was sustained. Defendants appeal.

Stivers and Leland, for appellant.

Struble and Goodrich, for appellees.

DAY, J. We have held that, where grain is deposited with a warehouseman with the understanding that he is to ship and sell it on his own account, and when the depositor desires to sell the warehouseman will pay the highest price or return a like quantity and quality, the transaction constitutes a sale, and the property passes to the warehouseman. *Johnston v. Browne*, 37 Iowa, 200.

The contract in question provides that “wheat of equal test and value, but not the identical wheat, may be returned.” This clearly gives the warehouseman the right to dispose of the wheat deposited on his own account, and, if there were no other provisions in the contract limiting and qualifying this provision, it would bring the case fully within the principle of *Johnston v. Browne*, and the wheat, from the time of the deposit, would be at the risk of the warehouseman. But, in order to get the exact sense and true meaning of the contract, all of its provisions must be construed together. The contract further provides that the wheat is received in store “for account and risk of C. C. Cowell, . . . loss by fire, heating, and the elements at owner’s risk.” As the wheat is at the risk of Cowell, it is evident that he is the party who is alluded to in the contract as owner. To hold that, because the warehouseman was not under obligation to return the identical wheat, the transaction in law became a sale, and hence Brown, Doty & Co. are the owners, at whose risk is loss by fire, heating, and the elements, would do violence to the evident intention of the parties.

The meaning of the whole contract taken together is clearly this: That so long as the wheat remains in the elevator, loss by fire, heating, and the elements, is at the risk of the depositor. In other words, so long as the wheat is kept in the elevator, though thrown in a common bin and mingled with other wheat of like quality, it is a mere bailment. But the warehouseman is not under obligation to retain the wheat of the depositor in his warehouse. He may, without breach of contract, and without being guilty of a conversion, ship the wheat away on his own account. When he avails himself of this privilege the character of the transaction and the relation of the parties change. There is then a completed sale, and the warehouseman assumes a liability which he can

discharge only by payment in wheat of like quality and value, or in money. The wheat does not pass to the warehouseman, and become at his risk, simply because that of a number of depositors, of like grade, is with their consent mingled in a common mass. Upon this subject see *Young v. Miles*, 20 Wis. 615; *Sterns v. Raymond*, 26 Wis. 74; and *Gardner v. Dutch*, 9 Mass. 407.

The answer alleges that the wheat deposited by the respective owners named in the contracts sued on was in the elevator, and with it, without fault or negligence of defendants, was destroyed by fire. These facts constituted a defense, under the contract of the parties.

The demurrer was improperly sustained.

Reversed.

SEXTON & ABBOTT v. GRAHAM.

SUPREME COURT OF IOWA. 1880.

[Reported 53 Iowa, 181.]

ACTION in equity to determine the respective rights of plaintiffs and others as warehouse receipt holders in a common mass of grain. The defendant James R. Graham was for many years a dealer in grain at Davenport, Iowa. He received grain belonging to other parties on storage, and bought and sold on his own account, and in the course of his business he issued from time to time a large number of warehouse receipts. He transacted his business at a building called Bazar Block, in which there was an elevator which was used for the purpose of receiving grain, and distributing it in the various apartments of the building. On the 20th day of October, 1875, the said Graham, being largely in debt, absconded, leaving his warehouse or grain elevator in charge of his son, who had been for some time before that his clerk and book-keeper. There were then in the warehouse nearly 7,000 bushels of oats and about 8,900 bushels of wheat. There were outstanding warehouse receipts for more than 60,000 bushels of wheat, and for 38,000 bushels of oats, which receipts had been issued to the several parties hereto. The plaintiffs, Sexton & Abbott, held a wheat receipt for 13,000 bushels which was in these words:

No. 33.

ELEVATOR, DAVENPORT, April 1, 1875.

Received in store from Sexton & Abbott thirteen thousand bushels of wheat, subject only to the order hereon of Sexton & Abbott, and the surrender of this receipt and the payment of charges.

It is hereby agreed by the holders of this receipt that the grain herein mentioned may be stored with other grain received about the date hereof, of the same quality by inspection. Loss by fire or heating at owner's risk.

13,000 bush.

JAMES R. GRAHAM,
per F. GRAHAM.

In Bazar Block, Room No. 3.

Said Sexton & Abbott also held a receipt for oats of which the following is a copy :

No. 16.

ELEVATOR, DAVENPORT, Oct. 16, 1875.

Received in store from Sexton & Abbott ten thousand bushels of oats, subject only to the order hereon of Sexton & Abbott, and the surrender of this receipt and the payment of charges.

It is hereby agreed by the holders of this receipt that the grain herein mentioned may be stored with other grain received about the date hereof, of the same quality by inspection. Loss by fire or heating at owner's risk.

10,000 bush.

JAMES R. GRAHAM,
per F. GRAHAM.

There was also a receipt to the defendant Geo. W. Baker for 5,000 bushels of wheat, dated May 31, 1875, assigned by Baker to the Davenport National Bank, as collateral security for a loan to him. Also, another receipt to Baker, dated June 4, 1875, for 5,000 bushels of wheat, assigned by Baker to the First National Bank of Davenport, as collateral security for a loan to him of \$3,800. Also, another receipt to said Baker for 1,200 bushels of wheat, dated July 13, 1875, and held by Baker. There were, also, two receipts to the defendants D. B. Sears & Sons, each for 2,000 bushels of wheat, one dated on the 27th day of August, 1875, the other on the 2d day of October, 1875. The defendants Chandler, Brown & Co. also had a receipt for 10,000 bushels of wheat, dated September 23, 1875. The defendant the Davenport National Bank also held wheat receipts amounting in the aggregate to 28,000 bushels, which had been issued by Graham to the bank as collateral security for loans of money made by the bank to him at various times. The said bank also held receipts for 17,300 bushels of oats. These were also collaterals for loans of money.

At the time of Graham's failure he was indebted to said bank in the sum of about \$20,000, evidenced by his promissory notes, and the bank had no other security aside from said warehouse receipts. Chandler, Brown & Co. were commission merchants in the city of Milwaukee, with whom Graham transacted a large amount of business. He issued the receipt to them as collateral security for an indebtedness of \$20,000, which arose by reason of overdrafts made by Graham upon them.

The receipts of Sexton & Abbott, those held by the Davenport National Bank and the First National Bank as assignee of Baker, and that held by Baker in his own right, and the receipts of D. B. Sears & Sons, are all claimed to have been issued by Graham to the respective parties holders thereof upon actual purchase of grain made by them, and upon full payment therefor, or upon actual storage of grain by the parties with Graham. The receipts issued to the several parties were mostly in the same form as those issued to Sexton & Abbott, of which copies are above given, except that most of those issued to the Davenport National Bank contain the clause, "storage and insurance

paid," and some of them omit the clause about loss by fire and heating. Those issued to Baker and to Chandler, Brown & Co. also omit the provision to store with other grain of same quality.

On the next morning after Graham absconded, B. B. Woodward, president of the Davenport National Bank, went to the warehouse or elevator of Graham, where the grain was stored, and demanded of Graham's son the delivery of the grain called for in the receipts held by the bank. Fremont Graham, the son of Jas. R. Graham, thereupon delivered to said Woodward the keys of the building, and Woodward took possession of the warehouse and put one Brown, a former employee of Graham, in charge of it, with instructions to permit no one to have any of the grain in the warehouse except on the order of the bank.

On the next day the said Geo. W. Baker, D. B. Sears & Sons, and Sexton & Abbott, commenced actions of replevin against Graham and the Davenport National Bank, and seized the grain upon writs issued in said actions.

Sexton & Abbott and the Davenport National Bank were the only parties who held receipts for oats, and the oats found in the warehouse were in one pile or mass.

On the 27th day of October, 1875, this action in equity was commenced by Sexton & Abbott, claiming that they were entitled to a balance of 5,000 bushels of wheat on their receipts for 13,000 bushels, and 10,000 bushels of oats on their receipt for oats, and that the other receipt-holders made claim to grain to fill their receipts, and that the amount of grain left by Graham was insufficient to fill all the outstanding receipts. They asked the appointment of a receiver to take possession of the wheat and oats and sell the same, and that the suits of replevin be enjoined, and that upon a final hearing the rights of the parties in the grain, or the proceeds thereof, might be adjusted and determined.

All of the other receipt-holders answered. Some of them filed cross-petitions claiming the grain, and to these there were answers and replies until, as one of the counsel expresses it, there was a "wilder-ness of pleadings."

D. B. Sears & Sons claimed a balance of 3,200 bushels of wheat as due them when Graham left. They obtained, by their writ of replevin, 640 bushels, which was in a separate pile in the warehouse. Their right to this was not disputed by any of the parties. Pending the suit, by an agreement consented to by all the parties, a further amount of 1,481 bushels, which was also in a separate pile, was divided between Sears and Sexton & Abbott. Sears & Sons had also removed some wheat from the main body or mass, and when the cause was submitted to the court below, they claimed 1,076 bushels. There was, therefore, left for such of the parties as were entitled thereto, a quantity of wheat, all stored in said warehouse in one undivided mass, containing 6,791 bushels, and also 6,796 bushels of oats, all stored in one mass in said warehouse.

The Davenport National Bank claimed the entire quantity of wheat and oats. Sexton & Abbott claimed all the oats. All of the other parties, including Sexton & Abbott, claimed an interest in the wheat, and denied the right of the Davenport National Bank to any part thereof. A receiver was appointed, who sold the grain in controversy, and the decree distributed the proceeds among the several parties, as follows: All the proceeds of the oats were awarded to Sexton & Abbott. It was found that D. B. Sears & Sons were entitled to the entire proceeds of the sale of 1,076 bushels of wheat, and that Sexton & Abbott, the two banks as assignees of the Baker receipts, and Baker for the receipt held in his own name, were entitled to participate in the balance of the proceeds of the wheat in proportion to the amount due upon the respective receipts held by them. No relief was given to Chandler, Brown & Co., nor to the Davenport National Bank upon the receipts held by it as collateral security for loans of money to Graham. Isaac M. Hill and W. H. Hubbard, who had filed a petition of intervention, claiming a right in the fund in the hands of the receiver by virtue of a judgment against Graham, and a garnishment process served upon the receiver, were, by the decree, denied any right to participate in said fund. The Davenport National Bank appeals.

Davison & Lane, for appellant.

Putnam & Rogers and *George E. Hubbell*, for Sexton & Abbott.

Green & Peters, *Bills & Block*, *Martin*, *Murphy & Lynch*, *Chas. Whittaker*, *Cook & Richman*, and *Stewart & White*, for the other appellees.

ADAMS, CH. J. The defendants Chandler, Brown & Co., Isaac M. Hill and W. H. Hubbard, who were, by the court below, denied any participation in the proceeds of the grain, do not complain of the decree. They are, therefore, practically out of the case, and their rights need not be considered.

The plaintiffs, Sexton & Abbott, and the defendants Baker and Sears & Sons have, as their counsel expresses it, waived minor differences among themselves and made common cause against their common enemy.

We will proceed, in the first place, to determine the rights of Sexton & Abbott as against the appellant, and in so doing we shall dispose for the most part, of the questions which arise between the appellant and the other appellees.

Sexton & Abbott claim that the appellant acquired no right in the grain, either by the issue to it of the receipts by Graham, or afterward by the delivery to it of the grain.

The appellant claims that, while Sexton & Abbott may at one time have owned the grain described in their receipts, they sold the same to Graham at the time of the issuance of the receipts, or, if not, that their title to the grain became extinguished by reason of what afterward transpired.

The first question to be determined is as to whether the transaction, in pursuance of which the receipts were issued to plaintiffs by Graham, was a sale by them to him. Of course, if the grain had been specially deposited, that is, with the agreement or understanding that it should be kept separate from all other grain, no question could have arisen. It would be conceded by the appellant that the transaction would have been a bailment and not a sale. But the receipt expressly provided that the grain might be stored with other grain of the same kind and grade, the conceded meaning of which is that the grain might be mixed with other grain of the same kind and grade in a common mass. Now, while the appellant contends that this is a most important fact, it does not contend that this fact alone would necessarily make the transaction a sale. Where a warehouseman merely receives grain from several depositors, with the understanding that it may be mixed in a common mass, and it is so mixed, the transaction is a bailment, and the depositors are tenants in common. *Cushing v. Breed*, 14 Allen, 380. But it is said that where the warehouseman is himself a depositor, and it is understood by the other depositors that their grain is to be mixed with his, with the right, on his part, to draw from the mass to the amount of his deposit, then the depositors do not become tenants in common, but the title to all the grain passes at once, upon deposit, to the warehouseman. In support of this view, the appellant cites *South Australian Insurance Co. v. Randall*, Law Rep. 3 Privy Council Appeals, 101; *Chase v. Washburne*, 1 Ohio St. 244; *Norton v. Woodruff*, 2 Coms. 155; *Carlisle v. Wallace*, 12 Ind. 252; *Smith v. Clarke*, 21 Wend. 84; *Hurd v. West*, 7 Cow. 752; *Lornegan v. Stewart*, 55 Ill. 45; *Wilson v. Cooper*, 10 Iowa, 565; *Johnston v. Browne*, 37 Iowa, 200. It is claimed by appellant, and we think the evidence so shows, that at the time of the transaction in question Graham was depositing, upon his own account, grain in his warehouse or elevator in common mass, and shipping therefrom, and that the plaintiffs knew it. We have then the question whether, such being the fact, the title to plaintiffs' grain under their receipts passed to Graham.

Upon this point one other fact ought to be mentioned. The evidence shows that the grain described in the plaintiff's receipt was already in the elevator, having been originally deposited by Graham as the owner. The receipts were issued in pursuance merely of what the parties claimed to be a sale from Graham to plaintiffs. How the same transaction could be a sale from plaintiffs to Graham is, to say the least, a little difficult to understand.

But suppose that the plaintiffs had bought the grain of a third person and brought it to the elevator and deposited it, would the title have passed to Graham? It is a common thing, we believe, for proprietors of elevators to employ them for the deposit of their own grain, if they have any, in common mass with others' grain. Depositors, we think, generally know this, and consent that their grain may

be mixed not only with grain belonging to third persons, but with grain belonging to the proprietor, if he should have any. This mode of doing business seems to be demanded by considerations of economy. Now we are asked to hold that such depositors lose title to their grain immediately upon its being deposited, and that the receipts issued to them, though expressly calling for grain, are no evidence of a claim for grain, but at best are merely evidence of a claim for money, and are good or otherwise, according as the maker is or is not responsible. It is contended that such deposits of grain are like general bank deposits of money. In our opinion, however, there is a very important difference. In case of a general bank deposit it is understood that the bank will use it in its own way. It is from the use of deposits that the bank is to receive its compensation for receiving the deposits and accounting for the same. It is true that as grain has a definite and well recognized market value it would not, ordinarily, make much difference to the receipt-holder whether he received the grain which his receipt called for, or was paid its market value in cash. But the rule contended for would make a great difference in the safety of the receipt-holder. In our opinion it cannot be sustained either upon principle or authority. The cases above cited as relied upon by appellant's counsel are none of them in point. In all of them there was enough in the receipts, or in the circumstances, or both, to evince an understanding upon the part of the depositor that the warehouseman should have a right to sell the thing deposited upon his own account, or otherwise appropriate it to his own use. Such an understanding does not exist upon the part of grain receipt-holders by reason of a mere agreement that the warehouseman may mix his own grain with theirs and draw out and sell the same amount. In such case the warehouseman becomes a tenant in common like any other depositor, and may be permitted to enjoy the same right of severance without affecting the title of his co-tenants.

Again, upon looking into the plaintiffs' receipts, we find that they are something more than mere receipts. They contain what appears to us to be an express contract of bailment. If so, it is not competent to show that there existed a different contemporaneous parol understanding. *Marks v. Cass County Elevator Co.*, 43 Iowa, 146.

The transaction, then, being a bailment in the outset, we come to inquire whether the relation of the parties became changed by reason of what afterwards transpired. The appellant contends that it did. It is insisted that the evidence shows that the grain in controversy is entirely different grain from that in store when the plaintiff's receipts were issued.

The business which Graham was doing was an ordinary grain warehouse or elevator business. Grain received from different depositors was put in at the top of the elevator and delivered to them at the bottom. Grain of like kind and grade was mixed in a common mass. Delivery was made to each depositor without the slightest reference to

identity of grain deposited. It was not only useless but impracticable to respect the identity of the deposit. The plaintiff's wheat receipt was held about six months. There were in store at the time of its issuance about 55,000 bushels. Afterwards there passed through the elevator about 150,000 bushels. This fact alone, it is said, is sufficient to render it improbable that any considerable part of the wheat in controversy is identical with that originally covered by the plaintiff's receipt; besides, it is said that the evidence shows that the elevator was cleaned out two or three times. It appears that a mode of receiving and delivering grain was employed two or three times which resulted in substantially effecting a change in the mass; it was done to prevent heating; it was accomplished by preventing grain received after a certain date from mingling with that received before. This was easily practicable by reason of the different floors and compartments of the elevator. The amount of grain in store, however, at any given time was neither greater nor less by reason of the cleaning out process. The different floors or compartments were emptied successively and successively refilled, but the change of mass was effected as substantially as if all had been emptied at once. The appellant insists that the change of mass destroyed all identity between the wheat in controversy and that originally covered by the plaintiff's receipts, and, if so, that the receipt cannot be upheld.

In the ordinary conduct of the business of an elevator a partial change of mass is effected by every receipt and shipment. Such partial change, however, does not impair the value of the outstanding receipts. As each receipt-holder withdraws his grain, the remaining receipt-holders become each the owner of a larger fraction in a smaller mass. Upon each new deposit being made, the receipt-holders become each the owner of a smaller fraction in a larger mass. So far, we presume that there is no controversy. The process may be continued from day to day, and so long as the change of mass is a partial one, though approximating day by day to completeness, the value of the outstanding receipts remains unchanged. Possibly it would be admitted by appellant that the value of a receipt would remain unchanged when next to the last kernel originally covered by it was withdrawn. Possibly somewhat more than that amount might be deemed necessary to uphold the receipt. But according to the appellant's theory, as we understand it, whatever the amount may be, whether one kernel or one bushel, its withdrawal, although in the ordinary and necessary conduct of the business, renders the receipt worthless as evidence of a claim to grain, and what a moment before was a valid title in the receipt-holder to all the grain called for by his receipt becomes transferred from the receipt-holder to the warehouseman; and that, too, in the absence of any agreement or understanding of that kind between the parties. It will be seen at once that the rule contended for would result in the most painful uncertainty and interminable confusion. No receipt-holder who had held his receipt even for a

short time during a period of active business would know, or could possibly ascertain, what his rights are. This result, so undesirable in every respect, is reached by appellant upon the purely technical view that unless a portion of the original grain, at least a kernel or two, remains, the receipt must, in the nature of things, fail. In our opinion, a complete answer is that as the receipt attaches upon each new deposit the receipt-holder becomes and remains a tenant in common at all times of the mass which is being added to and subtracted from.

At this point a question arises as to what is to be deemed a common mass. The elevator, as we have seen, was constructed with different floors and compartments. Grain was put in at the top of the elevator and delivered at the bottom. If a receipt-holder called for his grain immediately it seems probable that he would not only receive no part of the grain deposited, but would receive grain from some floor or compartment, which would contain no part of the grain deposited. He would, therefore, receive grain with which the grain deposited by him had not been actually mixed. But the delivery to him would not for that reason, we think, be wrongful. When grain is deposited in an elevator with the understanding that it may be mixed with all grain of that kind and grade in the elevator, and the grain of that kind and grade is distributed upon different floors or in different compartments merely because the weight of the grain, or prevention from heating, or convenience in handling, or some other reason of that kind requires it, and not at all for the preservation of identity, all the grain of that kind and grade is to be deemed a common mass within the view of the law as applicable to such a case. This must be so, because the grain is practically treated as a common mass. When grain passes into the elevator with the understanding that it may be mixed with other grain of the same kind and grade it passes beyond the control of the depositor, so far as identity is concerned. What the parties have agreed to treat as a common mass is such for the purpose of determining the rights of the parties. We think, then, that a depositor becomes a tenant in common of all the grain in the elevator with which his grain may properly be mixed, and he may demand the satisfaction of his receipt out of any or all such grain. Of course if grain is wrongfully abstracted there would not be enough to meet all the receipts. In such case the loss should be borne *pro rata*.

In this case grain was wrongfully abstracted. Graham after exhausting his own deposits drew largely in excess. The amount wrongfully taken by him exceeded the amount left on hand when he absconded. It is contended by the appellant that the amount thus left belonged to Graham. The appellant's theory is, as we understand it, that the amount on hand must be solely the result of Graham's deposits. The assumption that this grain belonged to Graham at the time he absconded involves the assumption that when grain was wrongfully abstracted by Graham, and afterwards a deposit was made by him, the law would not, in the absence of an agreement to that effect, apply

the subsequent deposit toward making good the previous wrongful abstraction.

Whether, if Graham's deposits had all been made subsequent to his wrongful taking, he could in a controversy between the receipt-holders and himself, in respect to the grain left on hand, be heard to say that they had no interest in it, because he had before the deposit of this grain wrongfully taken all their grain, is a question perhaps not fully settled by adjudication. As tending to support the rule that he would be estopped in such case, see *Gardiner v. Suydam*, 3 Selden, 363. But we need not go into this question. There is nothing to show that Graham's wrongful shipments were all made prior to his deposits. To the extent of his deposits at the time of his shipments they were not wrongful. And his shipments altogether never equalled the amount of his deposits, and the amount called for by the outstanding receipts. They lacked precisely the amount left on hand. That, we think, must be deemed to belong to the receipt-holders.

But it is said that subsequent to the issuance to the plaintiffs of their wheat receipts they gave their consent to Graham that he might sell their wheat upon his account. If they did give such consent, and the deficiency resulted from the sales of their wheat in pursuance of such consent, perhaps as between them and other receipt-holders they should sustain the loss.

There is some evidence showing a consent by plaintiffs to certain sales. One of the plaintiffs testified that Graham sometimes asked for permission to sell wheat, and that he gave permission on condition of his replacing it, which he generally did in a few days. Now while it is certain that he sold a large amount which he did not replace, it is not shown that that grain was sold by plaintiffs' permission.

The appellant further insists that the evidence shows that Graham not only sold a portion of plaintiffs' grain by their permission, but purchased of them all the balance. In the evidence upon this point there is a very decided conflict. Graham testifies that he not only purchased the plaintiffs' grain but paid them for it. But Graham's relation to the case is not such as to commend his testimony to us as entitled to the fullest credit. Besides there is an undisputed fact that prevents us from believing that Graham made such purchase and payment. The plaintiffs' receipt was held by the Citizens' National Bank of Davenport as collateral to a loan of \$10,000, which was well known to Graham. It was not within Sexton & Abbott's power to give Graham a good title while the bank held the receipt. Possibly title was of no consequence to Graham. He may have contemplated selling and shipping the grain without title, as he in fact did do to a considerable extent. But that is no reason why he should buy the grain of the plaintiffs, who he knew could not sell it, and pay them for it.

But it is said that Graham's testimony is corroborated. Four witnesses do indeed testify to hearing one of the plaintiffs say that they had sold their grain to Graham. It seems improbable that these wit-

nesses were all mistaken. There were negotiations for a sale, as appears from the evidence, and we are inclined to think that plaintiffs, for reasons known to themselves, spoke of the sale to others as having been consummated. But this is not, in our opinion, sufficient to overcome the testimony of the plaintiffs that such sale was not in fact made, corroborated as they are by the undisputed fact to which we have referred.

The appellant further insists that the evidence shows that the plaintiffs were partners with Graham, and that Graham had a right as partner to sell the grain. Graham testifies that such was the fact. But the right on the part of Graham to sell the grain as partner would not include the right to sell it upon his own account, and there is no pretence that he sold it upon any other. That circumstance alone would discredit him. But further than that the undisputed fact is that the title to the grain was not only solely in the plaintiffs, but they had transferred their receipt to the Citizens' National Bank as security, which bank still held it. If anything more were necessary to show that Graham did not consider the shipment and disposal of the grain by him as a partnership transaction, it may be found in the fact that no specific shipment and disposal of the grain appears to have been made. The shipment and disposal appear to have been an undistinguishable part of a criminal raid.

Having reached the conclusion that the plaintiffs and Graham in the outset sustained to each other the relation of bailors and bailee, and that nothing afterward transpired which changed the relation, we proceed to consider the relation of the plaintiffs to the appellant.

Both plaintiffs and appellant are receipt-holders. In our opinion, however, they do not stand in the same relation to the grain. The appellant's receipts were not issued to it upon deposits made by it, nor because it had acquired the title to any grain in the elevator. The understanding between Graham, the maker of the receipts, and the appellant was, that the receipts were issued upon grain owned by him, and to which he still retained the title. They were issued merely as security. The appellant insists that as such they are valid, being evidence of a pledge of the quantity of grain therein described.

Section 2172 of the Code provides that "no warehouseman . . . shall issue any receipt . . . for any personal property to any person unless such property is in store," and section 2171 provides that "all warehouse receipts, or other evidences of the deposit of property . . . shall be, in the hands of the holder thereof, presumptive evidence of title to said property."

It is evident that the property contemplated by the statute, for which a warehouse receipt may be issued, must be the property of the receipt-holder. This is so because the statute provides that the receipt shall be presumptive evidence of title in the holder. If it is issued in a case where the holder has no title, and where the receipt was not designed by either party to be evidence of title, it appears

to us that it is issued in contravention of the statute and cannot be sustained.

Under the rule contended for by the appellant we should have two distinct kinds of receipts, although of the same import upon their face; the one kind issued as evidence of title, and the other merely as a mode of effecting a lien. The allowance of two distinct kinds of receipts of the same import upon their face would have a tendency to introduce uncertainty and confusion, for which no advantage, so far as we can discover, would be a sufficient compensation. We should hesitate, therefore, about sanctioning the rule contended for even if the provisions of the statute were less explicit than they are. The appellant, however, cites and relies upon *Cochran v. Rippey*, 13 Bush, (Ky.) 495. In that case a warehouse receipt issued by a person upon his own property, and designed as security to the holder, was held valid. The appellant claims that the statute under which the decision was made is in its essential provisions similar to our own. But it appears to be contemplated by the fifth section of the statute that such receipts may be issued.

But it is claimed by appellant that even if the receipts held by it are invalid, it acquired a lien upon the grain paramount to any right or interest of the appellees. This claim is predicated upon the delivery of the grain made to the appellant after Graham absconded. The evidence shows that appellees purchased the grain described in their receipts of Graham, and allowed him to retain it without placing upon record any evidence of their purchase. The appellant therefore, claims that its lien is valid as against the appellees even though it were held to date merely from the time of delivery. We shall not consider all the questions discussed by counsel in this connection. No pledge was created by the delivery unless such was the understanding of the parties. Now it appears to us that such was not the understanding of either. The evidence shows conclusively that the appellant obtained possession under a claim of a subsisting lien and not by reason of a new agreement designed to give a lien. Graham says in his testimony, in speaking of the delivery of the grain to appellant — “I did not have any mind to give it to anybody particularly.” This shows that there was no understanding upon his part that a lien would be created by the delivery which would supersede the rights of all other receipt-holders. Nor do we see anything in what he said or did, or authorized his son to say or do, which could properly be construed as evincing such understanding. The reasonable inference is that he understood that all the holders of valid receipts would share in the grain according to their respective claims.

The understanding of the appellant is shown by what was done by its president at the time it took possession of the grain. The president testifies that he said to Graham's son who was in charge that he wished to get possession of the grain for the bank, and at the same time presented the receipts held by the bank, and possession was delivered to

him. The possession, then, was gained solely under an antecedent claim. The transfer thus made is not of itself evidence of a new and independent agreement, such as would be necessary to create a pledge, and we see nothing else that is.

The views which we have expressed thus far have had reference more especially to the plaintiffs' wheat receipt. The claims in respect to the oats are less complicated. No question is raised in respect to them not already disposed of.

Upon the receipts issued to Baker, an independent question is raised. It is claimed that Baker sold 10,000 bushels of his wheat through Graham, in Milwaukee. Baker, it appears, owned 11,200 bushels. A receipt for 5,000 bushels had been deposited by Baker in the appellant's bank as collateral security, and another receipt for the same amount had been deposited in another bank for the same purpose. A receipt for 1,200 was still retained by him. While the three receipts were so held, it appears that Baker directed Graham to make a sale of 10,000 bushels. Graham claims that in accordance with such directions he did make such sale in Milwaukee in August, 1875. But his testimony shows that what he calls a sale of 10,000 bushels of Baker's wheat was a mere contract to deliver that amount in September, and that he did not contemplate shipping from Baker's wheat unless, to use his own words, "wheat went against them." The evidence tends to show that no shipment was made from Baker's wheat in pursuance of any such contract, and that it was understood between Graham and Baker that none should be made, but that the contract was otherwise disposed of, and such, we think, was the fact.

The amount found due Sears & Sons as a basis of division of the common mass was 1,076 bushels. The appellant insists that there was not that amount due them, if anything.

The evidence shows that a part of the grain covered by the receipts held by Sears & Sons had been drawn out by them. In the decree in their favor some deduction was made on this account. The appellant insists that the deduction was not large enough. We have examined the evidence carefully upon this point, and are unable to determine with entire certainty what deduction should have been made. The receipts were evidence in their favor, and they were entitled to all that they were allowed unless there was affirmative evidence showing otherwise. In the obscurity of the evidence we are not disposed to disturb the decree upon this point.

The appellant objects to the amount allowed the receiver for services, and also to the amount allowed for other expenses, all of which were made a charge upon the fund in the receiver's hands. Of this the appellees, who are entitled to the principal part of the fund, do not complain. The appellant is interested only to the small extent to which it is allowed to share in the fund through one of the Baker receipts. In view of these facts, and the meagre condition of the

evidence upon this point, we do not think it would be proper for us to interfere.

We think that the judgment of the Circuit Court must be *Affirmed*.
ROTHROCK, J., *dissenting*.¹

B. *Tortious*.

ANONYMOUS.

QUEEN'S BENCH. 1593.

[*Reported Pop. 38, pl. 2.*]

IN trespass for carrying away certain loads of hay, the case happened to be this: The plaintiff pretending title to certain hay which the defendant had standing in certain land, to be more sure to have the action pass for him, took other hay of his own (to wit, the plain-

¹ "In the cases which we have now gone over the argument is very strong that there is a sale to the owners of the elevator, and it has already been fully stated. At the same time it cannot be denied that if the law is so, it will be followed by injustice and inconvenience. Undoubtedly those who deliver grain to an elevator think they have something more than the personal liability of the warehouseman, and regard him as their bailee in charge of their property. The holders of accepted orders look upon them as representing property in like manner. If the transaction is regarded as a sale, the safety of receipt-holders depends upon the warehouseman's solvency; if the doctrine which will be advocated here prevails, they run no risk unless he is both insolvent and dishonest. Of course, the opinion of merchants as to the nature of the transaction is not conclusive. As is observed by the Lord Justice James in a late case, 'there is no magic in the word "agency." It is often used in commercial matters, when the real relation is that of vendor and purchaser.' *Ex parte White. In re Nevill*, L. R. 6 Ch. 397, 399. But it is undoubtedly desirable to work out the expectations and intentions of the parties if the machinery of the law admits it. Suppose that warehousemen became insolvent, having always been careful to keep a quantity of grain in store corresponding to the amount for which they had receipts out, would not the holders of the receipts have a right to feel that they were unjustly treated, unless they were preferred to the general creditors in their claim upon that grain? Let us look at it a little more exactly.

"Suppose I deliver a copy of the General Statutes of Massachusetts, or other book easily purchasable in the market, to an agent to keep, telling him, however, that he may sell it at any time, provided that he will immediately appropriate another copy to me upon doing so, and give him like power of sale and substitution as to all succeeding copies. The title in the copy for the time being appropriated to me, to be vested in me. Is not that a perfectly possible transaction? The analogies of the law show that the title to a substituted volume would vest in me as soon as it was definitely appropriated to me. *Aldridge v. Johnson*, 7 El. & Bl. 885, 898, per Lord Campbell, C. J.; *Langton v. Higgins*, 4 H. & N. 402.

"Would it make any difference if the agent also had power to mix the volume with others belonging to third persons, from which it was not distinguishable, each owner being at liberty to call for one at any time? Would it make any difference that he was at liberty to add others of his own, if he was only at liberty to withdraw as many as he put in?" — 6 Am. Law Rev. 464, 465.

tiff) and mixed it with the defendant's hay, after which the defendant took and carried away both the one and the other that was intermixed, upon which the action was brought, and by all the court clearly the defendant shall not be guilty for any part of the hay, for by the intermixture (which was his own act) the defendant shall not be prejudiced as the case is, in taking the hay. And now the plaintiff cannot say which part of the hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it with which it is intermixed, as if a man take my garment and embroider it with silk, or gold, or the like, I may take back my garment, but if I take the silk from you, and with this, face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to the action for taking of the silk from you.

So here, if the plaintiff had taken the defendant's hay and carried it to his house, or otherwise, and there intermixed it with the plaintiff's hay, there the defendant cannot take back his hay, but is put to his action against the plaintiff for taking his hay. The difference appeareth, and at the same day at Serjeants' Inn in Fleetstreet, the difference was agreed by Anderson, Periam, and other justices there, and this case was put by Anderson: If a goldsmith be melting of gold in a pot, and as he is melting it, I will cast gold of mine into the pot, which is melted together with the other gold, I have no remedy for my gold, but have lost it.

WARD v. AYRE.

KING'S BENCH. 1615.

[Reported Cro. Jac. 366.]

TRESPASS of assault and battery, *et quòd cumulum pecuniæ*, containing five marks, *cepit, &c.*

The case was, The plaintiff and defendant being at play, the plaintiff thrust his money into the defendant's heap and mixed it, and the defendant kept it all; whereupon (they striving for the money) plaintiff brought this action.

The whole court were of opinion, in regard the plaintiff's own money cannot be known, and this his intermeddling is his own act, and his own wrong, that by the law he shall lose all; for, if it were otherwise, a man might then be made to be a trespasser against his will, by the taking of his own goods; therefore, to avoid that inconvenience, the law will justify the defendant's detaining of all: and so it is of an heap of corn voluntarily intermingled with another man's. Whereupon the rule of the court was, *quòd querens nihil capiat per billam.*

RYDER v. HATHAWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 21 Pick. 298.]

MORTON, J. delivered the opinion of the court.¹ This is trespass *de bonis asportatis*, in which the plaintiff claims to recover for twenty-three cords of wood.

It appeared in evidence that the defendant took a certain quantity of wood, but he justified the taking, on the ground that the plaintiff had cut and carried the wood from his land, and so that the wood was his, and he had a lawful right to take it. The wood in controversy was cut by the plaintiff and removed by him to a landing-place by the shore of the swamp, the soil of which was owned by the defendant. From this place the defendant carried it away. If the wood was really cut upon the defendant's land, the cutting and removing it by a wrong-doer would not divest him of his property in the wood, and he might lawfully remove it from the place where the plaintiff had put it.

The principal question in the case relates to the title of the land on which the wood grew.

Upon a careful revision, we are well satisfied, that in reference to the title, the instructions were correct, and the finding of the jury warranted by the evidence.

But in the next branch of the case we have found much greater difficulties.

It appeared that a part of the wood taken by the defendant had been cut and carried to the landing-place by the plaintiff from land indisputably his own. For this part he contended that he had a right to recover, however the title to the other lot might be decided. In relation to this part of the case the jury were instructed, that if "a part of the plaintiff's own wood was so mixed with the defendant's wood in the same pile, either that the defendant did not know it or could not by any reasonable examination distinguish it, the taking of such part was not a trespass for which this action would lie." Now if, under any circumstances, the taking of wood thus mixed might be a trespass, this general instruction would need some qualification, and without it would be incorrect, and might mislead the jury. And although, in all other respects, the instructions are right, and this may need but a slight modification, yet even that, under our practice, must lead to a new trial.

Few subjects in the law are less familiar, or more obscure, than that which relates to the confusion of property. If different parcels of chattels, not capable of being identified, owned by different persons,

¹ The opinion states the facts. That part of the opinion relating to the question of title is omitted.

get mixed, how are they to be severed? What are the relative rights of the different owners? Take, for example, grain or liquor. Can each one of the former owners take from the common mass his proportion, or do they become tenants in common of the whole? If one takes the whole, what shall be the remedy? Will trespass lie? If they become tenants in common, clearly not. There is some conflict on this subject between the common law and the civil law. If the intermixture takes place by accident, or without the fault of the parties, it would be very unreasonable to deprive either party of his property, or materially to affect his right to it. And yet oftentimes there must be great suffering, as by the confusion of property of different kinds and qualities, as of different kinds of grain or liquors, the intermixture of which would greatly impair, if not entirely destroy, the value of the whole. But it will not be useful further to consider the intermixture of property by accident, as it will not have much application to the case under consideration.

The cases of *intentional* intermixture present questions of greater perplexity. If the owners of goods incapable of being identified consent to intermix them, their consent makes them tenants in common. But if the property be wilfully and unlawfully intermingled, it clearly cannot constitute a tenancy in common, because a person cannot be made a tenant in common or copartner without his consent. The act of God or of the law may create such a confusion of the property of different owners, as necessarily to constitute a community of property between them. But no one person by his own act can compel another to become his cotenant.

By the rules of the civil law, if the intermixture was made wilfully and not by mutual consent, he who made it acquired the whole, and the only remedy for the other party was a satisfaction in damages for the property lost. Vinn. ad Inst. lib. 2, tit. 1, § 28. This rule seems to be very imperfect, as it would enable one person to acquire the property of another against his will, merely rendering himself liable to pay the value of it. But it undoubtedly went upon the ground, that the intermixture was a conversion, and, in this respect, is analogous to many cases of trover and trespass. But our law adopts an entirely opposite rule. That very learned commentator, Chancellor Kent, in 2 Kent's Comm. 297, says "the common law, with more policy and justice, to guard against fraud, gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed. If A will wilfully intermix his corn or hay with that of B, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B." *Hart v. Ten Eyck*, 2 Johns. Ch. R. 62.

But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbor's, by agree-

ment, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own, or be obliged to take his neighbor's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness or folly or misfortune caused the destruction of the whole. This doctrine is recognized and discussed by Lord Eldon, in *Lupton v. White*, 15 Ves. 432. See also *Panton v. Panton*, cited in 15 Vesey, 442; Story on Bailments, § 40; Ayliffe's Pand. lib. 3, tit. 3, p. 291; Ersk. Inst. bk. 2, tit. 1, § 17; 2 Dane's Abr. 119.

The intentional and innocent intermixture of property of substantially the same quality and value, does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him. It must already have been perceived that these principles are not perfectly consistent with the unqualified rule laid down for the government of the jury.

According to the above doctrine, if the plaintiff actually supposed that the land from which the wood was taken was his own, and that all the wood was his, then the mingling it together should not divest him of that which honestly belonged to him. But if he knew that the land was not his, or if he doubted whether it was his or not, and mixed the wood with an intent to mislead or deceive the defendant, and to prevent him from taking his own without danger of taking the plaintiff's, then he has by his own fraudulent act lost his property and can have no remedy. But if, as above stated, the plaintiff mingled the wood from the different lots supposing all of it to be his own, and if the defendant, knowing that some part of the wood came from the plaintiff's land, took the whole, he was a trespasser and is responsible in this action for the value of the plaintiff's wood thus taken by him. But if the defendant took the wood without any knowledge that any of it belonged to the plaintiff, then he is not liable in an action of trespass, though he may be in *assumpsit* if he has sold the wood, or if not, in trover, after a demand and refusal. *Bond v. Ward*, 7 Mass. R. 127.

The verdict must therefore be set aside and a new trial granted. But as the question of title has been fully and fairly tried and settled, there can be no reason for retrying that, and the new trial must be confined entirely to the question of damages.

Coffin and *Ezra Bassett*, for the plaintiff.

Warren and *Eliot*, for the defendant.

WILLARD v. RICE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846.

[Reported 11 Met. 493.]

TROVER for 527 dozen of palm leaf hats. At the trial before *Hubbard, J.*, it appeared that B. G. Sampson, on the 22d of March, 1842, mortgaged to the plaintiff a quantity of hats in New York, and the goods in a store in Keene (New Hampshire), among which were 450 dozen finished and 300 dozen unfinished palm leaf hats, and 7000 palm leaves. There was evidence tending to prove that the plaintiff, immediately after the mortgage was made, took possession of the mortgaged property and sent Sampson to New York to sell the hats there, and with the proceeds purchase goods in the plaintiff's name; that Sampson did so, and sent the goods which he so purchased to the store in Keene; that the plaintiff carried on business in said store so far as to sell the goods mortgaged, and those so received from New York, and received pay, to a considerable extent, in palm leaf hats; that Sampson continued in said store, and received large quantities of unfinished palm leaf hats in payment of debts due to him on his store books; and that said hats so received were by him mixed indiscriminately with the mortgaged hats and the hats received by the plaintiff in pay for goods sold by him as aforesaid, so that they could not be distinguished. It appeared that within a month after the mortgage was given, over 600 dozen of unfinished hats were received into the store from the sales of goods and from the aforesaid debts, and that hats were continually taken from the store and finished; but it did not appear on whose account this was done. It was in evidence that about the 1st of May, 1842, Sampson took, for the plaintiff, 400 or 500 dozen hats which had been finished, after the mortgage was made, from those that were in the store when the mortgage was made, and from those that were received into the store afterwards, and sent them to New York where they were sold by him; that at the time when said hats were so sent to New York, or immediately after, the hats in question in this action were taken from the store and sent by Sampson to the defendants for sale. The question in the case was whether any of the hats so sent to the defendants by Sampson were included in the mortgage.

The judge instructed the jury that "if Sampson had mixed the hats which he received after the plaintiff had taken possession indiscriminately with those mortgaged by him and with those received on account of the plaintiff from the sales of the mortgaged goods and of the goods brought from New York, so that the same could not be distinguished, then the plaintiff would be entitled to hold the same on account of the debts due to him from Sampson, as well as the other hats; and that

the defendants, if they afterwards received the hats in question from the mixed lot and sold them by Sampson's order, would be liable in this action to the plaintiff for their value."

A verdict was found for the plaintiff, subject to the opinion of the whole court as to the instructions given to the jury.

Hartshorn, for the defendants.

F. H. Dewey, for the plaintiff.

SHAW, C. J. The defendants, holding the goods as the consignees of Sampson, can only stand on his title, and make the same defence, after conversion proved, as he could make. That defence is, that part only of the identical hats which came to the hands of the defendants were included in the plaintiff's mortgage, and that the residue were Sampson's own goods. This leads to the only question of law that is raised by the report, viz., whether the rule of law prescribed by the judge in his instructions to the jury was correct. The jury were instructed that if Sampson intermixed the hats received from other sources, and which were his own, with those mortgaged, so that they could not be distinguished, the mortgagee had a right to hold the whole. This instruction, taken in connection with the subject matter, and the facts in proof, we think was right. Sampson was the mortgagor, but being intrusted with the possession of the goods it was his duty to keep them separately and preserve the mortgagee's property. His intermixing them purposely, or through want of proper care, was a violation of his duty, and unlawful. As his own could not be distinguished, he could take none of the mixed parcel without taking the plaintiff's, which he had no right to do; and as against him and his consignees, the plaintiff must hold the whole. *Hathaway v. Ryder*, 21 Pick. 298; *Colwill v. Reeves*, 2 Camp. 576; 2 Kent Com. (3d ed.) 364.

Judgment on the verdict.

HESSELTINE v. STOCKWELL.

SUPREME COURT OF MAINE. 1849.

[*Reported 30 Me. 237.*]

TROVER, for a quantity of pine mill logs.

At the trial before *Wells*, J., the plaintiff introduced testimony tending to prove, that in the winter of 1844-5, one Leander Preble, cut on his own land about 600,000 feet of pine lumber, and also cut on the land of the plaintiff, wrongfully and wilfully, about 100,000 feet of lumber of a similar quality, all of which lumber was marked with the same mark, and indiscriminately hauled and landed on the same landing place. That in the spring of 1845, said lumber was run down the stream and came into the possession of Franklin Adams & Co., and a part of it was taken to market, and the other part remained in the stream, and was subsequently sold by them to the defendant, who in

the spring of 1846, ran to market all the residue of said lumber, excepting that in controversy, which consisted of about 100,000 feet that had remained behind, and in November, 1846, was seized by the plaintiff.

Soon afterwards the defendant took this lumber out of the plaintiff's possession, for which taking this action is brought.

There was evidence introduced by the defendant that Preble had cut on the plaintiff's land only about 7,000 feet, for which he had given his note. And there was much evidence from both parties as to the cutting.

The Court instructed the jury that the plaintiff must prove that the logs for which he claimed damages in this action, had been cut on his land, and had been taken by the defendant; and that the plaintiff was entitled to recover for any logs cut by said Preble on the plaintiff's land, and which were taken by the defendant, unless said Preble had paid the plaintiff therefor; and that it did not appear that any question of confusion of property arose in the action.

A verdict was returned for the defendant.

Kent & Cutting, for plaintiff.

A. W. Paine, for defendant.

SHEPLEY, C. J. This was an action of trover brought to recover the value of certain pine logs.

The logs appear to have composed a part of a larger lot estimated to contain more than 600,000 feet, which were cut and hauled by Leander Preble. The case states that there was testimony tending to prove that Preble cut on his own land about 600,000 feet of pine lumber, and also cut on the land of the plaintiff about 100,000 feet of pine lumber of a similar quality, all of which logs were marked with the same mark and hauled and landed on the same landing place.

With other instructions the jury were instructed, "that it did not appear that any question of confusion of property arose in the action."

What will constitute a confusion of goods has been the subject of much discussion, and it has become a question of much interest to the owners of lands upon which there are timber trees, as well as to those persons interested in the lumbering business, whether the doctrine can be applicable to the intermixture of logs.

When there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. But it can do so only upon proof that the property of each can no longer be distinguished. That the doctrine might be applicable to mill logs is admitted in the case of *Loomis v. Green*, 7 Greenl. 393. The case of *Wingate v. Smith*, 20 Maine, 287, has been alluded to as exhibiting a different doctrine; but the case does not authorize such a conclusion. The instructions were, "that merely taking the mill logs and fraudulently mixing them with the defendant's logs would not constitute confusion of goods." These instructions were, and clearly must have been

approved; for an additional element was required that the mixture should have been of such a character that the property of each could no longer be distinguished. The opinion merely refers with approbation to the case of *Ryder v. Hathaway*, 21 Pick. 298, and says, "the principles there stated would authorize the instructions which were given on that point in this case."

The common law in opposition to the civil law assigns the whole property without liability to account for any part of it to the innocent party when there has been a confusion of goods, except in certain cases or conditions of property. Chancellor Kent correctly observes that the rule is carried no further than necessity requires. 2 Kent's Com. 365.

There is therefore no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

And there is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule and is fully sustained by authority. Lord Eldon, in the case of *Lupton v. White*, 15 Ves. 442, states the law of the old decided cases to be, "if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity; but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." This doctrine is stated with approbation by Kent. 2 Kent's Com. 365. It is again stated in the case of *Ryder v. Hathaway*. The opinion says, "if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But, if they were of unequal value, the rule would be more difficult."

In the case of *Willard v. Rice*, 11 Met. 493, the question, whether palm-leaf hats, which were intermixed, were of equal value, does not appear to have been, although it would seem that it might have been, made. The case is not therefore opposed to the doctrine here stated. The doctrine is noticed in the cases of *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Ringgold v. Ringgold*, 1 Har. & Gill, 11; *Brackenridge v. Holland*, 2 Blackf. 377.

If no logs were cut upon land owned by the plaintiff, no question could have arisen of confusion of goods. The jury were required by the instructions to find only, that none of those taken by the defendant were cut on the plaintiff's land. They were not required to find that no logs, composing the whole lot of six or seven hundred thousand feet, were cut on the plaintiff's land.

If Preble wrongfully cut any logs on land owned by the plaintiff, and mixed them with logs cut on his own land, so that they could not be distinguished, a question respecting confusion of goods might properly

have arisen. The admixture might have been of such a character that the whole lot of logs, including those in the possession of the defendant, might have become the property of the plaintiff. Or it might have been of such a character, the logs being of equal value, that the plaintiff would have been entitled to recover from any one in possession of those logs or of a part of them, such proportion of them as the logs cut upon his land bore to the whole number.

While the facts reported might not necessarily prove a confusion of goods, if part of the whole lot of logs were cut upon land owned by the plaintiff, they might have been sufficient to raise that question, and to present it for the consideration of the jury.

The instructions therefore, when considered together, requiring the plaintiff to satisfy the jury that some of that particular portion of the whole lot of logs, which the defendant had in his possession, were cut upon land owned by the plaintiff, and that no question of confusion of property appeared to arise, were too restrictive. They may have deprived the plaintiff of the right to recover upon proof that some of the logs composing the whole lot had been cut upon his land and so mixed with logs cut on land owned by Preble that they could not be distinguished.

Exceptions sustained, verdict set aside, and new trial granted.

FULLER v. PAIGE.

SUPREME COURT OF ILLINOIS. 1861.

[Reported 26 Ill. 358.]

THIS was an action of trespass commenced by Fuller against Paige in Aurora Common Pleas Court, and taken, by change of venue, to the Kane Circuit Court.

The declaration was in trespass in the usual form, for taking and carrying away goods and chattels of the plaintiff, consisting of a lot of drugs and medicines. There was a trial by jury, and a verdict for the defendant.

One Myers mortgaged the goods in controversy to Paige, Myers attending the store as a clerk. Myers sold the goods to Fuller, who was fully informed of the mortgage from Myers to Paige. Fuller stated that he knew of the existence of the mortgage at the time of the purchase, but that it was good for nothing, inasmuch as it had not been recorded. The consideration from Fuller to Myers was a pre-emption claim in Kansas, and a bond for a tract of land in Michigan. Myers stated that the sale to Fuller was to get property with which to pay his debts. The goods when mortgaged to Paige were appraised at \$1,000. Fuller, after his purchase from Myers, added a small stock to the drugs, and carried on business. When requested by Paige to select the goods

so added by him to the stock derived from Myers, he refused to do so, and Paige took the entire stock as mortgaged, together with such as Fuller had added to it. The mortgage described the goods secured by it.

Glover, Cook & Campbell, for plaintiff in error.

Hoynes, Miller & Lewis, for defendant in error.

BREESE, J. In this case the court below instructed the jury, in substance, that if the appellant, then plaintiff, purchased the goods described in the declaration, with a full knowledge of the mortgage to the defendant, and with the intent to cheat and defraud him of his lien, the sale was void as to the mortgagee.

This we hold to be the law. The mortgage was good as against Myers the mortgagor, without being recorded. If then the appellant purchased the goods of Myers with the knowledge of the mortgage, and for the purpose and with the intent to enable Myers to put the money in his own pocket and cheat the mortgagee, that was such a fraud in fact as to avoid the sale to appellant. It cannot be tolerated that a party thus acting should be permitted to enjoy the fruits of such conduct.

We do not say that the mere knowledge of the existence of a mortgage unrecorded would make the purchase from the mortgagor a fraud in law, where there is no intent manifested by such purchaser to commit a fraud in fact by enabling the mortgagor to pocket the avails, and so cheat the mortgagee.

When a purchase from a mortgagor is *bona fide* and without any intent to cheat, the case might be different. Here the facts show a contrivance and a design by the appellant knowing of the existence of the mortgage in collusion with the mortgagor to cheat the mortgagee. The parties cannot receive our aid in furtherance of such intention, nor do we think the law requires it. Good faith and absence of fraudulent intent must characterize all contracts.

Upon the other point the appellant had mixed up his own goods with the goods mortgaged, and he was notified to select his and take them away, which he refused to do. The appellee had a right to take his own goods, and if he took some, not his property, they being so confounded with his own that he could not distinguish them, it would be fraud to charge him in trespass however he might be liable in trover. On the whole case we think justice is with the appellee, and we accordingly affirm the judgment.

Judgment affirmed.

JENKINS v. STEANKA.

SUPREME COURT OF WISCONSIN. 1865.

[Reported 19 Wis. 126.]

ERROR to the Circuit Court for Winnebago County.

The action below was by Jenkins and others against Steanka, to recover possession of certain lumber, or the value thereof (alleged to be \$400), with damages for the detention. The plaintiffs obtained possession under the statute. Steanka was master of a sloop in which the lumber was found when seized by the sheriff; and claimed by his answer that the title to the lumber was in one Wright (for whom he was carrying the same on said sloop), subject to a lien for freight in favor of the owner of said sloop, and that said defendant, at the time of such seizure, was entitled to the possession as agent of said owner.

The jury found that defendant had the right of possession at the commencement of the action; that Wright owned the lumber; and that the value was \$360; and nominal damages. Judgment accordingly; and plaintiffs sued out their writ of error.

Earl P. Finch, for plaintiffs in error.

H. B. Jackson, for defendant in error.

By the Court, DOWNER, J. This is an action to recover forty thousand feet of pine lumber, alleged in the complaint to be wrongfully detained by the defendant, and of the value of \$400. The value is not denied by the answer. At the trial, the plaintiffs offered to prove the value less than \$400; but the Circuit Court refused to permit the evidence to be given, holding that the pleadings fixed and were conclusive as to the amount of the value. In this the court below erred. In actions of trover, trespass or replevin, before the Code, it was not necessary for the defendant to deny the amount of the value or the allegation of damages, and in this respect the Code has not altered the practice. They must be proved even though the defendant puts in no answer. *Conness v. Main*, 2 E. D. Smith, 314; *McKenzie v. Farrell*, 4 Bosworth, 202.

Questions were put to different witnesses by the plaintiffs during the progress of the trial, as to what the kind or quality of the lumber in dispute was. The court below refused to permit these questions to be answered. It seems to us the answers should have been received. They were competent as bearing on the question of the value of the lumber; also for another purpose. Testimony was given tending to prove that some part of the lumber in dispute was manufactured by one Wright, in his mill, at Fremont, out of logs belonging to the plaintiffs and cut on streams above Fremont, and that there was a great difference in the quality of lumber sawed out of logs cut at or near Fremont and that cut out of the plaintiffs' logs, the latter being much superior

in quality to the former. The defendants' witnesses, or some of them, testified that this lumber was made out of logs cut at Fremont. After this testimony was in, the plaintiffs renewed their inquiry as to the quality of the lumber in dispute, and the court again ruled the evidence inadmissible. It seems to us that it was clearly admissible as tending to prove whether the lumber in dispute was manufactured out of the plaintiffs' or Wright's logs.

The Circuit Court also erred in instructing the jury that "if they found for the plaintiffs, they could only recover the amount of lumber which they have proved to have been wrongfully taken by Wright, although it may have been commingled with the lumber of Wright wrongfully." The law, we think, is that if Wright wilfully or indiscriminately intermixed the lumber sawed from the logs of the plaintiffs with his own lumber, so that it could not be distinguished, and the lumber so mixed was of different qualities or value, then the plaintiffs would be entitled to hold the whole. *Willard v. Rice*, 11 Met. 493; 2 Kent's Com. (3d ed.), 364; *Ryder v. Hathaway*, 21 Pick. 298.

We do not deem it necessary to notice other rulings assigned for error of the court below excluding testimony, as the same questions may not arise upon a new trial.

Judgment of the court below reversed, and a new trial ordered.

MOORE v. BOWMAN.

SUPREME COURT OF NEW HAMPSHIRE. 1867.

[Reported 47 N. H. 494.]

TRESPASS for taking the plaintiff's mare. Plea, the general issue, with a statement that the defendant, being a deputy of the sheriff, took the mare on writs against Azariah W. Moore as his property. On trial it appeared that the mare belonged to the plaintiff. There was no evidence that she was liable to be taken for the plaintiff's debt, or that he was in debt. It was proved that Azariah W. Moore was in embarrassed circumstances when the mare was attached, and had been for several years before. The attachment was made in the stable belonging to Knapp's hotel in Littleton, on the 8th of March, 1865.

On that day Azariah W. Moore bought two horses of Orrin Bronson, at Landaff, professing to act as agent for his mother, and led the horses to a point half or three quarters of a mile above Lisbon village, where he tied and left them by the side of the highway leading to Littleton. He then rode with another horse to Lisbon village, where he met his son, John A. Moore, and his brother, the plaintiff. The plaintiff and John A. Moore came that morning from Lyman, where the plaintiff resided, with the mare which was afterwards attached.

At Lisbon village it was arranged that the plaintiff and John A.

Moore should go to Littleton with the plaintiff's horse and sleigh, and on their way take with them to Littleton the two horses bought of Bronson. The plaintiff and John A. Moore started from Lisbon village, took the two horses bought of Bronson, and led them behind the sleigh for about two and one half miles. They then took the plaintiff's mare out of his sleigh, and put in one of the Bronson horses, which was a large black mare, and after that led the other Bronson horse and the plaintiff's mare behind to Littleton. The plaintiff and John A. Moore testified that before the Bronson mare was put into the sleigh she was difficult to lead; that she pulled the man who led her twice out of the sleigh, and got away from them more than once; that this was the reason, and the only reason, why the shift of the horses was made.

The horses bought of Bronson were a large black mare and a small one. The plaintiff's mare was black; but the evidence did not tend to show that, except in color, there was any close resemblance between her and either of the Bronson horses.

Azariah W. Moore started from Lisbon after his son and the plaintiff, passed them on the way to Littleton, and had the horse which he drove, and which was a bay mare, put in the stable at Knapp's hotel.

That day a telegraphic dispatch was sent from Lisbon to Littleton, which was communicated to the defendant, informing him that Azariah W. Moore was on his way to Littleton with two horses, and directing him to attach them as the property of Azariah W. Moore.

Soon after the horse which A. W. Moore drove to Littleton was put in the stable, the plaintiff and John A. Moore arrived there and directed Herod Stevens, the hostler, to put the three horses they came with into the stable and feed them. There was no evidence that they or either of them gave the hostler any directions as to the manner in which the horses should be placed in the stalls, and they and the hostler testified that no such directions were given. The hostler put the plaintiff's mare and the small mare bought of Bronson in adjoining stalls near the door, and the other large Bronson mare in another part of the stable, several stalls distant.

The defendant, who was the only witness for the defence, testified that, after receiving the instructions before mentioned, he went to the stable and asked Stevens, the hostler, which of the three horses that came with the plaintiff were led; that the hostler told him the two that were in the stalls together near the door; that he then attached those two horses and directed Stevens to keep them for him. This was contradicted by Stevens, who testified that Bowman came and asked him to show the horses that the Moores brought; that he showed him the horse that A. W. Moore came with, and then the other three, and told him they were the three the boys came with; that the defendant looked at the horses and then told him he had attached the two that stood together next the door, and told him to keep them for him; that nothing was said about the horses being led there.

The front part of the stable was divided from the back part by a par-

tition, and the horses were put in the back part. The defendant testified that when he went to attach the horses, the plaintiff and John A. Moore were in the back part of the stable and had the large black Bronson mare out in the floor looking at her; that they put her back into the stall, and went out of the back part of the stable before he attached the horses; that as he was going out into the front part of the stable, he met A. W. Moore coming in, and gave him a summons, and pointed out to him the two horses which he had attached; that the plaintiff and John A. Moore were in the front part of the stable at that time, and near by when he spoke with A. W. Moore. A. W. Moore testified that the defendant did not point out the two horses he had attached, and that he supposed the two horses bought of Bronson were those attached; that neither the plaintiff nor John A. Moore were there when the summons was given him. The plaintiff, John A. Moore, and Stevens, the hostler, testified that neither the plaintiff nor John A. Moore were in the stable at all until about 6 o'clock, after the plaintiff called for his horse to go home.

The two horses were attached somewhere from three to four o'clock in the afternoon. The plaintiff testified that some time in the afternoon, he was told two of the horses were attached as his brother's, but that he supposed they were the Bronson horses, and had no information that his horse was attached till about six o'clock, when he directed the hostler to harness her. He and Stevens, the hostler, testified that, on being directed to harness his horse, the hostler told the plaintiff two of the horses were attached, and his horse might be one of them. That on going to the stable and seeing the horses attached, the plaintiff said one of them was his, and he must have her to go home to Lyman; that at the plaintiff's request the hostler went out and found the defendant, and told him Bernice R. Moore claimed one of the horses attached, and said he had owned it for two years, and wanted he should give it up; that the defendant told him to hold on to the horses he had put in his hands, and that he reported this to the plaintiff. The plaintiff testified that he then found his brother, Azariah W. Moore, and they went together to Mr. H. Bingham's office, and stated the case to him. The plaintiff, A. W. Moore, and Mr. Bingham, testified that by Mr. Bingham's advice, A. W. Moore went out to bring the defendant to the office; that A. W. Moore came to the office with the defendant; that Mr. Bingham, in the presence of A. W. Moore and the plaintiff, explained to the defendant the title of the plaintiff to the mare, and urged him to give up the plaintiff's mare and let him go home with her; that the defendant, in answer to this, said that he was ordered to make the attachment, was indemnified, and should not give up the horses he had attached, nor make any shift. There was evidence that after this, and towards nine o'clock in the evening, the plaintiff, by advice of Mr. Bingham, and with the consent of A. W. Moore, took the other Bronson horse and drove him home to Lyman. It appeared by evidence on the part of the plaintiff that both the Bronson horses remained in the

stable until one of them was taken by the plaintiff to go home with. There was no evidence except that above stated, to show that the defendant inquired to ascertain which two were the Bronson horses.

The defendant testified that he supposed he had attached the two Bronson horses; that he was not informed that the plaintiff made any claim to either of the horses attached, until, according to a previous arrangement made with Mr. Bingham, he went to acknowledge service of the writ in favor of A. W. Moore's mother, which he understood to have been made for his taking the two Bronson horses, when he was surprised to find there was another writ for the plaintiff; that he then understood for the first time that the plaintiff claimed to own one of the horses. The defendant's written acknowledgment of service was dated March 14, 1865, and Mr. Bingham testified that it was in fact made on that day.

The defendant rested his defence on two grounds:—

1. That there was a fraudulent contrivance between the plaintiff and his brother, Azariah W. Moore, to induce the defendant to attach the plaintiff's mare instead of one of the Bronson horses; that the defendant, by what was done in pursuance of this fraudulent contrivance, was deceived into the belief that the plaintiff's mare was one of the Bronson horses, and that, relying on the false representation and fraudulent conduct of the plaintiff, he attached the plaintiff's mare, believing her to be one of the Bronson horses.

2. That the plaintiff's mare was so mingled with the Bronson horses that he could not, by due diligence, ascertain which was the plaintiff's mare, and was not liable for taking her till the plaintiff should point her out.

At the commencement of his argument, the counsel for defendant read the following passage from *Taylor v. Jones*, 42 N. H. 36, and meant to be understood as requesting the court to charge the jury in accordance therewith:—

“In *Lewis v. Whittemore*, 5 N. H. 366, it was expressly held that an officer had a right to attach the goods of another, intermixed with those of the debtor, and hold them until they were identified by the owner, and a re-delivery demanded; that he could not be treated as a trespasser for doing what he had a right to do; that if, after identification and demand for re-delivery, he refused to give up the goods and proceeded to sell them, it would be a conversion for which trover would lie, but that trespass could not be maintained for the original taking.”

The court instructed the jury, that, in order to make out the defence on the first ground, it must appear that the plaintiff, by his declarations, or his conduct, induced the defendant to believe that the mare was one of the Bronson horses; that this must have been done by the plaintiff with the design to deceive and defraud, or in such circumstances that he was bound to suppose that it probably might deceive and defraud the defendant, or others, who were interested in the title to the mare; that the defendant must have been in fact deceived and misled into the

belief that the mare was one of the Bronson horses; and that he must have used due diligence to ascertain the fact; that if there was a conspiracy between A. W. Moore and the plaintiff, what was done by A. W. Moore in pursuance of the conspiracy would bind the plaintiff as much as if it had been done by himself.

On the second point, the court instructed the jury that, in case the plaintiff ordered the hostler to put the three horses in the stable, without any direction as to the manner in which they should be placed there, and the hostler put them together in the stable accidentally, and as matter of convenience, if the defendant, meaning to attach two of the three horses as the property of A. W. Moore, and knowing that one of them did not belong to A. W. Moore, undertook to select two of them as the horses of A. W. Moore, intending to hold them at all events, and finally, and not temporarily till he might get further information, and when informed that one of the horses belonged to the plaintiff, still insisted on holding the two which he had attached, he would be liable to the plaintiff in this action, provided there was no fraudulent design on the part of the plaintiff to procure his horse to be attached as the horse of A. W. Moore; but the question as to the plaintiff's negligence on the foregoing statement of facts, the court did not leave to the jury; and at the request of the defendant, the court further instructed the jury that it was a question for them to decide, whether defendant, when he went into the barn and selected the two horses that he would attach, meant to hold them at all events, and finally, and not temporarily, till he might get further information.

The plaintiff claimed exemplary damages. The court instructed the jury that, ordinarily, in trespass against an officer for taking the plaintiff's property on process against another party, the plaintiff would not be entitled to exemplary damages, but that in this case, if they found that the defendant rashly and heedlessly took the plaintiff's horse without taking due care to learn what the plaintiff's rights were, they might, if, looking to all the circumstances, they thought proper, give the plaintiff exemplary damages.

The defendant requested the court to instruct the jury that, in order to find exemplary damages, they ought to find that the defendant acted in bad faith, and knew that the horse belonged to the plaintiff. The court declined so to instruct the jury, but repeated the former instructions on this point.

The jury returned a verdict for the plaintiff. They found exemplary damages, and by consent returned separately \$115, for the value of the horse, and interest from the taking, and in addition \$25, for exemplary damages.

The defendant moved to set aside the verdict for error in the foregoing instructions and refusal to instruct.

C. W. & E. Rand, for defendant.

Binghams, for the plaintiff.

BELLOWS, J. If there was a fraudulent contrivance between the

plaintiff and his brother, A. W. Moore, to induce the officer to attach the plaintiff's mare, instead of one of the Bronson horses, by holding out that mare to be one of those horses, either by representation or acts, and the officer, relying upon such holding out, had attached the mare, and suffered the Bronson horse to escape, the plaintiff would be estopped to set up title to the mare in himself. *Drew v. Kimball*, 43 N. H. 282. To have this effect, however, the defendant must actually have been misled by the plaintiff's conduct, and induced thereby to change his position. If he was not so misled, but still believed that the mare belonged to the plaintiff, or had reason to think so, and with a reasonable use of means within his reach he might have ascertained the fact, he could not set up an estoppel. The truth is, the party setting up an estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth; and what is reasonable diligence is a question for the jury upon all the circumstances of the case. In some cases he might reasonably rely upon the acts or representations of the party to be estopped, without any inquiry whatever. In others, it would be gross negligence and want of good faith not to make use of the means at hand to ascertain the truth.

In *Odlin v. Gove*, 41 N. H. 479, which was a writ of entry to recover a strip of land fifteen inches wide on the street on which defendant had placed the walls of a building, and defendant attempted to set up an estoppel, upon the ground that plaintiff stood by and saw the building erected without objection, it was held, that if, under all the circumstances, including the plaintiff's silence, the defendant unreasonably failed to use the means of ascertaining the boundaries which were within his reach, he had no cause to complain; because, in cases of this sort, he is to be charged with such knowledge as reasonable diligence would have given him; and it has been accordingly held that a prior mortgagee of real estate who stands by and witnesses a second mortgage without objection, will not be postponed thereby, if his mortgage was duly registered; see *Odlin v. Gove*, before cited, p. 477, and cases. Such is also the doctrine of *Carter v. Champion*, 8 Conn. 554; *Begalow et ux. v. Topliff et al.*, 25 Vt. 273; and *Brinkerhoff v. Lansing*, 4 Johns. Ch. Rep. 63. In the latter case it is said by *Chancellor Kent* that it would require direct proof of intentional deception and fraud on the part of Lansing, before he could be postponed to a subsequent purchaser, his (Lansing's) mortgage, being duly registered. He does not, to be sure, say that if such intentional fraud had been shown, Lansing's mortgage would be postponed; nor did that question arise, though it may fairly be inferred that such was the learned Chancellor's opinion.

It may, however, be difficult to distinguish between the case as it really existed, and what it would have been had intentional fraud been shown. In that case Lansing's mortgagor leased part of the mortgaged lands for sixteen years, and Lansing was a subscribing witness to the execution of the lease, with a knowledge of its contents, and without

any objection; and it was held, that, as the mortgage was registered, the lessee was charged with constructive notice of it, and there was no estoppel. If the mortgage had not been registered, Lansing would have been estopped; and upon the ground that his conduct amounted to an affirmation that he had no title inconsistent with that which the lessor was then conveying; and it would, therefore, be a fraud in him to attempt afterwards to set up his mortgage. Whether at the time of executing the lease he intended at a subsequent period to assert his mortgage title against the lessee, or not, would be entirely immaterial in respect to the estoppel, for the fraud would consist in denying what he had before affirmed by his conduct to be true, namely, that the lessor had a right to make a lease of the land, by which the lessee had been misled. As the mortgage in this instance was recorded, it might be urged that Lansing may have supposed that the lessee had knowledge of it, and therefore there would be more propriety in charging him with notice, than if Lansing had distinctly affirmed that he held no such mortgage, and something like this may have been the view of Chancellor Kent.

However this may be, we find no case that goes the length of enabling a party to set up an estoppel of this sort, when with reasonable attention to the means of information at his hand he would not have been misled. In the case before us, the evidence of fraud on the part of the plaintiff was not very explicit, and the circumstances stated are equivocal; and it was proper that the jury should be instructed that the defendant was bound to the exercise of reasonable diligence under the circumstances, in the use of means at his hands to ascertain the truth about the horses. If he rashly decided upon the matter, with a careless indifference to the means of information, reasonably within his reach, he would not be entitled to complain. 2 Kent's Com. 485. Such, as we understand it, was the charge of the judge, in substance. What would be due diligence, was for the jury.

In regard to the intermingling of the horses, no instructions were given, although that point was argued by defendant's counsel, and an authority cited, meaning to be understood as requesting the court to charge the jury in accordance with that authority. We think, however, that the instructions should be asked for in a way to leave it open to no doubt; and that if no instructions were given upon a particular subject, and the attention of the judge not called to it at the close of or during the charge, ordinarily it would be understood as waived.

If the horses were accidentally placed as they were in the stable, without fraud on the part of the plaintiff, and the defendant selected two as the horses of the debtor, and attached them, intending to hold them at all events, and not temporarily till he could get further information, and he insisted upon holding them after notice that one of them belonged to the plaintiff, he would be liable in trespass, if the horse did belong to the plaintiff, and he was not estopped to claim it by some fraudulent act on his part. Had the plaintiff's and the debtor's horses been inter-

mingled so that the officer, using due diligence, could not distinguish them, he might, perhaps, take all and hold them until there was an opportunity to identify them; but his right to take possession and hold the plaintiff's horse would be limited by the occasion for it, and if, instead of taking it for the lawful purpose, he took it with the purpose of holding it at all events, he would be liable in trespass. The instructions on that point were, therefore, correct.

But it is urged that the two horses were so placed by the fault and negligence of the plaintiff, and that as the defendant was thereby misled, the taking was not unlawful. Had they been accidentally placed in adjoining stalls, it is quite clear that this would give the defendant no right to attach the plaintiff's horse as the property of the debtor, any more than to sell it as such. He might have taken and detained the three horses a reasonable time till he could make inquiries and ascertain which belonged to A. W. Moore; but if, instead of that, upon the knowledge he already had, he selected these two, and attached them with a determination to hold them at all events, he would be liable to the plaintiff in this form of action, and could not justify the taking upon the ground of mistake, any more than if he had taken the plaintiff's horse alone. He would have power to detain the whole until he could make inquiry; but if he did not take and detain them for that purpose, he had no right to take the plaintiff's horse at all. This would be illustrated by the supposition that he took the plaintiff's horse upon the ground that his title was derived from the debtor, and that the sale was fraudulent as to the creditor.

It is clear, then, we think, that, in case the horses were so placed by accident, the defendant had no right to attach the plaintiff's horse. This is clearly the doctrine of *Kingsbury v. Pond*, 3 N. H. 513; and it is not, in fact, contested by defendant's counsel; but they urge that if the horses were so placed by the plaintiff's fault, the law is otherwise; and this position makes it necessary to look more closely to the law which governs the rights of the parties where there is a confusion of goods. If the goods are accidentally mingled, and they are of such character that they can be distinguished and separated, there will be no change of property, but each is entitled to his own; if they are of such a nature that they cannot be identified and separated, as corn, oil, wine, hay, &c., then each is entitled to his aliquot part of the entire quantity.

If goods are mixed by the negligence or inadvertence of one of two owners, and they are of such nature that they *can* be identified and separated, the property of each remains as before; and the law must be the same where the mixture is by the wilful act of one party, unless the purpose was fraudulent. As if A mixes some of B's cattle, sheep, horses, wood, or furniture with his own, erroneously supposing that they belong to him. *Ryder v. Hathaway*, 21 Pick. 298, 305; Story on Bailments, sec. 40. To hold otherwise would be clearly unjust, and is not sanctioned by the authorities. The true rule seems to be this,

that if one man so confounds the goods of another with his own, that they cannot be distinguished, he must himself bear all the inconveniences of the confusion, and it is for him to distinguish his own property or lose it. This doctrine was applied to the case of a trustee having charge of the property of another. *Hart v. Ten Eyck*, 2 Johns. Ch. 107.

So, also, is *Lapton v. White*, 15 Ves. 432; and this doctrine is recognized by Judge Story in his work on Bailments, sec. 40; and so is 2 Kent's Com., 365. In *Pratt v. Bryant et al.*, 20 Vt. 333, it was held that a person who had intermingled his wood with that of another did not lose it thereby, although it could not be distinguished, and the intermingling was intentional, the person having erroneously supposed the other had bargained for it.

If the mixing is wilful and without the consent of the other, and the articles are of such a nature that they cannot be distinguished and separated, the civil law gives the whole to the one not consenting to the mixture, but allows a satisfaction to the other; but the common law, as it is laid down, gives the whole to the one not consenting, but without compensation to the other. Story on Bailments, sec. 40; 2 Kent's Com., sec. 364; and so it is distinctly held in *Willard v. Rice*, 11 Met. 493; *Beach v. Schmuttz*, 20 Ill. 185; 19 U. S. Dig. 127, sec. 2. This, however, is to be carried no further than necessity requires, and it seems to be understood by these same writers, that if the articles so mingled are of the same kind and of equal value, the injured party may take his given quantity, and not the whole. In many cases this would clearly be just, but however the law may be on this point, we think it quite clear, on the authorities, that a party does not lose his property in goods by a careless and negligent intermixture of them with the goods of another, if they can still be distinguished and separated.

It is clear, of course, that by mingling these horses, even if done negligently, the debtor acquired no title to the plaintiff's horse, and the creditor had no right to attach him for A. W. Moore's debt. Indeed, the law which affects the title in case of the confusion of goods, does not apply to cattle and horses, and things of a similar kind, that may readily be identified. It is so distinctly determined in respect to cattle, in *Holbrook v. Hyde*, 1 Vt. 286; and it is quite obvious, we think, that it must be so, for the very foundation of the rule is here wanting, and that is, the confusion of the goods, or the inability to identify them. See *Treat v. Barber*, 7 Conn. 274.

The right of a sheriff having a writ against one of the persons whose goods are together, but distinguishable, grows out of the necessity of the case. He has no right to attach the other's goods, but is bound to attach the debtor's. If he is unable to distinguish them, he may detain the whole reasonably, for the purpose of making inquiry; but his right in this direction extends no farther than the necessity of the case demands. If, on reasonable inquiry, he will be enabled to distinguish the goods, he is bound to make it, and could not otherwise justify the detention of another's goods. If the other owner, on request by the offi-

cer to point out his goods, refuse to do it, the officer might then take them and detain them until distinguished and demanded. Such is the doctrine of *Albee v. Webster*, 16 N. H. 362.

The mere fact that a party has been negligent or careless in allowing the goods to be mixed, would not exonerate the officer from the duty of making inquiry. If the party, by his acts or words, wilfully affirmed the property to be the debtor's, and so misled the sheriff, he might be estopped to claim the goods afterwards; but the mere negligence of the plaintiff in allowing the horses to be placed in adjoining stalls, could confer no right on the officer to attach and hold the plaintiff's horse for A. W. Moore's debt, or to do anything more than to detain it for reasonable inquiry.

If, then, he took the plaintiff's horse, not to detain it to make inquiry, but because he understood he was directed to attach it, and he did so, intending to hold it at all events, he did it at his peril, and would be liable to plaintiff in trespass; and there was evidence tending to prove that he so intended to hold it, there being testimony that plaintiff's counsel explained to the defendant the plaintiff's title, and requested him to give up the horse, but that the defendant declined to do so, saying he was ordered to make the attachment, was indemnified, and should make no shift.

In the case of *Gilman et al. v. Hill*, 36 N. H. 311, which was trover for a lot of sheep's pelts, attached on a writ against one Sanborn, it appeared that part of them belonged to the plaintiffs, and the rest had been mingled with the plaintiffs' without their knowledge, by the debtor. Upon the attachment, defendant was notified that the pelts belonged to plaintiffs, but he removed them without inquiry as to the plaintiffs' rights, and after the suit was brought sold them; the court held this was evidence of conversion; and it must have been upon the ground that defendant took them intending to attach and hold them, and not for the purpose of inquiry.

Where a debtor drove his sheep to plaintiff's pasture, and mixed them with plaintiff's without his consent, and the sheriff took the whole, the court held that he was liable in trespass to the plaintiff. *Kingsbury v. Pond*, 3 N. H. 513. The courts say that if the sheriff had requested the plaintiff to point out his sheep, and he had refused to do so, it might have altered the case. We think, however, that the result would have been the same if the plaintiff had consented to take the debtor's sheep to pasture, but without any purpose to conceal them from the officer.

When corn of the plaintiff's was intermixed with that of the debtor, without the consent of either, it was decided that an officer might take and hold the whole until the plaintiff identified his corn and demanded a delivery. *Lewis v. Whittemore*, 5 N. H. 366. In that case the intermixture must be regarded as accidental, and as the corn could not be distinguished, the owners would be tenants in common of their several shares; Story on Bail. sec. 40; and a sheriff might take and sell the debtor's interest.

In *Walcott v. Keith*, 22 N. H. 211, it is said that to justify an attachment of the goods of another, on the ground of their being mixed with those of the debtor, defendant must show that they were intermixed in such manner that he could not, upon due inquiry, distinguish them from the others; and so is *Wilson v. Lane*, 33 N. H. 476, holding, per *Bell, J.*, that it is the duty of the officer to make reasonable inquiry to ascertain what goods are liable to be attached; but that it was enough if he applied to plaintiff to point out his goods, and he refused to do it.

The case of *Robinson v. Holt*, 39 N. H. 557, goes upon the ground that the hay sued for was so intermixed with that of the debtor that it could not be distinguished, and that it was intermixed by the fault or negligence of the debtor, of such character that, as between the plaintiff and the officer, it all became the property of the debtor. If the facts are all reported, such a conclusion might be questionable, perhaps, but however this may be, the case differs widely from the one before us, because here the property was easily distinguished.

Taylor v. Jones, 42 N. H. 25, was trespass, and it was held that as the goods were mixed with those of the debtor, being marked as the debtor's without objection by the plaintiff, and in consequence of plaintiff's absence the goods could not be distinguished, the defendant was justified in taking the whole in the first instance, and trespass could not be maintained for the taking, unless by subsequent acts defendant became a trespasser *ab initio*.

In *Shumway v. Rutter*, 8 Pick. 443, which was trover for some furniture attached by the defendant as the property of J. S., it appeared that plaintiff's furniture was mixed with the debtor's, and in his possession, and so mixed that neither the plaintiff nor the debtor could distinguish it; that at the time of the attachment, J. S. told the officer it was all his, but soon after the plaintiff claimed a part of it, and defendant desired him to select what he claimed, but the plaintiff, although he produced the bill of sale of what he claimed, and showed it to the defendant, said he could not select the articles, neither could the debtor select them. The officer, therefore, retained and sold the whole.

The court decided that defendant was not a trespasser for taking the plaintiff's goods which he had allowed to be so intermixed, but that the sale of the whole was a conversion, upon the ground that he ought to have selected from the whole quantity enough to correspond with the bill of sale, and might, if he chose, retain the most valuable. The court also says that if the owner of a part can distinguish and point out what belongs to him, the officer would be a trespasser if he should take it.

In that case, the goods were so intermixed they could not be distinguished, and it is therefore clear that the officer would not be a trespasser for taking possession of the whole. In principle, the case is much like that of *Lewis v. Whittemore*, where plaintiff and the debtor were tenants in common of the whole mass.

The case of *Ryder v. Hathaway*, 21 Pick. 306, was trespass for wood, and the court held that if the plaintiff mixed wood from his own lot with wood from the defendant's lot adjoining, supposing it all to be his, and the defendant, knowing that part of it was the plaintiff's, took the whole, he would be a trespasser. This would certainly be so, if defendant knew what part belonged to plaintiff, and could distinguish it; otherwise, if so intermixed that it could not be separated, they would, in such case, be tenants in common.

Smith v. Sanborn, 6 Gray, 134, is a case where a debtor sold his stock of furniture to the plaintiff for \$2,000, and the plaintiff took possession of the store and furniture, and commenced retailing it, making new purchases from time to time, to the amount of \$200, which was added to the original stock. The defendant attached and sold the whole as the debtor's property. The court decided that the defendant had no right to attach the whole stock in plaintiff's possession, without first endeavoring, by the exercise of a proper degree of caution and diligence, to ascertain whether any, and if any, what part of it, was honestly owned by the plaintiff, and that it did not necessarily devolve upon the plaintiff, and without request, to give information about the state of the title; that it was no more than a reasonable precaution on the part of the officer to make some inquiry of the plaintiff in relation to the stock, before the service of the writ.

In *Treat v. Barber*, 7 Conn. 274, it was held that the confusion of goods is the mixture of substances that make one undistinguishable mass, such as liquids, corn, hay, &c., citing Wood's Just. 158, and 2 Bl. Com. 404. But that placing crockery, china, or other articles resembling each other on the same shelf, is not a confusion of them, within the meaning of the law.

The defendant introduced evidence tending to show that plaintiff had intermingled her goods with her father's goods, so that she alone could distinguish them, and that, wishing to attach the father's goods, he requested her to select such as belonged to her, but she refused to do it, claiming the whole as her own, part of them by *bona fide* purchase of her father. The court held that, as she claimed the whole, her refusal to select was no violation of her duty, and the defendant took them at his peril; and the court held that there was no error in refusing to instruct the jury that if she refused so to select, the defendants were not trespassers for taking the whole; but the court held that if the plaintiff had fraudulently intermingled the goods so as to be inseparable by the officer, to prevent an attachment of those that were her father's, the officer might justify taking the whole.

From this review of the cases, it is quite apparent that there is some confusion in the authorities upon the subject of confusion of goods; and so far as the rights of an officer about to make an attachment is concerned, it arises from not properly discriminating between those things which *can*, and those which *cannot*, be distinguished, when mingled together.

As to those which can be distinguished, the doctrine of confusion of goods does not apply, and although they may be wrongfully mingled by one owner, without the consent of the other, the title of neither is affected; and consequently the goods of one cannot be taken for the debts of the other. If, however, they are fraudulently intermingled to mislead and embarrass the officer, and prevent an attachment, he would be justified in taking and holding the whole for the purpose of selecting those of the debtor. As if in a case like that of *Kingsbury v. Pond*, 3 N. H. 513, the plaintiff had consented to the mixing of the debtor's sheep with his, so as to conceal them from the officer.

To justify the attachment of the goods of another where they are intermingled without any fraudulent design, and they are distinguishable, the officer must show that they were mixed in such manner that upon due inquiry he could not distinguish those of the debtor from the others. *Walcott v. Keith*, 22 N. H. 211; *Wilson v. Lane*, 33 N. H. 476; *Smith v. Sanborn*, 6 Gray, 134; *Treat v. Barber*, 7 Conn. 274; *Kingsbury v. Pond*, 3 N. H. 511.

The language of some of the cases would seem to imply that, if the goods were so intermingled that the officer could not select those of the debtor, he might, without notice to the other party, attach and hold the whole, until those of the other party were designated and claimed by him. Upon such views the officer might have taken all the horses in the stable when he found these, and held them until identified by their owners.

Such a doctrine, we think, cannot be supported. It is not necessary to enable the sheriff properly to execute his precept. If, as in this case, he wishes to attach two out of many horses, in the same stable, he is bound to make reasonable efforts and inquiries, in order to ascertain what horses belong to the debtor. If the various owners and the debtor are at hand, he would ordinarily inquire of them, although to guard against interference he might, while making such inquiries, detain in the stable such horses as he had reason to suppose might prove to be those he sought. This power, we think, is all that is necessary, and is the view that best accords with the adjudged cases. Nor do we think that the rule is otherwise where the goods are carelessly or negligently intermingled, but without fraud.

In the case of goods that cannot be distinguished, the fault of one party who causes the intermixture may affect the rights of both; but in a case like this it could not relieve the officer from the duty of making reasonable inquiry to ascertain what goods belong to the person other than the debtor, for such fault does not affect the title; *Bryant v. Weare*, 30 Me. 299; *Gilman v. Hill*, 36 N. H. 323; 2 Kent's Com. 364; and unless it was intended to mislead the officer, in which case it would be a fraud, it cannot relieve him of the duty to make reasonable inquiries.

What would be reasonable inquiry, must depend upon the circumstances of the particular case, and cannot be fixed by any positive rule;

Wilson v. Lane, 33 N. H. 476 ; and it is urged by defendant that among the considerations that ought to bear on the question of reasonable inquiry would be the plaintiff's own negligence, and that there was error in not submitting that to the jury.

There is, however, no objection to the instructions as to reasonable inquiry by the defendant ; but the question of negligence in the plaintiff, not submitted to the jury, and for which exception is taken, was, as we understand it, whether, by the plaintiff's fault in mixing the horses, the defendant was not authorized to attach the two he did take, as he would be, had there been fraud. Besides, from the case as reported, we are at a loss to perceive any evidence tending to prove negligence on the part of the plaintiff in allowing these horses to be placed in adjoining stalls.

As already suggested, we are of the opinion that if the defendant attached the plaintiff's horse with the purpose of holding him at all events, and not temporarily, to make inquiries, he is liable in trespass, and that the instructions on that point are correct.

Under the circumstances, it is clear that if there was no fraud in the plaintiff, the defendant had no right to attach the horse and hold him for A. W. Moore's debt. At the most, he had only the right to detain him a reasonable time for inquiry, and if he took him for the other purpose he is a trespasser.

It is proper to say that we have been led into this extended examination of authorities by the able and searching arguments at the bar.

As to exemplary damages, the instructions were, that the jury might give such, if they found that the defendant rashly and heedlessly took the plaintiff's horse without taking due care to learn what the plaintiff's rights were.

Where the act complained of is malicious or wanton, or is characterized by gross negligence in the defendant, exemplary damages may be awarded, according to the decisions in this State ; but we are not aware that they have gone so far as the rule in this case. In *Whipple v. Walpole*, 10 N. H. 130, the rule laid down was, that exemplary damages might be awarded where there was gross negligence ; and the rule laid down by Mr. Sedgwick, in his valuable work on Damages, p. 39, is, that exemplary damages may be awarded whenever the elements of fraud, malice, gross negligence, and oppression mingle in the controversy. This rule, however, is questioned in 2 Greenl. Ev. sec. 253, and note, where the authorities are extensively reviewed.

Upon the whole, we are not disposed to extend the rule which allows exemplary damages to cases where the injurious acts are merely rash and heedless.

There must, therefore, be judgment on the verdict for \$115, the exemplary damages being excluded, on the plaintiff's remitting the \$25 for exemplary damages.

SMITH *v.* MORRILL.

SUPREME COURT OF MAINE. 1869.

[*Reported 56 Me. 566.*]

TROVER, for a quantity of logs alleged to have been converted by the defendants in 1860. The writ is dated November 6, 1863.

There was evidence tending to show that, in the winter of 1858-9, the plaintiff lumbered on his township, called Holeb, adjoining which was the township called Forsyth, owned by the defendants; that the line between the townships was well marked and known to the plaintiff and his servants; that, during the operation, the plaintiff's servants, having cut all his timber accessible without removal of camps, breaking new roads, &c., intentionally and, without the knowledge or consent of the defendants, went upon the township of Forsyth, finished their operation thereon, hauled the logs to the same landing, and marked them with the same mark; that subsequently, after the plaintiff had learned all the facts of the trespass, together with the quantity of logs cut on Forsyth, from the return of his scaler, he caused the whole quantity to be put into the river, driven to Gardiner, caught, boomed, and rafted for sale, thus intermingling the logs in such a manner as to render it impracticable to separate those cut on Forsyth from those cut on Holeb; that the defendants, having no means of determining the quantity of logs cut on their land, seized a quantity which they deemed sufficient to cover their loss; that the plaintiff never, until the time of trial, informed the defendants of the quantity cut on Forsyth, although he had the means of doing so as early as April, 1859; that the defendants requested such information of the plaintiff, but did not receive it.

The court were to render such judgment as the legal rights of the parties required, upon the legal evidence reported.

S. Heath, for the plaintiff.

A. Libbey, for the defendants.

APPLETON, C. J. The plaintiff and defendants were owners of adjacent townships. The plaintiff trespassed upon the defendant's land, cutting thereon a considerable quantity of logs which were marked similarly to those cut on his own land, and were run with them to Gardiner.

The defendants having ascertained that the plaintiff had trespassed upon their land, seized a portion of the logs thus commingled, as cut on their premises, and more, as the plaintiff alleges, than were so cut. This action is brought to recover such excess.

As the plaintiff was a trespasser, the defendants had a legal right

to seize the logs cut on their land wherever they could find them. Their title thereto was as perfect as if cut by themselves.

It was the fault of the plaintiff that they were so mingled by him or his agents with his logs so that they could not be distinguished from them. The plaintiff must suffer from the consequences of this confusion.

By the common law, where an intermixture of goods is fraudulently made without the knowledge of the owner, and they cannot be separated and identified, the latter is entitled to the whole property without making satisfaction to the former for his loss. In *Bryant v. Ware*, 30 Maine, 295, where lumber was cut upon two tracts of adjoining owners by a trespasser, and the whole was so intermixed by him, or persons claiming under him, that the part belonging to each owner could not be distinguished, and the owner of one tract seized and took possession of the whole, — it was held, that one claiming under the wrongdoer could not maintain an action of trespass for such taking.

But the defendants seized only a portion of the logs cut by the plaintiff. Waiving, therefore, their right to all, if they had such right in the present case, the question arises whether they are liable as wrongdoers if they seize more logs than, as it is ultimately shown, were cut on their land.

It has been repeatedly held that an officer has a right to attach the goods of another, negligently or fraudulently intermixed with those of the debtor, and hold them until they were identified by the owner and re-delivery demanded; that he could not be treated as a trespasser for doing what he had a right to do; and that, if after identification and demand for re-delivery he refused to give up the goods, he would be liable for their value in trover, but that trespass could not be maintained for the original taking. *Bond v. Ward*, 7 Mass. 127; *Shumway v. Rutter*, 8 Pick. 443; *Willard v. Rice*, 11 Met. 493; *Levis v. Whittemore*, 5 N. H. 366; *Taylor v. Jones*, 42 N. H. 36. So here the defendants had a right to seize their own logs. It was by the wrongdoing of the plaintiff that they were cut, marked, and intermingled with his own. The plaintiff knew the number and kind of logs cut on the defendants' land. The defendants were ignorant of all this, and were never informed thereof by the plaintiff, as they testify, till the time of the trial. They seized what they regarded as the number of logs cut on their land. If they seized logs not so cut, the plaintiff should have notified them of such fact and pointed out the specific logs he claimed, if it was in his power so to do. If they took more than they had a right to take, he should have advised them of the exact amount of his own trespass. He cannot claim that they are wrongdoers when they rightfully seized their own logs, wrongfully commingled by him with those cut on his land. This they clearly had a right to do. *Bryant v. Ware*, 30 Maine, 295. The party wrongfully intermingling his goods with another's cannot reclaim them without first pointing them out. *Seavy v. Dearborn*, 19 N. H. 351; *Gilman v. Sanborn*, 36 N. H. 311.

So too if the defendants, acting in good faith, took more logs than the plaintiff had cut on their land, having a right to take all logs cut by trespassers, they would not be liable as wrongdoers until the plaintiff had pointed out the property belonging to him, and demanded it of them, which the defendants say was never done. It must be remembered that, if the plaintiff suffers, it is in consequence of his own wrongful acts. The defendants were acting for the protection of their acknowledged rights.

Judgment for defendants.

KENT, WALTON, DANFORTH and TAPLEY, JJ., concurred.

NOTE. — The acquisition by a transferee of a chattel or obligation of a right greater than that of the transferrer is dealt with later in this course under the head of Priority, and also in a separate course on Bills and Notes.

CHAPTER III.

TRANSFER OF RIGHTS IN PERSONAL PROPERTY.

SECTION I.

SATISFACTION OF JUDGMENT.

NOTE. — Other modes in which personal property is transferred without the consent of the person whose property is transferred are Forfeiture, Execution, Bankruptcy, and Marriage; as to the transfer of personal property on intestacy, see note to next section.

BRINSMEAD *v.* HARRISON.

COMMON PLEAS. 1871.

[*Reported L. R. 6 C. P. 584, 587-590.*]

JUNE 23. The judgment of the Court¹ (Willes and Montague Smith, JJ.) was delivered by

WILLES, J. We decided yesterday that, according to the law laid down by Lord Wensleydale in *King v. Hoare*, 13 M. & W. 494, a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There remains, however, an entirely different question, which arises upon the new assignment, and which is, whether a judgment in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of; because, if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem*: it is, to recover *prima facie* the value of the goods. It may be that the goods have been returned, and the judgment given for nominal damages only. To say in such a case that the mere obtaining judgment vests the property in the defendant would be an absurdity. It is clear,

¹ The question which it is here desired to present is sufficiently given in the opinion.

therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the defendant is, by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenk. 4th Cent. Case 88. Any other construction would seem to be absurd.

This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of Jervis, C. J., in *Buckland v. Johnson*, 15 C. B. 145, 157; 23 L. J. (C. P.) 204, in which that very learned and accurate judge did lay it down, upon the authority of a case in Strange, *Adams v. Broughton*, 2 Str. 1078, that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in Strange, is far from satisfactory. It is also reported in Andrews, p. 18, where the case is thus stated: "An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. And another action was now brought against Broughton by the same plaintiff, and for the same goods for which the first action was brought." An application appears to have been made to hold the defendant in the second action to special bail; and there was sufficient reason why special bail should not be allowed, because the judgment against Mason had the effect of preventing a second action being maintained against Broughton. The loose expressions of the Court, — that "the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world," — were quite unnecessary. The same may be said as to the *dictum* of Jervis, C. J., in *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. (C. P.) 204. That was an action against a person who jointly with his son had sold goods the proceeds of which the defendant had received. After the sale, the plaintiff (who claimed the goods), in ignorance that the father had received the money, brought an action against the son for money had and received and for damages for the conversion, and recovered a verdict for 100*l.* against him; but, not succeeding in obtaining satisfaction, in consequence of the son's insolvency, he brought a second action against the father for the same causes. It is clear that the proceedings in the first action amounted to an election to treat the matter as a wrong, and precluded the plaintiff from bringing a fresh action for money had and received. It was equally clear that the judgment in the first action was a merger of the remedy against either the father or the son; and, when the action was brought against the father, the answer was obvious. It was wholly unnecessary, therefore, to decide, as suggested by Jervis, C. J., that the recovery in the first action changed the property; and

what was said was properly treated by the reporter as amounting only to a "semble."

On the other hand, there is a series of decisions showing that a mere recovery, without satisfaction, has not the effect of changing the property. In *Jenkins*, 4th Cent. Case 88, it is said: "A, in trespass against B for taking a horse, recovers damages; by this recovery, *and execution done thereon*, the property of the horse is vested in B. *So'utio pretii emptionis loco habetur.*" That doctrine is acted upon in *Cooper v. Shepherd*, 3 C. B. 266; and, though the marginal note treats the *recovery* as changing the property, — a doctrine thrown out also in the note to *Barnett v. Branduo*, 6 M. & G. at p. 640, — the plea shows that the damages were satisfied; and the judgment of Tindal, C. J., shows that the property vests in the defendant only "on payment of the damages." To the same effect are the observations of Holroyd, J., in *Morris v. Robinson*, 3 B. & C. 196, at p. 206. "Where in trover," he says, "the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover." To the same effect is the note in 2 Wms. Saund. 47 *c c*, n. (z). It may also be proper to refer to the note to the case of *Holmes v. Wilson*, 10 Ad. & E. at p. 511, in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgment for the plaintiff upon the new assignment.

In order, however, to act upon our judgment of yesterday and to-day, it must be recollected that the present defendant will not be liable except in respect of a wrong other than that which was the subject of the action against the other wrong-doer.

Another point arises upon the new assignment. The plaintiff may have acquired the property in the goods after the recovery of the judgment in the former action. As, however, that point was not argued, we prefer resting our judgment upon the main point.

The judgment therefore will be for the defendant upon the sixth plea, and for the plaintiff upon the new assignment.

Judgment accordingly.

Powell, Q. C. (*Joyce* with him), for the defendant.

Kelly, for the plaintiff.¹

¹ See s. c. L. R. 7 C. P. 547. Cf. also *Osterhout v. Roberts*, 8 Cow. 43; *Rogers v. Moore*, Rice, 60, is *contra*.

SMITH v. SMITH.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1872.

[Reported 51 N. H. 571.]

LADD, J.¹ The agreed statement of facts upon which the former opinion in this case was rendered (50 N. H. 212), showed that *after* this plaintiff had paid the judgment recovered against him for the original taking of the posts, &c., this defendant entered upon the plaintiff's premises and carried them away again. The defendant now offers to prove that his taking was *before* that judgment was paid, though after it was rendered; and we are called on to decide that the plaintiff cannot recover the value of the property which he thus paid for in paying that judgment, because it was taken from him by the defendant before instead of after the payment.

The defendant's position, in a word, is this: he had changed his security for the conversion of his property from an unliquidated claim for damages for a tort into a judgment for its value. Without releasing or surrendering that judgment, he broke and entered the plaintiff's close, and took away the property for which he held the judgment; and having thus secured the property, he enforced payment for its value by collecting the judgment. He now claims that he is not liable for its value in this action, because the property did not pass to the defendant until the judgment was paid, that is, after his taking.

If there were no other way of meeting this position, it would doubtless furnish a strong argument in favor of the former doctrine, that it is the judgment and not the satisfaction which passes the property. *Adams v. Broughton*, 2 Stra. 1078; and see cases collected in *Buckland v. Johnson*, 15 C. B. 145. Such is not the law, however, in this State — *Hyde v. Noble*, 13 N. H. 494 — and probably not now in England; *Brinsmead v. Harrison*, Law Rep. 6 C. P. 584; s. c. Law Rep. 7 C. P. 547; — and the aid of no such doctrine need be invoked.

In the former opinion it was said that a satisfaction of the judgment by this plaintiff passed the title of the property to him to take effect by relation from the time of the conversion.

That remark was not strictly called for as the case then stood; but we have no doubt it was correct, and it fully meets the case as now presented. 2 Par. Bills and Notes, 436; 1 Hilliard on Torts, 51; *Buckland v. Johnson*, *sup.*; *Hepburn v. Sewell*, 5 Har. & Johns. (Md.) 211. In the latter case the point was directly raised and distinctly decided by the court. The remarks of Dorsey, J., in delivering the judgment of the court, are so much in point that I quote a portion of

¹ The case is sufficiently stated in the opinion.

them. He says, — “It must be borne in mind that the plaintiff, in an action of trover, compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser, or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant’s responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant as a purchaser must therefore be considered as coeval with the period of conversion, and this right being consummated by the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement.”

This view disposes of the defendant’s case; for if, upon payment of the judgment, the property in the posts, &c., passed absolutely to the plaintiff, and his title thereupon took effect by relation from the date of the conversion, he is clearly entitled to recover their value in the present suit.

We do not undertake to say that there may not be cases where this doctrine would not apply. All we decide is, that it does apply in a case like the present.¹

SECTION II.

GIFTS OF CHATTELS.

NOTE. — The passing of personal property on death, either testate or intestate, is dealt with later under the title of Wills and Administration. The important subjects of Sales and Mortgages are treated in separate courses.

IRONS v. SMALLPIECE.

KING’S BENCH. 1819.

[Reported 3 B. & Ald. 551.]

TROVER for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff’s father, and the plaintiff claimed the colts, under a verbal gift made to him by the testator twelve months before his death. The colts, however, continued to remain in possession of the father until his death. It appeared, further, that about six months before the father’s death, the son having been to a neighboring market for the purpose of purchasing hay for the colts,

¹ See *Fox v. Northern Liberties*, 3 W. & S. 103. Cf. also *Barb v. Fish*, 8 Blackf. 481; *Lovejoy v. Murray*, 3 Wall. 1. “If one declares in replevin for cattle with an *adhuc detinet*, and defendant has judgment against him for damages, by payment thereof the property of the distress shall be vested in him.” Per HOLT, C. J., in *More v. Watts*, 12 Mod. 424, 428.

and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish for the colts any hay they might want at a stipulated price, to be paid by the son. None, however, was furnished to them till within three or four days before the testator's death. Upon these facts, Abbott, C. J., was of opinion, that the possession of the colts never having been delivered to the plaintiff, the property therein had not vested in him by the gift; but that it continued in the testator at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff was therefore nonsuited.

Gurney now moved to set aside this nonsuit. By the gift, the property of the colts passed to the son without any actual delivery. In *Wortes v. Clifton*, Roll. Rep. 61, it is laid down by Coke, C. J., that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognized in *Shepherd's Touchstone*, tit. Gift, 226. Here, too, from the time of the contract by the father to furnish hay for the colts at the son's expense, the father became a mere bailee, and his possession was the possession of the son; and an action might now be maintained by the defendant, in her character of executrix, upon that contract, for the price of the hay actually provided.

ABBOTT, C. J. I am of opinion, that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. Here the gift is merely verbal, and differs from a *donatio mortis causa* only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now, it is a well-established rule of law, that a *donatio mortis causa* does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn v. Markham*, 2 Marsh. 532, where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift; and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I cannot think that that tardy supply can be referred to the contract which was made so many months before.

HOLROYD, J. I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession: here there has been no change of possession. If, indeed,

it could be made out that the son was chargeable for the hay provided for the colts, then the possession of the father might be considered as the possession of the son. Here, however, no hay is delivered during a long interval from the time of the contract, until within a few days of the father's death; and I cannot think that the hay so delivered is to be considered as delivered in execution of that contract made so long before, and consequently the son is not chargeable for the price of it.

BEST, J. concurred.

ABBOTT, C. J. The *dictum* of Lord Coke in the case cited must be understood to apply to a deed of gift; for a party cannot avoid his own voluntary deed, although he may his own voluntary promise.

*Rule refused.*¹

¹ "A gift of anything without a consideration, is good; but it is revocable before the delivery to the donee of the thing given. *Donatio perfectur possessione accipientis.* This is one of the rules of law." Jenk. Cent. 109.

"This reasoning I have gone upon is agreeable to Jenk. Cent. 109, *case 9*, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation *mortis causa*; for if to donation *inter vivos*, I doubt he went too far." Per LORD HARDWICKE, C., in *Ward v. Turner*, 2 Ves. Sen. 431, 442.

"In M. 7 E. 4, fo. 20, pl. 21, it is however said, '*Nota*, that it was held by *Choke* (Chief Justice of C. P.), and others of the justices, that if a man make a deed of gift of his goods to me, that is good and effectual without delivering the deed to me, until I disagree to the gift; and that should be (coivent estre) in a court of record,' &c. *Quære*, whether the resolution of the judges may not have been confined to the first proposition, the second, and more disputable, proposition, printed in italics, being added by the reporter.

"With respect to gifts of chattels *inter vivos*, the rule appears to be this: Gifts by parol, *i. e.* gifts made verbally, or in writing without deed, (as to which, see 2 Roll. Abr. 62; 14 Vin. Abr. 123), are incomplete, and are revocable by the donor, until acceptance, that is, until the donee has made some statement, or done some act, testifying his acquiescence in the gift; but gifts by deed are complete, and irrevocable by the donor, upon the execution of the deed, and vest the property in the donee until the latter disclaims, which he can do at any time before he has made any statement, or done any act, inconsistent with such disclaimer, (which disclaimer, notwithstanding the above case in M. 7 E. 4, may, by what appears to be the better opinion, be made *in pais*, and that, by parol.) After acceptance of the gift by parol, and until disclaimer of the gift by deed, the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift; see Perkius, Grant, 57; Com. Dig. tit. Biens, (D 2.)

"By the *Code Civil*, No. 938, 'A donation *inter vivos*, duly accepted, shall be perfect by the sole consent of the parties; and the property in the articles so given shall be transferred to the donee, without any other delivery being necessary.'

"But where a *donatio mortis causa* is made, the property does not vest without delivery; *Smith v. Smith*, 2 Stra. 955; *Bunn v. Markham*, 2 Marshall, 532. *Reddel v. Dobree*, 10 Simons, 244. In *Irons v. Smallpiece*, 2 B. & Ald. 551, it was ruled at Nisi Prius by Abbott, J., that a delivery was necessary to complete a gift *inter vivos*; and upon a motion by Gurney to set aside the nonsuit, the court refused to grant a rule, under an impression that the point had been decided in *Bunn v. Markham*, — the distinction between *donationes inter vivos* and *donationes mortis causa*, (which runs through the previous cases,) not being adverted to." Note by Sergeant Manning to *London & Brighton Railway Co. v. Fairclough*, 2 Man. & G. 691.

"I have always thought Lord Tenterden's opinion in *Irons v. Smallpiece* very re-

markable; he speaks of a 'deed or instrument of gift,' leaving it to be inferred that the assignment might be otherwise than by deed." Per MAULE, J., in *Lunn v. Thornton*, 1 C. B. 379, 381, 382.

"In *Irons v. Smallpiece* it was held that the verbal gift of a chattel, without actual delivery, does not pass the property to the donee, *Abbott, C. J.*, saying: 'By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.' That is not correct." Per PARKE, B., in *Ward v. Audland*, 16 M. & W. 862, 870, 871.

"It has, indeed, been held that a gift is not binding unless it be by deed, or the subject of the gift be actually delivered; but if the point were *res nova*, it would perhaps be decided differently." Per PARKE, B. in *Oulds v. Harrison*, 10 Exch. 572, 575.

"Actual delivery of the chattel is not necessary in a gift *inter vivos*. In the case of a *donatio mortis causa*, there is a reason for requiring some formal act. It is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattel has been changed. Although *Irons v. Smallpiece* and *Shower v. Pilck* have not been overruled, the subsequent cases, to speak familiarly, have hit them hard." Per CROMPTON, J., in *Winter v. Winter*, 4 L. T. N. S. 639, 640.

"My brother Manning in a learned note to the case of *The London and Brighton Railway Company v. Fairclough*, comments upon that decision [*Irons v. Smallpiece*] suggesting that sufficient weight was not given to the fact of acceptance by the donee of the gift. He certainly cites authorities of weight upon the subject." Per WILLIAMS, J., in *Martin v. Reid*, 31 L. J. N. S. C. P. 126, 127.

"I do not think that we are called upon, at present, to say whether we should overrule the case of *Irons v. Smallpiece*, or whether a gift not made by deed, and unaccompanied by transfer is invalid in law. Whenever that question shall come before me, I feel bound to say I shall require a much higher authority than the note of an editor, however learned or eminent, to induce me to overrule a decision of Lord Tenterden and his brethren in the Court of Queen's Bench." Per KELLY, C. B. in *Douglas v. Douglas*, 22 L. T. N. S. 127, 129.

"With respect to the two pictures by Canaletto and Sir Joshua Reynolds, it is admitted that they were Danby property, and the only question which arises as to them is whether during her lifetime Mrs. Harcourt disposed of these pictures by way of gift to her sister Mrs. Holwell. It is argued that she could not have disposed of them without some evidence of a gift, and that the evidence adduced by the defendants is of no avail because there has been no actual delivery, and there is no evidence of a deed.

"Now, if this case — with respect to the two pictures — depended upon the rule of law laid down in some of the older books, I could not certainly accede to the proposition generally that the actual delivery of a chattel is necessary to create a good gift *inter vivos*. I should begin by saying that a very great many cases, not unnaturally, have turned upon the question what is a good *donatio mortis causa*. One of those cases is the case of *Ward v. Turner*, where Lord Hardwicke entered into the question very fully, and certainly, as was to be expected, his mind was not so much impressed by the common law authorities as by the authorities which had grown up through the civilians of this country by the application of what is known as the civil law. That has clearly no application to the present case. The civil law never was any part of the common law of England, although the common law yielded to it in that portion of the law of this country which was administered in the ecclesiastical courts. The civil law has also been recognized in other respects, and especially in cases connected with the marriage laws of this country, some of them decisions of the House of Lords. The question then is, What is the common law? I have been consulting the older authorities, and although, no doubt, it is often said that actual delivery is necessary, yet there are other cases where, although there has been no deed, the contrary has been laid down.

"The modern law on the subject is founded on Lord Tenterden's judgment in *Irons v. Smallpiece*. I can only say that that case has been before the courts on the common law side of Westminster Hall for a great many years, and I cannot myself acquiesce in the view of the law there laid down. I am not bound by that decision, because

NOBLE v. SMITH.

SUPREME COURT OF NEW YORK. 1806.

[Reported 2 Johns. 52.]

THIS was an action of trespass for breaking and entering the close of the plaintiff, cutting down, taking and carrying away the wheat in the straw, which was there standing, and converting the same to his own use.

The cause was tried at the Rensselaer circuit in May, 1806, before Mr. Chief Justice Kent. The plaintiff proved that he was put into possession of the *locus in quo* in March, 1805, by the sheriff of Rensselaer county, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment against one Hallett, and that he continued in possession to the time of the trespass. At the time the sheriff put the plaintiff in possession, he did not remove the goods out of the house of Hallett. It was also proved that the defendants and their servants in July, 1805, broke and entered the same close, and there cut down and carried away, though forbidden by the plaintiff's overseer, near two hundred bushels of wheat in the straw. A witness for the defendants proved that Hallett had lived on the farm as a tenant to John Hill, the principal of the plaintiff, above two years before the plaintiff was put into possession. That two of the defendants were step-sons of Hallett and lived in his family. That after Hallett was

Baron Parke, afterwards Lord Wensleydale, in the case of *Ward v. Audland*, 16 M. & W. 862, 871, not merely dissented from that proposition, but distinctly expressed his opinion that it was not law. That was so clearly also the opinion of so eminent a judge as Mr. Justice Maule in another case (*Lunn v. Thornton*, 1 C. B. 379) that I think I may take it now that the true view of the law is this. The question to be determined is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a court of common law, and, of course, the same result would follow in a court of equity." Per POLLOCK, B. In *Re Harcourt*, 31 W. R. 578, 579.

"It is contended for the trustee that change of possession from the donor to the donee must be shewn, and that no property passes so long as the subject of the gift remains in the possession of the donor: *Irons v. Smallpiece*, 2 B. & A. 551, and *Shower v. Pilck*, 4 Ex. 478. On the other hand, it is said that the principle laid down in those two cases goes too far, and has been disapproved of by Parke, B., in *Ward v. Audland*, 16 M. & W. 871, by Crompton, J., in *Winter v. Winter*, 4 L. T. N. S. 639, and by Pollock, B., in *In Re Harcourt*, 31 W. R. 578. I am of opinion that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention." Per CAVE, J., In *Re Ridgway*, 15 Q. B. D. 447, 449.

dispossessed he was sued and taken on execution for rent due to Hill. The witness applied to the plaintiff to let Mrs. Hallett have some of the wheat then growing on the premises, for seed; and the plaintiff told the witness that "he would give the wheat growing to the defendants, the Smiths, for the support of themselves and Mrs. Hallett, and would procure a written surrender to be drawn up for Hallett to execute." The Smiths afterwards requested the plaintiff to give them a writing for the wheat, which the plaintiff refused to do, saying "that he would reserve it for them if he should demise the premises to any other person." The Smiths were relations of Hill, who requested them to repair the fence in the autumn, round the field in which the wheat was growing. Another witness stated that the plaintiff, in October, 1805, told him that he had given the wheat to the Smiths, but that he had revoked the gift on account of some offence they had given him. Something was said of a condition annexed to the gift, but what it was did not clearly appear.

The judge charged the jury that there was sufficient evidence of a valid gift of the wheat, and which was not revocable by the plaintiff. The plaintiff, therefore, submitted to a nonsuit.

A motion was now made to set aside the nonsuit, and for a new trial for the misdirection of the judge.

Henry, for the plaintiff.

Woodworth, Attorney-General, for the defendants.

Van Vechten, in reply.

KENT, Ch. J., delivered the opinion of the court.

This case presents the following questions: 1. Can property in corn growing be transferred by gift? 2. Is there here the requisite evidence of such a gift?

After a consideration of this case I am satisfied that the opinion which I gave at the circuit upon the trial of this cause was incorrect.

Lord Coke is reported to have said in *Wortes v. Clifton*, 1 Rol. Rep. 61, that by the civil law a gift of goods was not valid without delivery, but that it was otherwise by our law. This is a very inaccurate *dictum*, and the difference between the two systems, is directly the reverse. By the civil law, a gift *inter vivos*, was valid and binding without delivery; (Inst. lib. 2, tit. 7, § 2. Code lib. 8, tit. 54, l. 3, l. 35, § 5) but at common law it is very clear, from the general current of authorities, that delivery is essential to give effect to a gift. Bracton, *de acq. rerum dom.* lib. 2, fo. 15, b. 16, a. Noy, 67, Str. 955, Jenkins, 109, 2 Black. Comm. 441. In the analogous case, also, of gifts, *causa mortis*, it was held by Lord Hardwicke in the case of *Ward v. Turner*, 2 Vesey, 431, where the subject underwent a very full discussion, that a delivery was necessary to make the gift valid; and, accordingly, that a delivery of receipts for South Sea annuities, was not a sufficient delivery to pass these annuities by that species of gift.

Delivery in both kinds of gift is equally requisite, on grounds of public policy and convenience, and to prevent mistake and imposition.

If delivery be requisite, there was none in the present case. The land, at the time of the alleged gift, was in possession of one Hallett, and not of any of the defendants, to whom the gift is said to have been made; and before the wheat was ripe the plaintiff recovered the possession of the land by due course of law. Here was not even an attempt at a symbolical delivery, and giving the testimony the strongest possible construction in favor of the defendants, it amounted to nothing more than saying, *I give*, without any act to enforce it. A mere symbolical delivery would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key of a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject. 2 Vesey, 442-3; 4 Brown, 286; Toller's Law of Exc., 181-2. I do not know that corn, growing, is susceptible of delivery in any other way than by putting the donee into possession of the soil; but it is not necessary to give any opinion at present to that extent; nor do the court mean to do so. It is sufficient to say that there was no evidence of delivery in the present case, and, that to presume one we must go the whole length of the example given in the Roman law where the buyer is supposed to take possession of a large immovable column by his eyes and his affections, *oculis et affectu*. Dig. 41, 2. 1. 21. The courts of equity seem to have adopted the true rule in their decisions on the *donatio causa mortis*, in which they hold that the delivery must be actual and real, or by some act clearly equivalent.

The opinion of the court therefore is, that the nonsuit be set aside and a new trial awarded with costs, to abide the event of the suit.

New trial granted.

SECTION III.

ANNUITIES.

NOTE. — As a general rule, *choses in action* are not transferable at common law, though often made so by statute. Most of the law concerning the transfer of Legal Obligations and Privileges is best considered with other topics or in other courses; *e. g.*, Covenants running with the land (dealt with hereafter in connection with Easements and the transfer of Real Estate), Wills and Administration, Bills and Notes, Patents and Copyrights, Stock in Corporations, etc.

GERRARD v. BODEN.

COMMON PLEAS. 1621.

[Reported *Hell.* 80.]

AN annuity was brought by Gerrard against the parson of B. And the plaintiff counts, That the said parson granted an annuity of 40*l.*

pro bono consilio suo imposter. impenso, for term of life of the said parson. And for 30*l.* of arrearages this action was brought. *Finch*, thought the count not to be good. And first it is to be considered, if that annuity might be assigned and granted over or not. And as I think, it cannot. For an annuity is not but as a sum of mony, to be paid to the grantee by the grantor. And not at all to the realty, if the land be not charged by express words in the same deed. And to prove it, if a man grant an annuity to me and my heirs, without naming of my heirs, if the annuity be denied, it is gone; because my person is only charged with the annuity, and not the land. So if a man grants to you the stewardship of his mannor of D., and to your heirs, you cannot grant that over. And so of a bayliwick. But peradventure it may be said, that an annuity may be granted over in this case, because in the *habendum* it is said to the assignees of the grantee. But that is nothing to the purpose, as I think. For I take a difference when a thing comes in the *habendum* of a deed which declares the premises of the deed, for there it shall be taken effectual, but otherwise not. As if lands be given to a man and his heirs *habendum sibi & hæred. de corpore suo procreat*; that is a good tayl. But if a thing comes in the *habend.* which is repugnant to the premises of the deed, and to the matter of the thing which is given by the deed, then the *habend.* is void for that parcel. As in the case at bar, it is meerly contrary to the nature of the annuity to be assigned over to another. And there is no remedy given for it but an action; and it is common learning that a thing in action cannot be assigned over unless it be by the grant of the King. Also by their declaration they have acknowledged it to be no more than a *chose in action*. Then a rent-seck for which he had not any other remedy but an action after seisin. For he said that he was seised in his demesn as of franktenement of the rent aforesaid. Then it ought to be a rent-seck; for of no other rent can a man be seised in his demesn, because they lye in *prend.* as of advowsons common for years, and of estovers. And I will not agree that difference put by Littleton in his hook to this purpose. For of such things which lye in manual occupation or receipt, a man shall not say that he was seised in his demesn as of a rent, because it lyes in the *prend.* And in the 21 E. 4 the case is doubtful. And *Crawley* of the same opinion. *Hitcham* of the contrary. And at another day, *Hutton* [J.] said that the parties were agreed. *Hitcham*. We desire to have your opinion notwithstanding, for our learning. *Hurron* said: We are agreed that the annuity may be granted over, and it is not so much in the personalty as hath been argued by *Finch*. And in some books it is said that a release of personal actions is not a plea in a writ of annuity.

SECTION IV.

TRANSFER OF EQUITABLE RIGHTS.

NOTE. — Equitable Rights are in general freely assignable. The exceptions are considered in this section, so far as those exceptions are based on grounds of public policy. How far the transfer of an equitable right can be restrained by the person creating it, will be considered hereafter.

A. *Public Officers.*BARWICK *v.* READE.

COMMON PLEAS. 1791.

[*Reported 1 H. Bl. 627.*]

THE defendant, who was a lieutenant of marines, assigned his full pay to the plaintiff, in trust, first of all to pay and satisfy himself (the plaintiff) an annuity of £20 per annum, and then to pay over the surplus to the defendant, and also gave a bond and warrant of attorney as a further security. In the last term a rule was granted to show cause why the deed of assignment, bond, and warrant should not be given up to be cancelled on several grounds, the most material of which was, that the full pay of a military officer could not be legally assigned. When the motion was made, the court intimated a very clear opinion that such an assignment was illegal, it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them. However the rule was enlarged till this term, when on the motion of Kerby, Serjt. it was made absolute, no cause being shown, but the court seeming to retain their former opinion.

FLARTY *v.* ODLUM.

KING'S BENCH. 1790.

[*Reported 3 T. R. 681.*]

ON a rule to show cause why the defendant, an insolvent debtor, should not be discharged out of custody, the only question was whether or not his half-pay as a lieutenant in a reduced regiment of foot should be included in his schedule delivered in under the Lords' Act.

Marryat, who opposed the discharge, stated that several cases had been mentioned at Serjeant's Inn where this motion was first made.

One was that of a life-guard-man some few years ago, whose discharge was opposed before Aston, J., on the ground that, as the place was assignable for his own benefit, he was compellable to assign it for the benefit of his creditors; and the learned Judge refused to discharge him on that ground. Another instance was in the case of one Peake, a superannuated boatswain of the Royal George in May 1789, who was brought up by a creditor under the compulsory clause, where it was held that he was compellable to assign his commission; but before the expiration of the sixty days he made a compromise. There were two other cases, one in the Exchequer, where it was decided that a Captain Yates, of the navy, was not obliged to include his half-pay in the schedule, because it was not saleable by law; the other in the Court of Common Pleas of a master in the navy, who was discharged without assigning his half-pay, for the same reason. Now, he observed, there is a wide distinction between the former and the latter cases; for the statute 1 Geo. 2. st. 2 c. 14 s. 7, avoids all assignments of seamen's wages. But the commissions of officers in the army are assignable. In addition to the above cases he mentioned another, which happened about five years ago in the Common Pleas, where on an application by a horse-guard-man to be discharged, he was compelled to assign his half-pay. And in 1 Atk. 210, where the question was whether the office of under-marshal of the City was assignable under the bankrupt laws, Lord Hardwicke held that it was, and said (1 Atk. 214), "If an officer in the army should become a bankrupt, he should have no doubt but that he had a power to lay his hands upon his pay for the benefit of his creditors." The enacting clause of the Lord's Act, 32 Geo. 2 c. 28 s. 13, directs that the prisoner, before he is discharged, shall deliver in a schedule of all his estates, &c., real and personal, or which he or any person in trust for him is *interested in or entitled to*; which words are sufficient to carry even an equitable estate to the creditors; and indeed without this provision the sixteenth clause, which is the compulsory one, would be defeated. In *Stuart v. Tucker*, 2 Bl. Rep. 1140, it was held that the half-pay of an officer was assignable in equity. Now whatever interest passes by an assignment under a commission of bankrupt may be assigned under the Lord's Act to the creditors.

Garrow, contra, was stopped by the Court.

LORD KENYON, Ch. J. I am clearly of opinion that this half-pay could not be legally assigned by the defendant. *Vid. Lidderdale v. The Duke of Montrose and Lord Mulgrave*, post. 4 vol. 248. s. P., and consequently that the creditors are not entitled to an assignment of it for their benefits. Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides an officer has no certain interest in his half-pay; for the king may at any time strike him off the list. Indeed assign-

ments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the Judges, which are granted to support the dignity of the State and the administration of justice, may be assigned.

ASHHURST, J. All voluntary donations of the Crown are for the honor and service of the State. This seems from the cases mentioned to have been *vezata questio*: but on considering the consequences of this application, it seems more proper that half-pay should not be assigned.

BULLER, J. What the duty of the life-guardsmen was originally we do not know: but for some time past these places have been held regular objects of sale; and if an office may be sold by the party himself, it is assignable for the benefit of his creditors. But that is very different from the present case: for I know of no authority by which an officer may sell his half-pay; and on principles of policy he ought not to be permitted to do it. If the question had been whether or not the pay which was *actually due* might be assigned, I should have thought it, like any other existing debt, assignable; but that does not extend to *future accruing payments*.

GROSE, J. The future half-pay could not have been sold by the defendant himself; and therefore his creditors cannot compel him to assign it for their benefit.

The prisoner was ordered to be discharged accordingly.

GRENFELL v. DEAN AND CANONS OF WINDSOR.

CHANCERY. BEFORE LORD LANGDALE, M. R. 1840.

[*Reported 2 Beav. 544.*]

IN April, 1829, the defendant, the Rev. R. A. Musgrave, was appointed by letters patent, one of the prebends or canons of the collegiate church or free chapel of St. George, within his Majesty's castle at Windsor, an appointment which produced an income of about £1200 a year.

Being in want of money, Mr. Musgrave, in October, 1838, granted to the plaintiffs the said prebend or canonry, and all the annual income arising from renewal fines, rents, and other perquisites, emoluments, and advantages to which he was entitled as one of such prebends or canons, and he also assigned to them two several policies of insurance, for securing to the plaintiffs the repayment of the sum of £12,000.

It appeared from the answer of Mr. Musgrave, that the income arose from estates possessed by the corporation, the rents and proceeds of which were usually divided half-yearly between the dean and twelve canons; but it did not appear that there was any property vested in the dean and canons independently of the corporation.

There did not appear to be any spiritual duties attached to the office, nor any cure of souls, but the answer represented, that the corporation was governed by certain statutes and ordinances, whereby certain duties were imposed upon the members of the said corporation to be by them performed, each member of the said corporation having the privilege of residing in a house within the walls of the said castle of Windsor; and that if any member of the corporation failed to perform his appropriated duties, he, by virtue of the said statutes and ordinances, forfeited his right to share in the division of the surplus income of the said corporation, and in lieu thereof was entitled to receive a small fixed stipend, of the amount, as the defendant believed, of £25 a year only; and that the members of the corporation were in such cases entitled to the residue of his share of the surplus income of the corporation. That one of the duties, by the said statutes and ordinances imposed upon each of the said canons, was to reside in one of the said houses within the walls of the said castle of Windsor, and to attend divine service in the said chapel of St. George, at Windsor, twenty-one days in each year.

The defendant, Mr. Musgrave, having made default in payment of the interest and in keeping up the policies, the plaintiffs filed this bill for the purpose of obtaining payment, and for an injunction and receiver; on the 11th of January, 1840, an order was made on affidavit, before answer, restraining the dean and canons from paying, and the defendant from receiving, the income of the canonry and for the appointment of a receiver.

The defendant, Mr. Musgrave, having put in his answer, it was now moved on his behalf, to discharge the order for an injunction and receiver.

Mr. G. Richards, in support of the motion.

Mr. Pemberton and *Mr. W. T. S. Daniel*, contra.

THE MASTER OF THE ROLLS. The plaintiffs, being under the necessity of filing this bill, in consequence of the neglect of the defendant to pay either principal or interest on the money advanced, have obtained an order for a receiver. I do not enter into the question whether the order was opposed at the time, for the defendant had clearly a right to pursue any course he pleased upon that occasion, and supposing him to have then thought, or to have been then advised, that this order was proper, still it was perfectly competent for him afterwards, upon a more careful inquiry, to bring under the consideration of the court the question, whether the order ought to be sustained. It is now contended that the order should be discharged on two grounds: the first is, that it is an order which cannot be enforced for any useful or profitable purpose to the plaintiffs without the assent and concurrence of the defendant, Mr. Musgrave. Mr. Musgrave, being a canon of Windsor, has, it is said, a duty to perform, that is, he is to reside twenty-one days within the precincts of the castle of Windsor, and during that time he is to attend divine service, and if he does not, the

aliquot share or part of the general revenues of the corporation which he would otherwise be entitled to, is to be reduced to a certain small sum. He therefore says: "If I do not choose to attend during that time, the small sum only, and not the larger sum, will have to be received, and therefore the plaintiffs and the receiver will be unable to receive the income for the purpose of applying it in diminution or in exoneration of my debt." It cannot be supposed that Mr. Musgrave will be so unwise, as, rather than give the plaintiffs the benefit of that which they are clearly entitled to, wholly to neglect to perform the duty which entitles him to the receipt of this income, and thus leave the debt standing, and the interest accumulating upon it. I cannot presume that any such degree of absurdity will mark his future conduct.

In the next place it is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured. So, also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as for instance was the case in *Davis v. The Duke of Marlborough*; there the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and it was there the intention of the legislature that it should be kept in mind that it was for those great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services would be entirely lost; and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. With

respect to the case of *Cooper* and *Reilly*, some doubts have been expressed as to the propriety of the decision on the motion for a receiver; but the question was, whether the salary was assignable on grounds of public policy, and that depended on the nature of the duty and the interest of the public to secure the payment of the salary to the person by whom the duty was to be performed. If in this case the residence in Windsor Castle, and the attendance on divine service had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the Sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration. But from all which is stated in this answer that is not the case; it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiffs is valid, and I must therefore refuse the motion with costs.

WELLS v. FOSTER.

EXCHEQUER. 1841.

[Reported 8 M. & W. 149.]

ASSUMPSIT for money had and received, and on an account stated. Plea, *non assumpsit*. At the trial before *Lord Abinger*, C. B., at the Middlesex sittings after Hilary Term, it appeared that the defendant had held a situation as clerk in the Audit Office for upwards of twenty years, up to the year 1835, when, the establishment being reduced, he was placed on a retired allowance of £130 a year, granted to him, not for life, but as an allowance for maintenance until he should be called on to serve again, and with an express understanding that he was bound, whenever he should be called upon, to re-enter the Audit Office, or to take any other office under the Crown of equal value. In 1837, the defendant, being in execution at the suit of the plaintiff, executed to him an assignment of this annuity, and also gave a warrant of attorney to secure the payment of the debt by instalments. The deed of assignment contained a covenant that the defendant had good title to assign the annuity. In consideration of the execution of this deed, the defendant was discharged from custody. After his discharge, the plaintiff's debt remaining unpaid, he obtained an injunction to restrain the defendant from securing or assigning over any part of his pension; which was subsequently dissolved, upon the terms that the defendant's attorney should receive the pension and pay it into a banking-house, and that the plaintiff should be at liberty to bring any action he might be advised, for the amount so paid in. The present action was brought

accordingly. Upon these facts, the Lord Chief Baron directed a verdict for the plaintiff, damages £67. 10s., leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the defendant's pension was not assignable in law.

Erle having obtained a rule *nisi* accordingly, *Hoggins* now showed cause.

Erle and *W. J. Alexander*, contra.

LORD ABINGER, C. B. The court are of the opinion that this pension was not assignable. It stands upon the same footing as the half-pay of an officer in the army. It is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty. Besides, the defendant may be assigning what he has no right to receive; for his pension subsists only during pleasure, and it depends on Parliament whether it shall be continued or not. The rule to enter a nonsuit must be absolute.

PARKE, B. I concur in the opinion that this action is not maintainable, upon the ground that, on principles of public policy, the allowance granted to the defendant was not assignable by him. It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right, or whether it is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the Treasury and of Parliament, by which the fund for its payment is provided. On the other hand, even if it be payable only during pleasure, it appears to me that it is not therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But viewing the matter on the ground of public policy, we are to look, not so much at the tenure of this pension, whether it is held for life or during pleasure, as whether it is, in either case, such a one as the law ought to allow to be assigned. The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. In such a case, the assignee acquires a title to it both in equity and at law, and may recover back any sums received in respect of it by the assignor, after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable. Under the terms of the stat. 4 & 5 Will. 4, c. 24, the party, if an inferior officer, is liable at any time to be called upon to serve the public again; in the mean time a reduced allowance is awarded to him, in consideration of his holding himself in readiness for that purpose. This is the case of an officer who has received a compensation on account of a reduction in the number of the persons of his class employed in the office to which he belonged; and by the terms

of the 19th section, all such persons are bound to give their services again to the public if called upon, and in the event of their refusal to do so, are liable to forfeit their pension altogether. I cannot assent to the argument that this pension cannot be taken away, for it appears to me to be clear, from the 30th section of the act, that this gentleman, so far as the question of his retainer or discharge is concerned, is exactly in the same position as if he were in full employment or on full pay; that he is equally liable to be dismissed at any moment, either for positive misconduct, or on any ground which would render him an unfit person to remain in the service of the Crown. I think the true view of this case is, that the defendant is still to be considered as in the public service, although not at present actually performing any duty in it; and that the compensation allotted to him under this act is by way of salary, the object of which is to enable him to maintain such a position in life as will save him from the necessity of risking his character by incurring those temptations which persons reduced to poverty are necessarily exposed to, and which would render him an unfit person to be again employed as a servant of the Crown. For this purpose, public policy requires that he should not be permitted to assign it away.

ALDERSON, B. I am also of opinion that, on grounds of public policy, this pension is not assignable, and that in this respect it stands on the same footing as an officer's half-pay. The observations of Lord Kenyon, in *Flarty v. Odium*, are very forcible, and apply fully to the present case. It appears to me that the defendant is a supernumerary officer in the pay of the Crown, although not at the present moment actually employed; he may be called into active employment again whenever his services are required by the Crown. I think he is within the 30th section of the act, and is now liable to dismissal for misconduct or unfitness for service.

My Brother ROLFE requested me, before he left the court, to state that he is of the same opinion.

Rule absolute.

ARBUTHNOT *v.* NORTON.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1846.

[*Reported 5 Moo. P. C. 219.*]APPEAL from the Supreme Court of Judicature at Madras.¹*Mr. Kindersley*, Q. C. and *Mr. H. Prendergast*, for the appellants.*Mr. Chilton*, Q. C. and *Mr. Jenkins*, for the respondent.

THE RIGHT HON. DR. LUSHINGTON. The question in this case arises between Messrs. Arbuthnot & Co., who are merchants and bankers carrying on business at Madras, and Mr. John Bruce Norton, who is the son and executor of the late Sir John David Norton, who was one of the Puisne Judges of the Supreme Court of Madras; and it relates to a sum of £2,500, which is payable by virtue of the Statute 6th of Geo. IV., cap. 85, and which is granted in the following manner (so far as relates to this question): "that when and so often as it shall thereafter happen, that any Puisne Judge of the Supreme Court of Judicature at Madras shall depart this life, while in possession of the said office, and after the expiration of six calendar months from the time of his arrival in India, for the purpose of taking upon him the office of Puisne Judge, then, and in all and every of such cases, the Court of Directors shall, and they are thereby required to pay or direct, and cause to be paid out of the territorial revenues, from which the salary of such Puisne Judge, so dying, should be payable, to the legal personal representatives of such Puisne Judge, so dying, as aforesaid, over and above what may have been due to such Puisne Judge at the time of his death, a sum equal to the amount of six calendar months' salary of the office of Puisne Judge."

The sum on the present occasion, that is equal to the amount of six months' salary, is £2,500, and the claim of the appellants is limited to that sum; and the question is, whether, under the circumstances, they are entitled to it, within the provisions of this Act.

Now, it appears that some time anterior to the death of the late Sir John Norton, he, for a good and valuable consideration, purported to make an equitable assignment of all his right and interest in this £2,500, to Messrs. Arbuthnot, in consideration of monies received from them; and the first question is, whether Sir John Norton had the power of making such an assignment, or whether, by virtue of this Act of Parliament, this fund was destined to go to some other persons, or in some other direction.

With regard to this sum of £2,500, their Lordships are all of opinion, that the intention of the legislature was to provide against a contingency, which had arisen in two or three antecedent instances, and

¹ The case is sufficiently given in the opinion.

which contingency, in cases to come, is specifically provided for by this Act of Parliament, namely, that a person taking upon himself the office of a Judge in India, and dying in the possession of the office, having been put to great expenses at the time of making his outfit from this country to India, might have some certain means, whereby his estate would be enabled to be reimbursed that loss, in case of his death whilst in office.

Their Lordships think, that any construction of this Statute, which would appropriate this fund in any other way, would be against the whole intention of the legislature. Without saying what might be the meaning of the words which I have read, especially the words "legal personal representatives," in any other case, and without reference to any other context or construction, the only question here is, what is the meaning of those words in this Act of Parliament; and we are all of opinion that they mean the executor or administrator of the Judge deceased, and that the money is to be taken as part of his general assets, and to be administered as such.

That being so, the second question is, whether it was in the power of Sir John Norton to assign this sum of money.

No question has been raised at all, that if it was in his power, the letter, which forms part of these proceedings, is sufficient to constitute an equitable assignment.

Now we consider the £2,500 to have been part of his estate, precisely in the same light, and precisely of the same description, as if it had been a policy of assurance upon his life; that is to say, a certain sum of money to which he would be entitled, upon the contingency of a certain event; over which he had complete power of disposition by assignment in his lifetime, or by testamentary disposition, if he thought fit to exercise the power in that way.

With regard to the last question, which is a question certainly which their Lordships have thought deserving of greater attention and consideration than either of the preceding points that were discussed at the bar; namely, whether this assignment is against public policy or not, — we have come to the conclusion that it is not against public policy.

In giving this opinion, we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices: on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of these principles; and we think so because this is not a sum of money which, at any time, during the lifetime of Sir John Norton, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with decorum and propriety the high rank in life, in which he was placed in India. We do not see any of the evils, which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this

sum, inasmuch as during his lifetime his personal means would, in no respect whatever, have been diminished, but remain exactly in the same state as they were. It is for these reasons, that their Lordships are of opinion, that the judgment of the court below was erroneous, and that we are under the necessity of reversing that judgment; but being all of opinion that this was a case which it was necessary for an executor to have the judgment of a court upon, we think under the special circumstances, that the costs on both sides, both here and in India, should be paid out of the fund.¹

¹ "I am also of opinion, that there is nothing in the nature of the income which a Fellow of this College is entitled to, from which it can be inferred, that his income and emoluments are not assignable in equity, by reason of the uncertain amount or otherwise. The cases of assignment at law, which were cited in the argument are not applicable.

"The question which remains is, whether there are any such duties annexed to the situation, or office as it was called, of a Fellow, as to make the assignment of the income contrary to public policy. The assignment may be contrary to the implied intention of the founder of the College, contrary to the spirit of the statutes, which are the exponents of the intention of the founder, and may, therefore, expose the assignor to consequences very unpleasant to himself, and very injurious to those who have dealt with him on the faith of his assignment, it may be a violation of duty to the College, and very reprehensible, without being, for that reason, void as contrary to public policy. The advantages to the Fellow which are annexed to the fellowship are very great, and when well used by a studious and well conducted Fellow, may secure to himself the means of acquiring independence, and to the world some fruits of his useful pursuits and distinction in life. But the easy duties which are annexed to it, are duties intended for the purposes and benefit of the College, and not for the public, otherwise than in a secondary and remote sense, as it is for the benefit of society that all lawful contracts are duly executed. The Fellow of a College may be summoned to attend; if he attends he may vote in the election of officers, assist in what the defendant is pleased to call, the due administration of justice between the Fellows, and in carrying into due effect the statutes. But the defendant admits, that the Office, situation, or post of a Senior Fellow now held by him is not an Office in any way connected with the administration of justice, or an ecclesiastical office of any nature or character, and that there is not any cure of souls attached thereto, and he not only denies that there is any provision in the statutes, rules, or regulations of the College which renders it incumbent on him to be resident in the College, but admits that if there be any such rule, it has long ceased to be or be considered binding on the Fellows.

"There is nothing in this case which appears to me, in any degree, to resemble any of the cases in which assignments of income have been held void on the ground of public policy. The College may deal as the law allows them with a Fellow who has assigned his fellowship; but I am at a loss to conjecture, what special interest the public can have in the question whether Mr. Buller does or does not continue to be a Fellow: — does or does not hold himself in readiness to perform such slight duties as are annexed to the benefits he was intended to enjoy.

"I do not think that the public is at all concerned in the question, whether Mr. Buller continues to be a Fellow or not, whether the fellowship now occupied by him shall, at any time hereafter, be occupied by him or any other person; and I do not propose to interfere in any way with the internal arrangements of the College, with their authority over individual Fellows, or with the dividends they may hereafter apportion in respect of any fellowship. I have to consider only the dividends which they now have or hereafter may apportion to Mr. Buller.

"It appears to me, that he has effectually assigned such dividends as may be appor-

DENT v. DENT.

COURT OF PROBATE AND DIVORCE. 1867.

[Reported L. R. 1 P. & D. 366.]

THE wife had obtained a decree of judicial separation in this case, and an order had been made for the payment of £180, being the amount of her taxed costs, by the husband.

Dec. 18. *Pritchard* moved for a writ of sequestration, on affidavits that the costs had not been paid.

G. Browne, for the respondent, opposed the motion on two grounds: first, that a writ of sequestration could not be granted until after an attachment had issued; and, secondly, that the only property of which the respondent was possessed was his half-pay as a retired officer of the Indian navy, and was not liable to sequestration.

Pritchard, in reply. It has been the practice of the court to issue writs of sequestration without a previous attachment: *Clinton v. Clinton*, Law Rep. 1 P. & M. 215. The income of the respondent is a pension, and not half-pay.

The JUDGE ORDINARY. I think the court has power to grant a sequestration, although no attachment has been issued. The motion must stand over, in order that further affidavits may be filed informing the court of the nature of the respondent's income.

Jan. 29. *Pritchard* renewed the motion, upon an affidavit setting out that information had been received from the Secretary of State for India to the effect that the respondent had formerly been a lieutenant in the Indian navy, which is now abolished, and that his pension was solely in respect of past services, and he was not liable to be called on to serve again. The distinction between half-pay and a pension for past services is well understood, and has frequently been acted on. Half-pay being partly in respect of future service cannot be sequestered for reasons of public policy; but a pension solely for past services is liable to sequestration.

tioned to him, and that there is no sufficient reason to induce this court to abstain from giving effect to such assignment, and therefore I must order, that, for the purpose of paying what is due to the plaintiff, the sums of money which have already been or may hereafter be apportioned to Mr. Buller in respect of his fellowship, shall be applied in or towards satisfaction of the plaintiff's demand; and the necessary accounts must be taken.

"I do not mean to direct any account of the income and emoluments of the College but only an account of the sums of money which have now or hereafter may be by the College appropriated or apportioned to Mr. Buller; and I will either appoint a receiver of such sums as may be hereafter appropriated, or adopt any other mode of securing the plaintiff's interest which may be more satisfactory to the College." Per LORD LANGDALE, M. R. in *Feistel v. King's College, Cambridge*, 10 Beav. 491, 506-509.

G. Browne. The pension of a military or naval officer is given to him not only in respect of past services, but also to enable him to maintain his rank and keep up his position in society. It is entitled to exemption from sequestration on the same grounds as half-pay.

The following authorities were cited; Daniel's Chancery Practice, p. 948, 4th ed.; *Wells v. Foster*, 8 M. & W. 149; 10 L. J. (Ex.) 216; *McCarthy v. Goold*, 1 Ball & Beat. 387; *Knight v. Bulkeley*, 4 Jur. N. S. 527, and 5 Jur. N. S. 817; *Spooner v. Payne*, 2 De G. & Sm. 439; 1 De G. M. & G. 383. *Cur. adv. vult.*

The JUDGE ORDINARY. This case stood over that I might look into the authorities cited, with reference to the sequestration of a sum of money payable to the respondent, who was formerly an officer in the Indian navy, by way of pension for his past services. The authorities show that a distinction is drawn between money which is received as half-pay, and in respect to some extent of future services, and money which is received as a pension solely in respect of past services. The distinction appears always to have been preserved, and the line between the two classes of income has been very definitely drawn in the cases cited. The respondent's income is one of the latter class, and the sequestration must, therefore, issue.¹

STATE, *ex rel.* STATE BANK, v. HASTINGS.

SUPREME COURT OF WISCONSIN. 1862.

[Reported 15 Wis. 75.]

By the Court, COLE, J.² This is a motion to quash an alternative writ of *mandamus*. The substance of the relation is, that Judge M. M. Cothren, on the 3d day of August, 1861, executed and delivered to the Iowa County Bank the following instrument: "\$625. Mineral Point, August 3, 1861. On the first day of October next, pay the Iowa County Bank or order, six hundred and twenty-five dollars, in

¹ In *Re Robinson*, 27 Ch. D. 160, the Court of Appeal was inclined to think that alimony was not alienable. "We are familiar with instances of allowances which are not alienable in the case of men, such as the half-pay of the officers in the army and navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for her maintenance from time to time, and the court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the court from time to time to provide for the maintenance of the wife, therefore it is not assignable by the wife." Per COTTON, L. J. p. 164.

² The case is sufficiently stated in the opinion.

full for my quarter's salary commencing on that day, and oblige M. M. Cothren. To S. D. Hastings, State Treasurer of Wisconsin:" and that the Iowa County Bank, for value, indorsed and delivered the same to the relator, The State Bank. The relation states that the quarter's salary of Judge Cothren became due on the 1st of October last, and was certified by the secretary of state to the respondent, the state treasurer; that the same remains unpaid, and that the respondent has neglected and refused to pay the amount thereof to the State Bank, though he has sufficient funds in his hands applicable to that purpose. The writ is issued to compel the state treasurer to pay to the State Bank the sum of six hundred and twenty-five dollars. It is admitted that the state treasurer refused to pay the sum to the State Bank on the instrument above described, for the reason that Judge Cothren wrote him a letter previous to the first day of October last, forbidding its payment.

The single question arising upon the motion is: Does the relation state such facts as show that the State Bank is entitled to the amount of money, and to a writ of *mandamus* to compel the respondent to pay it over on the order?

It is conceded on both sides that the order is not in the nature of a bill of exchange, and that the legal incidents of negotiable paper do not belong to it. The order is drawn upon a particular fund, and its payment depended upon such contingencies as to deprive it of that character. What then is the nature and effect of the order?

In support of the motion it is argued that the instrument is merely a written authority given to the Iowa County Bank to draw for Judge Cothren his quarter's salary falling due on the 1st of October, 1861, with the power of substitution, but that this authority was revocable at pleasure, and did not operate as an assignment to the holder, of the particular fund upon which it was drawn. We deem this an erroneous view of the nature and effect of the order. We think it was an assignment by Judge Cothren of the quarter's salary in question to the Iowa County Bank, and that the money became payable to such bank, or to its order, according to the terms of the instrument. This position is fully sustained by the cases to which we were referred on the argument by the counsel resisting the motion to quash, as well as the following additional authorities: *Morton v. Naylor*, 1 Hill, 583; *Peyton v. Hallett*, 1 Caines, 363; *McLellan v. Walker*, 26 Maine, 114; *Legro v. Staples*, 16 Maine, 252; *Nesmith v. Drum*, 8 W. & S. 9; *Blin v. Pierce*, 20 Vermont, 25; *Brooks v. Hatch*, 6 Leigh, 534; *Mulhall v. Quinn*, 1 Gray, 105; *Hartley v. Tapley*, 2 id. 565; *Taylor v. Lynch*, 5 id. 49; *Lannan v. Smith*, 7 id. 150. The quarter's salary of Judge Cothren which became due on the 1st of October, 1861, was a possibility coupled with an interest, and as such capable of being assigned. *Brackett v. Blake*, 7 Met. 335. Chancellor Kent says, that it is sufficient that the thing contracted for has a potential existence, and that a single hope or expectation of means founded on a right *in esse*,

may be the object of sale, as the next cast of the fisherman's net, or fruits or animals not yet in existence, or the good will of a trade. 2 Kent, Lecture 39, page 602, 8th ed. The future earnings of a party to a contract may be assigned (*Hurtley v. Tapley*; *Taylor v. Lynch*; *Lannan v. Smith, supra*); or rents to become due (*Morton v. Naylor, supra*); while in *Brackett v. Blake*, and *Mulhall v. Quinn*, the court say: "If a party is under an engagement for a term of time, to which a salary is affixed, payable quarterly, especially if he has entered upon the duties of his office, although at any time liable to be removed, he has an interest which may be assigned."

We cannot see why this doctrine is not strictly applicable to the case at bar. It is true we were referred to some English cases, which held that the assignment of the pay of officers in the public service, judges' salaries, pensions, &c., was void, as being against public policy; but it was not contended that the doctrine of those cases was applicable to the condition of society, or to the principles of law or of public policy in this country. For certainly we can see no possible objection to permitting a judge to assign his salary before it becomes due, if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable.

Assuming that the instrument operated as an assignment of the salary to the Iowa County Bank or its assignee, still it is insisted the writ should be quashed on several grounds.

First, it is said the order should be presented to the secretary of state, to be audited and allowed. This we deem unnecessary. The quarter's salary due Judge Cothren on the 1st of October, 1861, was undoubtedly audited—if such a ceremony can be necessary—and certified to the treasurer as stated in the relation. This is the invariable practice of the state auditor. The order merely showed that this quarter's salary belonged to the State Bank. And this order was undoubtedly all the voucher or receipt which the treasurer might require, to show that he had paid the quarter's salary to the person to whom Judge Cothren had sold and assigned it, and who was authorized by Judge Cothren to receive the same.

Again, it is said that the proceeding by *mandamus* is peculiar, and that the writ will not lie when the party applying for it has any other adequate remedy. This is undoubtedly a correct proposition of law. But what remedy has the State Bank against the respondent? It is his duty to pay over money on appropriations to the party entitled to the same. He would probably have paid over to the State Bank the quarter's salary on this order, had he not been forbidden by Judge Cothren to do so. Still we hold that Judge Cothren has no right to stop the payment of the salary, having sold and transferred his interest in the fund to another. It then becomes the duty of the treasurer to pay it to the State Bank. It would not be contended that the treasurer would not be compelled by *mandamus* to pay the salary to Judge Cothren, had he not assigned it. Why then should he not be required

by the same proceeding to pay the fund to the person whom Judge Cothren has clothed with his rights over it and authorized to receive it?

The motion to quash the writ must be denied.

If the respondent desires to put in an answer, he can do so by filing the same within twenty days.¹

B. *Champerty.*

PROSSER v. EDMONDS.

EXCHEQUER. IN EQUITY. BEFORE LORD ABINGER, C. B. 1835.

[*Reported 1 Y. & C. Ex. 481.*]

THE LORD CHIEF BARON.² The point which, in this case, presents the greatest difficulty, is that which relates to the interest which Robert Todd had in the annuity fund, and which he assigned to these plaintiffs. No complaint is made in the bill of the misapplication of that fund, but it is insisted that the plaintiffs have a right to have their interest recognized distinctly in the reversionary portion of that fund. I incline to think that that interest is sufficiently disclosed to make the demurrer to the whole bill bad.

With respect to the question as to the validity of an assignment of a right to file a bill in equity, I must distinguish between this sort of case and the assignment of a *chose in action* or equity of redemption. It

¹ See *Brackett v. Blake*, 7 Met. 335, accordingly. The conclusion reached in the case of *State v. Hastings*, and *Brackett v. Blake*, is declared in *Billings v. O'Brien*, 45 How. Pr. 392, 402, "erratic and unsatisfactory, and furnishes no substantial ground for rejecting the authority of the long line of decisions referred to, that establish the invalidity of the assignment of the accruing salary of a public officer, as against public policy."

"Any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension which has been, or may hereafter be, granted, shall be void and of no effect; and any person acting as attorney to receive and receipt for money for and in behalf of any person entitled to a pension shall, before receiving such money, take and subscribe an oath, to be filed with the pension-agent, and by him to be transmitted, with the vouchers now required by law, to the proper accounting officer of the Treasury, that he has no interest in such money by any pledge, mortgage, sale, assignment, or transfer, and that he does not know or believe that the same has been so disposed of to any person.

"No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension-Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." — U. S. REV. STS., §§ 4745, 4747.

² The case is sufficiently given in the opinion.

may be said that the assignment of a mortgaged estate is nothing more than an assignment of a right to file a bill in equity. But the equity of redemption arises out of an interest, though only a partial interest. Courts of law and equity treat the mortgage as a mere security, and there is an interest left in the mortgagor, which he may assign. But, in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such a claim would be a question deserving of great consideration. My present impression is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud; and I should say that some authority is necessary to show that a man can assign to another a right to file a bill for a fraud committed upon himself. I own, however, that in the present case there is considerable difficulty arising from the reversionary interest which Robert Todd had to assign; and the question is, whether the bill is so framed as to entitle the plaintiffs to any equity on that subject.

With respect to the other points which have been raised, I think that William Todd, having assigned his interest to his brother, is not a necessary party to this suit. As to Jones, who was a party to the deed of assignment, there is some doubt.

Upon the whole, if I were called upon to decide this case now, I should decide against the demurrer on the narrow ground that there was, at the time of the assignment to the plaintiffs, a subsisting interest in Robert Todd, which did not pass to Edmonds. But the case deserves further consideration.

The LORD CHIEF BARON. The testator, after bequeathing certain annuities to various persons, directed that his real and personal estate should be sold by his executors, Edmonds and Hughes, and divided into three parts. His daughter, the wife of Edmonds, was to have one part; and, from the remaining two parts, she was to take £10,000, and the residue was to be divided between his two sons, Robert and William Todd; and he states, as his reason for giving his daughter a larger portion, that he had made advances to his two sons in his lifetime. He then specifies certain real estates, of which he gives the right of pre-emption to William Todd, and other estates, of which he gives the right of pre-emption to Robert Todd; and then he gives his daughter a right of pre-emption of any part of the residue; so that, with the exception of the two parts specifically appropriated to William and Robert Todd, if they chose to purchase them, his daughter had a right, if she chose, to purchase the whole.

The testator soon afterwards died. The two executors proceeded to administer his personal estate, and made sale of the real estate; and Edmonds, in right of his wife, purchased part of the real estate: though what part in particular was purchased by him is not specified; nor does it appear by the bill that he was the purchaser of any part of that of which the sons had a right of pre-emption. There was then a settlement of accounts, and there is a particular account annexed to the bill, and referred to; and, upon an inspection of that account, and from the circumstances stated in the bill, it appears that Edmonds had made payments from time to time to Robert and William Todd. These matters were then adjusted, and the balance due to the brothers was paid to them; and, up to that time, they acknowledged that the accounts were fully settled. Afterwards, both brothers executed releases to Edmonds and Hughes, the executors.

There are many conveyances and deeds set forth in the bill, but it is not necessary to particularize all of them, because those on which the question turns are few. The executors set apart a considerable sum of stock to answer the annuities bequeathed by the will, and the bill makes no complaint of that appropriation. They did no more than would be decreed to be done by this court, or any court of equity having the disposal of the testator's estate. By the release of 1829, Robert Todd purchased all the interest of his brother, William Todd; and, by other instruments, executed in 1830, his interest stood thus: that, with the exception of the reversionary interest which Robert Todd had in those sums which had been invested in the funds for payment of the annuities, he had, in consideration of a certain sum, and further sums which Edmonds had lent him, assigned to Edmonds the whole of his interest in his father's residuary estate, and also the whole interest of William Todd, which he had purchased. The whole of the accounts, therefore, had been settled, and the whole of the interest of Robert and William Todd vested in Edmonds in 1830. Matters remained so until the year 1833. By an instrument executed in that year, Robert Todd, having borrowed a sum of money of Messrs. Williams, the bankers, for securing to them the repayment of that sum, assigned to them the reversionary interest in the one-third part of the annuity fund, to which he had a right. By another deed, executed soon afterwards, it appears that, conceiving he had still an interest in other parts of the property, he assigned to Williams & Co. all his interest in his father's residuary personal estate, upon trust, that what money they should receive should be held for his benefit. The next deed of importance is executed in 1834, to which those bankers and Robert Todd were parties, and also the executors. By this deed Williams & Co., at the request of Robert Todd, released to Edmonds and Hughes that claim in the residuary interest which he had assigned to them; so that it appears that, for the second and last time, in May, 1834, the whole interest of Robert and William Todd was vested in the defendant Edmonds.

The bill states misconduct in the executors in administering the tes-

tator's estate. It charges imposition and misrepresentation as made to Todd, to induce him to sign the release and settle that account. It makes a case, which might be a case for Robert Todd to file a bill to call on the executors to acquit themselves by answer of the representations of fraud and concealment practised upon him. But still he had nothing but a naked right to file a bill in equity — no legal right — no equitable interest, except a reversionary interest in those sums of money, out of which the annuitants were paid. If he had a right to file a bill at all, it was a naked right not clothed with any possession.

Under these circumstances, the plaintiffs come upon the stage. In September, 1834, a deed was executed by Robert Todd to the plaintiffs. [His Lordship then stated the deed.] The plaintiffs, under color of this conveyance, have filed the present bill, in which they call on the executors to answer for their proceedings in the administration of the testator's estate — by which they seek of the court to set aside the deeds of conveyance from Todd to Edmonds — to annul the purchase by Edmonds of any portion of the real property of the testator — and generally for an account; and they ground themselves on representations stated to have been falsely made to Robert Todd, to induce him to enter into these arrangements. All that is material to the question is raised by the bill, to which Robert Todd is made a defendant, who had no complaint to make, and who refused to be a plaintiff.

The defendants, Edmonds and Hughes, have demurred to the bill on three grounds. One ground of demurrer is, that the scheduled creditors of Robert Todd are not parties; and another is, that William Todd is not a party. I do not find any case from which it appears that the mere circumstance of a creditor being interested in the administration of an estate, makes it necessary that he should be a party to a bill like the present. The mere engagement by a person to pay the creditors, if he gets in the fund, will not make them parties to any contract for their payment; though, no doubt, where the creditors are parties to and interested in a contract of that nature, they must be made parties to a bill for carrying that contract into effect. Therefore, the demurrer would be well if confined to the fact that Jones is not a party; for he was a party to the deed, and entered into an engagement under seal with the plaintiffs, by which it is plain that they are bound. The other creditors are named in the schedule, but there was no contract by which they are parties.

The omission to make William Todd a party is not a ground for allowing the demurrer. He parted with his whole interest to Robert Todd, and there is no imputation of fraud as between those two persons, and no suggestion that William Todd had any ulterior interest whatever. It is not the object of the bill to bring before the court any question as to the money in the funds; and, therefore, any interest which William Todd has in that is undisturbed. He has no interest in any question here. He is, therefore, not a necessary party.

The remaining cause of demurrer, namely, that the plaintiffs have no

right to equitable relief, raises an important and curious question, which is this — whether or not parties who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a *chose in action* may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me, that in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overturn a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a reconveyance, when the mortgage-money is paid, is true. But that is a right reserved to himself by the original security; it is a right coupled with possession and receipt of rent; and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase.

So, where a person takes an assignment of a bond, he has the possession; and, though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it. So, other cases might be stated to show, that where equity recognizes the assignment of an equitable interest, it is such an interest as is recognized also by third persons, and not merely by the party insisting on them.

What is this but the purchase of a mere right to recover? It is a rule — not of our law alone, but of that of all countries, Voet. Comm. ad Pandect. lib. 41, tit. 1, sect. 38, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a court of equity will discourage the practice. Mr. Girdlestone was so obliging as to furnish me with a case, that of *Wood v. Downes*, 18 Ves. 120, in which it appears to me that the principle laid down by Lord Eldon goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set

aside certain conveyances, which it was alleged were obtained by the defendant, in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord Eldon, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good policy. He said — “The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty;” and he accordingly decreed the conveyance to be set aside, on the ground of litigated title.

Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the present circumstances, Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favor.

But the case does not rest here. There is a short but useful statute, which it is proper to refer to, that of the 32 of Hen. 8, c. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of courts of law and equity. Under that statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he, as well as the buyer, is liable to the penal consequences of the act. I do not say that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and, therefore, an action could not be brought against him on the statute. At the same time, it is to be observed, that, from many cases in *Anderson and Coke*, it appears that courts of common law were favorable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained.

It has been the opinion of some learned persons, that the old rule of law that a *chose in action* is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee to stand in the right of assignor. This is not that case. Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.

The case itself is a strong illustration of the doctrine, that to encour-

age such transactions as the present is contrary to good policy. I do not know who the plaintiffs are; possibly they are attorneys. Suppose, then, that this party having an interest under this will, and having settled all his rights, assigns all his interest for a valuable consideration; if he be at liberty afterwards, by another assignment, to create a new trustee for himself, and can give the trustee a right to bring the matter into litigation, if that trustee is an attorney, and the court of equity entertains the suit, what is the result? That all the funds must be brought into court; and, as he stands in the situation of trustee, all the expense of litigation must be paid out of the fund; so that he receives an advantage out of the litigation itself. This is not the policy of the law, and yet if this assignment be good as regards the plaintiffs, so as to enable them to administer the fund over again, it is equally good if the trustee happens to be an attorney.

Upon these principles it appears to me, that this is a case of a purchase of a litigated title. Many cases are to be found to the effect, that where the title actually is in litigation, an agreement to divide the subject of dispute is not available in equity. But the policy of the law is not confined to those cases only.

Demurrer allowed.

Mr. Simpkinson and Mr. Koe, for the demurrer.

*Mr. S. Girdlestone and Mr. Bethell, for the bill.*¹

HILL v. BOYLE.

CHANCERY. 1867.

[*Reported L. R. 4 Eq. 260.*]

FRANCIS HILL (the uncle), by his will, dated the 28th of March, 1835, having made a provision for his wife, devised to Thomas Bate and William Robins, their heirs and assigns, certain freehold lands at the Lye, upon trust, at their discretion, to sell the mines and minerals lying under the said land for the best prices that could be obtained, and he empowered his trustees to lease such parts of the surface of the said land as should be requisite for working the same; and the testator declared that the said trustees, or other the trustees for the time being acting under his will, should stand and be possessed of all and singular the moneys to arise from the sale of the said mines and minerals and ores, upon trust to place out and invest the same in their names in some or one of the parliamentary or public stocks or funds of Great Britain, or in or upon government or real securities, and from time to time, at their discretion, to call in, sell, or dispose of, the stocks, funds, or securities, in or upon which the same trust moneys, or any part thereof, should for the time being be invested, and to place out and invest the

¹ See *Dickinson v. Burrell*, L. R. 1 Eq. 337.

same again in, or upon, new or other stocks, funds, or securities of the like nature, until the same should become payable or transferable pursuant to the directions of his will; and upon trust during the life of testator's nephew, Francis Hill (the plaintiff), to pay the interest, dividends, and annual proceeds of all and singular the said trust moneys, stocks, and securities, when and as the same should come in and be received, unto the said Francis Hill for his life. The testator then declared certain trusts, subsequent to the death of Francis Hill, in favor of his children. He died on the 4th of April, 1835, leaving his trustees, Bate and Robins, him surviving, and his will was proved by his executors, T. Pergeter and W. B. Collis.

By an indenture, dated the 23d of March, 1837, the trustees sold the mines, by way of lease for fourteen years renewable for the same term, to Francis Rufford, for £7,000, Rufford paid £2,000 at once, and £1,000 a year for five years. In 1848, the plaintiff mortgaged, with power of sale, his life estate to James Fisher, who, by indenture dated the 4th of October, 1858, sold the life estate to James Tree, and, by a deed dated the 8th of October, 1858, Tree mortgaged the life estate to Johnson. Bate died on the 13th of October, 1846, and Robins in July, 1860.

By an indenture, dated the 25th of March, 1861, between James Tree, of the city of Worcester, and James Fisher, of Cheltenham, of the one part, and Francis Hill (the plaintiff) of the other part, reciting that Hill became entitled, under his uncle's will, to a life estate in the interest and dividends of divers sums of money and securities, and in the interest of a sum of money to arise from the sale of minerals, and directed to be laid out in the names of the executors, and reciting that by virtue of several indentures the said life estate and interest in the said money became vested in the said James Fisher, and that the said James Fisher had since sold and assigned his interest to James Tree, but the whole of the purchase-money had not been paid; and reciting that at the date of the assignment to Fisher from Hill, Hill considered and stated that there was a considerable arrear of interest due to him from the executors and trustees acting under his uncle's will, but which arrears neither Fisher nor Tree would attempt to recover; and reciting that Hill had requested Tree and Fisher to release, assign, and give up to him, the said Hill, all arrears of interest due from the executors and trustees of the will of his uncle that accrued prior to the 1st of January, 1861, and were still unpaid, which they, the said Fisher and Tree, had agreed to do: It was by the said indenture witnessed, that in pursuance of the said agreement, and in consideration of five shillings paid to Tree and Fisher on the execution of the now stating indenture, they, the said Tree and Fisher, and each of them, did thereby release, assign, and give up to the said Hill, his executors, administrators, and assigns, all the arrears of the interest, dividends, and annual produce, which, previous to the 1st of January, 1861, arose from, or ought to have been paid upon, all or any part of the said real and personal estate of the

said Francis Hill, the uncle, and to which the said Hill was entitled; subject to the mortgages thereon held by the said James Fisher, as owner of the life estate therein under the will of the said Francis Hill, the uncle. Then followed the general words, with a *habendum* for Hill's absolute use and benefit, and power to sue for and recover the same.

The plaintiff, on the 21st of April, 1865, filed this bill against the defendants, who were the representatives of the trustees, setting forth the will of the testator and the mortgage deeds, alleging that instead of investing the moneys from time to time, as they were received, in the manner directed by the will, the trustees used the moneys, or part of them, in their business of bankers, and lent such moneys at a high rate of interest to their customers and others, and made large gains therewith; that they suppressed these facts from the plaintiff and his mortgagees, and paid them only a small rate of interest, and much less than the amount received by them; and that some of the securities alleged to have been taken for parts of the fund were, in fact, taken for debts due to the said T. Bate and W. Robins. The bill alleged that the plaintiff made numerous applications to the trustees, and to the surviving trustee, for an account of the investments, but without effect, and from his inability to obtain an account became embarrassed in circumstances.

The plaintiff charged that a considerable sum was due and owing in respect of the dividends and interest, gains and profits, upon and in respect of the said trust moneys, up to the 1st of January, 1861, and that so it would appear if the defendants set forth proper accounts. The plaintiff further charged that Bate and Robins made up their accounts with their customers with half-yearly rests, according to the custom of bankers, and that he was entitled to have the account taken in the same manner. He further charged that he had been unable to prosecute his claim earlier for want of pecuniary means. The bill prayed for an inquiry as to the securities on which the said sum of £7,000 was invested up to the 1st of January, 1861, and of the dividends and interest, gains and profits, produced thereby, and that it might be declared that the plaintiff was entitled to be paid the same, or, at his option, £5 per centum on the said last-mentioned trust moneys from time to time in the hands of the trustees, or the survivor, or of the executors, or of any banking firm of which they were members, after giving credit for all moneys paid on account, and that the defendants (other than the mortgagee) might be decreed to pay the same out of the testator's assets.

Mr. Dickinson, Q. C., and *Mr. W. Morris*, for the plaintiff, stated the case to the court.

The VICE-CHANCELLOR. Have you any precedent for a bill of this description?

Mr. Dickinson. None is necessary. The plaintiff sues as assignee of a sum of money uncertain in amount at present, but ascertainable on an account taken, which is due from the defendants by the rules of this

court. Suppose there had been no mortgage, it is quite clear the plaintiff would be in a position to maintain the suit. Then go one step further, suppose the mortgagee were plaintiff, it was equally clear that the suit would be properly constructed, though, perhaps, in the result nothing might be found due. Then why cannot the assignee of these moneys from the mortgagee maintain the suit which his assignor could maintain as a matter of course.

It is submitted, therefore, that the plaintiff is entitled to the decree asked by the bill.

Mr. Bacon, Q. C., Mr. Speed, Mr. Greene, Q. C., and Mr. Hallett, for the representatives of the trustees, and *Mr. Bagshawe* for the mortgagee, were not called on.

SIR JOHN STUART, V. C. I can recollect no case like the present. The plaintiff does not sue as assignee of the trust estate, or of any part of it. He is assignee of nothing but of a right to sue the trustee for the chance of recovering from him interest or profits of part of the trust funds, which were, for a certain period, in his hands. In my opinion such an interest is not assignable, nor a suit in respect of it maintainable in this court. The *cestuis que trust*, declining themselves to institute proceedings for an alleged breach of trust, have, in consideration of five shillings, assigned the moneys recoverable in respect thereof to the plaintiff.

The bill must be dismissed with costs.

PEOPLE v. TIOGA COMMON PLEAS.

SUPREME COURT OF NEW YORK. 1837.

[Reported 19 Wend. 73.]

A WRIT of alternative mandamus having issued, commanding the Tioga C. P. to vacate a rule between Jesse Thomas, plaintiff, and James Lounsberry, defendant, denying a motion made to vacate the entry of satisfaction acknowledged by Thomas and to grant the motion: the Common Pleas returned, that at the July term, 1836, of that court, Thomas recovered a verdict of \$550 damages against Lounsberry in an action on the case for debauching the plaintiff's servant, and that judgment was duly satisfied of record on a satisfaction piece acknowledged by him; that on a motion made to vacate the satisfaction, it appeared that on the 18th of February, 1836, the plaintiff executed a sealed power of attorney to the relator, reciting that the defendant had debauched the relator's step-daughter while she resided with the plaintiff, and that she had returned home to the house of the relator, where she was likely to occasion him additional expense and trouble, and authorizing the relator to prosecute Lounsberry in the plaintiff's name — he, the relator, to keep the plaintiff harmless from all damages, costs

and charges. Of the contents of this paper, the defendant had full notice before the verdict, which was the fruit of the prosecution mentioned in the power of attorney. Notwithstanding this, the Common Pleas denied the motion to vacate the satisfaction. A motion was now made for a peremptory mandamus.

M. T. Reynolds, for the relator.

S. Stevens, contra.

By the Court, COWEN, J. The questions are, 1. Whether, admitting this claim for the wrong done to Thomas to be assignable, the sealed instrument was operative as an assignment; and 2. If so, whether such a claim be assignable.

Looking at the facts recited in the power of attorney and the provisions to save Thomas harmless, no one can doubt that the object and intent of the power of attorney was to assign all Thomas' interest to Stanton, the relator, to whom in conscience it belonged. He was the real sufferer, and the plaintiff did a just and generous act in giving such a power. No two persons can understand it in different ways. It says, "because the defendant has probably brought disgrace upon the relator, with probable expense, I empower him to prosecute in my name, at his own expense. Witness my hand and seal." This is but another mode of saying, under seal, "You may receive to your own use the avails of the suit as an indemnity for your moral injury," &c. The words, "I do hereby authorize him to prosecute in my name," when viewed in connection with the reason and motives, and at whose expense, are equivalent to a covenant that the assignee might prosecute available to himself. It is like an irrevocable power of attorney, which, in the case of an ordinary *chose in action* operates as an assignment, and a power of attorney for a consideration is irrevocable. Per Lord Eldon in *Bromley v. Holland*, 7 Vesey, 28. Per Kent, J., in *Bergen v. Bennett*, 1 Caines' Cas. in Err. 15, 16, 17. The costs, time and other charges of such a prosecution were, it seems, actually incurred by Stanton. They are many times very great in this kind of action; at any rate, they make a *valuable* in addition to the *moral* consideration: no matter what the amount. Suppose the paper had said, "in consideration of one dollar to be paid," which had been afterwards advanced. The slightest consideration is sufficient, either of benefit to the assignor or damage to the assignee. Surely, something more than the mere burthen of a suit for Thomas' benefit was intended. The contrary would be a very absurd construction. Suppose Stanton had got the money, could Thomas have recovered it of him? I should think not a cent of it.

I regret to think, however, that the relator has mistaken his remedy, in moving to vacate the satisfaction entered upon the record. *Gardner v. Adams*, 12 Wendell, 297, 299, is cited and relied upon by the counsel for the defendants; but the question is not whether this demand be transferable so as to pass the *legal* right. Matters in action are never so transferable, unless they arise on certain commercial instruments.

As a general rule, however, a *chose in action* is said to be assignable in equity; and when assigned with notice to the person from whom it is due, courts of law protect the assignee against all prejudice from the acts of the assignor.

Chose in action, taken in its broadest latitude, comprehends not only a demand arising on contract, but also on wrong or injury to the property or person. 2 Woodd. Lect. 387; Toml. Law Dict. Chose; Lilly's Abr., *Chose in Action*. But for the purposes of any sort of assignment, legal or equitable, I can nowhere find that the term has ever been carried beyond a claim due either on contract, or such whereby some special damage has arisen to the estate of the assignor. Executors at law take every thing belonging to their testator which can be considered as property, or form the subject of dealing in any way. By the equitable construction of a statute, they shall take rights of suit for such injuries to the testator's personal property as render it less valuable to the executor. 1 Williams' Ex. 507-513. Their right to all demands arising on contract, especially, is very comprehensive; and yet, even they cannot sue for the breach of a marriage promise made to their testator, where no special damage is alleged, because the claim is in nature of a personal wrong. *Chamberlain v. Williamson*, 2 Maule & Sel. 408, 415. Lord Ellenborough there said, if such an action were maintainable by the executors, every action founded on an implied promise to the testator, where the damage subsists in his personal suffering, would also be maintainable; and among them, for all injuries affecting the life and health of the deceased, all such as arise out of the unskilfulness of medical practitioners, and the imprisonment of the party brought on by the negligence of his attorney, &c.

The object and policy of the law is, that executors and administrators should take as far as possible every thing wearing the semblance of personal property in the testator or intestate, as a part of the assets or fund to pay debts. The same object is aimed at by bankrupt and insolvent acts, which declare what shall pass to commissioners, trustees, and assignees. Such statutes are very broad in their terms. *Estate or effects* is used in the English statute, 1 Cooke's Bank Law, 261; *Property, real, personal, and mixed*, in that of Pennsylvania, Ingr. on Insolvency, 50, and *All the estate, real and personal, of every nature and description*, in the bankrupt law of the United States, 1 Peters, 218. Yet I have not been able to find any case in England which, in respect to personal estate, has given the assignees a greater right than would go to an executor: none which vests in them a right of action for a personal tort, or indeed any other mere tort, while there are several cases in Pennsylvania which deny that such a right will pass. In *Somner v. Wilt*, 4 Serg. & Rawle, 19, 28, the claim was for an abuse of legal process against the plaintiff's goods. Duncan, J., said the claim was neither *estate, credit* nor *effects*. The action is personal, and would die with the person. In *North v. Turner*, 9 Serg. & Rawle, 244, a trespass *de bonis asportatis* was put by the court as an

exception, because it affected the bankrupt's property, and was therefore separable from the person. But not so says Gibson, J., as to slander, assault and battery, criminal conversation, &c.; and this was afterwards held of a claim for a malicious and excessive distress. *O'Donnell v. Seybert*, 13 Serg. & Rawle, 54. In the two last cases the court appear to measure the assignable rights which pass to executors, and those which go to assignees of insolvents by the same rule. In the last case, Duncan, J., instances that of an action on a penal statute which does not survive. So of an action on the case for a deceit. *Shoemaker v. Kelley*, 2 Dall. 213.

It has been denied under the bankrupt law of the United States that even a right to trespass *de bonis asportatis* will pass. *Hempstead v. Bird*, 2 Day, 293; 3 id. 272, s. c. Speaking on the same subject in *Comegys v. Vasse*, 1 Pet. 213, Story, J., says: "In general, it may be affirmed that mere personal *torts* which die with the party, and do not survive to his personal representatives, are not capable of passing by assignment." *Gardner v. Adams*, before mentioned, merely declares that a *tort* is not assignable so as to warrant an action in the name of the assignee. But the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate, so far that it can be touched by a contract and made a subject of transfer between parties in any way, at law or in equity. If the right be not so entirely personal, that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency, or will on his death pass to his executors. The reason is because it makes a part of his estate, it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal, it is beyond the reach of contract; in the same sense we say of many *rights*, they are inalienable. No one would pretend that a man's person could be specifically affected by contract: though he should bind himself by indenture, equity could not enforce the agreement. *Mary Clark's Case*, 1 Blackf. 122. So of a man's absolute personal rights in general; as, his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, &c. These, though professedly aliened in the strongest terms, cannot be specifically bound. Neither law nor equity will recognize the transfer. A claim of damages for a violation of any of these or the like rights appears, upon the authorities, to come within the same rule as being correlatively of the same nature. Such, clearly, was the case at bar. The injury done to Thomas was a violation of his rights as a master. Even had his servant been bound by indenture, she could not have been assigned; and had he died, the indenture would have been void, *Baxter v. Burfield*, 2 Strange, 1266; though a contract that she should serve another would doubtless have bound him personally. Looking at the cases and at legal analogies, it appears to me the same distinction must prevail here. In *Caistre v. Eccles*, 1 Ld. Raym. 683, it was held that though the assignment of an apprentice was void

as such, yet it operated as a covenant by the first master that the apprentice should serve the second, on which a suit would lie. This very distinction was taken in respect to a tort in *Deering v. Farrington*, 3 Keb. 304. The defendant sold to the plaintiffs £500, part of the loss by firing a ship, which should be recovered against any person, and held that though this could not operate by way of assignment, yet the defendant having got the money himself, he was liable to the plaintiff on an implied covenant. Hales, C. J., said the assignment did not transfer the duty, but was a contract to transfer the benefit; and the law makes a covenant wherever the party will contravene his agreement by deed. This was not exactly a personal injury. The courts at this day might, as it respected property, hold such a claim assignable in equity; but the case shows the principle which is still applicable to personal wrongs.

A right to reclaim money paid on an usurious consideration has been held assignable. *Breckenridge v. Churchill*, 3 J. J. Marsh. 11, 13; and in *North v. Turner*, 9 Serg. & Rawle, 244, it was decided that a claim for a trespass committed by taking and converting personal property, as it would pass to an executor, might be assigned in equity, so as to be bound specifically; though it was conceded that injuries strictly personal could not. This case, it appears to me, goes the utmost length which can be allowed in the doctrine of equitable assignability. Assignments of personal injuries must still be regarded as mere covenants or promises, which we cannot directly protect against the interference of the immediate party, though the defendant have full notice of the effort to assign. If the person professing to assign will do prejudice to the right, by extinguishing or impairing it, the party with whom he deals must be left to his action for damages, according to the nature of the undertaking. If it be under seal, then he must bring covenant, as was held in *Deering v. Farrington*; if without seal, then *assumpsit*. *Motion denied, but without costs.*

McKEE v. JUDD.

NEW YORK COURT OF APPEALS. 1855.

[Reported 12 N. Y. 622.]

ACTION commenced in the Supreme Court the 28th of July, 1851. The complaint alleged that on the 7th of August, 1850, one Meritt was the owner of a horse and peddler's wagon, and a quantity of goods contained in boxes in the wagon; and that on the day last named the defendant took the horse, wagon, and goods from the possession of Meritt, and sold, disposed of and converted the goods, to the value of eighty dollars, to his own use; and that he kept and detained the horse and wagon for several days, to the damage of the plaintiff of twenty

dollars, and then returned them to him. The complaint further stated that on the 1st day of November, 1850, Meritt, "for a valuable consideration, by an instrument in writing under his hand and seal, sold, transferred and assigned his claim and demand against the defendant for said taking and detention of said horse and wagon, and the taking and converting of said goods to the plaintiff, who is now the owner of said demand." The complaint demanded judgment against the defendant on account of the premises for \$100, and interest from the 7th of August, 1850.

The defendant, by his answer, denied each and every allegation contained in the complaint. He further denied that Meritt had any assignable claim or demand against the defendant, or that he did assign or transfer any cause of action against the defendant to the plaintiff; and insisted that the plaintiff was not entitled to maintain the action. The answer also alleged that the property in question belonged to one Barnes, in whose possession it was; that it was seized and taken by virtue of an attachment issued by a justice of the peace in favor of the defendant against Barnes, and that the goods, which were sold, were sold by virtue of an execution issued upon a judgment for about \$70, recovered against Barnes in the suit commenced by the attachment and to satisfy the same; and that thereupon the residue of the property was returned to Barnes. There was a reply taking issue upon the allegations of new matter in the answer.

The cause was tried in October, 1852, at the Broome County Circuit before Mr. Justice Gray. The plaintiff gave evidence tending to prove that in August, 1850, the horse, wagon, and goods were owned by Meritt, and were in the possession of one Barnes only as his agent to sell the goods. It was further proved, that in the month last named a constable, by virtue of an attachment against Barnes and by the direction of the defendant, seized the property and detained it until he sold, a few days afterwards, sufficient of the goods to satisfy an execution issued against Barnes upon a judgment recovered in the suit commenced by the attachment, when he restored the horse and wagon and the residue of the goods to Barnes. The plaintiff read in evidence an instrument, dated the 1st day of November, 1850, executed by Meritt, whereby he assigned, conveyed, granted, sold, transferred and set over unto the plaintiff all his property and estate of every name, kind, nature, and description, in trust, to convert the same into money and apply the same to the payment of his, Meritt's, debts in the order of preference specified therein. It was proved that the goods sold by the direction of the defendant were worth from \$75 to \$80.

At the close of the evidence the counsel for the defendant insisted that the plaintiff was not entitled to recover, and requested the court to nonsuit him on the grounds: 1st. That the action was for a tort or wrong alleged and proved to have been committed before the assignment to the plaintiff, and that the cause of action therefor was not assignable; 2d. That there had been no demand of the property from

the defendant by the plaintiff, and no refusal by the former to deliver it to him. The court overruled said several objections and declined to nonsuit the plaintiff, and the counsel for the defendant excepted. The court further ruled and decided that if the jury found that the property belonged to Meritt, at the time it was taken and sold by the direction of the defendant, the plaintiff was entitled to recover. To this the counsel for the defendant excepted. There were some other questions in the case arising on the exclusion and admission of evidence, but they are not of general interest. The jury rendered a verdict in favor of the plaintiff for \$86 damages, upon which judgment was rendered. The judgment was affirmed at a general term of the Supreme Court in the 6th district. The defendant appealed to this court.

D. S. Dickinson, for the appellant.

G. W. Hotchkiss, for the respondent.

GARDINER, Ch. J. The action was not brought to reclaim the property taken by the defendant, or its proceeds, but to enforce the claim and demand accruing originally to Meritt, for the unlawful detention and conversion of the goods in controversy.

Whether this cause of action was assignable, so as to enable the plaintiff to sustain the suit in his own name, is the only important question now presented. The learned judge, who delivered the opinion of the Supreme Court was correct in saying that the terms of the deed were sufficiently comprehensive to embrace all the property of the assignor, and all the rights thereto appertaining. If a demand arising for a tortious conversion is assignable, I entertain no doubt that it passed by this conveyance. In *The People v. Tioga Common Pleas*, 19 Wend. 73, this subject was discussed by Judge Cowen with his usual learning and ability; he observes, in speaking of *choses in action*: "That for the purposes of any sort of assignment, legal or equitable, I can nowhere find that the term has ever been carried beyond a claim due either on contract, or such whereby some special damage has arisen to the estate of the assignor." And his conclusion is, that demands arising from injuries, strictly personal, whether arising upon tort or contract, are not assignable, but that all others are. Upon the authority and reasoning of that case, and the decisions there referred to, the law may be considered as settled, that a claim to damage arising from the wrongful conversion of personal property is a *chose in action* that is assignable; and as such, was transferred by the trust deed to the plaintiff. In the present Supreme Court there is a conflict of opinion, Judge Harris and his associates concurring in the views of Judge Cowen, and Judge Brown holding that a demand of that nature is not the subject of assignment. 7 Howard, 492; 18 Barbour, 500. If the demand was assignable, the action was properly brought in the name of the plaintiff, who had the exclusive right to recover the damages for the purposes of the trust. Code, §§ 111, 113. No demand or refusal was necessary to maintain the action. By the assignment the plaintiff succeeded to all the rights of the assignor;

this is a necessary consequence of the assignability of the claim, as distinguished from the property converted. 1 Selden, 344.

The judgment of the Supreme Court should be affirmed.

DENIO, JOHNSON, DEAN, and CRIPPEN, JJ., concurred. RUGGLES, J., took no part in the decision.

HAND, J. (Dissenting.) This action is for taking and converting the personal property of one Meritt. Admitting that the assignment by the latter was a valid transfer of his *choses in action* and other personal effects that were assignable, the principal question in the case is; Did the assignment in this case transfer a right of action for taking and converting personal property? The goods were sold on an execution in favor of defendant, and by his direction. But there was no proof that defendant himself took the goods before or after the sale, or converted them, except by directing them to be sold upon the executions; and the assignment was made nearly three months afterwards. The taking and conversion were therefore complete at the time the assignment was made, and the defendant then had no interest in or control over the property.

I had supposed that a mere right of action for a tort could not be assigned, either at law or in equity, except by means of some statutory proceedings. *Gardner v. Adams*, 12 Wend. 297; *People v. Tioga Common Pleas*, 19 id. 76; *Thurman v. Wells*, 18 Barb. 500; 2 Story, Eq. §§ 1039, 1040, g. 1048; *Hall v. Robinson*, 2 Comst. 293; 1 Font. 213, n. g.; Willard's Eq. 462. A cause of action arising from a tortious act will sometimes pass to the assignees of an insolvent, or to the assignees in bankruptcy. In those cases, there can be no objection on the ground of champerty and maintenance; and the criterion is whether the action is to recover damages for an injury to the property of the insolvent or bankrupt, or for a wrong personal to him. A *solatium* for an injury done to the person or personal feelings of the debtor cannot be assigned. But if the substantial cause of action arises from an act that diminishes or impairs his property, it passes to the assignees. *Roseboom v. Mosher*, 2 Den. 67, Bronson, C. J.; *Beckham v. Drake*, 2 H. L. Ca. 577; s. c., 11 M. & W. 315; 8 id. 846; *Rogers v. Spence*, 12 Cl. & Fin. 700; s. c., 13 M. & W. 571; 11 id. 191; *Wetherell v. Julius*, 10 Com. B. 267; *Stanton v. Collier*, 3 Ell. & Bl. 274; *Milnor v. Metz*, 16 Pet. R. 221; and see *Gillet v. Fairchild*, 4 Den. 80. The transfer in such cases is in compliance with a statute, and is generally *in invitum*. But where the act is done on the mere motion of the parties, the assignment of a bare right to bring an action for a mere tort has been considered void on the ground of public policy. There is nothing in the Code which abrogates this salutary principle; indeed the question is one of right or title and not of remedy.

There are other questions in the case; but on the objection already noticed, the judgment should be reversed.

MARVIN, J., concurred in the foregoing opinion delivered by Judge Hand.
Judgment affirmed.

PATTEN v. WILSON.

SUPREME COURT OF PENNSYLVANIA. 1859.

[Reported 34 Pa. 299.]

ERROR to the Common Pleas of Allegheny County.

This was an attachment execution issued by a justice of the peace on a judgment in favor of James Patten, for the use of John South, against Thomas M. Wolf, which was served on William Wilson, as garnishee. The garnishee appealed from the judgment of the justice.

On the 23d of March 1858, Thomas M. Wolf, the defendant, recovered a verdict in the District Court of Allegheny County, against William Wilson, the garnishee, for the sum of \$100, in an action of trespass *vi et armis*, for false imprisonment. On the 26th March, Wolf's attorney assigned this verdict, without consideration, to John R. Large; and on the 29th, judgment was entered on the verdict, and this attachment was laid.

It appeared in evidence, on the trial, that S. H. Geyer was Wolf's attorney in the action against Wilson; that Wolf had offered to pay Geyer \$100, out of the verdict, if he would try the case; to which offer Geyer acceded, and went on and recovered the verdict.

The court below (McClure, P. J.) charged the jury, that the assignment to Geyer was valid, as against the plaintiff's attachment; to which the plaintiff excepted; and a verdict and judgment having been given for the garnishee, the plaintiff removed the cause to this court, and here assigned the same for error.

Burgwin, for the plaintiff in error.

Marshall and *Brown*, for the defendant in error.

The opinion of the court was delivered by

WOODWARD, J. Mr. Geyer had no lien on the fund attached, by virtue of the professional relation betwixt him and his client, but we think that, under the facts disclosed in his testimony, he had an equitable assignment. He wanted more than \$100 for his services, but Wolf would agree to give no more, but that sum he agreed to give "out of the verdict," if Geyer would try his cause. Geyer did try the cause, and as between himself and Wolf, he acquired thus an equitable right to receive the \$100; Wolf would be estopped from demanding it in face of his agreement.

Now, the Act of Assembly under which Patten attached this money in the hands of Wilson, says, that debts attached in execution shall be "subject, nevertheless, to all lawful claims thereupon." See § 22 of Act of 16th June 1836, relating to executions.

The effect of this provision is, what perhaps would have been decided without it, to place the attaching creditor, as regards the rights of third

parties, exactly in the shoes of the debtor. If Wolf could not claim this money, as against his counsel, Geyer, neither can Wolf's attaching creditor. All the equities which Geyer could set up against Wolf, are equally available to him as against Patten.

And this decides the cause. We make no account of the assignment to Large. It was void as against Wolf's creditors. It is not that, but the equitable assignment to Geyer, which defeats the plaintiff.

An observation of the learned counsel for plaintiff in error, is worthy of notice as applicable to both of these assignments. He argues that, as the claim was for unliquidated damages in an action sounding in tort, it was not capable of assignment before verdict. Strictly that is true. But it is true only in respect to the rights of third parties. As between Wolf and Geyer, an assignment or agreement to assign the whole or part of a future verdict, would be binding, and, being founded on sufficient consideration, would be enforced. Such agreements between counsel and client are common; more frequent, indeed, than they ought to be. They have attracted the animadversion of this court, more than once; but they bind the parties, and the attaching creditor of one of the parties succeeds to no higher rights than he possessed.

The judgment is affirmed.

RICE *v.* STONE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported 1 Allen, 566.*]

BILL IN EQUITY, filed March 26, 1860, alleging that the plaintiff is a creditor of the defendant Stone; that Stone has not any property which can be come at to be attached; that on the 24th of March, 1860, Stone recovered judgment against the other defendant, Noah Perrin, in the Superior Court in Boston, for two hundred dollars and costs, in an action of tort for injuries to the person, which sum he is about to collect for his own use, and does not intend to apply the same to the payment of the plaintiff's demand; and praying for an injunction to stay execution on the judgment, and for a decree that the demand of the plaintiff shall be paid from the proceeds thereof.

The answer of Stone admitted the debt to the plaintiff; and averred that on the 16th of March, 1860, he obtained a verdict in his action against Perrin for two hundred dollars; and that on the following day, for a valuable consideration, he assigned his interest in the same and in the judgment to be rendered thereon, by an instrument in writing duly executed, a copy of which was annexed, to Paul Adams, who thereupon held and still holds the same.

Adams filed a petition in the case alleging the assignment to him, and claiming the amount of the verdict and judgment.

At a hearing in this court, at April term, 1860, before Bigelow, J., it was fully proved that the assignment was duly executed and delivered on the 17th of March to Adams, as security for a pre-existing debt then due from Stone to him, and of an amount exceeding the amount of the judgment, and was made in good faith and with no intention to hinder, delay, or defraud creditors. The question was raised whether the claim of Stone against Perrin having been ascertained by a verdict, was by law assignable after verdict and before judgment; and this question only was reserved for the determination of the whole court.

F. A. Brooks, for the plaintiff.

G. H. Preston, for the defendants.

CHAPMAN, J. No case is cited where it has been held that an assignment of a claim for damages for an injury to the person has been held good, when the assignment was made before judgment in an action for the tort. Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing in action, cause of suit or title for condition broken, could not be granted or assigned over at common law. Bac. Ab. Assignment, A. Com. Dig. Assignment, A. Shep. Touchstone, 240. But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various *choses in action*, and after a while courts of law recognized the validity of such assignments, and protected them by allowing the assignee to use the name of the assignor for enforcing the claim assigned. And at the present day claims for property and for torts done to property are generally to be regarded as assignable, especially in bankruptcy and insolvency. There may be some exceptions to this doctrine, but they need not be discussed here. But in respect to all claims for personal injuries, the questions put by Lord Abinger in *Howard v. Crowther*, 8 M. & W. 603, are applicable: "Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?" And we may add the broader inquiry, — has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain, suffered by an assignor? There were two principal reasons why the assignments above mentioned were held to be invalid at common law. One was to avoid maintenance. In early times maintenance was regarded as an evil principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole of its force. It would still be in the power of litigious persons, whether rich or poor, to harass and annoy others, if they were allowed to purchase claims for pain and suffering, and prosecute them in courts as assignees. And as there are no counterbalancing reasons in favor of such purchases, growing out of the convenience of business, there is no good ground for a change of the law in respect to such claims.

The other reason is, a principle of law, applicable to all assignments, that they are void, unless the assignor has either actually or potentially the thing which he attempts to assign. A man cannot grant or charge that which he has not. *Jones v. Richardson*, 10 Met. 481; *Moody v. Wright*, 13 Met. 17; *Codman v. Freeman*, 3 Cush. 309. In these cases the doctrine is applied to the mortgage of goods, which may be subsequently purchased by the mortgagor. But it applies equally to all sales of personal property and rights of property. In *Lunn v. Thornton*, 1 Man., G. & Scott, 379, it is applied to a sale of goods. This court has applied it to an assignment of wages where there is no contract for service. *Mulhall v. Quinn*, 1 Gray, 105.

The application of the doctrine of estoppel to conveyances of real estate with warranty, modifies the effect of the general doctrine in such cases, but can hardly be called an exception to it. Assignments of claims for torts done to property seem to be exceptions; yet these claims differ essentially from claims for personal torts. A claim for the tortious conversion or destruction of property, is based on a right to property which has a certain value. A claim for an injury to the property which is less than a conversion or destruction of it, is of the same character. So also the claim to recover threefold the amount taken for usurious interest. In *Gray v. Bennett*, 3 Met. 522, where it is decided that such a claim passes by assignment to the assignee of an insolvent debtor, it is distinguished from claims for injuries to the individual, such as assault and battery, false imprisonment, malicious prosecution, defamation, &c. The former is said to be a vested interest; and the latter are called mere personal rights.

It is there admitted that mere personal rights are not assignable. A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale. Until it is thus established, it has no elements of property sufficient to make it the subject of a grant or assignment. The considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed, whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal that an assignee cannot urge them with any force.

The character of this class of claims is not changed in this respect by a verdict before judgment. It must be made the subject of a definite judgment before it is assignable; a judgment upon which a suit may be brought. *Stone v. Boston & Maine Railroad*, 7 Gray, 539.

It is said in *Langford v. Ellis*, 14 East, 203, note, that the moment the verdict comes the damages are liquidated. This was an action of slander. But the principal case of *Ex parte Charles*, 14 East, 197, in which the other was cited, is regarded as overturning it. *Buss v. Gilbert*, 2 M. & S. 70. And these cases hold that neither an action for breach of promise of marriage nor for seduction passes to an assignee in bankruptcy before judgment. In our practice, where the points in

controversy are seldom raised by the pleadings, but are brought out in later stages of the case, the claim remains in great uncertainty till the judgment is rendered. And the case of *Stone v. Boston & Maine Railroad*, cited above, follows the ancient case of *Benson v. Flower*, Sir W. Jones, 215, where it was held that an action of the case is not assignable till after judgment, when it is reduced to a certainty.

Most of the cases in which the right to assign this class of claims has been discussed, have been assignments under the statutes of bankruptcy or insolvency. Much of the discussion has, therefore, related to the construction of these statutes; but the nature of the claims has also been regarded as an objection to their being assignable. In some cases the question has been discussed without reference to such statutes. In *Prosser v. Edmonds*, 1 Younge & Coll. 481, it was held that a bare right to file a bill in equity for a fraud was not assignable. Lord Chief Baron Lyndhurst remarked that courts of equity had relaxed the ancient rule as to the assignment of *choses in action*, "but only in the cases where something more than a mere right to litigate has been assigned." This constitutes a very important limitation.

In *North v. Turner*, 9 S. & R. 244, the claim was for trespass *de bonis*, and it was held to be assignable under the laws of Pennsylvania; but Gibson, J., admits that some claims are not assignable. He says: "There are undoubtedly some injuries which so particularly adhere to the person of him who has suffered them, as to preclude an assignment of his claim to compensation for them so as to make him a witness; such, for instance, as slander; assault and battery; criminal conversation with the party's wife, and many others that might be mentioned. The right to compensation for any of these would not pass by a statute of bankruptcy, or an assignment under the insolvent acts, nor could it be transmitted to executors or administrators." There cannot be the same objection to the transmission of such a claim to executors and administrators as to its assignment to strangers; and by our recent legislation actions for damage to the person survive; but we do not consider this as materially affecting the question whether such rights of action may be assigned to a stranger.

Gardner v. Adams, 12 Wend. 297, directly decides that a right of action for a tort is not assignable; but the question does not appear to have been much discussed, and the authority of the case is less valuable on that account. *The People v. Tioga Common Pleas*, 19 Wend. 73, was argued by able counsel, and appears to have been thoroughly discussed. It was there held that a right of action for debauching a step-daughter was not assignable; and the court refused to protect the assignee against a fraudulent discharge of the action by the assignor, on the ground that a *chose in action* for a personal tort is not assignable either in law or equity.

In view of these, and many other authorities to which we have referred, we are of opinion that the ancient doctrine of the common law on this subject is still in force, and that the reasons on which it was

originally founded are still valid. As an assignment of a claim for a personal injury is void, though it is made after verdict in an action to recover damages for the injury, the claim of the defendant Perrin cannot prevail.

The plaintiff's bill is authorized by Sts. 1851, c. 206, and 1858, c. 34, and he is entitled to a decree for the payment of his debt according to the prayer of his bill, and for costs.¹

C. *Life Insurance Policies.*

ASHLEY v. ASHLEY.

CHANCERY, BEFORE VICE-CHANCELLOR SHADWELL. 1829.

[*Reported 3 Sim. 149.*]

IN 1802 William Heath insured his life, in the Equitable Insurance Office, for £1,000. By a deed poll, dated the 10th of March 1810, Heath, in consideration of 5*s.*, and for divers other considerations him thereunto moving, assigned the policy to James Hodsoll. In October 1810 Hodsoll died. In February 1815 a decree was made in a suit instituted by Heath and others, against Hodsoll's executors, under which the policy was sold to General Ashley for £320: and, in August of the same year, the executors assigned the policy to General Ashley. In August 1817 General Ashley died. In 1829 the policy was sold to Charles Farebrother, under the decree in a cause instituted, by General Ashley's widow, against his executors. An order was afterwards made, on the application of Farebrother, for a reference to the master to inquire and state whether a good title could be made to the policy. The master reported in favor of the title. Farebrother excepted to the report; and General Ashley's executors presented a petition praying that the report might be confirmed; and that Farebrother might be ordered to pay his purchase-money into court, in trust in the cause. The exceptions and petition were heard at the same time.

The *Solicitor-General* and *Mr. Duckworth* for C. Farebrother.

Mr. Pepys and *Mr. Parker* for the petitioners.

THE VICE-CHANCELLOR. Unless this transaction is affected by the Act of Parliament, no objection can be made to it. By the 14th Geo.

¹ See *Zabriskie v. Smith*, 13 N. Y. 322; *Haight v. Hayt*, 19 N. Y. 464; *Johnston v. Bennett*, 5 Abb. Pr. N. S. 331; *Moore v. McKinstry*, 37 Hun, 194.

"We apprehend that the doctrine has never been held, that a claim of no fixed amount, or time, or mode of payment, — a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them." Per MILLER, J., in *Kendall v. United States*, 7 Wall. 113, 116, 117.

3, c. 48, it is enacted, &c. [His Honor here read the first three sections of 14 G. 3, c. 48.]¹ Now there is not a word said here as to the assignment of policies. This policy was good at the time it was effected. By an instrument of the 10th of March 1810, an assignment of it was made; and, subsequently, the parties who had become entitled to the policy, sold it, for a valuable consideration, under a decree of the court; so that some person became entitled to bring an action, on the policy, in the name of the assured, *Brown v. Carter*, 5 Ves. 862; *Prodgers v. Langham*, 1 Sid. 133; and if such an action had been brought, there is not a word in the Act of Parliament to defeat it. The question is whether the dealing with the policy has been such as that a court of equity would compel the assured to permit the assignee to use his name, in bringing an action on the policy. It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action, in his name, for the sum insured.

The case cited is not applicable; for there the action was brought by the assured; and, at the time of the action brought, his interest had ceased; and, therefore, it came within the third section of the Act of Parliament.

STEVENS v. WARREN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 101 Mass. 564.]

BILL IN EQUITY filed by the administrator of the estate of George L. D. Barton, against the administratrix of the estate of Dewey K. Warren and the next of kin of said Barton, alleging that the plaintiff had in his hands the proceeds of a policy of insurance issued to his intestate on his life; that the defendant Warren claimed them by virtue of an assignment of the policy made to her intestate by Barton; and that the next of kin of Barton claimed them as assets of his estate; and praying that the defendants might interplead.

¹ By 14 Geo. 3, c. 48, it is enacted: that "no insurance shall be made on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning of the act, shall be null and void, to all intents and purposes whatsoever.

"II. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person or persons name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made.

"III. That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received, from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events."

The defendants answered, and agreed that the court might, if it saw fit, take jurisdiction. The case is stated in the opinion.

H. W. Paine & R. D. Smith, for Warren's administratrix.

G. W. Baldwin, for the next of kin of Barton.

WELLS, J. The plaintiff, as administrator of Barton, holds the proceeds of a policy of insurance upon the life of his intestate. The fund is assets in his hands for the benefit of one of the defendants as next of kin, after payment of debts, unless the other defendant is entitled to receive it by virtue of an assignment of the policy in the lifetime of the assured.

It is not properly a case for interpleader. But the plaintiff sustains a twofold relation to the fund. If the claim of the defendant Warren can be maintained, either at law or in equity, it is not like an ordinary demand against the estate which will be barred at the end of two years, if not sooner prosecuted. It would be against the plaintiff personally, and not as administrator. He is not only liable to be harassed by conflicting claims; but exposed to the risk of being required to settle his accounts, and distribute or pay over the fund as administrator, before his liability to the other claimant is brought to a determination at law. The settlement of the estate is liable to be delayed by reason of a dispute affecting a considerable portion of the supposed assets. In such case the administrator may properly ask the direction and protection of the court. *Dimmock v. Bixby*, 20 Pick. 368; *Treadwell v. Cordis*, 5 Gray, 341.

The only question to be determined in regard to the rights of the parties is, whether an assignment of the policy, by the assured in his lifetime, without the assent of the insurance company, conveyed any right, in law or in equity, to the proceeds when due. The court are all of opinion that it did not.

In the first place, it is contrary to the express terms of the policy itself, by which it is provided and declared that any such assignment shall be void.

In the second place, it is contrary to the general policy of the law respecting insurance; in that it may lead to gambling or speculating contracts upon the chances of human life.

The general rule recognized by the courts has been, that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life. *Loomis v. Eagle Insurance Co.*, 6 Gray, 396; *Lord v. Dall*, 12 Mass. 115. Dewey K. Warren had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security; and to assert an absolute right by purchase. The rule of law against gambling-policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured.

When the contract between the assured and the insurer is "expressed

to be for the benefit of" another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts. c. 58, § 62. *Campbell v. New England Insurance Co.*, 98 Mass. 381. The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation by mutual agreement of the contracting parties of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the assured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained.

The purpose of the clause in the policy, forbidding assignments without the assent of the company, is undoubtedly to guard against the increased risks of speculating insurance. The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision.

The administrator will therefore hold the proceeds of the policy as assets of the estate of his intestate, discharged of any claim thereto under the assignment of the policy to Dewey K. Warren.

Decree accordingly.

FRANKLIN INSURANCE COMPANY v. HAZZARD.

SUPREME COURT OF INDIANA. 1872.

[*Reported 41 Ind. 116.*]

APPEAL from the Franklin Circuit Court.

WORDEN, J. This was an action by the appellee against the appellant on a life insurance policy, issued by the appellant to one William S. Cone, and by Cone assigned to the appellee.

Issue, trial, finding and judgment for the plaintiff below, a motion for a new trial having been made by the defendant and overruled, and exception having been duly taken.

The policy was issued September 2d, 1867, and stipulates for the payment of the sum of three thousand dollars by the company to the assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest and of the death of said Cone, deducting therefrom all indebtedness of the party to the company. The premium paid down was sixty-two dollars and forty cents, and a like premium was to be paid by the assured annually on the 2d of September, during the life of Cone. By the terms of the policy, if the first premium to become due after the issuing thereof should not be

paid at the time specified, the policy was to be forfeited, and the policy was not to be assigned without the consent of the company.

The material facts on which we place the decision of the cause, are these: On the 2d of September, 1868, the premium then falling due was not paid. Cone afterward said to the agent of the company that he had concluded not to keep up the policy, and he declined to pay the premium. Finally he sold the policy to the appellee, Hazzard, and on the 17th of September, 1868, duly assigned the same to him, and the assignment was assented to by the secretary of the company, subject to the conditions of the policy. Hazzard was not the creditor of Cone, nor had he otherwise any insurable interest in his life, but he simply purchased the policy, and paid therefor the sum of twenty dollars. On the policy's being assigned to Hazzard, he arranged with the company for the premium due on the 2d of September, 1868, by paying a part thereof in money and giving a note for the residue, which, we infer, was afterward paid. Cone died in July, 1869.

Can the appellee, on these facts, maintain the action?

We place no stress on the fact that the premium was not paid at the time it fell due, because the forfeiture of the policy seems to have been waived by the subsequent receipt, by the agents of the company, of the premium.

But the question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest. This question is one of first impression in Indiana, and the authorities elsewhere are somewhat in conflict upon the point. We therefore feel at liberty to decide it in conformity with what seem to us to be the general principles of law applicable to the question. There can be no doubt that a policy issued to Hazzard upon the life of Cone, the former having, as in this case, no insurable interest in the life of the latter, would be absolutely void. We quote the following passage from the opinion of the court, as delivered by Judge Selden, in the case of *Ruse v. The Mutual Benefit Life Insurance Company*, 23 N. Y. 516: "Our inquiry, therefore, is, whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured. A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong? Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against."

There are many authorities establishing that such policies are void, as contravening public policy, but it is unnecessary to make further reference to them. Now, if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another? If he purchase a policy as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same "demoralizing system of gaming," and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriter. We are aware that the doctrine is held in New York, that if the policy is valid in its inception, it may be assigned to any one, whether he have any interest in the life of the assured or not. *St. John v. The American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. The National Loan Fund Life Assurance Company*, 20 N. Y. 32. Such, also, seems to have been the view taken by the Vice-Chancellor in the case of *Ashley v. Ashley*, 3 Sim. 149. But the contrary doctrine is maintained in Massachusetts. *Stevens v. Warren*, 101 Mass. 564. The following passages, from the opinion of the court in the latter case, will show the scope and effect of the decision. [The court then quotes the greater part of the opinion in *Stevens v. Warren*, ante.]

The decision in the above case is made to rest quite as much upon the second as the first ground stated, viz., that an assignment of a policy of life assurance to one having no interest in the life of the assured, where the assignment is a cover for a speculating risk, is void, as contrary to the general policy of the law respecting insurance.

After pretty mature consideration, we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine on the subject. All the objections that exist against the issuing of a policy to one upon the life of another in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such policy is interested in the death, rather than the life, of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. In either case he is subject, in the language of Judge Selden, above quoted, to strong temptations to bring about the event insured against.

In this case there was but a simple purchase of the policy by Hazard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life. His contract of purchase was essentially a wager upon the life of Cone, and

his interests lay in the payment of few or no intermediate annual premiums, and the early happening of the event which was to entitle him to the three thousand dollars. By his purchase he became interested in the early death of the assured. We are of opinion that the law will not uphold such purchase, and that the appellee acquired no right to the policy or to the sum secured thereby.

Life assurance policies are assignable, to be sure, but in our opinion they are not assignable to one who buys them merely as matter of speculation, without interest in the life of the assured. What is such an interest in the life of another as will authorize one to insure his life, or purchase a policy upon his life, is a question not involved in the case, and we express no opinion upon it.

It has been suggested by the counsel for the appellee that our statute providing for the assignment of contracts embraces contracts of this description as well as others. This may be, but we do not think the statute contemplates the valid assignment of a contract to a party who, under the circumstances, in view of the general principles of law, is incapable of being an assignee of the contract.

In our opinion the plaintiff below was not, on the facts shown, entitled to recover, and the motion for a new trial should have prevailed.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings not inconsistent with this opinion.

U. J. Hammond and *J. M. Judah*, for appellant.

W. Morrow and *N. Truster*, for appellee.

CLARK v. ALLEN.

SUPREME COURT OF RHODE ISLAND. 1877.

[*Reported 11 R. I. 439.*]

ASSUMPSIT, tried by the court, jury trial being waived. The facts are stated in the opinion of the court.

Charles Hart, for plaintiff.

James Tillinghast, for defendant.

DURFEE, C. J. This is an action for money had and received, tried to the court, jury trial being waived. It appears that on the 26th of December, 1868, one Edward T. Ross got his life insured for \$2,000, payable to his wife at his decease. His wife was a second wife. He had children by his former wife, but none by her. She died before him, August 21, 1871. He was then in infirm health and short of means. He did not pay one premium promptly. The company, however, accepted payment afterwards, and issued the policy anew, payable to his legal representatives. On the 2d of January, 1872, he assigned the policy to the defendant, and received the defendant's note for \$125, which was paid April 10, 1872. The surrender value of the policy at

the time of the assignment was \$118. The defendant was Ross's brother-in-law. After the assignment, which was assented to by the insurers, the defendant paid five quarterly premiums of \$25 each. Ross died March 24, 1873. The defendant collected on the policy \$2,121.20. The plaintiff, who is administrator on Ross's estate, brings this action to recover that amount, less the amount of the note for \$125 and the five quarterly premiums with interest.

The plaintiff claims that the assignment was made as security for a loan, and not as an absolute sale. Testimony was submitted on this point. We think the assignment was intended to be an absolute sale.

The plaintiff contends that, if the assignment was an absolute sale, it was void as against public policy, and that he is therefore entitled to recover the money received on it, less the payments aforesaid, as money received to his use. The defendant claims that the assignment, though absolute, is valid, and that he is entitled to keep the money as his own.

Upon the question thus raised there is a conflict of decision. In Massachusetts and Indiana it has been decided that a life policy is not transferable outright to a person who has no interest in the life insured. *Stevens, Adm'r, v. Warren*, 101 Mass. 564; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116. A similar decision (but in a case having peculiar circumstances) has been made by the Supreme Court of the United States. *Cammack v. Lewis*, 15 Wall. 643. The reason given is, that it is unlawful for a person to procure insurance for himself on a life in which he has no interest, and that therefore it is unlawful for him to take an absolute assignment of a policy upon a life in which he has no interest; for otherwise the law could always be easily circumvented by first having a person get his own life insured and then taking an assignment of the policy. And it is also argued that the gambling or wagering element is the same, and the temptation to shorten the life insured is the same, in the one case as in the other. But, on the other hand, it has been decided in England that such an assignment is valid. *Ashley v. Ashley*, 3 Sim. 149, cited without disapproval by Chancellor Kent, in 3 Kent's Com. *369, note. The reason given is, that such an assignment is not within the prohibition of the English statute (14 Geo. III. cap. 48), and that the policy, being valid in its inception, is, like any other valid *chose in action*, assignable at the will of the holder, whether the assignee has an interest in the life insured or not. This view has been repeatedly affirmed in New York. *St. John v. Am. Mut. Life Ins. Co.*, 2 Duer, 419; also in 13 N. Y. 31, on appeal; *Valton v. Nat. Fund Life Assurance Co.*, 20 N. Y. 32; and see *Cunningham et al. v. Smith's Adm'r*, 70 Pa. St. 450. We think the assignment was valid. A life policy is a *chose in action*, a species of property, which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if per-

mitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because if permitted it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. See *Shilling, Adm'r, v. Accidental Death Ins. Co.*, 2 H. & N. 42. It is not claimed that the parties to the assignment here in question had any design to circumvent or evade the law. Perhaps *Cummock v. Lewis*, 15 Wall. 643, *supra*, may be found to be a case of that kind. Again the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal *chose in action* may be transferred, from the holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation which is supposed to beset the assignee without interest, to bring it to an end. *Dalby v. India & London Life Assurance Co.*, 15 C. B. 365; *Law v. London Indisputable Life Policy Co.*, 1 Kay & J. 223; *Rawls v. Amer. Life Ins. Co.*, 36 Barb. S. C. 357; also in 27 N. Y. 282, on appeal; *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Provident Life Ins. & Invest. Co. v. Baum*, 29 Ind. 236.

If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest? The truth is, it is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of life, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy, as a matter of business, after it has once been duly issued under the sanction of the law, and is therefore an existing *chose in action* or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they uphold the great and universally recognized interests of society, ought nevertheless to be cautious about making their own notions of public policy the criterion of legality, lest, under the

semblance of declaring the law, they in fact usurp the function of legislation. *Hilton v. Eckersley*, 6 El. & B. 47, 64.

We therefore decide that whatever the law of this State may be in regard to procuring insurance upon the life of another without any interest in the life insured, it does not forbid the sale and assignment of a valid policy, which is already in existence, to an assignee without interest in the life insured, when the assignment is permitted or not prohibited by the policy, and is made, not as a contrivance to circumvent the law, but as an honest and *bona fide* business transaction.

Judgment for defendant for his costs.

WARNOCK v. DAVIS.

SUPREME COURT OF THE UNITED STATES. 1881.

[*Reported 104 U. S. 775.*]

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Warnock, the plaintiff, is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. Davis and the other defendants are partners, under the name of the Scioto Trust Association, of Portsmouth, Ohio, and reside in that State. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company, of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of \$5,000; and, on the same day, entered into the following agreement with the Scioto Trust Association:—

“ This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, State of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy on his life, limited to the amount of \$5,000, hereby agrees to and with the Scioto Trust Association that nine tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except

the one tenth part of such moneys being subject to his disposition as aforesaid; also, to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of \$6.00 in hand on the execution and delivery of this agreement, and annual dues of \$2.50, to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

“ In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

“ It is hereby expressly understood and agreed by and between the parties hereto, that said Scioto Trust Association do not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

“ Witness our hands, this 27th day of February, A. D. 1872.

HENRY L. CROSSER,
THE SCIOTO TRUST ASSOCIATION,
By A. McFARLAND, *President*,
GEORGE DAVIS, *Treasurer*.”

The policy, bearing even date with the agreement, was issued to Crosser, and on the following day he executed to the association the following assignment: —

“ In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association, of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign, to said Scioto Trust Association all my right, title, and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one tenth part of the same; which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association; to wit, nine tenths thereof, and to pay the balance, one tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deduct-

ing therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

“Witness my hand and seal, this 28th day of February, A. D. 1872.

“HENRY L. CROSSER.” [SEAL.]

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the association collected from the company the amount of the policy; namely, \$5,000; one tenth of which, \$500, less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which with interest exceeds \$5,000. The defendants admit the collection of the money from the insurance company; but, to defeat the action, rely upon the agreement mentioned, and the assignment of the policy stipulated in it. The agreement and assignment are specifically mentioned in the second and third of the three defences set up in their answer. The first defence consists in a general allegation that Crosser assigned, in good faith and for a valuable consideration, nine tenths of the policy to the defendants; that a power of attorney was at the time executed to them to collect the remaining one tenth and pay the same over to his widow; and that after the collection of the amount they had paid the one tenth to her and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial, the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the association of the insurance money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

Mr. J. B. Foraker, for the plaintiff in error.

Mr. A. C. Thompson, for the defendants in error.

Mr. Justice FIELD, after stating the facts, delivered the opinion of the court, as follows:—

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defence. All the facts established by it are admitted in the other defences. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any

other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the State courts; and there is a conflict in their decisions. In *Franklin Life Insurance Company v. Hazzard*, which arose in Indiana, the policy of insurance, which was for \$3,000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the

company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind. 116. The court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts, in *Stevens v. Warren*, 101 Mass. 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative

risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary *chose in action*, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John v. American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. National Loan Fund Life Assurance Company*, 20 Id. 32. In the opinion in the first case the court cite *Ashley v. Ashley*, 3 Simons, 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, — so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in *Cammack v. Lewis*, 15 Wall. 643. There a policy of life insurance for \$3,000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow \$950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

So ordered.

MUTUAL INSURANCE COMPANY v. ALLEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1884.

[Reported 138 Mass. 24.]

BILL OF INTERPLEADER, filed October 22, 1881, by a corporation organized under the laws of the State of New York, against George Allen and Catherine Fellows, to determine which of the defendants was entitled to the proceeds of a policy of insurance, issued by the plaintiff on July 25, 1855, upon the life of Israel Fellows, in the sum of \$2,000. The bill alleged the following facts :

By the terms of the policy it was issued "for the sole use of Catherine Fellows," and the plaintiff promised and agreed "to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said assured, her executors, administrators, or assigns, for her sole use, within sixty days after due notice and proof of the death of the said Israel Fellows. And, in case of the death of the said Catherine Fellows before the decease of the said I. Fellows, the amount of the said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the said I. Fellows, as aforesaid." The policy also contained this clause: "N. B. If assigned, notice to be given to this company."

On Jan. 1, 1881, Israel Fellows, Catherine Fellows, and their two children, who were then of age, by two instruments in writing under their hands and seals, duly executed and delivered in this Commonwealth, assigned and transferred the policy of insurance to the defendant Allen, together with all their respective claims and demands under the same.

On March 7, 1881, Israel Fellows died, leaving his widow, Catherine Fellows, surviving him. Proof of his death was duly made. His widow made a demand upon the plaintiff for the payment of the policy, and brought an action upon the policy in the Supreme Court in New York.

In August, 1881, Allen also brought an action on the policy in this Commonwealth, in the name of Catherine Fellows, for his own benefit.

The answer of Allen admitted the allegations of the bill; and averred that Allen bought the policy for a good and valuable consideration.

The answer of Mrs. Fellows admitted the allegations of the bill; and averred that the assignment was invalid under the laws of the State of New York, and that Allen had no insurable interest in the life of Israel Fellows.

The case was heard by *Holmes, J.*, who reported it for the consideration of the full court, in substance as follows :

The plaintiff paid the money into court. The policy was delivered by the plaintiff in this Commonwealth. At that time, and when the assignment was made, the law of New York was as set forth in the Laws of 1840, c. 80, and in the cases of *Eadie v. Slimmon*, 26 N. Y. 1, and *Barry v. Equitable Assur. Society*, 59 N. Y. 587.

“The amount of premium annually paid upon the policy did not exceed \$300. There was some evidence that the defendant Fellows did not expect that her assignment, although absolute in form, was to be used, except as security for a loan of \$1,000 to her husband; but there was no evidence which satisfied me that there was any restriction upon his power to deliver it as an absolute transfer; and I found that the policy was assigned in Massachusetts to the defendant Allen by the defendant Fellows (both being then residents of Massachusetts), in consideration of \$1,000 paid to her husband by said Allen, and the discharge of certain notes held by said Allen amounting to \$470.79. If the transfer was valid in manner and form as agreed, Allen ceased from that moment to have an insurable interest in the life of said Fellows as a creditor, and he had no other.”

The judge ruled that, so far as the present question was concerned, the transfer was governed by the law of Massachusetts, and that, by the law of Massachusetts, it was not void for want of an insurable interest in the transferee; and found for Allen.

Such decree was to be entered as justice and equity required.

J. F. Colby, for Allen.

W. S. Slocum (*W. F. Slocum* with him), for Mrs. Fellows.

W. ALLEN, J. The contract of insurance was made and was to be performed in this State, and the money due upon it has been paid into court here; and the contract of assignment was made in this State between parties domiciled here. The validity and effect of the assignment, and the capacity of the parties to it, must be governed by the laws of this State. The only question which requires discussion is, whether, by that law, the assignment is void for want of interest of the assignee in the life insured.

The policy, in consideration of an annual premium to be paid by Mrs. Fellows, assured the life of her husband for her sole use, and for her children if she should not survive her husband. The promise was to the assured, her executors, administrators, and assigns. The policy contained no reference to an assignment except the following: “N. B. If assigned, notice to be given to this company.” The policy was issued in 1855. In 1881, an assignment in the words following, signed by Mrs. Fellows, her husband, and children (who were all of age), was indorsed upon the policy: “I hereby assign, transfer, and set over unto George Allen, of Boston, all my right, title, and interest in and to the within policy of life insurance, and all right that may at any time be coming to me thereon.”

A more formal instrument of assignment, with a power of attorney to receive “all sums of money that may at any time hereafter be or become

due and payable to us, or either of us, by the terms of said policy," was also executed by the same parties. The policy and assignments were delivered to the defendant Allen, and notice thereof given to the plaintiff. The consideration of the assignment was the payment of a sum of money by the assignee, and the discharge of certain notes held by him against Mr. Fellows. It is to be assumed, on the report, that the transaction was not, in the intention of the parties, a wagering contract, but an honest and *bona fide* sale of the equitable interest in the policy. The defendant Allen had no insurable interest in the life of Mr. Fellows except as his creditor, and that interest ceased when he ceased to be a creditor by accepting the assignment in satisfaction of his debt, so that he is in the position of a *bona fide* assignee of the policy for valuable consideration without interest in the life insured, and the question between him and the assignor is which has the equitable interest in the policy.

The policy is a common form of what is called life insurance, and is a contract by which the insurer, in consideration of an annual payment to be made by the assured, promises to pay to her a certain sum upon the death of the person whose life is insured. To prevent this from being void, as a mere wager upon the continuance of a life in which the parties have no interest except that created by the wager itself, it is necessary that the assured should have some pecuniary interest in the continuance of the life insured. It is not a contract of indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue, and if made in good faith for the purpose of providing against a possible loss, and not as a cloak for a wager, is sustained by any interest existing at the time the contract is made. See *Loomis v. Eagle Ins. Co.*, 6 Gray, 396, and *Forbes v. American Ins. Co.*, 15 Gray, 249. Mrs. Fellows had an insurable interest in the life of her husband, and the policy to her was a valid contract to pay the sum insured to her upon the event of his death. This contract was a *chose in action* assignable by her. *Palmer v. Merrill*, 6 Cush. 282.

The policy was not negotiable, and her assignment could not, in this State, pass the legal, but only the equitable, interest in the contract. The assignment was a contract between her and her assignee, to which the insurer was not a party. It purported to give to the assignee only the equitable interest of the assignor in the contract, — the right to recover in the name of the assignor the sum which should become due to her under the contract.

The direction in the policy, that notice of an assignment of it should be given to the insurer, had no effect upon the character of the assignment, however its operation might have been limited had notice not been given. The assent of the insurer to the assignment would not make a new contract of insurance. Its only effect would be to enable the assignee to enforce in his own name, instead of the name of the assignor, the rights she held under the contract. *McCluskey v. Providence Washington Ins. Co.*, 126 Mass. 306.

This distinction between the assignment of the interest of the insured in a policy, which is a contract between the assignor and the assignee only, and the transfer or renewal to a third person of a policy, which is a contract to which the insurer is a party, is illustrated in the case of fire insurance. That is strictly a personal contract of indemnity to the assured, and he, or his assigns in his name, can recover only an indemnity for actual loss to him. If he has no interest in the property insured at the time of the loss, he can recover nothing, and if he parts with his interest before a loss, he becomes incapacitated to recover upon the policy, and it ceases to insure anything and becomes void.

Wilson v. Hill, 3 Met. 66. It follows that, where a purchaser of insured property would have the benefit of an unexpired term of insurance, it must be by a new contract with the insurer, and not by assignment from the insured. This is usually provided for in the policy, so that by its terms an assignment by the insured with the assent of the insurer will continue the policy to the purchaser; but in such a case there is a new contract of insurance with the purchaser upon his newly acquired interest, and he becomes the assured. But the assured in a fire policy can, while his insurance continues, assign his rights under the policy in the same manner as the insured in a life policy can do. In *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337, Chief Justice Shaw says, after referring to the kind of transfer just mentioned: "But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a *chose in action*, it is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest, *prima facie*, in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee, with the consent of the insurers." See also *Phillips v. Merrimack Ins. Co.*, 10 Cush. 350.

If Mrs. Fellows had surrendered or forfeited her policy, and the contract between her and the insurer had become null, a new contract, by which the defendant Allen should have become the assured instead of Mrs. Fellows, might have required an insurable interest in him, though in the form of an assignment and a renewal or revival of the original policy. But the original policy has not been surrendered or forfeited, nor the contract in any way changed. Mrs. Fellows is still the assured, and the policy is supported by her interest in the life, and is in form

payable to her. If the assignment is valid, it is payable to her in trust for the assignee; if void, for her own use. In no respect can the assignment affect the validity of the contract of insurance, or taint that as a wagering policy. The only question that can be raised is as to the assignment itself, — whether, as between the parties to it, it is void as a gaming contract.

That a right to receive money upon the death of another is assignable at law or in equity will not be questioned. The right of Mrs. Fellows, under our law, to assign the equitable interest in the policy in question is not denied; but it is contended that she can assign it only to some one who has an insurable interest in the life of Mr. Fellows. We find no reason for this exceptional limitation of the right of assignment, which would allow Mrs. Fellows to assign her policy to Mr. Fellows, or his creditors or dependent relatives, but would forbid her to pledge it for her own debts, or sell it for her own advantage. If there is any such reason, it must be found in the contract of assignment itself, and irrespective of the rule that the original contract must be supported by an interest in the life insured. That rule was satisfied. Whether a similar rule affects the contract between the assignor and assignee must depend upon considerations applicable to that contract alone.

One objection urged is, that it gives to the assignee an interest in the death of the person whose life is insured, without a counterbalancing interest in his life. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow, and is not true, that the law does not allow the possession and assignment of such expectations, nor that an insurable interest is required in a life insurance for the purpose of protecting the life insured. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will as to the assignment of a like provision in the form of a life insurance.

The other objection urged is, that such transactions may lead to gaming contracts. This does not meet the question, which is whether such an assignment is in itself illegal as a wagering contract. Most contracts have an element of gambling in them. There is uncertainty in the value of any contract to deliver property at a future day, and great uncertainty in the present value of an annuity for a particular life, or of a sum payable in the event of a particular death, and such contracts and rights are often used for gambling purposes. The question is whether the right to a sum of money, payable on the death of a person under a contract in the form of an insurance policy, has any special character or quality which renders it less assignable than the right to a sum payable at the death of the same person under any other contract or assurance, or than a remainder in real estate expectant on such death. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and we are of opinion that an assignment of a

policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gaming risk between him and the assignee, or a cover for a contract of insurance between the insurer and the assignee, will pass the equitable interest of the assignor; and that the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal.

In England the question was raised whether the assignment of a life insurance without interest was prohibited by the St. of 14 Geo. III. c. 48, which forbids any insurance on the life of a person in which the person for whose benefit the insurance is made has no interest, or by way of gaming or wagering, and it was held that such an assignment was valid. *Ashley v. Ashley*, 3 Sim. 149. Shadwell, V. C., said, "It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action, in his name, for the sum insured." The same has been held in New York, where a similar statute exists. *St. John v. American Ins. Co.*, 3 Kern. 31; *Valton v. National Fund Assur. Co.*, 20 N. Y. 32. It has been decided in New York that insurance on a life in which the assured has no interest is void at common law, and that the St. of 14 Geo. III. c. 48, so far as it prohibits such insurance, is a declaratory act. *Ruse v. Mutual Benefit Ins Co.*, 23 N. Y. 516. In Rhode Island in a well-considered case, decided in 1877, a sale and assignment of a policy of life insurance to one who had no interest in the life, made, not as a contrivance to circumvent the law, but as an honest and *bona fide* transaction, was held valid. *Clark v. Allen*, 11 R. I. 439. In *Cunningham v. Smith*, 70 Penn. St. 450, a person took out an insurance on his own life, and paid for it with the money of the defendants, intending to assign the policy to the defendants, and did so assign it. The assignment was sustained. The court say that the defendants may have had such an interest in the life insured as would have entitled them to insure his life in their own name, although this was doubtful; but that the assured had an interest in his own life, "and if he was willing to insure himself with their money and then assign the policy to them, there is no principle of law which can prevent such a transaction." This transaction is obviously more open to objection than the assignment of the interest in a valid subsisting policy. In *Ætna Ins. Co. v. France*, 94 U. S. 561, a brother procured an insurance on his life for the benefit of his married sister, who was in no way dependent upon him. It was held to be valid, and that it was immaterial what arrangement was made between them for the payment of the premium. In delivering the opinion of the court, Mr. Justice Bradley, referring to the case of *Connecticut Ins. Co. v. Schaefer*, 94 U. S. 457, in which he delivered the opinion, said: "Any person has a right to procure an insurance on his life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to con-

stitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation."

Several cases have been cited as deciding that any assignment of a life policy to one who has no interest in the life is void. We will notice them briefly. *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, were both cases in which the policies were taken out, by the procurement of the assignees, in order that they might be assigned to them, under such circumstances as that they might well be held to be in evasion of the law prohibiting gaming policies. The remark of Mr. Justice Field in the latter case, that "the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name," was not necessary to the decision. In *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116, the assured had failed to pay the premiums, and had notified the insurers that he should not keep up the policy. He afterwards assigned it for \$20, the insurer assenting and receiving the premiums. The assignment was held void, the court saying that such policies are assignable, but not "to one who buys them merely as matter of speculation without interest in the life of the assured." Neither of these cases decides, whatever *dicta* may have accompanied the decision, that all assignments without interest are illegal. The case last cited is affirmed in the case of *Franklin Ins. Co. v. Sefton*, 53 Ind. 380, in which Chief Justice Worden, quoting from the opinion of the court in *Hutson v. Merrifield*, 51 Ind. 24, — that "the party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other *chose in action*," — says that it is not stated that it is assignable to a person incapable of receiving an assignment; and adds, "It may be added that where the policy holder dies before the death of the party whose life is insured, perhaps the administrator of the holder could, for the purpose of converting the assets into money and settling up the estate in due course of law, sell the policy to any one who might choose to become the purchaser."

Missouri Valley Ins. Co. v. Sturges, 18 Kan. 93, assumes and decides that the same objections lie to an assignment without interest as to an original insurance with no interest. The distinction between the two transactions is not considered. *Basye v. Adams*, 81 Ky. 368, seems to decide, on the authority of *Warnock v. Davis*, *Cammack v. Lewis*, *Franklin Ins. Co. v. Hazzard*, and *Missouri Valley Ins. Co. v. Sturges*, *ubi supra*, that an assignment without interest is void as against public policy.

The case of *Stevens v. Warren*, 101 Mass. 564, decided in 1869, has been supposed to hold that an assignment of the right of the assured in a life policy to one who has no interest in the life, is void without regard to the circumstances and character of the particular transaction, and has been referred to in some of the cases just cited as an authority

to that effect. We think that decision has been misunderstood, and that, in connection with other decisions of this court, it shows that the law in this Commonwealth accords with that laid down in *Clark v. Allen, ubi supra*.

In *Campbell v. New England Ins. Co.*, 98 Mass. 381, decided in 1868, a policy was taken out by one Andrew Campbell on his own life, and payable to himself and his representatives for the benefit of the plaintiff, who had no insurable interest in the life. The question of the right of the plaintiff to sue in her own name was waived, and the question considered was whether the policy could be supported for her benefit. In delivering the opinion of the court Mr. Justice Wells says: "It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract (so long as it remains executory), the interest by which it is supported and the relation of membership, all continue the same as if no such clause were inserted. It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured."

The question in *Stevens v. Warren*, which was decided about a year later, and in which the opinion is given by the same justice, was between the representatives of the assured and of his assignee. The terms, consideration, and circumstances of the assignment are not stated; it is only said that the defendant Warren claimed by virtue of an assignment of the policy, and that he was a purchaser of it, and had no interest in the life insured. The policy contained a provision that any assignment of it without the assent of the insurers should be void. The court held that the assignee acquired no rights under the assignment as against the representatives of the assignor, putting the decision upon both the grounds, that the assignment was prohibited by the contract of insurance, and that it was against the policy of the law against gambling policies. The court said: "The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision." In considering one branch of the case, the following language is used: "The rule of law against gambling policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured." That this language was not intended to apply to all assignments in which the assignee had no interest in the life, but to such only as were found or appeared to be in fact gaming transactions, is evident from what immediately follows in the opinion, in which the doctrine of *Campbell v. New England Ins. Co.*, is

adopted, and applied to assignments: "When the contract between the assured and the insurer is 'expressed to be for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured. And if it should appear that the assignment was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The assent of the insurer, if not required in the policy, must be immaterial as regards the validity of the transaction between the assignor and the assignee. If given, it would only enable the assignee to assert in his own name, instead of that of the assignor, the rights acquired by the assignment. So far as the transaction itself, apart from the circumstances attending it is concerned, taking out a policy payable to a stranger would seem more open to objection, as a gambling transaction, than selling a policy which had acquired an actual value. As the circumstances of the transaction are not disclosed in the report, they must be supposed to have been such as to call for the decision and the remarks which were applied to them in the application of the principle laid down.

In *Palmer v. Merrill*, *ubi supra*, where the subject of assignments of the interest in a life insurance is elaborately considered by Chief Justice Shaw, there is no suggestion that any interest of the assignee in the life is necessary to support the assignment, but it is considered as an ordinary assignment of a *chose in action*.

In *Troy v. Sargent*, 132 Mass. 408, it was held that the interest of a wife in a policy to her husband on his life, for her benefit, could be taken for a joint debt of herself and husband. Could it not be taken for her sole debt, although the creditor would have no interest in the life insured? A policy of life insurance is assets which pass to an assignee in bankruptcy, and can be reached by creditors. Is it necessary, when sold by the assignee or creditor, that the purchaser should have an interest in the life insured?

The general rule laid down in *Stevens v. Warren*, *ubi supra*, "that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life," and from which the inference that an assignee of a party must have an insurable interest seems to have been drawn, we think, is not strictly accurate, or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy, but it is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease, the policy would continue, and the insured would then have an insurance without interest. *Dalby v.*

India & London Assur. Co., 15 C. B. 365, and *Laro v. London Policy Co.*, 1 Kay & Johns. 223, cited in *Loomis v. Eagle Ins. Co.*, 6 Gray, 396; *Connecticut Ins. Co. v. Schaefer*, *ubi supra*; *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Provident Ins. Co. v. Baum*, 29 Ind. 236. The value and permanency of the interest is material only as bearing on the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception, it will not be avoided by the cessation of the interest. The mere fact that the assured himself has no interest in the life does not avoid or annul the policy.

We think that the second ruling was correct, and that the fact that the assignee had no insurable interest in the life does not avoid the assignment. It is one circumstance to be regarded in determining the character of the transaction, but is not conclusive of its illegality.

Decree for the defendant Allen.

CHAPTER IV.

POSSESSION.

NOTE. — In this chapter are collected cases illustrating the rights which may be had in personal property by persons other than the owners. The principal heads under which these rights may conveniently be classed are (1) Taking on Judicial Process; (2) Distraint; (3) Vendor's Lien; (4) Bailment; (5) Finding. The law of Vendor's Lien is best dealt with in connection with Sales; and the subject of Distress is omitted.

SECTION I.

TAKING ON JUDICIAL PROCESS.

GIBSON'S CASE.

EXCHEQUER. 1610.

[Reported 2 Rolle, Ab. 561, pl. 4.]

PER CURIAM. If a searcher searches certain stuffs, and unpacks them and puts them in the dirt, whereby they are damaged, although the search was legal, yet the abuse of this authority will make him a trespasser *ab initio*.

WILBRAHAM v. SNOW.

KING'S BENCH. 1670.

[Reported 2 Saund. 47.]

TROVER, upon special verdict. The case was this; the plaintiff, being sheriff, seized goods in execution by virtue of the writ of *feri facias*; and afterwards, and before they were sold, the defendant took and carried them away, and converted them to his own use; for which the plaintiff brought his action. And on the first argument it was adjudged that the action well lies; and that the plaintiff, being sheriff, has such a property in the goods, by seizing them in execution, that he may maintain an action of trespass or trover at his election; and judgment was given for the plaintiff *nisi*, etc., but it was not moved afterwards.

Sympson, for the plaintiff.

Wilmington, for the defendant. See 34 H. 6, 36 a., and the case

of *Ayre v. Aden* in Moor. 737; Cro. Jac. 73; Dalt. Office of Sheriffs, case 2, fol. 19, which case was adjudged as reported in those books, against the report of Yelverton, 44, and the Roll is in Easter 44 Eliz. Roll. 318.

SHORLAND *v.* GOVETT.

KING'S BENCH. 1826.

[Reported 5 B. & C. 485.]

TRESPASS for breaking and entering the plaintiff's dwelling-house, and remaining there a long time, to wit, for six hours, and until the plaintiff, in order to obtain the quiet and peaceable possession of his house, paid to the defendant £119 10s. 9*d.* of lawful money. As to breaking and entering the house, and making a noise therein, and remaining there for the space of time in the declaration mentioned, pleas, first, not guilty; second, *actio non*, because before the said time, when, to wit, on, &c., Sir W. T., bart., sued out of the court of our lord the king, before the king himself at Westminster, a certain writ of *fi. fa.* directed to the sheriff of Somersetshire, commanding him to cause to be levied of the goods and chattels in his bailiwick of J. H., R. S., and the plaintiff, as well a certain debt of £200, which the said Sir W. T. had then lately recovered against them in his said Majesty's said court; as also £10 which in the same court were awarded to the said Sir W. T. for his damages, &c., which said writ was delivered to the said sheriff, who made his warrant to R. S., and the defendant then and at the said time when, &c., being a bailiff of the said sheriff, and thereby by virtue of the said writ commanded them, &c., which said warrant afterwards and before the return of the said writ, and before the said time, when, &c., to wit, on, &c. was delivered to the defendant so being such bailiff, to be executed in due form of law, by virtue of which said writ and warrant the defendant afterwards, and before the return of the writ, to wit, at the said time when, &c., peaceably entered the said dwelling-house in order to levy the debt and damages aforesaid, according to the exigency of the writ, and on that occasion, and for that purpose stayed and continued in the said dwelling-house for the said space of time in the declaration mentioned, being a reasonable time in that behalf. And this, &c. Third plea to the trespasses in the introductory part of the second plea mentioned, stated the issuing of a *fi. fa.* indorsed to levy £110 15s. besides poundage, &c., and a warrant to defendant to levy; that defendant, in obedience to the warrant, peaceably entered in order to levy, and did levy the said last-mentioned sum, together with poundage, &c. Replication to the second plea, that the writ and warrant, in that plea mentioned, were respectively indorsed to levy a much less sum than the debt and damages in that plea mentioned, to wit, £110 15s., besides poundage, &c., and that shortly after the defendant entered into

the dwelling-house, in which, &c., and whilst he stayed and continued therein as in the second plea mentioned, and before the said writ and warrant were fully executed, the defendant, under color and pretence of the said writ and warrant, extortionately and unlawfully demanded, exacted, and received of and from the plaintiff a much larger sum of money, to wit, £3 10s. more than he was entitled to levy upon the goods and chattels of the plaintiff, under and by virtue of the said writ and warrant, and according to the direction indorsed thereon as aforesaid; which said sum of £3 10s., together with the further sum £116 0s. 9d., amounting in the whole to a large sum, to wit, £119 10s. 9d., being the amount then and there claimed by the defendant by virtue of the said writ and warrant, the said plaintiff was forced and obliged to pay for the purpose in the declaration mentioned. And this, &c. Similar replication to the third plea. Demurrer and joinder.

E. Lawes, in support of the demurrer.

Manning, contra.

BAYLEY, J. It seems to me that this replication is bad, and that the defendant cannot be deemed a trespasser *ab initio*. In the cases cited from Rolle's Abr. and Cro. Car., where it is said that a sheriff is made a trespasser *ab initio*, by the neglect to return a writ, the expression is inaccurate. There, for want of the return, no complete justification was ever shown. The distinction is this, where there are facts alleged on the record, making out a good defence, but something added in the replication destroys that defence, the party is made a trespasser *ab initio*. But if the sheriff seizes goods under a writ where it is his duty to make a return, he never has a justification unless he discharges that duty; he must, therefore, allege that return in his plea. A bailiff not having the return of process is not bound to make such allegation, as appears by *Girling's Case*, which has been cited for the plaintiff. Here, then, the defendant had a good justification without showing a return. The answer given to it is, "that before the writ and warrant were fully executed, the defendant demanded, exacted, and received a larger sum than he was entitled to levy." Does that make him a trespasser with reference to the acts alleged in the count? Where the subsequent act is a trespass, the law assumes that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. But here the subsequent act was not a trespass, nor can it be reasonably supposed that the original entry was for the purpose of the extortion. For these reasons I think that the defendant cannot, in this case, be considered as a trespasser *ab initio*, and that our judgment must be in his favor.

HOLROYD, J. If the allegations contained in this replication were sufficient to make the defendant a trespasser *ab initio*, the consequences to him would be very serious, for he would be liable to damages to the extent of the whole sum levied, and not merely the surplus exacted illegally. He is still liable for the extortion, although not for the sum which he was authorized to levy. The cases cited as to the necessity of

a return by a sheriff are not applicable. In them, but for the return, the act would have been unlawful *ab initio*; instead of saying that the want of the return made the sheriff a trespasser *ab initio*, it would be more correct to say that the presence of the return was necessary in order to make his act lawful *ab initio*. The only question here is, whether the first resolution in the *Six Carpenters' Case* was correct, viz. that the parties were not trespassers *ab initio*, because the subsequent act was not a trespass. This replication does not show that the defendant held the goods longer than he was entitled so to do; but that he took £3 10s. more than he was authorized to levy. The whole money was paid at once, and until a part was paid the bailiff had a right to keep possession. It is not averred that the smaller sum was tendered and refused; and perhaps even that, according to the doctrine in 8 Co. 146, might not have been sufficient.

LITTLEDALE, J. If the defendant were a trespasser *ab initio* there can be no doubt that the plaintiff would be entitled to recover the whole sum levied, just as if no justification at all had been pleaded. Considering the numerous instances of extortion that occur, there would unquestionably have been many actions of this nature had they been thought maintainable. It is contended, however, that such is the law according to the *Six Carpenters' Case*. Whether there is much good sense in that case it is unnecessary to say; for the decision of the present question it suffices to say, that in every instance put by Lord Coke there was a subsequent act of trespass, which made the party liable to be treated as a trespasser *ab initio*. Com. Dig. Trespass (C. 2), *Dye v. Leatherdale*, 3 Wils. 20; and *Taylor v. Cole*, 3 T. R. 292, all confirm Lord Coke's view of the case. Here no act of trespass subsequent to the entry and levy is shown; the replication alleges the extortion to have been before the writ was fully executed. There are many statutes against extortion, but in none of them is it said that the party guilty of it is a trespasser; nor is he said to be so in any of the instances put in Com. Dig. tit. *Extortion*, or *Trespass ab initio*. I think, therefore, that this replication is bad.

Judgment for the defendant.

MELVILLE v. BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1818.

[Reported 15 Mass. 82.]

THE case was thus. There were two tenants in common of a chattel, and the sheriff, upon an execution against one of them, seized the chattel and sold the whole of it, and paid over the whole money to the judgment-creditor. The other part-owner of the chattel brought trespass against the sheriff; and it was holden that the action well lay.

It was objected that, as the sheriff was authorized to seize the whole

on the execution, he could not be a trespasser; and that the plaintiff ought to have brought trover, or *assumpsit* for the proceeds of the sale of his share. But it was answered and resolved by the whole court, that although the sheriff might seize the whole, yet that he ought to have sold but the share of the judgment-debtor; the subsequent abuse of his authority made him a trespasser *ab initio*; and the other part-owner, in such a case, might maintain either trover or trespass, at his election.

The *Solicitor-General*, and *Shaw*, for the plaintiff.

W. Sullivan, for the defendant.

GARDNER v. CAMPBELL.

SUPREME COURT OF NEW YORK. 1818.

[Reported 15 Johns. 401.]

THIS was an action of replevin, for taking certain goods and chattels of the plaintiff. The defendant pleaded to the declaration, which was in the ordinary form, —

1. *Non Cepit*.

2. An avowry, setting forth that the defendant, on the 31st of December, 1817, was under-sheriff of the county of Cortlandt, on which day a *fi. fa.* directed to the sheriff of Cortlandt was issued out of this court against the plaintiff, at the suit of Aaron Benedict, for a debt of \$3,132, and \$14.43 damages and costs; that the writ was delivered to the defendant to be executed, who thereupon, and before the return day thereof, levied upon the goods in question, continued in possession of them until the twelfth of January, 1818, and sold them on the tenth of January to satisfy the execution.

3. An avowry, stating the execution and levy, and that the defendant continued in possession of the goods until the twelfth of January, 1818.

4. A cognizance, as bailiff of the sheriff of Cortlandt, setting forth the execution, levy, and sale.

The plaintiff pleaded, —

1. To the first avowry, that before the taking of the goods and chattels mentioned in the declaration, and while the *fi. fa.* was in the defendant's hands, to wit, on the seventh of January, 1818, he settled with the defendant as to the *fi. fa.*, and found that there was due and owing thereon \$734.04, including sheriff's fees, which the plaintiff tendered to the defendant, and which the defendant accepted in satisfaction and discharge of the execution.

2. A similar plea to the second avowry.

3. To the first and second avowries, that on the seventh of January, 1818, one Barney, at the request of the plaintiff, tendered and paid to the defendant, the sum of \$734.04, being the amount then due

and owing on the execution, including sheriff's fees, which sum the defendant accepted, and gave a discharge in full satisfaction of the execution.

4 and 5. To the cognizance, the plaintiff pleaded a settlement with, and payment to the defendant, by himself, and by Barney, at his request, as in his first and third pleas.

To the second plea the defendant replied, denying a settlement and payment of the amount due on the execution; and as to the first, third, fourth, and fifth pleas, there was a demurrer and joinder. The cause was submitted to the court without argument.

SPENCER, J., delivered the opinion of the court. The first objection to the pleas is that they admit the original caption to be lawful, and that when that is the case, replevin does not lie.

In the case of *Hopkins v. Hopkins*, 10 Johns. Rep. 372, this court adopted the well known and ancient principle, that when a person acts under an authority or license given by the law, and abuses it, he shall be deemed a trespasser *ab initio*; but the action is grounded on a tortious taking; and the *Six Carpenters' Case*, 8 Co. 146, recognizes a distinction between the actual and positive abuse of a thing taken originally by authority of the law, and a mere nonfeasance, such as a refusal to deliver an article distrained.

The conclusive objection to all the pleas is, that confessedly the defendant took the plaintiff's goods under and by virtue of an execution; and they are, in the language of this court, in *Thompson v. Button*, 14 Johns. Rep. 86, in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody when the officer has found them in the possession of the defendant in the execution, and taken them out of his possession.

The pretence set up here is, that the execution was paid and satisfied. Whether it was or not, makes no difference in the principle. If the fact be true, the plaintiff is not without his redress; he cannot be allowed to set up that fact to divest the sheriff's possession; the goods were lawfully taken by the defendant, and replevin is not the appropriate remedy. If it were allowed, the execution of the writ of *feri facias* might, in all cases, be delayed or eluded.

Judgment for the defendant.

SECTION II.

BAILMENT.

A. *Nature and Acquisition of Lien.*

CHAPMAN v. ALLEN.

KING'S BENCH. 1632.

[*Reported Cro. Car.* 271.]

ACTION of trover of five kine. Upon not guilty pleaded, a special verdict was found, that one Belgrave was possessed of those five kine, and put them to pasturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at pasture; and that afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds: afterwards one Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster; and if *super totam materiam* he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if, &c. then for the defendant.

JONES, Justice, and myself (*absentibus cæteris justiciariorum*), conceived, that this denial upon demand, and delivery of them to Foster, was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is enforced to have his action against him who put them to pasturage. And it is not like to the cases of an innkeeper or taylor; they may retain the horse or garment delivered them until they be satisfied, 1 Com. Dig. 211, but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them. Whereupon rule was given, that judgment should be entered for the plaintiff.

SKINNER v. UPSHAW.

NISI PRIUS. 1702.

[*Reported 2 Ld. Raym.* 752.]

THE plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his

hire; but that the plaintiff refused, &c., and therefore he retained them. And it was ruled by *Holt*, Chief Justice, at Guildhall (the case being tried before him there) May 12. 1 Ann. Reg. 1702, that a carrier may retain the goods for his hire; and upon direction, the defendant had a verdict given for him.

KRUGER *v.* WILCOX.

CHANCERY. 1755.

[*Reported Ambl.* 252.]

THIS cause coming on for further directions, the case was:—

Mico was general agent in England for Watkins, who was a merchant abroad, and at different times had received considerable consignments of goods, and upon the balance of account was in disburse. Afterwards Watkins consigned to him a parcel of logwood, for which he paid the charges, &c. Watkins coming to England, Mico said, as he was here, he might dispose of the goods himself: Watkins accordingly employs a broker to sell them, and Mico tells the broker, that Watkins intends to sell them himself, to save commission; and Mico gave orders to the warehouseman, to deliver the goods to that broker. The broker sells them, and makes out bills of parcels to Watkins; and opens an account with Watkins, but takes no notice of Mico.

After the goods were sold, Mico begins to suspect Watkins' circumstances, and resorts to the broker, to know whether he has opened an account with Watkins.

The great question in the cause was, Supposing Mico had a lien on these goods and produce, so as to be entitled to retain them for the balance of the account; whether he has not parted with that right?

After argument at the bar, Lord Chancellor adjourned the cause to the 27th, and desired the four merchants, who were examined in the cause on the different sides, might attend in court, in order to be consulted by him upon the point. And accordingly this day they attended, viz., Mr. Alderman Baker and Bethell, Mr. Willetts and Fonereau; and after having asked them several questions, upon the custom and usage of merchants relating to the matter in doubt, his Lordship gave his opinion with great clearness, as follows:—

LORD HARDWICKE, Chancellor. This is a case of bankruptcy, in which this court always inclines to equality: yet if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him, notwithstanding the bankruptcy.

Question is, whether in this case, Mico is intitled to a specific lien, and consequently a preference in point of satisfaction out of the money arising by sale of these goods?

Two things are to be considered:—

1st. What lien a factor gains on goods consigned to him by a merchant abroad? and whether Mico gained such lien in this case?

2d. If he did, whether he has done anything to part with it?

As to 1st. All the four merchants, both in their examination in the cause, and now in court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well as for the charges, customs, &c., paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say; nor can I find any such case. I have no doubt, it would be so in this court, if the goods *remained in specie*; nor do I doubt of its being so, where they are turned into money.

To the 2d question. I am of opinion Mico has parted with his right, and that it is for the benefit of trade to say he has.

All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases.

Question. Whether this case amounts to the delivery up of the log-wood to the principal? I think it does. Mico suffers Watkins to employ a broker; and tells the broker, that Watkins intends to sell them himself, to save commission. Mico gives orders to the warehouseman to deliver the goods to the broker. The broker sells them, and makes out bills of parcels to Watkins, and takes no notice of Mico. It amounts to the same thing, as if Mico had delivered the goods in specie to Watkins.

It is safer for trade to hold it in this manner, than otherwise; for by that manner of acting, Mico gave Watkins a credit with other people (for the sale was public, and by that the goods appeared to be Watkins'), which would not have been the case if Mico had retained for the balance of his account.

It is better to allow that which is the public notorious transaction, than that which is secret. Suppose an action had been brought by Watkins against the broker, for money had and received, the broker could not have defended himself by saying, So much is due to Mico.

The merchants have admitted, that the specific lien as to the customs, charges, &c., does continue; even the law would have allowed it, if the goods had remained in specie; the goods being sold, makes the case stronger. But that is not now before me, being determined by his late Honor the MASTER OF THE ROLLS, and acquiesced in by the parties.¹

¹ "It was certainly doubtful, before the case of *Krutzer and Wilcocks*, 'whether a factor had a lien, and could retain for the balance of his general account.'" Per LORD MANSFIELD, C. J., in *Green v. Farmer*, 4 Burr. 2214, 2218.

NAYLOR *v.* MANGLES,

NISI PRIUS. 1794.

[*Reported 1 Esp.* 109.]

ASSUMPSIT for money had and received.

The plaintiff had purchased from one Boyne twenty-five hogsheads of sugars then lying in the defendant's warehouses, who was a wharfinger. Boyne was in debt to the defendant to the amount of £167, part of which only was for the charges of these twenty-five hogsheads of sugar, the remainder was for the balance of a general account, for which the defendant claimed a lien, and refused to deliver them to the plaintiffs till the whole sum was paid. The plaintiffs paid him the whole money, and then brought this action to recover it back.

The whole question turned upon the point whether a wharfinger had a lien for the balance of a general account upon the goods in his possession.

The counsel for the defendant said that it had been decided in three different cases that they had, and called witnesses to prove it, with which the jury seemed completely satisfied.

LORD KENYON said, liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, etc., in which case, as the law imposed the burden, it also gave him the power of retaining, for his indemnity. This was the case of innkeepers, who had by law such a lien. That a lien from usage was matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point that wharfingers had the lien contended for.

Bearcroft, Shepherd, and Park, for the plaintiff.

Erskine, for the defendant.

RUSHFORTH *v.* HADFIELD,

KING'S BENCH. 1805.

[*Reported 7 East*, 224.]

THIS was an action of trover to recover the value of a quantity of cloth which the bankrupts had sent by the defendants as common carriers, who claimed a lien upon it for their general balance due to them as such carriers for other goods before carried by them for the bankrupts. The plaintiffs had tendered the carriage price of the particular goods in dispute, and the sole question was, whether the defendants, as common carriers, had a lien for their general balance. On the first

trial a verdict was found for the defendants, which this court thought was not sustained by the evidence, and therefore they granted a new trial. 6 East, 519. The cause was again tried at the last assizes at York, before *Chambre, J.*, when the defendants' book-keepers in London, at Stamford, and at Haddersfield, swore to their practice to retain goods for their general balance, and particularized one instance in December, 1799, where an action was brought, which being referred, was decided on another point; a second in May, 1800, where there was no bankruptcy; a third in May, 1803, where the bankrupt's assignee demanded the goods but afterwards paid the balance; a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened; and a sixth instance, of the like sort as the last, in 1804. In addition to these, Welch, a carrier from Manchester and Leeds, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance; and to two other instances of goods sent to Glasgow; one where the carriage of the particular goods was £3 and the general balance £20; another where the carriage was a few shillings and the general balance £8; in both instances bankruptcies intervened, and the assignees paid the general balance. Hanley, a Northallerton carrier, spoke to two instances of retainer of goods, twelve and thirteen years ago, till the individuals paid the general balance; but neither were bankrupts. The book-keeper of Pickford, a carrier from London to Liverpool, particularized an instance of retaining for the general balance in 1792, where the vendee became bankrupt; but there the vendor stopped *in transitu*, and he paid the general balance at the end of two months; a second similar instance in the same year; a third instance in 1795, where the senders became bankrupts, and their general balance was paid by the vendees; a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years, but no account how the matter was finally settled; and two other like instances in 1794 and 1795. And Clark, a Leicester carrier, also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from twenty to thirty years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting with the defendants in conformity to it; in which case they were to find for the defendants; otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside in last Michaelmas term, as a verdict against all the evidence.

Cockell, Serjt., now showed cause against the rule.

Park and *Wood*, contra.

LORD ELLENBOROUGH, C. J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about ten or twelve years back, and several of them of very recent date. The question, however, results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them, it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is therefore to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances, again, were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence therefore is open to observation. If indeed there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted upon it? And they have in effect found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negating the lien claimed by the defendants on the score of general usage.

GROSE, J. This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law, that no such lien can exist except by the contract of the parties expressed or implied.

LAWRENCE, J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way, but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If then it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally that they have no such lien as that now claimed upon the ground of general usage.

LE BLANC, J. This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party, therefore, who sets up such a claim ought to make out a very strong case. But upon weighing the evidence which was given at the trial, I do not think that this is a case in which the court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them.

Rule discharged.

CHASE v. WESTMORE.

KING'S BENCH. 1816.

[Reported 5 M. & S. 180.]

TROVER for a quantity of wheat-meal, fine pollard, coarse pollard, and bran, together with some sacks which were stated in the first count of the declaration to be the property of the bankrupts, and in the second count, of the plaintiffs as their assignees. On the trial before *Graham, B.*, at the Hants Spring Assizes, 1815, a verdict was found for the plaintiff for £1200, subject to the opinion of the court upon the following case:—

The bankrupts were, before their bankruptcy, in partnership as mealmen, the defendants were partners as millers. One of the bankrupts, before the act of bankruptcy, applied to the defendants to grind a quantity of wheat, when it was agreed between them that the wheat should be sent by the bankrupts in their vessels, and that the defendants should grind it at 15*s.* per load, for which sum the defendants were to unload the wheat from the vessels, grind it, find sacks to manufacture it in, and return the meal, &c., when ground, into the bankrupts' vessels in the river near to which the mill was situated. About nineteen loads of the wheat were sent at first, afterwards other quantities, making in the whole one hundred and forty-six loads. It was agreed that if any mixture was to take place, one of the bankrupts should correspond with the defendants on the subject, and, in fact, some of the grain was afterwards mixed at his request. At the time of the bankruptcy there remained in the defendants' possession seven loads of wheat unground, ten of meal produced by wheat which had been ground, sixty bushels of fine pollard, twenty bushels of coarse pollard, twenty bushels of bran, also produced from the wheat ground, and eighty sacks which had been delivered by the bankrupts to the defendants, for the purpose of being filled with the meal ground from the corn. The defendants, on demand made on the part of the plaintiffs, after the bankruptcy, refused to deliver up this property.

And two questions were argued in the last term by *A. Moore* for the plaintiffs, and by *Gifford*, for the defendants: First, whether the defendants had a right to detain this property for their general balance under the statute of 5 G. 2, c. 30, s. 28. Secondly, whether they had a lien on it, in whole or in part, that is to say, for the balance due to them for grinding all the wheat which had been ground by them, or for the grinding only of such part as had been and remained ground in their hands at the time of the bankruptcy.

Lord Ellenborough, C. J., observed that the court did not think this case necessarily involved the doctrine of mutual credit; but on the other point, as it involved the consideration of several ancient authorities, the court would take time to consider. *Cur. adv. vult.*

LORD ELLENBOROUGH, C. J., now delivered the judgment of the court.

This case was argued before us last term, and stood over for our consideration, upon the single question, whether a workman, having bestowed his labor upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner, at the time of its delivery to him, can, by law, detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion, upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question, for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels, and at different times. The general question is of very great and extensive importance. Several authorities were referred to (which I shall hereafter notice) against the right to detain; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires, that our decision should not be governed by them; and we believe the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price, and the implied contract to pay a reasonable price or sum; and that the right of detainer has been practically acknowledged in both cases alike. In the case of *Wolf v. Summers*, 2 Camp. 631, Mr. J. Lawrence does not appear to have been aware of any such distinction. It is impossible, indeed, to find any solid reason for saying that if I contract with a miller to grind my wheat, at 15s. a load, he shall be bound to deliver it to me, when ground, without receiving the price of his labor; but that if I merely deliver it to him to grind, without fixing the price, he may detain it until I pay him, though probably he would demand, and the law would give him, the very same sum. Certainly if the right of detainer, considered as a right at common law (and it must be so considered in this case), exists only in those cases where there is no manner of contract between the parties, except such as the law implies, this court cannot extend the rule, and authorities were quoted to establish this proposition; but, upon consideration, we are of opinion that those authorities are contrary to reason, and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 Roll. Ab. 92, which, however, is only a *dictum* of Williams, J.; and it does not appear on what occasion it was pronounced, or that it governed the decision of any case. It is in these words: "If I put my clothes to a tailor to make, he may keep them until satisfaction for the making. . . . But if I contract with a tailor that he shall have so much for making my apparel, he cannot keep them until satisfaction, for the making. T. T. 3 Ja. K. B., by Williams, J." This distinction appears to have been acknowledged by Lord Holt, in a case of *Collins v. Ongly*, Selw. N. P. 1280, 4th edit., as quoted by C. J. Ryder, in the case of *Brenan v. Currant*. But the point was not in judgment be-

fore Lord Holt, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge. The latter case of *Brenan v. Currint* is reported in Sayer, 224; and it is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is no more than the law would have implied if the parties had not expressed it. The opinion of Popham, C. J., in the *Case of the Hosteler*, Yelv. 66, has sometimes been cited, as an authority for this distinction; but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal. The Chief Justice there says, "That an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price;" but the power of sale in the case there put has been since denied. See *Jones v. Pearle*, 1 Stra. 556. The case in Yelverton was an action for the keep of the horse; and all that was said by the Chief Justice as to detainer and sale was extra-judicial. It was in the very same year, term, and court, in which the opinion of Williams, J., is said to have been delivered; and if (as seems very probable) his opinion was delivered on this occasion, it was extra-judicial also. The case of *Chapman v. Allen*, Cro. Car. 271, has also been quoted on this subject; that case, however, does not appear to have been decided on the ground supposed; but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to a third person, on receiving from such third person the amount of his demand. In *Cowell v. Simpson*, 16 Ves. 275, the Lord Chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment he is reported to have said, "If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other;" but it is evident, from other parts of the report, that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession; and, consequently, will defeat a claim to the exercise of such a right. And we agree that where the parties contract for a particular time or mode of payment the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract. And if Williams, J., is to be understood to speak of a contract for the time, as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. And we are inclined to think that he must have intended to express himself to that effect; because the earliest authority that we

have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a contract for a determinate price. This authority is in the Year Book, Easter Term, 5 Edw. 4, fol. 2, b. : " Note, also, by Haydon, that an hosteler may detain a horse if the master will not pay him for his eating. The same law is, if a tailor make for me a gown, he may keep the gown until he is paid for his labor. And the same law is, if I buy of you a horse for 20s., you may keep the horse until I pay you the 20s. ; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid." In this passage the law, as applied to the cases of the hosteler, the tailor, and the vendor, is said to be the same, and in the latter the sum is supposed to be fixed. The distinction drawn is where a future time of payment is fixed. If so material a distinction as that which depends upon fixing the amount of the price, had been supposed to exist at that time, we think it would have been noticed in this place ; and, not being noticed, we think it was not then supposed to exist. So, in the case of *Cowper v. Andrews*, Hobart's Rep. 41, Lord Hobart, speaking of the word "*pro*," "*for*," says that this word " works by condition precedent in all personal contracts. As if I sell you my horse *for* ten pounds, you shall not take my horse, except you pay me ten pounds (18 Ed. 4, 5, and 14 H. 8. 22), except I do expressly give you day ; and yet, in this case you may let your horse go, and have an action of debt for your money ; and so may the tailor retain the garment till he be paid for the making, by a condition in law." The reason in the case of sale is given in the 14th Hen. 8, 20, a. : " The cause is for that each has not the same advantage the one against the other ; for the one will have the thing in possession, the other but an action, which is not reason, nor the same advantage." Considering the operation of the word "*for*," as noticed by Lord Hobart, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15s. as in a contract to sell a load of wheat for £15. The former, indeed, is in substance a sale of a certain portion of the time and labor of the miller, and of the use of his machinery. And as it is clear that the miller could not maintain an action upon the contract without averring that he had ground, and was ready to deliver, the wheat ; if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller ; for he will have his goods and the miller will have only an action. If the distinction which has been contended for on the part of the plaintiff should be allowed, what must be said in those cases where a workman is not only to bestow a portion of his labor on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price ? As in the case of a picture-frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the work-

man, on the ground of his having applied to it his paint or varnish, or thread, or other materials, or must he deliver these to his employer without payment, because he has bestowed his own personal labor in addition to them? Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given; and, therefore, we think the case of *Brenan v. Currint*, and the *dicta* on which it appears to have been founded, are not law, and that the judgment in the present case must be for the defendants. *Postea to the defendants.*

BEVAN *v.* WATERS.

NISI PRIUS. 1828.

[*Reported Mood. & M.* 235.]

ASSUMPSIT for goods sold and delivered, and work and labor.

The question in the cause was, whether the defendant was liable to the plaintiff for the training of a race-horse, which the defendant had bought of a third person, whilst in the plaintiff's possession, and which had been given up to the defendant under an agreement, as was contended, to pay for the training, in consideration of the abandonment of the plaintiff's lien. The defendant contended that there was no lien, and the detention was altogether wrongful, under the authority of *Wallace v. Woodgate*, R. & M. N. P. C. 193.

Wilde, Serjeant, and *R. V. Richards*, for the plaintiff.

Jones, Serjeant, for the defendant.

BEST, C. J. It was certainly held in that case, on the authority of *Yorke v. Grenough*, 2 Ld. Raym. 866, that a livery-stable keeper has no lien; but this case goes farther, and on the principle of the common law, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races.

*Verdict for the plaintiff.*¹

JUDSON *v.* ETHERIDGE.

EXCHEQUER. 1833.

[*Reported 1 Cr. & M.* 743.]

DETINUE for a gelding. Plea: *actio non*, because he says that the said gelding, in the said declaration mentioned, was on the day and year aforesaid delivered by the plaintiff to the defendant to be stabled

¹ Part of the case relating to another point is omitted.

and taken care of, and fed and kept by the defendant for the plaintiff for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf. And the defendant in fact further saith, that afterwards, and before and at the time of the commencement of this action, to wit, on the 16th day of March, 1833, in the county aforesaid, the plaintiff became and was indebted to the defendant in a large sum of money, to wit, the sum of £10, being a reasonable and fair remuneration and reward in that behalf, for and in respect of the defendant having before then stabled and taken care of, and fed and kept, the said gelding for the plaintiff, under and by virtue of the said delivery and bailment. And the said defendant in fact further saith, that the said sum of £10 is still due and owing to the defendant. And for which reason he, the defendant, hath, from the time of the delivery of the said gelding, hitherto detained and still detains the same, as he lawfully may, for the cause aforesaid. General demurrer and joinder.

Mansel, in support of the demurrer.

Erle, contra.

LORD LYNTHURST, C. B. The question is on the sufficiency of the plea. Now, the plea states that the horse was delivered by the plaintiff to the defendant, to be stabled and taken care of, and fed and kept by the defendant for the plaintiff, for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf; it then states that the plaintiff became indebted to the defendant in the sum of £10 — being a reasonable and fair remuneration and reward — for and in respect of the defendant having stabled and taken care of, and fed and kept the horse under and by virtue of the said delivery and bailment; and so justifies the detention until that sum should be paid. Upon this plea the question is, whether, on the state of facts disclosed, the defendant has or has not a lien upon the horse; I am of opinion that he has no lien. The present case is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labor performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way. In *Chapman v. Allen*, it was decided that a person receiving cattle to agist had no lien. In *Yorke v. Grenough*, it was held, not merely by Lord Chief Justice Holt, but by the whole court in their decision, that a livery-stable keeper had no lien. As to the case of *Jacobs v. Latour*, that, so far from establishing the right of lien, confirms the former decisions; for Lord Chief Justice Best expressly draws the distinction between a trainer, who bestows his skill and labor, and a livery-stable keeper; between horses taken in by a trainer and altered in their value by the application of his skill and labor, and horses standing at livery without such alteration. When the case came on before the Court of Common Pleas, that distinction seems to have been supported. It appears to me, therefore, that the present case is decided by the concurrence of all the authorities.

VAUGHAN, B. I am of opinion, that it is clear, from the authorities

on this subject, that the present defendant had no right to detain the horse in question, and consequently that our judgment must be for the plaintiff.

BOLLAND, B. In deciding against the right of lien in this case we break in upon no former decisions. Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit and improvement of the animal. The doctrine might, perhaps, be extended further so as to embrace the case of a breaker, into whose hands a young horse is placed to be broken in. The breaker makes it a different animal. The chattel is improved by the application of his labor and skill. In the present case it does not appear that anything was to be done to the animal, to improve it or render it a different animal by the application of the skill and labor of the bailee.

GURNEY, B., concurred.

Judgment for the plaintiff.

JACKSON v. CUMMINS.

EXCHEQUER. 1839.

[Reported 5 M. & W. 342.]

TRESPASS for breaking and entering an outhouse and premises belonging to the plaintiff, and seizing and driving away ten cows, the property of the plaintiff, and converting and disposing of the same to the defendants' own use, &c.

The defendants pleaded, first, not guilty; secondly, as to taking &c. two of the cows, that the said cows, for the space of eight months before the said time when &c., had been depastured, agisted, and fed by the defendant Charles Cummins for the plaintiff, in and upon certain lands of him the said Charles Cummins, at the request of the plaintiff, for a certain reward and remuneration to be paid the said Charles Cummins by the plaintiff, and there was and still is due and owing to the said C. Cummins from the plaintiff the sum of £16 5s., for and in respect of the said agistment of the said two cows; and that it was agreed between the plaintiff and defendant Charles Cummins, that the said C. Cummins should retain, have, and take and keep the possession of the said two cows so long as the said sum of £16 5s., should remain unpaid; that the said two cows then and at the time of the said agreement were in the possession of the said C. Cummins, and so remained until the plaintiff fraudulently, unlawfully, and wrongfully took them out of the same as hereinafter mentioned; that afterwards, and after the said agreement, and whilst the said two cows were in the possession of the said C. Cummins under the same, and whilst the said C. Cummins had a lien upon the same by law and by the agreement aforesaid, and just before the said time when &c., the plaintiff wrongfully, unlawfully, and surreptitiously, and contrary to the said agreement,

with force and arms, broke and entered the said close of the said C. Cummins in which the said two cows were depasturing and agisting as aforesaid, and wrongfully, fraudulently, unjustly and unlawfully took, carried, and drove away the same out of the said close of the said C. Cummins, and put and placed the same in the said outhouse and premises in the declaration mentioned, without paying the said sum so agreed to, and then due to the said C. Cummins. The plea concluded with a justification by the defendant Cummins in his own right, and by the other defendants as his servants, in peaceably entering the outhouse and premises, in order to retake the cattle, and retaking them accordingly.

The plaintiff took issue on the first plea, and to the second replied *de injuria*.

The cause was tried before *Parke, B.*, at the last Assizes for Yorkshire, when it was proved that the cows had been depastured on land belonging to the defendant. The jury found that there was no such agreement as stated in the plea, that the defendant should retain and keep possession of the cows until the amount due for the pasturage was paid, and thereupon found a verdict for the plaintiff, the learned judge reserving leave to the defendant to move to enter a nonsuit, in case the court should be of opinion that a lien existed at common law for the agistment of cattle. Alexander having, in Easter Term last, obtained a rule accordingly.

Cresswell now showed cause.

Alexander, in support of the rule.

PARKE, B. I am of opinion that this rule ought to be discharged. The first question is, whether it was competent for the defendant, under this plea, which speaks of a lien by agreement, to set up a claim for a lien at common law? If it were necessary to decide that question, I should say that I think it was competent for him to do so. The plaintiff, it is true, might have demurred specially to the plea for duplicity, in setting up two distinct grounds of lien, viz. by force of an agreement, and by the general law; but as it is, the averment of the agreement for a lien may be rejected, and the claim of lien under the general law supported, should such really exist. I also think that, after the recent decision in *Owen v. Knight*, 4 Bing. N. C. 54; 5 Scott, 307, as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows; which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass. It is not, however, necessary to decide either of these points, because I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by Best, C. J., in *Bevan v. Waters*, and by this court in *Scarfe v. Morgan*, is, that by the general law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that

principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*; he simply takes in the animal to feed it. In addition to which, we have the express authority of *Chapman v. Allen*, that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle, that no lien can exist in the case of agistment; and it was so understood by this court in *Judson v. Etheridge*. The analogy, also, of the case of the livery-stable keeper, who has no lien by law, furnishes an additional reason why none can exist here: for this is a case of an agistment of milk cows, and, from the very nature of the subject-matter, the owner is to have possession of them during the time of milking; which establishes that it was not intended that the agister was to have the entire possession of the thing bailed; and there is nothing to show that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner. As to the case of the training groom it is not necessary to say anything, as it has not been formally decided; for in *Jacobs v. Latour*, 5 Bing. 130; 2 M. & P. 201, the point was left undetermined. It is true, there is a *Nisi Prius* decision of Best, C. J., in *Bevan v. Waters*, that the trainer would have a lien, on the ground of his having expended labor and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right, during the continuance of the process, to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right, which overrides it; so that I doubt if that doctrine would apply where the animal delivered was a race-horse, as that case differs much from the ordinary case of training. I do not say that the case of *Bevan v. Waters* was wrongly decided; I only doubt if it extends to the case of a race-horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply. But, at all events, I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established; in addition to which, such a claim would be inconsistent with the more general right exerciseable by the owner of the cattle.

ALDERSON, B. I agree that the agister has no lien in this case. On the first point, however, I give no opinion.

MAULE, B. I think the effect of this plea is to set up a claim of lien

under the agreement only ; for, if understood in the sense which would make it not demurrable, it says, during the continuance of such a state of circumstances, these cattle were taken away. On the other point, I agree with the rest of the court that no lien exists.

*Rule discharged.*¹

BRITISH EMPIRE SHIPPING COMPANY *v.* SOMES.

KING'S BENCH. 1858.

[*Reported E. B. & E. 353.*]

ACTION for money had and received.² A case was stated substantially as follows: The plaintiffs were the owners of a ship called The British Empire. The defendants were shipwrights on a large scale. The plaintiffs employed the defendants to repair the ship, and she was taken into the defendants' dock at Blackwall, September 1, 1856. When the repairs were completed the defendants declined to let the ship go until their bill for repairs was paid, or security given for its payment ; and the plaintiffs not doing either, the defendants on November 25, 1856, gave the plaintiffs written notice that they should charge them £21 a day for the hire of their dry dock from the time when their account was delivered, November 20. The plaintiffs disputed the right of the defendants to make this charge, but on December 22, 1856, paid, under protest, the whole amount claimed by the defendants, which included the sum of £567 as rent of the dock for twenty-seven days at £21 a day. The question for the court was whether the defendants were entitled to retain the £567.

The case was argued in Easter Term, 1858. Before *Lord Campbell*, C. J., and *Wightman*, *Erle* and *Crompton*, JJ.

Blackburn, for the plaintiffs.

T. Jones, for the defendants.

LORD CAMPBELL, C. J., now delivered judgment.

We are of opinion that, under the circumstances stated in the special case, the defendants are not entitled to retain the sum paid to them in respect of the item of £567, or any other sum, as a compensation for the use of their dock in detaining the plaintiffs' ship. As artificers who had expended their labor and materials in repairing the ship which the plaintiffs had delivered to them to be repaired, the defendants had a lien on the ship for the amount of the sum due to them for these repairs ; but we do not find any ground on which their claim can be supported to be paid for the use of their dock while they detained the ship under the lien against the will of the owners. There is no evidence of any

¹ *Goodrich v. Willard*, 7 Gray, 183, *accord*.

² The following short statement is substituted for that in the report.

special contract for such a payment. The defendants gave notice that they would demand £21 a day for the use of their dock during the detention: but the plaintiffs denied their liability to make any such payment, and insisted on their right to have their ship immediately delivered up to them. Nor does any custom or usage appear to authorize such a claim for compensation, even supposing that a wharfinger with whom goods had been deposited, he being entitled to warehouse-rent for them from the time of the deposit, might claim a continuation of the payment during the time he detains them in the exercise of right of lien till the arrears of warehouse-rent due for them is paid (see *Rex v. Humphery*, M'Cl. & Y. 173): there is no ground for a similar claim here, as there was to be no separate payment for the use of the dock while the ship was under repair, and the claim only commences from the refusal to deliver her up. The onus therefore is cast upon the defendants to show that, by the general law of England, an artificer who, exercising his right of lien, detains a chattel, in making or repairing which he has expended his labor and materials, has a claim against the owner for taking care of the chattel while it is so detained. But the claim appears to be quite novel; and, on principle, there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of the chattel can hardly be supposed to have promised to pay for the keeping of it while, against his will, he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained: when does the debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it. *Hurtley v. Hitchcock*, 1 Stark. 408.

The right of detaining goods on which there is a lien is a remedy to the party aggrieved which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amend for the keep of a horse which he has seized as an estray (*Henley v. Walsh*, 2 Salk. 686), the distrainer of goods which have been replevied cannot claim any lien upon them: *Bradwell v. Ball*, 1 Bro. C. C. 427. So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep. *Bul. N. P.* 45.

If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, "the cattle are to be sustained with meat and drink at the peril

of him that distraineth, and he shall not have any satisfaction therefore." Co. Litt. 47 b.

For these reasons, on the question submitted to us, we give judgment for the plaintiffs.

*Judgment for the plaintiffs.*¹

STEINMAN v. WILKINS.

SUPREME COURT OF PENNSYLVANIA. 1844.

[Reported 7 W. & S. 466.]

THE plaintiff brought this action of trover against the defendant, who is a warehouseman in Clarion County, on the Allegheny River, for the supposed conversion of certain goods retained for the price of warehouse room, being part of a larger lot which was stored in his warehouse by Hamilton & Humes, of whom the plaintiff is the general assignee. The greater part had been delivered to Hamilton & Humes, and the residue having been demanded without tender of any charges, M'Calmont (President of the Common Pleas of Clarion County) directed the jury that though the defendant could not retain for the general balance of his account, he might retain for all the charges on all the goods forwarded to him at the same time. A bill of exceptions was sealed, and the point was argued on a writ of error to this court by—

Gilmore, for plaintiff in error;

Howe, for defendant in error.

The opinion of the court was delivered by—

GIBSON, C. J. Though a plurality of the barons in *Rex v. Humphery*, M'Cl. & Y. 194-5, dissented from the *dictum* of Baron Graham that a warehouseman has a lien for a general balance, like a wharfinger, I do not understand them to have intimated that he has no lien at all. They spoke of it as an entity, and seem to have admitted that he has a specific lien, though not a general one. There is a well-known distinction between a commercial lien, which is the creature of usage, and a common-law lien, which is the creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law; and for that reason it would be impossible to maintain the position of Baron Graham, for there is no evidence of usage as a foundation for it, and no text-writer has treated of warehouse room as a subject of lien in any shape. In *Rex v. Humphery*, it was involved in the discussion only incidentally; and I have met with it in no other case. But there is doubtless a specific lien provided for it by

¹ The case was affirmed in the Exchequer Chamber, E. B. & E. 367, and in the House of Lords, 8 H. L. C. 338.

the justice of the common law. From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet in the recent case of *Jackson v. Cummins*, 5 Mees. & Welsb. 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters*, Mood. & Malk. 235, in which a trainer was allowed to retain for fitting a race-horse for the turf. In *Jackson v. Cummins* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Scarfe v. Morgan*, 4 Mees. & Welsb. 270, the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world. Before *Chase v. Westmore*, 5 Maule & Selw. 180, there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case Lord Ellenborough, alluding to the old decisions, said that if they "are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;" and Chief Justice Best declared in *Jacobs v. Latour*, 5 Bing. 132, that the doctrine of lien is so just between debtor and creditor, that it cannot be too much favored. In *Kirkham v. Shawcross*, 6 T. R. 17, Lord Kenyon said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it. What rule forbids the lien of a warehouseman? Lord Ellenborough thought, in *Chase v. Westmore*, that every case of the sort was that of a sale of services performed in relation to a chattel, and to be paid for, as in the case of any other sale, when the article should be delivered. Now, a sale of warehouse room presents a case which is bound by no pre-established rule or analogy; and, on the ground of principle, it is not easy to discover why the warehouseman should not have the same lien for the price of future delivery and intermediate care that a carrier

has. The one delivers at a different time, the other at a different place ; the one after custody in a warehouse, the other in a vehicle ; and that is all the difference. True, the measure of the carrier's responsibility is greater ; but that, though a consideration to influence the quantum of his compensation, is not a consideration to increase the number of his securities for it. His lien does not stand on that. He is bound in England by the custom of the realm to carry for all employers at established prices ; but it is by no means certain that our ancestors brought the principle with them from the parent country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry ; and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburg, frequently refused to load at the current price. Now, neither the carrier nor the warehouseman adds a particle to the intrinsic value of the thing. The one delivers at the place, and the other at the time, that suits the interest or the convenience of the owner of it, in whose estimation it receives an increase of its relative value from the services rendered in respect of it, else he would not have undertaken to pay for them. I take it, then, that, in regard to lien, a warehouseman stands on a footing with a carrier, whom in this country he closely resembles.

Now, it is clear from *Sodergren v. Flight & Jennings*, cited 6 East, 662, that where the ownership is entire in the consignee, or a purchaser from him, each parcel of the goods is bound, not only for its particular proportion, but for the whole, provided the whole has been carried under one contract ; it is otherwise where to charge a part for the whole would subject a purchaser to answer for the goods of another, delivered by the bailee with knowledge of the circumstances. In this instance, the entire interest was in Hamilton & Humes, in whose right the plaintiff sues ; and the principle laid down by the presiding judge was substantially right. On the other hand, the full benefit of it was not given to the defendant in charging that the demand and refusal was evidence of conversion. There was no evidence of tender to make the detention wrongful ; and the defendant would have had cause to complain, had the verdict been against him, of the direction to deduct the entire price of the storage from the value of the articles returned, and to find for the plaintiff a sum equal to the difference. But there has been no error which the plaintiff can assign.

*Judgment affirmed.*¹

¹ See *Low v. Martin*, 18 Ill. 286.

B. *Lien given by wrongdoer, when good against true owner.*ROBINSON *v.* WALTER.

KING'S BENCH. 1616.

[*Reported 3 Bulst. 269.*]

In an action upon the case for a trover and conversion brought by the plaintiff against the defendant, being an innkeeper, for a horse.

The case, upon the defendant's plea in bar, was this: The defendant keeping a common inn, a stranger brings the plaintiff's horse into this common inn of the defendants, there sets him for some time, and afterwards goes his way, leaving the plaintiff's horse there as a pledge for his meat.

The defendant, being the innkeeper, being not paid for the meat of the horse, retains the horse for his meat; the plaintiff afterwards, being the true owner of the horse, and hearing that his horse was there, demanded his horse of the defendant, who refused to deliver him. Upon this he brings his action. The defendant by way of plea in bar, sets forth all this matter of his keeping a common inn, how that the horse was brought thither, and there left at meat, which was unpaid, and that he retained the horse for his meat, till he was satisfied for the same, and that if the plaintiff would pay him for his meat, he would then deliver the horse to him, but not otherwise; upon this plea the plaintiff demurred in law.

Upon the first opening of this case, the court inclined to be of opinion against the plaintiff; that the defendant's plea was good, and that he might well retain the horse, and that against the plaintiff, being the true owner of him, until he was satisfied by him for his meat, and notwithstanding his horse was left there by a stranger, unknown to the owner; and for this was remembered the books of 39 H. 6 fol. 18 b., and 5 H. 7 fol. 15 b., the case of the leather converted.

DODDERIDGE, Justice. This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: he is to receive all guests and horses that come to his inn; he is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat.

The court agreed with him herein, but the court said, that this being a new and a good case, they held it fit to be argued by counsel on both

sides, and so for this purpose, this case was adjourned to a further time.

Afterwards, (S.) Termin. Trin. 15 Jac. B. R., this case was moved again, and argued on both sides.

Divers authorities were cited, and reasons urged, and enforced for the defendant, that the plea was good. That the defendant being a common innkeeper, may retain a horse, brought into his inn, and there left, until he be paid for his meat, and for this purpose, Coke 8. pars. fol. 146, 147 a, the *Six Carpenters' Case*, was cited, and 5 E. 4 fol. 2 b. placito 16. That an hostler may well detain a horse, if the master will not pay for his meat, and so of a tailor a garment by him made, till he be paid for it; and so is 22 E. 4. fol. 49 b. Several reasons urged for this, as (S).

1. *In respectu loci*, this being a common inn, where he is compellable to receive horses coming thither, and is not to examine whose they are, and this place hath a privilege, as to a distress, not to be there distrained by another, as a millstone not to be distrained, by 14 H. 8. fol. 25 b; nor a horse at the smith's shop, by 22 E. 4, fol. 49 b., 7 H. 7 fol. 2 a. A horse not to be there distrained for the prejudice of the common-weal, nor yet in a market or fair; so that an inn is there compared to a market. A second reason of this (S),

2. Why he may detain a horse for his meat, nothing more reasonable, as it was urged. An infant shall be bound by his bond for his meat.

If one drives the cattle of another into the ground of I. S. he may, as it was urged, detain them, till he be satisfied for the hurt done by them.

3. Because here was no default in the innkeeper, who did entertain him; neither is he to demand whose horse this was, for that every man hath a license in law, to come with his horses into an inn, and the innkeeper cannot put him back; and so is the *Six Carpenters' Case* before remembered; but he may detain them for their meat. Mich. 6. Jac. B. R. between *Harlow v. Wood*, the same case was (as is here now in question) and resolved that an innkeeper may retain and keep a horse left in his inn for his meat, though it be the horse of a stranger.

MOUNTAGUE, Chief Justice. Where one is hired to serve, there he shall not wage his law, because compellable. *Communia hospitium* are compellable to receive guests and their horses; and so he is to answer for them, which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his head; the innholder may sell him presently, and this is justifiable. Here in this case, the innkeeper said to the plaintiff, Prove the horse to be yours, pay for his meat, and you shall have him. This is no denial, nor yet any conversion, he claims no property at all; he only detains the horse, till he be satisfied for his meat, and so he may well do by the law; he may keep him, till he be paid for his meat, because he is compellable at the first to receive him.

DODDERIDGE, Justice. One who hath no keeping for his horse, doth devise this way to send his man with him to an inn, and to let him stand there, and afterwards to come thither himself, and of the innkeeper to demand his horse, and upon his refusal, to bring his action upon the case; this is a fine trick for the plaintiff to have his horse kept, and to give the innkeeper nothing for the same; but instead of paying of him for his meat, to pay him with an action, which he hath no cause so to do, as this case here is, the innkeeper may well justify the keeping of his horse, till he do pay him for his meat, which is all he desires to have.

HAUGHTON, Justice, differed in opinion. The party being the true owner of the horse, hath no other way to provide for himself, but this. The innkeeper hath his proper remedy against him, who brought and left the horse there for his meat, and for him thus to prejudice the owner of the horse, by the wrong of another, this will be very inconvenient.

CROKE, Justice. If a stranger takes my cattle, and puts them into the ground of another, he may well keep them till I pay him for their meat, and hurt there done. If a man's horse be stolen, and brought unto an inn, or if a man lends his horse to one for a day, and he keeps him three or four days, the innkeeper here was in no fault at all. If the horse was stolen and brought thither, he cannot charge the innkeeper with this, but he which brought him thither, and there left him. Here the innkeeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him.

MOUNTAGUE. If a stranger takes the horse of another, and sets him up in an inn, if the horse was there stolen away, the party may have his remedy against the innkeeper.

If a man's servant carries his master's horse to an inn, and there leaves him, and he is stolen away; an action lieth here for the master, as well as for the servant, against the innkeeper.

DODDERIDGE agreed this to be so, if he knew him to be his servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his horse, he is to look for him, and when he hath found him in the inn, if he should not be enforced to pay for his meat, this would be a trick, to have his horse kept for nothing, and to have him brought by his servant to the inn. The owner hath a benefit, (S.) meat for his horse, and for the which he ought to pay.

CURIA. The pleading here is not good, therefore they did advise the party to plead to issue, and so to go to trial, and so judgment may then be given upon the event, but as the case here is; CROKE, DODDERIDGE, and MOUNTAGUE, clear of opinion for the defendant against the plaintiff.

HAUGHTON differed from them in opinion for the plaintiff.

And so upon this action here brought, and upon the demurrer to the defendant's plea, the opinion of the court was against the plaintiff, that

the demurrer was not good; and so the rule of the court was, *Quod querens nil capiat per billam.*

Nota. That the like case, as this principal case is, was in this court. Termiu. Trin. 9 Jac. B. R., between *Skipwith* plaintiff, against *I. S.* an innkeeper (in a trover, and conversion for his horse, brought to the inn, by a stranger, and there detained for his meat) argued by the four judges, and the court therein divided WILLIAMS & CROKE Justices, That the innkeeper may keep the horse till he be paid for his meat.

YELVERTON & FENNER, Justices, *è contra*, touching this matter, *vide* prima pars, fol. 170.

Vide also, the custom of London, for an innkeeper to have a horse praised and sold for the meat he had eaten. Termino Trinit. 10 Jac. B. R. 1 pars, fol. 207. *Mosse* plaintiff, against *Townsend* defendant.

STIRT v. DRUNGOLD.

KING'S BENCH. 1617.

[*Reported 3 Bulst. 289.*]

In an action upon the case, for a trover, and conversion, the plaintiff declares, and shows that 20 Septembris 14 Jac. he was possessed of a horse, a saddle, a bridle, and a saddle-cloth, as of his own proper goods and chattels, and he being so thereof possessed, the same day and year, he casnally lost them, the which, the same day and year, came to the hands of the defendant, and he sciens them to be the goods of the plaintiff, refused to deliver them, being requested so to do, but, afterwards, (S.) 1 Octobris 14 Jac., did convert them to his own proper use, *ad damnum querentis*, 30 l. *unde actio.*

The defendant pleads, and sets forth, that before these goods came into his possession by trover, as in the declaration is expressed, and before the conversion, (S.) by the space of two years last past, he did keep a common inn, called the Sword and Buckler in Holburne, in the parish of St. Gyles *in campis*, the which was a common hostry. And that before the time of the conversion laid, one William Hadlane was possessed of the said horse, and came riding upon him into his said inn, with the saddle, and he did then request the defendant to keep the horse there at meat, and so he did for the time and space of seven weeks, which came unto 23s. and that afterwards, (S.) 6 Novembris 14 Jac., the plaintiff came thither and demanded his horse, the defendant answered, that if he would pay him for his meat he had eaten, he would deliver him, which to do he refused, and for his satisfaction, he detained the horse, upon which plea, the plaintiff demurred in law.

The whole court clear of opinion for the defendant, and that he might well keep the horse until satisfaction was made unto him for his meat. And so by the rule of the court, judgment was given for the defendant,

that his plea was good, and the plaintiff had no cause of demurrer, and therefore the judgment of the court was, *Quod querens nil capiat per billam*.

But some question was made whether he might retain the saddle, bridle, and cloth as well as the horse.

BROADWOOD v. GRANARA.

EXCHEQUER. 1854.

[Reported 10 *Exch.* 417.]

THIS was a case stated for the opinion of the court by consent of the plaintiffs and defendant, and by order of a judge.

The declaration stated that the defendant converted to his own use the plaintiffs' goods, — that is to say, a boudoir grand-pianoforte. The defendant pleaded, first, not guilty; secondly, that the goods were not the plaintiffs'. Upon which issues were joined.

The plaintiffs are, and at the time of the alleged conversion were, in partnership as manufacturers of pianofortes, in Great Pulteney Street, London. The defendant was, and is, the proprietor of an inn or hotel, called the Hotel de l'Europe, in Leicester Place, Leicester Square.

In March, 1853, a Monsieur Hababier, a foreigner and professional pianist, went to reside at the defendant's hotel, and remained there, occupying apartments, and occasionally taking his meals in the house, for some months. On the 28th of March Monsieur Hababier, then residing at the hotel, as before mentioned, went to the manufactory of the plaintiffs in Great Pulteney Street, and requested the use or loan of a grand-pianoforte. It has been, and is, usual for the plaintiffs to lend pianofortes to musical artists without charge; and in compliance with this request a grand-pianoforte was sent to the before-mentioned hotel for the use of Monsieur Hababier. This pianoforte remained at the hotel in possession of Monsieur Hababier, in his apartments, until the 9th of June following, when it was taken away and replaced by a boudoir grand-pianoforte, also supplied by the plaintiffs, without charge, to Monsieur Hababier.

Monsieur Hababier remained at the hotel until the 27th of June, and during that time incurred a bill for the use of the apartments, and for board, hire of carriages, and other accommodation, to a considerable amount. Some payments were made on account, but at the time of the demand and refusal hereinafter mentioned there was a balance due from him to the defendant of £46 3s. 5d., consisting in part of use of apartments, &c., after the 9th of June.

On the 27th of June the plaintiffs' clerk applied to the defendant for the last-mentioned pianoforte, and requested that it might be delivered to him for the plaintiffs. He, at the same time, handed to the defend-

ant a written authority from Monsieur Hababier to deliver it to the plaintiffs. The defendant declined to deliver up the pianoforte. On the following day the clerk again went to the house of the defendant, taking with him a van and two porters, and again demanded the pianoforte. On this occasion the defendant asked him if he had brought any money, and being answered in the negative, said, "Unless Messrs Broadwood pay my bill for the rent of the apartments I will not give up the piano."

It is admitted, for the purposes of this case, that the hotel of the defendant was and is an inn; and that the defendant was and is entitled to the rights of an innkeeper.

The defendant at all times knew the pianoforte in question was not the property of Monsieur Hababier, but that of the plaintiffs; and the plaintiffs at all times knew that the said Monsieur Hababier was stopping at an hotel. The balance due to the defendant from Monsieur Hababier is still unpaid.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiffs are entitled to maintain the action. If the court shall be of opinion that the action is maintainable, the verdict is to be entered for the plaintiffs, with £100 damages. If the court shall be of opinion that the defendant had a right to detain the pianoforte, then the verdict is to be entered for the defendant.

Watson, for the plaintiffs.

Willes, for the defendant.

POLLOCK, C. B. We are all of opinion that the lien claimed by the defendant cannot prevail. I need not go through the series of decisions referred to, or the propositions propounded at the bar, because the limited ground on which I think the plaintiffs entitled to judgment is this: that there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is the case of goods, not brought to the inn by a traveller *as his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances I am clearly of opinion that the defendant has no lien.

PARKE, B. I am of the same opinion. It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is

bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this pianoforte.

ALDERSON, B. I am of the same opinion.

PLATT, B. The case of *Johnson v. Hill*, 3 Stark. 172, shows the principle of law which is applicable to the present case. If a person brings the horse of another to an inn, the innkeeper may detain it from the owner until its keep is paid. But if, as the jury found in *Johnson v. Hill*, the innkeeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach. Here the plaintiffs send a pianoforte to the room of the guest, and the innkeeper well knew that it was not the property of the guest, and that it was not competent for him to pledge it for a debt of his own. Then how can it be said that any act of the plaintiffs gave the defendant a right to detain the pianoforte for his guest's debt? The plaintiffs might have taken it away the next minute. The case does not fall within the principles of law relating to the lien of innkeepers.

Judgment for the plaintiffs.

THREFALL v. BORWICK.

QUEEN'S BENCH. 1872.

[*Reported L. R. 7 Q. B. 711.*]

DECLARATION for detaining a pianoforte of plaintiff.

First plea, not guilty; and, *inter alia*, third plea, that defendant was an innkeeper, and kept a common inn for the reception of travellers and others. That defendant had a lien upon the piano for money payable by one Butcher to defendant for lodging and entertainment for himself and his wife and sister, and that Butcher, being then lawfully possessed of the piano, brought it to the inn with him, and defendant detained it in exercise of his lien as innkeeper.

Issue joined; and replication to the third plea, that the piano was let on hire to Butcher by plaintiff for a certain time which had elapsed before the detention by defendant, and the piano was not goods which a traveller ordinarily travels with, and defendant was not bound by law to take it in, and plaintiff never authorized Butcher to pledge it or create any lien upon it.

Issue joined.

At the trial, at Lancaster Spring Assizes, 1872, before *Lush, J.*, it appeared that the defendant kept the Ferry Hotel, on Lake Windermere, and that one Butcher came there with his wife and sister in April, 1871. In addition to board and lodging, Butcher had a private sitting-room, for which he paid 16s. a week. Butcher brought with him a pianoforte, which defendant thought was Butcher's own, but which he had in fact only hired of the plaintiff. This was put in the private sitting-room. After several weeks, Butcher left the hotel in defendant's debt for board, &c., £45; and, on demand by the plaintiff, the defendant claimed to detain the piano in exercise of his lien as innkeeper for the debt due by Butcher.

A verdict passed for defendant, with leave to move to enter it for plaintiff for twenty-two guineas.

A rule was obtained accordingly, on the ground that the defendant had no lien upon the plaintiff's piano.

Holker, Q. C., showed cause.

John Edwards, in support of the rule.

MELLOB, J. The rule must be discharged. It is not necessary to say anything as to the amendment of the pleadings, because we are all of opinion that the plaintiff's counsel has failed to show that the limits of the innkeeper's liability on the one hand, and of his privilege on the other, are such as he sought to establish. Whether or not the innkeeper would have been liable, if an indictment had been brought against him, for not receiving this guest and his goods, having accommodation for them, it is unnecessary to consider; when, having accommodation, he has received the guest with his goods and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And, under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive. In *Turrill v. Crawley*, 13 Q. B. 197; 18 L. J. (Q. B.) 155, the case which was most relied upon for the narrower view, *Cole-ridge, J.*, says, we must give effect to the changing usages of society, and in noticing the distinction attempted between carriages and horses, he says the fact that most of the decisions are with respect to horses is "obviously explainable by reference to the mode of travelling in former times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them." That, therefore, is no authority against the defendant; and the decision was that though the guest was not the true owner of the carriage, that made no difference if the innkeeper did not know it. In *Broadwood v. Granara*, 10 Ex. 417; 24 L. J. (Ex.) 1, the innkeeper knew that the piano did not belong to the guest, and did not receive it as part of the guest's goods; and on that ground alone the innkeeper was held not entitled to a lien; although there are some *dicta*, not necessary to the decision, to the effect that the innkeeper was not bound to receive the piano. Possibly not, though the liability may well be extended according to the extended usages of society; but,

whether the defendant was bound to receive the piano or not, he did receive it as the goods of the guest, and so became liable for it, and therefore must be entitled to his lien. The rule must, therefore, be discharged.

LUSH, J. I am of the same opinion. The innkeeper's lien is not restricted to such things as a travelling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods which the guest brings with him, and the innkeeper receives as his. This is laid down in *Calye's Case*, 8 Rep. 32 a, at least as to the innkeeper's liability, and his lien must be co-extensive. If he has this lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner.

QUAIN, J. I am of the same opinion. There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveller may be ordinarily expected to bring with him. In the fifth resolution in *Calye's Case*, 8 Rep. at f. 33 a, the expression in the writ of *bona et catalla* is shown to be extended by the subsequent words, *ita quod hospitibus damnum non eveniat*; and although the words *bona et catalla* "do not of their proper nature extend to charters and evidences, &c., or obligations, or other deeds or specialities, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them [that is, the loss of them] great damages happen to the guest; and therefore if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialities, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." A chest of deeds is certainly not ordinary traveller's luggage, and there is, therefore, no pretence for saying that there is any rule which confines the liability of the innkeeper to such articles; and certainly we ought not to confine his correlative lien within narrower limits. The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters, or obligations; and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow that he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest.

*Rule discharged.*¹

¹ Affirmed, Cam. Scacc. L. R. 10 Q. B. 210.

FITCH v. NEWBERRY.

SUPREME COURT OF MICHIGAN. 1843.

[Reported 1 *Douglass (Mich.)*, 1.]

THIS was an action of replevin for the taking and detention of sixty-five kegs of nails, one box of goods, and one barrel of apples, tried in the circuit court for the county of Wayne, before Geo. Morell, Presiding Judge, at the November term, 1841. The taking and detention of the property were admitted by the pleadings. The facts in issue were found by a special verdict, which was certified to this court for its opinion upon the questions of law arising therefrom. The facts found, out of which the question decided by this court arises, are the following:—

The goods and chattels described in the declaration were the property of the plaintiffs. They contracted with the New York & Michigan Line for the transportation of the nails, to be delivered to Hutchinson, Campbell & Co., Detroit, for \$1 per hundred pounds, payable in Michigan funds, and paid the freight in advance to the proprietors of the line at Detroit. The nails were shipped by the agents of the plaintiffs, at Port Kent, on Lake Champlain, July 18, 1838, by the New York & Michigan Line to Detroit, Mich., consigned to the plaintiffs at Marshall, Mich., care of Hutchinson, Campbell & Co., Detroit, and on such shipment the following bill of lading was given, signed by the master of the sloop Lafayette:—

F. & G. Marshall, Michigan.

Care of

J. Movius & Co., Ypsilanti,

H. Campbell & Co., Detroit.

New York & Michigan Line.

Care of

Eddy & Bascomb, Whitehall.

Shipped, in good order and well conditioned, by Keeseville Mf. Co. on board the sloop called the Lafayette, whereof C. P. Allen is master for this voyage, now lying at the port of Port Kent, and bound for Whitehall, — To say :

Sixty-five kegs of nails of 100 lbs. each	6,500 lbs.
Tare	390 “
	6,890 “

At 16 $\frac{2}{10}$ cts. per hund. delivered in Albany, is \$11.60

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the port of Albany (the danger of the seas only excepted), unto the agents of the New York & Michigan Line, or to their assigns; freight for the said sixty-five kegs being paid to Albany, by Messrs. Eddy & Bascomb, \$11.60.

In witness whereof, the master, as purser of the said vessel, hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated at Port Kent, the 18th day of July, 1838.

CHARLES P. ALLEN.

The several kegs of nails were each marked "F. & G. Marshall, Michigan, care of Hutchinson, Campbell & Co., Detroit." Robert Hunter & Co., at Albany, and Hunter, Palmer & Co., at Buffalo, were partners in the business of transportation and forwarding between Albany, N. Y., and Detroit, Mich., and they, together with the defendants, who were also forwarding and commission merchants at Detroit, were the owners, and each at their respective places of business, agents of the Merchants' Line. Hunter, Palmer & Co. received the nails at Buffalo from one of the canal boats of the Merchants' Line, accompanied by a bill of lading from Robert Hunter & Co. as consignors, and advanced the freight and charges upon them from Troy to Buffalo. They then shipped them to Detroit on board a steamboat belonging to the Merchants' Line, consigning them, by another bill of lading, to the care of the defendants, who received them Aug. 11, 1838, and paid the freight and charges on them from Troy to Detroit, amounting to the sum of \$85.63. The box of goods and barrel were shipped at a date subsequent to the shipment of the nails, from Whitesboro', N. Y., by the same line, upon the same terms, to the care of Hutchinson, Campbell & Co., marked "Fitch & Gilbert, Marshall, Michigan; care of Hutchinson, Campbell & Co., Detroit; New York & Michigan Line;" and the freight on them was also paid by the plaintiffs in advance. They were received in the warehouse of the defendants at Detroit, Oct. 26, 1838, and, as appeared by their books, they paid the freight and charges upon them to Detroit, amounting to \$3.83. The defendants had no knowledge of the contract made by the plaintiffs with the New York & Michigan Line for the transportation of the goods, or of the payment of the freight to said line, until in the fall of 1838, after their receipt by the defendants, when the plaintiffs demanded delivery of the goods, and informed them of such contract and payment. They refused to deliver the goods either to the plaintiffs or at the warehouse of Hutchinson, Campbell & Co. until the freight and charges of transportation thereon, advanced by them, amounting to \$89.46 (and exceeding the cost of transportation under the contract between the plaintiffs and the New York & Michigan Line), and also their charges for wharfage and storage of the goods, amounting to \$16.53, were paid, claiming a lien upon the goods for such advances and charges. Whereupon the plaintiffs sued out this writ of replevin.

H. H. Emmons, for the plaintiffs.

Geo. C. Bates, for the defendants.

RANSOM, J. Upon the facts found in the special verdict, several questions were raised, but the most important, and the only one which we deem it necessary to consider, is, whether the defendants had acquired a lien upon the goods, which they could enforce, even against the owners, the plaintiffs in this case.

On the part of the defendants, it is contended that a common carrier who receives goods for carriage and transports them, may detain them by virtue of his lien, for freight, even against the owner, in case the

freight has been earned without fraud or collusion on his part; that, if goods be stolen, or otherwise tortiously obtained from the legal owner, at New York or elsewhere, and carried by a transportation line from thence to Detroit, without a knowledge of the theft on the part of the carrier, he would be entitled to a lien for freight, even against the owner. This doctrine is sought to be maintained by the defendants' counsel, on several grounds: 1. He insists that a common carrier is bound to receive goods which are offered for transportation, and to carry them; that it is not a matter of choice whether he will receive and carry them or not; that he is liable to prosecution if he refuses. 2. That a common carrier is not only bound to receive and transport goods that are offered, but he is liable for their loss, in all cases, except by the act of God and public enemies; and the same rule, he insists, applies to warehousemen and forwarders. 3. That the duties and obligations of common carriers and innkeepers, are, in all respects, analogous; and an innkeeper is bound to receive and entertain guests, and to account for a loss of their baggage while under his care. 4. That a common carrier, being bound by law to accept goods offered him for carrying, and being responsible for their safe delivery in all cases, except when prevented by the act of God or public enemies, is entitled to a lien for their freight, against all persons, including even the owner, when the goods were tortiously obtained from him; that he is not bound to inquire into the title of the person who delivers them: and such lien exists, although there be a special agreement for the price of carriage. 5. That the master is not bound (nor his agent for him) to deliver any part of a cargo until the freight and other charges are paid.

But for the plaintiffs it is contended: 1. That liens are only known or admitted in cases where the relation of debtor and creditor exists, so that a suit at law may be maintained for the debt which gives rise to the lien; that a lien is a mere right to detain goods until some charge against the owner be satisfied. 2. That the defendants obtained possession of the goods without authority from the owners, either express or implied; that no legal privity exists between the parties, and therefore the relation of debtor and creditor does not exist between the defendants or their principals and the plaintiffs, and no action could be maintained by either against them for the freight, or any part of it. 3. They contend further that, even if the defendants lawfully received the goods from the original carriers of the plaintiffs, the New York & Michigan Line, they did so as their agents and servants, and were bound by their agreement with the plaintiffs; that their contract of affreightment is incomplete, and therefore no freight is due.

That common carriers are bound to receive goods which are offered by the owners or their agents for transportation, and to carry them for a just compensation, upon the routes which they navigate, or over which they convey goods in the prosecution of their business, is too well settled to require discussion, although this general proposition is subject to some qualifications.

Chancellor Kent says, 2 Kent's Com. 598 : " Common carriers undertake generally, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price. They consist of inland carriers by land or water, and carriers by sea ; and as they hold themselves out to the world as common carriers, for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite conveniences to carry, and are offered a reasonable or customary price ; and if they refuse without some just ground, they are liable to an action."

The books, English and American, are filled with strong cases affirming this doctrine. See 2 Show. R. 332 ; 5 T. R. 143 ; 4 B. & Ald. 32 ; 1 Pick. R. 50, and numerous other cases, and the elementary writers *passim*.

That common carriers are responsible for the safe conveyance and delivery of the goods committed to them for carriage, is just as conclusively settled as that they are bound to receive and carry them. A common carrier is said to be in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident without the intervention of man, and public enemies. 2 Kent's Com. 597 ; *Colt v. McMechen*, 6 Johns. R. 160. This doctrine is sustained by a series of decisions running back through a period of more than a century and a half. *Proprietors Trent Navigation v. Wood*, 3 Esp. R. 127 ; *Dale v. Hall*, 1 Wils. 288 ; *Forward v. Pittard*, 1 T. R. 33 ; *Hyde v. Trent Navigation Company*, 5 T. R. 389.

Another position taken by the defendants' counsel, that the duties of common carriers and innkeepers are analogous, may be admitted. As a general proposition it cannot be denied. Upon the obligations and liabilities imposed on common carriers, for the transportation, safe custody, and delivery of goods, the counsel for the defendants base a corresponding right to compensation for such transportation and delivery, and a lien on the goods for its payment.

If, as contended for by the defendants, a carrier is bound to receive and carry all goods offered for transportation, without the right of inquiring into the title or authority of the person offering them, then clearly he should be entitled to a lien, even against the owner, upon the goods, until he is paid for the labor he may bestow in their carriage.

Let us now inquire whether such is the law.

The doctrine is certainly opposed to all the analogies of the law, and it seems to me to every principle of common justice.

The only adjudged case I have been able to find, which favors it, is *Yorke v. Grenough*, 2 Ld. Raym. 866. That was replevin for a gelding. The defendant, who was an innkeeper, received the horse from a stranger who had stolen him. On demand being made for the horse by the owner, the defendant, who was ignorant of the theft when he received him, refused to deliver him up until paid for his keeping, insist-

ing on his right of lien. The court held it reasonable that he should have a remedy for payment, which was by retainer; and that he was not obliged to consider who was the owner of the horse, but whether he who brought him was his guest. And Holt, C. J., cited the case of the *Exeter carrier*, which he thus stated: Where A. stole goods and delivered them to the Exeter carrier to be carried to Exeter, the owner finding the goods in the possession of the carrier, demanded them of him. The carrier refused to deliver them, without being first paid for the carriage. The owner brought trover for his goods, and it was adjudged that the defendant might detain them for the carriage, on the ground that the carrier was obliged to receive and carry them. Powell, J., denied the authority of the *Exeter case*, but concurred with C. J. Holt in the decision of the case then under consideration. There is an obvious ground of distinction between the cases of carrying goods by a common carrier, and the furnishing keeping for a horse by an innkeeper. In the latter case, it is equally for the benefit of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief or by himself or agent; in either case, food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where, perhaps, he never designed and does not wish them to go? Or, as in this case, is the owner of goods benefited by having them taken and transported by one transportation line, at their own price, when he had already hired and paid another to carry them at a less price? This distinction does not, however, at all effect the determination of the case before us; we place it entirely upon other grounds.

The case of *Bevan v. Waters*, 3 C. & P. 520, was cited to show that a carrier was not bound to inquire into the title of a person offering goods for carriage. In that case the plaintiff bought two horses of defendant, which had been previously placed in the possession of one Boast, a livery-stable keeper, for feeding and training. When the plaintiff, after the purchase, applied to Boast for the horses, he refused to deliver them till paid for keeping and training, which the plaintiff paid, amounting to £130, and then brought *assumpsit* against the defendant for the money. He was allowed to recover on the ground that Boast had a valid lien upon the horses, and that the sale by defendant to the plaintiff created such a privity between them, as authorized the plaintiff to discharge the lien and resort to the defendant for repayment.

The decision of that case, it is seen, does not rest at all upon the ground contended for here by the defendants.

Several elementary authorities are also cited by defendants' counsel, in support of the doctrine assumed, but they are found, in every instance, to refer to the case of *Yorke v. Grenough*, 2 Ld. Raym., and of course do not go far to fortify the position taken in this case; but leave it still resting upon the authority of that decision alone.

All the other cases, in which the general proposition is laid down that

common carriers are bound to receive goods offered for carriage, are evidently based upon the supposition that the goods are there offered by their owners or their authorized agents; and that, if in any way they acquire possession of property without consent of the owner, express or implied, they, like all other persons, may be compelled to restore it to such owner, or pay him for its value. And that the doctrine of *caveat emptor* applies, with the same force, to that class of persons as to others, is manifest, I think, from an examination of authorities.

The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them. 1. That the person offering the goods has authority to do so. 2. That a just compensation, or the usual price, be tendered for the carriage. 3. That although the owner, or his agent, offer goods for carriage and tender payment for the freight in advance, still he is not bound to receive them, unless he have the requisite convenience to carry them.

In an action brought against a carrier for refusing to receive and carry goods, would it not constitute a valid defence that the plaintiff had stolen them, although, at the time of offering, the carrier may not have known they had been stolen?

In Story on Bail. § 582, it is laid down that a carrier is excused for non-delivery of goods to the consignee, when they are demanded, or taken from his possession, by some person having a superior title to the property. And, again, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods.

If, then, the owner could reclaim the goods in the hands of the carrier, *after* their delivery to him, and that would excuse a non-delivery to the depositor, it is clear that he would be justified in refusing to receive them from one having a wrongful possession, although at the time of such refusal, he might not know the manner in which they had been obtained.

So, a carrier is in all cases entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them. Story on Bail. § 586; 5 Barn. & Ald. 353; 4 Id. 32; 3 Bos. & Pull. 48; and Whit. on Liens. 92.

If, then, a common carrier may demand payment for carriage in advance, and if he may reject goods offered by a wrong doer, or by one having no authority to do so, is he not bound to take care that the person from whom he receives them has authority to place them in his custody?

In Story on Bail. § 585, it is said: A carrier having once acquired the lawful possession of goods for the purpose of carriage, is not bound to restore them to the owner again, unless his due remuneration be paid; evidently presupposing the goods to have been delivered to him by the owner; and cites 9 Johns. 17; 3 Johns. Cases, 9. In *Lemprier v. Pasley*,

2 T. R. 485, it was held that goods wrongfully delivered to the person claiming them, who paid freight and other charges, could not be detained for those expenses against the rightful owner. In 2 Kent's Com. 638, it is laid down that possession is necessary to create the lien, but though there be possession of goods, a lien cannot be acquired, when the party came to that possession wrongfully. So, if the party came to the possession of goods without due authority, he cannot set up a lien against the owner. 2 Kent's Com. 638; 5 T. R. 604; 4 Esp. R. 174; 7 East, 5. In *Buskirk v. Purington*, 2 Hall R. 561, property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on board the vessel of the defendants. The owner claimed the goods, demanded them, and on defendants' refusal to deliver them, brought trover for their value. The defendants insisted on their right of lien for the freight, but the plaintiff was allowed to recover.

In *Salters v. Everett*, 20 Wend. 275, the master of a vessel, with whom the defendant in error shipped goods from New Orleans to New York, during the voyage made a new bill of lading in his own name as owner. The goods at New York were sold to the plaintiff in error, who was ignorant of the shipmaster's fraud. The owner (the defendant in error) sued the purchaser for their value, or return. Senator Verplanck, in the opinion which he delivered in the Court of Errors, held this doctrine: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser, under a defective title, cannot hold against the true proprietor." And again, "there is no case to be found, or any reason or analogy anywhere suggested in the books which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently." *Id.* 281. "If the owner lose his property, or is robbed of it, or it is sold or pledged, without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it, for a specific purpose, as for transportation, or for work to be performed upon it, the owner can follow and reclaim it in the hands of any person, however innocent." *Id.* 282.

In *The Anne*, 1 Mason, C. C. R. 512, persons not authorized by the owner took command of a vessel, and carried her out of the regular course of the voyage, and employed a pilot to take her into port, and he sought to enforce his lien on the vessel for pilotage. In deciding that case the court say: "It cannot be maintained, upon any acknowledged principles of law, that mere wrong doers, or usurpers of the command of the ship, not acknowledged or appointed by the owner, can create a lien on the ship, or personally bind the owner, by a contract which they may choose to make, whether it be beneficial to him or not."

In *Greenway v. Fisher*, 1 C. & P. 190, it was said, that if goods be placed in the hands of a common carrier without the consent of the owner, and while he has them in possession they be demanded, and he

refuse to deliver them, trover lies at the suit of the owner. In *Hoffman v. Carrow*, 22 Wend. 318, the court say: "The doctrine of our decision is, that the original and true owner of moveable property who has not, by his own act or assent, given a color of title or an apparent right of sale to another, may recover its value from any one having it in possession, and refusing to deliver it up to him."

If it be said for the defendants that Allen, the master of the vessel on which the goods were originally shipped, or Eddy & Bascomb, the wharfingers and forwarders to whose care at Whitehall they were consigned, delivered them to the defendants, or to those from whom they received them, it may be replied, that if such were the fact it would not affect the rights of the plaintiffs, or the liabilities of the defendants, under the facts found by the special verdict in this case.

The jury have found that the plaintiffs contracted with the New York & Michigan Line to transport their goods to Detroit, and paid them the stipulated price for the carriage, in advance. The only power over the goods which that line derived from their contract with the plaintiffs was to safely carry and deliver them at the place of consignment. They had no authority to transfer them to any other line, and make the plaintiffs chargeable for the freight. And the defendants, under such a transfer, could acquire no right to compensation for freight as against the plaintiffs.

Nor had Eddy & Bascomb, from any fact appearing in the case, any authority to forward the goods, from Whitehall, by any conveyance other than that which the plaintiffs had directed, and which appeared upon the bill of lading that accompanied the goods. A special authority must be strictly pursued; and whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power. 2 Kent's Com. 631. No one can transfer to another a better title than he has himself, or a greater interest in personal property than he or the person for whom he acts possesses. *Hoffman v. Carrow*, before cited.

To create a lien, it is necessary that the party vesting it should have the power to do so. A person can neither acquire a lien by his own wrongful act, nor can he retain one, when he obtains possession of goods without the consent of the owner, express or implied. 5 T. R. 606; 1 Saund. Pl. & Ev. 326; 2 Stark. Ev. 360; *Andrew v. Dietrich*, 14 Wend. 31.

It is quite clear that from no delivery made of the goods in question, by the original carriers, to the Merchants' Line, can any contract be implied that the plaintiffs would pay them for the freight, and thus lay the foundation for the lien claimed.

But if it be admitted that the owners or agents of the New York & Michigan Line, delivered the plaintiffs' goods to the defendants, or to those for whom they acted, they must be presumed to have received them as the agents of that line, and to have transported them from Albany to Detroit, for and on account of that line; and they, conse-

quently, can resort to it alone for compensation. If the defendants are the agents of the New York & Michigan Line, they are bound by the contract of affreightment which that line made; and to entitle them to freight (had it not been paid in advance), they should show that contract strictly and fully performed, by a delivery of the goods to the consignees named in the contract. It is not sufficient that the goods arrive at the port of destination, but there must be a delivery of them to perfect the right to freight. *Ab. on Sh. 273.* It is a general and an acknowledged rule, that the voyage must be performed according to the contract, before the ship owner or master can demand his freight. Conveyance and delivery of the cargo are conditions precedent, and must be fulfilled. A partial performance is not sufficient, unless delivery be dispensed with, or prevented by the owner. *Palmer v. Lorrillard*, 16 Johns. R. 356.

If the goods came to the hands of the defendants or their principals, without the agency of those who control the New York & Michigan Line, with or without fraud, as by finding them in a storehouse, or on a wharf at Whitehall, Albany, Buffalo, or elsewhere, it would not vary the case.

If goods came to the possession of a person by finding, and he has been at trouble and expense about them, he has a lien upon the goods for compensation, in one case only, and that is the case of goods lost at sea; then there is a lien for salvage. This lien is allowed upon principles of commercial necessity, and is thought to stand upon peculiar grounds of maritime policy, and does not apply to cases of finding upon land. 2 Mason R. 88; 2 Kent's Com. 635, and numerous cases there cited.

But it is insisted by the plaintiffs that a lien can only be created when the relation of debtor and creditor exists between the parties.

A lien is defined to be a *tie, hold, or security* upon goods or other things, which a man has in his custody, till he is paid what is due him. 2 Pet. Dig. 692.

In the case of the *United States v. Barney*, it was held that a lien cannot exist against the government; for liens are only known or admitted in cases where the relation of debtor and creditor exists, so as to maintain a suit at law for the debt or duty which gives rise to the lien, in case the pledge be destroyed or the possession lost. An innkeeper cannot, therefore, upon the ground of a lien, justify the arrest and detention of the horses employed in the transportation of the public mails. 2 Pet. Dig. 693; 3 Hall's Law Jour. 128. In *Oppenheim v. Russell*, 3 B. & P. 49, Justice Heath says: "There is a certain privity of contract between the consignor of goods and the carrier, and it is evident that there is this privity of contract from this consideration, that if the consignee cannot be found, or refuse to receive the goods, the carrier may come upon the consignor for the carriage of the goods, which he could not do, unless there was a privity of contract between them." Is not the principle decided in these cases perfectly conclusive of the rights

of the parties to this suit? It seems to me to be a proposition too plain to be controverted. That one man cannot, by his own act, make another his debtor, without his consent, will not be questioned. Consequently, it is not sufficient to create the relation of debtor and creditor, that the plaintiff should have rendered services to the defendant, without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. *Bartholomew v. Jackson*, 20 Johns. 28, is a strong case upon this point. The action was *assumpsit*, for removing a stack of wheat, without the knowledge of the defendant, to prevent its being burned. The court, in their decision of the case, adopt this language: "The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied." *Everts v. Adams*, 12 John. 352, where the plaintiff furnished medicines for a town pauper, and sought to charge the overseers of the poor, and *Dunbar v. Williams*, 10 Johns. 249, where the plaintiff provided medicines to defendant's slave, without the knowledge of the owner, and numerous kindred cases, are to the same effect.

Schmaling v. Thomlinson, 6 Taunt. 147, bears directly upon the question involved in this case. The action was for commission, work and labor, and money paid for shipping and forwarding the goods of the defendants from London to Amsterdam. The defendants employed Aldibert, Becker & Co. to perform the business, and they employed the plaintiffs, who had no communication with, or knowledge of the defendants. The plaintiffs forwarded the goods as directed. The court decided there was no privity between the plaintiffs and defendants; that the defendants looked to Aldibert, Becker & Co. for the performance of their business, and Aldibert, Becker & Co., and they only, had a right to look to the defendants for payment. There the forwarder delivered the goods and sued for the carriage, &c. Here the defendants refused to deliver the goods, and insisted on their right to a lien. The principle involved, however, is the same in both cases, if it be admitted that there must be a debt to sustain a lien.

Finally, on a full and careful consideration of this case, we arrive at the following conclusions:—

1. That a common carrier is bound to receive and carry goods only when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required.

2. If a common carrier obtains the possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value.

3. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt, sought to be enforced by the lien.

The facts set forth in the special verdict found in this case do not

bring it within the principles which justify the lien claimed by the defendants, and, therefore, judgment for the plaintiffs must be entered upon the verdict for their damages for the detention of the goods relieved, and for their costs.¹

C. *Loss of Lien.*

JONES v. PEARLE.

KING'S BENCH. 1723.

[*Reported 1 Stra.* 557.]

IN trover for three horses, the defendant pleaded, that he kept a public inn at Glastenbury, and that the plaintiff was a carrier and used to set up his horses there, and £36 being due to him for the keeping the horses, which was more than they were worth, he detained and sold them, *prout ei bene licuit*: and on demurrer judgment was given for the plaintiff, an innkeeper having no power to sell horses, except within the city of London. 2 Roll. Abr. 85; 1 Vent. 71; Mo. 876; Yel. 67. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again. *Wilkins v. Carmichael*, Doug. 105; Co. Bank. Laws 516, 3 ed.

M'COMBIE v. DAVIES.

KING'S BENCH. 1805.

[*Reported 7 East*, 5.]

THIS action of trover for tobacco having gone to a second trial, in consequence of the opinion of the court delivered in Trinity term last, 6 East, 538, when it was considered that the defendant's taking an assignment of the tobacco in the King's warehouse by way of pledge from one Coddan, a broker, who had purchased it there in his own name for his principal, the plaintiff (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority), and the defendant's refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to Coddan his broker in £30 on the balance of his account; and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by assignment

¹ *Robinson v. Baker*, 5 Cush. 137; *accord.* *Contra, semble, Waugh v. Denham*, 16 Ir. C. L. 405; and *King v. Richards*, 6 Whart. 418.

from Coddan for a valuable consideration stood in his place and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered this £30 ought to be nonsuited. *Lord Ellenborough*, C. J., however, being of opinion that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.

The Solicitor-General now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground that the defendant who stood in the place of Coddan, and was entitled to avail himself of all the rights which Coddan had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of Coddan's claim upon them. And in answer to the case of *Daubigny v. Duval*, 5 Term Rep. 604 (which was suggested as establishing a contrary doctrine), he observed that Lord Kenyon was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his Lordship seemed to retain that opinion when the case was moved in court, though the rest of the bench differed from him. But —

LORD ELLENBOROUGH, C. J., said, that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession; yet it was quite clear that a lien could not be transferred by the tortious act of a broker pledging the goods of his principal, which he had no authority to do. That in *Daubigny v. Duval*, though Lord Kenyon was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, Assignees of Gard v. Pym*, 1 East, 4, to have fully acceded to their opinion; for he there states that "the right of lien has never been carried further than while the goods continue in the possession of the party claiming it." And afterwards he says, "In the case of *Kinloch v. Craig*, 3 Term Rep. 119, afterwards in Dom. Proc. ib. 786, where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this court, and afterwards in the House of Lords."

His Lordship then, after consulting with the other judges, declared

that the court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case; and added, that he would have it fully understood that his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien.

PER CURIAM,

*Rule refused.*¹

BOARDMAN v. SILL.

NISI PRIUS. 1808.

[*Reported 1 Camp. 410, note.*]

TROVER for some brandy, which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney-General* contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered, trover would not lie. But *Lord Ellenborough* considered, that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, — which would admit of some doubt. The plaintiff had a verdict.

WHITE v. GAINER.

COMMON PLEAS. 1824.

[*Reported 2 Bing. 23.*]

TROVER for eight pieces of cloth. At the trial before *Park, J.*, Gloucester Lent Assizes, 1824, it appeared that on the 9th of July, 1822, Symes, a clothier, hearing that a bailiff was in his house, went to sleep at the house of the defendant, Gainer (a dyer and miller of cloth), to whom he was considerably indebted for work done in the course of his business. The next day Symes, by way of securing Gainer, sold to him the pieces of cloth in question, together with several others, delivering a bill of parcels bearing date a few days before. On the

¹ See *Story, Bailm. §§ 325, 326.*

first of August a commission was issued against Symes, who was declared a bankrupt on the 19th.

In September, the plaintiffs demanded the cloths in question of the defendant, who refused to deliver them up, saying, "He might as well give up every transaction of his life," but making no demand. In a conversation in the March ensuing he said, "The thing might have been settled long ago if the assignees would have allowed him his demand for milling and rowing the eight pieces of cloth." The value of the cloths in dispute was £98 3s., and the defendant's general balance against Symes for milling, dyeing, and rowing cloth, £188 11s. It was contended at the trial that the defendant's lien, as far as he had any, was merged in the purchase of the cloth; and that at all events he had waived it by not making any claim in respect of it when the cloth was demanded. The learned judge directed the jury that the plaintiffs, previously to their demand, ought to have tendered at least the amount of the lien for workmanship on the cloths in dispute; but he reserved the point as to the merger of the lien for the consideration of this court. A verdict having been found for the defendant, on the issue as to these eight pieces of cloth,

Taddy, Serjeant, now moved for a rule *nisi* to set aside this verdict and have a new trial, on the grounds urged at the assizes; and he cited *Boardman v. Sill*, 1 Camp. 410, to show that the defendant had waived his lien, by not specifying and insisting on it at the time the cloths were demanded of him.

BEST, C. J. I agree in the law as laid down in *Boardman v. Sill*, but not in the application of it now proposed. In that case it was holden that if a party, when goods are demanded of him, rests his refusal upon grounds other than that of lien, he cannot afterwards resort to his lien as a justification for retaining them. Therefore if, even in this case, the defendant, when applied to to deliver the goods, had said, "I bought them, they are my property," I should have holden there was a waiver of his lien; but he said no such thing, but only, "If I deliver them, I may as well give up every transaction of my life." Now, his business was that of a miller of cloth, and if he had given up his lien in this instance, he might have been called on to do so always; he therefore refused to deliver them, and it was then for the plaintiffs to consider what offer they should make. It has been urged that he bought them after the bankruptcy. If that were so, he stands in the same situation as every other purchaser under the same circumstances; the purchaser is liable to restore them to the assignees, but the assignees must take them subject to such rights as had accrued previously to their claim, and the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled,—the right of lien. It might have been otherwise if the defendant, when called on to surrender the goods, had relied on the purchase; but this was not the case, and the verdict must stand.

PARK, J. If the defendant, on the first conversation, had said any-

thing inconsistent with the claim of lien there might have been some ground for this application; but the transactions of his life were milling and rowing cloth, and those were the transactions which he said he might as well give up, if he gave up this. The subsequent conversation puts the matter out of doubt, when he declared the thing might have been settled, if his demand for milling and rowing the cloth had been allowed; and this clearly shows he never intended to relinquish his lien.

BURROUGH, J. If he had said he purchased the cloth, and that the lien formed part of the price, there might be some ground for the motion. But it is clear the fact was not so. *Rule refused.*

JACOBS v. LATOUR.

COMMON PLEAS. 1828.

[*Reported 5 Bing. 130.*]

TROVER for the conversion of certain race-horses. At the trial before *Burrough, J.*, last Hertford assizes, it appeared that these horses had been placed by Lawton with the defendant Messer, a trainer, and were by him kept and trained for running. Lawton being indebted to Messer for his services in this respect, and for the keep of the horses, and being insolvent, Messer obtained a judgment against him on the 5th of May, 1827, for £227, upon which he issued a *fi. fa.* on the 16th of the same month, returnable on the 23d. The levy was made on the 16th, and under it the horses in question, which had never been out of his possession, were sold to Messer for £156.

On the 22d of May, 1827, a commission of bankrupt having issued against Lawton, upon an act of bankruptcy committed in February, 1825, the plaintiff, as his assignee, brought this action to recover the value of the before-mentioned horses.

It was contended, on the part of the defendants, that if the execution would not avail against the commission of bankrupt, at all events the defendant Messer had a lien for his services in training the horses, which entitled him to keep them till his account was settled; a verdict, however, was found for the plaintiff, with leave for the defendants to move to set it aside on this ground, and enter a nonsuit instead. Accordingly *Wilde, Serjt.* obtained a rule *nisi* to this effect, citing *Chase v. Westmore*, 5 M. & S. 180.

Andrews, Serjt., for the plaintiff.

Wilde, for the defendant.

BEST, C. J. This was an action of trover against a stable keeper and trainer, to recover the value of certain horses placed with him for the purpose of being trained. The first question in the cause is, Whether the defendant had any lien on the horses; and the second.

Whether, if he had a lien, it was destroyed by his taking the horses in execution.

It is not necessary for us to enter on the first question, because we are of opinion that if he had any lien, it was destroyed by the execution at his suit.

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.

As between debtor and creditor the doctrine of lien is so equitable that it cannot be favored too much; but as between one class of creditors and another there is not the same reason for favor.

Rule discharged.

SCARFE *v.* MORGAN.

EXCHEQUER. 1838.

[*Reported 4 M. & W. 270.*]

TROVER for a mare. Pleas, first, not guilty; secondly, that the mare was not the property of the plaintiff. At the trial before *Parke*, B., at the last Assizes for the county of Suffolk, it appeared that the mare in question had been sent on more than one occasion to the premises of the defendant, who was a farmer, to be covered by a stallion belonging to him, and the charge of 11s. for the last occasion not having been paid, the defendant refused on demand to deliver up the mare, claiming a lien not only for the 11s., but for a further sum amounting altogether to £9 7s. 4½*d.*, for covering other mares belonging to the plaintiff, and including also a small sum for poor-rates; on which demand and refusal, the plaintiff, without making any tender of the 11s., brought the present action. It also appeared in evidence that the contract in question was made and executed on a Sunday. The learned judge, on these facts being proved, directed the jury to find a verdict for the plaintiff for £25, the value of the mare, giving liberty to the defendant to move to enter a nonsuit on the three following points, which were raised at the trial:—First, whether this was a case in which any lien would exist at all; secondly, if it could, whether the defendant had waived his lien for this particular charge by insisting on payment of his whole demand; and thirdly, whether this contract, being made and executed on a Sunday, was void by the statute 29 Car. 2, c. 7. Byles having, in Easter Term, obtained a rule *nisi* accordingly, —

Kelly and *Gunning* showed cause.

Byles and *O'Malley*, contra.

PARKE, B. With respect to the principal point in this case (which has been very well argued on both sides) as to the right of lien on a mare for the expense of covering, we will take time to consider our judgment; but, assuming that there was a lien, the court have no difficulty as to the other two points. As to the first point argued by Mr. Kelly, the court are unanimous in considering that if the defendant had a lien, he did not waive it under the circumstances of this case, by claiming to hold the mare not merely for the expense of covering her, but also for the expense of covering other mares belonging to the same plaintiff, and also for some payments made in respect of poor-rates which he had against him. The only way in which such a proposition could be established, would be to show that the defendant had agreed to waive the lien, or that he had agreed to waive the necessity of a tender of the minor sum claimed to be due. Looking at the mode in which he made the claim, and at the ground on which he considered it to be made, I think it is clear he has not waived the lien, or excused the necessity of making a tender; for when the demand was made he said, "I have a general account with you, on which a balance is due to me of so much," and part of it was, particularly, a charge of 11s. for covering this mare. The cases referred to by Mr. Kelly seem to be distinguishable from the present. In the case of *Boardman v. Sill*, the defendant did not mention his lien at all, but claimed to hold the goods on the ground of a right of property in them, and did not set up any claim of lien at all. In *Knight v. Harrison*, the ground of refusal was, that the right of property was in another person as to the goods in question, and that he had a general lien for expenses on those goods. Neither of those two cases appears to me to apply to the present. In this case it would be strange to say that the defendant meant to waive his lien of the 11s. when that was one of the things he said he would hold the mare for, and it would be equally strange to say that he meant to excuse the tender of that sum, when no tender was made of any sum at all. I do not mean to say that such circumstances may not occur as would amount to the waiver of a lien, and of the tender, but that a great deal more must have passed than was proved to have passed on the present occasion. If he had said, "You need not trouble yourself to make a tender of the sum for which I have a lien, and I shall claim to hold the mare for it," the plaintiff would then be in the same situation as if a tender had been made; but we think the defendant cannot be deprived of his right of holding the property on which he had a lien, by anything that has passed on the present occasion. Then, as to the other objection, that this was an illegal contract, on the ground of its having been made on a Sunday; we are of opinion that this is not a case within the statute 20 Car. 2, c. 7, which only had in its contemplation the case of persons exercising trades, &c. on that day, and not one like the present, where the defendant, in the ordinary

calling of a farmer, happens to be in possession of a stallion occasionally covering mares ; that does not appear to me to be exercising any trade, or to be the case of a person practising his ordinary calling. But independently of that consideration, this is not the case of an *executory* contract ; both parties were *in pari delicto* — it is one which has been executed, and the consideration given ; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property either special or general has passed thereby, the property must remain ; and on that ground also, this lien would be supported, though it were or might have been illegal to have performed this operation on a Sunday. It seems to me, however, that it was not so ; there is nothing like a trade, and no direct dealing on a Sunday. The only point, therefore, now to be determined, is, whether the defendant had any lien at all of this description ; and upon that we will take time to consider.

BOLLAND, B. I am of the same opinion in this case as my Brother Parke, as to these two points ; and I confess I have a very strong opinion in favor of the defendant on the other.

ALDERSON, B. Upon the two points on which the court has given judgment, I entirely concur. It seems to me a monstrous proposition, to say that a party who claims in respect of two sums to detain a mare, is to be supposed to have waived his right to detain her as to one. The more natural conclusion is, that the defendant intended to act upon both ; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other ; and with respect to the observation that has been cited as having fallen from Lord Tenterden, that if the defendant had given notice, the plaintiff would have paid, an equally strong observation appears to arise the other way ; for probably had the plaintiff said, "I tender you this sum, which I admit I am bound to pay," it might cause the defendant to reflect whether he really had a right to detain the mare as to the other. It seems to me you cannot say, that because the party claims more than it may be ultimately found he had a right to, he would not have a right to a tender of the sum which the other ought to pay.

GURNEY, B., concurred.

Cur. adv. vult.

The judgment of the court on the principal point was delivered in this term by —

PARKE, B. The court have already disposed of two questions argued in this case. The first, whether the defendant's lien on the plaintiff's mare, if it existed, was waived by a claim to retain her, not merely for the amount due on the particular occasion, but also on others, as well as for a debt of a different kind. The second, whether the circumstance, that the transaction occurred on a Sunday, rendered the lien invalid. We expressed our opinion on the first point, that there was no waiver of the lien, nor any dispensation with the tender of the amount due on that occasion ; and on the second, that this was not a

transaction in the course of the ordinary calling of the defendant; and if it was, that still the lien would exist, because the contract was executed, and the special property had passed by the delivery of the mare to the defendant, and the maxim would apply, *in pari delicto potior est conditio possidentis*.

The only remaining question upon which the court reserved its opinion is, whether the defendant is entitled to a specific lien on the animal, the subject of the action. The jury have found that it was delivered into his possession for the purpose mentioned; that the sum is still due; and that the mare remained in the defendant's possession after the claim had arisen and was due.

The case is new in its circumstances, but must be governed by these general principles which are to be collected from the other cases in our books.

The principle seems to be well laid down in *Bevan v. Waters*, by Lord Chief Justice Best, that where a bailee has expended his labor and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases.

This, then, being the principle, let us see whether this case falls within it; and we think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may by his skill and labor, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument.

But there is another difficulty which, unless answered, would prevent the lien from taking effect. It is clear that, even in such cases, if the nature of the contract applicable to such skill or labor be inconsistent with the lien, that the latter, which is but a stipulation annexed impliedly to the contract, cannot exist. Prior to the case of *Chase v. Westmore*, the general opinion had been that there could be no lien where there was any express contract at all. That case, however, decided, that where there was an express contract, but containing no stipulation inconsistent with the lien, it might still exist. In the case of the livery-stable keeper there is such an inconsistency, because, by the nature of the contract itself, the possession is to be redelivered to the owner whenever he may require it. In fact, that falls within the principle of the time of payment being, by the contract itself, postponed to a period after the redelivery of the chattel. The doubt as to the case of the trainer, in *Jacobs v. Latour*, turns on this. There the question is, whether in the contract for training, there is a stipulation for the redelivery of the horse trained for the purpose of

racing. So, again, if a time be fixed for the payment; for there the lien is inconsistent with the right of intermediate redelivery.

This case, however, presents no such difficulty; there does not appear here any such inconsistency. The mare is delivered for the purpose of being covered, and for a specific price to be paid for it. In this there is nothing inconsistent with the implied condition that the defendant shall detain her till payment. And on the contrary, according to *Cowper v. Andrews*, Hob. 41, cited in *Chase v. Westmore*, the word "for" works by condition precedent in all personal contracts, as, if I sell you my horse *for* ten pounds, you shall not take my horse except you pay the ten pounds.

So that, in this case, the lien is more consistent with this contract than the denial of it.

It occurred to us in the course of the discussion which was very ably conducted on both sides, that there was a difficulty arising out of the circumstance that this being a living chattel, might become expensive to the detainer, and that the allowance of such a lien would raise questions as to who was liable to feed it intermediately. But Mr. Byles answered this difficulty satisfactorily, by referring us to the analogous case of a distress kept in a pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate, and to the case of a lien upon corn, which requires some labor and expense in the proper custody of it.

Other cases were cited in the argument, but they were cases of general lien, which clearly turn upon contract or usage of trade, in which he who seeks to establish such contract or usage *ultra* the general law, is held to strict proof of the exception on which he relies. These are wholly distinguishable from this case.

Upon the whole, we think this lien exists, and judgment must be for the defendant.

Rule absolute to enter a nonsuit.

BRYANT *v.* WARDELL.

EXCHEQUER. 1848.

[*Reported 2 Exch. 479.*]

TROVER for theatrical dresses and other property. Pleas: not guilty, and not possessed; upon which issue was joined. At the trial of the cause, before *Parke, B.*, at the Middlesex sittings in the present term, it appeared that the plaintiff and the defendants, in the year 1845, with a view to the exhibition of a dwarf of the name of Richard Garnsey, entered into the following agreement: "Memorandum of agreement made the 29th of December, 1845, between W. Bryant, of the one part, and R. Wardell, N. Dormer, and T. R. Lewis, of the other part. For the considerations hereinafter mentioned, the said W. B. hereby

agrees to permit and allow R. Garnsey, otherwise called 'the miniature John Bull,' to be publicly exhibited by the said R. W., N. D., and T. R. L., for twelve calendar months from the date hereof, either in London, or within eighty miles thereof; and the said R. W., N. D., and T. R. L. shall have the exclusive control of such exhibition, and of the arrangement connected therewith; and they hereby agree to bear and pay all the expenses whatever which may be in any way incurred in connection with such exhibition. That the said R. W., N. D., and T. R. L., shall retain, receive, and be paid three fourths of the clear profits arising from the said exhibition, and the said W. B. shall receive or be paid the remaining one fourth of such profits. That this agreement shall continue and remain in full force for twelve calendar months certain; and in case the said R. W., N. D., and T. R. L., shall be desirous, at the expiration of such term, to continue the same for six calendar months longer, they shall be at liberty to do so; and in that case, the said W. B. shall, during such six calendar months, receive and be paid one half of the profits arising from the said exhibition, instead of one fourth. That James Garnsey, the father of the said R. G., shall be employed by the said parties hereto, at a salary of 15s. per week for twelve calendar months certain, provided this agreement shall remain in full force, and for such further time as such exhibition shall be continued, such salary to be considered as part of the expenses of the said exhibition. That the sum of 30s. per week shall be paid to the said J. G. and his wife, for twelve calendar months certain, or for such other or further time as such exhibition shall be continued; such payments shall be considered and form part of the expenses thereof. That A. Whitwham shall be employed by the said parties hereto for the first six weeks of the said exhibition, and the said W. B. shall be employed for three months next after the expiration of the said six weeks; and afterwards, the said A. W. and W. B. shall be employed alternately, so long as such exhibition shall be continued. That the said parties hereto are to be allowed to have the use of certain property and dresses during the said exhibition, and at the expiration of this agreement such property and dresses are to be given up to the said W. B. That the said W. B. or A. W. shall be at liberty to act as check-taker at such exhibition, or to appoint a person for such purpose at their own expense. That the said N. D. having, on the 27th day of December instant, advanced and paid the said W. B. the sum of £40 for the use of the said property and dresses, such sum of £40 is to be repaid to the said N. D. out of the first profits of the said exhibition. That the expenses of and connected with the said exhibition shall commence this day. That the accounts of and relating to such exhibition shall be settled, and the balance and the profits ascertained and divided between the parties hereto, every fortnight." After this agreement had been entered into, the property in question was disposed of in a different way, but the jury found a verdict for the stage and scenery only, which, at the end of the term, were not delivered, but during the term were taken

to pieces and applied — and this the jury found to have been done by all the defendants — in constructing a different sort of stage at a different exhibition. It was objected by the defendants' counsel that the plaintiff and defendants were partners under the terms of the agreement; and, secondly, that the plaintiff had not, at the time of the conversion, such a property in the goods as would maintain the action. The learned judge, however, was of a contrary opinion, and the plaintiff had a verdict.

Ogle now moved for a new trial on the ground of misdirection.

POLLOCK, C. B. We are all of opinion that there ought to be no rule in this case. In the first place, we think that the construction which was put upon the contract at the trial is correct. It is clear from several parts of the agreement that the words "the said parties" mean parties *other* than Bryant. For in one part of it there is a statement that "Whitwham shall be employed by the said parties" for a certain time, and "the said W. Bryant shall be employed" for another period. Now, it is clear that Bryant was not to be employed by himself, but by the three defendants. And in the succeeding clause the same words — *the said parties* — must mean the three defendants. There was, therefore, no partnership between the plaintiff and defendants in the property in question. As to the other point, we are clearly of opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which the goods had been bailed to the defendants. The case of *Cooper v. Willomatt*, 1 C. B. 672, is a decisive authority upon this point. It was there held that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bona fide*. The cases on the subject are referred to there. The rule is, that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion. *Rule refused.*¹

PARKE, B., ROLFE, B., PLATT, B., concurred.

KERFORD *v.* MONDEL.

EXCHEQUER. 1859.

[Reported 28 *L. J. N. S.* 303.]

THIS was an action of trover, brought by the plaintiff to recover certain bags of sugar and cochineal.

Pleas, not guilty and not possessed.

The cause came on to be tried, at the Liverpool Spring Assizes, *coram Byles, J.*, when a verdict was taken for the plaintiff, subject to a special case, which stated the following facts.

¹ See *Farrant v. Thompson*, 5 B. & Ald. 826; *Fenn v. Bittleston*, 7 Exch. 152.

The defendant was the managing owner of the barque *Maia*, which, on the 11th of November 1857, he chartered to Mr. John Carmichael, of Liverpool, for a voyage to Central America and back. By the charter the vessel was to receive a full cargo of merchandise, and therewith proceed to a port or ports in Central America, and there deliver the same, and receive and take on board from the freighter, or his agents, a full cargo of sugar and other lawful produce, and proceed to, &c., and make a true and faithful delivery thereof agreeable to bills of lading. The said John Carmichael to pay as freight outwards at the rate of 55*s.* per ton of forty cubic feet, and for weight 40*s.* per ton of 20 cwt., and homewards at the rate of 50*s.* per ton of 20 cwt., for freight, 70*s.* per ton for sugar or coffee in bags, and any other produce shipped in full proportion thereto. The master might sign bills of lading as tendered without prejudice to the charter-party. And it was agreed that for the security and payment of all freight, dead freight, and other charges, the master or owner should have a lien on the said cargo or goods laden on board. The vessel sailed, and on her homeward voyage one Larraondo shipped the bags of sugar and cochineal sued for under separate bills of lading, making them deliverable to Mr. John Carmichael, "on payment of freight and carriage as agreed," and according to custom, they were to be taken as containing the word "assigns." The cochineal was £5,000, the sugar £2,667. These bills of lading were signed by the master of the *Maia*, in pursuance of the charter. The master was not aware of any agreement other than the charter-party. But there had been an agreement between Carmichael and Larraondo, dated the 23d of August 1857, of which the defendant was ignorant until the return of the ship. By this agreement Carmichael was to provide Larraondo with room in ships up to 1,200 tons each, he to pay £4 10*s.* a ton of 2,220 lb. of sugar in bags, or other cargoes in the same proportion. The cargo shipped was not sufficient to fill the ship, and dead freight for the same still remained unpaid. The bills of lading for the cochineal and sugar were sent by Larraondo's agent. Larraondo inclosed a letter to Carmichael, who handed the inclosure to Larraondo, not knowing what it contained. Larraondo retained the bills of lading, and afterwards, on payment of drafts for £5,000 and £2,667, handed them to the plaintiff, who was his agent. Carmichael became bankrupt in September 1858, and on the 27th of October the plaintiff requested the assignee in bankruptcy to indorse the bills of lading for the cochineal, which he did, on the plaintiff paying a bill for the £5,000 (not accepted by the bankrupt) for the benefit of the estate. And on the 29th of December the assignee indorsed the bills of lading for the sugar, on the plaintiff taking up a bill for £2,667. The *Maia* arrived at Liverpool on the 10th of January 1859. The defendant was to pay the expense of sending the cochineal to London. Next day the defendant claimed dead freight, and the assignees refused to adopt the charter. On the 18th of January the plaintiff sent to the defendant for his signature to delivery orders for the cochineal and sugar. The

defendant refused to sign, stating that he had called a meeting of the consignees of goods to decide the question about dead freight, and that he would communicate notice of the meeting to the plaintiff. The plaintiff's clerk had money, and told the defendant that he had it to pay the freight, but did not say how much. The plaintiff afterwards made out an account of what he considered due for the freight of the cochineal and sugar, — the sugar at £4 10s. per ton, the cochineal in proportion, total, deducting £2 1s. for a bag of sugar short, £650. To this account was attached a statement that by measurement the sugar was 48 cubic feet per ton and the cochineal 90 per cent (omitting fractions), and in this ratio deducting £5 per cent for stowage, about 5 feet per ton, the freight for the cochineal would be about £8 6s. per ton, at which rate it was accordingly calculated. The plaintiff sent his clerk to the defendant with the account, showing £652 to be due, and offered to pay that amount — which he had in his hand — but the defendant's cash-keeper said he could not take it. Nothing further took place, and this action was brought.

On the trial of the cause, the defendant set up his lien for the freight on the goods and also for dead freight, and objected to the calculation of the amount of freight on the goods, on the ground that there was and could be no right to deduct a sum of £2 1s. in respect of the value of sugar short landed, and that the deduction of £5 per cent in respect to the cochineal was improper, and that he was entitled to a larger freight thereon than the amount which the plaintiff had calculated, even according to the terms of the agreement between Larraondo and Carmichael.

The jury found that it was neither customary nor reasonable to deduct the said £5 per cent in respect of the freight on the cochineal.

The court were to have power to draw inferences of fact, and the questions were, first, whether the plaintiff was entitled to recover in the action; secondly, whether the defendant was entitled to a lien on the sugar and cochineal for the amount of his dead freight.

Brown (with him *Brett*), for the plaintiff (June 23). The term "freight as agreed" in the bills of lading meant freight proper, or live freight, not dead freight.

[The court intimated that they were of that opinion.]

Besides, the sum tendered was reckoned at £4 10s. per ton, and £3 10s. was all that was due for live freight, and the excess would more than cover the £2 1s. and the £5 per cent deducted for stowage of cochineal.

The court then called on —

Milward (with him *Atherton*). Dead freight is mentioned in the charter-party, and "freight as agreed" meant agreed by the charter-party. Then the defendant had Carmichael's right to declare £4 10s. per ton. The deductions made by the plaintiff in his accounts were both wrong, and the true sum due was never tendered, and there was no conversion by the defendant; he only refused a delivery order.

[BRAMWELL, B. On the main point, the meaning of the term "freight and carriage as agreed," we are all clearly of opinion that it means live freight, not dead freight. Indeed, dead freight is not, properly speaking, freight at all, and the bills of lading are silent about it.]

On the other points —

Brown, in reply. There was a virtual conversion of the goods; they could only be got at by a delivery order, which the defendant refused, and thereby deprived the plaintiff of the goods. There was a waiver of an actual tender. *Cur. adv. vult.*

BRAMWELL, B., now delivered the judgment of the court.¹ In this case the principal point was decided on the argument; and then there remained what may be called a bye point to decide, which was this: whether the plaintiff had established that there was a conversion of these goods. In order to do so he contended that the defendant had refused to deliver them up, and without sufficient reason, which he alleged to be a conversion. The defendant denied that there was any refusal; and he said, moreover, if there was a refusal, it was not an unwarrantable refusal. Now, we are clearly of opinion that there was a refusal. The case states that the defendant refused to deliver up the goods. It is true that he went on and said he had opened a credit about the dead freight; but, after all, it was a refusal, simple and clear; and although he gave that as a reason for refusing, it would not make it less a refusal. No doubt, if there had been suggested by the defendant's counsel anything like a request for an answer, it would not have been a refusal. But the case finds it was a plain, peremptory refusal. As to the case of *Clark v. Chamberlain*, 2 Mee. & W. 78, which was cited, we concur in the observations of Parke, B., cited from that case. But there is a great difference, because in that case the defendant was a public officer, and had a right to make inquiries as to what should be done with the goods. Here the defendant had no right to do what he said he would do. It stands, therefore, that there was a plain, simple, unqualified refusal. Then it was said it was a refusal which he, the defendant, was authorized to make. We are of opinion that it was not. There is no doubt he had a lien upon these goods for the true freight, and if he had thought fit to say, "I detain them on that score," he would have had a right to do so. But the case of *Scarfe v. Morgan* 4 Mee. & W. 270; s. c. 7 Law J. Rep. (N. S.) Exch. 324 lays down the law very clearly as to these matters; and it establishes that the plaintiff has a right to maintain this action. The marginal note of *Scarfe v. Morgan* is not quite accurate, because it does not mention that which is contained in the judgment of Baron Parke, that a man may so conduct himself as either to waive the lien, or to dispense with the tender of the amount of that lien. That is not mentioned in the marginal note. Now, the effect of Baron Parke's judgment is this: that if a man has

¹ Martin, B., Bramwell, B., Chanuall, B., and Watson, B.

two claims for goods, or claims a lien for two different causes on goods, as to one claim rightful and as to the other wrongful, and he does not in any way indicate that he dispenses with a tender, it seems really that in that case a simple refusal to deliver them up would not suffice. But the rest of that judgment is clear to show that if he goes on, and so conducts himself as to indicate that a tender of the one amount had been nugatory, he dispenses with the tender. The learned judge says so in so many words; and to the same effect is the case of *Evans v. Nichol*, 4 Sc. N. S. 43; s. c. 11 Law J. Rep. (N. S.) C. P. 6; *Hardingham v. Allen*, 4 Com. B. Rep. 793; 17 Law J. Rep. (N. S.) C. P. 198. Then, as to the matter of fact in this case, we can draw a conclusion; we are satisfied there is evidence of it; and we conclude that the defendant here, in effect, said, "I claim these goods in respect of the lien for two different items; you need not trouble yourself to tender one of them, because if you do so I shall not deliver them up: I shall keep them for the other." If that is so, it is a reasonable thing to show that he dispenses with what he owned would be a nugatory tender of the sum he was entitled to receive. We are of opinion, therefore, that there was a conversion of the goods of the plaintiff, and that he is entitled to maintain the action.

WATSON, B., added — I am entirely of the same opinion. The real question agitated between these parties is, whether there was a lien for dead freight under the circumstances. Now, in the original charter there was a lien for dead freight. But the master was to sign bills of lading for goods shipped on board the vessel, and the goods were shipped on board the vessel; and in the bill of lading there is no lien for a dead freight at all, but merely for freight (*i. e.* freight for carriage) as agreed. It is perfectly clear that does not apply to dead freight. The price is for the carriage of goods. It would be a monstrous supposition that a man who shipped £100 worth of goods on board a vessel should be held responsible for £1,500 of dead freight.

MULLINER v. FLORENCE.

COURT OF APPEAL. 1878.

[*Reported 3 Q. B. Div. 484.*]

ACTION for the detention and conversion of horses, carriages, and harness.

At the trial at the Warwickshire Summer Assizes, 1877, before *Pollock*, B., the following facts were given in evidence. The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his

departure from the inn he owed the defendant £109 for lodging, food, and entertainment. In November, 1876, a pair of horses, wagonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff who lived at Leamington. The horses, wagonette, and harness were not taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time when the latter quitted the inn, he was in debt to the defendant for the keep of these horses, and the defendant claimed on this account from him £22 10s. Bennett left the horses, wagonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses. The plaintiff demanded from the defendant possession of the horses, wagonette, and harness, and tendered to him a sum of £20 for the keep of the horses; but the defendant refused to give up the horses, wagonette, and harness. The defendant sold the horses by auction for £73, but he retained possession of the wagonette and harness. Bennett was afterwards convicted of fraud, and sentenced to penal servitude. The defendant claimed to keep the proceeds of the sale, and also to retain the wagonette and harness, on account of the sums of £109 and £22 10s.

Upon these facts the learned judge directed judgment to be entered for the defendant.

Sir James Stephen, Q. C., and J. S. Dugdale, for the plaintiff.

Mellor, Q. C., and Graham, for the defendant.

BRAMWELL, L. J. The first question for our decision is, what was the innkeeper's lien. Was it a lien on the horses for the charges in respect of the horses, and on the carriage in respect of the charges of the carriage, and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly for the whole amount of the defendant's claim as innkeeper. I am of opinion that the latter was the true view as to his lien, and for this reason, that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items. An innkeeper may demand the expenses before he receives the guest, but if he does not, and takes him in and finds him in all things that the guest requires, it is one contract, and the lien that he has is a lien in respect of the whole contract to pay for the things that are supplied to him while he is a guest. If this was not the case, a man might go to an hotel with his wife, and then it might be said that the innkeeper's lien was on the guest's luggage for what he had consumed, and on the wife's luggage for what she had had. The contract was, that the guest and his horses and carriage shall be received and provided for; there was one contract, one debt, and one lien in respect of the whole of the charges. The cases cited on behalf of the plaintiff are really against him. In order to justify the argument for him, it ought to be shown that if fifty

pieces of cloth are sent to a dyer under one contract, he would only have a lien on each piece for the work done in respect of it. It seems to me, therefore, in this case the lien is a general lien. So far our judgment is for the defendant.

On the second question, namely, whether the sale was wrongful, I think the learned judge was wrong. The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person. Several cases were cited, but none of them are inconsistent with the present. Those mainly relied on were *Donald v. Suckling*, Law Rep. 1 Q. B. 585, and *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130. In the latter case it was no doubt held that the sale by the pledgee of an article pledged to him was tortious, and that the action could be maintained. But looking at the substance of the thing, and at the decision of *Halliday v. Holgate*, Law Rep. 3 Ex. 299, in all these cases the courts held that although the pledgee in repledging the article had exceeded what he had a right to do, yet inasmuch as there remained in the pledgee an interest, not put an end to by the unauthorized pledge, he could transfer the pledge to another person. In *Johnson v. Stear* it certainly was held to be a tortious conversion. In the other two cases it was held not to be so. What in substance those cases decided was, that as the interest under the original pledge was not determined, the immediate right to the possession of the chattels was not re-vested in the pledgor so as to give him a right of action. Those cases, however, were cases between the pledgor and the pledgee, and have nothing whatever to do with the present case. The interests of the pledgee there could be assigned, but here the parting with the chattels subject to the lien destroyed it.

The third question argued was as to the amount of damages. The general rule is that where a person converts property to his own use by selling it and receives the price, he is liable for the value of the article, and he cannot set-off. Now what were the authorities cited to the contrary? *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. (Ex.) 180, is distinguishable on the ground that the case was decided on its special facts. The ground of the decision was that "as the vendor could not sue for goods bargained and sold, the result would be that he could not in any form of action recover the price; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for the full value without deducting

the price." I cast no doubt on that case; the ground on which it is based is different. The next case was *Brierley v. Kendall*, 17 Q. B. 937; 21 L. J. (Q. B.) 161. That was an action of trespass, and the plaintiff had mortgaged the goods wrongfully seized by the defendants as a security for money advanced by them to him. Another case was *Johnson v. Stear*. I only wish to add one word as to that case. The court there held that the action was maintainable, but I see that Blackburn, J., in his judgment in *Donald v. Suckling*, at p. 617, doubts whether that case was rightly decided, because he says, "This can be reconciled with the cases above cited, of which *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J. (Ex.) 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract or pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*." So that Blackburn, J., doubts whether the Court of Common Pleas were right in that case in giving the plaintiff even nominal damages. Whether that decision is right or not, the plaintiff clearly was not entitled to substantial damages. The reasoning in that case, however, is not applicable to the present. But there is a remark of Williams, J., in his judgment, at p. 134, which I think is applicable; it is this: "The true doctrine, as it seems to me, is that whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when resumed as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover which stands in the place of such resumption." Now in this case if the plaintiff, after the sale of the horses, had thought fit to go to the vendee and say to him, "Those horses are mine," and the vendee had refused to give them up, he could have maintained an action against the vendee for the full value of the horses; but instead of acting in this manner he has treated the sale by the defendant as a conversion. He is not to be worse off because he has brought his action against the defendant instead of against the vendee. It is said if the plaintiff succeeds that the defendant's lien would be useless to him, and that the plaintiff would be better off than he was before the sale of the horses by the defendant. I do not think there is anything unreasonable in holding the defendant liable if the defendant was not bound to feed the horses. In a case of a distress damage feasant before the recent statute (12 & 13 Vict. c. 92) the distrainer was not bound to feed the animals distrained.

It seems to me, therefore, that the learned judge was wrong. I think that we ought to reverse the judgment, and give the plaintiff judgment for £73, but as the defendant has a lien on the carriage and harness for the whole bill, and that amount was not tendered, the defendant is entitled to retain his judgment as to the wagonette and harness. Under these circumstances the judgment will be entered for the plaintiff for £73, and as to the rest of the case the judgment will stand for the defendant.

BRETT, L. J. This was an action against the defendant in respect of a wrongful sale of the plaintiff's horses, and in respect of a wrongful withholding from him of a carriage and harness. The defence set up is that the defendant held the horses and the carriage and harness under a lien, and that the plaintiff therefore could not maintain the action in respect of any of them. The lien claimed by the defendant was that of innkeeper.

The first question is, What is the extent of an innkeeper's lien, and to what goods did the lien attach? I am of opinion the lien attached both on the horses and the carriage and harness for the full amount of the innkeeper's bill. Where the innkeeper in the course of his ordinary business receives not only travellers but also their horses and carriages, he has an innkeeper's lien for his whole claim. He has one obligation, he is bound to receive the traveller and any horses or carriages he may bring with him; and as there is but one business, one obligation, and one contract, according to the custom of England it gives him one lien, and the lien cannot be split up and a separate lien claimed in respect of separate chattels. Therefore here the defendant has a lien for the whole bill incurred by Bennett, and that lien is on the carriage and horses and harness.

With regard to the horses, the defendant has sold the horses; it was an unjustifiable sale; he had no right to sell them, and as he had only a lien, the sale destroyed the lien. If he had parted with the possession in the horses, he would have lost the lien, and so in the case of a wrongful sale the lien is destroyed. With regard to the carriage and harness, the defendant has a lien on them for his whole account. The plaintiff was willing to pay some portion of the bill, but he never was willing to pay the whole amount. Then it was said, although the defendant improperly sold the horses, yet the plaintiff is not entitled to maintain the action, because the defendant had a lien on them, and the plaintiff has not tendered the amount of the lien. But this argument is not tenable, for by the sale the lien was destroyed, and there is no debt due from the plaintiff to the defendant. It does not seem to me to be necessary to decide whether the cases cited were rightly decided or not. *Donald v. Suckling*, Law Rep. 1 Q. B. 585, and *Halliday v. Holgate*, Law Rep. 3 Ex. 299, were cases not of lien, but where the property had been pledged with a power of sale; and the judgments in these cases were founded on the distinction which existed between the cases of pledge and lien, therefore those cases signify nothing, this not being a case of pledge. With regard to *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130, that also was the case of property pledged, and it is no authority in the present instance. At all events, I should say that those cases were only authorities if the action had been brought by Bennett, but none whatever as against the plaintiff who is seeking to recover his own property.

With regard to the damages, even if *Johnson v. Stear* be an authority against an action by Bennett, it is no authority as against the

plaintiff, who has an absolute right of property, and as there has been a wrongful sale he is entitled to recover full damages. However, *Johnson v. Stear* would require very great consideration before it was acted upon.

As to the plaintiff's claim to the carriage and harness, the defendant had a lien on the carriage and harness, and the plaintiff cannot recover as to them, but he is entitled to recover the sum of £73 in respect of the horses.

In the result, the plaintiff will have judgment for £73, which will carry the general costs of the cause, the defendant's costs to be deducted; and with respect to the appeal, as each party has substantially succeeded, no costs of the appeal will be allowed.

COTTON, L. J. The question is, what is the defendant's lien as innkeeper? Is it a lien as to the whole bill in respect of all the things brought by the guest to the inn, or is it a separate lien as regards the horses and also with respect to the harness and carriage. The innkeeper has a general lien for the whole amount of his bill. As to the horses, harness, and carriage, there would be a lien for any special expenditure, and there is no reason for exempting the horses, harness, and carriage from the general lien an innkeeper has in the guest's goods by the general law. The innkeeper is bound to receive the horses, harness, and carriage with the guest as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest, and there is no reason for excluding the claim of the innkeeper although the horses, harness, and carriage are not received in the dwelling-house, but in adjoining buildings. There is no authority for saying that the innkeeper's lien does not extend to the horses, harness, and carriage the guest brings with him as much as to the other things of the guest.

With regard to the harness and carriage, although the plaintiff tendered the amount due in respect of the horses, the defendant had a lien on the harness and carriage, and as to them the defendant is entitled to our judgment.

As to the horses, it was not contended that the sale was right, but the question was argued that as the plaintiff could not have taken them out of the hands of the defendant without satisfying his lien, he could not recover substantial damages. I do not accede to this argument. The defendant as an innkeeper has only a right to keep the horses until his bill is paid; he has parted with his possession and put an end to his right. The plaintiff therefore has an absolute title to the horses, and is entitled to such damages as amount to the real value. Although the defendant received the horses at the inn, and the innkeeper's lien attached, yet the lien is lost by the act of the defendant, and the innkeeper cannot claim anything as against the plaintiff as there is no debt owing from one to the other. *Johnson v. Stear* was decided on the principle that the person who sold the goods had some interest in them, and that case is different from the present, where the person has only

a right of detainer. Erle, C. J., says, "The deposit of the goods in question with the defendant to secure payment of a loan by him to the depositor on a given day, with a power to the defendant to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien." What, therefore, Erle, C. J., says is, assuming that the sale was wrongful, the defendant had an interest in the goods, and the owner can therefore only recover the real damage that he has actually sustained.

The judgment, therefore, will be entered for the plaintiff in £73, and for the defendant so far as relates to the harness and carriage.

Judgment accordingly.

HANNA v. PHELPS.

SUPREME COURT OF JUDICATURE OF INDIANA. 1855.

[Reported 7 Ind. 21.]

APPEAL from the Wabash Circuit Court.

DAVISON, J. *Assumpsit.* The complaint is that Phelps, the plaintiff below, on the first day of December, 1849, delivered to Hanna and Burr, who were then engaged in the business of rendering lard from hogs' heads by steam, and barreling the lard so rendered for hire at the town of Wabash, three thousand hogs' heads, which they agreed to render into lard, and barrel the same for the plaintiff, within a reasonable time, &c., for which service he agreed to pay them a reasonable compensation, &c. It is averred that the defendants have failed to perform the agreement on their part, &c.

Pleas: 1. The general issue; 2. Performance; 3. That the plaintiff was indebted to the defendants \$200 for rendering lard and barreling the same, &c., which sum exceeds in amount their indebtedness to him, &c.

Issues being made on these pleas, the cause was tried by the court, who found for the plaintiff. New trial refused, and judgment.

The court, upon the defendants' motion, gave a written statement of the facts on which its finding was based, and of the conclusions of law arising on the facts. That statement is as follows:—

1. The plaintiff delivered to the defendants, as bailees, two thousand one hundred hogs' heads, out of which lard was to be rendered by them for him, which heads each produced four pounds of lard, making eight thousand four hundred pounds.

2. The defendants delivered to the plaintiff, at Jackson's warehouse, in the town of Wabash, in twenty-three barrels, 5,162 pounds of lard, leaving unaccounted for and undelivered 3,238 pounds. The lard was worth 5 cents per pound, making for the last-named quantity in money \$161.90. As a compensation for rendering said lard the defendants were entitled to \$84, leaving a balance due the plaintiff of \$77.90.

3. The plaintiff, after the delivery of the twenty-three barrels, and before the commencement of this suit, notified the defendants to deliver to him all the lard made from said heads; but they declined to deliver any more lard. He did not at any time before the suit either pay or tender to them any sum for their services, nor was any demand made by them for such services. When the twenty-three barrels were delivered, the lard was subject to their claim for rendering the same, amounting to \$51.63, which amount was never paid to them. The delivery at Jackson's warehouse was with his consent.

These were all the facts proved in the cause; and upon them the court, as a conclusion of law, decided that no payment or tender for services in rendering the lard was necessary before suit.

Was this decision correct? Generally speaking, if a chattel delivered to a party receive from his labor and skill an increased value, he has a specific lien upon it for his remuneration, provided there is nothing in the contract inconsistent with the existence of the lien. And such lien exists equally whether there be an agreement to pay a stipulated price for "the labor and skill," or an implied contract to pay a reasonable price. The present is one of the cases in which liens usually exist in favor of the party who has bestowed services on property delivered to him for the purpose. And unless the record discloses facts or circumstances sufficient to produce the inference that the defendants waived their lien before the institution of this suit, they were not compelled to give up the property when the plaintiff demanded it without the payment or tender of a reasonable compensation for rendering and barreling the lard. If the defendants, at the time of the demand, had refused, on the ground of their lien, to part with the property, the law of this case would be clearly in their favor; but here the plaintiff's demand was answered by an absolute refusal to deliver any more lard. We are therefore to inquire whether that refusal waived the lien.

Upon this subject the authorities are not uniform. In England the rule seems to be that a person having a lien upon goods does not waive it by the mere fact of his omitting to state that he claims them in that right when they are demanded. But if a different ground of retention than that of the lien be assumed, the lien ceases to exist. *White v. Gainer*, 9 Moore, 41; 2 Bing. 23; 1 Carr. & P. 324; 1 Camp. 410. It is, however, contended that the refusal of the defendants, to have shielded them, should have been qualified by their claim of a lien. There is authority in support of that position. *Dow v. Morewood*, 10 Barb. 183, was replevin for twenty-one cans of oil. In that case it was held "that the defendant having upon demand made, refused to deliver the oil to the plaintiff without setting up any lien thereon, waived his right to set up a lien afterwards for freight, &c.; that he could not be allowed to deny the plaintiff's title before suit brought, and afterwards defeat a recovery by setting up a lien."

We are inclined to adopt this rule of decision. An unqualified refusal, upon a demand duly made, is evidence of a conversion; because

it involves a denial of any title whatever in the person who makes the demand. In the case before us the defendants "declined to deliver any more lard." This was, in effect, an assumption that they had in their possession no more belonging to the plaintiff. At least he had a right to infer from their answer to his demand that they would deliver to him no more lard unless compelled to do so by action at law. And having thus assumed a position relative to the property inconsistent with his title, he had, further, the right to infer that a tender to the defendants for their services would be unavailing. We are of opinion that the facts proved are sufficient to sustain the judgment.

There is a point made as to the jurisdiction of the court. This case was tried by the Hon. Thomas S. Stanfield, judge of another circuit, at a special term held in June, 1853; and it is contended that all the steps required by law to authorize such special term have not been taken. 2 R. S., p. 5, s. 3. We have heretofore decided that the above special term was held in conformity with the statute just cited. *Murphy v. Barlow*, 5 Ind. R. 230.

The judgment must be affirmed.

PER CURIAM. The judgment is affirmed, with five per cent damages and costs.

H. P. Biddle, for the appellants.

D. D. Pratt and *D. M. Cox*, for the appellee.

MEXAL *v.* DEARBORN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[*Reported 12 Gray, 336.*]

ACTION of tort for taking a quantity of calf skins. The declaration in one count alleged title in the plaintiff; and in another a lien for work done upon them by the plaintiff as a currier. Answer, that the goods belonged to William Jameson, and were taken possession of under a warrant issued in proceedings in insolvency against Jameson, directed to the defendant as messenger.

At the trial in the superior court of Suffolk at September term 1857, the plaintiff offered evidence that the calf skins were left with him by Jameson to be curried; and that when the work was partially done, Jameson sold them to him in payment of a debt due him, a part of which was for the work done on these skins, and gave a bill of sale thereof to the plaintiff, in whose possession they then were.

It appeared that proceedings in insolvency were duly commenced against Jameson soon after this sale; and a warrant issued to the defendant as messenger, on which he took the skins. The defendant offered evidence that the sale to the plaintiff was fraudulent and void as against Jameson's creditors.

The plaintiff claimed to recover the whole value of the skins, on the ground that the sale was not fraudulent; and also to recover on the second count, the amount of work performed on the skins, on the ground that he had a subsisting lien on them therefor.

Abbott, J. ruled, "that if the plaintiff bought the skins of Jameson, taking a bill of sale of them, together with the possession, and this purchase was good as between the parties, then if the jury were satisfied that the sale was fraudulent as against the creditors of Jameson, and that when the defendant took them the plaintiff claimed under said bill of sale to him, and not on the ground of having a lien on them, and had so continued in his claim till the commencement of this action, never demanding the amount of his lien of the defendant, or notifying him that he claimed any, but persisting in his claim under the sale to him, the plaintiff would not be entitled to recover on the second count the amount of his lien." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

P. J. Butler, for the plaintiff.

P. Willard, for the defendant.

MERRICK, J. By purchasing the calf skins, which had been put into his possession to be curried, and by taking a bill of sale thereof, and afterwards, to the time of the commencement of this action, claiming them solely under that title, without having given notice of any other to the defendant when he took them away in discharge of his duty as messenger under the proceedings in insolvency against the vendor, the plaintiff lost or waived the lien which he had previously acquired. A good and sufficient consideration was paid for the transfer of the property, and as between the parties to the contract the sale was absolute and complete. The ownership thus obtained was entirely inconsistent with the existence of the previous lien. A lien is an incumbrance upon property, a claim upon it which may be maintained against the general owner. But there is no foundation upon which he who owns the whole can create a special right in his own favor to a part. The inferior or partial title to a chattel necessarily merges in that which is absolute and unconditional, when both are united and held by the same individual. This is a general consequence. But in the present instance, it is obvious that the parties extinguished, and intended to extinguish, the lien which had been previously created upon the calf skins; for the value of the work and labor which had previously been bestowed upon them by the vendor was by their express agreement made part of the consideration of the sale. After such a transaction the rights of the parties were wholly changed. The vendor could no longer assert any claim to the property, and the workman had none against his employer. His debt had been paid, the property had become his own, and a lien upon it in his own favor thereby rendered both needless and impossible.

But the result is the same if the facts upon which the ruling excepted to in the superior court was made are considered in another aspect. The law will not allow a party to insist upon and enforce in his own

behalf a secret lien upon personal property after he has claimed it unconditionally as his own, and has thereby induced another to act in relation to it, in some manner affecting his own interest, as he would, or might, not have done if he had been openly and fairly notified of the additional ground of claim. It would be fraudulent in him to practise such concealment to the injury of others; and to prevent the possibility of attempts so unjust becoming successful, the law implies that an intended concealment of that kind is of itself a waiver of the lien. The authorities cited by the counsel for the defendant, not less than its intrinsic reasonableness, fully warrant the ruling to which the plaintiff objected.

Exceptions overruled.

D. *Pledge.*

JOHNSON *v.* STEAR.

COMMON PLEAS. 1863.

[*Reported 15 C. B. N. S. 330.*]

THIS was an action brought by the plaintiff as assignee of one Mathew Cumming, a bankrupt, for the alleged wrongful conversion by the defendant of 243 cases of brandy and a pipe of wine.

The defendant pleaded not guilty and not possessed, whereupon issue was joined.

The cause was tried before *Erle, C. J.*, at the sittings in London after last Easter Term. The facts as proved or admitted were as follows: On the 26th of January, 1862, the bankrupt, Cumming, applied to the defendant for an advance of £62 10s. upon the security of certain brandies then lying in the London Docks. The defendant consented to make the advance, and Cumming gave him his acceptance at one month for the amount, at the same time handing him the dock-warrant for the brandies and the following memorandum:—

“I have this day deposited with you the undermentioned 243 cases of brandy, to be held by you as a security for the payment of my acceptance for £62 10s. discounted by you, which will become due January 29, 1863; and, in case the same be not paid at maturity, I authorize you at any time, and without further consent by or notice to me, to sell the goods above mentioned, either by public or private sale, at such price as you think fit, and to apply the proceeds, after all charges, to the payment of the bill; and, if there should be any deficiency, I engage to pay it. (Signed) M. CUMMING.”

Then followed an enumeration of the marks and numbers on the cases.

On the 3d of January, Cumming obtained from the defendant a further advance of £25 upon the security of a warrant for a pipe of port

wine, with an I. O. U. and a post-dated check (7th January), but no distinct authority, as in the case of the brandies, to sell on default of payment on a given day.

Cumming absconded on the 5th of January, and was declared a bankrupt on the 17th; and the plaintiff was afterwards appointed assignee.

On the 28th of January, the defendant contracted to sell the brandies to Messrs. Ruck & Co. On the 29th (the day on which Cumming's acceptance became due) the dock-warrant was delivered to them, and on the 30th they took actual possession of the brandies. The check given by Cumming for the second advance being also dishonored, the defendant sold the wine for £40. The demand and refusal were on the 27th of February.

On the part of the defendant it was submitted that there was no conversion, and that the transactions were protected, the adjudication being now the dividing line; and that, at all events, the plaintiff was only entitled to nominal damages for the premature sale of the brandies, — it being assumed that the bankrupt had no intention to avail himself of his right of redemption.

Under the direction of the learned judge, the jury returned a verdict for the plaintiff, assessing the value of the wine at £40, and that of the brandies at £62 10s.; and leave was reserved to the defendant to move to enter a verdict for him if the court should be of opinion that the plaintiff was not entitled to recover.

Powell, in Trinity Term, moved for a rule accordingly.

Denman, Q. C., and *Howard*, now showed cause.

ERLE, C. J., now delivered the judgment of the majority of the court.¹

In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that, on the 28th of January, Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts, the questions are, — first, was there a conversion? and, if yes, — secondly, what is the measure of damages?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and, although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan; for which purpose the dock-warrant would have

¹ Consisting of himself, Byles, J., and Keating, J.

been an important instrument. We decide for the plaintiff on this ground : and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises.

The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrong-doer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien : and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.

It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful ; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more : and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion ; but, in substance, it is the same cause of action ; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid.

There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnor in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Viall*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff ; and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages ; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet the defendant as an unpaid vendor had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion.

In *Story on Bailments*, § 315, it is said : “ If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted : and it seems that, by the common law, the pawnee in such action for the value has a right to

have the amount of his debt recouped in damages." For this he cites *Jarvis v. Rogers*, 15 Mass. R. 389. The principle is also exemplified in *Brierly v. Kendall*, 17 Q. B. 937. There, although the form of the security was a mortgage, and not a pledge; and although the action was trespass and not trover; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40s.

WILLIAMS, J. I agree with the rest of the court that there was sufficient proof of a conversion; for, although the mere sale of the goods (according to *The Lancashire Waggon Company v. Fitzhugh*, 6 Hurlst. & N. 502) would have been insufficient, yet I think the handing over of the dock-warrant to the vendees before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol, according to the doctrine applied to cases of donations *mortis causa*; it is the means of coming at the possession of a thing which will not admit of *corporal delivery*. *Ward v. Turner*, 2 Ves. sen. 431; *Smith v. Smith*, 2 Stra. 295.

But I cannot agree with my Lord and my learned Brothers as to the other point; for, I think the damages ought to stand for the full value of the brandies. The general rule is indisputable, that the measure of damages in trover is the value of the property at the time of the conversion. To this rule there are admitted exceptions. There is the well-known case of a redelivery of the goods before action brought, which, though it cannot cure the conversion, yet will go in mitigation of damages. Another exception is to be found in cases where the plaintiff has only a partial interest in the thing converted. Thus, if one of several joint-tenants or tenants in common alone brings an action against a stranger, he can recover only the value of his share. So, if

the plaintiff, though solely entitled to the possession of the thing converted, is entitled to an interest limited in duration, he can only recover damages proportionate to such limited interest, in an action against the person entitled to the residue of the property (though he may recover the full value in an action against a stranger). The case of *Brierly v. Kendall*, which my Lord has cited is an example of this exception. There, the goods had been assigned by the plaintiff to the defendant by a deed the terms of which operated as a re-demise, and, since the defendant's quasi estate in remainder was not destroyed or forfeited by his conversion of the quasi particular estate, the plaintiff, as owner of that estate, was only entitled to recover damages in proportion to the value of it.

With respect, however, to liens, the rule, I apprehend, is well established, that, if a man having a lien on goods abuses it by wrongfully parting with them, the lien is annihilated, and the owner's right to possession revives, and he may recover their value in damages in an action of trover. With reference to this doctrine, it may be useful to refer to Story on Bailments. In § 325, that writer says: "The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and that, if he does pledge them, he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatever for the debts due by him to the factor." After stating that the English legislature had at length interfered, the learned author continues, in § 326, — "In America, the general doctrine that a factor cannot pledge the goods of his principal, has been repeatedly recognized. But it does not appear as yet to have been carried to the extent of declaring the pledge altogether a tortious proceeding, so that the title is not good in the pledgee even to the extent of the lien of the factor, or so that the principal may maintain an action against the pledgee without discharging the lien, or at least giving the pledgee *a right to recover the amount of the lien in the damages.*" But, in the 6th edition, by Mr. Bennett, it is added, — "Later decisions have, however, fully settled the law, that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover the whole value of the pledgee, *without any deduction or recoupment for his claim against the factor.*" And I may mention that I have reason to believe this rule as to liens was acted upon a few days ago in the Court of Queen's Bench. *Siebel v. Springfield*, 9 Law T. N. S. 325.

But it is said that the maintenance of such a rule in respect of pledges is inconsistent with *Chinery v. Viall*, mentioned by my Lord. It seems to me, however, that the decision of that case does not interfere

with the general rule as to damages in trover, but only establishes a further exception in the peculiar and somewhat anomalous case of an unpaid vendor, whose right in all cases has been deemed to exceed a lien: see Blackbarn on Contracts, p. 320. I cannot, however, think that this exception can be properly extended to the case of a pledgee. An unpaid vendor has rights independent of and antecedent to his lien for the purchase-money. But the property of a pledgee is a mere creature of the transaction of bailment; and, if the bailment is terminated, must surely perish with it. Accordingly, it is said in Story on Bailments, § 327, — “It has been intimated that there is, or may be, a distinction favorable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances and other dues. He has a special property in them, and may maintain an action for any violation of this possession, either by the principal or by a stranger. And he is generally treated, in judicial discussions, as in the condition of a pledgee.” Again, in § 299, “As possession is necessary to complete the title by pledge, so, by the common law, the positive loss or the delivery back of the possession of the thing with the consent of the pledgee, *terminates his title.*” And, further, in the same section, — “If the pledgee voluntarily, by his own act, places the pledge beyond his own power, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge.” See *Whitaker v. Sumner*, 20 Pick. R. 399.

It should seem, then, that the bailment in the present case was terminated by the sale before the stipulated time; and, consequently, that the title of the plaintiff to the goods became as free as if the bailment had never taken place. If he had brought an action against an innocent vendee, the passage I have already cited from Story, § 325, demonstrates that he might have recovered the absolute value of the goods as damages. Why should he be in a worse condition in respect of an action against the pledgee who has violated the contract of pledge?

The true doctrine, as it seems to me is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption.

In the present case, I think it plain that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world. And I therefore think he ought to recover the full value of them in this action.

Nor can I see any injustice in the defendant's being thus remitted to his unsecured debt, because his lien has been forfeited by his own violation of the conditions on which it was created.

Rule absolute to reduce the damages to 40s.

DONALD v. SUCKLING.

QUEEN'S BENCH. 1866.

[Reported L. R. 1 Q. B. 585.]

DECLARATION. That the defendant detained from the plaintiff his securities for money, — that is to say, four debentures of the British Slate Company, Limited, for £200 each, — and the plaintiff claimed a return of the securities or their value, and £1,000 for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and endorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonored; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

Harington, for the plaintiff.

Gray, Q. C. (*Gadsden* with him), for the defendant.

July 7. The following judgments were delivered: —

SHEE, J. [After stating the pleadings.] This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff, — that is, to sell on the plaintiff's account and for his and Simpson's benefit, — and a repawn of them by Simpson as a security for a loan to him by the defendant.

It must be taken against the defendant that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson, along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him; viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and re-vested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (On Bailments, pp. 118, 36) to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;" and by Lord Holt (*Coggs v. Bernard*, 2 Ld. Raym. 913), to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair (Institutions of the Law of Scotland, b. i. tit. 13, s. 11), "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispense in the case of not-payment;" and by Bell (Principles of the Law of Scotland, ss. 1362, 1363; 4th ed. p. 512), "a real right or *jus in re*, inferior to property, which vests in the holder a power over the subject to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see *Pigot v. Cuddey*, 15 C. B. N. S. 701; 33 L. J. 134), the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton (Co. Litt. 89 a), to have a

“property;” and in *Southcoté’s Case*, 4 Rep. 83 b, to have a “property in, and not a custody only,” of the chattel pawned; by which Lord Holt (2 Ld. Raym. 916, 917) understands Lord Coke to mean a “special property,” consisting in this, “that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him;” or, in the words of Fleming, C. J. in *Ratcliff v. Davis*, Cro. Jac. 245: “a special property in the goods to detain them for his (the pawnee’s) security;” that is, not a property properly so called, but the *jus in re*, that is, *in re aliena*, of the Roman lawyers; the opposite, as Mr. Austin says (Lectures on Jurisprudence: Tables and Notes, iii. 192), to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says (On Bailments, s. 324), that “the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee.” So much of this passage as is stated to be clear law; viz. that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (*i. e.*, it may be presumed, on the same conditions as those on which he holds it) by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us, inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale *or otherwise*, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position that a pawnee who, as in this case, has placed the chattel pawned out of the pawnor’s power, and out of his own power, to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor’s debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr Justice Story, indeed, says (On Bailments, s. 299), “that if the pledgee voluntarily and by his

own act places the pledge beyond his power to restore it, — as by agreeing that it may be attached at the suit of a third person, — that will amount to a waiver of the pledge.” It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale, — sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or in detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us, nor indeed was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable, or barely distinguishable, in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, “generally treated in juridical discussions as in the condition of a pledgee.” (On Bailments, ss. 325, 327; citing *Daubigny v. Duval*, 5 T. R. 604; *M'Combie v. Davies*, 7 East, 5.)

The case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, is a clear authority for holding that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on *toties quoties*, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, and the case of *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180, and *Brierly v. Kendall*, 17 Q. B. 937; 21 L. J. Q. B. 161, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of Queen's Bench, in the second and the third, are based on the principle that, in an action to recover damages for a conversion, it is

not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages ; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form *ex contractu* ; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury, of the damages to be paid by him for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor.

That this was the *ratio decidendi* in these cases seems to me clear from the facts of *Chinery v. Viall*, and *Brierly v. Kendall*, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In *Chinery v. Viall*, the plaintiff, who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted.

In *Brierly v. Kendall*, an action of trespass, there was a loan of the defendant to the plaintiff secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass ; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale ; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In *Johnson v. Stear*, the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which, under his contract with the owner of them, he might have sold and delivered them ; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief

Justice, speaking for himself and two of his learned brothers, did indeed say, that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract" (15 C. B. N. S. 334, 335; 33 L. J. C. P. 131); but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien" other than "a special property," as defined by the authorities before referred to by me; viz., a real right or *jus in re*, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more by the words "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn which, as in the case of *Johnson v. Stear*, the pawnor "had no intention to redeem," — the proceeds of the sale being devoted before action brought to discharge of the debt for which the pawn had been given as a security, — and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing out of his power, and out of the pawnor's power, to redeem the pawn should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burthen of making other provision to meet his bill. By this act of Simpson the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount

of the current salable value of the debentures. I am at a loss to see how the conduct of Simpson in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security (*Ryall v. Rolle*, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 136; *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, per Williams, J.); or the operation of the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*.

For these reasons, as it seems to me, the case of *Johnson v. Stear* ought not to govern our decision. It could not be followed by us as an authority in favor of the defendant without inattention to its true principle; viz., that between the parties to a contract the measure of damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*; and that in such a case, general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation: the interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing cannot be delivered to him (Tidd's Forms, 8th ed. 339), and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error (*Peters v. Heyward*, Cro. Jac. 682); the integral undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the court in *Johnson v. Stear*, is entitled only to recover the amount, in money, of the damage which he proves himself to have sustained; in an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detainee can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the *ratio decidendi* in *Johnson v. Stear* to the case before us.

It raises a strong presumption against the defence set up in this plea that nothing bearing the slightest resemblance to the right of possession which it claims for the assignee of a pawnee, is to be found in the copious title of the Digest (Dig. lib. xx. tit. 1), “De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum,” or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title, “De pigneratitia actione, vel contra” (Dig. lib. xiii. tit. 7), or in the works of any English, French, or Scotch jurist.

The *dictum* of the majority of the court in the case of *Mores v. Conham*, Owen, 123, 124, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case; nor, as it seems to me, a point essential to its decision; the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detainee at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference drawn from this very obscure and superficially reasoned case in favor of the defendant's plea is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of “hypothèque” and “gage” last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security (Domat, Lois Civiles, liv. iii. tit. 1, s. 1); and with the doctrine of Erskine, a jurist of nearly equal eminence, that “in a pledge of moveables the creditor who quits the possession of the subject loses the *real right* he had upon it.” Institute of the Laws of Scotland, b. iii. tit. 1, s. 33.

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might (as Mr. Justice Williams said in the case of *Johnson v. Stear*, 15 C. B. N. S. 341; 33 L. J. C. P. 134) lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment; and may—the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill—recover them, or their full value, if they cannot be delivered to him, in this action of detainee.

MELLOR, J. [After stating the declaration and plea.] To this plea

the plaintiff demurred, and upon demurrer I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures deposited with him as a security for the due payment of money at a certain time does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems *prima facie* to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this court must give effect to them. There is a well recognized distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story (On Bailments, tit. Pawns or Pledges, s. 311) that "the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing 'the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, so that the violation of it makes void the contract?

In the case of *Legg v. Evans*, 6 M. & W. 36, 41, an action of trover having been brought against the defendants, as sheriff of Middlesex, to

recover the value of some pictures and picture-frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams that the plaintiff should draw and endorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and *the right* which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a *personal right* which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description which is a personal interest in the goods;" and farther on he said: "Here the interest cannot be transferred to any other individual, it continues only as long as the holder keeps possession of the subject-matter of the lien either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and endorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money and a right to hold by way of lien to secure the same object. In *Pothonier v. Dawson*, Holt, N. P. 385, cited in argument in *Legg v. Evans*, 6 M. & W. 40, Gibbs, C. J., said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are *deposited by way of security* to indemnify a party against a loan of money, it is more than a pledge.¹ The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal reten-

¹ *Quære*, whether "pledge" should not be read "lien."

tion in case of a lien and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. 42, the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." Story on Bailments, s. 311. In each case the *general property remains in the pawnor*; but the question is as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his Treatise on Bailments, s. 324, thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In *M'Combie v. Davies*, 7 East, 5 (see pp. 6 and 7), it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principal's, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal and could not be transferred by the tortious act of the broker pledging the goods of his principal;" the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would, therefore, seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The

case of *M'Combie v. Davies* shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still, the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were entrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the Court in *Smart v. Sandars*, 3 C. B. 400, 401; and see s. c., after amendment of pleadings, 5 C. B. 917.

There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194, 5th ed. A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to re-vest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In *Johnson v. Stear*, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62 10s., discounted by the defendant, and which would become due January 29, 1863, and in case such acceptance was not paid at maturity the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock-warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of *trover*, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling; and although that alone might not be a conversion, yet, by delivering over the dock-warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan;" but the majority of the Court (Erle, C. J., Byles and Keating, JJ.) held that the plaintiff was only entitled to nominal damages, on the express ground "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created 'an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.'" See 15 C. B. N. S. 334, 335; 33 L. J. C. P. 131. From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." See 15 C. B. N. S. 340; 33 L. J. C. P. 134. Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point; and although it may be open to doubt whether in an action of *trover* the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am, nevertheless, of opinion that the substantial ground upon which the majority of the court proceeded, viz., that the "act of the pawnee did not annihilate the contract nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit by way of pledge of goods for securing the payment of money, and all cases of *lien* correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person

for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, *who, upon tender of the sum secured, immediately becomes entitled to the possession of the goods*, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a "vadium or pawn" in *Coggs v. Bernard*, 2 Ld. Raym. 916, 917; although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J. [After stating the pleadings.] The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonor of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonored, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay, the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither

having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based on his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honored which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this ground. In *Daubigny v. Duval*, 5 T. R. 606, Buller, J., puts the case on the ground that "a lien is a personal right and cannot be transferred to another." In *M. Combie v. Davies*, 7 East, 6, Lord Ellenborough puts the decision of the court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." Story, in his *Treatise on Bailments*, ss. 325-327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that both in principle and on authority a contract such as that stated in the plea — pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing) — does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though

there was no actual delivery of possession ; but the right of hypothec is not recognized by the common law. Till possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself. *Howes v. Ball*, 7 B. & C. 481. I mention this because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, s. 328 : " It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them ; and in either case the transferee was entitled to hold the pawn until the original owner discharged the debt for which it was pledged. But beyond this the (second) pledge was inoperative and conveyed no title, according to the known maxim, *nemo plus juris ad alium transferre potest quam ipse habet.*"

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the court in *Mores v. Conham*, Owen, 123, 124, where the court say that the pawnee is responsible " if he misuseth the pawn ; also he hath such interest in the pawn as he may *assign over*, and the *assignee* shall be subject to detinue if he detains it *upon payment of the money* by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision ; but it shows that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt, in his celebrated judgment in *Coggs v. Bernard*, 2 Ld. Raym. 916, that a pawnee " has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right of detention. And Story, in his Treatise on Bailments, s. 327, says : " But whatever doubt may be indulged as to the case of a factor, it has been decided " — that is, in America — " that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the

owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it that he had renounced the contract, which, as was said in *Fenn v. Bittleston*, 7 Ex. 160; 21 L. J. Ex. 43, operates as a disclaimer of a tenancy at common law; or, as it is put by Williams, J., in *Johnson v. Stear*, 15 C. B. N. S. 330, 341; 33 L. J. C. P. 130, 134, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to show a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding. *Lee v. Atkinson*, Yelv. 172. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to show a renunciation of the contract with the owner of the horse. Now, I think that the sub-pledging of goods held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore, stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general, all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though

there has been a sub-pledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with, or repugnant to, the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to *Mores v. Conham*, Owen, 123, in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloxam v. Sanders*, 4 B. & C. 941, and *Milgate v. Keble*, 3 M. & G. 100, are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in *Milgate v. Keble*, Id. 103, Tindal, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this court, is that of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority that at all events there remains in the pawnee an interest not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving as his reason "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." 15 C. B. N. S. 341; 33 L. J. C. P. 134. And if this was correct, the present plaintiff is entitled to judgment. But the majority of the court decided that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." 15 C. B. N. S. 334, 335; 33 L. J. C. P. 131. This can be reconciled with the cases above cited, of which *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J. Ex. 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of

pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130. It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shows that after consideration they *meant* to decide that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of —

COCKBURN, C. J. The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell or otherwise dispose of the debentures in the event of nonpayment of the bill, — in other words, as a pledge, — and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may be well inferred from the nature of the thing pledged — as in the case of a valuable work of art — that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of

the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, — for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of *Johnson v. Stear*. There, goods which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the court held — on an action of trover being brought to recover the goods — that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership by the conversion of the goods by the pawnee. But, however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill of exchange until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favor of the defendant.

Judgment for the defendant.

Keighley and *Gething*, for the plaintiff.

Edmonds and *Mayhew*, for the defendant.

HALLIDAY v. HOLGATE.

EXCHEQUER. 1868.

[Reported L. R. 3 Ex. 299.]

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a verdict for the plaintiff in an action of trover brought by the creditors' assignee of one Bentley against the defendant to recover the value of certain shares, the defendant pleading, amongst other pleas, not possessed.

On the 30th of April, 1866, Bentley bought of one Scholefield fifteen shares in the Whitewell Mining Company, limited, which, by the articles of association of the company, were not transferable till the 2d of January, 1867, and Scholefield at the same time, by a memorandum in writing, agreed to execute a transfer of the shares to Bentley as soon as he legally could. Bentley at the same time bought ten other shares in the same company, and took a similar memorandum.

In June, 1866, Bentley borrowed of the defendant £350 on his own promissory note payable on demand, and on the security of the twenty-five shares above mentioned, and he at the same time handed to the defendant the two agreements, promising to deliver to him the scrip as soon as he received it. On the 16th of January, 1867, Bentley handed to the defendant the fifteen scrip certificates for the first fifteen shares, and received back the agreement relating to the ten shares, on paying £100 on account of the debt.

On the same day Bentley's firm stopped payment; they were afterwards adjudicated bankrupts, and the plaintiff was appointed creditors' assignee, Bentley absconding before passing his final examination. The defendant, after the bankruptcy, sold the scrip of ten of the fifteen shares, but it did not appear that he had made any demand on, or given notice to, either Bentley or the plaintiff, the assignee. The value of the scrip for the ten shares was admitted to be £200.

The cause was tried before *Mellor, J.*, at the Liverpool Spring Assizes, 1867, and the learned judge nonsuited the plaintiff, reserving leave to him to move to enter a verdict for him for £200, or such other sum as the court should think fit. A rule was obtained accordingly, and was, after argument in the court below, in Hilary Term last, discharged on the authority of *Donald v. Suckling*, Law Rep. 1 Q. B. 585. The plaintiff appealed.

Jordan, for the appellants.

Quain, Q. C. (*Herschell* with him), was not called upon.

The judgment of the court (WILLES, BLACKBURN, KEATING, MONTAGUE SMITH, and LUSH, JJ.) was delivered by

WILLES, J. We are all of opinion that this judgment must be

affirmed. The action is brought by an assignee in bankruptcy to recover the value of certain scrip certificates of the bankrupt, alleged to have been converted by the defendant. The defendant was under advances to the bankrupt, in respect of which the bankrupt pledged to the defendant the certificates in question. The bankrupt became in default, and absconded, and the defendant thereupon sold a part of the certificates sufficient to repay the whole or part of the amount due to him. The assignee seeks to recover either the whole value or nominal damages in respect of the wrong done by the sale. As to the claim for the whole value, it is certainly a strong contention. The scrip certificates were in the hands of the defendant as a security for money due, and the assignee has sustained no actual damage, for the debt could have been paid no otherwise, yet the assignee seeks to recover the whole value as if at the time the certificates were his own. It does not require much argument to show that there is no principle for such a rule, and we should not be disposed to act upon it unless we are compelled by some authority to do so. But the authorities invite us to do the reverse, for *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130 shows that if any action lies at all in such a case, the verdict can only be for nominal damages, and that an allowance must be made for the amount of the debt which has been thus satisfied, that being the amount which the pledgor or his assignee would have had to pay before he could have required the article to be delivered up. We are quite satisfied to abide by that decision.

But it has been argued that the plaintiff is at any rate entitled to nominal damages, for that a conversion was committed by the sale of the certificates. That sale, it is contended, had the effect of putting an end to the bailment of pledge; the property of the pledgee was thereby determined, so as to enable the assignee to say that at the moment when the sale took place he became entitled to the certificates by virtue of the general property which then reverted in him. This reasoning proceeds upon a somewhat subtle and narrow ground, for it is admitted that the assignee could only claim nominal damages. But we cannot arrive at the conclusion that he is so entitled without getting rid of the case of *Donald v. Suckling*, Law Rep. 1 Q. B. 585; and so far from feeling disposed to overrule that case, we are satisfied of its good sense, and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage — viz., a pledge — where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so

far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to re-vest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

E. *Actions of Bailor against Bailee.*

LIT. § 71. . . . If I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

ANONYMOUS.

COMMON PLEAS. 1587.

[*Reported Moore, 248, pl. 392.*]

A DRAPER having a servant to sell cloths in his shop, the servant took cloths and converted them to his own use, and it was adjudged that trespass *vi et armis* lay, because he was only a servant, and had the possession of the cloths as servant, and so preserved the possession of his master. And therefore if a shepherd or a butler stole sheep or plate, that was felony at the common law. 3 Hen. VII., and 21 Hen. VII. But if one delivers a chattel to his servant to deliver over, and he steals it, that is no felony, because he has a special property, on which he can maintain trespass for a taking out of his possession. And ANDERSON [C. J.], said that in all cases where the servant has neither special nor general property, trespass lies, otherwise of a bailee. And accordingly they adjudged also at this term, that if a lessee at will cuts trees, trespass *vi et armis* lies, because the trees are not delivered to him.

BLOSS v. HOLMAN.¹

COMMON PLEAS. 1587.

[Reported Owen, 52.]

JOHN BLOSS brought an action of trespass, *quare vi et armis*, for taking of his goods, against Holman, and the defendant pleaded not guilty, and the jury gave a special verdict, namely, that the plaintiff at the time of the trespass was of the Mystery of the Mercers, and that at that time the defendant was his servant, and put in trust to sell his goods and merchandises in *shopa sua*, *ibidem de tempore in tempus*, and that he took the goods of the plaintiff named in the declaration, and carried them away, and prayed the advice of the court, if the defendant were culpable or not; and upon the *postea* returned, *Shuttleworth* prayed judgment for the plaintiff. And the doubt was because the declaration was *quare vi et armis*, because it appeared that the defendant had custody of the goods; but *Shuttleworth* doubted whether he had custody, and cited the case of Littleton, namely, if I give my sheep to compasture, &c. and he kills them, an action of trespass lies; and the justices held that in this case the action did well lie; and PERIAM said that the defendant had only an authority, and not custody or possession; and judgment was given for the plaintiff. 3 H. 7, 12; 21 H. 7, 14. And WINDHAM said, that if he had embezzled his master's goods, without question it was felony. *Quod fuit concessum* (ANDERSON absent), and the law will not presume that the goods were out of the possession of the plaintiff; and the next day came the LORD ANDERSON and rehearsed the case, and said, that the defendant had neither general nor special property in the goods, for it is plain he could have no general property, and special he had not, for he could not have an action of trespass if they were taken away, then if he had no property, a trespass lies against him, if he take them; so if a shepherd steal sheep, it is felony, for he hath no property in them; wherefore he gave judgment accordingly.¹

¹ s. c. *sub nom. Glosse & Hayman's Case*, 1 Leon. 87.

“Thus far nothing has been said with regard to the custody of servants. It is a well-known doctrine of the criminal law, that a servant who criminally converts property of his master intrusted to him and in his custody as servant is guilty of theft, because he is deemed to have taken the property from his master's possession. This is equivalent to saying that a servant, having the custody of his master's property as servant, has not possession of that property, and it is so stated in the Year Books.

“The anomalous distinction according to which, if the servant receives the thing from another person for his master, the servant has the possession, and so cannot commit theft, is made more rational by the old cases. For the distinction taken in them is, that while the servant is in the house or with his master, the latter retains possession; but if he delivers his horse to his servant to ride to market, or gives him a hag to carry to London, then the thing is out of the master's possession and in the servant's. In this more intelligible form, the rule would not now prevail. But one half of it, that a guest

CAMPBELL v. STAKES.

NEW YORK COURT FOR THE CORRECTION OF ERRORS. 1828.

[Reported 2 Wend. 137.]

ERROR from the Supreme Court. Sarah Stakes, in July, 1821, commenced an action of trespass in the Common Pleas of New York, against Samuel Campbell and Thomas Campbell, and declared against them, for that on the fourth of July, 1820, they drove a certain mare belonging to the plaintiff with such violence, and whipped and cruelly treated her in such manner, that she died. Samuel Campbell alone was taken on the process issued against the defendants. He appeared by guardian, and pleaded 1. *Non cul.*; 2. That at the time when, &c., the mare was in the possession of the defendants by virtue of a contract of bailment, whereby the plaintiff had let the mare and a tilbury to the

at a tavern has not possession of the plate with which he is served, is no doubt still law, for guests in general are likened to servants in their legal position.

"There are few English decisions, outside the criminal law, on the question whether a servant has possession. But the Year Books do not suggest any difference between civil and criminal cases, and there is an almost unbroken tradition of courts and approved writers that he has not, in any case. A master has maintained trespass against a servant for converting cloth which he was employed to sell, and the American cases go the full length of the old doctrine. It has often been remarked that a servant must be distinguished from a bailee.

"But it may be asked how the denial of possession to servants can be made to agree with the test proposed, and it will be said with truth that the servant has as much the intent to exclude the world at large as a borrower. The law of servants is unquestionably at variance with that test; and there can be no doubt that those who have built their theories upon the Roman law have been led by this fact, coupled with the Roman doctrine as to bailees in general, to seek the formula of reconciliation where they have. But, in truth, the exception with regard to servants stands on purely historical grounds. A servant is denied possession, not from any peculiarity of intent with regard to the things in his custody, either towards his master or other people, by which he is distinguished from a depositary, but simply as one of the incidents of his status. It is familiar that the status of a servant maintains many marks of the time when he was a slave. The liability of the master for his torts is one instance. The present is another. A slave's possession was his owner's possession on the practical ground of the owner's power over him, and from the fact that the slave had no standing before the law. The notion that his personality was merged in that of his family head survived the era of emancipation." Holmes, Com. Law, 226-228.

"It is important to note exactly the difference between a mere servant and a bailee. If A. gives goods to B., *e. g.* a carrier, A. retains the right to possess the goods, but he passes the possession itself to B. If, on the other hand, B. is not a carrier, but a mere servant, A., though he may give the custody or detention of the goods to B., does not pass to him the possession of them. Hence B., the bailee, has, as against third parties, a right to possession, and can bring trover; but B. the servant having no possession, has no right to possession, and cannot bring trover. It is conceived, that if B. should be in any way acting, not only as a servant, but also as a bailee, he might bring an action for the conversion of the goods." Dicey, Parties, 358, note (c).

defendants for hire, averring that at the time of the making of the contract, and also at the time of the supposed trespasses, the defendants were respectively infants within the age of twenty-one years. The plaintiff demurred to the second plea, the defendant joined, and the Common Pleas gave judgment for the defendant. The plaintiff removed the record into the Supreme Court by writ of error, and in August, 1825, the judgment of the Common Pleas was reversed, and judgment for costs taxed at \$95.42, given in favor of the plaintiff in error in that court, and a *venire de novo* awarded. At the ensuing term, Campbell applied for and obtained leave to amend his plea. 5 Cowen, 21, when he plead 1. *Non cul.*; 2. That the mare, at the time when, &c., was in the possession of the defendants by virtue of a contract of bailment for hire; and that the supposed beating, fatiguing by over-driving, &c., occurred and took place through the unskilfulness, want of knowledge, discretion, and judgment of the defendants; and that, on the termination of the contract of bailment, the defendants returned and re-delivered to the plaintiff the mare in full life; and averred that at the time of the bailment, and of the committing of the supposed trespasses, the defendants were respectively infants, &c., concluding with a verification and prayer of judgment. The plaintiff replied *precludi non*, because the said S. Campbell, of his own wrong, and without the cause by him in his plea alleged, and with force and arms, &c., did commit the said several trespasses, &c. *in modo et forma*, &c.; and further, that at the time when, &c., the defendant was of full age, concluding to the country with *similiter*. In November, 1826, the cause was tried at the New York Circuit, and the jury found the defendant guilty of the premises laid to his charge in manner and form, &c. and assessed the damages of the plaintiff at \$200, but took no notice of the issue on the plea of infancy. On this verdict, a judgment was entered in the Supreme Court.

In June, 1827, John Campbell, the administrator of Samuel Campbell, who was deceased, brought a writ of error, removing the record from the Supreme Court into this court. Besides the general assignment of error that the declaration is insufficient, &c. the plaintiff specially assigned for error the reversal of the judgment of the Common Pleas, alleging that the same ought to have been affirmed. The defendant pleaded in *nullo est erratum*.

J. Platt, for the plaintiff in error.

J. Anthon, for the defendant in error.

THE CHANCELLOR. The first point made by the plaintiff is, that the action should have been case, and not trespass. If the object of this point is to support the first error assigned, to wit, that the declaration is insufficient, it certainly cannot be sustained.

The declaration is in the ordinary form of a declaration in trespass, and I can see no objection to it, either in form or substance. But I presume this point was intended to apply to the case made by the special plea of the defendant in the court below. I am satisfied an

action on the case cannot be maintained against an infant under such circumstances. If the infant was liable at all, trespass was the proper form of action. An action on the case necessarily supposes the defendant to have a right to the possession of the property under the contract of hiring, at the time the injury is committed. Independent of the contract of hiring, the defendant would have no right to the possession, and trespass would be the proper remedy. If the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defence to such an action; for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy. The cases of *Jennings v. Randall*, 8 Term Rep. 335, and *Green v. Greenbank*, 2 Marsh. Rep. 485, were cases of that description.

The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either, would not subject him or an adult to an action of trespass, the contract remaining in full force. But if the infant does any wilful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him. The case of *Vasse v. Smith*, in the Supreme Court of the United States (6 Cranch's Rep. 226), was decided upon this principle. The special plea in the Court of Common Pleas was defective in not averring the fact, which was afterwards inserted in the amended plea, that the injury complained of, occurred in the act of driving the mare, through the unskilfulness and want of knowledge, discretion and judgment of the defendant. With that averment, I think the plea of infancy, with the contract of hiring, would have been a complete answer to the action. But without such averment, I think the court were bound to presume it was a wilful injury, which would amount to an election by the infant to disaffirm the contract. I therefore am of opinion that the judgment of the Supreme Court on the pleadings as they stood was correct.

I am also of opinion that the defendant in the court below, by electing to amend his pleadings, waived his right to bring a writ of error on the judgment of the Supreme Court, founded on the original pleadings. If the cause had been originally commenced in the Supreme Court, the former pleadings would not have been found in the record. As the *venire de novo* was awarded in the Supreme Court, and these proceedings formed a part of the record of the Court of Common Pleas, which was brought into the Supreme Court by writ of error, it was perhaps necessary that the original pleadings should remain upon the record. But the election of the defendant to waive them by amending his plea,

also forms a part of the record ; and he cannot now take advantage of any error in the judgment of the Supreme Court, founded on the original pleadings.¹

F. *Actions of Bailor against Third Person.*

WILBY v. BOWER.

Nisi Prius. 1649.

[*Reported Clayton, 135, pl. 243.*]

THE plaintiff did deliver his horse to be kept at grass, and the defendant took him away from the pasture, &c., and the plaintiff brought trespass, and the judge overruled it that the action would not lie in this case, because the horse was in the possession of another, which was against my opinion being of counsel with the plaintiff, because the action is transitory, and he is in the owner's possession everywhere, and if I give my horse in London to I. S., I, being then at York, he may have trespass without other possession. F. N. B. 140 ; Perkins, 30 ; 21 E. 4, 25 ; 21 H. 7, 39 ; 21 H. 6, 43.

¹ The rest of the opinion is omitted.

Of *Campbell v. Stakes*, GIBSON, C. J. in *Wilt v. Welsh*, 6 Watts, 9, 12, says : " I know nothing, nor did I ever before hear, of a constructive election to disaffirm in order to strip an infant of his privilege, and, by turning him from a contractor into a trespasser, to put him in a worse condition than if the contract had been indefeasible. Such a construction is not in keeping with the benign principles of the common law, which, in other cases, holds him only to such acts as are beneficial to him, and declares such as are positively detrimental to him to be positively void. Even were that otherwise, yet to give to an injury done to the thing bailed the character of an independent trespass, would require the bailment to have been first terminated ; for the very foundation of the argument is, that the contract was out of the way at the time ; but by the most attenuated construction, its cessation and the inception of the wrong, could be but simultaneous. On what principle, then, can it be a trespass ? The distinction taken in the *Six Carpenters' Case*, 8 Co. 146, betwixt an authority given by the law, whose abuse makes the offender a trespasser from the beginning, and a license by the party, whose abuse does not, has never been questioned. The killing of a beast distrained by the grantee of a rent charge makes not the distress a trespass, because it is given by the grant and not by the law. 1 Inst. 141. The reason is that a party is entitled to the best protection the law can give against the abuse of an authority delegated not by himself but by the law, which, to that end, makes void everything improperly done under it ; while a party who gives an authority to an unsafe person has only himself to blame for it. 6 Wils. Bac. 561. Now taking for granted that the act annihilated the contract, it cannot be denied that there was a precedent license, for an excessive use of which the infant is sought to be charged as for a trespass ; with what pretence of reason, when an adult could not be so charged, it is unnecessary to say. The theory on which a breach of contract has been thus turned into a trespass, is as incomprehensible to me as the theory on which a common recovery bars an entail ; and why we should employ any juggle whatever to tear from an infant the defences with which the law has covered his weakness, is equally incomprehensible."

WARD *v.* MACAULEY.

KING'S BENCH. 1791.

[*Reported 4 T. R. 489.*]

THE plaintiff was the landlord of a house, which he let to Lord Montfort ready furnished; and the lease contained a schedule of the furniture. An execution was issued against Lord Montfort, under which the defendants, sheriff of Middlesex, seized part of the furniture, notwithstanding the officer had notice that it was the property of the plaintiff. For this the plaintiff brought an action of trespass against the defendants. At the trial *Lord Kenyon* thought that trespass would not lie, and that the plaintiff should have brought trover. A verdict, however, was taken for the plaintiff for value of the goods, with liberty to the defendants to move to enter up a nonsuit if this court should be of opinion that the plaintiff could not recover in this form of action.

Mingay obtained a rule for that purpose on a former day; against which

Erskine now showed cause.

LORD KENYON, Ch. J. The distinction between the actions of trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods taken. In the case put of a carrier, there is a mixed possession: actual possession in the carrier, and an implied possession in the owner.

BULLER, J. The carrier is considered in law as the servant of the owner, and the possession of the servant is the possession of the master.

PER CURIAM,

Rule absolute.

GORDON *v.* HARPER.

KING'S BENCH. 1796.

[*Reported 7 T. R. 9.*]

IN trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this court on the following case: On October 1st, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not ex-

pired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the County of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of J. Broomhead and others, executors of J. Broomhead deceased, against one Borrett, to whom the goods in question had belonged; but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borrett to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

Burrough, for the plaintiff.

Best, contra.

LORD KENYON, Ch. J. The only point for the consideration of the court in the case of *Ward v. Macauley* was, whether in a case like the present the landlord could maintain an action of trespass against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extrajudicial opinion, to which, upon further consideration, I cannot subscribe. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can, notwithstanding, recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term; the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply; the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act, nor can it thereby be re-vested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do; but it is clear that he cannot maintain trover.

ASHURST, J. I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing, and a right of possession, and that unless both these rights

concur the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but supposing the things leased had been manufacturing engines, there is no reason why a creditor, seizing them under an execution, should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is, whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him; for he declares that being possessed, &c. he lost the goods; he is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tort-feasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant. Then by what authority can he recover them from any other person during the term? It is laid down in some of the books (Vid. 1 Bac. Abr. 45, and 5 Bac. Abr. 257, 2 Com. Dig. tit. *Detinue*, letter D.) that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent; but certainly it may be said to be a good general criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And if not, it is a strong argument to show that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward v. Macauley*. But the only question there was, whether trespass would lie under these circumstances; and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

LAWRENCE, J. The observation which my brother Grose has made upon the form of the action of trover is very material; the plaintiff therein states that he was possessed of the goods mentioned, and being so possessed he casually lost them, and that they came to the hands and possession of the defendant by finding. And the princi-

pal difficulty in most of the cases reported upon this head has been, whether the plaintiff had such a possession whereon he could declare in this action; as in *Latch*, 214, where the plaintiff, as executor, declared upon the possession of his testator, and the court held that to be sufficient, because the property was vested in the executor; and no other person having a right to the possession, the property drew after it the possession in law. In *Berry v. Heard*, Palm. 327. and Cro. Car. 242, it was for a long time in great doubt, whether the landlord had such a possession of timber cut down pending a lease on which he could maintain trover; but it was finally determined that he had, because the interest of the lessee in it remained no longer than while it was growing on the premises, and determined instantly when it was cut down. Now here if the taking of the goods by the sheriff determined the interest of the tenant in them, and revested it in the landlord, I admit that the latter might maintain trover for them upon the authority of the other case; but it is clearly otherwise; for here the tenant's property and interest did not determine by the sheriff's trespass, and the tenant might maintain trespass against the wrong-doer, and recover damages. He is bound to restore the goods to the landlord at the end of his term, and could not justify his not doing so because a stranger had committed a trespass upon him in taking them away. *Postea to the defendant.*

LOTAN v. CROSS.

NISI PRIUS. 1810.

[Reported 2 Camp. 464.]

TRESPASS for running against the plaintiff's chaise.

It appeared that the plaintiff, a stable-keeper, was owner of the chaise; but that when the injury was done, it was in the possession of one Brown, a friend of his, whom he had permitted to use it.

The objection being taken that trespass could not be maintained by the plaintiff under these circumstances,

LORD ELLENBOROUGH said: The property is proved to be in the plaintiff, and *prima facie* the thing is to be considered in his legal possession, whoever may be the actual occupier. Show a letting for a certain time to Brown, and the possession would be in him; but a mere gratuitous permission to a third person to use a chattel does not, in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used. Vide *Smith v. Milles*, 1 T. R. 480; *Ward v. Macauley*, 4 T. R. 489; *Gordon v. Harper*, 7 T. R. 9.

The witnesses stated that the defendant seemed to have no intention of running his carriage against the plaintiff's chaise; and that the

accident appeared to arise entirely from the negligent manner in which the defendant was driving.

Park thereupon objected that the action should have been case and not trespass.

LORD ELLENBOROUGH. The injury to the plaintiff being immediate from the act done by the defendant, it was settled in *Leame v. Bray*, 3 East, 393, that trespass is the proper remedy, and that the defendant's intentions were immaterial. *Verdict for the plaintiff.*

Park, in the ensuing term moved for a new trial on the ground that the action was misconceived; and stated that *Leame v. Bray* had been overruled by the court of C. P. in *Huggett v. Montgomery*, 2 N. Rep. 446.

CURIA. If we are desired to review the case of *Leame v. Bray*, the matter should be brought before us in a different shape than a motion for a new trial. We do not entertain so slight an opinion of our own judgment as to allow it to be thus canvassed. We will wait for some case where the question is raised upon the record, and may be carried farther. *Rule refused.*

SMITH v. SHERIFF OF MIDDLESEX.

KING'S BENCH. 1812.

[Reported 15 East, 607.]

THIS was an action of trespass and conversion against the sheriff, for taking and carrying away certain goods of the plaintiff, being different articles of household furniture. At the trial before *Lord Ellenborough*, C. J., at Westminster, it appeared that the plaintiff, a tradesman, had supplied the goods in question to one Mary Anne East, who, according to the entry in the plaintiff's books, was to pay him for the hire of them at the rate of £20 per cent per annum upon the value; but according to the evidence of Mrs. East herself, the goods had been recently put into her house by the plaintiff, for the hire of which she was to pay him; but at the time of the taking and conversion complained of, no contract had been made between them either for any precise time or for any certain sum. Mrs. East was a married woman living at that time apart from her husband under a deed of separation; which was known to the plaintiff when he furnished her with the goods; and the sheriff entered and levied upon these goods by virtue of a writ of execution at the suit of a creditor of the husband. Before the sale by the sheriff, notice was given to him by the plaintiff, that the goods taken in execution were his property; and he claimed to have them restored to him. The plaintiff recovered a verdict for the value, with leave to the defendant to move to set it aside and enter a nonsuit, if the action were not

maintainable : and in moving for the rule the case of *Gordon v. Harper*, 7 Term Rep. 9, was cited and relied upon, to show that the action did not lie, inasmuch as the plaintiff had not the right of possession as well as the property of the goods in him at the time of the taking and supposed conversion, by reason that the right of possession was then in Mrs. East under the general contract of hiring.

Park, and *Marryat*, showed cause against the rule.

Garrow, and *Reader*, contra.

LORD ELLENBOROUGH, C. J. This case has been presented during parts of the argument in different points of view from what it appeared in at the trial. In order to maintain trover the plaintiff must have a present right of property in the goods ; the first question therefore is whether the plaintiff had put the right of property out of him by a valid contract for the hire of the goods with Mrs. East? If the contract were for a year, it would put the property out of him for that time ; or if, according to Mrs. East's evidence, the hiring were only general, without determining either price or time, it would operate as a contract for a reasonable price, so long as both parties pleased ; and still the property would be out of him for the time if it were a valid contract. That brings it to the question whether Mrs. East, being a married woman, could make a valid contract for the hire of the plaintiff's goods. Now a contract to be valid must bind both parties ; but she being married, it could not bind her. It is said, however, that it would bind her husband, being for necessaries for her use ; but I know of no case where a husband has been held liable upon a contract of this sort made by his wife living apart from him, as for necessaries ; and no such case was made before the jury. Then has he confirmed the contract? There is no such evidence. The case therefore stands upon her own contract unconfirmed, which is liable to the infirmity of her being a married woman. It was argued on the other hand, that supposing the contract was good, the notice given by the plaintiff to the sheriff's officer would have determined it : but to that I cannot accede ; for to determine a contract, which is determinable upon notice, the notice should be brought home to the other contracting party ; and it is not enough that it should be given to one acting adversely under some supposed derivative title in the law from that party. The notice therefore which was given to the sheriff's officer would not alter the case. The conclusion is that this action lies, because the plaintiff had the present right of property in him at the time, inasmuch as the married woman to whom he sent the goods was not capable of contracting with him for the hire, so as to take the property out of him.

GROSE J. I am of the same opinion. It is argued that the plaintiff had not a vested property in the goods in him at the time ; but it is not shown who had any property in them adverse to him. The property was clearly once in him, and nothing is shown to divest it out of him.

LE BLANC J. This is a mere question of law. The plaintiff cannot recover unless he can show a present right of property. But it is clear

that originally the property was in him; and if he had parted with it, somebody else must have it. It is contended that either Mrs. East or her husband took it. But she being a married woman could make no contract: and as to her husband, it is said that he was bound for necessities for her; but these are not found to be necessities. Then as to his adoption of the contract, it does not appear that he was even cognizant of it, and therefore had not adopted it. If then the property had not passed to another, it must have remained in the plaintiff. This distinguishes the present from the former case, where the property had passed from the original owner to another, and was out of the plaintiff who brought the action.

*Rule discharged.*¹

¹ “The bailor also obtained a right of action against the wrong-doer at a pretty early date. It is laid down by counsel in 48 Edward III., in an action of trespass by an agister of cattle, that, ‘in this case, he who has the property may have a writ of trespass, and he who has the custody another writ of trespass. Persay: Sir, it is true. But he who recovers first shall oust the other of the action, and so it shall be in many cases, as if tenant by *elegit* is ousted, each shall have the assize, and, if the one recover first, the writ of the other is abated, and so here.’

“It would seem from other books that this was spoken of bailments generally, and was not limited to those which are terminable at the pleasure of the bailor. Thus in 22 Edward IV., counsel say, ‘If I bail to you my goods, and another takes them out of your possession, I shall have good action of trespass *quare vi et armis*.’ And this seems to have been Rolle’s understanding in the passage usually relied on by modern courts.

“It was to be expected that some action should be given to the bailor as soon as the law had got machinery which could be worked without help from the fresh pursuit and armed hands of the possessor and his friends. To allow the bailor to sue, and to give him trespass, were pretty nearly the same thing before the action on the case was heard of. Many early writs will be found which show that trespass had not always the clear outline which it developed later. The point which seems to be insisted on in the Year Books is, as Brooke sums it up in the margin of his Abridgment, that two shall have an *action* for a single act, — not that both shall have trespass rather than case. It should be added that the Year Books quoted do not go beyond the case of a wrongful taking out of the custody of the bailee, the old case of the folk-laws. Even thus limited, the right to maintain trespass is now denied where the bailee has the exclusive right to the goods by lease or lien; although the doctrine has been repeated with reference to bailments terminable at the pleasure of the bailor. But the modified rule does not concern the present discussion, any more than the earlier form, because it still leaves open the possessory remedies to all bailees without exception. This appears from the relation of the modified rule to the ancient law; from the fact that Baron Parke, in the just cited case of *Manders v. Williams*, hints that he would have been prepared to apply the old rule to its full extent but for *Gordon v. Harper*, and still more obviously from the fact, that the bailee’s right to trespass and trover is asserted in the same breath with that of the bailor, as well as proved by express decisions to be cited.

“It is true that in *Lotan v. Cross*, Lord Ellenborough ruled at Nisi Prius that a lender could maintain trespass for damage done to a chattel in the hands of a borrower, and that the case is often cited as authority without remark. Indeed, it is sometimes laid down generally, in reputable text-books, that a gratuitous bailment does not change the possession, but leaves it in the bailor; that a gratuitous bailee is *quasi* a servant of the bailor, and the possession of one is the possession of the other; and that it is for this reason that, although the bailee may sue on his possession, the bailor has the same actions. A part of this confusion has already been explained, and the rest will be

G. *Actions of Bailee against Third Person.*

ANONYMOUS.

KING'S BENCH. 1374.

[*Reported Year Book, 48 Edw. III. 20 pl. 8.*]

A MAN brought a writ of trespass in the King's Bench for certain oxen and cows taken with force and arms in a certain vill.

Hasty. Where you bring this writ of trespass for your beasts, *ut supra*, we say that the said beasts, at the time of the taking, belonged to Walter Wich', of W., and that Walter W., whose the beasts were, sued a replevin in the County; and thereupon the delivery was made, and then [the suit] was removed into the Common Bench, and we say against you, that we took the said beasts for rent arrear, issuing from the same place as to which he complains (and he showed for what term), and we demand judgment if you can take such beasts as belong to others than yourselves.

Ham. To this we say that Walter W. bailed to us the said beasts to agit on our land, so they were in our keeping, and an action for them given to us. Wherefore we demand judgment whether our writ is not good.

Hasty. And since you have confessed property of the beasts in Walter W., and also that the said beasts were in your custody, you may have an action of trespass by another writ, making mention of the fact that they were in your custody, and not by a general writ wherefore, &c.

CAVENDISH, [C. J.] There is no other writ in the Chancery in the case. *Sed vide*, that for executors the writ will be *in custodia sua*

when I come to speak of servants, between whom and all bailees there is a broad and well-known distinction. But on whatever ground *Lotan v. Cross* may stand, if on any, it cannot for a moment be admitted that borrowers in general have not trespass and trover. A gratuitous deposit for the sole benefit of the depositor is a much stronger case for the denial of these remedies to the depositary; yet we have a decision by the full court, in which Lord Ellenborough also took part, that a depositary has case, the reasoning implying that *a fortiori* a borrower would have trespass. And this has always been the law. It has been seen that a similar doctrine necessarily resulted from the nature of the early German procedure; and the cases cited in the note show that, in this as in other respects, the English followed the traditions of their race.

"The meaning of the rule that all bailees have the possessory remedies is, that in the theory of the common law every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and as even a wrongful possessor may have full damages or a return of the specific thing from a stranger to the title. On the other hand, so far as the possessory actions are still allowed to bailors, it is not on the ground that they also have possession, but is probably by a survival, which has been explained, and which in the modern form of the rule is an anomaly. The reason usually given is, that a right of immediate possession is sufficient, — a reason which excludes the notion that the bailor is actually possessed." Holmes, *Com. Law*, 171-175.

existentia. And I say in this case, he who has the property can have a writ of trespass, and he who has the custody, another writ of trespass.

Percy. Sir, it is true, but he who shall recover first will oust the other of his action; and so it will be in several cases, as if tenant by *elegit* is ousted, both shall have an assize, and if one recovers first, the writ of the other is abated, *sic hic.* And afterwards the issue was taken whether they were agisted on the plaintiff's land or not. *Et sic ad patriam.*

ANONYMOUS.

COMMON PLEAS. 1409.

[*Reported Year Book, 11 Hen. IV. 17, pl. 39.*]

A MAN sued a general replevin for his cattle wrongfully taken.

Trem.' said that the cattle were another's, and not the plaintiff's, and he made an avowry for a return.

Skrene. He whom you allege to have the property in the cattle lent the cattle to us to manure and improve our land, by force whereof they were in our custody, and we demand judgment, and we pray damages.

Trem.' And we demand judgment, because you knew the property was in another, as we have alleged, and we pray for a return.

COLEPEPER [J]. He supports his action well enough on the special matter which he has shown, why do you demur?

Trem.' He ought to have alleged in his writ *de averiis in custodia sua existentibus.*

Skrene. It is at our election to do either the one or the other.

THIRNING [C. J.] Plead no more about this matter, for against you he has property, &c.¹

¹ "HANKFORD [J.] If a stranger who has no right takes beasts in my custody, I shall have a writ of trespass against him, and shall recover the value of the beasts, because I am charged with the beasts against him who has bailed them to me, and who has the property; but here the case is wholly otherwise, *quod HILL et COLEPEPER [JJ.] concesserunt.* Et nota that COLEPEPER [J.] said in this case that a man shall have a writ *de averiis in custodia sua existentibus.* Sed vide that those of Chancery will not grant such a writ *in custodia sua.*" Year Book, 11 Hen. IV. 24, pl. 46 (1409).

"On the evidence, I admit it is questionable whether the plaintiff had a sufficient right of property. But the error, if any, lay with the jury. They were instructed that a mere servant, who, as such, has only the charge or custody of goods, has not a special property in them, but that the property remains in the master, and the action for their recovery must be brought in his name; and that unless the goods in question had been delivered by Weir to the plaintiff as a bailee, and under a particular responsibility, this action could not be sustained. This was a direction as favorable to the defendant as the law would warrant. The judge left the application of the rule to the jury, whose business it was to apply it to the facts." Per GIBSON, J., in *Harris v. Smith*, 3 S. & R. 20, 23.

See *Tuthill v. Wheeler*, 6 Barb. 362.

ROOTH *v.* WILSON.

KING'S BENCH. 1817.

[Reported 1 *B. & Ald.* 59.]

CASE against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse of plaintiff, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close and was killed. Plea, not guilty. At the trial before *Richards*, Baron, at the last Spring Assizes for the county of Nottingham, it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it, after dark, into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from the one to the other. The liability to repair was admitted. Defence, that the plaintiff had not such a property in the horse as to entitle him to maintain this action. The learned Judge, however, suffered the cause to proceed, and the jury found a verdict for the plaintiff. In Easter Term last a rule was obtained by *Reader* for setting aside this verdict and having a new trial, against which cause was now shown by

Copley, Serjt.

Reader, contra.

LORD ELLENBOROUGH, C. J. The plaintiff certainly was a gratuitous bailee, but as such he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable: such liability is sufficient to enable the plaintiff to maintain this action; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest.

BAYLEY, J. I am entirely of the same opinion: the plaintiff by receiving the horse becomes accountable. Case is a possessory action; the declaration merely states that it was the horse of the plaintiff; if this had been an indictment, might it not have been described as the horse of the plaintiff, as in the common case of goods stolen from a washerwoman?

ABBOTT, J. I think that the same possession which would enable the plaintiff to maintain trespass, would enable him to maintain this action.

HOLROYD, J. The plaintiff was entitled to the benefit of his field not

only for the use of his own cattle, but also for putting in the cattle of others; and by the negligence of the defendant in rendering the field unsafe, he is deprived in some degree of the means of exercising his right of using that field for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain this action. *Rule discharged.*

BURTON v. HUGHES.

COMMON PLEAS. 1824.

[*Reported 2 Bing. 173.*]

TROVER for certain articles of furniture seized by the defendants under a commission of bankrupt against Robert Cross. At the trial before *Bayley, J.*, York Lent Assizes, 1824, Kitchen, a dealer in furniture, proved that he was owner of the furniture in question, which he had lent to the plaintiff under the terms of a written agreement, and that the plaintiff had placed it in a house occupied by the bankrupt's wife.

The agreement between Kitchen and the plaintiff was called for, but could not be produced for want of a stamp.

On the part of the defendants it was then contended that the plaintiff must be nonsuited; that at the time of the taking he had neither the property nor the possession of these goods, but only an alleged interest under an agreement; of which interest as the agreement could not be produced, there was no evidence whatever; that in order to support trover, the plaintiff must prove property, special interest, or actual possession, even though that possession should be tortious as against a third person. A verdict having been found for the plaintiff,

Cross, Serjt., in the last term, upon the grounds urged at the trial, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Bosanquet, Serjt., now showed cause.

Cross, for the defendant.

BEST, C. J. If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is, whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to [*Sutton v. Buck*, 2 Taunt. 302] confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover. In that case a party, whose title was not completed by registry or any regular conveyance, sued in trover to recover a ship of which he had been possessed; registry was absolutely necessary to give him a title, and yet it was holden he might recover against a wrong-

doer. Mansfield, C. J. says, "Suppose a man gives me a ship, without a regular compliance with the register act, and I fit it out at £500 expence, see what a doctrine it is that another man may take it from me and I have no remedy. The only doubt on the case, I think, arises from the register act, lest, if we should decide that any property passed by the transfer, it should militate against that act, and I have never been able entirely to free my mind from that doubt; but at present I think that on the circumstances, the plaintiff might maintain trover." Lawrence, J. says, "There is enough property in this plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged that the contract is void, with respect to the rights of third persons, as well as between the parties, yet, as far as regards the possession, it is good as against all, except the vendor himself." It is impossible to distinguish that case from the present; but it has been contended here that the defendants were not wrong-doers; — certainly not, in taking the effects of the bankrupts, but they are wrong-doers in taking the effects of a third person; they had no right to take goods belonging to the plaintiff which were clearly distinguishable from any the bankrupt ever had.

PARK, J. If this had been a question between Kitchen and the bankrupt, it might have borne a totally different complexion; but whether Mrs. Cross was to live in the house, or Burton, was altogether immaterial as against the defendants, and the case which has been referred to is much stronger than the present. There it was holden that possession of a ship under a transfer, void for non-compliance with the register act, is a sufficient title in trover against a stranger for parts of the ship being wrecked. Admitting that the defendants were not wrong-doers, at all events they were strangers, and possession is sufficient to enable a party to maintain trover against a stranger. What Chambre, J. says, is very material. "The plaintiff has possession under the rightful owner, and that is sufficient against a person having no color." (Here the plaintiff was let into possession by Kitchen, the rightful owner.) "An agister, &c., a carrier, a factor, may bring trover; even a general bailment will suffice without being made for any special purpose, but only for the benefit of the rightful owner." It was immaterial how the plaintiff came into possession, but as there was no dispute between him and Kitchen the verdict must stand.

BURROUGH, J. concurring, the rule was

Discharged.

LUDDEN *v.* LEAVITT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[*Reported 9 Mass. 104.*]

TROVER for a yoke of oxen and a horse. The case came before the court upon an agreed statement of facts, from which it appears that the chattels mentioned in the declaration were originally the property of the defendant, and being attached by one Blake, a deputy of the sheriff of the county of Oxford, in which county this action originated, on a writ in favor of one Blossom against Leavitt, this latter requested Ludden, his next neighbor, to become responsible to the officer for the chattels attached, which he did by giving the officer a written receipt for them, with a promise to deliver them on demand. After receiving the cattle, the plaintiff observed to the defendant that they were neighbors; desired him, in case the cattle should get into his enclosure, that he would keep them well, and not hurt them; and promised to take them away, and pay him the damage. These transactions took place in the highway, near the defendant's house, where the plaintiff then left the cattle, and they continued in the defendant's possession, with the plaintiff's knowledge, for several months; after which the defendant sold and delivered them to one Soule, in whose possession they continued, until the plaintiff caused them to be attached in the present action, as the property of the defendant, who received of Soule a note of hand for the estimated value of them. Within thirty days after Blossom recovered his judgment against Leavitt, he delivered his execution to Blake, who demanded the cattle of Ludden. He, being unable to deliver them, paid Blake a sum of money in discharge of his engagement.

If, upon the facts stated, the court should be of opinion that the plaintiff was entitled to recover, the defendant was to be defaulted; otherwise the plaintiff was to become nonsuit; and in either case judgment to be rendered accordingly.

Greenleaf, for the plaintiff.

Dana, for the defendant.

CURIA. It is unnecessary to go into an inquiry whether the juggling between the plaintiff and defendant in the present action gave any equitable claims to one against the other; since there is a general principle, which will decide this action and all others similar to it, of which there are many in various parts of the Commonwealth.

It appears, from the agreement of the parties, that the only right acquired by the plaintiff over the property in contest was by delivery of it by the deputy sheriff to him for safe keeping. This did not constitute him a bailiff of the property, but a mere servant of the sheriff,

without any legal interest in the cattle. The sheriff should have brought the action, as the special property unquestionably remained in him, notwithstanding the delivery to the plaintiff. The general property was in the defendant. The plaintiff, therefore, having neither the general nor special property, cannot maintain trover. Whether the circumstances and facts agreed do not give him a right to satisfaction in some other form of action, needs not now be determined.

*Plaintiff nonsuit.*¹

POOLE v. SYMONDS.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1818.

[Reported 1 N. H. 289.]

TROVER for a mare. The cause was tried here at the last May Term upon the general issue, when it appeared in evidence that the mare once belonged to one Ezra Flanders; that Ziba Huntington, a deputy sheriff, having an execution in his hands in favor of P. Noyes against Flanders for about \$30 debt and costs, on the 26th of June 1817, seized the mare upon the execution; that Flanders, being desirous to procure time to raise money and pay the execution, and thereby prevent the sale of the mare, requested Huntington to delay the sale, to which Huntington, who had been directed by Noyes to grant Flanders any indulgence not inconsistent with the safety of the debt, assented; Huntington took the mare into his possession, and delivered her for safe keeping to the plaintiff, who gave Huntington his promise in writing to return her on demand. Poole kept the mare until the 8th of August 1817, when she was attached as the property of Flanders by the defendant, another deputy sheriff, on mesne process in favor of A. W. Morse against Flanders, and is now held by the defendant by virtue of that attachment. It did not appear that the mare was ever in the possession of Flanders after Huntington seized her, nor that Huntington had ever advertised her for sale upon the execution.

The jury returned a verdict for the plaintiff, and assessed the damages at \$30.

William Smith, for the defendant.

Gilbert and J. Bell, for the plaintiff.

The opinion of the court was delivered by

RICHARDSON, C. J. On behalf of the defendant it is contended, that Poole has not a sufficient interest in the chattel in question to enable

¹ In *Warren v. Leland*, 9 Mass. 265, it was held that a deputy sheriff's bailee had no such property as to maintain replevin. The court say, "We have heretofore decided, that where an officer attaches personal chattels, and delivers them to a third person for safe keeping, such third person has no such property in the chattels as will enable him to maintain replevin for them. *Ludden v. Leavitt*. The plaintiff fails on this ground."

him to maintain this action, and several decisions in the Supreme Court of Massachusetts are relied upon as directly in point; and it is not to be doubted, that, if those decisions were correct, this objection must prevail. But the decisions in this State have been different. In the case of *Eastman v. Eastman*, in the county of Hillsborough, December Term, 1814, where the case was precisely like the present one, except that the article in question had been taken upon mesne process in Massachusetts, and the plaintiff had become answerable for it to an officer there, the cases in the ninth volume of the Massachusetts Reports were cited by counsel and considered by the court; but the court (Smith, C. J., Livermore, and Ellis, justices) were clearly of opinion, that the plaintiff might maintain the action. No authority is cited by the court in Massachusetts in support of their decision; nor is it recollected that the determination here was supported by authorities. We have therefore felt it to be our duty to reconsider the question, and endeavor by a careful examination of the adjudged cases which bear upon the point to ascertain what the real law of the case is.

No man can maintain trespass, trover, or replevin for personal chattels without either an absolute or special property in the goods, and also possession. But this possession may be either actual or constructive. Thus an executor is by construction of law possessed of the goods of the testator, and may maintain trover for them, although he has never been in the actual possession of them. So where one had wreck by prescription or grant, and another took it away, trespass or trover lay before seizure. And if A. in London gives J. S. his goods in York, and another takes them away before J. S. obtains actual possession, J. S. may maintain trespass or trover. So if the owner deliver his goods to a carrier or other bailee, although in such case another has the actual possession, still the owner has by construction of law a sufficient possession to maintain trover or trespass. This constructive possession is not founded on the mere right of property, but upon the right of possession. For if he, who has the absolute property, has not also the right of possession, he can have no constructive possession. Thus where the owner of goods let them for a year and they were taken away by a third person within the year, it has been held that he could maintain neither trespass nor trover. This constructive possession in one is by no means inconsistent with an actual possession in another. In many cases either he who has the actual, or he who has the constructive possession, may maintain trespass, trover, or replevin; but a judgment in favor of one will be a bar to an action in favor of the other. In some cases he who has only a special property, may have a constructive possession. Thus a factor, to whom goods have been consigned, but have never been received, has such a constructive possession, that he can maintain trover.

A special property in goods may in some cases be founded upon mere possession. Thus he who finds goods which have been lost has a special property in them, because possession is evidence of title.

Thus too where goods were stolen from a stage coach, it was held, that they were well alleged in the indictment to be of the goods or chattels of the stage coachman, although he was the mere servant of the owner of the coach, and not answerable for the goods.

A special property may also be founded upon a responsibility for, or an interest in, the possession of chattels. Thus he, to whom goods are delivered merely to keep and redeliver upon request, has a special property in them. 21 H. 7, 14 pl. 23, where it is said the point had often been decided. Jones on Bailment, 112.

That a sheriff, who has seized goods upon mesne process, or upon execution, an agister of cattle, a carrier, factor, consignee, pawnee, trustee, &c. have a special property, admits of no doubt. 11 H. 4, 17 pl. 39; 48 E. 3, 20 pl. 8; 2 Saund. 47; 6 John. 195; 12 John. 403.

But a mere servant has not a special property in goods. Thus where a servant was employed in a shop merely to sell goods, he was held not to have a special property in them. Nor has a shepherd, who is employed to tend sheep, any property in the sheep. The reason is, because the law considers the goods and the sheep as much in the actual possession of the owner, as if the servant were not with them, and the servant is not responsible for them. If the goods or the sheep are taken away by a stranger, it is no injury to the servant, because he has no interest in the possession. But if a servant undertakes specially to be accountable for goods committed to his custody, he at once exchanges the character of a mere servant for that of a bailee, and has a special property.

Thus it seems that any person, who has an absolute or a special property, in a personal chattel, and a right to reduce it to immediate possession, has in law such a possession as will enable him to maintain an action to vindicate his right of possession, and this is what the law denominates a constructive possession. And any individual, who has a particular interest in the possession of such chattel, whether such interest be founded upon the evidence of title which possession affords, as in the case of a finder of lost goods, or on a right to the use of the chattel, as in the case of a hirer, &c., or on some responsibility for it, as in the case of a sheriff, &c., has what the law denominates a special property, and may maintain an action, whenever that special property is unlawfully invaded.

It now remains to compare the facts in the case before us with these principles. Huntington having seized the mare upon execution, delivered her to Poole and took his promise in writing to redeliver her on demand. Did this contract impose any responsibility upon Poole? That it did is not to be doubted. The extent of his responsibility is immaterial. It is enough that he was responsible for the safe-keeping and redelivery of the mare. This according to the principles to be deduced from the books gave him a sufficient interest in the possession to enable him to maintain this action. But it is said that Huntington had a special property in the mare; that two persons cannot have

severally a special property in a chattel, and that therefore, Poole would not have a special property in her. It is for those who hold this doctrine to show why two may not have severally, a special interest in a chattel, as well as two may have severally, one the general, and the other a special property in it at the same time. The reason is certainly not very obvious. It is true, that there are but two species of property in a chattel, absolute and special; but it by no means follows from this, that two cannot have severally a special property in it. There can be but one absolute owner of a chattel, but it seems to us very clear that several persons may have, severally, a special interest in it. Thus in the present case, when Huntington had seized the mare he immediately became responsible both to the debtor and creditor, and thereby acquired a special property in her, and when he delivered her to Poole for safe-keeping he did not part with his special property; but the moment that Poole became responsible for the safe-keeping and redelivery of her, he also acquired a special property in her, perfectly subordinate to and not at all inconsistent with, the special property of Huntington. If then the mare was unlawfully taken by the defendant, it was an injury both to Huntington and to Poole, and either may maintain an action: but a judgment in favor of one will be a good bar to an action by the other. Flanders had the general property, but not the right of possession; he could therefore maintain no action. Huntington's right of action was founded upon his special property and right of possession; Poole's upon his special property and actual possession. If Poole is to be considered as a mere servant, he must be held responsible to Huntington only as a servant. For it would be repugnant to every principle of justice to hold him responsible as a bailee while we allow him only the rights of a mere servant. But a mere servant is not responsible for goods forcibly taken from him, and if Poole is to be considered as employed in that character it would seem to be a good defence to any action Huntington may bring against him, that the mare was taken by force from him by the debtor or any other person without his fault. But this would undoubtedly be contrary to the understanding of the parties and might defeat the very object of the contract. It is therefore the opinion of the court that the plaintiff had a sufficient interest in the mare to enable him to maintain this action, and thus this objection cannot prevail.

But the defendant further contends, that Huntington having kept the mare more than five weeks without taking any step to complete the levy, the attachment so far as respected other creditors of Flanders was dissolved, and cites the case of *Caldwell v. Eaton* [5 Mass. 399] in support of this objection. Our statute relative to the seizure and sale of goods upon executions is precisely like that of Massachusetts, and we see no reason to doubt that the construction of their court upon the statute in the case just mentioned is correct. We are not however prepared to say that the sheriff can in no case with the consent of the debtor keep the goods more than four days before sale without dissolv-

ing the attachment with respect to other creditors, provided he proceeds within the four days to fix and advertise the time and place of sale. When the sheriff seizes goods upon execution he should immediately within the four days proceed to advertise them for sale, and should sell them as soon after the expiration of the four days as can be conveniently done. If he does not do this, other creditors have a right to consider the attachment as dissolved, and to take the goods from his possession. The verdict in this case must therefore be set aside and a new trial be granted.¹

HAMPTON v. BROWN.

SUPREME COURT OF NORTH CAROLINA. 1851.

[Reported 13 Ired. 18.]

APPEAL from the Superior Court of Law of Davidson County, at the Fall Term, 1851, his Honor Judge Ellis presiding.

This is an action of trover for a horse, and was tried on the general issue. The plaintiff was deputy sheriff, and had a *feri facias* on a judgment in favor of one Hoffman against one Horne, by virtue of which he seized the horse. He did not, however, take the horse out of the possession of Horne, and the latter sold it to the defendant a few days afterwards, and, upon demand by the plaintiff, the defendant refused to give the horse up. The counsel for the defendant insisted that the action would not lie, because the plaintiff did not keep the possession of the horse, but left it with Horne, from whom the defendant purchased; and, also, because the defendant, if liable at all, was liable at the suit of the sheriff, and not of the plaintiff. But the court instructed the jury that upon these facts the plaintiff was entitled to recover; and after a verdict and judgment against him, the defendant appealed.

Gilmer and *Miller*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. Although a sheriff may have trover, or trespass for goods seized in execution, which are taken by another, yet his deputy cannot. The reason why the sheriff has the action is, that the debtor is discharged and the sheriff becomes liable to the value of the goods, and therefore the law vests the property in him. *Wilbraham v. Snow*, 2 Saund. 47. But the law charges the deputy with no duty to the creditor. If he make defaults in serving the execution, he cannot be sued for it, but his principal only. On the contrary, when he takes goods on execution the sheriff becomes answerable for their value to the creditor, and hence the property vests in the sheriff and not in the deputy. It was suggested that the deputy held as the bailee of the sheriff, and thus

¹ *Thayer v. Hutchinson*, 13 Vt. 504 accord. So in a case of replevin. *Miller v. Adsit*, 16 Wend. 335.

had a special property. He, however, is not a bailee, in the sense of having a possession of his own, but he is merely the servant of his superior and holds for him. The plaintiff, therefore, has no property in the horse, and cannot have this action.

PER CURIAM.

*Judgment reversed, and venire de novo.*¹

¹ "It has been supposed, to be sure, that a 'special property' was necessary in order to maintain *replevin* or *trover*. But modern cases establish that possession is sufficient, and an examination of the sources of our law proves that special property did not mean anything more. It has been shown that the procedure for the recovery of chattels lost against one's will, described by Bracton, like its predecessor on the Continent, was based upon possession. Yet Bracton, in the very passage in which he expressly makes that statement, uses a phrase which, but for the explanation, would seem to import ownership, — *Poterit rem suam petere*. The writs of later days used the same language, and when it was objected, as it frequently was, to a suit by a bailee for a taking of *bona et catalla sua*, that it should have been for *bona in custodia sua existentia*, it was always answered that those in the Chancery would not frame a writ in that form.

"The substance of the matter was, that goods in a man's possession were his (*sua*), within the meaning of the writ. But it was very natural to attempt a formal reconciliation between that formal word and the fact by saying that, although the plaintiff had not the general property in the chattels, yet he had a property as against strangers, or a special property. This took place, and, curiously enough, two of the earliest instances in which I have found the latter phrase used are cases of a depository, and a borrower. Brooke says that a wrongful taker 'has title against all but the true owner.' In this sense the special property was better described as a 'possessory property,' as it was, in deciding that, in an indictment for larceny, the property could be laid in the bailee who suffered the trespass.

"I have explained the inversion by which a bailee's right of action against third persons was supposed to stand on his responsibility over, although in truth it was the foundation of that responsibility, and arose simply from his possession. The step was short, from saying that bailees could sue because they were answerable over, to saying that they had the property as against strangers, or a special property, because they were answerable over, and next that they could sue because they had a special property and were answerable over. And thus the notion that special property meant something more than possession, and was a requisite to maintaining an action, got into the law.

"The error was made easier by a different use of the phrase in a different connection. A bailee was in general answerable for goods stolen from his custody, whether he had a lien or not. But the law was otherwise as to a pledgee, if he had kept the pledge with his own goods, and the two were stolen together. This distinction was accounted for, at least in Lord Coke's time, by saying that the pledge was, in a sense, the pledgee's own, that he had a special property in it, and thus that the ordinary relation of bailment did not exist, or that the undertaking was only to keep as his own goods. The same expression was used in discussing the pledgee's right to assign the pledge. In this sense the term applied only to pledges, but its significance in a particular connection was easily carried over into the others in which it was used, with the result that the special property which was requisite to maintain the possessory actions was supposed to mean a qualified interest in the goods." Holmes, Com. Law, 242-244.

"The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of *trover* is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of property; *Rogers v. Kennay*, 9 Q. B. 592; but these expressions should not mislead the student. The action of *trover* tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods. . . . The action of *trover* tries the right of possession, and may

or may not determine the property. For strange as it may appear, there is no action in the law of England by which the property either in goods or lands is alone decided." Wms. Pers. Prop. (12th ed.) 31, 32.

See also Dicey on Parties, 346, 347, 352, 353, 358-360.

MEASURE OF DAMAGES IN ACTION BY BAILOR OR BAILEE. — "He who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over. See 21 Hen. 7, 14 *b. acc.*" *Heydon and Smith's Case*, 13 Co. 67, 69.

CHESLEY v. ST. CLAIR.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE.

[Reported 1 N. H. 189.]

THIS was an action of trover for a horse, saddle, and bridle. The cause was tried here at the last term upon the general issue. The plaintiff, to maintain the issue on his part, proved that one Benjamin Hodgdon had bailed the articles mentioned in the writ, to him to ride to Dover. The defendant denied that Hodgdon had any interest in the article, and introduced evidence to show that the property was his own. Upon this the plaintiff called Hodgdon as a witness to prove that he, Hodgdon, was the lawful owner of the property. The defendant objected to the admission of Hodgdon as a witness on the ground that he, having bailed the property to the plaintiff, was interested in the event of the suit, but he was admitted, and the jury returned a verdict for the plaintiff.

J. Mason, for the defendant.

Ichabod Bartlett and *James Bartlett*, for the plaintiff.

RICHARDSON, C. J. The question is, whether in an action of trover, brought by the bailee of a chattel against a stranger, the bailor is a competent witness for the bailee to prove the general property in himself? There is such a privity between the bailor and the bailee of chattels that a recovery by one in an action of trespass or trover against a stranger for taking the goods is, in general, a bar to an action by the other. And a recovery by the bailee in trespass or trover against a third person operates as a transfer of the property or chattel to such third person. *Solutio pretii emptionis loco habetur*. It seems to follow that whatever may be recovered in such a suit by a bailee must be recovered to the use of the bailor, as much as if it were recovered upon a contract of sale of the chattel by the bailee with the assent of the bailor. And it has been held that a verdict in favor of the bailee may be used in evidence in an action by the bailor against the bailee. If this be law, it is clear that Hodgdon was an incompetent witness.

It is very clear that a recovery by the bailee betters the situation of the bailor because it settles the question of property, and this has been held sufficient to exclude a witness.

There may be cases, however, in which the bailor will be a competent witness for the bailee. Thus if the goods are wrongfully taken from the bailee, and he obtains possession of them again, or if the bailor releases the property to the trespasser, and the bailee bring trespass to recover the damages he may have sustained by being deprived of the possession, as it seems he may, in such case there seems to be no reason why the bailor should not be a witness for the bailee, for it is clear that he can have no interest in the recovery.

In the present case as the object of the suit is to recover the value of the property, and as the only question between the parties is, whether the property belonged to Hodgdon or the defendant, we are of opinion that Hodgdon was an incompetent witness for the plaintiff and that the verdict must be set aside, and a new trial granted.

See *Little v. Fossett*, 34 Me. 545; *White v. Webb*, 15 Conn. 302, 305; *Harker v. Dement*, 9 Gill, 7; *Lyle v. Barker*, 5 Binn. 457.

SECTION III.

FINDING.

A. *Rights of Finder against Owner.*

MULGRAVE v. OGDEN.

QUEEN'S BENCH. 1591.

[*Reported Cro. Eliz.* 219.]

ACTION sur trover of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion. So if he of purpose misuseth it, as if one finds paper, and puts it into the water, &c.; but for negligent keeping no law punisheth him. *Et adjournatur.*¹

BINSTEAD v. BUCK.

COMMON PLEAS. 1776.

[*Reported 2 W. Bl.* 1117.]

TROVER for a pointing dog. The plaintiff proved the dog to be his property, and that it was found at the defendant's house twelve months after it was lost. The defendant said the dog strayed there casually, and demanded 20s. for twenty weeks' keep, before he would deliver up the dog. A verdict for the plaintiff, subject to the opinion of the court, whether this refusal amounted to a conversion of the dog?

Foster, for the defendant, declined arguing the question, and so
Postea to the plaintiff.

¹ "If a man findes goods, an action upon the case lieth, for his ill and negligent keeping of them, but no trover and conversion, because this is but a *non fesans*. Per COKE, C.J., in *Isaack v. Clark*," 2 Bulst. 306, 312 (1615).

NICHOLSON *v.* CHAPMAN.

COMMON PLEAS. 1793.

[*Reported 2 H. Bl. 254.*]

THIS was an action of trover brought under the following circumstances: A considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the Thames, but the ropes with which it was fastened accidentally getting loose it floated, and was carried by the tide as far as Putney, and there left at low water upon a towing-path within the manor of Wimbledon. Being found in this situation, the bailiff of the manor, one Fairchild, employed the defendant Chapman to remove the timber with his wagon from the towing-path, which it obstructed, to a place of safety at a little distance. This Chapman accordingly did, and when the plaintiff sent to demand the timber to be restored to him, refused to deliver it up, unless £6 10s. 4d. were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompense to himself for the trouble of drawing the timber from the water side to the place where it then lay; but this demand the plaintiff refused to comply with, and did not tender any other sum. The bailiff acted under the following order, made at a court leet of the lord of the manor in May, 1792: "Complaint having been made to this court of the great detriment arising to the tenants, &c., within this manor from timber having been left by the tide upon the towing-path within the same; it is ordered that Francis Fairchild, the bailiff of this manor, do under the authority of this court, remove the same to a proper place of safety until the lord or his steward shall give proper directions for the benefit of the particular owner or proprietor thereof." But no such customary right as was set up in the lord, was established at the trial; the Lord Chief Justice therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the defendant as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the plaintiff for the value of the timber, subject to the opinion of the court on the question, Whether there ought not to have been a tender of two guineas before action brought? if the court should be of that opinion, the verdict to be entered for the defendant, he undertaking to deliver up the timber on payment of two guineas; but if they should be of a contrary opinion, then the verdict to be entered for the plaintiff for the value.

Adair and *Runnington*, Serjts., on part of the plaintiff.

Bond and *Clayton*, Serjts., argued on the other side.

LORD CHIEF JUSTICE EYRE. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question, Whether this transaction could be assimilated to salvage? The taking

care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent), are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld. 1 Ld. Raym. 393; Salk. 654, pl. 2. But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage feasant, if that should happen to be the case. But this is not a case of damage feasant; the timber is found lying upon the banks of the river, and is taken into the possession and under the care of the defendant without any extraordinary exertions, without the least personal risk, and in truth with very little trouble. It is therefore a case of mere finding and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment.¹

¹ It seems probable that in such a case, if any action could be maintained, it would be an action of assumpsit for work and labor, in which the court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompense would come properly before a jury. REP.

So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle) ; which therefore reduces the merits of this case to this short question, Whether every man who finds the property of another which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompense which he may reasonably deserve? It is enough to say that there is no instance of such a lien having been claimed and allowed; the case of a pointer dog, 2 Black. 1117, was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it if it were to be established. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner, seeking to recover his property in an action of trover, will be placed, if he is at his peril to make a tender of a sufficient recompense before he brings his action; such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased; perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the quantum of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

*Judgment for the plaintiff.*¹

¹ See *Reeder v. Anderson*, 4 Dana, 193; *Preston v. Neale*, 12 Gray, 222; *Chase v. Corcoran*, 106 Mass. 286.

WENTWORTH v. DAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[Reported 3 Met. 352.]

THIS action, which was trover for a watch, was submitted to the court on the following statement of facts:—

The plaintiff lost the watch mentioned in his declaration, about the middle of October, 1839, in Bradford, in the county of Essex, and put the following advertisement into the "Essex Banner," a newspaper published at Haverhill, in said county: "Twenty dollars reward. Lost, upon the road from Haverhill to Brighton, about two miles from Haverhill Bridge, a gold lever watch. Whoever will return it to this office shall receive the above reward. Francis Wentworth. Oct. 12."

The watch was found, a few days afterwards, by a minor son of the defendant, who delivered it to the defendant, and he took the custody of it for his son, and very soon afterwards left it at the printing office of the "Banner," in the care of the printer, with directions to deliver it to the owner, on his paying the twenty dollars reward.

In the month of January, 1840, the plaintiff returned to Haverhill, and on his refusing to pay the twenty dollars, the defendant resumed the possession of the watch, and while it was thus in his possession, the plaintiff demanded it of him, but he refused to deliver it, unless the plaintiff would pay him the twenty dollars for his son. The plaintiff refused to do this, but said he would pay ten dollars. The defendant refused to deliver the watch, and the plaintiff brought this action.

E. Ames, for the plaintiff.

Homer, for the defendant.

SHAW, C. J. Although the finder of lost property on land has no right of salvage, at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done. *Symmes v. Frazier*, 6 Mass. 344.

But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor. *Green v. Farmer*, 4 Bur. 2221. In *Kirkman v. Shawcross*, 6 T. R. 14, it was held, that where certain dyers gave general notice to their customers, that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers, after notice of such terms, must be taken to have assented to them, and thereby the goods became charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid. Nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption that it was not the intention of the vendor to part with his goods, till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was, that whoever should return his watch to the printing office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication, is that the acts of performance were to be mutual and simultaneous, — the one to give up the watch, on payment of the reward; the other to pay the reward, on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the reward, in behalf of himself and his son, and was not bound to surrender the actual possession of it, till the reward was paid; and therefore a refusal to deliver it, without such payment, was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the article restored; in which case, no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider whether such an offer would be equally efficacious in bringing back his lost property, as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives

before him, he made an offer to pay the reward on the restoration of the watch ; and his subsequent attempt to get the watch, without performing his promise, is equally inconsistent with the rules of law and the dictates of justice.

The circumstance, in this case, that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit were brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it to the owner, without payment of the reward, was no conversion.

*Judgment for the defendant.*¹

WILSON v. GUYTON.

COURT OF APPEALS OF MARYLAND. 1849.

[*Reported 8 Gill, 213.*]

APPEAL from Harford County Court.

This was an action of replevin, instituted by the appellee, for the recovery of a horse which had strayed from the possession of the plaintiff, and had been taken up by one William H. Pearce, and was retained by the defendant as Pearce's agent. The plea was *non cepit*.

At the trial, the defendant proved that the plaintiff was the owner of the horse in question, and that having lost said horse in the month of July, 1847, the plaintiff offered a liberal reward, by advertisement, to any one who would take up said horse, and deliver him to the plaintiff; and that said Pearce, after said advertisement, and in consequence thereof, took up said horse, and offered to deliver him to the plaintiff, upon said plaintiff's paying \$3, as the reward for such taking up. He also further proved, that plaintiff admitted that the sum of \$3 was a reasonable reward, and within the terms of the advertisement, and that defendant held said horse at the time the writ was issued in this case, as the agent of said Pearce. The defendant then prayed the court to direct the jury, "that unless the plaintiff proved, or offered proof that he had, before the institution of this suit, paid the said \$3, the reward aforesaid, or tendered or offered to pay the same, the said plaintiff is not entitled to recover." Which direction the court (*Archer, C. J., and Purviance, A. J.*) refused to give, but instructed the jury, that the said William H. Pearce had no right to retain said horse till the said reward was paid. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

¹ *Cummings v. Gann, 52 Pa. 484, accord.*

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, JJ.

By *Otho Scott*, for the appellant, and

By *H. W. Archer*, for the appellee.

DORSEY, C. J., delivered the opinion of this court. The doctrine of lien is more favored now than formerly; and it is now recognized as a general principle, that wherever the party has, by his labor or skill, &c., improved the value of property placed in his possession, he has a lien upon it until paid. And liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding of the parties that they should exist. The existence of liens has also been sustained where they contributed to promote public policy and convenience. If any article of personal property has been lost, or strayed away, or escaped from its owner, and he offers a certain reward, payable to him who shall recover and deliver it back to his possession, it is but a just exposition of his offer, that he did not expect that he who had expended his time and money in the pursuit and recovery of the lost or escaped property, would restore it to him, but upon the payment of the proffered reward, and that as security for this, he was to remain in possession of the same until its restoration to its owner, and then the payment of the reward was to be a simultaneous act. It is no forced construction of his act, to say that he designed to be so understood by him who should become entitled to the reward. It is, consequently, a lien created by contract. It is for the interest of property holders so to regard it. It doubles their prospect of a restoration to their property. To strangers it is everything; for few, indeed, would spend their time and money, and incur the risks incident to bailment, but from a belief in the existence of such a lien. Public convenience, sound policy, and all the analogies of the law, lend their aid in support of such a principle. Nor are we without an express authority upon this subject. In *Wentworth v. Day*, 3 Metcalf, 352, the Supreme Court of Massachusetts decided, "that a finder of lost property, for the restoration of which the owner has offered a reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it, the owner refuses to pay the reward."

But, in the case before us, there is no ground for the implication of such a lien from the compact of the parties. There was no fixed or certain reward offered by the owner, to be paid on the delivery of his property. His offer was to pay a "liberal reward." Who was to be the arbiter of the liberality of the offered reward? It cannot be supposed that the owner, by his offer, designed to constitute the recoverer of his property the exclusive judge of the amount to be paid him as a reward. And it is equally unreasonable and unjust, to say that the owner should be such exclusive judge. In the event of a difference between them, upon the subject, the amount to be paid must be ascertained by the

judgment of the appropriate judicial tribunal. This would involve the delays incident to litigation, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part, that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion; and, therefore, the law will never infer its existence either from the agreement of the parties, or in furtherance of public convenience or policy.

Judgment affirmed.

B. *Rights of Finder against Third Persons.*

ARMORY *v.* DELAMIRIE.

NISI PRIUS, BEFORE PRATT, C. J. 1722.

[*Reported 1 Stra. 505.*]

THE plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled.

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master who gives a credit to his apprentice, and is answerable for his neglect. *Jones v. Hart*, Salk. 441; *Cor. Holt*, C. J.; *Mead v. Hamond*, 1 *Stra.* 505; *Grammar v. Nixon*, *Ib.* 653.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.

BRIDGES v. HAWKESWORTH.

QUEEN'S BENCH. 1851.

[Reported 15 Jur. 1079.]

THIS was an appeal against a decision of the judge of the County Court of Westminster. The following facts appeared upon the case stated and signed by the judge: In October, 1847, the plaintiff, who was town traveller to Messrs. Rae & Co., called at Messrs. Byfield & Hawkesworth's on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying upon the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of £65. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. The defendant caused advertisements to be inserted in the Times newspaper, to the effect that bank notes had been found, and the owner might have them on giving a proper description and paying the expenses. No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant had refused to deliver them up to the plaintiff, and an action had been brought in the County Court of Westminster in consequence of that refusal. The case also found that the plaintiff, at the time he delivered over the notes to the defendant, did not intend to divest himself of any title that he might have to them. The judge had, upon these facts, decided that the defendant was entitled to the custody of the notes as against the plaintiff, and gave judgment in his favor accordingly. It was to review this decision that the present appeal had been brought.

Gray (*Heath* with him) for the appellant. The plaintiff, by finding the notes in question, acquired a title to them against the whole world, except the true owner. *Armory v. Delamirie*, 1 Str. 504; 1 Smith's L. C. 151 (6th ed.) 315. Having found them, he delivered them to the defendant for a special purpose only, and never intended to part with his property therein. The judge appears to have decided the case upon the ground that they were found in the house of another; but that makes no difference. If they had been found in the highway they would have been the property of the finder, except as against the true owner; and yet the highway is the private property of some one, subject to the right of the public to pass over it. Suppose they had been found in the yard of the defendant, then they could be lawfully retained as against him; he might have had an action of trespass for entering

the yard, but not any action founded on the possession of the goods. How did the defendant acquire any property therein? The mere fact of the notes having been dropped on the floor of his shop did not give it to him. [PATTESON, J. If one enters a cab, and takes away a parcel left there by a former passenger, the property might be laid in the cab-owner in an indictment for the felony. WIGHTMAN, J. If the notes had been left on a chair, and the customer coming in had merely lifted them off, would they have become his property? They were not lost in the ordinary sense of the term, but were there *in conspectu omnium*. You say that any one taking possession of them, although they were in one sense in the possession of the shopkeeper, acquires a title to them, except as against the true owner.] Yes. Perhaps an indictment would lie for stealing the goods of a person unknown; but here the owner of the shop, not having taken possession, could not lay the property in himself. [PATTESON, J. Is there any instance of indicting a person for stealing the goods of a person unknown? If the owner be unknown, could felony be committed in respect of the goods? There might probably be an indictment for a robbery of a person unknown.] The man who first picked up the notes would be the finder, even although the owner of the shop should first see them. Puffendorf, lib. 4, c. 6, § 8, shows that the bare seeing, or the knowing where lost goods are, is not sufficient. [WIGHTMAN, J. You must go further, and show that their being in the shop of the defendant makes no difference. Blackstone says, that whatever moveables are found on the face of the earth belong to the first occupier.] That would be so where no owner appears; it would be the same, as between the finder and the rest of the world, as if there were no owner. Blackstone (1 Com. 296), speaking of treasure trove, says, "Such as is casually lost or unclaimed still remains the right of the fortunate finder." That was an express authority for the general rule; and if the other side contended that the notes being found in a man's house made any difference, it lay upon them to establish that proposition. [PATTESON, J. In Puffendorf, lib. 4, c. 6, § 13, it is said, "He who hath hidden treasure in another's ground, without acquainting the lord of the soil, is judged to have slipped his opportunity; . . . but if the ground belongs to another, then the finder seems engaged by his conscience to inquire, at least indirectly, of him concerning the matter, because, without this, it cannot certainly be known but that the money was laid there by the master of the place only for the greater security, or by some person else with his privity and consent." From which it would appear, that if it were laid there without the consent or privity of the owner of the soil, he would not be entitled to it. These notes were certainly not intrusted to the defendant — they were lost.] By the law of nature, a finder acquires property by taking possession of the goods found, and those cases in which the property is given to the State or to particular individuals are exceptions upon the law of nature. In *Reg. v. Kerr*, 8 Car. & P. 176, it was held, "that a servant who had found some bank notes in her

master's house ought to have inquired of him whether they were his or not." Those were her master's notes, which brought the facts within the rule laid down by Puffendorf where the owner of property is known. It therefore does not apply to this case. But if the other side were right, the servant would be equally guilty of felony whether they were her master's notes or not. They must put it upon the ground of a special property in the owner of the house; and if so, the servant would be guilty of felony whether she made inquiry as to the true owner or not; but a finder is not guilty of larceny where he has no reasonable opportunity of knowing the owner, because the articles found belong to him, whatever may be his intention at the time of taking them. [PATTESON, J. If goods were found in an inn, it would be different. There a special property is vested in the innkeeper by reason of his liability. In *Merry v. Green*, 7 M. & W. 623, it was held, that there might be property in a person of goods, although he did not know of its existence. There a bureau was bought at an auction, and a purse of money was found in a secret drawer therein; and it was held that it belonged to the seller, although he knew nothing of it. That and *Cartwright v. Green*, 8 Ves. 405, appear to be the nearest to the present case.] In *Merry v. Green*, the money was not lost—it was entirely inclosed in a chattel belonging to the seller; here the loss and the finding are stated in the ease. The defendant, to have any right, must have indicated his intention to take possession before the other did. If the shopkeeper had placed it on one side until he found the owner, it would have been different; but here the plaintiff is the finder. As to the notes being found in the shop, that reduces it merely to a question of degree; a shop is more private than a field, a field more private than a highway; but the fact of the articles found being upon the soil of another does not prevent them from becoming the property of the finder. The defendant had not made himself liable to the true owner. *Isaack v. Clark*, 2 Bulst. 312, shows "that when a man doth find goods, he is bound to answer him that hath the property." The defendant received the notes only for the purpose of advertising them, and restoring them to the true owner, if he should appear. [He also cited *Sutton v. Moody*, 1 Ld. Raym. 250].

Heath offered to address the court on the same side, but it was decided that only one counsel could be heard on each side.

Hake, for the respondent. The plaintiff could not acquire property in these notes by merely picking them up; and if he could he had in this case divested himself of that property by handing them over to the defendant, thereby making him the principal in the matter, and investing him with the responsibility of a finder. The notes, if they were in truth the property of a customer, came into the shop by leave of the owner of the shop. Dig. lib. 41, De Aeq. Re. Dom., tit. 1. [PATTESON, J. That assumes that they are deposited intentionally; in which case there can be no doubt whatever.] Savigny, in his celebrated *Treatise on the Law of Possession* (translated by Sir Edward Perry),

§ 18, states that the principle of the rule is easily to be discovered. The maxim is, "*Vacua est quam nemo detinet.*" Here the *jus detentionis* was in the defendant, and there was no vacancy of possession. If the goods had been of larger bulk, the owner of the house might have distrained them damage feasant, and no one could have taken them from his custody. If a scintilla of dominion might be exercised by the shopkeeper, they could not vest in the finder. [PATTESON, J. Savigny speaks of money buried in the land; but how is it if it be in my house? The expression "If I know where it is, I possess it, without the act of taking it from its place of concealment" (p. 163, note e), seems to make the question of property turn upon a mere chance.] That doubt is answered by the case of *Merry v. Green*. In many instances property is held to belong to the owner of the soil, though he does not know of it, as in the case in Lord Raymond. In *Toplady v. Stalye*, Sty. 165, Rolle, C. J., says, "If cattle be stolen, and put into my ground, I may take them damage feasant." If the owner could not take them away, how could a stranger do so? *Anon.*, 1 Bulst. 96. In the Year Book, 12 Hen. 8, 9, it is said, "that the owner of a forest is the owner of the wild creatures therein *ratione loci.*" In *Reg. v. Kerr*, Parke, B., asks, "What if I drop a ring, is my servant to take it away?" Suppose my guest loses his ring, is the servant finding it at liberty to keep it? Has not the owner of the house a right to take it from him? [WIGHTMAN, J. In that case there would be no question about the property.] If, in *Armory v. Delamirie*, the sweep had been employed to sweep a chimney, and, having entered a house for that purpose, had picked up a jewel therein, he could not have claimed it. In the case of a wreck, the lord, before seizure, has a constructive possession. In *Smith v. Milles*, 1 T. R. 480, Ashurst, J., says, "The right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord." [PATTESON, J. That is a manorial right, and does not apply to any other person. WIGHTMAN, J. In the preface to Savigny a difficulty is suggested in the passage quoted from Mr. Bentham: "A street porter enters an inn, puts down his bundle upon the table, and goes out; one person puts his hand upon the bundle to examine it, another puts his to carry it away, saying, 'It is mine.' The innkeeper runs to claim it, in opposition to them both. The porter returns, or does not return. Of these four men, who is in possession of the bundle?"] In that case the innkeeper has the property *ratione loci et impotentie*. The parcel cannot fly away. In *Isaack v. Clark*, Lord Coke says the finder has it in his election to take the goods or not into his custody. Did the plaintiff take to himself the charge of these notes, or make himself liable for the advertisements? [WIGHTMAN, J. If the plaintiff had merely showed them to the defendant, and said he would keep them, could the defendant have sued him for them?] Yes; by reason of their being found in the house he had a constructive possession, and also something less than a possession, — a *jus detentionis*. *Burn v. Morris*, 4 Tyr. 485, shows that the defendant was

responsible to the true owner. In the *Case of Swans*, 7 Rep. 17 b., Lord Coke says that a possessory right is obtained in wild animals *ratione loci et impotentie* — that is, so long as they do not or cannot fly away. The reason of these decisions is given by Savigny (p. 163), — “A movable becomes connected with an immovable without, nevertheless, being incorporated with it.” *Semayne’s Case*, 5 Rep. 93, shows that a house protects all goods lawfully there; and it is to be inferred that it displaces all right in a finder. The maxim of the civil law is, *Si in meam potestatem pervenit, meus factus sit*. Savigny (p. 169) comments upon it — “Possession of a thing may be acquired simply by the fact of its having been delivered at one’s own residence, even though we are absent from the house at the time.” [WIGHTMAN, J. There they were directed to the house: here, if the finder had put the notes into his own pocket, the owner of the shop would not have known of them. If you can put any case where the goods came into the house without the knowledge of the owner of the house, it would be in point. PATTESON, J. If property is intentionally in my house, it is certainly in my possession.] There is a distinction between property obvious on the surface of the soil and what is buried. In the former case it is supposed that it will be seen by the owner or his servants; but if it is buried, the next owner is as likely to find it as the former one (Savigny, 169). The passages in Blackstone cited on the other side put the question upon the intention of the true owner to come back and claim the goods. By our old law goods found were to be delivered to justices; and in Deut. c. 22, we read, “Goods found should be kept near where they are lost.” In *Reg. v. Thurborn*, 2 Car. & K. 831, it was held, that to prevent the taking of goods from being larceny, it is essential that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed to have abandoned them. In 5 Rep. 109 a., it is said, “If one steal my goods and throw them into the house of another, they are not waifs.” So in Com. Dig., “Waif.” This case is undistinguishable from one where goods are left at an inn, and the relation of landlord and guest has ceased; if the goods are then stolen, the innkeeper is not liable. The act of taking possession of the notes by the plaintiff did not render him chargeable to the true owner, nor confer a property upon him. Dig., lib. 41, tit. 1, De Acq. Re. Dom.; *Muy v. Harvey*, 13 East, 197. If no engagement be exacted to redeliver, the party delivering cannot sue while the trust remains open. The defendant may set up a *jus tertii*; he is liable to the true owner, and ought not to be liable to two in respect of one interest. He advertised that the notes could be had at his shop, and incurred liability for the advertisements. [He also cited *Ogle v. Atkinson*, 5 Taunt. 759, and *Templeman v. Case*, 10 Mod. 24.]

Gray, in reply, cited Savigny, 170 — “Every case of possession is founded on the state of consciousness of unlimited physical power.”

Cur. adv. vult.

PATERSON, J., now delivered the following judgment: The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by some one. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory v. Delamirie*, which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear. Nothing that was done afterwards has altered the state of things; the advertisements inserted in the newspaper, referring to the defendant, had the same object; the plaintiff has tendered the expense of those advertisements to the defendant, and offered him an indemnity against any claim to be made by the real owner, and has demanded the notes. The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them. There is no authority in our law to be found directly in point. Perhaps the nearest case is that of *Merry v. Green*, but it differs in many respects from the present. We were referred, in the course of the argument, to the learned works of Von Savigny, edited by Chief Justice Perry; but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution of the present question. It was well asked, on the argument, if the defendant has the right, *when* did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the street, and there found by some one passing by, could it be contended that the defendant was entitled to them from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff, and he has been offered an indemnity, the sufficiency of which is not disputed. We find, therefore, no circumstances in this case to

take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is, that the plaintiff is entitled to these notes as against the defendant; that the judgment of the court below must be reversed, and judgment given for the plaintiff for £50. Plaintiff to have the costs of appeal. *Judgment accordingly.*¹

REGINA v. ROWE.

CROWN CASE RESERVED. 1859.

[*Reported Bell, C. C. 93.*]

THE following case was reserved by the Chairman of the Glamorganshire Quarter Sessions.

At the Glamorganshire Midsummer Quarter Sessions, 1858, William Rowe was indicted for stealing 16 cwt. of iron of the goods and chattels of The Company of Proprietors of the Glamorganshire Canal Navigation.

It appeared by the evidence that the iron had been taken from the canal by the prisoner, who was not in the employ of the Canal Company, while it was in process of being cleaned. The manager of the canal stated that, if the property found on such occasions in the canal can be identified, it is returned to the owner. If it cannot, it is kept by the Company.

It was objected that, as the Canal Company are not carriers, but only find a road for the conveyance of goods by private owners, the property was not properly laid as that of the Canal Company. The prisoner was convicted, and sentenced to two calendar months imprisonment in the House of Correction at Cardiff, but was released on bail. *Armory v. Delamirie*, 1 Stra. 505; s. c. 1 Smith's L. C. 151.

This case was considered, on 22d November, 1858, by POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., CHANNELL, B., BYLES J. and HILL, J. No counsel appeared. *Cur. adv. vult.*

On 5th February, 1859, the judgment of the court was given by

POLLOCK, C. B. The judges who have considered this case are unanimously of opinion that the conviction should be affirmed. The case finds that some iron had been stolen by the prisoner from the canal while the canal was in process of cleaning, and while the water was out. The prisoner was not in the employ of the Canal Company, but a

¹ See *Bowen v. Sullivan*, 62 Ind. 281, the head-note of which is inaccurate.

stranger; and the property of the Company in the iron before it was taken away by the prisoner was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the possession of the landlord for the purpose of delivering it up to the true owner; and he has sufficient possession to maintain an indictment for larceny.

Conviction affirmed.

BARKER v. BATES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[Reported 13 Pick. 255.]

TRESPASS. The plaintiff declared in his first count that the defendants broke and entered his close, and that being so entered, they took and carried away a stick of timber there found. The second count was for taking and carrying away the stick of timber.

At the trial, before *Shaw*, C. J., it appeared that the plaintiff was the owner of a farm in the town of Scituate, within the limits of the old colony of Plymouth, bounded easterly by the sea, which farm included two pieces of land conveyed to the United States as hereafter mentioned, and that at the time of the commission of the supposed trespass, he remained the owner of all of the farm, excepting the parts so conveyed.

In 1811 an act was passed by the legislature of Massachusetts (St. 1810, c. 54), providing that the United States might purchase or take any tracts of land, not exceeding six acres, which should be necessary for the lighthouse authorized to be erected at the entrance of the harbor of Scituate, reserving to this Commonwealth exclusive jurisdiction over the land, except so far as might be necessary to enable the United States to carry their object into effect.

In pursuance of this act certain commissioners appraised and set off to the United States the two parcels of land above mentioned. The boundaries of the first parcel were described as beginning at a stake and stones, and, after various courses, running northeasterly "to the cliff, thence by the cliff to the first-mentioned stake and stones." Below the cliff was a beach. A plan of the farm and of the two parcels set off to the United States, was used in the case.

It appeared that the stick of timber in question was discovered by the defendants on the rocks, at low-water mark, below the easterly side of the parcel of land above described, that it was then marked by one of the defendants with his name, and that the defendants subsequently attempted to carry away the stick from this place, but were prevented by the roughness of the sea. The stick was afterwards thrown upon the beach, below and adjoining the plaintiff's land, and on the easterly side thereof, and the defendants took and carried it away from the place last mentioned, and converted it to their own use.

If upon the facts in the case the court should be of opinion that the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment to be rendered against them for the sum of fifteen dollars damages; otherwise a new trial was to be granted.

W. Baylies and Warren, for the defendants.

Eddy and Beal, for the plaintiff.

SHAW, C. J., delivered the opinion of the court. The sole and single question in the present case is, which of these parties has the preferable claim, by mere naked possession, without other title, to a stick of timber, driven ashore under such circumstances as lead to a belief that it was thrown overboard or washed out of some vessel in distress, and never reclaimed by the owner. It does not involve any question of the right of the original owner to regain his property in the timber, with or without salvage, or the right of the sovereign to claim title to property as wreck, or of the power and jurisdiction of the governments, either of the Commonwealth or of the United States, to pass such laws and adopt such regulations on the subject of wreck, as justice and public policy may require.

In considering this question of the relative right of possession, a preliminary one has been discussed, which is, whether the plaintiff had title to the land upon which the stick of timber was found. This place appears to have been on the seashore, between high and low water mark, in the town of Scituate, a town within the limits of the old colony of Plymouth. [The court then considered the question of the title to the *locus*, and resolved that it was the freehold of the plaintiff. The discussion of this question in the opinion is omitted. — ED.]

Considering it as thus established, that the place upon which this timber was thrown up and had lodged was the soil and freehold of the plaintiff, that the defendants cannot justify their entry, for the purpose of taking away or marking the timber, we are of opinion that such entry was a trespass, and that as between the plaintiff and the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and therefore that the plaintiff has a right to recover the agreed value of the timber in his claim of damages.

CLARK v. MALONEY.

NISI PRIUS IN DELAWARE. 1840.

[Reported 3 *Harrington*, 68.]

ACTION of trover to recover the value of ten white pine logs. The logs in question were found by the plaintiff floating in the Delaware Bay after a great freshet, were taken up and moored with ropes in the mouth of Mispillion creek. They were afterwards in the possession of

defendants, who refused to give them up, alleging that they had found them adrift and floating up the creek.

BAYARD, Chief Justice, charged the jury. The plaintiff must show first, that the logs were his property; and secondly, that they were converted by the defendants to their own use. In support of his right of property, the plaintiff relies upon the fact of his possession of the logs. They were taken up by him, adrift in the Delaware Bay, and secured by a stake at the mouth of Mispillion creek. Possession is certainly *prima facie* evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict. *Verdict for the plaintiff.*

Ridgely and Bates, for plaintiff.

Houston and Booth, for defendants.

M'AVOY v. MEDINA.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[*Reported 11 Allen, 548.*]

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

At the trial in the Superior Court, before *Morton, J.*, it appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told

him to keep it, and if the owner should come to give it to him; and otherwise to advertise it: which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found.

The judge ruled that the plaintiff could not maintain his action, and a verdict was accordingly returned for the defendant; and the plaintiff alleged exceptions.

E. J. Sherman and *J. C. Sanborn*, for the plaintiff.

D. Saunders, Jr., for the defendant.

DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there make a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

*Exceptions overruled.*¹

¹ See *Kincaid v. Eaton*, 98 Mass. 139, *accord*.

DURFEE v. JONES.

SUPREME COURT OF RHODE ISLAND. 1877.

[Reported 11 R. I. 588.]

ASSUMPSIT, heard by the court, jury trial being waived.

DURFEE, C. J. The facts in this case are briefly these: In April, 1874, the plaintiff bought an old safe, and soon afterwards instructed his agent to sell it again. The agent offered to sell it to the defendant for ten dollars, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for ten dollars, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet-iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to \$165, of the denomination of the national bank bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent.

The plaintiff does not claim that he acquired, by purchasing the safe, any right to the money in the safe as against the owner; for he bought the safe alone, not the safe and its contents. See *Merry v. Green*, 7 M. & W. 623. But he claims that as between himself and the defendant his is the better right. The defendant, however, has the possession, and therefore it is for the plaintiff, in order to succeed in his action, to prove his better right.

The plaintiff claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except, unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right. The case at bar is in this view like *Bridges v. Hawkesworth*, 15 Jur. 1079; 21 L. J. Q. B. 75, A. D. 1851; 7 Eng.

L. & Eq. 424. In that case, the plaintiff, while in the defendant's shop on business, picked up from the floor a parcel containing bank notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendant as owner of the shop in which they were found. "The notes," said the court, "never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there." The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as *his* safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum v. Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it as against the railroad company.

The plaintiff also claims that the money was not lost, but designedly left where it was found, and that therefore as owner of the safe he is entitled to its custody. He refers to cases in which it has been held, that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that of such money or property the owner of the shop or place where it is left is the proper custodian rather than the person who happens to discover it first. *State v. McCann*, 19 Mo. 249; *Laurence v. The State*, 1 Humph. 228; *McAvoy v. Medina*, 11 Allen, 549. It may be questioned whether this distinction has not been pushed to an extreme. See *Kincaid v. Eaton*, 98 Mass. 139. But however that may be, we think the money here, though designedly left in the safe, was probably not designedly put in the erevice or interspace where it was found, but that, being left in the safe, it probably slipped or was accidentally shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit.

The plaintiff claims that the finding was a wrongful act on the part of the defendant, and that therefore he is entitled to recover the money or to have it replaced. We do not so regard it. The safe was left with the defendant for sale. As seller he would properly examine it under an implied permission to do so, to qualify him the better to act as seller. Also under the permission to use it for his books, he would have the right to inspect it to see if it was a fit depository. And finally, as a possible purchaser he might examine it, for though he had once declined to purchase, he might on closer examination change his mind. And the defendant, having found in the safe something which did not belong there, might, we think, properly remove it. He certainly would not be expected either to sell the safe to another, or to buy it himself without first removing it. It is not pretended that he used any violence or did

any harm to the safe. And it is evident that the idea that any trespass or tort had been committed did not even occur to the plaintiff's agent when he was first informed of the finding.

The general rule undoubtedly is, that the finder of lost property is entitled to it as against all the world except the real owner, and that ordinarily the place where it is found does not make any difference. We cannot find anything in the circumstances of the case at bar to take it out of this rule.

We give the defendant judgment for costs.

A. J. Cushing, for plaintiff.

Francis W. Minor, for defendant.¹

HAMAKER v. BLANCHARD.

SUPREME COURT OF PENNSYLVANIA. 1879.

[*Reported 90 Pa. 377.*]

Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Error to the Court of Common Pleas of Mifflin County: Of May Term, 1879, No. 57.

Assumpsit by James Blanchard and Sophia, his wife, for the use of the wife, against W. W. Hamaker.

This was an appeal from the judgment of a justice of the peace. The material facts were these: Sophia Blanchard was a domestic servant in a hotel in Lewistown, of which the defendant was the proprietor. While thus employed, she found in the public parlor of the hotel, three twenty-dollar bills. On finding the money, she went with it to Mr. Hamaker, and informed him of the fact, and upon his remarking that he thought it belonged to a whip-agent, a transient guest of the hotel, she gave it to him, for the purpose of returning it to said agent. It was afterwards ascertained that the money did not belong to the agent, and no claim was made for it by any one. Sophia afterwards demanded the money of defendant, who refused to deliver it to her. Defendant admitted that he still had the custody of the money.

In the general charge the court (BUCHER, P. J.), *inter alia*, said: "If you find that this was lost money, Hamaker did not lose it, and that it never belonged to him, but that it belonged to some one else who has not appeared to claim it, then you ought to find for the plaintiff, on the principle that the finder of a lost chattel is entitled to the possession and use of it as against all the world except the true owner. . . . The counsel for the defendant asks us to say that as the defendant was the proprietor of a hotel and the money was found therein, the

¹ See *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562.

presumption of law is that it belonged to a guest, who had lost it, and that the defendant has a right to retain it as against this woman, the finder, to await the demand of the true owner. I decline to give you such instructions; but charge you that under the circumstances there is no presumption of law that this money was lost by a guest at the hotel, and that the defendant is entitled to keep it as against this woman for the true owner."

The verdict was for the plaintiffs for \$60, with interest, and after judgment thereon, defendant took this writ and assigned for error the foregoing portions of the charge.

H. J. Culbertson, for plaintiff in error.

J. A. McKee, for defendants in error.

Mr. Justice TRUNKER delivered the opinion of the court.

It seems to be settled law that the finder of lost property has a valid claim to the same against all the world, except the true owner, and generally that the place in which it is found creates no exception to this rule. But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter or other place, by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building. *McAvoy v. Medina*, 11 Allen (Mass.), 548. An article casually dropped is within the rule. Where one went into a shop, and as he was leaving picked up a parcel of bank notes, which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons, except the real owner. *Bridges v. Hawkesworth*.

The decision in *Mathews v. Harsell*, 1 E. D. Smith (N. Y.), 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes, which she handed to her mistress, to keep for her. Mrs. Barmore afterwards intrusted the notes to Harsell, for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them, and appropriated the proceeds; whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, Woodruff, J., says: "I am by no means prepared to hold that a house-servant who finds lost jewels, money or chattels, in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the

antidote: "And yet the court of Queen's Bench in England have recently decided that the place in which a lost article is found, does not form the ground of any exception to the general rule of law, that the finder is entitled to it against all persons, except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior.

The assignments of error are to so much of the charge as instructed the jury that, if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but accidentally lost, is settled by the verdict. It is admitted that it was found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest, or a boarder, or one who had called with or without business. The pretence that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited, in argument, touching the rights, duties and responsibilities of an inn-keeper in relation to his guests; these are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises; the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer, and gives him the article on his false pretence that he knows the owner and will restore it, she is entitled to have it back and hold it till the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others. The learned judge was right in his instructions to the jury.

*Judgment affirmed.*¹

MERCUR, J., dissents.

¹ See *Tatum v. Sharpless*, accord. 6 Phil. 18 (1865).

BOOK III.

INTRODUCTION TO THE LAW OF REAL PROPERTY.

CHAPTER I.

TENURE.

SECTION I.

TENURE IN GENERAL.

Co. Lit. 65 a. For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before.¹

2 Bl. Com. 59, 60. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a *mesne* lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land. 1 Inst. 296.

¹ "According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established; and it seems there are some few portions of allodial land in the northern part of our own island." — Hargrave's note *ad loc.*

See Digby, Law Real Prop. c. 1, sect. 2, § 1.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did.¹

ST. 18 EDW. I. c. 1; ST. OF WESTM. III.; ST. QUIA EMPTORES (1290).
 Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

c. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

c. 3. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

SECTION II.

MANORS.

Co. Cop. § 31. — The efficient cause of a manor is expressed in these words, *of long continuance*: for, indeed, time is the mother, or rather the nurse, of manors; time is the soul that giveth life unto every manor, without which a manor decayeth and dieth: for 't is not the two material causes of a manor, but the efficient cause (knitting and uniting together those two material causes) that maketh a manor. Hence it is that the king himself cannot create a perfect manor at this day; for such things as receive their perfection by the continuance of time come not within the compass of a king's prerogative: and therefore the king cannot grant freehold to hold by copy, neither can the king create any new custom, nor do any thing that amounteth to the creation of a new custom.

LEAKE, DIGEST OF LAND LAW, 19–22. — A grant of land from the Crown under the feudal system usually conferred rights of jurisdiction and other sovereign rights or franchises within the territory, by virtue of which it was constituted a *manor*. The larger manors, comprising inferior manors and lordships held of them by sub-infeudation, were, in early times, often called, with some slight distinctions of meaning, *honours* and *baronies*.

In regard to territory, a manor comprised the portions of the fee retained in possession by the lord himself, called the *demesne* lands,¹

¹ “Demesne, termed in latine *demanium*, *domanium*, or *dominicum*, is taken in a double sense, *propriè* and *impropriè*. *Propriè*, for that land which is in the king's own hands; and Chopimus saith, that *domanium est illud quod consecratum, unitum, et incorporatum est regie coronæ*, — ‘domain is that which is consecrated, united, and incorporated with the royal crown.’ Take *domanium* in this sense, and then you exclude all common persons from being seised *in dominio*; for admit the king pass over the demesne lands, as soon as they come into a common person's hands *desinunt esse terræ dominicales*, — ‘they cease to be domain lands;’ for though the king's patentee hath the land granted to him and to his heirs, yet coming from the king, it must necessarily be holden of the king, but it is contrary to the nature of demesne lands to be holden of any. Therefore though those lands, which commonly are termed *ancient demesne*, viz., such lands as were formerly in the hands of Edward the Confessor, may properly be termed generally ancient demesne, because they were in ancient time in the king's own possession; yet to term them at this day the lord's demesnes, or the tenant's demesnes, being severed from the Crown, is improper.

“Then, by this it appeareth that those lands are termed *improperly* demesne which are in the hands of an inferior lord or tenant, nor can such a one in propriety of speech be said to stand seised of any land whatsoever *in dominio suo*, — ‘in his demesne;’ but if you observe narrowly the manner of pleadings, the words are used in a proper sense, for you shall never find that an inferior lord or tenant will plead that he is simply seised *in dominio*, but still with this addition, *in dominio suo ut de feodo*, — ‘as a fee;’

terræ dominicales, and the portions granted in fee to tenants by subfeudation to hold of the manor by services, *terræ tenementales*, of which the lord retained the seignory and services. There might also be *waste* land, not as yet in occupation, used in common by the tenants of the manor for pasturage and like purposes; but the title remained in the lord, who might from time to time *approve* or appropriate the waste, subject to the rights exercised over it by his tenants.

In regard to jurisdiction, the manor comprised a court called the Court Baron or Lord's Court, having two distinct branches or courts. The superior or freehold branch of the court was constituted of the tenants holding fees of the manor, who were bound by their tenure to give *suit* or service at the court as judges; and their jurisdiction extended to pleas concerning the lands thus held of the manor.

The aggregate of these rights and incidents constituted a manor in the legal acceptation of the term; and accordingly a manor is described in law as consisting of demesne lands, and seignories and services anciently united thereto, together with the jurisdiction of a court baron; all of which elements are necessary to constitute a perfect manor.¹

After the statute *Quia emptores* no new manor could be created. The grant of a fee no longer created a seignory and tenure, for the grantee held of the superior lord and not of the grantor. The lord, therefore, could not create freehold tenants to hold a court baron, which is an essential element in the constitution of a manor. Moreover, manors are sanctioned only by prescription or ancient custom; hence

and that very aptly, for this word *fee* implieth thus much, that his estate is not absolute, but depending upon some superior lord. Therefore I conclude, with the Feudists, that a common person may aptly be said to stand seised *in feodo*, — 'in fee,' — or *in dominico suo ut de feodo*; but improperly *in dominico* simply. The king, *è converso*, may properly be said to stand seised *in dominico* simply; but *in feodo* improperly, or *in dominico suo ut de feodo*, — 'as in his demesne of fee.'" Co. Cop. §§ 11, 12.

See *A. G. v. Parsons*, 2 C. & J. 279. — ED.

¹ Perkins, s. 670; Co. Lit. 58 *a, b*; Co. Cop. s. 31; Spelman Gloss. "Manerium." As to the distinction of the demesne lands and the lands in tenure, see Co. Lit. 17 *a*; *A. G. v. Parsons*, 2 C. & J. 279, and the authorities cited in the judgment. As to the right of the tenants over the waste and of the lord to approve the waste, with and without the consent of the tenants, see *Boulcot v. Wiumill*, 2 Camp. 261; *Betts v. Thompson*, L. R. 6 Ch. 732; *Warrick v. Queen's Coll. Ox.* 1b. 716.

Numerous conjectures have been made as to the derivation of the word *manor*. A plausible one is from the French word *mesner*, to govern, which Coke notices as most agreeing with the nature of a manor, — "for a manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or site." Co. Cop. s. 31; approved by Watkins, Cop. p. 7. In this view of a manor it is included in the list of Franchises, — the definition of a franchise being "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." 2 Blackst. Com. 37. *Manor* has also been derived *a mancndo*, as being the seat of the feudal lord. Co. Lit. 58 *a*; Spelman; 2 Blackst. Com. 90. Manors, together with most of the other elements of feudality, are said to have had their commencement, historically, in England in Saxon times. Co. Lit. 58 *b*; and see 1 Spence Eq. Jur. p. 64, and authorities there referred to. But they were consolidated into a system of general application at the Conquest. 1 Spence, 90.

the king himself, though he can create a new tenure, cannot create a perfect manor at the present day. Co. Cop. s. 31; see *Bradshaw v. Lawson*, 4 T. R. 443.

A manor may become extinguished as a perfect manor, by the severance of the demesne lands from the seignory and services of the lands in tenure; as, if the lord transfer to some stranger the services of all his tenants and reserve unto himself the demesnes; or, if he grant away the demesnes and reserve the services. A manor may also be extinguished by the extinction of the services; as if the lord purchase all the land of the freeholders, or release unto his freeholders all their services. Co. Cop. s. 31; *Sir Moyle Finch's Case*, 6 Co. Rep. 63 a.

A manor might also be extinguished by failure of the court baron. Two freeholders of the manor, at least, were necessary to hold the court baron; consequently, if this number of tenants failed, the court could no longer be constituted, and the manor, without a court baron, ceased legally to exist.¹

But in all the above cases of extinction, though the manor no longer exists in its legal integrity, it may continue as a manor *by repute*,—*nomine tantum*; and it may still be attended with such of the rights and incidents of the original manor as may remain unaffected by the legal extinction.²

It may here be mentioned that besides the freehold tenants holding fees of the manor, there is, in many manors, a class of tenants occupying parts of the demesne lands without acquiring fees or freehold estates. They hold under a distinct tenure known as customary or copyhold tenure. Corresponding to which is the customary branch of the Court Baron having jurisdiction over these customary tenancies of the demesne lands. In this branch of the court the lord or his steward is the judge; and it may still be held though the freehold branch of the Court Baron may have become extinct. Co. Lit. 58 a; *post*, Part I. c. ii. "Customary Tenure."

Another distinct court frequently existed as a franchise of a manor called the Court Leet, exercising a general criminal and administrative jurisdiction within the manor. This court was not a necessary incident of a manor, but appertained to the lord only by special prescription or special grant of the franchise from the Crown; its jurisdiction has been wholly superseded by other courts and officers. Co. Cop. s. 31; 4 Inst. c. 54; see Kitchen on Courts.³

¹ Co. Lit. 58 a; Co. Cop. s. 31; see *Chetwode v. Crew*, Willes, 614; *Bradshaw v. Lawson*, 4 T. R. 443. The jurisdiction of the Court Baron in writs of right concerning lands within the manor was expressly abolished by 3 & 4 Will. IV. c. 27, s. 36, and in all other matters the court has been either superseded or fallen into disuse. See a provision for the surrender of manorial courts in which debts or demands may be recovered, 9 & 10 Vict. c. 95 (the County Courts Act), s. 14.

² Co. Cop. s. 31; see 6 Co. 64 a, 66 b; *Soane v. Ireland*, 10 East, 259; *Watkin's Cop.* by Coventry, p. 27, n. (1), *Ib.* p. 48; as the right to manorial wastes, *Ib.*

³ See Co. Cop. § 31; *Chetwode v. Crew*, Willes, 614; *Soane v. Ireland*, 10 East, 259. — Ed.

SECTION III.

MILITARY TENURES AND THEIR INCIDENTS.

MAGNA CARTA, c. 2. If any of our earls or barons, or any other which hold of us in chief by knight's service, die, and at the time of his death his heir be of full age, and oweth to us relief, he shall have his inheritance by the old relief; that is to say, the heir or heirs of an earl, for a whole earldom, by one hundred pound; the heir or heirs of a baron, for a whole barony, by one hundred marks; the heir or heirs of a knight for one whole knight's fee, one hundred shillings at the most; and he that hath less shall give less, according to the old custom of the fees.

c. 3. But if the heir of any such be within age, his lord shall not have the ward of him, nor of his land, before that he hath taken of him homage; and after that such an heir hath been in ward, when he is come to full age, that is to say, to the age of one and twenty years, he shall have his inheritance without relief and without fine; so that if such an heir, being within age, be made knight, yet nevertheless his land shall remain in the keeping of his lord unto the term aforesaid.

c. 6. Heirs shall be married without disparagement.

c. 15 (Charter of King John). We will not give leave to any one, for the future, to take an aid of his own freemen, except for redeeming his own body, and for making his eldest son a knight, and for marrying once his eldest daughter; and not that unless it be a reasonable aid.

c. 39 (Charter of 1217). No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him which belongeth to the fee.

ST. 20 HEN. III. ST. OF MERTON (1235), c. 6. Of heirs that be led away, and withholden, or married by their parents, or by other, with force, against our peace, thus it is provided; That whatsoever layman be convict thereof that he hath so withholden any child, led away, or married; he shall yield to the loser the value of the marriage; and for the offence his body shall be taken and imprisoned until he hath recompensed the loser, if the child be married; and further until he hath satisfied the king for the trespass; and this must be done of an heir being within the age of fourteen years. And touching an heir being fourteen years old or above, unto his full age, if he marry without licence of his lord to defraud him of the marriage, and his lord offer him reasonable and convenient marriage, without disparagement, then his lord shall hold his land beyond the term of his age, that is to say, of one and twenty years, so long that he may receive the double value of the marriage, after the estimation of lawful men, or after as it hath been offered him for the said marriage before, without fraud or collusion, and

after as it may be proved in the King's Court. And as touching lords which marry those that they have in ward to villains, or other, as burghesses, where they be disparaged, if any such an heir be within the age of fourteen years, and of such age that he cannot consent to marriage, then if his friends complain of the same lord, the lord shall lose the wardship unto the age of the heir, and all the profit that thereof shall be taken shall be converted to the use of the heir being within age, after the disposition and provision of his friends, for the shame done to him; but if he be fourteen years and above, so that he may consent, and do consent to such marriage, no pain shall follow.

c. 7. If an heir, of what age soever he be, will not marry at the request of his lord, he shall not be compelled thereunto; but when he cometh to full age, he shall give to his lord and pay him as much as any would have given him for the marriage, before the receipt of his land, and that whether he will marry himself, or not; for the marriage of him that is within age of mere right pertaineth to the lord of the fee.¹

ST. 52 HEN. III. ST. OF MARLEBRIDGE (1267), c. 16. If any heir after the death of his ancestor be within age, and his lord have the ward of his lands and tenements, if the lord will not render unto the heir his land (when he cometh to his full age) without plea, the heir shall recover his land by assise of mortdauncestor, with the damages that he hath sustained by such withholding, since the time that he was of full age. And if an heir at the time of his ancestor's death be of full age, and he is heir apparent, and known for heir, and be found in the inheritance, the chief lord shall not put him out, nor take, nor remove any thing there, but shall take only simple seisin therefore for the recognition of his seigniorie, that he may be known for lord. And if the chief lord do put such an heir out of the possession maliciously, whereby he is driven to purchase a writ of mortdauncestor, or of consenage, then he shall recover his damages as in assise of novel disseisin. Touching heirs, which hold of our lord the king in chief, this order shall be observed, that our lord the king shall have the first seisin of their lands, like as he was wont to have before time: neither shall the heir, nor any other, intrude into the same inheritance, before he hath received it out of the king's hands, as the same inheritance was wont to be taken out of his hands and his ancestors' in times past. And this must be understood of lands and fees, the which were accustomed to be in the king's hands by reason of knight's service, or sergeanty, or right of patronage.

ST. 3 EDW. I. ST. OF WESTM. I. (1275) c. 22. Of heirs married within age, without the consent of their guardians, afore that they be past the age of fourteen years, it shall be done according as it is contained in the statute of Merton. And of them that shall be married without the con-

¹ See Lit. §§ 107-109.

sent of their guardians, after they be past the age of fourteen years, the guardian shall have the double value of their marriage, after the tenour of the same act. Moreover, such as have withdrawn their marriage, shall pay the full value thereof unto their guardian for the trespass, and nevertheless the king shall have like amends, according to the same act, of him that hath so withdrawn. And of heirs females, after they have accomplished the age of fourteen years, and the lord (to whom the marriage belongeth) will not marry them, but for covetise of the laud will keep them unmarried; it is provided that the lord shall not have nor keep, by reason of marriage, the lands of such heirs females, more than two years after the term of the said fourteen years. And if the lord within the said two years do not marry them, then shall they have an action to recover their inheritance quit, without giving anything for their wardship or their marriage. And if they of malice, or by evil counsel, will not be married by their chief lords (where they shall not be disparaged) then their lords may hold their land and inheritance until they have accomplished the age of an heir male, that is, to wit, of one and twenty years, and further, until they have taken the value of the marriage.

Id., c. 36. For as much as before this time, reasonable aid to make one's son knight, or marry his daughter was never put in certain, nor how much should be taken, nor at what time, whereby some levied unreasonable aid, and more often than seemed necessary, whereby the people were sore grieved: it is provided that from henceforth of an whole knight's fee there be taken but 20s. And of 20 pound land holden in socage 20s., and of more, more, and of less, less; after the rate. And that none shall levy such aid to make his son knight, until his son be fifteen years of age; nor to marry his daughter until she be of the age of seven years. And of that there shall be made mention in the king's writ, formed on the same, when any will demand it. And if it happen that the father, after he hath levied such aid of his tenants, die before he hath married his daughter, the executors of the father shall be bound to the daughter, for so much as the father received for the aid. And if the father's goods be not sufficient, his heir shall be charged therewith unto the daughter.

1 Edw. III. St. 2 (1326), c. 12. Whereas divers people of the realm complain themselves to be grieved, because that lands and tenements which be holden of the king in chief, and aliened without licesse, have been seized heretofore into the king's lands, and holden as forfeit; the king shall not hold them as forfeit in such case, but will and grant from henceforth, of such lands and tenements so aliened, there shall be reasonable fine taken in the Chancery, by due process.¹

¹ "The tenant originally could not alien his fee without the license of the lord, for granting which a fine or payment was charged. The statute *Quia emptores* enabled

25 EDW. III. ST. OF PURVEYORS (1351). Reasonable aid to make the king's eldest son knight, and to marry his eldest daughter, shall be demanded and levied after the form of the statute thereof made and not in other manner; that is to say, of every fee holden of the king, without mean, twenty shillings and no more, and of every twenty pound of land holden of the king without mean in socage, twenty shillings and no more.

LIT. §§ 85, 90-93, 95, 97. Homage is the most honorable service, and most humble service of reverence that a franktenant may do to his lord. For when the tenant shall make homage to his lord he shall be ungirt and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: I become your man (*Jeo deveigne vostre home*) from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king; and then the lord so sitting shall kiss him.

Note, none shall do homage but such as have an estate in fee simple, or fee tail, in his own right, or in the right of another, for it is a maxim in law, that he which hath an estate but for term of life, shall neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee tail, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shall do homage, because he hath title to have the tenements by the curtesy of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himself in as tenant by the curtesy, then he shall not do homage to his lord, because he then hath an estate but for term of life.

More shall be said of homage in the tenure of homage ancestral.

Fealty is the same that *fidelitas* is in Latin. And when a freeholder doth fealty to his lord, he shall hold his right hand upon a book, and shall say thus: Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and his saints; and he shall kiss the book. But he shall not kneel when he maketh his fealty, nor shall make such humble reverence as is afore-said in homage.

And there is great diversity between the doing of fealty and of hom-tenants to alien without license; but this statute did not extend to the tenants *in capite* of the Crown. The claim of the Crown was afterwards settled by statute at a reasonable fine, which was adjudged to be one third of the yearly value for license, and one year's value upon alienation without license. 18 Edw. I. c. 1; 1 Edw. III. c. 12; 34 Edw. III. c. 15; Co. Lit. 43 a, b; 2 Inst. 67." — Leake, Dig. Land Law, 28.

age : for homage cannot be done to any but to the lord himself ; but the steward of the lord's court, or bailiff, may take fealty for the lord.

Also, tenant for term of life shall do fealty, and yet he shall not do homage. And divers other diversities there be between homage and fealty.

Escuage is called in Latin *scutagium*, that is, service of the shield ; and that tenant which holdeth his land by escuage, holdeth by knight's service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the half of a knight's fee. And it is said that when the king makes a voyage royal into Scotland to subdue the Scots, then he which holdeth by the service of one knight's fee ought to be with the king forty days, well and conveniently arrayed for the war. And he which holdeth his land by the moiety of a knight's fee ought to be with the king twenty days ; and he which holdeth his land by the fourth part of a knight's fee ought to be with the king ten days ; and so he that hath more, more, and he that hath less, less.

And after such a voyage royal into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certain ; *scil.*, a certain sum of money, how much every one, which holdeth by a whole knight's fee, who was neither by himself, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case that it was ordained by the authority of the parliament, that every one which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord forty shillings ; then he which holdeth by the moiety of a knight's fee shall pay to his lord but twenty shillings ; and he which holdeth by the fourth part of a knight's fee shall pay but ten shillings ; and he which hath more, more, and which less, less.

Co. Lit. 72 *b*. No escuage was assessed by parliament since the reign of Edward II., and in the eighth year of his reign escuage was assessed.

Lit. §§ 98, 100, 103, 110–112. And some hold by the custom, that if escuage be assessed by authority of parliament at any sum of money, that they shall pay but the moiety of that sum, and some but the fourth part of that sum. But because the escuage that they should pay is uncertain, for that it is not certain how the parliament will assess the escuage, they hold by knight's service. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.

And it is to be understood that when escuage is so assessed by authority of parliament, every lord, of whom the land is holden by escuage, shall have the escuage so assessed by parliament ; because it is intended by the law that at the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.

Tenure by homage, fealty, and escuage is to hold by knight's service

(*per service de chivaler*), and it draweth to it ward (*gard*), marriage, and relief. For when such tenant dieth, and his heir male be within the age of twenty-one years, the lord shall have the land holden of him until the age of the heir of twenty-one years; the which is called full age, because such heir, by intendment of the law, is not able to do such knight's service before his age of twenty-one years. And also if such heir be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him. But if such tenant dieth, his heir female being of the age of fourteen years or more, then the lord shall not have the wardship of the land, nor of the body; because that a woman of such age may have a husband able to do knight's service. But if such heir female be within the age of fourteen years, and unmarried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heir female of sixteen years; for it is given by the statute of W[estm]. I. cap. 22, that by the space of two years next ensuing the said fourteen years, the lord may tender covenable marriage without disparagement to such heir female. And if the lord within the said two years do not tender such marriage, &c., then she at the end of the said two years may enter, and put out her lord. But if such heir female be married within the age of fourteen years, in the life of her ancestor, and her ancestor dieth, she being within the age of fourteen years, the lord shall have only the wardship of the land until the end of the fourteen years of age of such heir female, and then her husband and she may enter into the land and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender marriage to her which is married, &c. For before the said statute of W[estm]. I. such issue female, which was within the age of fourteen years at the time of the death of her ancestor, and after she had accomplished the age of fourteen years, without any tender of marriage by the lord unto her, such heir female might have entered into the land and ousted the lord, as appeareth by the rehearsal and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is always intended by the words of the same statute, that the lord shall not have these two years after the fourteen years, as is aforesaid, but where such heir female is within the age of fourteen years, and unmarried at the time of the death of her ancestor.

And of heirs males which be within the age of twenty-one years after the decease of their ancestor, and not married, in this case the lord shall have the marriage of such heir, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of twenty-one years. And it is to be understood that the heir in this case may choose whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heir covenable marriage within the age of twenty-one years without disparagement, and the heir refuseth this, and doth not marry himself within the said age, then the guardian shall have the value of the marriage of such heir

male. But if such heir marrieth himself within the age of twenty-one years, against the will of the guardian in chivalry, then the guardian shall have the double value of the marriage by force of the statute of Merton aforesaid, as in the same statute is more fully at large comprised.¹

Also divers tenants hold of their lords by knight's service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a door or some other place of the castle, upon reasonable warning, when their lords hear that the enemies will come, or are come in England. And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeanty. But in all cases where a man holds by knight's service, this service draweth to the lord ward and marriage.

And if a tenant which holdeth of his lord by the service of a whole knight's fee dieth, his heir then being of full age, *scil.*, of twenty-one years, then the lord shall have 100s. for a relief, and of the heir of him which holds by the moiety of a knight's fee, 50s., and of him which holds by the fourth part of a knight's fee, 25s.; and so he which holds more, more, and which less, less.

Co. Lit. 77 a. When an heir hath been in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is half a year's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole year's profit for *primer seisin*; but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesy, or tenant for life, then he shall pay but the moiety of one year's profit.

If the heir be in ward by reason of a tenure of an honor or manor (except as before), he shall not sue livery, but an *ouster le maine cum exitibus*, albeit he never made tender. And if he be of full age, the king shall have no *primer seisin*, but relief. But where the tenure is *in capite*, there the king shall have the mean profits until the tender be made; and if the tender be made, and not duly pursued, the king shall also have all the mean profits.

Lit. §§ 143, 147, 153. Tenant by homage ancestral is, where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heir he is, have holden the same land of the same lord and of his ancestors, whose heir the lord is, time out of memory of man, by homage, and have done to them homage. And this is called homage ancestral, by reason of the continuance, which hath been, by title of prescription, in the tenancy in the blood of the tenant, and also in the seigniorship in the blood of the lord. And such service of homage ancestral draweth to it warranty, that is to say, that the lord which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestral.

¹ See *Palmer's Case*, 5 Co. 126 b.; *Darey's Case*, 6 Co. 70 b.

Also, if a man which holds his land by homage ancestral alien to another in fee, the alienee shall do homage to his lord; but he holdeth not of his lord by homage ancestral, because the tenancy was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warranty of the land of his lord; because the continuance of the tenancy in the tenant and to his blood by the alienation is discontinued. And so see that if the tenant which holdeth his land of his lord by homage ancestral alieneth in fee, though he taketh an estate again of the alienee in fee, yet he holds the land by homage, but not by homage ancestral.

Tenure by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king, by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service than the service in the tenure of escuage. For he, which holdeth by escuage, is not limited by his tenure to do any more especial service than any other which holdeth by escuage, ought to do. But he, which holdeth by grand serjeanty, ought to do some special service to the king, which he that holds by escuage ought not to do.

Co. Lit. 105 b. This tenure hath seven special properties, — 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certain and particular. 4. The relief due in respect of this tenure differeth from knight's service. 5. It is to be done within the realm. 6. It is subject to neither *aid pur faire fitz chivaler*, or *file marier*. And, 7, It payeth no escuage.

Lit. §§ 154, 156. Also, if a tenant which holds by escuage dieth, his heir being of full age, if he holdeth by one knight's fee, the heir shall pay but 100s. for relief, as is ordained by the statute of Magna Charta, c. 2. But if he which holdeth of the king by grand serjeanty dieth, his heir being of full age, the heir shall pay to the king for relief one year's value of the lands or tenements which he holdeth of the king by grand serjeanty over, and besides all charges and reprises. And it is to be understood that *serjeantia* in Latin is the same *quod servitium*, and so *magna serjeantia* is the same *quod magnum servitium*.

Also, it is said that in the marches of Scotland some hold of the king by cornage, that is to say, to wind a horn to give men of the country warning when they hear that the Scots or other enemies are come or will enter into England; which service is grand serjeanty. But if any tenant hold of any other lord than of the king by such service of cornage, this is not grand serjeanty, but it is knight's service, and it draweth to it ward and marriage; for none may hold by grand serjeanty but of the king only.

Co. Lit. 13 a. *Escheate, eschæta*, is a word of art, and derived from

the French word *escheat* (*id est*) *cadere, excidere, or accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore of some, *escheats* are called *excadentiæ* or *terræ excadentiales*. *Dominus vero capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cri per modum donationis fit reversio cujusque tenementi.* And Ockam (who wrote in the reign of Henry II.), treating of tenures of the king, saith, *porro eschætoe vulgo dicuntur, quæ decedentibus hiis qui de rege tenent, &c. cum non existit ratione sanguinis hæres, ad fiscum relabuntur.* So as an escheat doth happen two manner of ways, *aut per defectum sanguinis*, i. e. for default of heir, *aut per delictum tenentis*, i. e. for felony, and that is by judgment three manner of ways, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.* And, therefore, they which are hanged by martial law in *furorè belli* forfeit no lands; and so in like cases escheats by the civilians are called *caduca*.

The father is seised of lands in fee holden of *I. S.*; the son is attainted of high treason; the father dieth; the land shall escheat to *I. S.* *propter defectum sanguinis*, for that the father died without heir. And the king cannot have the land, because the son never had anything to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

SECTION IV.

SOCAGE TENURE.

LIT. §§ 117, 118, 120, 121, 123, 126–129. Tenure in socage is where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certain rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itself maketh not knight's service.

Also, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalry, is a tenure in socage.

Also, if a man holdeth of his lord by escuage certain, *scil.* in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but half a mark for escuage, and no more nor less, to how great a sum, or to how little the escuage runneth, &c., such tenure is tenure in socage, and not

knight's service. But where the sum which the tenant shall pay for escuage is uncertain, *scil.* where it may be that the sum that the tenant shall pay for escuage to his lord may be at one time more and at another time less, according as it is assessed, &c., such tenure is tenure by knight's service.

Also, if a man holdeth his land to pay a certain rent to his lord for castle-guard, this tenure is tenure in socage. But where the tenant ought by himself or by another to do castle-guard, such tenure is tenure by knight's service.

Also, in such tenures in socage, if the tenant have issue and die, his issue being within the age of fourteen years, then the next friend (*le prochain amy*) of that heir, to whom the inheritance cannot descend (*a que le heritage ne poet descender*), shall have the wardship of the land and of the heir until the age of fourteen years, and such guardian is called guardian in socage. For if the land descend to the heir of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heir of the part of the mother, then the father, or next friend of the part of the father, shall have the wardship of such lands or tenements. And when the heir cometh to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself if he will. And such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir when it pleaseth the heir, after he accomplisheth the age of fourteen years. But such guardian upon his account shall have allowance of all his reasonable costs and expenses in all things, &c. And if such guardian marry the heir within age of fourteen years, he shall account to the heir or his executors of the value of the marriage, although that he took nothing for the value of the marriage; for it shall be accounted his own folly that he would marry him without taking the value of the marriage, unless that he marrieth him to such a marriage that is as much worth in value as the marriage of the heir.

Also, the lord of whom the land is holden in socage, after the decease of his tenant, shall have relief in this manner. If the tenant holdeth by fealty and certain rent to pay yearly, &c., if the terms of payment be to pay at two terms of the year, or at four terms in the year, the lord shall have of the heir his tenant as much as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and ten shillings rent payable at certain terms of the year, then the heir shall pay to the lord ten shillings for relief, beside the ten shillings which he payeth for the rent.

And in this case, after the death of the tenant, such relief is due to the lord presently, of what age soever the heir be; because such lord cannot have the wardship of the body nor of the land of the heir. And the lord in such case ought not to attend for the payment of his relief, according to the terms and days of payment of the rent; but he is to

have his relief presently, and therefore he may forthwith distrain after the death of his tenant for relief.

In the same manner it is, where the tenant holdeth of his lord by fealty and a pound of pepper or cummin, and the tenant dieth, the lord shall have for relief a pound of cummin or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearly a number of capons or hens, or a pair of gloves, or certain bushels of corn, or such like.

But in some case the lord ought to stay to distrain for his relief until a certain time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distrain for his relief until the time that roses by the course of the year may have their growth, &c. And so of the like.

Co. Litt. 77 a. He that holdeth of the king by socage in chief, and dieth, his heir of full age, the king shall have livery and *primer seisin* only of the lands so holden, and not of the lands holden of others. But if the heir of such a tenant in socage in chief be within the age of fourteen at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after; and the reason thereof is, for that the custody of his body and lands in that case belong to the *prochein amy*, as guardian in socage. Neither shall the king have *primer seisin* of lands holden in burgage (as some have said), for that it is no tenure *in capite*.

LIT. §§ 130-132, 159-165, 265. Also, if any will ask why a man may hold of his lord by fealty only for all manner of services, inso-much as when the tenant shall do his fealty, he shall swear to his lord that he will do to his lord all manner of services due, and when he hath done fealty, in this case no other service is due. To this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heirs ought to do no manner of service to his lord nor his heirs, then by long continuance of time it would grow out of memory, whether the land were holden of the lord or of his heirs, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heirs, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heirs have some service done unto them, to prove and testify that the land is holden of them.

And for that fealty is incident to all manner of tenures, but to the tenure in frankalmoign (as shall be said in the tenure of frankalmoign), and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty only; and when he hath done his fealty, he hath done all his services.

Also, if a man letteth to another lands or tenements for term of life,

without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for term of years, it is said that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of waste, when the lessor hath cause to bring a writ of waste against him; which writ shall say, that the lessee holds his tenements of the lessor for term of years. So the writ proves a tenure between them. But he which is tenant at will according to the course of the common law, shall not do fealty, because he hath not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custom; and the other is, for that he taketh his estate in such form to do his lord fealty.

Tenure by petit serjeanty is, where a man holds his land of our sovereign lord the king to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.

And such service is but socage in effect; because that such tenant by his tenure ought not to go, nor do anything, in his proper person, touching the war, but to render and pay yearly certain things to the king, as a man ought to pay a rent.

And note, that a man cannot hold by grand serjeanty, nor by petit serjeanty, but of the king, &c.

Tenure in burgage is where an ancient borough is, of which the king is lord, and they that have tenements within the borough hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certain rent by year, &c. And such tenure is but tenure in socage.

And the same manner is, where another lord, spiritual or temporal, is lord of such a borough, and the tenants of the tenements in such a borough hold of their lord to pay each of them yearly an annual rent.

And it is called tenure in burgage, for that the tenements within the borough be holden of the lord of the borough by certain rent, &c. And it is to wit that the ancient towns called boroughs be the most ancient towns that be within England; for the towns that now be cities or counties, in old time were boroughs, and called boroughs; for of such old towns called boroughs come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

Also, for the greater part such boroughs have divers customs and usages which be not had in other towns. For some boroughs have such a custom that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called borough English.

Parceners by the custom are, where a man seised in fee simple or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent, and hath issue divers sons and die, such

lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.

2 BL. COM. 84. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind (though it was and is to be found in some other parts of the kingdom), we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman Conquest was the general custom of the realm. The distinguishing properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to alien his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "The father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together; which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain.¹

¹ ANCIENT DEMESNE. "There is great confusion in the law books respecting this tenure. All agree that it exists in those manors, and in those only, which belonged to the Crown in the reign of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis*. But the copyholders of these manors are sometimes considered tenants in Ancient Demesne, and land held in ancient demesne is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders of the manor who are truly tenants in ancient demesne, and land held in ancient demesne passes by common law conveyances without the instrumentality of the lord. The copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not hold of the manor. They form the Customary Court. The Court of Ancient Demesne, which is analogous to the Court Baron, is constituted by those who hold in socage of the lord of the manor. . . . The tenants in ancient demesne, properly so called, were made subject to certain restraints and entitled to certain immunities, which produce serious inconveniences at the present day. They were forbidden to bring or to defend any real action touching their tenements, except in the lord's court; and they were exempted from serving on juries elsewhere, and from paying toll in any part of England."—Third Report of Commissioners on the Law of Real Property, 12, 13.

SECTION V.

FRANKALMOIGN.

LIT. §§ 133, 135, 137, 139, 140, 141. Tenant in frankalmoign is, where an abbot, or prior, or another man of religion, or of holy church, holdeth of his lord in frankalmoign; that is to say, in Latin, *in liberam eleemosinam*, that is, in free alms. And such tenure began first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successors in pure and perpetual alms, or in frankalmoign; (or by such words to hold of the grantor, or of the lessor, and his heirs in free alms :) in such case the tenements were holden in frankalmoign.

And they, which hold in frankalmoign, are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor, and for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord; because that this divine service is better for them before God, than any doing of fealty; and also because that these words (frankalmoign) exclude the lord to have any earthly or temporal service, but to have only divine and spiritual service to be done for him, &c.

But if an abbot, or prior, holds of his lord by a certain divine service, in certain to be done, as to sing a mass every Friday in the week, for the souls, *ut supra*, or every year at such a day to sing a *placebo et dirige*, &c., or to find a chaplain to sing a mass, &c., or to distribute in alms to an hundred poor men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distrain, &c., because the divine service is put in certain by their tenure, which the abbot or prior ought to do. And in this case the lord shall have fealty, &c., as it seemeth. And such tenure shall not be said to be tenure in frankalmoign, but is called tenure by divine service. For in tenure in frankalmoign no mention is made of any manner of service; for none can hold in frankalmoign, if there be expressed any manner of certain service that he ought to do, &c.

And if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seal alien the same tenements to a secular man in fee simple, in this case the secular man shall do fealty to the lord; because he cannot hold of his lord in frankalmoign. For if the lord should not have fealty of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

Also, if a man grant at this day to an abbot or to a prior lands or tenements in frankalmoign, these words (frankalmoign) are void ; for it is ordained by the statute which is called *Quia emptores terrarum* (which was made *anno* 18 E. I.) that none may alien nor grant lands or tenements in fee simple to hold of himself. So that if a man seised of certain tenements, which he holdeth of his lord by knight's service, and at this day he, &c., granteth by license the same tenements to an abbot, &c., in frankalmoign, the abbot shall hold immediately the tenements by knight's service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoign, by reason of the same statute. So that none can hold in frankalmoign, unless it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoign, or by other services ; for he is out of the case of that statute.

And note, that none may hold lands or tenements in frankalmoign but of the grantor, or of his heirs. And therefore it is said, that if there be lord, mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoign, if the mesne die without heir the mesnaltie shall come by escheat to the said lord paramount, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty ; because he cannot hold of him in frankalmoign, &c.

SECTION VI.

ABOLITION OF MILITARY TENURES.

ST. 12 CAR. II. (1660) c. 24.

An Act taking away the Court of Wards and Liveries and Tenures in Capite, and by Knight-Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof.

Whereas it hath been found by former experience that the Court of Wards and Liveries and tenures by knight-service either of the king or others, or by knight-service *in capite*, or soeage *in capite* of the king, and the consequents upon the same, have been much more burthen-some, grievous and prejudicial to the kingdom than they have been beneficial to the king ; and whereas since the intermission of the said court, which hath been from the four and twentieth day of February, which was in the year of our Lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight-service, whereupon divers questions might possibly arise unless some seasonable remedy be taken to prevent the same ; be it therefore enacted by the King our Sovereign Lord, with the assent of the Lords and Commons in Parliament assembled, and by the authority of the same, and it is hereby enacted, That the Court of Wards

and Liveries, and all wardships, liveries, primer seisins and *ousterlemains*, values and forfeitures of marriages, by reason of any tenure of the King's Majesty, or of any other by knight-service, and all mean rates, and all other gifts, grants, and charges, incident or arising for or by reason of wardships, liveries, primer seisins, or *ousterlemains* be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty-five; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: And that all fines for alienations, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising for or by reason of wardship, livery, primer seisin, or *ousterlemain*, or tenure by knight-service, escuage, and also *aide pur file marrier, et pur faire fitz chivalier*, and all other charges incident thereunto, be likewise taken away and discharged from the said twenty-fourth day of February one thousand six hundred forty and five: any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: And that all tenures by knight-service of the king, or of any other person, and by knight-service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding: And all tenures of any honours, manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politick or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February one thousand six hundred forty-five, and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February one thousand six hundred forty-five, and for ever hereafter, turned into free and common socage; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

2. And that the same shall for ever hereafter stand and be discharged of all tenure by homage, escuage, voyages royal, and charges for the same, wardships incident to tenure by knight's-service, and values and forfeitures of marriage, and all other charges incident to tenure by knight-service, and of and from *aide pur file marrier*, and *aide pur faire fitz chivalier*; any law, statute, usage, or custom to the contrary in any wise notwithstanding. And that all conveyances and devises of any manors, lands, tenements, and hereditaments, made since the said twenty-fourth day of February, shall be expounded to be of such effect as if the same manors, lands, tenements, and hereditaments had been then held and continued to be holden in free and common socage only; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

3. And be it further ordained and enacted by the authority of this present Parliament, That one Act made in the reign of King Henry the

Eighth, intituled An Act for the Establishment of the Court of the King's Wards; and also one Act of Parliament made in the thirty-third year of the reign of the said King Henry the Eighth, concerning the officers of the Courts of Wards and Liveries, and every clause, article, and matter in the said Acts contained, shall from henceforth be repealed and utterly void.

4. And be it further enacted by the authority aforesaid, That all tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight-service, or *in capite*, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, *ousterlemain*, *aide pur faire fitz chivalier* and *pur file marrier*; any law, statute, or reservation to the contrary thereof in any wise notwithstanding.

5. Provided nevertheless, and be it enacted, That this Act, or anything herein contained, shall not take away, nor be construed to take away, any rents certain, heriots, or suits of court, belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident or belonging to tenure in common socage due or to grow due to the King's Majesty, or mean lords, or other private person, or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common socage.

6. Provided always, and be it enacted, That anything herein contained shall not take away, nor be construed to take away, any fines for alienation due by particular customs of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*.

7. Provided also, and be it further enacted, That this Act, or anything herein contained, shall not take away, or be construed to take away, tenures in frankalmoign, or to subject them to any greater or other services than they now are; nor to alter or change any tenure by copy of court-roll, or any services incident thereunto; nor to take away the honorary services of grand serjeanty, other than of wardship, marriage, and value of forfeiture of marriage, escuage, voyages royal, and other charges incident to tenure by knight-service; and other than *aide pur faire fitz chivalier*, and *aide pur file marrier*.

TENANCY IN CAPITE. "Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and therefore when an honor or other seignory came into the hands of the Crown by escheat or otherwise, its tenants were as much tenants *in chief* to the king as those who were so by original grant from the Crown. In proof of this Mr. Madox selects from ancient records a great variety of instances between the 8th of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are expressly styled tenures *in capite*; and as Mr. Madox adds no instances of a later time than

Henry the Eighth and Queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured, that the error complained of by Mr. Madox originated soon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of *tenures in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject; between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de corona*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy *in capite* is very evident, as well throughout the statute of Charles the Second for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the Crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, Lord Coke is excusable or conforming in his language to it; because before his time it had been adopted by the legislature. See 37 H. 8 c. 20 s. 2, 3, 4. 1 E. 6 c. 4 s. 1, 2, & 3, and Mad. Baron. Angl. 233."—Hargrave's note to Co. Lit. 108a.

TENURE IN THE UNITED STATES. Land in the colony of Virginia was holden of the king as of the "manor of East-Greenwich, in the county of Kent, in free and common socage only, and not *in capite*." Lucas, Chart. 8, 12, 22; so in Massachusetts, Id. 36, 75; so in Connecticut, Id. 54; so in Rhode Island, Id. 65. Land in Maryland was holden of the king as of the castle of Windsor, in the county of Berks, "in free and common socage, by fealty only, for all services, and not *in capite*, or by knight's service;" yielding annually "two Indian arrows of those parts." Id. 90. And the proprietary could grant land to be held of himself, the statute of *Quia emptores* notwithstanding. Id. 95. So in Pennsylvania, yielding "two beaver skins." Id. 101, 106. Land in Georgia was to be held of the king as of the manor of Hampton Court, in the county of Middlesex, in free and common socage, and not *in capite*, at a money rent. Id. 117.

"Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation (1 Kent, 473, and cases cited in note *a* to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178; and when the first Constitution of this State came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this State, subject, of course, to alteration by the legislature. (Art. 35.) The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the king was not within the statute *Quia emptores*, a certain tenure, which, after the act of 12 Charles II. (ch. 24) abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I. (*The People v. Van Rensselaer*, 5 Seld. 334.) But with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787. A

contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his Treatise upon Tenures." Per DENIO, J., in *Van Rensselaer v. Hays*, 5 N. Y. 68, 73.

See Gray, Perpetuities, §§ 22-23.

CHAPTER II.

ESTATES.¹

SECTION I.

FEE-SIMPLE.

LIT. §§ 1, 2. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful, or pure. And so *feodum simplex* signifies a lawful or pure inheritance. *Quia feodum idem est quo hæreditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas pura.* For if a man would purchase lands or tenements in fee-simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assigns for ever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree (*de quel plus long degree qu'il soit*), may inherit and have the land as heir to him.²

¹ "It is to be known that a freehold is that which one holds to himself and his heirs in fee and inheritance, or in fee only to himself and his heirs. So also it is a freehold if one holds for life only or in the same way for an indeterminate time, without any certain limit of time; to wit, until something is done or not done, as if it is said, I give to such a one until I shall provide for him. But that cannot be called a freehold which one holds for a certain number of years, months, or days, although for a term of a hundred years which exceeds the lives of men. So that cannot be called a freehold which one holds at the will of his lords, which can be seasonably and unseasonably revoked, as from year to year, and from day to day." Bract. lib. 4, c. 28, fol. 207.

² "In the most ancient time [the feud] was so entirely in the power of the lords that when they wished they could take away a thing given by them as a feud. But afterwards they came to be good for a year only. Then it was determined that it should be continued for the life of the vassal; but since this by right of succession did not belong to sons, it was so extended that it did pass to sons; to whom [*in quem*], to wit,

the lord was willing to give this benefice. Which to-day is so established, that it comes equally to all. But when Conrad was starting for Rome, the vassals who were in his service, prayed that by a law promulgated by him, he would deign to extend this from son to grandsons, and that a brother might succeed to a brother who had died without lawful heir in a benefice which was their fathers'. But if one of two brothers has received a feud from his lord, upon his death without lawful heir his brother does not succeed to the feud, because although they have received in common [*quod etsi communiter acceperint*], one does not succeed the other, unless it has been expressly so said, to wit, that upon the death of one without lawful heir, the other shall succeed; but if there is an heir, the other brother shall not take. . . . This also should be known that a benefice does not pass by succession to collateral relations beyond first consins, according to the practice established by the ancient sages, although in modern times it has been carried to the seventh generation, which in male descendants is extended by the new law indefinitely." Lib. Feud. lib. 1, tit. 1, §§ 1, 2, 4.

"When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seized of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. . . .

"However, in process of time, when the feodal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchaser: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

"Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*: unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but *every grant of lands in fee-simple is with us a feudum novum to be held ut antiquum, as a feud whose antiquity is indefinite*: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance." 2 Bl. Com. 221, 222.

SECTION II.

FEE-TAIL.

Co. Lit. 19 a. Before which statute of *Donis conditionalibus*, if land had been given to a man, and to the heirs males of his body, the having of an issue female had been no performance of the condition; but if he had issue male, and died, and the issue male had inherited, yet he had not had a fee simple absolute; for if he had died without issue male, the donor should have entered as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien; Secondly, to forfeit; Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue: for if the donee had issue and died, and the land had descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir should not have inherited, because he was not within the form of the gift, viz., heir of the body of the donee. Lands were given before the statute in frank-marriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collateral issue shall not inherit, but the donor shall re-enter. So note, that the heir in tail had no fee simple absolute at the common law, though there were divers descents.

If lands had been given to a man and to his heirs males of his body, and he had issue two sons, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger son *per formam doni*. And so if land had been given at the common law to a man and the heirs females of his body, and he had issue a son and a daughter, and died, the daughter should have inherited this fee simple at the common law; for the statute of *Donis conditionalibus* createth no estate tail, but of such an estate as was fee simple at the common law, and is descendible in such form as it was at the common law. If the donee in tail had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

If donee in tail at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to bar the possibility of the donor.¹

¹ See *Barksdale v. Gamage*, 3 Rich. Eq. 271.

ANONYMOUS.

CORNISH ITER. 1302.

[*Reported Fitz. Ab. Formedon, 65.*]

FORMEDON in reverter because the donee died without issue. *Asseby*. The donee alienated before the statute and had issue. *Heyham*. He had no issue when he made the alienation. *Asseby*. It may be that he had no issue when he aliened, but that he had issue afterwards, and then is the alienation good. *Heyham*. No. *Asseby*. He had had issue. THE JUSTICES. It is nothing to the point, if he had had issue alive when he aliened, for there might have been issue, and the issue might have died before the alienation; by that alienation will not the plaintiff be barred. *Asseby*. He had issue alive when he made alienation; and the others *contra*.¹

ANONYMOUS.

CORNISH ITER. 1302.

[*Reported Fitz. Ab. Formedon, 66.*]

FORMEDON in reverter, and he counted that he made the gift to one C. with his daughter in frank marriage, and that they are dead without issue. *Hunt*. The tenements were given before the Statute to the said C. and A., and after the death of C. the tenant that now is took the said A. to wife and had issue, which is alive, and so he holds by the law of England. *Middleton*. The said A. died after the Statute, wherefore we pray judgment if he can claim by the courtesy. BRUMPTON. It is found that the tenements were given before the Statute to C. and A., and that the tenant that now is, is the second husband of A., and before the Statute in such case the second husband will hold by the law of England; and this appears by the Statute which has restrained this and says *nec secundus vir*, &c.; wherefore this court adjudges that he shall hold these tenements for his life, and after his death the demandant shall have them.²

¹ *Barksdale v. Gamage*, 3 Rich. Eq. 271, *contra*.

² "And at the common law there was no estate of inheritance but what was fee simple. But these estates in fee simple were of two sorts, the one absolute, and the other conditional, as hath been said. And the fee simple conditional was, where land was given to a man to the heirs of his body begotten, and herein the abuse was after issue had rather than before issue had. For before issue had if he had aliened, this should not have bound the issues had afterwards, nor the donor if there had been no issue, for until issue had the donee had no power to alien, though he had after issue. For when the

ST. 13 EDW. I. ; ST. OF WESTM. II. (1285) c. 1 ; DE DONIS CONDI-
 TIONALIBUS. First, concerning lands that many times are given upon con-
 dition, that is, to wit, where any giveth his land to any man and his
 wife, and to the heirs begotten of the bodies of the same man and his
 wife, with such condition expressed that if the same man and his wife
 die without heir of their bodies between them begotten, the land so
 given shall revert to the giver or his heir; in case also where one giv-
 eth lands in free marriage, which gift hath a condition annexed, though
 it be not expressed in the deed of gift, which is this, that if the hus-
 band and wife die without heir of their bodies begotten, the land so
 given shall revert to the giver or his heir; in case also where one giveth
 land to another and the heirs of his body issuing, it seemed very hard
 and yet seemeth to the givers and their heirs, that their will being ex-
 pressed in the gift was not heretofore nor yet is observed. In all the
 cases aforesaid after issue begotten and born between them, to whom
 the lands were given under such condition, heretofore such feoffees had
 power to aliene the land so given, and to disinherit their issue of the
 land, contrary to the minds of the givers, and contrary to the form ex-
 pressed in the gift: and further, when the issue of such feoffee is fail-
 ing, the land so given ought to return to the giver or his heir by form
 of gift expressed in the deed, though the issue, if any were, had died;
 yet by the deed and feoffment of them, to whom land was so given
 upon condition, the donors have heretofore been barred of their rever-
 sion of the same tenements which was directly repugnant to the form
 of the gift: wherefore our lord the king, perceiving how necessary and
 expedient it should be to provide remedy in the aforesaid cases, hath
 ordained, that the will of the giver according to the form in the deed of
 gift manifestly expressed shall be from henceforth observed, so that
 they to whom the land was given under such condition shall have no
 power to aliene the land so given, but that it shall remain unto the issue
 of them to whom it was given after their death, or shall revert unto the
 giver or his heirs if issue fail, either by reason that there is no issue at
 all, or if any issue be, it fail by death, the heir of such issue failing.

gift was to one and to the heirs of his body, they took it that he could not lawfully
 alien until he had such heirs, and that if he did alien, the donor (although he could
 not enter presently) after the death of the donee, if he had no issue, might have a
fermedon in reverter. For the gift being to one and to the heirs of his body, they
 adjudged it not to be a full fee-simple until he had heirs of his body, for when it was
 uncertain whether he should have an heir of his body or not, they did not take him to
 have a full inheritance. And therefore the law was taken in such case, that if the gift
 was to husband and wife, and to the heirs of their two bodies begotten, and the hus-
 band had died before issue had, and the wife had taken a second husband, and had
 issue, there the second husband should not be tenant by the curtesy, nor should their
 issue inherit, and if the wife had died, the second wife of the husband should not be
 endowed; for until such heir as the donor had appointed was begotten, they took it
 that the inheritance was not consummate in him." Per BROWN, J., in *Willion v.*
Berkley, Plowd. 223, 245, 246.

See *Paine's Case*, 8 Co., 34 a, 35 b; Co. Lit. 19 a, Hargrave's note.

Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it: "*Command A. that justly, &c., he render to B. the manor of F. with its appurtenances, which C. gave to such a man, and such a woman, and to the heirs of the said man and woman issuing;*" or, "*which C. gave to such a man in free marriage with such a woman, and which, after the death of the aforesaid man and woman, to the aforesaid B., son of the aforesaid man and woman, ought to descend, by the form of the gift aforesaid, as he saith;*" or, "*which C. gave to such a one and the heirs of his body issuing, and which after the death of the said such a one, to the aforesaid B., son of the aforesaid such a one, ought to descend, by the form, &c.*" The writ whereby the giver shall recover when issue faileth is common enough in the Chancery. And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

LIT. §§ 13-19, 21-24. Tenant in fee tail is by force of the statute of W[estm]. II. c. 1, for before the said statute all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute tenant in tail is in two manners, — that is to say, tenant in tail general, and tenant in tail special.

Tenant in tail general is, where lands or tenements are given to a man and to his heirs of his body begotten. In this case it is said general tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives, and by every of them hath issue), yet every one of these issues by possibility may inherit the tenements by force of the gift; because that every such issue is of his body engendered.

In the same manner it is where lands or tenements are given to a woman and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by every husband may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.

Tenant in tail special is, where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called especial tail, because if the wife die, and he taketh another wife and have issue, the issue of the

second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

In the same manner it is where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmarriage, the which gift hath an inheritance by these words (frankmarriage) annexed unto it, although it be not expressly said or rehearsed in the gift, — that is to say, that the donees shall have the tenements to them and to their heirs between them two begotten. And this is called especial tail, because the issue of the second wife may not inherit.

And note, that this word (*Talliare*) is the same as to set to some certainty or to limit to some certain inheritance. And for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin *feodum talliatum*; i. e., *hæreditas in quandam certitudinem limitata*. For if tenant in general tail dieth without issue, the donor or his heirs may enter as in their reversion.

In the same manner it is of the tenant in especial tail, &c. For in every gift in tail without more saying the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor and to his heirs the like services as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past, and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

And all these entails aforesaid be specified in the said statute of W[estm]. II. Also there be divers other estates in tail, though they be not by express words specified in the said statute, but they are taken by the equity of the same statute. As if lands be given to a man and to his heirs males of his body begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entails aforesaid it is otherwise.

In the same manner it is if lands or tenements be given to a man and to his heirs females of his body begotten; in this case his issue female shall inherit by force and form of the said gift, and not his issue male. For in such cases of gifts in tail the will of the donor ought to be observed who ought to inherit and who not.

And in case where lands or tenements be given to a man and to the heirs males of his body, and he hath issue two sons, and dieth, and the eldest son enter as heir male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails which are specified in the said statute.

Also, if lands be given to a man and to the heirs males of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die; in this case the son of the daughter shall not in-

herit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs males ought to convey his descent whole by the heirs males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himself the descent by an heir male.

NOTE ON WARRANTY AND ON FINES AND RECOVERIES. The object of the *St. De Donis* was to prevent the alienation of entailed estates. The history of the mode in which this object was defeated is curious. (1) It was held that if any one whose heir a tenant in tail was had warranted the estate to a stranger, such tenant was barred if assets had descended on him from the warrantor; and where the warranty had been given by one from whom the estate tail could not possibly have descended, as a younger brother, the tenant in tail was barred without assets. Warranty of this latter sort was called collateral warranty. The principal rules governing lineal and collateral warranty are given in the sections quoted below from Littleton. (2) The courts allowed a collusive suit to be brought by the one to whom a tenant in tail wished to convey the land; and a judgment in this suit, which was called a common recovery, barred not only the issue in tail, but also all reversioners and remainder-men, except the Crown. The validity of common recoveries to disentail land seems to have been first judicially recognized in *Taltarum's Case*, Y. B. 12 Edw. IV. 19 (1473). (3) The Sts. of 4 Hen. VII. (1490) c. 24, and 32 Hen. VIII. (1540) c. 36, gave the same general effect to fines, which were another and very ancient species of collusive suit, as had been given to common recoveries. A fine levied with proclamations, in accordance with the provisions of those statutes, bound immediately all persons claiming under the cognizor, as the person levying the fine was called, and bound, unless claim was made within five years, all other persons except the Crown.

Simpler methods of docking entails have been adopted in recent times. In most of the United States, estates tail have been abolished. See Stimson, *Am. Stat. Law*, § 1313.

The fuller discussion of the barring of estates tail does not belong here; but for convenience of reference are subjoined: (1) sections of Littleton on lineal and collateral warranty; (2) the Statutes of Fines, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36; (3) the forms of a fine and of a recovery.

LIT. §§ 143, 145. Tenant by homage ancestral is, where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heir he is, have holden the same land of the same lord and of his ancestors, whose heir the lord is, time out of memory of man, by homage, and have done to them homage. And this is called homage ancestral, by reason of the continuance, which hath been, by title of prescription, in the tenancy in the blood of the tenant, and also in the seigniorship in the blood of the lord. And such service of homage ancestral draweth to it warranty, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant when he is impleaded of the land holden of him by homage ancestral.

And it is said, that if such tenant be impleaded by a *procepe quod reddat*, &c., and vouch to warranty his lord, who cometh in by process, and demands of the tenant what he hath to bind him to warranty, and he showeth how he and his ancestors, whose heir he is, have holden their land of the vouchee and of his ancestors time out of mind of man; and if the lord, which is vouched, hath not received homage of the tenant nor of any of his ancestors, the lord (if he will) may disclaim in the seigniorship, and so oust the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then he shall not disclaim, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements which the vouchee had at the time of the voucher, or any time after.

CO. LIT. 102 a. Here is a point worthy of observation, that in the case of homage ancestral (which is a special warranty in law), by the authority of Littleton, the

lands generally that the lord hath at the time of the voucher shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an express warrantie, the heirs shall be charged but only for such lands as he hath by descent from the same ancestor which created the warranty.

ST. 4 EDW. I. (ST. DE BIGAMIS), (1276) c. 6. In deeds also where is contained *dedi et concessi tale tenementum* without homage, or without a clause that containeth warranty, and to be holden of the givers, and their heirs, by a certain service; it is agreed that the givers and their heirs shall be bounden to warranty. And where is contained *dedi et concessi*, &c. to be holden of the chief lords of the fee, or of other, and not of feoffors, or of their heirs, reserving no service, without homage, or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life, by force of his own gift, shall be bound to warrant. All these constitutions aforesaid were made at Westminster, in the parliament next after the feast of St. Michael, the fourth year of the reign of King Edward, son of King Henry; and from that time forth they shall take effect.

ST. 6 EDW. I. (ST. OF GLOUCESTER), (1278) c. 3. It is established also, that if a man aliene a tenement that he holdeth by the law of England, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of mortdauncestor of the seisin of his mother, although the deed of his father doth mention that he and his heirs be bound to warranty. And if any heritage descend to him of his father's side, then he shall be barred for the value of the heritage that is to him descended. And if in time after any heritage descend to him by the same father, then shall the tenant recover against him of the seisin of his mother by a judicial writ that shall issue out of the rolls of the justices before whom the plea was pleaded, to resummon his warranty, as before hath been done in cases where the warrantor cometh into the court, saying that nothing descended from him by whose deed he is vouched. And in like manner the issue of the son shall recover by writ of cosinage, aiel, and besaiel. Likewise in like manner the heir of the wife shall not be barred of his action after the death of his father and mother by the deed of his father, if he demand by action the inheritance of his mother by a writ of entry which his father did aliene in the time of his mother, whereof no fine is levied in the king's court.

2 INST. 293. And by the equity of this statute the warranty of tenant in tail is no bar unless there be assets in fee simple descended.

LIT. §§ 703-712, 715, 718. Warranty lineal is, where a man seised of lands in fee maketh a feoffment by his deed to another, and binds himself and his heirs to warranty, and hath issue and die, and the warranty descend to his issue, that is a lineal warranty. And the cause why this is called lineal warranty is not because the warranty descendeth from the father to his heir, but the cause is, for that if no such deed with warranty hath been made by the father, then the right of the tenements should descend to the heir, and the heir should convey the descent from his father, &c.

For if there be father and son, and the son purchase lands in fee, and the father of this disseiseth his son, and alieneth to another in fee by his deed, and by the same deed bind him and his heirs to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any snit, nor by other mean of law, have the same lands by cause of the said warranty. And this is a collateral warranty; and yet the warranty descendeth lineally from the father to the son.

But because if no such deed with warranty had been made, the son in no manner could convey the title which he hath to the tenements from his father unto him, inasmuch as his father had no estate in right in the lands; wherefore such warranty is called collateral warranty, inasmuch as he that maketh the warranty is collateral to the title of the tenements; and this is as much to say, as he to whom the warranty descendeth, could not convey to him the title which he hath in the tenements by him that made the warranty, in case that no such warranty were made.

Also, if there be grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warranty, &c. and dieth and after

the grandfather dieth; now the son is barred to have the tenements by the warranty of the father. And this is called a lineal warranty, because if no such warranty were, the son could not convey the right of the tenements to him, nor show how he is heir to the grandfather but by means of the father.

Also, if a man hath issue two sons and is disseised, and the eldest son release to the disseisor by his deed with warranty, &c. and dies without issue, and afterwards the father dieth, this is a lineal warranty to the younger son, because albeit the eldest son died in the life of the father, yet by possibility it might have been, that he might convey to him the title of the land by his elder brother, if no such warranty had been. For it might be, that after the death of the father the elder brother entered into the tenements and died without issue, and then the younger son shall convey to him the title by the elder son. But in this case if the younger son releaseth with warranty to the disseisor, and dieth without issue, this is a collateral warranty to the elder son, because that of such land as was the father's, the elder by no possibility can convey to him the title by means of the younger son.

Also, if tenant in tail hath issue three sons, and discontinue the tail in fee, and the middle son release by his deed to the discontinuee, and bind him and his heirs to warranty, &c. and after the tenant in tail dieth, and the middle son dieth without issue, now the eldest son is barred to have any recovery by writ of *formedon*, because the warranty of the middle brother is collateral to him, inasmuch as he can by no means convey to him by force of the tail any descent by the middle, and therefore this is a collateral warranty. But in this case if the eldest son die without issue, now the youngest brother may well have a writ of *formedon* in the descender, and shall recover the same land, because the warranty of the middle is lineal to the youngest son, for that it might be that by possibility the middle might be seised by force of the tail after the death of his eldest brother, and then the youngest brother might convey his title of descent by the middle brother.

Also if tenant in tail discontinue the tail, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warranty, &c. and dieth without issue, this is a collateral warranty to the issue in tail, because the warranty descendeth upon the issue, that cannot convey himself to the entail by means of his uncle.

Also, if the tenant in tail hath issue two daughters and dieth, and the elder entereth into the whole, and thereof maketh a feoffment in fee with warranty, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moiety, and as to the other moiety she is not barred. For as to the moiety which belongeth to the younger daughter, she is barred, because as to this part she cannot convey the descent by means of her elder sister, and therefore as to this moiety, this is a collateral warranty. But as to the other moiety, which belongeth to her elder sister, the warranty is no bar to the younger sister, because she may convey her descent as to that moiety which belongeth to her elder sister by the same elder sister, so as to this moiety which belongeth to the elder sister the warranty is lineal to the younger sister.

And note, that as to him that demandeth fee simple by any of his ancestors, he shall be barred by warranty lineal which descendeth upon him, unless he be restrained by some statute.

But he that demandeth fee tail by writ of *formedon* in descender shall not be barred by lineal warranty, unless he hath assets, by descent in fee simple by the same ancestor that made the warranty. But collateral warranty is a bar to him that demandeth fee, and also to him that demandeth fee tail without any other descent of fee simple, except in cases which are restrained by the statutes, and in other cases for certain causes, as shall be said hereafter.

And note, that in every case where a man demandeth lands in fee tail by writ of *formedon*, if any of the issue in tail that hath possession, or that hath not possession, make a warranty &c. if he which sueth the writ of *formedon* might by any possibility, by matter which might be *en fait*, convey to him, by him that made the warranty *per formam doni*, this is a lineal warranty, and not collateral.

Also, if a father giveth land to his eldest son, to have and to hold to him and to the

heirs males of his body begotten, the remainder to the second son, &c. if the eldest son alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collateral warranty to the second son, for he shall not be barred of his action of *formedon* in the remainder, because the warranty descended to the daughter of the elder son, and not to the second son; for every warranty which descends, descendeth to him that is heir to him who made the warranty, by the common law.

Co. Lrr. 393 b. A lineal warranty and assets is a good plea in a *formedon* in the descender; wherein it is to be known that if tenant in tail alieneth with warranty, and leave assets to descend; if the issue in tail doth alien the assets, and die, the issue of that issue shall recover the land, because the lineal warranty descendeth only to him without assets; for neither the pleading of the warranty without the assets, nor the assets without the warranty, is any bar in the *formedon* in the descender. But if the issue to whom the warranty and assets descended had brought a *formedon*, and by judgment had been barred by reason of the warranty and assets; in that case, albeit he alieneth the assets, yet the estate tail is barred for ever; for a bar in a *formedon* in the descender, which is a writ of the highest nature that an issue in tail can have, is a good bar in any other *formedon* in the descender brought afterwards upon the same gift.

“So as the doctrine of the binding of lineal and collateral warranties, or their not binding, is an extraction out of men’s brains, and speculations, many scores of years after the Statute *De donis*.

“And if Littleton (whose memory I much honor) had taken that plain way in resolving his many excellent cases in his chapter of warranty, of saying the warranty of the ancestor doth not bind in this case, because it is restrained by the Statute of Gloucester or the Statute *De donis*, and it doth bind in this case, as at the common law, because not restrained by either statute (for when he wrote there were no other statutes restraining warranties, there is now a third 11 H. 7), his doctrine of warranties had been more clear and satisfactory than now it is, being intricately under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all, his cases: for no man’s warranty doth bind, or not, directly, and *à priori*, because it is lineal or collateral; for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms; but those are restraints by consequent only from the restraints of warranties made by statutes.” Per VAUGHAN, C. J., in *Bole v. Horton*, Vaugh. 360, 375.

ST. 4 HEN. VII. (1490) c. 24. Item, where it was ordained in the time of King Edward the First, by the statute *De finibus*, that notes and fines to be levied in the King’s court afore his justices should be openly and solemnly read, and that pleas in the mean time should cease, and this to be done by two days in the week, after the discretion of the justices, as in the said statute more plainly appeareth: The King our Sovereign Lord considereth, That fines ought to be of the greatest strength to avoid strifes and debates, and to be a final end and conclusion; and of such effect were taken afore a statute made of non-claim, and now is used to the contrary, to the universal trouble of the King’s subjects, will therefore it be ordained, by the advice of the Lords Spiritual and Temporal, and the Commons, in the said Parliament assembled, and by the authority of the same, That after the ingrossing of every fine to be levied after the feast of Easter, that shall be in the year of our Lord 1490, in the King’s court, afore his justices of the Common Place, of any lands, tenements, or any other hereditaments, the same fine be openly and solemnly read and proclaimed in the same court the same term, and in three terms then next following the same ingrossing in the same court, at four several days in every term; and in the same time that it is so read and proclaimed, all pleas to cease. And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women covert (other than been parties to the said fine) and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine; and saving to every person or per-

sons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest, as they have to or in the said lands, tenements, or other hereditaments, the time of such fine ingrossed ; so that they pursue their title, claim, or interest by way of action, or lawful entry, within five years next after the said proclamations had and made : And also saving to all other persons such action, right, title, claim, and interest in or to the said lands, tenements, or other hereditaments, as first shall grow, remain, or descend, or come to them after the said fine ingrossed and proclamation made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied ; so that they take their action, or pursue their said right and title, according to the law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come : And that the said persons and their heirs, may have their said action against the pignor of the profits of the said lands and tenements, and other hereditaments, at the time of the said action to be taken. And if the same persons, at the time of such action, right, and title accrued, descended, remained, or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of whole mind, then it is ordained by the said authority, That their action, right, and title, be reserved and saved to them and their heirs, unto the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert, and of whole mind, so that they, or their heirs, take their said actions, or their lawful entry, according to their right and title, within five years next after that they come and be at their full age, out of prison, within this land, uncovert, and of whole mind, and the same actions pursue, or other lawful entry take, according to the law. And also it is ordained by the authority aforesaid, That all such persons as be *covert de baron*, not party to the fine, and every person being within age of twenty-one years, in prison, or out of this land, or not of whole mind, at the time of the said fines levied and ingrossed, and by this said act afore except, having any right or title, or cause of action, to any of the said lands and other hereditaments, that they, or their heirs, inheritable to the same, take their said actions or lawful entry according to their right and title, within five years next after they come and be of age of twenty-one years, out of prison, uncovert, within this land, and of whole mind, and the same actions sue, or their lawful entry take and pursue, according to the law. And if they do not take their actions and entry as is aforesaid, That they and every of them, and their heirs and the heirs of every of them, be concluded by the said fines for ever, in like form as they be that be parties or privies to the said fines : Saving to every person or persons, not party nor privy to the said fine, their exception to avoid the same fine, by that, that those which were parties to the fine, nor any of them, nor no person or persons to their use ne to the use of any of them, had nothing in the lands and tenements comprised in the said fine at the time of the said fine levied. And it is ordained by the said authority, That every fine that hereafter shall be levied in any of the King's courts, of any manors, lands, tenements, and other possessions, after the manner, use and form, that fines have been levied afore the making of this act, be of like force, effect, and authority, as fines so levied be or were afore the making of this act ; this act, or any other act in this present parliament made or to be made, notwithstanding. And every person shall be at liberty to levy any fine hereafter at his pleasure, whether he will after the form contained and ordained in and by this act, or after the manner and form aforesaid used.

ST. 32 HEN. VIII. (1540) c. 36. Forasmuch as in the fourth year of the reign of the late King of famous memory, King Henry the Seventh, father of our most dread sovereign lord the King that now is, it was, among many good and sundry statutes and ordinances then made for the common wealth, enacted, ordained, and established the form and manner how fines should be levied with proclamations in the King's court before his justices of his Common Place, and that such fines, with proclamations so had and made, to the intent to void all strife and debates, should be a final end, and conclude as well privies as strangers to the same, certain persons excepted and saved, as in the same statute more plainly appeareth ; sithen which time, by diversity of inter-

pretations, and expounding of the same statute, it hath been, and is yet, by some manner of persons doubted and called in question, whether fines with proclamations levied or to be levied before the said justices, by any person or persons having, or claiming to have in any manors, lands, tenements or hereditaments comprised in the same fine, in possession, reversion, remainder, or in use, any manner of estate-tail, should immediately after the said fine levied, engrossed, and proclamation made, bind the right heir and heirs of such tenant in tail, and every other person and persons seised or claiming to their use or uses; by occasion whereof divers debates, controversies, suits and troubles have been begun, moved, and had within this realm, and mo be like to ensue, if remedy for the same be not provided; for the establishment and reformation whereof, and for the sure and sincere interpretation of the said statute, in avoiding all dangers, contentions, controversies, ambiguities and doubts that hereafter may ensurge, grow or happen, our said Sovereign Lord the King, with the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by authority of the same, hath enacted and ordained, That all and singular fines, as well heretofore levied, as hereafter to be levied before the said justices with proclamations, according to the said statute, by any person or persons of full age of one and twenty years, of any manors, lands, tenements or hereditaments, before the time of the said fine levied in any wise entailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons in possession, reversion, remainder or in use, shall be, immediately after the same fine levied, engrossed, and proclamations made, adjudged, accepted, deemed and taken, to all intents and purposes, a sufficient bar and discharge for ever against the said person and persons, and their heirs claiming the same lands, tenements and hereditaments, or any parcel thereof, only by force of any such entail, and against all other persons claiming the same, or any parcel thereof, only to their use, or to the use of any manner of heir of the bodies of them; any ambiguity, doubt or contrariety of opinion, risen or grown upon the said estatute to the contrary notwithstanding.

II. Provided alway, That this Act, nor any thing therein contained, shall extend to bar or exclude the lawful entry, title or interest of any heir or heirs, person or persons, heretofore given or hereafter to be given, grown or accrued to them or any of them, in or to any manors, lands, tenements and hereditaments, by reason of any fine or fines heretofore levied, or hereafter to be levied, by any woman after the death of her husband, contrary to the form, intent, and effect of the statute made in the said eleventh year of the said King Henry the Seventh, of any manors, lands, tenements and hereditaments, of the inheritance or purchase of the said husband or of any his ancestors, given or assigned to any such woman in dower, for term of life or in tail, in use or in possession, but that the same Act made in the said eleventh year of the said late King Henry the Seventh shall stand, remain and be in full strength and virtue in every article, sentence and clause therein contained, in like manner and form as though this present Act had never been had ne made.

III. Provided also, That this Act, ne any thing therein contained, do extend to any fine or fines at any time heretofore levied, or hereafter to be levied, of any lordships, manors, lands, tenements or other hereditaments whatsoever they be, the possessors and owners whereof, by reason of any express words contained in any special Act or Acts of Parliament made or ordained since the saith fourth year of the reign of the said late King Henry the Seventh, stand, be bounden or restrained from making any alienations, discontinuances, or other alterations of any of the same lordships, manors, lands, tenements or other hereditaments, contained in the said fine or fines; but that all and every such fine and fines at any time heretofore levied, or hereafter to be levied, by any such person or persons or their heirs, of any such lordships, manors, lands, tenements or other hereditaments, shall be of such like force and strength in the law, and of none other effect than the same fine so levied, or to be levied, should have been if this present Act had never been had nor made; any thing therein contained to the contrary thereof in any wise notwithstanding.

IV. Provided also, That this Act, nor any thing therein contained, shall extend to any fine or fines heretofore levied of any manors, lands, tenements or hereditaments

now in suit, demand or variance, in any of the King's courts, or whereof any charters, evidences or muniments concerning the same, be now in demand in the King's high court of chancery ; nor to any fine or fines heretofore levied of any manors, lands, tenements or hereditaments, which before the first day of this present Parliament have been recovered, gotten or obtained by reason of any judgment, entry, decree, arbitration, or other lawful means, contrary to the purport, intent or effect of any such fine or fines thereof, heretofore levied ; nor to any fine or fines heretofore levied, or hereafter to be levied, by any person or persons, of any manors, lands, tenements or hereditaments, before the time of the levying of the same fine, given, granted or assigned to the said person or persons so levying the same fine, or to any of his or their ancestors in tail, by virtue of any letters patents of our said sovereign lord, or any of his progenitors, or by virtue of any Act or Acts of parliament, the reversion whereof, at the time of the same fine or fines, so levied, being in our said sovereign lord, his heirs or successors ; but that every such fine and fines shall be of like force, strength and effect, as they were or should have been, if this act had never been had nor made.

The following forms of a fine and a recovery have been taken from the appendix to the second volume of Blackstone's Commentaries : —

A Fine of Lands Sur Cognizance De Droit, Come Ceo, etc.

SECT. 1. *Writ of Covenant ; or Præcipe.*

George the Second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale ; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of St. Michael in one month, to shew wherefore they have not done it : and have you there the summoners and this writ. Witness ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution, { John Doe.
 { Richard Roe.

Summoners of the within-named { John Den.
Abraham, Cecilia, and John, { Richard Fen.

SECT. 2. *The License to Agræe.*

Norfolk, } David Edwards, esquire, gives to the lord the king ten marks for
to wit, } license to agree with Abraham Barker, esquire, of a plea of covenant
of two messuages, two gardens, three hundred acres of land, one hundred acres of
meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

SECT. 3. *The Concord.*

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John ; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs, for ever. And, further, the same Abraham, Cecilia, and John have granted, for themselves and their heirs, that they will warrant to the aforesaid David and his heirs the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quitclaim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John two hundred pounds sterling.

SECT. 4. *The Note or Abstract.*

Norfolk, } Between David Edwards, esquire, complainant, and Abraham Barker,
 to wit. } esquire, and Cecilia his wife, and John Barker, esquire, deforciant of two
 messuages, two gardens, three hundred acres of land, one hundred acres of meadow,
 two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale,
 whereupon a plea of covenant was summoned between them: to wit, that the said
 Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the ap-
 purtenances, to be the right of him the said David, as those which the said David hath
 of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised
 and quitted claim, from them and their heirs, to the aforesaid David and his heirs for
 ever. And, further, the same Abraham, Cecilia, and John have granted for themselves
 and their heirs, that they will warrant to the aforesaid David and his heirs the afore-
 said tenements, with the appurtenances, against all men, for ever. And for this recog-
 nition, remise, quitclaim, warranty, fine, and agreement, the said David hath given to
 the said Abraham, Cecilia, and John two hundred pounds sterling.

SECT. 5. *The Foot, Chirograph, or Indentures of the Fine.*

Norfolk, } This is the final agreement, made in the court of the lord the king at
 to wit. } Westminster, from the day of Saint Michael in one month, in the twenty-
 first year of the reign of the lord George the Second, by the grace of God, of Great Brit-
 ain, France, and Ireland, king, defender of the faith, and so forth, before John Willes,
 Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful sub-
 jects of the lord the king then there present, between David Edwards, esquire, com-
 plainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire,
 deforciant, of two messuages, two gardens, three hundred acres of land, one hundred
 acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the ap-
 purtenances, in Dale, whereupon a plea of covenant was summoned between them in the
 said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged
 the aforesaid tenements, with the appurtenances, to be the right of him the said David,
 as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and
 John; and those they have remised and quitted claim, from them and their heirs, to
 the aforesaid David and his heirs, for ever. And, further, the same Abraham, Cecilia,
 and John have granted for themselves and their heirs that they will warrant to the
 aforesaid David and his heirs the aforesaid tenements, with the appurtenances, against
 all men, for ever. And for this recognition, remise, quitclaim, warranty, fine, and
 agreement, the said David hath given to the said Abraham, Cecilia, and John two hun-
 dred pounds sterling.

SECT. 6. *Proclamations, endorsed upon the Fine, according to the Statutes.*

The first proclamation was made the sixteenth day of November, in the term of
 Saint Michael, in the twenty-first year of the king within-written.

The second proclamation was made the fourth day of February, in the term of Saint
 Hilary, in the twenty-first year of the king within-written.

The third proclamation was made the thirteenth day of May, in the term of Easter,
 in the twenty-first year of the king within-written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the
 Holy Trinity, in the twenty-second year of the king within-written.

*A Common Recovery of Lands with¹ Double Voucher.*SECT. 1. *Writ of Entry sur Disseisin in the Post; or Præcipe.*

George the Second, by the grace of God, of Great Britain, France, and Ireland,
 king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command

¹ Note, that if the recovery be had with single voucher, the parts marked "thus" in sect.
 2 are omitted.

own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose : and of this he puts himself upon the country. And the aforesaid Francis thereupon craveth leave to imparl ; and he hath it. And afterwards the aforesaid Francis cometh again here into court, in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. Therefore it is considered that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances : and that the said David have of the land of the aforesaid " John, to the value [of the tenements aforesaid] ; and, further, that the said John have of the land of the said " Jacob to the value [of the tenements aforesaid]. And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid, with the appurtenances : and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person ; and the sheriff, namely, Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid, with the appurtenances, as he was commanded. All and singular which premises, at the request of the said Francis, by the tenor of these presents, we have held good to be exemplified. In testimony whereof we have caused our seal appointed for sealing writs in the Bench aforesaid to be affixed to these presents. Witness, Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

DETERMINABLE AND BASE FEES. " Intendments should be guided by the rules of the law, and not by idle conceits, and to prove this further, 13 Hen. VII., 11 Hen. VII., 21 Hen. VI. fo. 37, it is held, and the law seems plain, that if land be given to one and his heirs so long as J. S. has heirs of his body, the donee has a fee and may alien it notwithstanding there be a condition that he shall not alien; and 11 lib. Assize, p. 8, a like case is put and held as above : and there if land be given to one and his heirs so long as J. S. or his heirs may enjoy the Manor of D., those words (so long) are utterly vain and idle, and do not abridge the estate . . . and yet it is to be admitted that one may have an estate in fee determinable, but never by the act and consent of the parties without any entry for condition broken or title defeasible ; and to show briefly how this will be is now convenient, and it will be if the lord of a villein being tenant in tail enters on the land, &c., he and his heirs will enjoy the land so long as the villein has issue, and then his estate determines ; so he who recovers rent against a tenant in tail, '*que ill' teign in tail*' [out of what he holds in tail ?] ; or [suppose] that tenant in tail of land be attainted of treason, the king will have a fee of the land entailed determinable on death without issue, and has no greater estate ; but these estates last mentioned are not made by the first creation of the estates but by matter coming afterwards by other means." Per ANDERSON, C. J., in *Christopher Corbet's Case*, 2 And. 134, 138, 139.

" Before the statute of *Quia emptores* (18 Edw. 1) an estate might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and his heirs should be tenants of the manor of Dale; and upon C. D.'s ceasing to have issue, or to be tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry, but as a principle of tenure, in the nature of an *escheat* upon the death of a tenant in fee-simple without heirs general. But the statute of *Quia emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of *Quia emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage

SECTION III.

ESTATES FOR LIFE.

LIT. §§ 32-36, 56, 57. Tenant in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

Also, if tenements be given to a man and to his heirs which he shall beget on the body of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especial tail. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue, which is heir to the donees in especial tail, cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid.

And note, that tenant in tail after possibility of issue extinct shall not

in 2 And. 138, contains an accurate exposition of the law upon this subject: 'If land be given to A. and his heirs, *so long as J. S. has heirs of his body*, the donee has fee, and may alien it. 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the s. c. is put and held as before; and that there if the land be given to one and his heirs, *so long as J. S. and his heirs* shall enjoy the manor of D., those words (*so long*) are entirely void and idle, and do not abridge the estate.'

"The references in this passage (with the exception of the 11 Ass. 8) are not in the report correctly stated; but they are discovered in 13 Hen. 7, Easter Term, fol. 24; 11 Hen. 7, pl. 25; 21 Hen. 6, Hill, pl. 21. It will be proper to refer to the case first mentioned; premising, that, by the common law, where an absolute estate in fee simple was granted, no restraint could be placed on the alienation of it; inasmuch as such restraint would be repugnant to the grant itself. Upon a question in the case referred to, whether a condition restraining alienation upon the grant of an estate tail since the statute *De donis* was valid, Vavisor thought it valid; but added, that he agreed that such condition imposed on a feoffee in fee simple, *so long as J. S. has issue*, was void." 1 Sand. Uses (5th ed.) 208-210. See Gray, Perpetuities, §§ 31-41.

be punished of waste, for the inheritance that once was in him, 10 H. 6. 1. But he in the reversion may enter if he alien in fee, 45 E. 3. 22.

Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

And some have said, that he shall not be tenant by the curtesy, unless the child, which he hath by his wife, be heard cry; for by the cry it is proved, that the child was born alive. Therefore *Quære*.

Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband [for she must be above nine years old at the time of the decease of her husband], otherwise she shall not be endowed.

Tenant for term of life is, where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech he which holdeth for term of his own life, is called tenant for term of his life, and he which holdeth for term of another's life, is called tenant for term of another man's life (*tenant pur terme d'auter vie*).

And it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certain lands or tenements to another in tail, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for term of life, or for term of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in tail hath a freehold, &c.

SECTION IV.

ESTATES LESS THAN FREEHOLD.

LIT. § 58. Tenant for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee.

Co. LIT. 46 b. The lessee before entry hath an interest, *interesse termini*, grantable to another.

LIT. § 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him.

Co. LIT. 57 b. There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over. As tenant *pur terme d'auter vie* continueth in possession after the decease of *Ce' que vie*, or tenant for years holdeth over his term; the lessor cannot have an action of trespass before entry.

SECTION V.

REVERSIONS AND REMAINDERS.

LIT. § 19. In the same manner it is of the tenant in especial tail, &c. For in every gift in tail without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor, and to his heirs the like services, as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unlesse it be for fealty) until the fourth degree is past, and after the fourth degree is past the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

Co. LIT. 22 b. A reversion is where the residue of the estate always

doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* Tenant in fee simple maketh gift in tail, so it is of a lease for life, or for years.

Co. Lit. 23 a. “ *The donees and their issue shall do to the donor, and to his heirs the like services, as the donor doth to his lord next paramount.*” The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over: as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of *W[estm]. 2*, the donee had holden of the donor as of his person, and now of him as of his reversion: but if a man make a lease for life, or years, and reserve nothing, he shall have fealty only and no rent, though the lessor hold over by rent, &c.

Co. Lit. 143 a. “ *Remainder*,” in legal Latin, is *remanere*, coming of the Latin word *remaneo*; for that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time.

Co. Lit. 18 a. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in tail be made to a villein, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee. But if the lord infeoffe the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the party; as if lands be given to A., so long as B. hath heirs of his body, the remainder over in fee, the remainder is void.

2 Inst. 505. But yet tenant for life, and tenant in tail are not wholly excluded by force of these words [in fee simple] out of this Statute [*Quia emptores*, c. 3], for where the whole fee simple passeth out of the feoffor, there this Act extendeth to estates for life and in tail; as if an estate for life or in tail be made of land, the remainder in fee, there then tenant for life or in tail shall hold *de capitali domino* by force of this act, but otherwise it is when a reversion remaineth in the donor or lessor.

SECTION VI.

JOINT OWNERSHIP.

LIT. §§ 241, 242, 265, 277, 280–282, 287, 292, 294, 309, 319, 321. Parceners are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custom. Parceners

after the course of the common law are, where a man, or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor. And they are called parceners; because by the writ, which is called *breve ue participatione facienda*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners: and if there be three daughters, they be called three parceners; and four daughters, four parceners; and so forth.

Also, if a man seised of tenements in fee simple or in fee tail dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shall not be called parcener, but she is called daughter and heir, &c.

Parceners by the custom are, where a man seised in fee simple, or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.

Jointenants are, as if a man be seised of certain lands or tenements, &c. and infeoffeth two, three, four, or more, to have and to hold to them for term of their lives, or for term of another's life, by force of which feoffment or lease they are seised, these are jointenants.

And it is to be understood, that the nature of jointenancy is, that he which surviveth shall have only the entire tenancy, according to such estate as he hath, if the jointure be continued, &c. As if three jointenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second jointenant hath issue and die, yet the third which surviveth shall have the whole tenements to him and to his heirs for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dieth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heirs, so as they shall have this by descent, and not by survivor, as jointenants shall have, &c.

And as the survivor holds place between jointenants in the same manner it holdeth place between them which have joint estate or possession with another of a chattel, real or personal. As if a lease of lands or tenements be made to many for term of years, he, which survives of

the lessees, shall have the tenements to him only during the term by force of the same lease. And if a horse, or any other chattel personal be given to many, he which surviveth shall have the horse only.

In the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, he which surviveth shall have the whole debt or duty. And so is it of other covenants and contracts, &c.

Also, if there be two jointenants of land in fee simple within a borough where lands and tenements are devisable by testament, and if the one of the said two jointenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion, which surviveth, by the survivor; the which he doth not claim, nor hath any thing in the land by the devisor, but in his own right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causa qua supra*.

Tenants in common are they, which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoff two jointenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by several titles, for the alienee cometh to the moiety by the feoffment of one of the jointenants, and the other jointenant hath the other moiety by force of the first feoffment made to him and to his companion, &c. And so they are in by several titles, that is to say, by several feoffments, &c.

Also, if three jointenants be, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two jointenants: but yet the other two jointenants are seised of the two parts which remain jointly, and of these two parts the survivor between them two holdeth place, &c.

Also, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

Also, as there be tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattels reals and personals. As if a lease be made of certain lands to two men for term of 20 yeares, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common.

In the same manner it is of chattels personals. As if two have jointly by gift or by buying a horse or an ox, &c. and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c. because that their titles and rights in this were several, &c.

NOTE.—For statutory changes in the United States, see Stimson, Am. Stat. Law, §§ 1371, 1375.

CHAPTER III.

SEISIN AND CONVEYANCE.

SECTION I.

SEISIN.

LIT. § 448. Freehold in law is, if a man disseiseth another, and dieth seised, whereby the tenements descend to his son, albeit that his son doth not enter into the tenements, yet he hath a freehold in law, which by force of the descent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shall be endowed.

Co. LIT. 266 b. Here Littleton describeth what a freehold in law is, for he had spoke before in many places of freeholds in deed.¹

LEAKE, DIGEST OF LAND LAW, 46-48. A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expect-

¹ "It may not, perhaps, be improper in this place to attempt a short explanation of some words familiar both in the ancient and modern law.

"*Seisin* is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a descent the person, on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But, in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the *actual* seisin of the lands. The fee is intrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee." Hargrave's note, 217.

ant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A for life or in tail, and upon the determination of his estate to B, the future limitation takes effect as a remainder immediately expectant upon A's estate.¹ But upon a feoffment to A in fee or for life, and after one year to B in fee; — or to A in fee, and upon his marriage to B in fee; — or to A in fee or for life, and upon B paying A a sum of money to B in fee, — the limitations shifting the seisin from A to B at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law. Plowden, 29; 1 Hayes Conv. 19–21. Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title. Co. Lit. 342 b; Butler's note, *Ib*; see 1 Hayes Conv. (5th ed.) 12, 14.

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. "Livery of seisin must pass a present freehold to some person and cannot give a freehold *in futuro*." — "If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes." Co. Lit. 217 a; 5 Co. 94 b, *Barwick's Case*.

As a consequence of the same rule if a feoffment were made to A for life and after his death and one day after to B for life or in fee, the limitation to B was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A.²

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests in the fee.

Accordingly a remainder might be limited to take effect upon a condition, or in a person not ascertained, as an unborn child, so as to be in

¹ "The remainder is good and passeth out of the donor by the livery of seisin; for the particular estate and remainder, to many intents and purposes, make but one estate in judgment of law." Co. Lit. 143 a. See 1 Hayes Conv. 21.

² Plowden, 25; Fearne C. R. 307. "Since the tenancy was not allowed to be vacant or in suspense for an instant, it was essential to the validity of every conveyance of the freehold that it should be made to take immediate effect. On the same principle, it was essential that all substitutions should be so strictly consecutive as not to leave the feud unprovided with a tenant even for an instant." 1 Hayes Conv. 16.

abeyance or uncertainty until the condition happened or the person became ascertained. Such a limitation was good and might remain in uncertainty so long as the particular estate continued, as it was supported by the seisin of that estate. But it was essential that it should have become certain and absolute at the time when the particular estate determined; and if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect.¹

A remainder limited to an uncertain person or upon an uncertain condition, and so long as the uncertainty lasted, became known as a *contingent* remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events was a *vested* remainder; the remainderman was presently *invested* with a portion of the seisin or freehold.

LIT. § 324. Also, when a man will show a feoffment made to him, or a gift in tail, or a lease for life of any lands or tenements, there he shall say, by force of which feoffment gift, or lease, he was seised, &c. but where one will plead a lease or grant made to him of a chattel real or personal, then he shall say, by force of which he was possessed, &c.

Co. Lit. 200 b, 201 a. “*He was seised, &c.*” *Seisin* is a word of art, and in pleading is only applied to a freehold at least, as *possessed* for distinction sake is to a chattel real or personal. As if B. plead a feoffment in fee, he concludeth, *virtute cujus prædict’*. *B. fuit seisitus, &c.* But if he plead a lease for yeares, he pleadeth, *virtute cujus prædictus B. intravit, et fuit inde possessionatus*; and so of chattels personals, *virtute cujus fuit inde possessionatus*.

And this holdeth not only in case of lands or tenements which lie in livery, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by livery, he is not to plead any entry, for he is in actual seisin by the livery itself. Otherwise it is of a lease for years, because there he is not actually possessed until an entry.

LIT. § 647. Also, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abeyance, viz. in consideration and in the under-

¹ Co. Lit. 342 b; 378 a; Perkins, §§ 52, 87. “If a man seised of land, lease it to a stranger for life, and grants the remainder over to the right heir of J. S., which J. S. is then alive; in that case the fee is in abeyance, viz., in the consideration of the law, and is in no certain person.” Ib. § 708. *Fearne C. R.* 3, 281, 307; “It is a general rule, that every remainder must vest, either during the particular estate, or else at the very instant of its determination.” Ib. 307. A contingent remainder, as putting the freehold in abeyance, seems to have been originally regarded as an infringement of feudal principles, and is said not to have been fully recognized until the reign of Henry VI. See Williams, *Real Prop.* 243, 7th ed.

standing of the law, until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor.

SECTION II.

DESCENT AND PURCHASE.

LIT. § 12. Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed.

Co. LIT. 18 b. A purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase. But a descent, because it cometh merely by act of law, is not said to be a purchase; and accordingly the makers of the Act of Parliament in 1 H. 5, ca. 5, speak of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheat or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith. Like law of the state of tenant by the curtesy, tenant in dower, or the like. But such as attain to lands by mere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglary, piracy, or the like, can justly be termed purchase.

SECTION III.

LIVERY OF SEISIN.

LIT. § 59. And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it behooveth to have livery of seisin.

Co. LIT. 48 a, b. And there be two kinds of livery of seisin, viz. a livery in deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the door, or turf or twig of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per haspam et annulum vel per fustem vel baculum, &c.*

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, "I give you yonder land to you and your heirs, and go, enter into the same, and take possession thereof accordingly," and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur*. And herewith agreeth Bracton: *Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere*: and in another place he saith, *in seisinā per effectum et per aspectum*. But if either feoffor or the feoffee die before entry the livery is void. And livery within the view is good where there is no deed of feoffment. And such a livery is good albeit the land lie in another county. A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery.

LIT. § 60. But if a man letteth lands or tenements by deed or without deed for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

THOROUGHGOOD'S CASE.

KING'S BENCH. 1612.

[Reported 9 Co. 136.]

It was found by office in the county of Cambridge, 21 Jan. anno 36 Eliz. by force of a writ of *Diem clausit extremum* after the death of Robert Thoroughgood, that he was seised in fee of an house, &c. and divers lands and tenements in Tadlowe in the county aforesaid, and that the said house, &c. was held of the King in chief by knight's service; and he being thereof so seised *fecit & sigillavit in dicto messuagio quoddam scriptum indentatum, in hæc verba*: To all Christian people, &c. Robert Thoroughgood sendeth greeting, &c. Know ye, that I the said Robert for divers good causes, &c. have given, granted, and enfeoffed, and by these presents do give, grant, enfeoff, and confirm to Henry Hutton and Edward Eliot all that my capital messuage, &c. lands and tenements, &c. *habendum* unto the said Henry Hutton, and Edward Eliot, and their heirs, &c. *dat' 18 Julii anno 35 Eliz. Et ulterius dicunt, quod præd' Robert jacens in extremis deliberavit in præd' messuagio præd' 18 Julii scriptum præd' indentatum præfat' s*

Henrico Hutton & Edwardo Eliot pro et in nomine seisinæ præd' messuagii & omnium residuorum terrarum & tenementorum indicto scripto indentato contentorum: and further found the other points of the writ. And upon this case two questions were moved; 1. If in this case the jury have found a sufficient delivery of the indenture to make it a deed in law. 2. If this delivery of the indenture in the house, in the name of seisin of the house, and of the residue of the lands and tenements aforesaid, was a sufficient livery of seisin in law, or not. As to the first, it was resolved, that the actual delivery of a writing sealed to the party, without any words, is a good delivery; for *in traditionibus scriptorum non quod dictum est, sed quod gestum est inspicitur*: but here he saith, "I deliver this writing to you," which clearly is sufficient, although he doth not say, as his deed or as his act. And therefore if A. makes a writing to B. and seals it, and delivers it to B. as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed, for the law respects the delivery to the party himself, and rejects the words which will make the express delivery to the party, upon the matter no delivery. And therefore in *Mich. 12 H. 8. Rot. 751. in Banco*, Anne Quilter, late wife of John Quilter, and others, executors of the will of the said John Quilter, brought an action of debt against Edward Cobham on a bond, &c. the defendant pleaded that he delivered the bond to the testator as a schedule, upon condition if the plaintiff made indentures between the defendant *ex una parte, & præfat' testator' ex altera parte, de certis conditionib', convent' & agreement' inter easd' partes adtunc concord', &c. pro adnullatione præd' script' obligat', &c. ante festum Mich' Archang' deliberand' quod extunc præd' script' obligator' in omni suo robore staret, sin aliter, vacua foret: et id' defendens dicit quod præd' testat' non fecit aliquam indent' &c. & sic id' defendens dicit quod script' præd' in formâ præd' deliberat' dictis indent' inter easd' partes minime confectis non est factum suum, et hoc, &c.* Judgment if action? And thereupon the plaintiff demurred in law, and it was resolved, that the said delivery was good in law, although the condition was not performed, and the plaintiffs had judgment to recover. And *Tr. 13 H. 8. Rot. 405 in Banco*, between T. Bodenham, Esq. plaintiff and Ed. Mermion Clerk, defendant in debt on a bond the like plea pleaded, and a demurrer upon it, and judgment given for the plaintiff which judgments (upon search which I commanded to be made) I have seen. And therewith agrees the report of 19 H. 8. a. and takes the difference when it is so delivered to the party himself, and when to a stranger, as it was there agreed, 35 Ass. p. 6. a writing may take effect by actual delivery to the party himself without any words: and as a writing may take effect by actual delivery without words, so it may take effect by words without actual delivery; as if a writing is sealed and it lies in a window, or upon a table, and the obligor saith to the obligee, "see there's the writing, take it as my deed" and he takes it accordingly it is a good

delivery in law: in the same manner as if one makes a charter of feoffment, and within the view of his land saith to another, "see you the land, enter into it and enjoy it according to the form and effect of this charter;" and the feoffee enters, it amounts to a good livery of seisin of the land: and if words in such case shall amount to a livery of seisin, by which a freehold shall pass, *a fortiori* words shall amount to a delivery of a deed; wherefore it was concluded *a fortiori* in the case at bar, when Robert Thoroughgood delivered the writing to the parties, saying, "here I deliver you this writing," it is a good delivery thereof to take effect as a deed: *vide* 33 Ass. 2. 33 E. 3. Assise 367. 43 E. 3. 28. 13 E. 4. 8. 8 H. 6. 26. 9 H. 6. 37 & 59. *vide* 4 H. 6. 5. If the obligor delivers the bond to the obligee to re-deliver to him, the obligee may detain the bond for ever, and these words to re-deliver to him are void. *Vide* 29 H. 8. 34 & 35 Dyer, & Trin. 43 El. between *Hawkston* and *Catcher* in *B. R.* where some opinions *ex improviso* were conceived, that the obligor might deliver a bond as an escrow to the obligee; but believe you the said judgments given upon demurrer in law in the point: wherefore as to the first point it was clearly resolved, that the said writing sealed took effect as a deed by the delivery aforesaid.

As to the second point, first it was clearly resolved, that the delivery of the deed upon the land, doth not amount to a livery, for it has another effect, *sc.* to take effect as a deed, as it is resolved in *Sharp's Case*, anno 42 *El. in Com' Banco*, reported by me in the sixth part of my reports, f. 26. and there it is well agreed, that to every livery of seisin there is requisite, either an act, which the law adjudges livery, or apt words which amount to it, and there the case of 43 E. 3. Feoffments & Faits 51 is cited, which is to this effect: in assise the recognitors found a special verdict, *sc.* that the plaintiff was seised of land in fee, and the tenant drew and engrossed a charter of feoffment of the land in view, &c. in the name of the plaintiff to the tenant himself and his heirs, and the tenant delivered the charter to the plaintiff, and prayed him to deliver seisin in the same land, and the plaintiff would not deliver seisin, but he delivered back the charter to the tenant upon the land, and the tenant kept himself *in*, and if the delivery of the charter upon the land was a sufficient livery of seisin, was the question, and there Kirton, Justice, said, if the plaintiff had spoke in this manner, when he delivered the charter to the tenant, "Sir, I deliver to you this charter in the name of seisin of all the lands and tenements contained in the charter," it had been a good delivery of seisin, but so he doth not do in this case, wherefore the court awarded that the plaintiff should recover seisin. And it was resolved, that although most properly livery of seisin is made by delivery of a twig or turf of the land itself, whereof livery of seisin is to be given; and so it is good to be observed; yet a delivery of a turf or twig growing upon other land; of a piece of gold or silver, or other thing upon the land in the name of seisin is sufficient, for the turf or twig which grows upon the land, when

it is severed is not parcel of the land, and when the feoffor is upon the land, his words without any act are sufficient to make livery of seisin; as if he saith, "I deliver seisin of this land to you in the name of all the land contained in this deed;" or, "Enter you into this land, and take seisin of it in the name of all the land contained in this deed," or such other words, without any ceremony or act done; and that is the reason that the delivery of any thing upon the land in the name of seisin is sufficient, because his words alone without anything were sufficient; for if words alone out of the land which is within the view are sufficient in law, *a fortiori* when they are spoke upon the land itself; and yet it is not wisely done to omit usual ceremonies and acts in such cases, for they imprint a better remembrance of the thing which is done, because they are subject to sight, than words alone, which are only heard, and which easily and usually slip out of memory: wherefore it was resolved, that the delivery of the deed upon the land in the name of seisin was sufficient in law. And the said case of Sharp was affirmed for good law in this case. 3. It was resolved, that this delivery of the writing amounted to two several acts at one and the same instant, viz. to deliver the writing as a deed, and to deliver seisin of the land according to the deed.

SECTION IV.

GRANT AND ATTORNMENT.

Co. Litt. 172 a. "*Grant*," *Concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot pass without deed; as advowsons, services, rents, commons, reversions, and such like.¹

¹ "The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. The Romans, misled by the double sense of *res*, unhappily distinguished *res corporales* and *res incorporales*, the former being things *quæ tangi possunt, veluti aurum, vestis*, the latter mere rights, *quæ in jure consistunt*. It is obvious that this is mere confusion, the two ideas not being *in pari materia*, or capable of being brought under one class, or of forming opposite members of a division. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself, but 'the rights annexed to or issuing out of the land.' A moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most un-

LIT. § 551. Attornment is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the most common attornment is, to say, Sir, I attorn to you by force of the said grant, or I become your tenant, &c. or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.

Co. LIT. 309 a, b. *Attornment* is an agreement of the tenant to the grant of the seigniorv, or of a rent, or of the donee in tail, or tenant for life or years, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a turning or attorning from one to another. We use also *attornamentum* as a Latin word, and *attornare* to attorn. And so Bracton useth it: *Item videndum est si dominus attornare possit alicui homagium et servitium tenentis sui contra voluntatem ipsius tenentis, et videtur quod non.*

And the reason why an attornment is requisite, is yielded in old books to be, *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quod possit eum subjugare capitali inimico suo, et per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderet.*

“*The tenant must attorn to the grantee in the life of the grantor, &c.*” And so must he also in the life of the grantee: and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor dieth before attornment, the seigniorv, rent, reversion, or remainder descend to his heir; and therefore after his decease the attornment cometh too late: so likewise if the grantee dieth before attornment, an attornment to the heir is void, for nothing descended to him: and if he should take, he should take it as a purchaser, where the heirs were added but as words of limitation of the estate, and not to take as purchasers.

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth pass to

fortunate, because if by ‘corporeal’ is meant ‘relating to land,’ then a large class of incorporeal hereditaments are also entitled to the name; if by ‘incorporeal’ is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality, however, it appears that the names point to different classes of rights; and in fact, Stephen in his edition of Blackstone, 5th ed., vol. i. p. 656, almost confines incorporeal hereditaments to *jura in alieno solo*. See Austin, vol. ii. pp. 707, 708.” Digby, Hist. Real Prop., App. to Part I. (11) note.

the conusee and his heirs; and the attornment to the conusee or his heirs at any time to make privity to distrain is sufficient. But all this is to be taken as Littleton understood it, viz. of such grants as have their operation by the common law. For since Littleton wrote, if a fine be levied of a seignior, &c. to another to the use of a third person and his heirs, he and his heirs shall distrain without any attornment, because he is in by the Statute of 27 H. 8, cap. 10, by transferring of the state to the use, and so he is in by act in law.

And so it is, and for the same cause, if a man at this day by deed indented and enrolled according to the Statute, bargaineth and selleth a seignior, &c. to another, the seignior shall pass to him without any attornment; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornments since Littleton wrote.

But if the conusee of a fine before any attornment by deed indented and enrolled, bargaineth and selleth the seignior to another, the bargainee shall not distrain, because the bargainor could not distrain. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quam ipse habet*. *Vide Sect. 149*, where upon a recovery, the recoverer shall distrain and avow without attornment.

A grant to the king, or by the king to another, is good without attornment, by his prerogative.

Lrr. §§ 567-569. Also, if a man letteth tenements for term of years, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for term of life, or in tail, or in fee; it behooveth in such case that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment without any livery of seisin, &c. because if any livery of seisin, &c. should be or were needful to be made, then the tenant for years should be at the time of the livery of seisin ousted of his possession, which should be against reason, &c.

Also, if tenements be letten to a man for term of life, or given in tail, saving the reversion, &c. if he in the reversion in such case grant the reversion to another by his deed, it behooveth that the tenant of the land attorn to the grantee in the life of the grantor, or otherwise the grant is void.

In the same manner is it, if land be granted in tail, or let to a man for term of life, the remainder to another in fee, if he in the remainder will grant this remainder to another, &c. if the tenant of the land attorn in the life of the grantor, then the grant of such a remainder is good or otherwise not.¹

¹ See Lit. §§ 579 *et seq.* "Sir Will. Cordall, Mr. of the Rols [1557-1581], denied to compel one to attorn here that was at liberty by the common law, in the *Case of Sir John Windham*.

"Chancellor Bromely likewise denied such compulsion generally, but where the party

ST. 4 ANNE (1705), c. 16, § 9. And be it further enacted by the authority aforesaid, That from and after the said first day of Trinity term [1706], all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.¹

DOE d. WERE v. COLE.

KING'S BENCH. 1827.

[Reported 7 B. & C. 243.]

EJECTMENT for the recovery of the moiety of certain lands and premises, situate in the parishes of Loddiswell and Churstow, in the county of Devon. At the trial before *Gaselee, J.*, at the last assizes for the county of Devon, the plaintiff had a verdict, subject to the opinion of this court on the following case:—

The lessors of the plaintiff made title under a deed of conveyance from one Walter Prideaux, which recited, that he was indebted to them in a sum of £3000, and that he had agreed to secure the same by demising and assigning the premises thereafter mentioned; that in pursuance of an agreement recited in the deed, and in consideration of 5s., he Prideaux did demise, lease, grant, assign, transfer, and set over, direct, limit, and appoint unto R. Were, W. Were, and S. Were, as trustees, their executors, administrators, and assigns, all that moiety or half part of and in all that messuage, &c. lying and being in the town of Kingsbridge, and therein particularly described, which said premises were then in the tenure or occupation of the said Prideaux, and the reversion, remainder, rents, issues, and profits thereof, and of

quarrelled with the particular tenant's estate or entereth into some part of the lands in demise, or hath covenanted for recompense for non-attornment, there he utterly denieth to enforce the attornment. *Paseh, 21 Eliz. [1579] in Case of Philips and Doctor Sandford.*" Cary, 5.

¹ For similar statutes in the United States, see Stimson, Am. Stat. Law, § 2009.

"Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by St. 4 Anne, c. 16, § 9, a grant of the reversion is good and effectual without attornment. *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the Revolution, and this provision being a rule in amendment of the common law, we may probably consider it in force here. *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures, which were in use under our former government. *Farley v. Thompson*, 15 Mass. 25, 26." Per SHAW, C. J., in *Burden v. Thayer*, 3 Met. 76, 78.

every part thereof; and also all that the moiety of and in all that capital messuage Barton Farm, and demesne lands called or commonly known by the name of Hatch Arundel, situate, lying, and being in the parishes of Loddiswell and Churstow, in the county of Devon; and which said last-mentioned premises were heretofore in the possession of one A. Rendell, and of the said W. Prideaux, and do contain in the whole by estimation 150 acres or thereabouts (be the same more or less), and are now in the possession of the said W. Prideaux and of Samuel Cole. The indenture then, after describing two other moieties or half parts undivided of a messuage and tenement, and of a barn situate in the parish of Loddiswell, in the possession of Joanna Saunders, proceeded as follows: "and all houses, outhouses, &c. profits, &c. hereditaments and appurtenances whatsoever to the said moieties belonging, and the reversion and reversions, remainder and remainders, rents, suits, and services thereof, and of every part thereof, and all the estate, right, title, interest, term and terms of years, use, trust, property, claim, and demand whatsoever of him, W. Prideaux, his heirs or assigns, either in law or equity, of, into, or out of the same or any part thereof, to have and to hold the said moiety, or half part of the said messuage, tenement, or dwelling-house in Kingsbridge, with the appurtenances, unto the said R. Were, W. Were, and S. Were, their executors, administrators, and assigns, from the date of the indenture, for and during, and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended, yielding and paying, therefore, yearly and every year during the said term, unto him, W. Prideaux, his heirs or assigns, the rent of one pepper corn if the same should be lawfully demanded; and to have and to hold all and singular the several moieties or half parts hereby demised and assigned, or mentioned, or intended so to be, situate, lying and being in the several parishes of Loddiswell and Churstow, with their, and each and every of their several and respective rights, members, and appurtenances unto the said R. W., W. W., and S. W., their executors, from the day of the date thereof, for and during all the natural life of the said W. Prideaux without impeachment of waste."

The trusts as to all the premises were declared to be for sale, when R. W., W. W., and S. W. should think proper. There were covenants by W. Prideaux, that he had full power to convey the same, and a right of entry given to R. W., W. W., and S. W. This indenture was duly executed by W. Prideaux at the time of its date, no livery of seisin was indorsed on it, and no evidence was offered that any had in fact been made. The defendant, Samuel Cole, before and at the time of the execution of this indenture, was tenant from year to year to W. Prideaux of part of the lands and premises comprised in the deed, and therein described as being situate in the parishes of Loddiswell and Churstow.

After the execution of this indenture, viz. in October 1825, W. Prideaux became a bankrupt, and the defendant, S. Cole, having disclaimed

to hold under the lessors of the plaintiff, defended this action of ejectment under an indemnity from the assignees of W. Prideaux.

Follett for the lessors of the plaintiff. The question in this case is, whether the deed was sufficient, without livery of seisin, to pass the estate in the lands in the parish of Loddiswell to the lessors of the plaintiff for the life of the grantor. The lessor of the plaintiff had a reversion expectant on the determination of Cole's tenancy, and that will pass by the word *grant* without livery. It is true, that in order to pass a freehold interest in possession, livery of seisin is essential, unless the conveyance takes effect under the statute of uses; but a reversion expectant on an estate of freehold, or for years, passed by grant with the attornment of the tenant before the statute of the 4 Anne, c. 16, § 9. Co. Lit. 49 a; 2 Bl. Com. 317; Shepherd's Touchstone, 210, 288; 1 Saund. 232, n. 3; Bacon's Abridgment, Lease N. And if it so passed then, it will, since the statute, pass by grant without the attornment of the tenant. It may, perhaps, be said, that although a reversion expectant on the determination of a freehold term would pass by the deed, yet that this being a reversion expectant on the determination of a term for years, it will not pass; but Littleton, §§ 567, 568, and Lord Coke's Comment on the latter section, and Littleton, § 572 shew, that there is no distinction in this respect between a reversion expectant on the determination of a freehold term, and one expectant on the determination of a term for years. A tenancy from year to year is a term for years. *Botting v. Martin*, 1 Campb. 317. Assuming that the deed was not intended to pass the reversion, it was clearly intended to pass the land; and if the words in the deed are sufficient for that purpose, the court will give effect to the intent. *Roe v. Tramer*, 2 Wils. 75; *Huggerston v. Hanbury*, 5 B. & C. 101.

Coleridge, contra. It must be conceded, that a person seized of a freehold, of which a lessee for years is in possession, may transfer his reversionary interest by deed without livery of seisin. But here, Walter Prideaux was in possession of some part of the premises intended to be conveyed, and those will not pass by this deed. This action is brought to recover those premises, of which Cole, at the time when the deed was executed, was in possession. The deed does not profess to grant the reversion of any premises; it describes the premises sought to be recovered, as being in the possession of Walter Prideaux and of Samuel Cole. It is clear, therefore, that it was the intention of the parties that an immediate possession of the lands, and not the mere reversion of them, should pass. It is a presumption of law, resulting from the deed, that Prideaux and Cole were joint-tenants of the estate; and then the possession of one would be the possession of both. Now if a grantor and his tenant are in possession of an estate, and the deed of grant does not point out what part was in his own possession, and what in that of the tenant, but professes to pass an immediate freehold, the one will not pass without livery of seisin, and the other will not pass, because it was not the intention of the grantor.

BAYLEY, J. It is laid down distinctly, in Co. Lit. 49 a, "that if a man be seised of two acres in fee, and letteth one of them for years, and intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession in name of both, only the acre in possession passeth by the livery. Yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment." And Lord Coke afterwards says, "So it is if any man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of livery." Now that is an authority to shew, that where lands are in possession of a tenant, the reversioner may convey his interest by deed. All lands lie in livery or in grant: and they do not lie in livery where the party intending to convey cannot give immediate possession. Here Prideaux had the freehold in him, but the right of possession was in his tenant. He, therefore, had a reversion expectant on the determination of the term. Now a reversion, which is a vested right, lies in grant. There can be no doubt that this instrument has words fully sufficient to operate by way of grant. On the short ground, that where the right of possession is in a tenant for years, the right of the landlord is a reversion expectant on the determination of the tenancy, and lies in grant, and not in livery, I am of opinion that the reversion of the lands sought to be recovered passed by the deed.

HOLROYD, J. The passage cited from Co. Lit. 49 a is decisive to show that the reversion passed by this deed to the lessors of the plaintiff.

LITLEDALE, J. If Prideaux had been in actual possession of these premises, and intended to have conveyed his interest to a stranger, he ought to have delivered seisin. But possession being in a tenant for year to year, Prideaux had only a reversion, and in order to convey that reversion to the tenant in possession, must have released his right; but the proper mode of passing a reversion to a stranger not in possession is by grant. Here Prideaux has granted the reversion by the deed in question to the lessors of the plaintiff, who are entitled to recover.

Judgment for the plaintiff.

FISHER v. DEERING.

SUPREME COURT OF ILLINOIS.

[Reported 60 Ill. 114.]

APPEAL from the Superior Court of Cook county; the *Hon. Joseph E. Gary*, Judge, presiding.

Mr. Consider H. Willett, for the appellant.

Mr. J. A. Cram, for the appellee.

MR. JUSTICE WALKER delivered the opinion of the court. It appears,

from an examination of the authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and *choses in action*. But the 32 Hen. 8, chapter 34, section 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. *Marle v. Foke*, 3 Salk. 118; *Robins v. Cox*, 1 Levinz, 22; *Ards v. Walkins*, 2 Croke's Eliz. 637; *Knowles' Case*, 1 Dyer, 5 b; 5 Barn. & Cress. 512, and the note.

In *Williams v. Hayward*, 1 Ellis & Ellis, 1040, after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. 8, an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that whilst the assignment of the reversion created a privity of estate between the assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover subsequently accruing, but not rent in arrear at the time he acquired the reversion.

To give the assignee of the reversion a more complete remedy, the 4 and 5 Anne, chapter 16, section 9, was adopted, dispensing with the necessity of an attornment which the courts had held to be necessary under the 32 Hen. 8, to create a privity of contract. But this latter [former] Act has never been in force in this State, and hence the decisions of the British courts, made under it, are not applicable. In many States of the Union this latter [former] Act has been adopted, and the decisions of their courts conform, of course, to its provisions. But we having adopted the common law of England, so far as the same is applicable and of a general nature, and all Statutes or Acts of the British Parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, except certain enumerated Statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. *Gross' Comp.* 1869, 416. It then follows that the 32 Hen. 8, chapter 34, section 1, is in force in this State, as it is applicable to our condition, and is unre-

pealed. And we must hold, that the construction given to that Act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to appellant several instalments of rent falling due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of *Chapman v. McGrew*, 20 Ill. 101, announces a contrary doctrine. In that case this question was presented, and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee, was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that, the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of *Dixon v. Buell*, 21 Ill. 203, only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

PERRIN v. LEPPER.

SUPREME COURT OF MICHIGAN.

[Reported 34 Mich. 292.]

ERROR to Calhoun Circuit.

T. G. Pray, for plaintiffs in error.

Brown and Patterson, for defendants in error.

MARSTON, J. Brown and Van Arman, being the owners, as tenants in common, of certain property in Marshall, on the 6th of September, 1859, leased the same to defendants for a term of five years from and after that date, for which defendants agreed to pay them two hundred and seventy-five dollars per year, payable quarterly. On the 12th day of April, 1862, Van Arman by warranty deed conveyed his interest in said premises, together with the rents, issues and profits thereof, to plaintiffs, who, about the 14th of April, 1862, gave defendants notice of such purchase, and that they, the plaintiffs, would require one-half the rent from and after that time. This request not having been complied with, plaintiffs, December 29, 1863, commenced this action to recover the amount of rent claimed by them. In their declaration they

declared specially upon the lease, setting forth the conveyance by Van Arman to them, and also inserted a count for use and occupation. The court charged the jury that in order for plaintiffs to recover upon either count, it was incumbent on them to prove that before the action was commenced the Leppers had recognized and acknowledged the relation of landlord and tenant as existing between them; in other words, that there had been an attornment. There being no such evidence, plaintiffs failed. To this ruling they excepted, and the question here raised is really the only one in the case. It is true that counsel for defendants in error insists that the plaintiffs, even if entitled to recover, could not sue alone, but must have joined their co-tenant of the reversion in bringing this action. It may be doubtful whether such a question properly arises under the ruling of the court, but as a new trial must be ordered, and this question may again come up, we may as well dispose of it at the present time, by saying that the non-joinder could only be set up in abatement, which was not done in this case, and if not so pleaded, it would merely go to apportion the damages. *Achey v. Hull*, 7 Mich. 430.

It has come to be the generally accepted doctrine in this state, that a person who is owner of real estate, personal property or choses in action, or who has an interest therein, may grant, convey or assign his right or interest, without the assent or acquiescence of any third person, and that the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had. The law has always been very liberal in this state in permitting assignments of choses in action, and now permits the assignee to sue and recover thereon in his own name. The lessor of real estate may convey his reversion, and his grantee will be entitled to the rents accruing thereafter, or he may assign the reversion, reserving the rents, or assign the rents due and to become due. In either case when the rents are assigned, the assignee may sue and collect them in his own name under our statute. The conveyance from Van Arman to plaintiffs was of his entire interest in the demised premises, "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." The effect of this conveyance was not to release defendants from the payment of rent; they could no more thereafter than before retain the beneficial use and enjoyment of the demised premises and at the same time be exempt from the payment of rent under their lease. Van Arman, however, after his conveyance was no longer entitled to collect this rent. That right he had transferred and assigned to the plaintiffs. If defendants, by refusing to attorn to the plaintiffs, can prevent their collecting, the only effect would be to complicate matters and place obstructions in the way of the sale of demised premises. The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law. The landlord could not alienate the estate without the consent of his tenant. This consent was called an attornment. It was founded upon

a state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which this doctrine sprung never having had any existence here, why should the rule itself? Where the reasons from whence a rule arose cease to exist, the rule should cease also. In a country where they never existed, the rule should not be adopted. Of course there may be exceptions to this. Other reasons for continuing a rule may arise while those from whence the rule grew have passed away, but we discover none such in this instance. The doctrine of attornment is inconsistent with our laws, customs and institutions. It may serve a useful purpose in estopping a tenant from denying the title of a landlord to whom he has attorned, but beyond this it can be of but little if any use. "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." Story, J., in *Van Ness v. Pacard*, 2 Pet. 144; or as was said in *Lorman v. Benson*, 8 Mich. 25: "Questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs." Cooley's Const. Lim. 23 and note.

I am of opinion that the court erred in charging the jury that an attornment was necessary to entitle the plaintiffs to recover. The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

SECTION V.

RELEASE AND SURRENDER.

LIT. §§ 444, 445, 459, 460. Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this form, or of this effect.

Know all men by these presents, that I, A. of B. have remisid, released, and altogether from me and my heirs quiet claimed: (me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamasse): or thus, for me and my heirs quiet claimed to C. of D. all the right, title, and claim (totum jus, titulum, et clameum) which I have, or by any means may have, of and in one messuage with the appurtenances in F. &c. And it is to be understood, that these words, remisisse, et quietum clamasse, are of the same effect as these words, relaxasse.

Also, if a man letteth to another his land for term of years, if the

lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

[But the contrary is holden, Pasch. 2 E. 4. by all the justices.]

Co. Lit. 337 b. “*Surrender,*” *sursum redditio*, properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.

SECTION VI.

DEVISE.

LIT. §§ 167, 586. Also, in some boroughs, by the custom, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whom such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the form and effect of the devise, without any livery of seisin thereof to be made to him, &c.

In the same manner is it, where a man letteth such tenements devisable to another for life, or for years, and deviseth the reversion by his testament to another in fee, or in fee tail, and dieth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorn. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor; and if the effect of this should lie upon the attornment of the tenant, then perchance the tenant would never attorn, and then the will of the devisor should never be performed, &c. and for this the devisee shall distrain, &c. or he shall have an action of waste, &c. without attornment. For if a man deviseth such tenements to another by his testament, *habendum sibi in perpetuum*, and dieth, and the devisee enter, he hath a fee simple,

causa qua supra ; yet if a deed of feoffment had been made to him by the devisor of the same tenements, *habendum sibi in perpetuum*, and livery of seisin were made upon this, he should have an estate but for term of his life.¹

SECTION VII.

DISSEISIN AND OTHER OUSTER.

LIT. §§ 279, 385. And note that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and onsteth him which hath the freehold, &c.

Descents which toll entries are in two manners, to wit, where the descent is in fee, or in fee tail. Descents in fee which toll entries are, as if a man seised of certain lands or tenements is by another disseised, and the disseisor hath issue, and dieth of such estate seised, now the lands descend to the issue of the disseisor by course of law, as heir unto him. And because the law cast the lands or tenements upon the issue by force of the descent, so as the issue cometh to the lands by course of law, and not by his own act, the entry of the disseisee is taken away, and he is put to sue a writ of *entre sur disseisin* against the heir of the disseisor, to recover the land.

LIT. §§ 414, 415, 422, 423, 592, 595-600, 611, 698. Continual claim is where a man hath right and title to enter into any lands or tenements whereof another is seised in fee or in fee tail, if he which hath title to enter makes continual claim to the lands or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. As in case that a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent.

In the same manner it is, if tenant for life alien in fee, he in the

¹ All socage land and two thirds of the land held by knight service were made devisable by will in writing by the Sts. of 32 Hen. VIII. (1540) c. 1, and 34 & 35 Hen. VIII. (1543) c. 5. Land held by knight-service having been turned into socage land by the St. of 12 Car. II. (1660) c. 24, all land has since that time been devisable.

reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continual claim made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heir, then cannot he in the reversion nor he in the remainder enter. But if he in the reversion or in the remainder, who hath cause to enter upon the alienee, make continual claim to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time.

And if his adversary who occupieth the land, dieth seised in fee, or in fee tail, within the year and a day after such claim, whereby the lands descend to his son as heir to him, yet may he which makes the claim enter upon the possession of the heir, &c.

But in this case after the year and the day that such claim was made, if the father then died seised the morrow next after the year and the day, or any other day after, &c. then cannot he which made the claim enter: and therefore if he which made the claim will be sure at all times that his entry shall not be taken away by such descent, &c. it behooveth him that within the year and the day after the first claim made, to make another claim in form aforesaid, and within the year and the day after the second claim made, to make the third claim in the same manner, and within the year and the day after the third claim to make another claim, and so over, that is to say, to make a claim within every year and day next after every claim made during the life of his adversary, and then at what time soever his adversary dieth seised, his entry shall not be taken away by any descent. And such claim in such manner made is most commonly taken and named continual claim of him which maketh the claim, &c.

Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz. where a man hath aliened to another certain lands or tenements and dieth, and another hath right to have the same lands or tenements, but he may not enter into them because of such an alienation, &c.

Also, if tenant in tail of certain land thereof enfeoff another, &c. and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a *formedon in le discender*, &c.

Also, if there be tenant in tail, the reversion being to the donor and his heirs, if the tenant make a feoffment, &c. and die without issue, he in the reversion cannot enter, but is put to his action of *formedon in le reverter*.

In the same manner is it, where tenant in tail is seised of certain land whereof the remainder is to another in tail, or to another in fee. If the tenant in tail alien in fee, or in fee-tail, and after die without issue, they in the remainder may not enter, but are put to their writ of *formedon* in the remainder, &c. and for that that by force of such

feoffments and alienations in the cases aforesaid, and the like cases they that have title and right after the death of such a feoffor or alienor may not enter, but are put to their actions, *ut supra*; and for this cause such feoffments and alienations are called discontinuances.

Also if tenant in tail be disseised, and he release by his deed to the disseisor and to his heirs all the right which he hath in the same tenements, this is no discontinuance, for that nothing of the right passeth to the disseisor, but for term of the life of tenant in tail which made the release, &c.

But by the feoffment of tenant in tail, fee simple passeth by the same feoffment by force of the livery of seisin, &c.

But by force of a release nothing shall pass but the right which he may lawfully and rightfully release, without hurt or damage to other persons who shall have right therein after his decease, &c. So there is great diversity between a feoffment of tenant in tail, and a release made by tenant in tail.

But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years, &c.

Warranty that commences by disseisin is in this manner: as where there is father and son, and the son purchaseth land, &c. and letteth the same land to his father for term of years, and the father by his deed thereof enfeoffeth another in fee, and binds him and his heirs to warranty, and the father dies, whereby the warranty descendeth to the son, this warranty shall not bar the son; for notwithstanding this warranty the son may well enter into the land, or have an assise against the alienee if he will, because the warranty commenced by disseisin: for when the father which had but an estate for term of years, made a feoffment in fee, this was a disseisin to the son of the freehold which then was in the son. In the same manner it is, if the son letteth to the father the land to hold at will, and after the father make a feoffment with warranty, &c. And as it is said of the father, so it may be said of every other ancestor, &c. In the same manner is it, if tenant by *legit*, tenant by statute merchant, or tenant by statute staple, make a feoffment in fee with warranty, this shall not bar the heir which ought to have the land, because such warranties commence by disseisin.¹

Co. Lit. 277 a, b. "*Abate*," is both an English and French word, and signifieth in his proper sense to diminish or take away, as here by his entry he diminisheth and taketh away the freehold in law

¹ St. 8 & 9 Vict. c. 106 (1845), c. 4, provides "that a feoffment made after" October 1, 1845, "shall not have any tortious operation." For like Statutes in the United States, see Stimson, Am. Stat. Law, § 1402.

descended to the heir: and so it is said to abate an account, signifying subtraction or withdrawing, &c. and to abate the courage of a man. In another sense it signifieth to prostrate, beat down, or overthrow, as to abate castles, houses, and the like, and to abate a writ; and hereof cometh a word of art, *abatamentum*, which is an entry by interposition. Now the difference *inter disseisinam, abatamentum, intrusionem, deforciamentum, et usurpationem, et purpresturam*, is this:

A disseisin is a wrongful putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of an inheritance, and between the death and the entry of the heir, a stranger doth interpose himself, and abate.

Intrusion first properly is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir a stranger doth interpose himself and intrude.

Secondly, he that entereth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

Thirdly, when the heir in ward entereth at his full age without satisfaction for his marriage, the writ saith, *quod intrusit*.

Deforciamentum comprehendeth not only these aforesaid, but any man that holdeth land whereunto another man hath right, be it by descent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law: one, when a stranger that no right hath presenteth to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawful warrant, royal franchises, he is said to usurp upon the king those franchises.

Purprestura, or *pourprestura*, a purpresture. *Purprestura est, &c., generaliter quoties aliquid fit ad nocumentum regi tenementi, vel regia via (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common street or public water, or such like public things, it is derived of the French word *pourpris*, which signifieth an inclosure, but specially applied, as is aforesaid, by the common law.

SECTION VIII.

REMEDIES.

5 RICH. II. ST. 1 (1381), c. 7. And also the King defendeth, That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body and thereof ransomed at the King's will.¹

3 BL. COM. 117, 118. *Personal* actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs: and they are the same which the civil law calls "*actiones in personam quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions (or, as they are called in the Mirror, *feodal* actions), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the Statute of Gloucester, which is a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.

¹ See St. 8 Hen. VI. c. 9.

1 ROSCOE, REAL ACTIONS, 3. The following table exhibits a view of the various species of real actions :—

REAL ACTIONS ARE,	I. DROITURAL OR WRITS OF RIGHT.	<p>Properly so called.</p> <ol style="list-style-type: none"> 1. Right patent. 2. Right <i>quia dominus remisit curiam</i>. 3. Right <i>in capite</i>. 4. Right in London. 5. Right close. 6. Right <i>de rationabili parte</i>. 7. Right of advowson. 8. Right of dower. <p>In the Nature of a Writ of Right.</p> <ol style="list-style-type: none"> 1. Right upon disclaimer. 2. <i>De rationabilibus divisis</i>. 3. Right of ward. 4. <i>De consuetudinibus et servitiis</i>. 5. <i>Cessavit</i>. 6. Escheat. 7. <i>Nativo habendo</i>. 8. <i>Quo jure</i>. 9. <i>Secta ad molendinum</i>. 10. <i>Ne injuste vexes</i>. 11. Writ of mesne. 12. Dower <i>unde nihil habet</i>. 13. <i>Quod permittat</i>. <p>14. Formedon. { In descender. In remainder. In reverte"</p>								
	II. POSSESSORY.	<p>Writs of Assize.</p> <ol style="list-style-type: none"> 1. <i>Novel disseisin</i>. 2. Nuisance. 3. <i>Darrein presentment</i>. 4. <i>Juris utrum</i>. 5. <i>Mortd'ancestor</i>. <p>Writs of Entry.</p> <table border="0" style="margin-left: 20px;"> <tr> <td style="vertical-align: top;"> <ol style="list-style-type: none"> 1. <i>Sur disseisin</i>. 2. <i>Sur intrusion</i>. </td> <td style="vertical-align: top; padding-left: 10px;"> <table border="0"> <tr> <td style="vertical-align: top;"> <ol style="list-style-type: none"> 1. By person incapable. 2. By particular tenant. 3. By husband seised <i>jure uxoris</i>. 4. 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ST. 52 HEN. III., ST. OF MARLEBRIDGE (1267), c. 29. It is provided also, That if those alienations (whereupon a writ of entry was wont to be granted) hap to be made in so many degrees, that by reason thereof the same writ cannot be made in the form beforesaid, the plaintiffs shall have a writ to recover their seisin, without making mention of the degrees, into whose hands so ever the same thing shall happen to come by such alienations, and that by an original writ to be provided therefor by the Council of our Lord the King.

CO. LIT. 238 b. "*Writ of entry sur disseisin.*" *Breve de ingressu super disseisinam.* This writ lieth only upon a disseisin made to the demandant or to some of his ancestors, and of this writ there be four kinds. The first is a writ that lieth for the disseisee against the disseisor upon a disseisin done by himself, and this is called a writ of entry in the nature of an assise. The second is a writ of *entrie sur disseisin en le per*, whereof Littleton here speaketh, for the heir by descent is in the *per* by his ancestor: so it is if the disseisor make a feoffment in fee, a gift in tail, or a lease for life, for they are in the *per* by the disseisor. The third is a writ of *entrie sur disseisin en le per & cui*; as where A. being the feoffee of D. the disseisor maketh a feoffment over to B. there the disseisee shall have a writ of entry *sur disseisin* of lands, &c. in which B. had no entry but by A. to whom D. demised the same, who unjustly and without judgment disseised the demandant. These are called *gradus*, degrees, which are to be observed, or else the writ is abatable; for *sicut natura non facit saltum, ita nec lex.*

The fourth is a writ of *entrie sur disseisin in le post*, which lieth when after a disseisin the land is removed from hand to hand beyond the degrees; and it is called *in le post*, because the words of the writ be, *post disseisinam quam D. injuste, &c. fecit, &c.*¹

Proceedings on an Action of Trespass in Ejectment, by Original, in the King's Bench.

SECT. 1. *The Original Writ.*

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Berkshire, greeting. If Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All-Souls, wheresoever we shall then be in England, to show wherefore with foree and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esquire, hath demised to the

¹ By St. 3 & 4 Wm. 4, c. 27, § 36, no real or mixed action, "except a writ of right of dower, or writ of dower *unde nihil habet*, or a *quare impedit* or an ejectment," is to be brought after the year 1834.

aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the names of the pledges and this writ. Witness ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Pledges of prosecution, { John Doe.
Richard Roe.

The within-named William Stiles { John Den.
is attached by pledges, { Richard Fen.

SECT. 2. *Copy of the Declaration against the casual Ejector, who gives Notice thereupon to the Tenant in Possession.*

Michaelmas, the 29th of King George the Second.

Berks, } William Stiles, late of Newbury in the said county, gen-
to wit. } tleman, was attached to answer Richard Smith, of a
plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers, Esquire, demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the Lord the King, &c. And whereupon the said Richard by Robert Martin his attorney complains, that whereas the said John Rogers, on the first day of October, in the twenty-ninth year of the reign of the Lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said Lord the King; whereby the said Richard saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c.

Martin, for the plaintiff. }
Peters, for the defendant. }

Pledges of Prosecution, { John Doe.
Richard Roe.

MR. GEORGE SAUNDERS, —

I am informed that you are in possession of, or claim title to, the

premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary Term in his Majesty's Court of King's Bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

WILLIAM STILES.

5th January, 1756.

SECT. 3. *The Rule of Court.*

Hilary Term, in the twenty-ninth Year of King George the Second.

Berks, } It is ordered by the court, by the assent of both parties,
to wit, } and their attornies, that George Saunders, Gentleman,
may be made defendant, in the place of the now defendant, William
Stiles, and shall immediately appear to the plaintiff's action, and shall
receive a declaration in a plea of trespass and ejectment of the tene-
ments in question, and shall immediately plead thereto Not Guilty:
and, upon the trial of the issue, shall confess lease, entry, and ouster,
and insist upon his title only. And if upon the trial of the issue, the
said George do not confess lease, entry, and ouster, and by reason
thereof the plaintiff cannot prosecute his writ, then the taxation of costs
upon such *non pros.* shall cease, and the said George shall pay such
costs to the plaintiff, as by the Court of our Lord the King here shall
be taxed and adjudged, for such his default in non-performance of this
rule; and judgment shall be entered against the said William Stiles,
now the casual ejector, by default. And it is further ordered, that if
upon the trial of the said issue a verdict shall be given for the defend-
ant, or if the plaintiff shall not prosecute his writ upon any other cause
than for the not confessing lease, entry, and ouster as aforesaid, then
the lessor of the plaintiff shall pay costs, if the plaintiff himself doth
not pay them. By the Court.

Martin, for the plaintiff,

Newman, for the defendant.

NOTE. — The above form of beginning an action of ejectment is taken from the Appendix to the Third Volume of Blackstone's Commentaries. The later proceedings are omitted.

CHAPTER IV.

COPYHOLDS.

LIT. §§ 73, 74, 78. Tenant by copy of court roll is, as if a man be seised of a manor within which manor there is a custom, which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c. at the will of the lord according to the custom of the same manor.

And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behooveth him after the custom to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this form, or to this effect. .

A. of B. cometh into this court, and surrendereth in the same court a mease, &c. into the hands of the lord (*in manus domini*), to the use of C. of D. and his heirs, or the heirs issuing of his body, or for term of life, &c. And upon that cometh the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heirs issuing of his body, or to him for term of life, at the lord's will, after the custom of the manor, to do and yield therefor the rents, services and customs thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

Tenants by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custom) in their hand, the which they shall deliver to the steward or to the bailiff according to the custom of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entered upon the roll, and the steward or bailiff according to the custom shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

CHAPTER V.

USES AND TRUSTS.¹

SECTION I.

USES BEFORE ST. 27 HEN. VIII. C. 10.²

KEILW. 42, PL. 7 (1502). Vavasour, J., said that the subpœna commenced in the time of Edward III. ; but this was always against the feoffee upon confidence himself, for against his heir the subpœna was never allowed until the time of Henry VI., and in this point the law was changed by Fortescue, C. J.³

ST. 1 RICH. III. (1483), c. 1. Forasmuch as by pryvy and unknown feoffments, great unsurety, trouble, costs, and grievous vexations daily grow among the King's subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments, nor women that have jointures or dowers in any lands, tenements, or other hereditaments, nor men's last wills to be performed, nor leases for term of life, or of years, nor annuities granted to any person or persons for their services for term of their lives or otherwise be in perfect surety, nor without great trouble and doubt of the same, because of the said pryvy and unknown feoffments : (2) For remedy whereof, be it ordained, established, and enacted, by the advice of the Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled, and by authority of the same, that every estate feoffment, gift, release, grant, leases and confirmations of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had by any person

¹ On Equity Jurisdiction in general, see Langdell, Eq. Pl. §§ 36-45 ; Digby, Real Prop. (1st ed.) 244-247 ; (2d ed.) 285-287 ; (3d ed.) 276-279 ; Haynes, Outlines of Eq. 6-20.

² On Uses before the Statute, see also Digby, Real Prop. c. 6 ; Leake, Digest Land Law, 99-102.

³ "The experience and practice of uses were not ancient, and my reasons why I think so, are these four : First, I cannot find in any evidence before King R. II. his time, the clause *ad opus et usum*, and the very Latin of it savoureth of that time ; for in ancient time, about Edw. I. and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see partly by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin, whereas this phrase *ad opus et usum*, and the words *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus* and *usus* coupled together, and that they did govern an ablative case ; as they do indeed since this Statute, for they take away the land and put them into a conveyance." Bacon, Uses, 22.

or persons being of full age, of whole mind, at large, and not in duress, to any person or persons; and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had or given, and to all other to his use, (3) against the seller, feoffor, donor, or grantor thereof, (4) and against the sellers, feoffors, donors, or grantors, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors, or grantors, and every of them, (5) and against all other having or claiming any title or interest in the same, only to the use of the same seller, feoffor, donor or grantor, sellers, feoffors, donors or grantors, or his or their said heirs at the time of the bargain, sale, covenant, gift or grant made, (6) saving to every person or persons such right, title, action or interest, by reason of gift in tail thereof made, as they ought to have had, if this Act had not been made.

 ANONYMOUS.

COMMON PLEAS. 1522.

[Reported Year Book 14 Hen. VIII., 4, pl. 5.]

ONE J. S. sued a replevin for his cattle tortiously taken.

The defendant avowed for that J. D. and J. B. were seised of a ploughland of land in their demesne as of fee to the use of R. N. by the feoffment F. R., &c., and being so seised granted an annual rent out of the said ploughland to A. by the name of Alice, wife of R. to hold during the term of her life with a clause of distress, and afterwards Alice married the defendant, before the taking, and for so much in arrear he avowed the taking, &c.

To which the plaintiff said that J. D. and J. B. were seised to the use of W. N. and being so seised granted the said rent to the said A. as alleged, she then having notice of the use, that the said J. D. and J. B. enfeoffed one Halpenny in fee whereby he was seised, and being so seised, and Alice also being seised of the rent, the said W. N. by his deed released all his right to the said Halpenny to him and his heirs forever *absque hoc* that J. D. and J. B. were seised to the use of R. N. as the avowant has alleged, &c., and prays judgment if this avowry, &c.

FITZ-HERBERT, J. First it is to be seen to whose use the grantee shall be seised.¹ I think he shall be seised to the first use, notwithstanding he had no notice, for uses are at common law and not by the statutes of Richard, and a use is but a trust and confidence which feoffor puts in his feoffee according to the estate which was at common law, for if a woman seised of land at common law will upon a communication of marriage enfeoff one, if he does not perform the trust, the law

¹ Only so much of the opinion of the court as relates to this point is given. The translation is taken from Professor Ames's pamphlet on Uses and Trusts before the St. of 27 Hen. VIII.

gives her a remedy to recover her land back by a writ of entry *causa matrimonii praelocuti*. And so if I will that my executor sell my land which is devisable, if he will not, but takes the profits to his own use, the heir may enter upon him for the non-performance of his trust as was adjudged in 38 Lib. Ass. p. 3. And then the trust is a necessity, for a dead man cannot perform his own will. But, Sir, in this present case this feoffment in trust was only a pleasure and not a necessity, but still he is as much bound in conscience to perform his will as the executor since he took the estate to do it, and if he deceives him no one will say that he does well. At the common law the feoffor had no remedy except by subpœna, but now by the statute he may enter and make a feoffment according to his will, if his feoffee will not do his will. But how a use shall be changed depends upon the common law and upon the estate of the feoffee, for if I enfeoff B. to hold to him his heirs and assigns, my trust and confidence is in him, his heirs, and assigns; and this is easily shown, for the heirs will be bound to perform the feoffor's will as much as the father, and the second feoffee as much as the first, if there is no consideration, and so it is if the feoffee suffer a recovery without a consideration. For it shall be intended since he parted with the land without consideration that he parted with it in the most proper way, i. e. to hold it as he held. For when an act rests in intendment and is indifferent, the law makes the most favorable presumption, for if I see a priest and a woman together suspiciously, still as long as there is doubt whether he is doing good or evil the former is to be presumed, and so here. And, Sir, the rent is, in a manner, part of the land, and here the trust was in the land out of which the rent was granted, and this grant is without consideration, and it may be granted to the first use, wherefore it shall be so intended. And although the rent was not *in esse* and he had no use in it before, still he may have the use. For I take it clearly if one is seised of a seignory in gross and grants it to his use, if the land escheats, that the feoffee shall nevertheless be seised to the first use for it comes in lieu of the seignory: and yet he had no use in the land before; and so one may grant for term of life and express the use.

BROKE, J. to the same intent. Sir, as the feoffor puts confidence and trust, so shall be his use, and the use is in the feoffor in conscience, although the feoffee has the land by the common law. And so it is not like an estate upon condition at common law, for the whole inheritance is in the feoffee, and if he dies without heir, the feoffor cannot enter; but if he gives the land in tail and the donee dies without heir, he may enter, and every dealing with the land should be according to the wish of the feoffor. For if the feoffee acts otherwise, he is chargeable in conscience, and so is the heir of the feoffee; and the feoffee of the feoffee if there is no consideration; and so is he who comes in by fine and false recovery. *Scilicet*, those recoveries in a writ of entry in the *post*. For in all these cases it is the act of the feoffee and being without consideration the law intends that it was according to the first use; and,

Sir, conscience does not make the use, but common reason which is common law, which is indifferent to all laws spiritual and temporal; and, Sir, although common reason says that if I enfeoff one without consideration, this shall be to my use, still this land shall be in the feoffee like any other land and take the same course: for if he has a wife and dies, his wife shall have dower to her own use, for here there is no act of the feoffee and she does not claim by the feoffee, but the law makes her estate; and so if he is bound in a statute merchant; and so in case of a lord taking by escheat, for in these cases there was no act by the feoffee, to deceive or defraud the feoffor, but it was done by order of the law. And, Sir, the notice as here is the important matter, for if there was no notice there would be no use, but if he has notice, he is *particeps criminis*.

POLLARD, J. to the same intent. As has been said uses were at the common law and are nothing more than confidence and trust, and the feoffee is bound to act according to the trust, otherwise he would deceive his feoffor, which would not be reason. And there is a diversity when there is a default in the feoffee in deceiving the feoffor, and when not, for if the feoffee die his wife shall have dower, and so in case of a statute merchant or escheat, for there is no default in feoffee, but the operation of law. But the default is in me, and although my feoffee is bound in a statute merchant, still I can enter and make a feoffment and the execution is discharged. And so if my feoffee endowed his wife *ad ostium ecclesie* and I re-enter, it is void, for the feoffee took the estate by my feoffment, and not by law. And if the feoffees enfeoff one without consideration, it is the first use unless it be without notice; but if upon consideration without notice the use is changed, and if with notice, though upon consideration, the first use remains; and this is the diversity.

BRUDENELL, J. to the contrary.¹

ANONYMOUS.

COMMON PLEAS. 1522.

[Reported Bro. N. C. by March, 89.]

A MAN makes a feoffment in fee, to four, to his use, and the feoffees make a gift in tail without consideration, to a stranger, who had not consanance of the first use, *habend.* in tail, to the use of *cestui que use*, and his heirs; the tenant in tail shall not be seised to the first use, but to his own use, for the Stat. of *Westm.* 2, *cap.* 1, wills, *quod voluntas donatoris in omnibus observetur*; that a man ought to refer his will to the law, and not the law to his will: Also none can be

¹ The opinion of Brudenell, J. is omitted.

seised to the use of another, but he which may execute an estate to *cestui que use*, which shall be perfect in law, which tenant in tail cannot do; for if he executes an estate, his issue shall have a *formedon*; and the best opinion [is] that an abbot, mayor and commonalty, nor other corporations shall not be seised to a use, for their capacity is only to take to their own use: and also if the abbot execute an estate, the successor shall have a writ of entry *sine assensu capituli*: and those that are in the *post*, as by escheat, mortmain, perquisite of villein, recovery, dower, curtesy, and the like, are seised to their own use and not to another use: and also the Stat. of 1 R. 3, is, That all gifts, feoffments & grants of *cestui que use* shall be good against all, &c. saving to all persons their rights and interests in tail, as if this Stat. had not been made; and therefore tenant in tail shall not be seised to a use. And 't was agreed by the court, That the words in the end of the Stat. of 1 R. 3, saving such right and interest to the tenant in tail, &c. is taken tenant in tail in possession; and not tenant in tail in use: for *cestui que use* in tail hath no right nor interest. And also here there is a tenure betwixt the donors and the donees, which is a consideration that the tenant in tail shall be seised to his own use: and the same law of tenant for term of years, and tenant for life, their fealty is due; and where a rent is reserved, there, though a use be expressed to the use of the donor, or lessor, yet this is a consideration that the donee or lessee shall have it to his own use: and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use; this is a void limitation of the use: for the law by the consideration of money, makes the land to be in the vendee. *Et opinio fuit*, That a use was at common law before the Stat. of *Quia emptores terrarum*, but uses were not common before the same Stat. For upon every feoffment before this Stat. there was a tenure betwixt the feoffors and the feoffee; which was consideration, that the feoffee shall be seised to his own use: but after this Stat. the feoffee shall hold *de capitali domino*, and there is no consideration betwixt the feoffor and the feoffee without money paid, or other especial matter declared, for which the feoffee shall be seised to his own use: for where the Stat. of Marlebr. is, that a feoffment by the father, tenant in chivalry, made to his son by covin, shall not toll the lords ward, &c. In these cases the feoffor after such feoffment takes the profits of the land all his life. And the same law by SHELLEY [J.] of a feoffment made by a woman to a man to marry her, the woman takes the profits after the espousals: *Quære inde*; for this is an express consideration in itself. And by NORWICH, [J.] If a man deliver money to J. S. to buy land for him, and he buys it for himself, & to his own use, this is to the use of the buyer, and not to the use of him who delivered the money; and there is no other remedy but an action of deceit.¹

¹ "But one of the most important circumstances, in the history of the decline of the feud, is, the *introduction of uses*. By these the legal estate of the land was in the

feoffee. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestui que use*, there was no point of connection, between him and the lord. Besides, when a feoffment was made to uses, it seldom happened, that, the feoffment was made to a single person. The feoffees were numerous, and when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees, to the subsisting uses. In the meantime, the ownership of the land was transmitted and aliened, at the will of the *cestui que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase, became seldom due, and those incident to descent almost never accrued to the lord. Now, where a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief: when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship, and marriage. From these observations, it is clear, how great a fraud was practised upon the lord, by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence we find, that, among the mischiefs recited in the preamble to the Statute of Uses, the loss to the lord, of the fruits of tenure, is particularly insisted on. It does not fall within the nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the Statute of the 1 Richard the 2d. cap. 9, which gave an action to the disseisee, both against the feoffee, and the *cestui que use*. It is observable, that the *senatus consultum Trebonianum* gave the same right of action against the *hæres fidei commissarius*. Unquestionably the object of the Statute of the 27 of Henry 8 was to effect a total extirpation of uses." Co. Lit. 191 a. Butler's note, VI. 11.

"The introduction of *Uses* produced a great revolution in the transfer and modification of landed property. Without entering into a minute discussion of the difference between uses at common law, and uses since the Statute of 27 H. 8, — a point, particularly well explained in Mr. Sanders's Essay on Uses and Trusts, it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the fensual duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law-writers the *cestuy que use*, had the beneficial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the *cestuy que use* was without remedy. To redress this grievance, the writ of subpoena was devised, or rather adopted from the common-law courts, by the Court of Chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. Thus uses were established. — They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and, in all other respects, to have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of, or annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming *that* possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seised to an use, though the estates in their hands were subject to rents, commons and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the per*. Thus, between the feoffee and *cestui que use*, there was a confidence in the person and privity in estate. (See *Chudleigh's Case*, 1 Rep. 120, and *Burgess and Wheate*, 1 Bla. 123.) But this was only between the feoffee and *cestui que use*. To all other persons the feoffee was as

SECTION II.

STATUTE OF USES.

ST. 27 HEN. VIII. (1536) c. 10. Where by the common laws of this realm, lands tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another

much the real owner of the fee, as if he did not hold it to the use of another. *He* performed the feudal duties; *his* wife was entitled to dower; *his* infant heir was in wardship to the lord; and, upon *his* attainder, the estate was forfeited. To remedy these inconveniencies, the Statute of 27 H. 8 was passed, by which the possession was divested, out of the persons seised to the use, and transferred to the *cestui que use*. For, by that Statute, 'it is enacted, that, 'when any person shall be seised of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: then, and in every such case, the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use.' Co. Lit. 271 b, Butler's note, II.

"Down to the time of Hen. VI., the *cestui que trust* could only proceed in the Court of Chancery against the feoffee in trust himself; indeed it was insisted by the common law judges in the reign of Edw. IV., that a subpoena did not lie against the heir of the trustee; afterwards, by universal consent, it was extended to his heir, and then to alienees with express notice of the trust, or without valuable consideration, in which case notice was implied. But a purchaser of the legal estate for valuable consideration *bona fide*, without notice, might then, as now, hold the land discharged of any trust or confidence; the only remedy was against the feoffee, or his executor if the feoffee were dead.

"If the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for the escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, was liable to perform the trust, because they were not parties to the transaction, but came in by act of law, or in the *post*, and not in the *per*, as it was said, though doubtless their title in reason was no better than that of the heir against whom the remedy was extended. It was the same as regards any other person who obtained possession, not claiming by any contract or agreement with the feoffee, between whom and the *cestui que use*, therefore, there was no privity. 'Where there was no trust, there could be no breach of trust.' The remedy against a disseisor, therefore, was not in chancery at the instance of the *cestui que trust*, but at law at the instance of the feoffee; and it was part of his duty to pursue his legal remedies at the desire of the *cestui que trust*.

"As regards the *cestui que trust* also, privity was in some sense essential to his obtaining relief; thus, on the death of the original *cestui que trust*, in the case of a simple trust or use, the right to sue a subpoena was held to descend to the heir as representing his ancestor; but neither a wife, a husband, nor judgment creditor was entitled to this privilege." 1 Spence Eq. Jur. 445.

by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fils chivalier & pur file marier*, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's Highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the lords their escheats thereof; (15) and many other inconveniencies have happened and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's Highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, That it may be enacted by his Highness, by the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, in manner and form following; that is to say, That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or

reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

II. And be it further enacted by the authority aforesaid, That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any of them that be so jointly seised, that in every such case that those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence or trust, such estate, possession and seisin, of and in the same lands, tenements, rents, reversions, remainders and other hereditaments, in like nature, manner, form, condition and course, as he or they had before in the use, confidence or trust of the same lands, tenements or hereditaments; (2) saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements or hereditaments, to any use, confidence or trust, all such right, title, entry, interest, possession, rents and action, as they or any of them had, or might have had before the making of this Act.

III. And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents or hereditaments, whereof they be, or hereafter shall be seised to any other use, as if this present Act had never been had nor made; any thing contained in this Act to the contrary notwithstanding.

IV. And where also divers persons stand and be seised of and in any lands, tenements or hereditaments, in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of x. li. or more or less, out of the same lands and tenements, and some

other person one other annual rent, to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof:

V. Be it therefore enacted by the authority aforesaid, That in every such case the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance had been made and executed to them, by such as were or shall be seised to the use or intent of any such rent to be had, made or paid, according to the very trust and intent thereof, (2) and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, (3) and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed, upon the trust and intent for payment or surety of such rent.

VI. And be it further enacted by the authority aforesaid, That whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife; (2) or where any such estate or purchase of any lands, tenements, or hereditaments, hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointer of the wife; (3) that then in every such case, every woman married, having such jointer made or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointer, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; (4) but if she have no such jointer, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this Act, or any law or provision made to the contrary thereof notwithstanding.

VII. Provided alway, That if any such woman be lawfully expelled or evicted from her said jointer, or from any part thereof, without any

fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto.

VIII. Provided also, That this Act, nor any thing therein contained or expressed, extend or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for or concerning such right, title, use, interest or possession, as they or any of them have, claim or pretend to have for her or their jointer or dower, of, in or to any manors, lands, tenements, or other hereditaments of any of their late husbands, being now dead or deceased; any thing contained in this Act to the contrary notwithstanding.

IX. Provided also, That if any wife have, or hereafter shall have any manors, lands, tenements or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of parliament, and the said wife after that fortune to overlive her said husband, in whose time the said jointer was made or assured unto her, that then the same wife so overliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed or assured during the coverture, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of parliament, as is aforesaid, (2) and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements and hereditaments as her husband was and stood seised of any state of inheritance at any time during the coverture, anything contained in this Act to the contrary thereof notwithstanding.

X. Provided also, That this present Act, or anything herein contained, extend nor be at any time hereafter interpreted, expounded or taken, to extinct, release, discharge or suspend any Statute, recognizances or other bond, by the execution of any estate, of or in any lands, tenements or hereditaments, by the authority of this Act, to any person or persons, or bodies politic; any thing contained in this Act to the contrary thereof notwithstanding.

XI. And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements and hereditaments, to the great trouble of the King's subjects; (2) the King's most royal Majesty minding the tranquillity and rest of his loving subjects, of his most excellent and accustomed goodness is pleased and contented that it be enacted by the authority of this present Parliament, That all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May, that shall be in the year of our Lord God 1536, of any lands, tenements or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner and

form as they were commonly taken and used at any time within forty years next afore the making of this Act; any thing contained in this Act, or in the preamble thereof, or any opinion of the common law to the contrary thereof notwithstanding.

XII. Provided always, That the King's Highness shall not have, demand or take any advantage or profit, for, or by occasion of the executing of any estate, only by authority of this Act, to any person or persons, or bodies politic, which now have, or on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any use or uses, trusts or confidences in any manors, lands, tenements or hereditaments holden of the King's Highness, by reason of primer seisin, livery, *ouster le main*, fine for alienation, relief or harriot; (2) but that fines for alienations, reliefs and harriots, shall be paid to the King's Highness, and also liveries and *ouster le mains* shall be used for uses, trusts and confidences to be made and executed in possession by authority of this Act, after and from the said first day of May, of lands and tenements, and other hereditaments holden of the King, in such like manner and form, to all intents, constructions and purposes, as hath heretofore been used or accustomed by the order of the laws of this realm.

XIII. Provided also, That no other person or persons, or bodies politick, of whom any lands, tenements or hereditaments be or hereafter shall be holden mediate or immediate, shall in any wise demand or take any fine, relief or harriot, for or by occasion of the executing of any estate by the authority of this Act, to any person or persons, or bodies politic, before the said first day of May, which shall be in the year of our Lord God 1536.

XIV. And be it enacted by authority aforesaid, That all and singular person and persons, and bodies politic, which at any time on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any estate unto them executed of and in any lands, tenements or hereditaments, by the authority of this Act, shall and may have and take the same or like advantage, benefit, voucher, aid prayer, remedy, commodity and profit by action, entry, condition or otherwise, to all intents, constructions and purposes, as the person or persons seised to their use of or in any such lands, tenements or hereditaments so executed, had, should, might or ought to have had at the time of the execution of the estate thereof, by the authority of this Act, against any other person or persons, or for any waste, disseisin, trespass, condition broken, or any other offence, cause or thing concerning or touching the said lands or tenements so executed by the authority of this Act.

XV. Provided also, and be it enacted by the authority aforesaid, That actions now depending against any person or persons seised of or in any lands, tenements or hereditaments, to any use, trust or confidence, shall not abate ne be discharged for or by reason of executing of any estate thereof by authority of this Act, before the said first day of May,

which shall be in the year of our Lord God 1536, any thing contained in this Act to the contrary notwithstanding.

XVI. Provided also, That this Act, nor any thing therein contained, shall not be prejudicial to the King's Highness for wardships of heirs now being within age, nor for liveries, or for *ouster le mains*, to be sued by any person or persons now being within age, or of full age, of any lands or tenements unto the same heir or heirs now already descended ; any thing in this Act contained to contrary notwithstanding.

XVII. Provided also, and be it enacted by the authority aforesaid, That all and singular recognizances heretofore knowledged, taken or made to the King's use, for or concerning any recoveries of any lands, tenements or hereditaments heretofore sued or had, by writ or writs of entry upon disseisin *in le post*, shall from henceforth be utterly void and of none effect, to all intents, constructions and purposes.

XVIII. Provided also, That this Act, nor any thing therein contained, be in any wise prejudicial or hurtful to any person or persons born in Wales or the marches of the same, which shall have any estate to them executed by authority of this Act, in any lands, tenements or other hereditaments within this realm, whereof any other person or persons now stand or be seised to the use of any such person or persons born in Wales or the marches of the same ; but that the same person or persons born in Wales, or the marches of the same, shall or may lawfully have, retain and keep the same lands, tenements or other hereditaments, whereof estate shall be so unto them executed by the authority of this Act, according to the tenor of the same ; any thing in this Act contained, or any other Act or provision heretofore had or made to the contrary notwithstanding.

SECTION III.

USES RAISED ON TRANSMUTATION OF POSSESSION.

Co. Lit. 271 b. Note. uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery, &c. or out of the state of the owner of the land, by bargain and sale by deed indented and enrolled, or by covenant upon lawful consideration.

DYER 111 b. *in marg.* Noy, of Lincoln's Inn, Mich. 19. Jac. at Moot in the Hall put this difference, that if a man make a feoffment in fee to the use of himself for life, the fee-simple remains in the feoffees, for otherwise he will not have an estate for life according to his intention ; but if the use be limited to himself in tail, it is otherwise, for both estates may be in him.

M. 34 & 35. Eliz. in the Court of Wards, in the argument of the

Earl of Bedford's Case [2 And. 197; Moor. 718] it was holden by POPHAM and ANDERSON, that if A. make a feoffment to the use of himself for forty years, and does not limit any other estate, the fee is in the feoffees.¹

SAME'S CASE.

EXCHEQUER. 1609.

[*Reported 2 Roll. Ab. 791.*]

IF A. in consideration of £100 by B. makes a feoffment in fee to B. to the use of B. and C. the son of B., that will raise a use to C. well enough, though the whole consideration was given by B.

ST. 29 CAR. II. (1676), c. 3, § 7. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

§ 8. *Provided* always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

¹ "It was said, if a man at this day seised of the land on the part of the mother, makes a feoffment in fee, without consideration, he shall be seised, as he was before, on the part of the mother. And if there be two joint-tenants, one for life, and the other in fee, and they levy a fine without declaration of any use, the use shall be to them of the same estate as they had before in the land. So if A. tenant for life, and B. in reversion or remainder, levy a fine generally, the use shall be to A. for life, the reversion or remainder to B. in fee; for each grants that which he may lawfully grant, and each shall have the use which the law vests in them, according to the estate which they convey over. If A. is seised in fee of an acre of land, and he and B. levy a fine of it to another, without consideration, the use implied shall be to A. only and his heirs; for an use which is but a trust and confidence, and a thing in equity and conscience, shall be, by operation of law, to him who, in truth, was owner of the land, without having regard to estoppels or conclusions, which are averse to truth and equity. So it was adjudged in the principal case, when husband and wife levy a fine without declaration of any use (which was sufficient in law), the law shall revert the use in the wife only; because the estate in the land passes only from her, and the husband joins with her but for conformity." *Beckwith's Case*, 2 Co. 56 b, 58 a (1589).

SHORTRIDGE v. LAMPLUGH.

KING'S BENCH. 1702.

[Reported 2 Salk. 678.¹]

H. BROUGHT covenant as assignee of a reversion, and showed, that the lessor, in consideration of £5, bargained and sold to him for a year, and afterwards released to him and his heirs, *virtute quarundam indentur. bargainæ venditionis & relaxationis necnon vigore statuti de usibus*, &c. he was seised in fee. And it was objected, that the use must be intended to be to the releasor and his heirs, because no consideration of the release nor express use appeared by the pleading: so that without considering the operation of the conveyance, the question was upon the pleading, Whether the use shall be intended to the releasor, unless it be averred to be to the releasee? *Et per* HOLT, C. J. to which the rest agreed: —

This way of pleading was certainly good before the Statute 27 H. 8, so is Plowd. 478, and many precedents in Co. Ent. of feoffments averred in the same manner; for the use was a matter that was extrinsical to the deed, and depended upon collateral agreements at common law, and then the use might, *as since the Statute of Frauds by writing*, be averred by parol, and therefore in pleading the conveyance was taken to the use of him to whom the conveyance was made, till the contrary appeared; if it were otherwise, it ought to come on the other side; and 27 H. 8, has not altered the course of pleading, which is rather confirmed by the Statute; because, if now the use be construed to be to the releasor or feoffor, the conveyance will be to no manner of purpose, it being still the old estate to which the old warranty and other qualities remain annexed; whereas before the Statute there might be some end in making the feoffment, viz. to put the freehold out of him and prevent wardship; and Co. Lit. goes no farther, than where is a feoffment to particular uses and estates, the residue of the use shall be to the feoffor, which is reasonable; for the raising those particular estates appears a sufficient reason for the conveyance. And POWELL, J. doubted, whether there could be a resulting use on a lease and release, unless where particular uses are limited; for this way of conveyance is grounded on the ancient way of releasing at common law, wherein there was a merger of estate, which is a good consideration, as where the lessor confirms to the lessee and his heirs. In error of a judgment of C. B. which was affirmed.

¹ s. c. 2 Ld. Raym. 798; 7 Mod. 71.

BROUGHTON v. LANGLEY.

KING'S BENCH. 1703.

[Reported 2 Salk. 679.¹]

ONE seised of lands in fee, devised them to trustees and their heirs, to the uses, intents, and purposes hereinafter mentioned, viz. to the intent and purpose to permit A to receive the rents and profits for his life, and after that the trustees should stand seised of the premises to the use of the heirs of the body of A. with a proviso, that A. with the consent of his trustees, might make a jointure for his wife; and the question was, Whether A. had an estate-tail executed, or not? And it was adjudged he had. HOLT, C. J. pronounced the judgment of the court, and gave these reasons: 1st, That this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the Statute, which mentions the word *trust* as well as *use*; and the case in 2 Vent. 312, *Burchet* and *Durdant*, is not law; and that the change of expression in the principal case by using the word *permit* in the first clause, which are words of trust, and afterwards making mention of a use, is immaterial, in regard trusts at common law and uses are equally executed by the statute.

2dly, It was held, That a power to make a jointure, does not necessarily exclude an estate in tail, or an intent to give it; because tenant in tail, without discontinuing or barring the tail, cannot make a jointure; and so this power has its use.

LORD ALTHAM v. EARL OF ANGLESEY.

KING'S BENCH. 1709.

[Reported Gilb. 16.]

TENANT in tail, remainder in tail, with remainders over. Tenant in tail, having a mind to dock the intail, and but the remainders, levies a fine with proclamation *sur conusance de droit come ceo*, &c. to J. S. and his heirs, in order to make him tenant to the *precipe*; but no use of this fine was declared. Seven years afterwards, a *precipe* was brought against J. S. who came in and vouched the conusor of the fine, who vouched over the common vouchee, and the question here was, if J. S. were a good tenant to the *precipe*, and the common recovery well suffered.

¹ See s. c. reported at greater length, 2 Ld. Raym. 873.

As to the first¹ question, it was resolved by HOLT, POWEL, POWIS, and GOLD, that the said J. S. was a good tenant to the *precipe*, and that the recovery was well suffered, and all the remainders barred.

This question doth arise principally upon the Statute of Frauds and Perjuries, 29 Car. 2, c. 3. Whereby 't is enacted, that all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested, and proved by some writing signed by the party, who is by law enabled to declare such trust, or else by his last will in writing, or else they shall be utterly void, provided always, that where any conveyance shall be made of any lands, or tenements, by which a trust or confidence shall or may arise, or result by implication or construction of law, or be transferred or extinguished, by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this Statute had not been made.

It was unanimously agreed, that this Statute did not extend to this case, viz. where there is only cognizor and cognizee, and that it extended only to third persons; though it was objected, that in this case, when, by the fine, the legal estate was conveyed to J. S. and his heirs, and no use declared of it, that the use did result to conusor and his heirs, and then before the *precipe* was brought, the legal estate was out of the conusee, by virtue of the Statute, for transferring uses into possession. But HOLT, C. J. and POWEL held in this case, that when a fine is levied, or a feoffment made to a man and his heirs, the estate is in the conusee and feoffee, not as an use, but by the common law, and may be averred to be so; and for the form of pleading the averment, you may see Co. Ent. 219, 220. Where a fine was levied, and the conusee in pleading averred, *Cujus quidem finis pretextu predicti, J. S. fuit seisitus de, &c. cum pertinent in dominico suo ut de feodo*, and in Plowd. 477, 478. A feoffment was pleaded *habendum* to A. and his heirs for ever, *Virtute cujus feoffment idem A. fuit seisitus de, &c. cum pertinent in dominico suo ut de feodo*; and in this case it plainly appears, that the intent of the fine, was to make the said J. S. a tenant to the *precipe*, for the common recovery, and when the common recovery is effected, a use shall arise by operation of law from the conusor and his heirs,² from whom the estate first moved.

HOLT, C. J. held, that uses were not within this Statute, but that the Statute did restrain only the operation of trusts and confidences in

¹ [A second point was on the admissibility of certain depositions. The part of the case relating to this is omitted. — Ed.]

² See the case of *Long and Buckridge*, Trin. 4 Georgii, adjudged, that the averment of *Cujus quidem finis pretextu, &c.* is only *expressio eorum quæ tacite in sunt, & nihil operatur*, and that *prima facie*, the fine shall pass the estate to the conusee; and to bring the use back to the conusor, the conusor must show, that the intent was not to give it to the conusee; for else the conusee shall be deemed to take the estate by the common law. And this case of *Lord Anglesey and Altham* was there held to be good law.

chancery ; but all the other justices held the contrary, and that uses were within it ; for the common law makes no distinction between trusts and confidences, and uses ; and there was no foundation to make a difference between trusts and uses, since the Statute 27 H. 8, though they have done it in chancery. And now, since the Statute of Frauds, 29 Car. 2, c. 3, no stranger can take a use by any parol averment.

If a fine be levied to a man and his heirs, to the use of him and his heirs, in this case, he shall take by the common law, and not by way of use ; and in this case, there may be a parol averment, to prevent a resulting use to the conusor in fee ; for when the fine is levied, an use doth immediately arise, either to the conusor and his heirs, or to the conusee and his heirs ; and when there is a subsequent deed, it only shows what the intent of the parties was, at the time of the fine levied, 9 Co. *Dowman's Case* ; so that when a fine is levied, an use doth arise by implication of law, to the conusee and his heirs, and consequently this case is excepted out of the Statute. The fine and recovery here make but one conveyance ; and if the use should result to the conusor and his heirs, it would destroy the middle part of the conveyance, and defeat the plain intention of the parties, which was to put the use in the conusee ; and this is evident, because the conusor, by suffering himself to be vouched, has owned it. And how could tenant in tail make himself tenant in fee, if so be this must be construed a resulting use ?

As to an objection that was made, that there might be a long time between the fine and recovery ; admitting that there had been a long time between the fine and recovery, yet there it may be made good by a parol averment, before the Statute of Frauds, and by writing since, upon the reason of *Dowman's Case*, if nothing were done intermediate to the contrary. Dyer, 136.

GOLD said, that if a fine *sur' conusans de droit come ceo, &c.* were levied, a use did result to the conusor ; but if the conusee did grant and render the lands to the conusor in tail, the conusee was seised of the reversion to his own use. Moor. 156, Dyer, 311. So if a feoffment be made to A. and his heirs, upon condition to enfeoff B. and his heirs, without limiting or declaring any use. In this case, when A. has enfeoffed B. and his heirs, an use shall arise to B. and his heirs ; and in all cases of common recoveries, a tenant to the *pre-cipe* shall be presumed, and that as well in a new recovery as in an old one.

ARMSTRONG v. WOLSEY.

COMMON BENCH. 1756.

[Reported 2 Wils. 19.]

EJECTMENT, tried at Norwich before Parker, Ch. Baron, who reserved this short case for the opinion of the court. A. B. being in possession of the lands in question levied a fine *sur conusans de droit come ceo, &c.* with proclamations to the conusee and his heirs, in the 6th year of the present king, without any consideration expressed, and without declaring any use thereof; nor was it proved that the conusee was ever in possession.

So that the single question is, whether the fine shall enure to the use of the conusor or the conusee; and after two arguments the court was unanimous, and gave judgment for the plaintiff, who claimed as heir of the conusor.

CURIA: In the case of a fine *come ceo, &c.* where no uses are declared, whether the conusor be in possession, or the fine be of a reversion, it shall enure to the old uses, and the conusor shall be *in* of the old use, and although it passes nothing, yet after five years and non-claim it will operate as a bar.

And in the case of a recovery suffered, the same shall enure to the use of him who suffers it (who is commonly the vouchee) if no uses be declared; but he gains a new estate to him and his heirs general; and although before the recovery he was seised *ex parte materna*, yet afterwards the estate will descend to his heirs *ex parte paterna*, as was determined in *Martin v. Strachan*, 1 Wils. 2, 66. *Sed vide* that case 2 Stra. 1179.

In the case at bar, the ancient use was in the conusor at the time of levying the fine; and it seems to have been long settled before this case, that a fine without any consideration, or uses thereof declared, shall enure to the ancient use in whomsoever it was at the time of levying the fine; and as it was here in the conusor at that time, the judgment must be for the plaintiff.¹

1 SAND. USES (5th ed.) 96–98. As the Statute did not expressly abolish all future limitations of, and estates created by, uses, there was actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the Act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the Act, the Chancery, which judged according to the intention of the parties, would have construed the *possession* to be in the feoffee, and the *use* in the feoffor. Does the Statute destroy this construction? On the contrary, the case appears to come directly within the meaning of it; the words being,

¹ See *Roe v. Popham*, 1 Doug. 25.

that where any person, &c. stands seised to the use of another, by reason of any feoffment, &c. or by any manner of means whatsoever, then, &c. In this case, the feoffee stands seised to the use of another, viz. the feoffor, by an admitted construction before the Act. The Act certainly did not intend to alter the manner of raising uses; nor did it mean to make any thing pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the Statute. *Vide* 2 Raym. 800; Co. Lit. 22 b; Jenk. Cent. 253. It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the Statute. *Armstrong v. Wolsey*, 2 Wils. 19; Doug. 26; *Beckwith's Case*, 2 Co. 56, 58 b; Dyer, 146 b; 1 Roll. Ab. 781; *Read v. Errington*, Cro. Eliz. 321; 22 Vin. 214, pl. 1, and notes.

Indeed it is said, *Shortridge v. Lamplugh*, 2 Salk. 678; 7 Mod. 71; 1 Stra. 107, that if a feoffment be pleaded, the use need not be averred to the feoffee; because if nothing appear to the contrary, the use must be intended to be in him; and that such was the form of pleading before the Statute. If this be the course of pleading, it may be asked, What utility can arise from the doctrine of resulting uses? To which it may be answered, that although the rules of pleading do not require an averment of the use in favor of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for him.¹

I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance; *Roe v. Popham*, Doug. 24, and 22 Vin. 215, pl. 2, and notes, and pl. 6, 7; and he or they, in that case, claim under the old use. However, when a tenant in tail suffers a recovery without consideration or declaration of the use, the use (notwithstanding the aspect of some of the cases; see *Argol v. Cheney*, Latch. 82; *Waker v. Snow*, Palm. 359) will result to the *recoveree* in *fee*: 9 Co. 8 b; Gilb. Uses, 61; *Nightingale v. Ferrers*, 3 P. W. 206; for as the recoveror or demandant acquires a seisin in fee, the use, if it result at all, must result according to the extent of that seisin; the words of the Act being, that the *estate, title, right, and*

¹ *Anglesea v. Altham*, Holt Rep. 737; 1 Stra. 107. In the margin of Salkeld's Reports, which belonged to the late Serjeant Hill, opposite to the case of *Shortridge v. Lamplugh*, is the following MS. note, which, although not in the handwriting of, is evidently dictated by, the learned Serjeant.

"*Contra*, Vin. Uses (Y. a.) pl. 1, and the notes, pl. 24; but most of the cases there cited before the Statute; and, therefore, *Q.* if since the Statute it is not necessary, in pleading a feoffment or release, for the feoffor or releasor to make an averment, that it was to his use? and it seems, that the want of a consideration would be evidence of the truth of such averment, if traversed; but if the deed purports a valuable consideration, the feoffor or releasor cannot be admitted to take such averment. Dyer, 169, pl. 21, S. P. 9; Co. 11 b, accordingly as to a recovery, and Salk. 676, pl. 2, as to a fine and feoffment."

possession of the person seised to the *use* shall be transferred to the *cestui que use*; and in the very distinguished argument of the Chief Justice Lee, in delivering the opinion of the court in the case of *Martin v. Strahan*, 5 Term Rep. 107, 110, in note, is the following passage: "It is the use of the *fee-simple* that passes to the recoveror from *tenant in tail*, and which results to *him* (i. e. tenant in tail) *and his heirs*, if no use is declared."

2 HAYES CONV. (5th ed.) 464, 465. The limitations in a deed operating under the Statute of Uses must, in their creation, be either —

1. Vested, — conferring, therefore, legal estates (as, where the land is limited to A. for life, remainder to B. for life or in tail, remainder to C. in fee, or to A. for life, remainder to B. for life or in tail), in which case the whole use of the fee-simple (in the first example), or such portion of the use as the limitations embrace (in the second example), is immediately drawn out of the grantor, covenantor, &c., and executed in the *cestui que use* by the statute, and the undisposed of residue of the use (in the second example), results to, or remains in, the grantor, &c., as a reversion expectant on the particular estates created by the limitations; — or,

2. Not vested, and not, therefore, conferring legal estates (as to the heirs of the body of B., a person now living, or to A. for life, if he shall return from Rome, remainder to the heirs of the body of B., a person now living, or from and after Christmas-day next to A. in fee), in which case the *whole* use of the fee-simple results to, or remains in, the grantor, &c., subject to be drawn out of him, to the extent of the estates to be conferred by the limitations, on their becoming vested, either as remainders, if eventually capable of effect as such (for, in the second example, the limitation to the heirs of the body of B. would, if A. should return from Rome in B.'s lifetime, be good as a contingent remainder), or if not so capable, and if confined within the bounds prescribed by the rule against perpetuities, then as springing or future uses; — or,

3. Partly vested, and partly not vested (as, to A. for life, remainder to the heirs of the body of B., a person now living, remainder to C. in fee; or to A. for life, and, at the end of one year or one day after his death, to the heirs of the body of B., a person now living), in which case such portion of the use as the vested limitations embrace, is immediately drawn out of the grantor, &c., and executed in the *cestuis que use* by the statute; and the undisposed of *residue* of the use results to, or remains in, the grantor, &c., as a reversion expectant on the particular estates created by such vested limitations, subject to be drawn out of him, to the extent of the estates to be conferred by the remaining limitations, on their becoming vested, either as remainders, or as springing or future uses.

The foregoing propositions, of course, assume that, in deeds taking effect by transmutation of possession, there is nothing to rebut the supposed resulting use, and fix it in the feoffees, releasees, &c.; and it

should be observed that the legal use will not result to the grantor, releasor, &c., where it would defeat the intent of the conveyance by merging a particular estate expressly limited to the grantor, releasor, &c.¹

Assuming these positions to be accurate, it would seem to flow from them, as a necessary consequence, that by no possibility can a *particular* estate of freehold, in any case, result to, or remain in, the grantor, covenantor, &c. ; — for,

1. Where no limitation is vested, less than the *whole* use of the fee-simple cannot result or remain ; — and,

2. Where all or some of the limitations are vested, and absorb the whole use of the fee-simple, *nothing* can result or remain ; — and,

3. Where all or some of the limitations are vested, but do not absorb the whole use of the fee simple, the *residue* of the use (being the ultimate remnant of the ancient use) will result or remain, as a reversion expectant on such portion of the use as passes in the particular vested estates.

On principle,² it is conceived that the grantor, &c., cannot be *in* of a *particular* estate of freehold, as part of his old use, whereof he hath not disposed, because if he make a *partial* disposition of the use, it must be in some particular vested estate or estates ; and, such particular estate or estates being deducted, the residue will be the use of the *ulterior* fee-simple.

LEAKE, DIGEST LAND LAW, 107, 108. Upon the same principle, if upon a feoffment or conveyance in fee the use be declared for a particular estate only, and no consideration appear to carry the residue, so much of the use as is undisposed of by the declaration remains in the grantor as a resulting use.³ Thus, if the use be declared to the grantee or another for life, or in tail, or for years only, the reversion of the use being undisposed of results to the grantor. And a consideration paid in such case will be presumptively attributed to the estate limited, and will afford no inference as to the use undisposed of.⁴

But if the use be declared to the *grantor* for an estate for life or years, the reversion, though not expressly disposed of, does not result to him but vests in the grantee ; for by the opposite construction the particular estate would merge in the reversion and the grantor would resume the entire fee, against the express terms of the declaration of uses, which restricts his interest to the particular estate. If, however, the use be declared to the grantor for an estate tail, he may also take the reversion

¹ “ But it is said, that if a man be seised of land in fee, and grant a rent issuing out of the land to a stranger, without any consideration, &c., the grantee shall be seised of this rent to his own use ; for the law cannot intend such a grant to be made to the use of the grantor.” Perk. § 531.

² But see *Pibus v. Milford*, 1 Vent. 372 ; *Fearne*, C. R. 42.

³ Co. Lit. 23 a, 271 b ; 1 Sanders Uses, 61, 103.

⁴ 1 Sand. Uses, 104 ; Co. Lit. 22 b, 271 b.

by resulting use; for an estate tail and the reversion in fee may subsist together in the same person.¹

If the feoffment or conveyance of the legal possession be made for a particular estate only, as a gift in tail, or a lease for life or for years, the tenure alone thereby created, with its attendant services and obligations, supplied a consideration sufficient to prevent the use from resulting, and to carry it to the donee or lessee; and this doctrine applies at the present day. But an express use declared in favor of another would rebut the use implied from the tenure in such cases.² The Statute *Quia emptores* prevented the creation of any tenure which might carry the use upon a conveyance of the fee simple.³

SECTION IV.

USES RAISED WITHOUT TRANSMUTATION OF POSSESSION.

ST. 27 HEN. VIII., c. 16. ST. OF ENROLMENTS (1535). Be it enacted by the authority of this present Parliament, That from the last day of July, which shall be in the year of our Lord God 1536, no manors, lands, tenements or other hereditaments, shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented sealed, and inrolled in one of the King's courts of record at Westminster, (2) or else within the same county or counties where the same manors, lands or tenements, so bargained and sold, lie or be, before the *Custos Rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; (3) and the same enrolment to be had and made within six months next after the date of the same writings indented; (4) the same *Custos Rotulorum*, or justices of the peace and clerk, taking for the enrolment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ii. s. that is to say, xij. d. to the justices, and

¹ Bacon on Uses, Rowe's ed. notes, p. 223; 1 Sanders on Uses, 103; see *Adams v. Savage*, 2 Salk. 679; L. Raym. 854. "Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together: in such case by the operation of the Statute *De donis*, the estate tail is kept alive, not merged by the reversion in fee." *Per* KENYON, C. J., 5 T. R. 110, in *Roe v. Balldere*.

² Perkins, §§ 534-537; 2 Leon. 16, *Brent's Case*; Dyer, 312 a. The relation of landlord and tenant is a consideration in law, hence in a contract for a lease no other consideration is necessary. *King's Leaseholds*, L. R. 16 Eq. 521. [See particularly 1 Sand. Uses (5th ed.) 86-88. — Ed.]

³ Perkins, §§ 528, 529.

xij. d. to the clerk; (5) and for the enrolment of every such writing indented before them, wherein the land comprised exceeds the sum of xl. s. in the yearly value, v. s. that is to say, ii. s. vi. d. to the said justices, and ii. s. vi. d. to the said clerk for the enrolling of the same: (6) and that the clerk of the peace for the time being, within every such county, shall sufficiently enroll and ingross in parchment the same deeds or writings indented as is aforesaid; (7) and the rolls thereof at the end of every year shall deliver unto the said *Custos Rotulorum* of the same county for the time being, there to remain in the custody of the said *Custos Rotulorum* for the time being, amongst other records of every of the same counties where any such enrolment shall be so made, to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so enrolled.

II. Provided always, That this Act, nor any thing therein contained, extend to any manner lands, tenements, or hereditaments, lying or being within any city, borough or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs or other officer or officers have authority, or have lawfully used to enroll any evidences, deeds, or other writings within their precinct or limits; any thing in this act contained to the contrary notwithstanding.

SHARINGTON v. STROTTON.

QUEEN'S BENCH. 1565.

[Reported *Plowd.* 298.]

TRESPASS *quare clausum*,¹ on March 20, 1564. The defendants pleaded that the *locus* was, and from time immemorial had been, parcel of the Manor of Bremble; whereof Andrew Baynton being seised in fee, by an indenture made in 1560 between said Andrew, of the one part, and Edward Baynton, his brother, of the other part, it was covenanted, granted, and agreed between the parties in manner and form following; that is to say, whereas Andrew, at the date of the indenture, had no issue male of his body, said Andrew, then being fully determined and resolved how, in what manner, quality, and degree said manor should continue, remain, and be, as well in his lifetime as after his death, and then being desirous that the said manor might come, remain, and descend to the heirs male of his body, in manner and form afterwards expressed, and to the intent that it might continue and remain to such of the blood and name of Baynton as in the same indenture should be named, mentioned, and contained, did, as well for the said causes as for the good-will, fraternal love, and favor which he bore, as well to Edward Baynton his brother, as to such others of his brothers as should be in the indenture named, covenant and grant, for himself

¹ This short statement of the case is substituted for that in the report.

and his heirs, that he, his heirs and assigns, and all and every other person or persons and their heirs, who then were seised or should afterwards stand or be seised of said manor, should from thence stand and be thereof seised, to the use of Andrew for life, and after his death to the use of Edward Baynton and Agnes his wife, and their assigns for their lives, and after their death to the use of the heirs male of Andrew lawfully begotten or to be begotten on the body of Frances Lee, and for default thereof to the use of the heirs male of the body of Edward Baynton, and for default thereof to the use of Henry Baynton, another brother, and the heirs male of his body, and for default thereof to the use of another Henry Baynton, a half-brother, and the heirs male of his body, by force of which covenant, grant, and agreement, and of the Statute made the fourth day of February in the twenty-seventh year of the reign of King Henry VIII., concerning the transferring of Uses into Possession, said Andrew was seised of said manor, the remainder over to Edward and Agnes for their lives, remainder to the heirs male of Andrew lawfully begotten on the body of Frances Lee, with remainders over; that Andrew died February 6, 1564, without heirs male of his body; that thereafter, but before the trespass, Edward and Agnes Baynton entered into the manor and were seised; that the plaintiffs then entered; and that the defendants, as servants of Edward and Agnes Baynton, and by their command, re-entered and did the trespass, &c. The plaintiffs demurred.

The case was argued at Michaelmas Term, 1565.

And after these arguments the court took time to deliberate until Hilary Term, and from thence until Easter Term, and from thence until this present Trinity Term, in the eighth year of the reign of the present Queen, and the defendants now prayed judgment. And CORBET, Justice, said, that he and all his companions had resolved that judgment should be given against the plaintiffs. For it seemed to them that the considerations of the continuance of the land in the name and blood, and of brotherly love, were sufficient to raise the uses limited. But, he said, as my Lord Chief Justice is not now present, you must move it again when he is present, and you shall have judgment. And afterwards, at another day, CATLINE, Chief Justice, being present, the apprentice prayed judgment. And CATLINE and the court were agreed that judgment should be entered against the plaintiffs, and he ordered Haywood, the Prothonotary, to enter it. And the apprentice said, May it please your lordship to show us, for our learning, the causes of your judgment. And CATLINE said, It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *Naturæ vis maxima*, I say *Natura bis maxima*, and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz. of the marriage

had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it, but the other causes and considerations are effectual, and those which moved us to our judgment. Wherefore judgment was given as follows.¹

TAYLOR v. VALE.

QUEEN'S BENCH. 1589.

[Reported Cro. El. 166.]

REPLEVIN. The case was upon demurrer. Vale having a rent charge in fee by indenture, which was enrolled within six months, giveth and granteth it to Hall in fee, and there was no attornment.

NOTA. In truth the case was, that he for a certain sum of money giveth, granteth, and selleth the rent, &c. But it was pleaded only, that he by indenture *dedit et concessit*.

And it was ruled without any argument, that the rent without attornment passeth not, being only by way of grant, and not of bargain or sale; although the deed was enrolled. But WRAY [C. J.] said, that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is enrolled, this shall pass the rent without attornment, though there be no words of bargain and sale. And the plaintiff had judgment.

CALLARD v. CALLARD.

QUEEN'S BENCH AND EXCHEQUER CHAMBER. 1593.

[Reported Moore, 687.]

IN *ejectione firmæ*, on a demise by Eustace Callard. And on not guilty pleaded it was found by special verdict that Thomas Callard was seised in fee, and in consideration of the marriage of Eustace, his son and heir apparent, being on the land, spoke these words to the said Eustace, viz. "Eustace, stand forth. I do here, reserving an estate for mine own and my wife's life, give unto thee and to thine heirs for ever those my lands and [*sic*] Barton of Southcot." And afterwards Thomas enfeoffed Richard, who was the defendant, being his younger son in fee, with warranty and died. Eustace entered and demised it to the plaintiff, who entered, and the defendant ejected him. On which special verdict, on long debate in the Queen's Bench, judgment was given for the plaintiff, on which the defendant brought a writ of error in the Exchequer Chamber, and here the judgment was reversed at Hilary Term, 39 Eliz.

¹ [Then follows the record of the entry of the judgment sustaining the demurrer.]

[1597]. Note that in the Queen's Bench POPHAM [C. J.] held strongly that the consideration of blood raised a use to Eustace without writing, and so he had the possession by St. 27 Hen. VIII. But GAWDY, FENNER, and CLENCH [J.J.], *contra* to this opinion; yet on the final judgment they agreed, because they took the words to amount to a feoffment with livery, being on the land, and the use to be to the feoffor and his wife for life, and then to Eustace and his heirs. But note that in the Exchequer Chamber EWENS [B.] took the law in the same manner as the puisne judges in the Queen's Bench, and that the judgment ought to be affirmed for this cause; but he held, *contra* to POPHAM [C. J.], that the use could not arise without writing. BEAUMONT [J.] took it as a feoffment to Eustace in fee, and the reservation to the father and his wife void for repugnancy; and therefore he wished to have the judgment affirmed; and he also was against POPHAM [C. J.]. But all the other justices, viz. ANDERSON [C. J.], PERYAM and CLARKE [BB.], and WALMSLEY and OWEN [J.J.], all agreed, that there was no feoffment executed, because the intent was repugnant to the law, to wit to pass an estate to Eustace, reserving a particular estate to himself and his wife. And a use it could not be, because the purpose was not to raise a use without an estate executed, but by an estate executed, which did not take effect, and they all agreed that if it was a use, yet it could not arise on natural affection without deed. Note that the witnesses who proved the words to the jury were attainted of perjury in the Star Chamber at Easter Term 40 Eliz. [1598].

WARDE *v.* TUDDINGHAM.

KING'S BENCH. 1605.

[*Reported 2 Roll. Ab. 783, pl. 5.*]

CONSIDERATION of ancient acquaintance, or of being chamber-fellows or entire friends, will not raise any use. Agreed by the court.

BACON, USES, 13, 14. I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it; and therefore in 8 Regiⁿ*æ* it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth never hurt it; and yet they say that an use is but a nimble and light thing; and now, contrariwise, it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor deed enrolled, without the weight of a consideration; but you shall

never find a reason of this to the world's end, in the law: But it is a reason of chancery, and it is this:

That no court of conscience will enforce *donum gratuitum* though the intent appear never so clearly, where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery.

EDWARD FOX'S CASE.

COMMON PLEAS. 1610.

[Reported 8 Co. 93 b.]

IN a writ of second deliverance by Eliz. Smalman widow, and Thomas Powys defendant which began in *Communi Banco*, 7 Jac. Rot. 1546, the defendant demurred on the bar to the avowry; and on the record the case was such: Edward Fox seised of four acres of meadow, fifty acres of pasture, and ten acres of underwood, in Snitton in the county of Salop, anno 31 Eliz. demised them to Gilb. Smalman, and to the said Elizabeth his then wife, and to Thomas Smalman, *habendum* to Gilbert and Elizabeth for their lives, the remainder to the said Thomas for his life, yielding during their lives the yearly rent of four marks, at the feasts of the Annunciation of our Lady, and St. Michael the Archangel, by equal portions; and afterwards the said Gilbert Smalman died; after whose death, *scilicet* 20 Sept. anno 3 Regis Jacobi, the said Edward Fox by indenture, for the consideration of £50 *præd'* by the said Thomas Powys to the said Edward Fox paid, demised, granted, set, and to farm let to the said Thomas Powys the said tenements aforesaid; to have and to hold to the said Thomas Powys from the day of the date of the said indenture, for the term of ninety-nine years, yielding and paying therefore during the said term, to the said Edward Fox and his heirs, the yearly rent of 40s. at the feasts of the Annunciation of our Lady, and St. Michael the Archangel, or within twenty-eight days after every of the said feasts, and that the said Eliz. did never attorn. And the only point in this case was, whether the said demise and grant to T. Powys should amount to a bargain and sale, so that the reversion with the rent should pass to T. Powys by the Statute of Uses without any attornment. And it was adjudged that this demise and grant upon consideration of £50 amounts to a bargain and sale for the said years; for in case when a freehold or inheritance shall pass by deed indented and enrolled, it need not have the precise words of bargain and sale, but words equipollent, or which do tantamount, are sufficient; as if a man covenants in consideration of money to stand seised to the use of his son in fee; if the deed be enrolled, it is a good bargain and sale, and yet there are not any words of bargain and sale, but they amount to so

much, as it is held in *Bedel's Case*, in the Seventh Part of my Reports, 40 b. So if a man for money aliens and grants land to one and his heirs, or in tail, or for life, by deed indented and enrolled, it amounts to a bargain and sale, and the land shall pass without any livery and seisin. And at the common law before the Statute of 27 H. 8 of Uses, if a man for money had aliened and granted lands to one and his heirs, &c. by that the use of the land should pass, for it is a full bargain, and all this was unanimously agreed; but forasmuch as the intention of the parties is the creation of uses, if by any clause in the deed it appears that the intent of the parties was to pass it in possession by the common law, there no use shall be raised; and therefore if any letter of attorney be in the deed or covenant to make livery of the lands, according to the form and effect of the deed, or other such like, there it shall not pass by way of use; *quia, verba intentioni non e contra debent inservire; et verba debent intelligi, ut aliquid operentur.*¹ But in the case at bar, the intent of the grantor may be well collected, that he did intend that the grant should take effect presently, and should not depend upon any subsequent attornment; for the rent reserved thereupon was payable presently; and therefore it will be reasonable, that Tho. Powys the lessee should have the rent reserved on the first lease for lives presently; and that he cannot have before attornment (which peradventure will never be made) and *eo potius* because the said Thomas Powys has no means to compel the first lessees to attorn; but if it shall pass as a bargain and sale, it shall be presently executed by the Statute of 27 H. 8, for there needs no enrolment in this case, because but a term for years passes, and no estate of freehold, and there needs no attornment, because it is executed by the Statute. And by this construction every one will have remedy for that which he ought to have. *Vide Sir Rowland Heyward's Case* in the Second Part of my Reports, fol. 35 b.

¹ "In Anon. 3 Leon. 16, it was determined to the contrary. In that case, A. by deed indented, conveyed in the following words: 'I the said A. have given, granted, and confirmed, for a certain piece of money, &c.,' the *habendum* was to the feoffee with warranty against A. and his heirs; and there was a letter of attorney to make livery and seisin. The deed was enrolled within one month after the making of it; and the attorney after four months from the delivery made livery of seisin. It was the opinion of the whole court, that the conveyance should operate as a bargain and sale. *Vid.* 4 Cruise Dig. 107 (3d ed.); Sanders on Uses, vol. ii. p. 48." Note by Fraser.

LUTWICH v. MITTON.

COURT OF WARDS. 1620.

[Reported Cro. Jac. 604.]

It was resolved by the two Chief Justices, MONTAGUE and HOBART, and by TANFIELD, Chief Baron, that upon a deed of bargain and sale for years of lands whereof he himself is in possession, and the bargainee never entered; if afterwards the bargainors make a grant of the reversion (reciting this lease) expectant upon it to divers uses, that it is a good conveyance of the reversion; and the estate was executed and vested in the lessee for years by the statute; and was divided from the reversion, and not like to a lease for years at the common law; for in that case there is not any apparent lessee until he enters: but here, by operation of the Statute, it absolutely and actually vests the estate in him, as the use, but not to have *trespass* without entry and actual possession: wherefore they would not permit this point to be further argued.

BARKER v. KEETE.

COMMON BENCH. 1678.

[Reported Freem. 249.]

THE case was: Edward Hudson being tenant in tail, remainder to William, his brother, to make a tenant to a *præcipe* to suffer a recovery, makes a lease to one Pepes for six months, and upon that a release, and then suffers a recovery. The plaintiff claimed under the remainder-man.

The question was only upon the lease for six months, the words being, that he did "demise, grant, and to farm let, the lands in question to Pepes, *habend'* for six months, rendering a pepper-corn, if demanded."

The question was, whether this pepper-corn rent was a sufficient consideration to make the lease operate by virtue of the statute, so that the lessee should be said to be in possession, so as to be capable to take a release before entry?

For it was agreed by all, if it did operate only as a lease at common law, that the party was not capable of taking an enlargement of his estate by a release until actual entry, according to 1 Inst. 46.

1. And it was argued by *Stroud*, that this is only a lease at common law; for the words "demise, grant, and to farm let," are words used

at the common law ; and there is no word of consideration, nor of bargain and sale, in the deed, so that it cannot be intended that the parties meant that it should operate by way of use.

2. This is an executory consideration, and it is also contingent ; for this rent of a pepper-corn is not to be paid, unless it be demanded, which is uncertain whether it will or not ; besides, it is not payable presently, and a future consideration shall never raise a present use ; and that is the reason of the *Lord Paget's Case*, Moor. 194 ; 1 Co. 154 ; 1 Leon. 194 ; no use did rise there, because the consideration of payment of his debts was executory, and was no present consideration. *Vide* Cro. Eliz. 378 ; 6 Co. 15.

3. The consideration of a pepper-corn is of no value to raise an use ; and therefore if an infant make a lease, rendering a pepper-corn, it is a void lease. 43 Ed. 3 ; Fitz. Entr. 26.

But as to this point all the court, except NORTH, C. J., did incline, that this lease did operate by the Statute.

For, as to the first objection, they said, it had been often adjudged, that, though there were not the words "bargain and sell," yet it would operate by way of use, there being a sufficient consideration. 8 Co. 93.

2. As to the second objection, they held, that though this rent was to be paid futurely, yet it was a present duty ; and the obligation to pay it was present, for "yielding and paying" makes a covenant. And NORTH said, that where things are done in the same instant, they would transpose them, and suppose a precedency, it being to support common assurances ; and so they might suppose the covenant to pay the rent to precede the raising of the use, and then the consideration would be executed.

And NORTH said, he had known it ruled several times, that a lease and release in the same deed was a good conveyance, for priority should be supposed.

3. As to the third they all held, that the value of the consideration was not material ; for it is usual, if an estate be of the value of £1,000 *per annum*, to make 5s. the consideration in a bargain and sale for a year ; and by *Porter's Case*, 1 Co. 24, a penny is sufficient to alter the use of a feoffment, and to cause the feoffee to be seised to his own use ; and so in the case of *Sutton's Hospital*, 10 Co. 34.

And as to the lease of an infant, reserving a pepper-corn, that shall be a void lease, because it appears to the court, that there is no proportionable consideration.

And NORTH said, that if there had appeared any intent of the parties, that it should operate by way of use, he should not have doubted of the case, but the intent ought to appear ; and he said, in the case of *Garnish v. Wentworth*, tried before the Lord Chief Justice Bridgman, a conveyance was endeavoured to be set up by a covenant to stand seised, by reason that the party was related to him that made it, though it were nine degrees off ; and Bridgman said in that case, it were wor-

thy of consideration, whether the use should rise, because the party that made it did not know of the relation, and so could not intend it. But that point was not determined, because upon examination it appeared, that there was no relation in the case.

And in the case of *Rigby and Smith*, Cro. Car. 529, though the express consideration be natural love to his children, yet the party being his brother, to whom the conveyance was made, and part of the consideration being to settle his lands in his blood, though that particular relation was not named, it was well enough, because it seemed to be pointed at. *Vide* 7 Co. 39.

And they said, that the very tenure was sufficient to change an use, or at least to keep it from resulting; and therefore, if a lease be made without consideration, or reservation of rent, the use shall not result, as it shall in case of a feoffment, because there is no tenure.

And WYNDHAM said, that although it might not be a consideration to raise an use of a freehold, where the deed is to be enrolled, because by the Statute it is to be a valuable consideration, yet it might serve in case of a lease for years.

And whereas it was objected, that it ought to be money for the consideration, it was said, though it should not pass by bargain and sale, yet the use might rise by a covenant to stand seised well enough.

And NORTH said, that if the truth of this case had been found, there would have been no question in it; for this recovery was to support a mortgage, though it was not so found, and that would have been a sufficient consideration.

And NORTH said, that this conveyance by lease and release was first invented by Sir Francis More, for formerly they used to make a lease, and the lessee used to go and enter, and the same day they made the release.

Another point was stirred, viz., that in case there were no good tenant to the *præcipe*, yet he in remainder being heir to the tenant in tail, should be estopped, according to the opinion of Plow. *Manwell's Case*; but that opinion of Plow. was denied by the court, according to 3 Co. 6; for if that were law, then there need never be any lawful tenant to the *præcipe*, which the law requires; because by the judgment the tenant is to be turned out of possession; and though all are estopped that claim under the parties to the recovery, yet the issue in tail and the remainder are not, because they claim paramount from the donor.

Another point was, here being a special conclusion made, whether the judges should be bound by this special conclusion of the verdict; for it was held in the case of *Lane v. Cooper*, Moore's Reports, that they should not; but it is said, and so held, that since that the law had been held contrary. 5 Co. 95; 2 Roll. 701.¹

¹ s. c. 2 Mod. 249.

ROE v. TRANMER.

COMMON PLEAS. 1757.

[*Reported 2 Wils. 75.*]

EJECTMENT for lands in Yorkshire. Upon the trial of this cause it appeared in evidence, that Thomas Kirby being seised in fee of the lands in question made and executed certain deeds of lease and release. The lease dated November 9, 1733, made between the said Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, whereby it is witnessed that the said Thomas Kirby, in consideration of 5s. did grant, bargain and sell to the said Chr. Kirby, his executors, administrators and assigns, the lands in question; to have and to hold the same unto the said Chr. Kirby, his executors, administrators and assigns, from the day before the date thereof for the term of one year under a pepper corn rent, to the intent that by virtue of these presents, and by force of the Statute for transferring uses into possession, he the said Christopher may be in the actual possession of all the premises, and be enabled to take and accept of a grant and release of the reversion and inheritance thereof to them and their heirs, to, for and upon such uses, intents and purposes, as in and by the said grant and release shall be directed or declared. In witness, &c. executed by Thomas Kirby.

The release dated November 10, 1733, made between Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, witnesseth that for the natural love he beareth towards his said brother, and for and in consideration of £100 to the said Thomas Kirby paid by the said Chr. Kirby, he the said Thomas Kirby hath granted, released and confirmed, and by these presents doth grant, release and confirm unto the said Chr. Kirby in his actual possession thereof now being, by virtue of a bargain and sale for one whole year to him thereof made by the said Thomas Kirby, by indenture dated the day next before the day of the date hereof, and by force of the Statute made for transferring of uses into possession, after the death of the said Thomas Kirby, all that one close, &c. (the premises without any words of limitation to the releasee;) To have and to hold the said premises unto the said Chr. Kirby and the heirs of his body lawfully begotten, and after their decease to John Wilkinson, eldest son of my well-beloved uncle John Wilkinson of North Dalton in the county of York, gentleman, to him and his heirs and assigns, and to the only proper use and behoof of him the said John Wilkinson the younger, his executors, administrators or assigns for ever, he the said John Wilkinson the younger paying or causing to be paid to the child or children of my well-beloved brother Stephen Kirby the sum of £200 and for want of such child or children, then to the child or

children of my well-beloved sister Jane Kirby, and for want of such issue, then to the younger children of my well-beloved uncle John Wilkinson of North Dalton aforesaid, and for want of such younger children, then the said estate above-mentioned to be free from the payment of the above-named sum of £200. Then the releasor covenants that he is lawfully seised in fee, and that he hath good right and full power to convey the premises to the said Chr. Kirby, and also that it may and shall be lawful to and for the said Chr. Kirby, or the said John Wilkinson the younger, from and after the death of him the said Thomas Kirby, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said messuage, lands and premises, with the appurtenances, not only without the lawful let, suit, &c. of him the said Thomas, but all others claiming under him, &c. free from all incumbrances. Then it is covenanted by all the parties, that all fines and recoveries and deeds of the premises levied, suffered or executed by the parties, or any of them, or by any other persons, shall be and enure to the use of the said Chr. Kirby and his heirs of his body lawfully begotten, and for want of such issue, then to the use of the said John Wilkinson junior, his heirs and assigns for ever, according to the true intent of these presents. In witness, &c. executed by Thomas Kirby.

It further appeared in evidence, that Chr. Kirby on the 10th of November, 1733, paid to the said Thomas Kirby £20 in money, and gave him his note for £80 payable to the said Thomas Kirby, who signed a receipt on the backside of the said deed of release in these words, viz. Received the day and year within written of the within named Chr. Kirby the sum of one hundred pounds, being the full consideration-money within mentioned to be paid to me. I say received by me Thomas Kirby. Witness, M. J. S. T.

It further appeared in evidence that Chr. Kirby died without issue in 1740, and that John Wilkinson the lessor of the plaintiff is the same John Wilkinson named in the deed of release, but it did not appear that the said John Wilkinson had notice of the said deeds of lease and release until a short time before this ejectment was brought.

This being the case for the consideration of the court, the general question is, whether the lessor of the plaintiff has a title to recover upon the lease and release.

It has been argued at the bar three times, the first time by Serjeant *Willes* for the lessor of the plaintiff, and Serjeant *Poole* for the defendant, and the second and third times (because of a new judge) by Serjeant *Hewit* for the plaintiff, and *Sir Samuel Prime*, the king's first serjeant, for the defendant.

After time taken to consider, the court were all of opinion that the release was void as a common law conveyance, it being to convey a freehold to commence *in futuro*, but that it should have the effect and operation of a covenant to stand seised to uses; and in Hilary term 31 Geo. 2, Lord Chief Justice *WILLES* gave the judgment of the whole court for the plaintiff.

WILLES, C. JUSTICE. It is admitted and agreed on all hands that this deed is void as a release, because it is a grant of a freehold to commence *in futuro*; and therefore the only question is, whether it shall take effect as a covenant to stand seised to uses; and we are all of opinion that it shall (my brother Bathurst, not being here, authorized me to say he is of the same opinion).

Many cases have been cited on both sides, some of which are very inconsistent with one another, and to mention them all, would rather tend to puzzle and confound, than to illustrate the matter in question; and therefore I shall only take notice of those things we think most material, and of some few cases nearest in point for our judgment.

It appears from the cases upon this head, in general, that the judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds *ut res magis valeat quam pereat*. I rely much upon Sheppard's Touchstone of Common Assurances, 82, 83 (which is a most excellent book), where he says, when the intent is apparent to pass the land one way or another, there it may be good either way.

By the word *intent*, is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but an intent that the land shall pass at all events one way or other.

Lord Hobart (who was a very great man) in his Reports, fo. 277, says: "I exceedingly commend the judges that are curious and almost subtil (*astuti*) to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the Act;" and my Lord Hale in the case of *Crossing* and *Scudamore*, 1 Vent. 141, cites and approves of this passage in Hobart.

Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise; and certainly it is more considerable to make the intent good in passing the estate, if by any legal means it may be done, than by considering the manner of passing it, to disappoint the intent and principal thing, which, was to pass the land. *Osman* and *Sheafe*, 3 Lev. 371. Upon this ground we go.

We are all of opinion that in this case there is every thing necessary to make a good and effectual covenant to stand seised to uses. First, here is a deed. Secondly, here are apt words, the word *grant* alone would have been sufficient, but there are other words besides, which are material, viz. A covenant that the grantor has power to grant, and a covenant that all fines, recoveries, &c. of these lands shall enure to the uses in the deed. Thirdly, the covenantor was seised in fee. Fourthly, here appears a most plain intent that Wilkinson the lessor of the plaintiff should have the lands in case Chr. Kirby died without issue. And lastly, here is a proper consideration to raise an use to the lessor

of the plaintiff, for the covenantor in the deed names him to be the eldest son of his well-beloved uncle; these are all the circumstances necessary to make a good deed of covenant to stand seised to uses.

In support of their opinion the Ch. Justice only cited and observed upon these cases, viz. *Crossing* and *Scudamore*, 1 Mod. 175; 2 Lev. 9; 1 Vent. 137; *Walker* and *Hall*, 2 Lev. 213; *Coultman* and *Senhouse*, Tho. Jones, 105; Carth. 38, 39; *Baker* versus *Hil.*, 2 W. & M. B. R.; *Osman* and *Sheafe*, 3 Lev. 370.

The C. Justice lastly cited two of the strongest cases mentioned for the defendants, as *Hore* and *Dix*, 1 Sid. 25; *Samon* and *Jones*, 2 Vent. 318, and said he did not (for his own part) understand them, and that if he had sat in judgment in those cases, he should have been of a different opinion in both; however, he said the present case differed from these two cases. Lastly, he said the whole court were clear of opinion that a man seised, might covenant to stand seised to the use of another person after the covenantor's death. *Postea* delivered to the plaintiff.

LEASE AND RELEASE. "It was not long, however, before a loophole was discovered in this latter Statute [St. of Enrolment], through which, after a few had ventured to pass, all the world soon followed. It was perceived that the Act spoke only of estates of inheritance of freehold, and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only, was not therefore affected by the Act, but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law, was supplied by the Statute of Uses; which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and sold to him. And as any pecuniary payment, however small, was considered sufficient to raise a use, it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here then was an opportunity of making a conveyance of the whole fee simple, without livery of seisin, entry or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by lease and release, — a method which was first practised by Sir Francis Moore, serjeant at law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate; and although the efficiency of this method was at first doubted, it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease, as it is called) for a year derived its effect from the Statute of Uses; the release was quite independent of that Statute, having existed long before, and being as ancient as the common law itself. The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee, by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the Statute, was given him by the lease. After the passing of the Statute of Frauds, it became necessary that every bar-

SECTION V.

LIMITATION OF USES.

MILDMAY'S CASE.

COURT OF WARDS. 1582.

[Reported 1 Co. 175.]

THE case in an information exhibited in the Court of Wards by Richard Kingsmill, Esq. attorney of the same court, against the Lady Anne Sharrington, late wife of Sir Hen. Sharrington, Knt. and John Talbot, Esq. and Oliff his wife, one of the daughters and heirs of the said Sir Henry Sharrington, which was resolved Hil. 24 Eliz. and afterwards Hil. 26 Eliz. adjudged in the Court of Common Pleas, rot. 745, between Anthony Mildmay, Esq. plaintiff, and Roger Standish, Gent. defendant, in an action upon the case for slandering his title, &c. which judgment was M. 26 & 27 Eliz. rot. 35, affirmed in the King's Bench, in a writ of error, and was in effect thus: The said Sir Henry Sharrington having a wife the said Dame Anne, and three daughters, Grace married to the said Anthony Mildmay, Ursula married to Thomas Sadler, Esq. and Oliff married to the said John Talbot, by indenture bearing date 20 Augusti 15 Eliz. made between the said Sir Henry Sharrington of the one part, and Edmund Pirton and James Paget, Esqrs. of the other part, in consideration of a jointure for his wife, for the advancement of his issue male of his body, if he should have any, and for the advancement of his said three daughters and the heirs of their bodies, if he should have no heir male of his body, and for the continuance of his land in his blood, and for other good and just considerations did covenant to stand seised of six hundred acres of land (*exempli gratia*) to the uses, intents, and purposes, and under the proviso following, *scil.* of all to the use of himself for his life, and after for 300 acres of land, in certain, to the use of his wife for her life for her jointure; and of the other 300 acres after his death, and of the said 300 acres limited for the jointure of the wife after their deaths to the use of the heirs males of his body begotten; and for default of such issue, then for the 300 acres not being limited for jointure, &c. to the use of his three daugh-

gain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter." Wms. Real Prop. (13th ed.) 187-189.

ters severally by themselves, and to the heirs of their bodies; and for default of such issue, to the use of the right heirs of the said Sir Henry, with like limitation of the other 300 acres to them of the like estate, with the reversion to his right heirs. And if any of his said three daughters should die without issue, then her portion should be by moieties to the survivors of the like estate, *ut supra*, with remainder *ut supra*; with proviso for the three several husbands of the said three daughters to have several portions for their lives, if they should survive their wives, and should not be entitled to be tenants by the curtesy, with this proviso in these words following, *scil.* Provided always, and it is covenanted and agreed between all the said parties, that it shall be lawful for the said Sir Henry by his will in writing to limit any part of the said lands to any person or persons for any life, lives, or years, for the payment of his debts, performing of his legacies, preferment of his servants, or any other reasonable considerations as to him shall be thought good, and all persons thereof seised, to stand seised thereof to the use of such persons and for such interests as shall be so limited by his will. After which the said Ursula died without issue, Grace and Oliff surviving, whereby her portion by moieties came to them: and afterwards the said Sir Henry by his will in writing for the advancement of his daughter Oliff, and of her husband, and of the heirs of the body of the said Oliff, limited a great part, limited by the indenture for the portion of Grace, after the death of his wife, and another great part of land which remained to her by the death of the said Ursula, to the said Oliff and her husband, and to the heirs of the body of Oliff for 1000 years without reservation of any rent; and afterwards the said Sir Henry died without issue male, and whether this limitation for 1000 years being made for the advancement of his daughter Oliff and her husband, and the heirs of the body of the said Oliff, be good in law by force of the said proviso, was the question. And it was resolved and adjudged by Sir CHRISTOPHER WRAY, Ch. Just. of England, Sir EDM. ANDERSON, Ch. Just. of the Court of Common Pleas, and all the judges of England, that the limitation for 1000 years was void, and not warranted by the said proviso; and in this case five points were resolved.

First, that an use cannot be raised by any covenant or proviso, or by bargain and sale upon a general consideration: and therefore, if a man by deed indented and enrolled according to the Stat. for divers good considerations bargains and sells his lands to another and his heirs, *nihil operatur inde*; for no use shall be raised upon such general consideration, for it doth not appear to the court that the bargainor hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient or not; and that cannot be when it is alleged in such generality. But note reader, the bargainee in such case may aver that money or other valuable consideration was paid or given, and if the truth be such, the bargain and sale shall be good. So if I by deed covenant with J. S. for divers good considerations, that I and my heirs will stand seised to the use of him and his heirs, no use without a spe-

cial averment shall be raised by it; but if J. S. be of my blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof; for in both these cases the person who shall take the use is certain; and that such averment may be taken which stands with the deed, although it be not expressly comprised in the deed, is proved by a case adjudged in an assize between *Villers* and *Beamont*, term. Pasch. 3 & 4 Ph. & M. reported by Bendloes, serjeant at law; which case you will find also Pasch. 3 & 4 Ph. & M. Dy. fo. 146, where the case in effect was, that George Beamont and Jane his wife, as in the right of his wife, were seised of the manor of Northall, &c. and had issue Will. Beamont, who had issue Rich. Beamont, and he and his wife, by indenture 12 H. 8, between them of the one part, and Rich. Clark of the other part, in consideration of £70 given by Rd. Clark, did bargain and sell the land to the said Rich. Clark for 30 years, the remainder to themselves for their lives, the remainder to Will. Beamont for life, the remainder to Rich. Beamont and to one Collet the daughter of Rd. Clark in tail, &c. and afterwards a recovery was had to the same uses; Rd. Beamont and Collet did intermarry; and it was found and averred, that the said indenture was made, and the said recovery had *tam in consideratione maritagii præd' inter Rich' Beamont & Colletam, habend' & celebrand'* (to make it a jointure within the Statute of 11 Hen. 7) *quam* of the said sum of £70, and it was adjudged, that although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration which stood with the indenture, and which was not contrary to it; *a fortiori* in the said cases, for in the deed there is no certain consideration, but the deed is general for divers good considerat. then the averment that the bargaineer gave money, &c. or that the covenantee was of his blood, is but an explanation and particularizing of the general words of the deed, which include every manner of consideration, and in all the said cases the matter so averred is traversable and issuable.

Secondly, it was resolved, that when uses are raised by covenant in consideration of paternal love, &c. to his sons and daughters, or for the advancement of any of his blood; and after in the same indenture a proviso is added, that the covenantor for divers good considerat. may make leases for years, &c. that the covenantor in such case cannot make a lease for years to his son or daughter, or to any other of his blood (much less to any other person) because the power to make leases for years was void when the indenture was sealed and delivered; for the covenant upon such general consideration cannot raise the use for the causes afores. and no particular averment can be taken because his intent was as general as the consideration was, and his intent was not at the time of the delivery of the deed to demise to any person in certain, to one more than another, but to demise generally to whom he pleased; and therefore his power to make leases (the uses being created and raised by covenant upon the considerations aforesaid) was void *ab*

initio. But if the uses had been limited upon a recovery, fine or feoffment, in that case there needs not any consideration to raise any of the uses, and so a manifest difference. And the case at bar is stronger, because the proviso which gave power to make leases will defeat or at least incumber the estates vested and settled upon good considerations in strangers by the covenants of the same indenture. So note a difference when the consideration is general, and the covenant or bargain made with a person certain, there an averment according to the truth of the case may be taken as aforesaid; but when the consideration is general, and the person uncertain, there no averment can help: and therefore if I for divers good considerations covenant with you, that I will stand seised to the use of such a one as you shall name, now although you name my son, or my cousin, yet no use shall be raised thereby, because, for the generality and incertainty, it was void *in initio*, and never could be made good to any purpose after; and no averment can make it good, or reduce it to any certainty, for the intent of the covenantor was as general as his words were. But if I covenant with you that in consideration of fatherly love, or for the advancement of my blood, I will stand seised to the use of such of my sons, or to the use of such of my cousins as you shall name, upon the nomination made the use shall be raised, for there the consideration is particular and certain, and the person by matter *ex post facto* may be made certain.

3. Upon these words in the proviso (other considerations) it was held, that this word (other) could not comprehend any consideration mentioned or expressed in the indentures before the proviso; for (other) ought to be other in nature, quality, and person, and the advancement of his daughter is the consideration mentioned before.

4. It was resolved, that the said limitation of 1000 years was as well against the intent of the parties, as against the words of the proviso, for the intent and scope of the indentures was to make distribution of his lands amongst his three daughters, and the heirs of their bodies; and every of them, upon good consideration and by agreement between their parents, had her portion by herself; but if this limitation for 1000 years should be good, it would rather frustrate the estate of the other sister, and defraud the intent of the parties grounded upon a consideration of marriage, than perform and pursue the intent and meaning of the proviso, for the intent of the proviso was never to give any power to make void the estates of the other sisters; but it appears by all the parts of the indenture, that each daughter should be advanced equally; and so this limitation for 1000 years without any rent reserved was against the intent and meaning of the parties; it seems also to be against the words of the proviso, for that cannot be called a reasonable consideration which tends to the subversion of the estates vested and settled by the said indentures upon so good and just considerations against the meaning of the parties. After the said resolution of the justices certified into the Court of Wards, it was adjudged in the Common Pleas, and also affirmed upon a writ of error in the King's Bench in an action upon the case

brought by the said Anthony Mildmay against Roger Standish, because the said Roger had said, and openly published that the said land was lawfully assured to the said John Talbot and Oliffe his wife for 1000 years, and that they were lawfully possessed of the interest of the said term, whereas, in truth the said land was not lawfully assured for the term afores. nor were the said John Talbot and Oliffe lawfully possessed of the interest thereof, and so for slandering of the estate and title which was conveyed to his wife by the said indentures, and showed all in certainty, and how he was prejudiced by the said words, he brought the said action. And Standish pleaded the said proviso in the same indentures, and the said limitation for 1000 years by the said will, &c. according to the said proviso (as he pretended) by virtue whereof he said the said Oliffe had an interest for 1000 years, and justified the words upon which the plaintiff demurred. And it was adjudged, that the action upon the case was maintainable: and in this case two points were resolved in both the courts: first, that the said lease for the causes afores. was void in law. Secondly, although *de facto* the said John Talbot and Oliffe had a limitation of the land by the said will of Sir Henry Sherington in writing for 1000 years, which was the occasion that Standish, being a man not learned in the law, did affirm and publish that Oliffe had a term for 1000 years; yet forasmuch as he hath taken upon him the knowledge of the law, and meddling with a matter which did not concern him, had published and declared, that Oliffe had a good estate for 1000 years, in slander of the title of Mildmay, and thereby had prejudiced the plaintiff, as appears by the plaintiff's declaration; for this reason the judgment given for the plaintiff was affirmed in the writ of error; *et ignorantia juris non excusat*.

SIR EDWARD CLERE'S CASE.

NISI PRIUS. 1599.

[Reported 6 Co. 17 b.]

IN an assise by Parker against Sir Edward Clere, Knight, of lands in the county of Norfolk, the case in effect was such, Clement Harwood, seised of three acres of land, each of equal value, held *in capite*, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing, and afterwards by his last will in writing, he devised the said third acre to one in fee (under whom the plaintiff claimed). And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole, was the question. And in those cases four points were resolved by POPHAM, Chief Justice, and Baron CLARK, justices of assise of the

said county, upon conference had with the other justices: 1. If a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. *Vide Lit. fol. 109 a.* When a man makes a feoffment to the use of his last will, he has the use in the mean time. 2. If in such case the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate deviseable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case, the land being held *in capite*, the devise is good for two parts, and void for the third part. For as the owner of the land he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part; for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held *in capite*. 3. If a man makes a feoffment in fee of lands held *in capite*, to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for a third part: for a feoffment to the use of his will, and to the use of him and his heirs is all one. 4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he could not as owner of the land devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land, and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case at bar, having, as owner of the land, conveyed two parts to the use of his wife *ut supra*) he could not make any devise (thereof) therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void; and judgment was given accordingly for the plaintiff for the whole land so devised. And afterwards on the said judgment Sir Edward Clere brought a writ of error in the King's Bench, *sed non prævaluit*, but the judgment was affirmed.¹

¹ "The Chief Justice [HOLT] held that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the whole estate remained to the feoffor in the mean time; so it is if it were to commence after the death of A. without issue, if he die without issue within twenty years." *Davies v. Speed*, 2 Salk. 675 (1692).

EGERTON'S CASE.

KING'S BENCH. 1619.

[Reported Cro. Jac. 525.]

ERROR upon a judgment in the Common Pleas in a writ of covenant. Two errors were assigned. First. For that a fine being levied by indenture, declared the use to be to the wife of J. S., and the Court of Common Pleas adjudged it to be an estate for life, whereas it is not so expressed. And as to that point the judgment was affirmed, for DODERIDGE said. although the fine be but as a graut, yet an estate for life may pass. *Vide* 1 Co. 106, *Shelley's Case*.¹

LEAKE, DIGEST OF LAND LAW, 112, 113. The limitation of uses is not restricted by the doctrines of common law concerning the seisin; and, therefore, a use for a freehold estate may be limited to arise *in futuro* or upon a contingency without any prior limitation to support it as a remainder. Thus a conveyance of the immediate legal possession may be made to the use of a person and his heirs, after four years, or after the death of the grantor, or to such uses as the grantor shall appoint by will. 1 Sanders on Uses, 136; Gilbert on Uses, by Sugden, 153, 161; *Clerk's Case*, 6 Co. 18 a; *Davies v. Speed*, 2 Salk. 675. *per* Holt, C. J. So, a bargain and sale might be made to the use of another after four years; so, a covenant to stand seised to the use of another after the covenantor's death. *Roe v. Tranmer*, 2 Wils. 75; *Doe v. Prince*, 20 L. J. C. P. 223.

In all such cases of uses to arise *in futuro*, the use, being undisposed of except at the time or in the event specified, results or remains in the grantor or covenantor in fee simple as before, until the future use arises to displace it; the use does not result or remain for a particular estate only, so as to convert such limitations into remainders. Bacon on Uses, Rowe's ed., note (137); Gilbert on Uses, by Sugden, 161, 162; 1 Hayes Conv. 464, App. ii. 2, on Resulting Uses.

A future estate in the use may also be limited to take effect in substitution or defeasance of a previously limited estate, and even of an estate in fee simple; for the rules of common law, not admitting of any future limitations shifting the freehold except by way of remainder, nor of any

¹ The decision on the other error assigned is omitted.

“And he [WALMESLEY, J.] said that if a man before the Statute of 27 Hen. 8 had bargained his land for money generally, without these words, ‘his heirs,’ the Chancellor would oblige him, according to conscience and the intent of the parties, in regard of the value, to have executed an estate in fee, and that was so long as uses were things merely in trust and confidence; but the uses since the Statute are transferred and made into an estate in the land: and therefore he said that if after the Statute he bargain and sells the land to one generally for money, he hath but an estate for life.” *Corbet's Case*, 1 Co. 83 b, 87 b. (1600).

limitations after an estate in fee simple, had no application to the use. A marriage settlement is a well-known instance of such limitations; where the use is first limited to the settlor in fee, and, upon the marriage taking place, then to the uses of the settlement. 1 Sanders Uses, 143; Gilbert on Uses, by Sugden, 153.

Future uses of the above kinds, including all such as are not limited by way of remainder, are called *springing* or *shifting uses*, the former term more especially denoting those that arise or spring up without any prior limitation; the latter denoting those that shift the use in substitution of a prior estate. Sugden's note to Gilbert on Uses, 152. Being executed by the Statute, they made a great advance upon the common law in the limitation of future estates.

NOTE. —“ At common law a man could not limit a remainder to himself, nor could he limit it to his heirs, for *filius est pars patris*; see *Champernon's Case*, 4 H. 6, 19 b, pl. 6; *Earl of Bedford's Case*, Mo. 718. Therefore, if a lease were made to A. for life, remainder to the right heirs male of the body of the lessor, remainder to the right heirs of the lessor for ever, the limitations to the heirs would be void, because the donor could not make his right heir a purchaser *without departing with the whole fee-simple out of his person*. *Greswold's Case*, Dy. 156 a, pl. 24. So if a man make a lease for life, the remainder to himself in tail or in fee, the remainder is void. But as Lord C. J. Hale observed, in all cases touching uses there is great difference between a feoffment to uses, a covenant to stand seised, and a conveyance at the common law. If a man by feoffment to uses conveys lands to the use of J. S. for life, he may remit the use to himself and the heirs male of his body by the same deed, and so alter that which was before a fee-simple, and turn it into another estate; but if A. gives land to B. for life, remainder to A. and the heirs male of his body, because a man cannot give to himself, the remainder is void, for a man cannot convey to himself by a conveyance at the common law. 1 Ventr. 377, 378. And in *Southcot and Stowel*, 2 Mod. 207, the court held, that though at the common law a man cannot be donor and donee without he part with the whole estate, yet it is otherwise upon a conveyance to uses; and see Co. Lit. 22 b.

“ The student must cautiously observe, that in these cases the rules of law still remain in full force, as applicable to common law conveyances, by which the estates are created at once, and not served out of the seisin of the feoffee. The Statute has given one conveyance the same operation which two formerly had, and therefore considering a conveyance to uses as having a double operation, the strict rules of law remain, even in regard to them. This, however, at first sight does not appear to be the case on a covenant to stand seised, for a man may covenant to stand seised to the use of himself in tail, and the use will be served out of his own seisin, and transferred into a possession by the Statute. But there is no solid distinction between this case and the others; for immediately after the execution of the covenant, equity supplies a common law conveyance by holding the covenantor himself to be a trustee, and to stand seised to the use: on this seisin the Statute attaches, and thus the use takes effect as a legal estate, although the owner did not actually depart with any portion of the estate, much less the fee out of himself. It should be remembered, that the omission of a few words in a conveyance will call this important distinction into action. If a man make a feoffment at once to A. for life, remainder to himself in tail, the deed would operate purely at common law, and the remainder would be void; but if the feoffment were made to A. and his heirs, to the use of A. for life, remainder to the feoffor in tail, the remainder would be good, — at law the entire fee-simple would vest in A., in equity A. would be seised to the uses, and the Statute operating on this seisin would clothe the uses with the legal estate.” *Gilb. Uses* (Sugden's ed.), 150-152, note.

SECTION VI.

OPERATION OF THE STATUTE OF USES.

ANONYMOUS.

COMMON PLEAS. 1582.

[*Reported Cro. El. 46.*]

NOTA that *cestui que use*, at this day, is immediately and actually seised and in possession of the land; so as he may have an assise or trespass before entry against any stranger who enters without title, and this by the words of the 27 Hen. 8, c. 10, viz., "that *cestui que use* shall stand and be seised," &c.; and this was the opinion of divers justices.

HEELIS *v.* BLAIN.

COMMON PLEAS. 1864.

[*Reported 18 C. B. N. S. 90.*]

APPEAL¹ from the decision of a revising barrister disallowing the claim of the appellant, Arthur Heelis, to have his name retained on the list of voters for the township of Pendleton. In 1839, by indentures of lease and release, land was conveyed to Spencer in fee to the use, intent, and purpose that John Robinson, his heirs and assigns, should and might have, receive, and take from said land a yearly rent of £50, by half-yearly payments, on June 24 and December 25, and to further uses. Robinson, in 1862, granted the rent-charge to Stephen Heelis and his heirs; and on January 27, 1864, Stephen Heelis granted it to John Heelis and his heirs, to the use of the said John Heelis and five other persons and their respective heirs, as tenants in common. Of these persons the appellant was one.

The half-year's rent which became due June 24, 1864, being the first which became due after the execution of the indenture of January 27, 1864, was, on July 8, paid to the said John Heelis, for himself and the said five other persons, and he paid their shares over to the others at various times between July 8 and July 30. No part of the rent-charge was paid after January 27, 1864, until the rent-charge due June 24 was paid.

It was objected to the claim of the appellant that he had not been in the actual possession or in the receipt of the rent for his own use for

¹ This short statement is substituted for that in the report.

six months next previous to the last day of July, as required by St. 2 Wm. IV. c. 45, § 26; and on this ground the revising barrister disallowed the claim.

Joshua Williams, for the appellant.

Keane, Q. C., for the respondent.

ERLE, C. J. I am of opinion that the revising barrister is wrong, and that the claimant is entitled to be registered. He claimed to have been in the actual possession of a share of a rent-charge for six calendar months before the 31st of July; and it appears that more than six months before that day a rent-charge of £50 which had been created by the owners in fee simple of certain land in Pendleton in 1839, was conveyed by Stephen Heelis, to whom it had come by various mesne assignments, to John Heelis and his heirs, to the use of the claimant and five other persons as tenants in common. No payment on account of the rent-charge was due or paid to the claimant and the other five persons until after the 24th of June, 1864. and, if it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear from *Hayden*, app., *The Overseers of Twerton*, resp., 4 C. B. 1; 1 Lutw. Reg. Cas. 510, that there would have been no actual receipt of the rent-charge so as to entitle the claimant to be registered. But the conveyance under which the party claims here is a conveyance operating by the Statute of Uses; and the 1st section of that Statute enacts, that, where any person shall be seised of (amongst other things) any rent, &c., in trust for any other person, &c., the *cestui que trust* shall have lawful seisin and possession of the same. The Statute 2 W. 4, c. 45, § 26, enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, &c., unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months, &c. The 27 H. 8, c. 10, § 1, says, that, where any person is seised of a rent to the use of any other person, the person who has the use shall stand seised in possession of such rent to all intents and purposes in the law. I am of opinion that the word "possession" has a technical meaning, and that the Legislature in the time of Henry 8 and the Legislature in the time of William 4 attached the same meaning to the words "actual possession," and that a conveyance under the 27 H. 8, c. 10, gives the *cestui que use* the actual possession which is required to constitute a qualification under the 2 W. 4, c. 45, § 26. It is said that the merely interposing an use is an evasion of the Statute. But I attach no weight to that argument, because the two cases which have held that actual receipt of the rent is essential to perfect the right to be registered, show that the handing over anything in the name of the rent would afford less facility of proof than the production of a deed operating by virtue of the Statute of Uses, which has been put in practice thousands of times since the time of Henry 8. So far, therefore, as regards the Statute. Then, as to the authorities, Mr. Williams has invited our attention to some which are

entitled to the very highest respect. In *Anonymous*, Cro. Eliz. 46, is a resolution of divers justices that *cestui que use* at this day is immediately and actually seised and in possession of the land, so as he may have an assise or trespass before entry against a stranger who enters without title; and this by the words of the 27 H. 8, c. 10, viz., "that *cestui que use* shall stand and be seised," &c. And, though the report is short, it is not the less valuable, for, often in the reports of that day the most important propositions are laid down in four or five lines, and certainly lose no force by reason of their conciseness. Then, again, we have Bacon's Readings upon the Statute of Uses, which is also entitled to very great respect. So, Chief Baron Comyns, whose great work stands high in the estimation of every one in the profession, and who is the universal referee for almost every proposition, lays it down, — title *Uses* (I.), — that, "by the Statute 27 H. 8, c. 10, *cestui que use* is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry;" adopting the *dictum* in Cro. Eliz. 46. Then we have the authority of Co. Lit. 315 a, and Butler's note, which seems to me to involve the whole of the learning contained in the judgment of Tindal, C. J., in *Murray*, app., *Thorniley*, resp., 2 C. B. 217; 1 Lutw. Reg. Cas. 496. Butler's note points out the distinction between the conveyance of a rent at common law and the limitation of a rent as an use under the Statute. Then, I take notice of that which is not strictly authority, viz., Cruise's Digest, vol. 3, p. 274, § 15, and Burton's Compendium of the Law of Real Property, § 1116; and I think I am warranted in so doing, since it is a main ground of Lord Eldon's judgment in the *Britton Ferry Case* that the practice of conveyancers is to be taken notice of by those who administer the law, — a very wise and salutary principle; for, according to my experience, the persons intrusted with that branch of the law have ever been remarkable for ability and learning: and the argument which we have heard this day satisfies me that the mantle of those great men has not descended upon unworthy shoulders.

KEATING, J. I also am of opinion that the decision of the revising barrister in this case was wrong; but I feel bound to add, that, if I had been called upon to decide the point, unaided by the light of the able argument we have heard this day. I should have come to the same conclusion. Mr. Williams has satisfied me that there is a clear distinction between the grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. The 26th section of the Reform Act enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, &c., unless he shall have been in the *actual possession* thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months at least next previous to the last day of July in such year. In *Murray*, app., *Thorniley*, resp., 2 C. B. 217; 1 Lutw. Reg. Cas. 496, it was held that a grant of a rent-charge at common law did not give the grantee a right to be registered under that provision

unless he had been in actual receipt of the rent for the prescribed period. The Chief Justice founds his judgment in that case upon the very authorities which have been brought before us to-day. He cites the 235th section of Littleton: "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assise, or else not, &c." Lord Coke, exemplifying his own doctrine that there is often virtue in an etcetera, explains what that means, thus: "By this &c. is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise or any other real action, but there must be an actual seisin." Mr. Williams admits that the actual possession spoken of in the Reform Act must be such an actual possession as would have entitled the party to maintain an assise. Then we find from the *Anonymous Case* in Cro. Eliz. 46, — which certainly derives additional authority from being cited by Chief Baron Comyns, — that, "by the Statute 27 H. 8, c. 10, *cestui que use* is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry." That therefore brings this case precisely within the ground upon which *Murray*, app., *Thorniley*, resp., was decided, and establishes the distinction between the grant of a rent-charge at common law, and a grant under the Statute of Uses. Upon these grounds I am of opinion that the revising barrister took an erroneous view of this case, and consequently that his decision must be reversed.

Williams asked for costs.

ERLE, C. J. Where the decision is in favour of the appellant, no costs are allowed. But, where the decision is in favour of the respondent, the *general* rule is to give him his costs, — the court reserving to itself the right to modify the rule as the circumstances of each case may seem to them to render it expedient.¹

Decision reversed.

¹ See *Hadfield's Case*, L. R. 8 C. P. 306.

NOTE. — *Scintilla Juris*. "The mode of operation of the Statute with future uses, when limited by way of contingent remainders or as springing or shifting uses, formerly caused much perplexity and difference of opinion. The Statute seemed to exhaust the seisin in serving the prior vested uses, so as to leave none to serve such future uses as and when they should arise. To meet this difficulty it was conceived that there remained in the grantees to uses a possibility of seisin, becoming an actual seisin when the executory uses required it. This was the celebrated doctrine of the *scintilla juris*, as this possibility of seisin was called. The only practical bearing of this doctrine lay in the suggestion that the *scintilla juris* might be dealt with in a manner to risk the safety of the dependent uses.

"After much abstruse speculation concerning the nature of the statutory process, the result generally accepted seems to have been that it immediately converted uses of all admissible kinds into legal limitations in a manner quite beyond the power or control of the grantees to uses, and that the latter were merely formal instruments for carrying the legal title to the uses." Leake, Dig. Land Law, 116.

See Sugd. Pow. (7th ed.) c. 1, § 3.

SECTION VII.

USES NOT EXECUTED BY THE STATUTE.

NOTE. 1544.

[Reported Bro. Ab. Feoff. al Uses, 52.]

A MAN makes a feoffment in fee to his own use for the term of his life, and that after his decease J. N. shall take the profits; this makes a use in J. N. Otherwise if he says that after his death, the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N., for he never has them unless by the hands of the feoffees.

TYRRELL'S CASE.

COURT OF WARDS. 1557.

[Reported Dyer, 155.]

JANE TYRREL, widow, for the sum of four hundred pounds paid by G. Tyrrel her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. 6, bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, &c. to have and to hold the said &c. to the said G. T. and his heirs for ever, to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the said G. T. and the heirs of his body lawfully begotten, and in default of such issue, to the use of the heirs of the said Jane for ever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrolment, &c. And this case has been doubted in the Common Pleas before now: *ideo quære legem*. But all the judges of C. B. and SAUNDERS, Chief Justice, thought that the limitation of uses above is void, &c. for suppose the Statute of Enrolments [cap. 16] had never been made, but only the Statute of Uses, [cap. 10] in 27 H. 8, then the case above could not be, because an use cannot be engendered of an use, &c. See M. 10 & 11 Eliz. † fol.

BACON, USES, 42. The second word material is the word *seised*: this excludes chattels. The reason is, that the Statute meant to remit the common law, Chattels might ever pass by testament or by parol; therefore the use did not pervert them.

SAMMES'S CASE.

COURT OF WARDS. 1609.

[Reported 13 Co. 54.]

JOHN SAMMES being seised of Grany Mead by copy of court roll of the manor of Tollesham the Great, of which Sir Thomas Beckingham was lord, and held the same of the king by knight's service *in capite*; Sir Thomas by his deed indented, dated the 22d of December, in the first year of King James, made between him of the one part, and the said John Sammes and George Sammes son and heir apparent of the said John of the other part, did bargain, sell, grant, enfeoff, release, and confirm unto the said John Sammes the said mead called Grany Mead, to have and to hold the said mead unto the said John Sammes and George Sammes, and their heirs and assigns, to the only use and behoof of the said John Sammes and George Sammes, their heirs and assigns forever: and by the same indenture Sir Thomas did covenant with John and George, to make further assurance to John and George, and their heirs, to the use of them and their heirs, and livery and seisin was made and delivered, according to the true intent of the said indentures, of the within mentioned premises to the uses within mentioned.

John Sammes the father dieth, George Sammes his son and heir being within age, the question was, Whether George Sammes should be in ward to the king or no? And in this case three points were resolved:—

1. Forasmuch as George was not named in the premises, he cannot take by the *habendum*; and the livery made according to the intent of the indenture, doth not give any thing to George, because the indenture as to him is void: but although the feoffment be good only to John and his heirs, yet the use limited to the use of John and George, and their heirs, is good.

2. If the estate had been conveyed to John and his heirs by the release and confirmation, as it well may be to a tenant by copy of court-roll, the use limited to them is good: for upon a release which creates an estate, a use may be limited, or a rent reserved without question; but upon a release or confirmation, which enures by way of *mitter le droit*, an use cannot be limited, or a rent reserved.

But the third was of greater doubt, if in this case the father and son were joint-tenants, or tenants in common? For it was objected, when the father is only enfeoffed to the only use of him and his son, and their

heirs in the *per*, that in this case, they shall be tenants in common. By the feoffment the father is *in* by the common law in the *per*, and then the limitation of the use to him and his son, and to their heirs, cannot divest the estate, which was vested in him by the common law, out of him, and vest the estate in him in the *post* by force of the Statute, according to the limitation of the use; and therefore as to one moiety, the father shall be *in* by force of the feoffment in the *per*, and the son, as to the other moiety, shall be *in* by force of the Statute, according to the limitation of the use in the *post*, and by consequence they shall be tenants in common. But it was answered and resolved, that they were joint-tenants, and that the son in the case at bar should have the said grant by the survivor: for if at the common law A. had been enfeoffed to the use of him and B. and their heirs, although that he was only seised of the land, the use was jointly to A. and B. For a use shall not be suspended or extinct by a sole seisin, or joint seisin of the land: and therefore if A. and B. be enfeoffed to the use of A. and his heirs, and A. dieth, the entire use shall descend to his heir: as it appears in 13 H. 7, 6, in *Stoner's Case*: and by the Statute of 27 H. 8, cap. 10, of Uses, it appeareth, that when several persons are seised to the use of any of them, that the estate shall be executed according to the use.

And as to that which was said, that the estate of the land which the father hath in the land, as to the moiety of the use which he himself hath, shall not be divested out of him: to that it was answered and resolved, that that shall well be; for if a man maketh a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the Statute according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in himself by force of the Statute; and yet the same is out of the words of the Statute of 27 H. 8, which are, where any person, &c. stand or be seised, &c. to the use of any other person; and here he is seised to the use of himself: and the other clause is, where divers and many persons, &c. be jointly seised, &c. to the use of any of them, &c. and in this case A. is sole seised: but the Statute of 27 H. 8, hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So if a man, seised of lands in fee-simple, by deed covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee; in that case, by the operation of the Statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use. And it is to be known, that an use of land (which is but a pernancy of the profits) is no new thing, but part of that which the owner of the land had; and therefore, if tenant in borough English, or a man seised of the part of his mother, maketh a feoffment to another without consideration, the younger son in the one case, and the heir on the part of the mother on

the other, shall have the use, as they should have the land itself, if no feoffment had been made: as it is holden in 5 E. 4, 7; see 4 & 5 Phil. & Mar., Dyer, 163. So if a man maketh a feoffment unto the use of another in tail, and afterwards to the use of his right heirs, the feoffor hath the reversion of the land in him; for if the donee dieth without issue, the law giveth the use, which was part of the land to him; and so it was resolved, Trinity, 31 Eliz. between *Fenwick* and *Milford* in the King's Bench. So in 28 H. 8, Dyer 11, the *Lord Rossé's Case*: a man seised of one acre by priority, and of another acre by posteriority, and make a feoffment in fee of both to his use: and it was adjudged, that although both pass at one instant, yet the law shall make a priority of the uses, as if it were of the land itself: which proves, that the use is not any new thing, for then there should be no priority in the case. See 13 H. 7, b, by Butler.

So in the case at bar, the use limited to the feoffee and another, is not any new thing, but the permanency of the old profits of the land, which well may be limited to the feoffee and another jointly: but if the use had been only limited to the feoffee and his heirs, there, because there is not any limitation to another person, *nec in presenti, nec in futuro*, he shall be *in* by force of the feoffment.

And it was resolved, that joint-tenants might be seised to an use, although that they come to it at several times: as, if a man maketh a feoffment in fee to the use of himself, and to such a woman, which he shall after marry, for term of their lives, or in tail, or in fee; in this case, if after he marrieth a wife, she shall take jointly with him, although that they take the use at several times, for they derive the use out of the same fountain and freehold, *sc.* the first feoffment. See 17 El., Dyer, 340. So if a disseisin be had to the use of two, and one of them agreeth at one time, and the other at another time, they shall be joint-tenants; but otherwise it is of estates which pass by the common law: and therefore, if a grant be made by deed to one man for term for life, the remainder to the right heirs of A. and B. in fee, and A. hath issue and dieth, and afterwards B. hath issue and dieth, and then the tenant for life dieth; in that case the heirs of A. and B. are not joint-tenants, nor shall join in a *Scire facias* to exeunte the fine, 24 E. 3, Joinder in Action 10, because that although the remainder be limited by one fine, and by joint words, yet because that by the death of A. the remainder as to the moiety, vested in his heir, and by the death of B. the other moiety vested in his heir at several times, they cannot be joint-tenants: but in the case of a use, the husband taketh all the use in the mean time; and when he marrieth, the wife takes it by force of the feoffment and the limitation of the use jointly with him, for there is not any fraction and several vesting by parcels, as in the other case, and such is the difference. See 18 E. 3, 28. And upon the whole matter it was resolved, that because in the principal case the father and son were joint-tenants by the original purchase, that the son having the land by survivor, should not be in ward: and accordingly it was so decreed.

COOPER v. FRANKLIN.

KING'S BENCH. 1616.

[Reported Cro. Jac. 400.]

EJECTMENT. Upon a special verdict, for lands in Phelpham, the case was, John Walter was seised of those lands in fee, and made a feoffment of them to Thomas Walter, *habendum* to him and his heirs of his body, to the use of him and his heirs and assigns for ever. The question was, Whether Thomas Walter had an estate in fee tail only, or in fee determinable upon the estate tail?

First, Whether a use may be limited upon an estate tail at the common law, or at this day after the Statute of 27 Hen. 8, c. 10, of Uses.

Secondly, Whether this limitation of uses to him and his heirs shall not be intended the same uses, being to the feoffee himself, and to the same heirs, as it is in the *habendum*? *Quære, quia non adjudicatur.*

But the opinion of the court upon the argument inclined, that he was tenant in tail; and the limitation of the use out of the tail is void as well after the statute as before; for the Statute never intended to execute any use, but that which may be lawfully compelled to be executed before the Statute; but this cannot be of an estate tail; for the Chancery could not compel him at the common law to execute the estate; and so the Statute doth not execute it at this day. *Vide* 27 Hen. 8, pl. 2; 24 Hen. 8, pl. 62; "Feoffments al Uses," 41. *Et adjournatur.*¹

Co. Lit. 22 b. If a man make a feoffment in fee to the use of himself in tail, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate tail executed in him by the Statute, and the feoffee is in by the common law, which is worthy of observation.²

¹ s. c. 3 Bulst. 184. See 1 Sand. Uses (5th ed.) 87, 88.

² "This has been taken for an assertion that the feoffee is *ultimately* in by the common law (see 5 Bac. Ab. 728); but it may bear a very different meaning. The point to which Lord Coke directs the reader's observation is, that though the feoffee is in the first instance in by the common law (as he must be by force of the livery made to him), and the Statute afterwards comes and takes out of him a particular estate which it gives to the feoffor, yet the feoffee has not a reversion, but a remainder. Now it is certain that if the same person who is here described as feoffee (and whom we may call A.) had been seised in fee, and had given an estate tail to B. by bargain and sale, though that estate tail would have received its legal essence from a similar operation of the Statute, yet A. would have had a reversion, and not a remainder. It is therefore necessary to account for the difference; and this, it is submitted, cannot be better effected than by the interpretation, that though A. is in the first place *in* of

MEREDITH v. JOANS.

KING'S BENCH. 1630.

[*Reported Cro. Car. 244.*]

ERROR of a judgment in Flintshire. The error was assigned in point of law, viz.: That judgment was given there upon a special verdict for the plaintiff, where it ought to have been for the defendant. The case was, land was given to husband and wife, *habendum* to husband and wife to the use of them and the heirs of their bodies. The question there was, Whether it were an estate for life only, or an estate tail? And it was adjudged to be an estate tail.

Littleton, Recorder of London, now argued for the plaintiff in the writ of error, and *Calthrop* for the defendant.

And all the Court, *absente* RICHARDSON, held, that the judgment ought to be affirmed; for they conceived, that this limitation in the *habendum*, "to the use of the grantees and the heirs of their bodies," is as a limitation of the land itself, being all to one person, and is as if it had been said, "*habendum* to them and to the heirs of their bodies;" and not like to the case 2 & 3 Eliz., Dyer, 186; for true it is, when the estate is limited to one or two, to the use of others and their heirs, the first estate is not enlarged by this implication, and the use cannot pass a greater estate. But here when the grant and *habendum* convey the estate, and the limitation of the use is to the same person, that shows the intent of the parties, and is a good limitation of the estate; for it is not an use divided from the estate, as where it is limited to a stranger, but the use and estate go together; wherefore it is all one as if the limitation had been "to them and the heirs of their bodies." And JONES said, that he knew many conveyances had been made in this manner, and twice brought in question, and adjudged to be an estate tail. Whereupon judgment was affirmed.

the whole fee simple by the common law, he is immediately afterwards in of a remainder by the Statute. And this interpretation agrees with the language of the case in Dyer, 362 b, cited by Lord Coke in the margin, where the objection suggested is not that the feoffee 'is in by the common law,' but that 'the fee simple first passed to him.'" Burt. Real Prop. (6th ed.) § 160, note.

DOE d. LLOYD v. PASSINGHAM.

KING'S BENCH. 1827.

[Reported 6 B. & C. 305.]

EJECTMENT for lands in the county of Merioneth. Plea, the general issue. At the trial before *Burrough, J.*, at the last summer assizes for Salop, it appeared that the lessor of the plaintiff claimed as devisee in tail under the will of Catherine Lloyd, who was co-heiress, with her sister Mary, of Giwn Lloyd, who died in 1774. In 1746, by indenture made between himself, G. Lloyd, of the first part, Sarah Hill of the second part, Sir Rowland Hill and John Wynne of the third part, and Sir Watkin Williams Wynne and Edward Lloyd of the fourth part; in consideration of an intended marriage with the said Sarah Hill, and of a sum of £8,000, being the marriage portion of the said Sarah Hill, paid or secured to be paid to him Giwn Lloyd, he, Giwn Lloyd, did grant, release, and confirm unto the said Sir Watkin Williams Wynne and Edward Lloyd in their actual possession then being, by virtue of an indenture of bargain and sale, &c., and to their heirs and assigns, certain premises therein particularly described, and, amongst others, the premises in question; to have and to hold the said premises with their appurtenances, unto the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns; to the only proper use and behoof of them the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns for ever, upon trust, nevertheless, and subject to the several uses, intents, and purposes thereafter mentioned, that is to say, to the use of the said Giwn Lloyd and his heirs until the said intended marriage should take effect, and from and after the solemnization of the said intended marriage, then to the use and behoof of Giwn Lloyd and Sarah his intended wife, and their assigns, for and during the term of their natural lives, and the longer liver of them, as and for her jointure and in lieu and full satisfaction of dower; and from and after the decease of such survivor to the use of Sir Rowland Hill and John Wynne, their executors, administrators, and assigns, for the term of one thousand years, to and for the several intents and purposes thereafter mentioned; and from and after the expiration or other sooner determination of that estate, to the use and behoof of the first son of the body of the said Giwn Lloyd on the body of the said Sarah Hill, his intended wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use and behoof of the second son in like manner, and then to the daughters; and for default of such issue, to the use and behoof of the said Giwn Lloyd, his heirs and assigns for ever. And it was thereby declared and agreed by and between all and

every the said parties to the said indenture, that the term of one thousand years thereinbefore limited to Sir Rowland Hill and John Wynne, was upon trust that they did and should immediately after the decease of Giwn Lloyd, by sale or mortgage of the whole or any part thereof, raise the sum of £3,000 to be paid and applied in manner thereafter mentioned. And it was thereby declared and agreed by and between the parties to the said indenture that a sum of £4,000 of the said sum of £8,000 should immediately after the solemnization of the said intended marriage be paid into the hands of them the said Sir Rowland Hill and John Wynne, upon trust that the same should be paid, laid out, and applied by them with all convenient speed in the purchase of freehold lands, tenements, or hereditaments in fee simple, in the county of Merioneth aforesaid or elsewhere in the principality of Wales, or in that part of Great Britain called England, with the approbation of them the said Giwn Lloyd and Sarah Hill, his intended wife, or the survivor of them, testified by any deed or writing under the hands and seals of them the said Giwn Lloyd and Sarah Hill, and the survivor of them, duly executed in the presence of two or more credible witnesses; and that the said lands, tenements, and hereditaments, when so purchased, and every part and parcel thereof, with their appurtenances, should be conveyed to them the said Sir Watkin Williams Wynne and Edward Lloyd, and their heirs, and to the survivor of them and his heirs, *to and for the use and behoof of the several persons, and for such estate and estates* as the premises thereinbefore mentioned, and thereby granted and released by the said Giwn Lloyd, were conveyed, settled, limited, and appointed. And it was thereby also further declared and agreed that in case there should be no issue of the said intended marriage, and that the said Sarah Hill should be minded by her last will and testament to give or devise any sum not exceeding £4,000, or the estate thereby intended to be purchased therewith, or any part thereof as aforesaid, to any person or persons whatsoever, it should be lawful to and for her the said Sarah Hill, notwithstanding her coverture, to give and devise the same, or any part thereof, to such person or persons, and to and for such estate and estates, and such uses, intents, and purposes, as she should limit, direct and appoint; and in such case they the said Sir Watkin Williams Wynne and Edward Lloyd should stand seised of all and every the lands, tenements, and hereditaments so to be purchased as aforesaid, to them and their heirs. to and for such uses, intents, and purposes, as she the said Sarah Hill should, by such her last will, limit, direct, and appoint; and then and from thenceforth all and every the uses and limitations to the said Giwn Lloyd and his heirs, of and concerning the said lands, tenements, and hereditaments to be purchased as aforesaid, should cease, determine, and be absolutely void, to all intents and purposes whatsoever.

Giwn Lloyd died in 1774, and Sarah his wife in 1782, intestate, and without having had any issue. Catherine Lloyd, the testatrix, continued in possession of the estate from the death of Sarah Lloyd until the time

of her own death, in 1787. For the defendants, it was contended, that the legal estate was vested in Sir W. W. Wynne and Edward Lloyd, by the deed of 1746, and, consequently, that neither Giwn Lloyd nor the testatrix had any legal estate; and, therefore, the lessor of the plaintiff could not derive any such estate from her. The learned judge reserved the point, and the plaintiff having obtained a verdict, a rule *nisi* for entering a nonsuit was granted in Michaelmas term.

Taunton, Campbell, and Richards now showed cause.

Shadwell, Oldnall Russell, and E. V. Williams contra.

BAYLEY, J. I am of opinion that we ought not to make the rule absolute for entering a nonsuit, but that there should be a new trial in this case. Considering the length of time that has elapsed since the purposes of the settlement made by Giwn Lloyd were at an end, I think the question as to presuming a reconveyance of the legal estate ought to be submitted to a jury. The first point for our consideration is upon the construction of the settlement; for if it vested the legal estate in the trustees, then the lessor of the plaintiff had not the legal estate unless there had been a reconveyance. The limitation is to Sir W. W. Wynne and E. Lloyd, and to their heirs and assigns, *habendum* to them their heirs and assigns, to the only proper use and behoof of them their heirs and assigns upon certain trusts. I felt upon first reading it, that this was in a very singular form, and it appeared to me that the words "to the use and behoof of them their heirs and assigns," had been introduced by an accidental mistake, but I now think that they were introduced by design, but through ignorance. It is certainly singular that Giwn Lloyd should part with the legal estate immediately on the execution of the settlement, and that he and his wife should only be equitable tenants for life. It is also singular that the term created for the purpose of raising portions should be a mere equitable term, and that the lands to be purchased with the £4,000 should be limited in such a manner as to leave it doubtful whether or no the *cestui que trust* would take the legal estate. That would not necessarily be the case, for the direction, that the estate purchased should be limited "for such estate and estates" as the other premises, might mean for equitable estates; and, therefore, this is not absolutely inconsistent with the idea that the trustees were to take the legal estate. And on the other hand, the power which Giwn Lloyd and his wife would have had to defeat all the contingent limitations, if the trustees did not take the legal estate, shows so strong a purpose to be answered by construing the deed according to the strict legal operation of the language used that I think we are not at liberty to put any other construction upon the words than that which they usually bear. Now, ever since I have belonged to the profession of the law, I have invariably understood that an use cannot be limited upon an use. That is admitted to be so in general, but a distinction has been taken where the limitation is to A., to the use of A. in trust for B., and it is said that then A. is in by the common law. That is true; but he is in of the estate clothed with the use, which is

not extinguished, but remains in him. In the case of *Meredith v. Joans*, cited in argument to show that where an estate is limited to A., to the use of A., he is in by the common law, it is said, "for it is not an use divided from the estate, as where it is limited to a stranger, but *the use and the estate go together.*" That case therefore shows, that although the trustees in this case might be in by the common law, yet they were in both of the estate and the use. There are two cases expressly in point. *Lady Whetstone v. Bury* [2 P. Wms. 146] is a very clear case, and the words used were precisely the same as those found in the deed in question, and it was there decided, and also in *The Attorney General v. Scott* [Cas. temp. Talb. 138], which came before Lord Talbot, one of the greatest real property lawyers that ever filled the office of Lord Chancellor, that the legal estate vests in him to whom by the words of the instrument the use is limited. Upon the authority of these two cases, I am of opinion that the use of the estate in question was executed in the trustees. Then, upon the other question, there is certainly some ground for presuming a reconveyance; but, on the one hand, I think the court would be going a great deal too far were they to make such a presumption, and, on the other, I think the lessor of the plaintiff ought to have an opportunity of submitting that point to a jury. The rule should, therefore, be made absolute for a new trial.

HOLROYD, J. I agree with my Brother Bayley, that in this case there ought to be a new trial. Upon the first perusal of the deed in question I had no doubt that the legal estate was vested in the trustees, having always understood that an use cannot be limited upon an use; and although I was struck by the ingenuity of the distinction pointed out by Mr. Taunton, yet upon further consideration it appears to me that his argument does not warrant it. The argument is, that as the trustees did not in the first instance take to the use of another, but of themselves, they were in by the common law, and not the Statute; that the first use was, therefore, of no effect, and the case was to be considered as if the deed had merely contained the second limitation to uses. But that is not so; for although it be true that the trustees take the seisin by the common law, and not by the Statute yet they take that seisin to the use of themselves, and not to the use of another, in which case alone the use is executed by the Statute. They are, therefore, seised in trust for another, and the legal estate remains in them. As to the question of intention, even if it were intended that the deed should operate in a different mode from that pointed out by the law, when the legal estate is given to trustees that intention cannot countervail the law. But the intention appears to me altogether doubtful; the absence of trustees to preserve contingent remainders affording a strong reason for supposing that the parties meant to give the legal estate to the trustees.

LITTLEDALE, J. I am entirely of the same opinion. It is said that by the construction now put upon the deed the intent of the parties will

be defeated. If we were not construing a deed, I should feel disposed to give a liberal effect to the intention, but if all matters of convenience and inconvenience which raise a presumption of intention are to be taken into consideration, as affording rules for the construction of deeds, and are to have the effect of overruling the plain words of such instruments, the law will very soon be thrown into utter confusion. Here, however, there is a balance of inconveniences, and therefore we may come at once to the legal construction of the settlement. I never entertained a doubt that a second series of uses could not be executed. It is true that certain cases show these trustees to have taken the estate by the common law, but they took it coupled with the use. The cases cited upon this point are perfectly clear, and they are well collected in a note, by Serjeant Williams, to *Jefferson v. Morton*, 2 Saund. 11, n. 17. However, for the reasons given, I think that there ought not to be a nonsuit, but a new trial.

Rule absolute for a new trial.

PEACOCK *v.* EASTLAND.

CHANCERY. 1870.

[Reported *L. R.* 10 *Eq.* 17.]

THIS was a suit by vendors for specific performance, the question of title which was raised on the face of the bill being whether, in the circumstances of the case, an estate tail vested in their testator had been barred.

By an indenture dated the 15th day of November, 1866, M. P. Moore, who was tenant in tail in possession of a share in certain real estates, granted to E. Moore and J. H. Marsden and their heirs the share in question, to hold the same to them and their heirs, freed and discharged from all estates tail of M. P. Moore, and all remainders, &c., to take effect after the determination or in defeasance of such estates tail or any of them, to the use of E. Moore and J. H. Marsden, their heirs and assigns, upon trust to sell the same in manner therein mentioned, and stand possessed of the proceeds in trust for M. P. Moore the grantor, his executors, administrators, and assigns.

This deed was duly enrolled as a disentailing assurance, but was not executed by either of the grantees.

M. P. Moore died on the 25th of November, 1866, having previously made his will, dated 18th of August, 1866, by which he gave all his real and personal estate (except estates vested in him as a trustee or mortgagee) to the plaintiff, Sophia Peacock, absolutely, and appointed her and the plaintiff H. Peake his executors, and devised to them all estates vested in him as trustee or mortgagee

By a deed-poll dated the 9th of April, 1867, under the hands and seals of E. Moore and J. H. Marsden, reciting the indenture of the 15th

of November, 1866, and reciting that E. Moore and J. H. Marsden never executed the same indenture, nor had they, or either of them, ever accepted or acted in the trusts reposed in them by the same indenture, but, on the contrary, they had wholly declined to act therein, and were desirous to make and execute the disclaimer in the now stating deed-poll contained, it was witnessed that they, E. Moore and J. H. Marsden, had renounced and disclaimed all the messuages, &c., by the said indenture granted or otherwise assured or expressed or intended so to be, with their and every of their appurtenances, and all the estate, right, title, interest, inheritance, uses, trusts, powers, and authorities whatsoever by the said indenture expressed to be given or declared to or concerning the said E. Moore and J. H. Marsden or either of them.

The defendants who had agreed to purchase from the plaintiffs, S. Peacock and H. Peake, the testator's share in part of the property, his one fourth of which was comprised in the deed of the 15th of November, 1866, took the objection that this deed was wholly defeated by the disclaimer, and was inoperative as a disentailing assurance, in which case it was admitted that the plaintiffs could not make a title.

Mr. Jessel, Q. C., and *Mr. H. Cadman Jones*, for the plaintiffs.

E. Moore and Marsden were parties to the deed of November, 1866, in two capacities: as grantees to uses, and as *cestuis que use*. They could disclaim the use, but we say that they could not disclaim the instantaneous seisin which they took as releasees to uses: Hanbury Jones on Uses, p. 99; Cruise, Dig., 4th ed., vol. iv. p. 131; *Gorton's Case*, 2 Roll. Abr. 787; Sug. Gilb. on Uses, p. 224, n. 2; Sugden on Powers, 8th ed., preface, and p. 11; Sanders' Uses and Trusts, 5th ed., p. 85, n. 2; Bacon, Law Tracts, p. 348. This is in accordance not only with convenience, but with technical rules; for the legal estate passed at once to the grantees to uses without their assenting: *Thompson v. Leach*, 2 Vent. 198; Sheppard's Touchstone, p. 285. It has passed through them, and served the use, which if defeated by the disclaimer must be defeated by relation; but the doctrine of relation, which is only applied "of necessity," *ut res magis valeat quam pereat*, or "to advance a right" (*Butler and Baker's Case*, 3 Rep. 28 b, *Menvil's Case*, 13 Rep. 19), cannot be applied in such a case. The use, therefore, on the disclaimer, resulted to the settlor in fee.

Then, further, we contend that, on the construction of the disclaimer, there was no intention to disclaim the seisin, but only the use. If the court be against us on both points, we say that still this was a good disentailing assurance within the terms of 3 & 4 Will. 4, c. 74, § 40, as being an assurance by which the tenant in tail "could have made the dispositions." It is, moreover, a disposition in equity by reason of the declaration of trust.

Mr. Charles Hall, for the defendants.

The question whether a releasee to uses can disclaim a momentary seisin does not arise in the present case; for though the plaintiff's case has been argued as if it depended upon the Statute of Uses, the deed

of the 15th of May, 1866, was in reality a simple common law grant, the grantees being the same persons as those who are to have the use; so that it is to be construed in the same way as it would have been before the Statute of Uses: Cases and Opinions, vol. ii. p. 281; *Jenkins v. Young*, Cro. Car. 230; Hayes' Conveyancing, vol. i. p. 460; *Doe v. Passingham*, 6 B. & C. 305; and *Gorman v. Byrne*, 8 Ir. C. L. Rep. 394. On these authorities I contend that the deed would operate as a common law grant: and the estate of the grantees cannot be affected by the trust for sale, for that creates an equity to which this court could give effect, but it cannot alter the legal estate.

This being so, the question arises as to the effect of the disclaimer by the grantees. It has been contended that a disclaimer cannot relate back.

In *Butler and Baker's Case*, if it is an authority at all for the present purpose, the *dicta* are in favor of the defendant's contention; and the same may be said of *Menville's Case*, 13 Rep. 19, 21. *Thompson v. Leach*, 2 Vent. 198, only decided that the presumption is in favor of an estate being in the grantee until the contrary is shown.

The effect of disclaimer is clearly stated in Sheppard's Touchstone, p. 285, where it is said: "The law presumes that every grant is for the benefit of the grantee, and therefore, till the contrary is shown, supposes an agreement to the grant. From the moment there is evidence of disagreement, then, in construction of law, the grant is void *ab initio*, as if no grant had been made."

The disclaimer, therefore, by E. Moore and J. H. Marsden was of a common law estate, and its effect was to make the grant to them void *ab initio*: *Townson v. Tickell*, 3 B. & A. 31. This being so, the deed is inoperative as a disentailing assurance.

Mr. Jessel, in reply.

LORD ROMILLY, M. R., after stating the facts, continued: I am of opinion that the disentailing deed of the 15th of November, 1866, had no operation. It does not appear to me to be a question arising on the Statute of Uses, or that the doctrine of *scintilla juris*, as was first argued before me, arises. That question, which was so much and so eagerly discussed by Lord St. Leonards, I had always supposed to be settled by the Statute passed at the instance of his lordship for that purpose (23 & 24 Vict. c. 38, § 7). I think the objection made by Mr. Charles Hall is a just one, that the deed on which this question arises, if it is correctly set forth in the bill, is a common law deed, operating by grant, and not by the Statute of Uses, under which alone could the question arise of whether a releasee to uses can disclaim the momentary seisin which vests before disclaimer.

The real question seems to me to be this: Whether, by grant at common law, any man can confer upon another, against his will and without his consent, any estate whatever in any property? Consequently, in my opinion, all the cases which refer to the releasee to uses being a mere conduit-pipe, have no application to this case. The releasee to

uses is a mere conduit-pipe, because the essence of a conveyance under the Statute of Uses is to give the property to one for the use of another.

In the case of *Thompson v. Leach*, 2 Vent. 198, it was expressly held that the estate surrendered did not pass to the surrenderee unless he accepted it. The only difference that existed between the judges was this: that Mr. Justice Ventriss, admitting that principle, thought that in the absence of evidence acceptance must be implied, because it must be supposed to be for the benefit of the surrenderee to accept, and that, therefore, his assent must be implied. But in this instance no question arises from the absence of evidence; it is a grant of the property to E. Moore and J. H. Marsden, their heirs and assigns, and they have both disclaimed and renounced all interest; consequently the case of *Townson v. Tickell*, 3 B. & A. 31, which is conclusive against any estate being vested in a man against his consent, applies.

Lord Tenterden, in *Townson v. Tickell*, 3 B. & A. 36, said: "The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge; and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift."

All the cases to which I have been referred relate to conveyances under the Statute of Uses, which, as I have already stated, appear to me to have no application to this case. The question then resolves itself into this: Does the deed, which gave no estate or interest to any one, bar the estate tail of M. P. Moore under the Statute of Fines and Recoveries for this purpose? I have examined the Act for the abolition of fines and recoveries very carefully, and I cannot find any clause or provision which enables any one to bar an estate tail by a deed which conveys no estate to any one, and is in fact merely the expression of a desire on the part of the tenant in tail to make another a trustee for the sale of the estate, if he would consent, which he has not done. I am of opinion, therefore, that a good title cannot be shown to the undivided one fourth part, which belongs to M. P. Moore.

ORME'S CASE.

COMMON PLEAS. 1872.

[Reported L. R. 8 C. P. 281.]

APPEAL from the revising barrister for the Southeastern Division of the County of Lancaster.

Robert Byron Orme, on the list of claimants, was objected to.

The claim was in respect of "one-third share of rent-charge issuing from freehold land and buildings;" and in the fourth column "William Orme" was named as "owner."

By an indenture dated the 13th of October, 1871, and made between William Orme of the one part, and Robert Byron Orme, Enoch Lawton, and James Kerfoot of the other part, W. Orme, being seised in fee simple in possession of certain lands, messuages, and hereditaments in Ashton-under-Lyne, granted unto R. B. Orme, Lawton, and Kerfoot, and their heirs, one perpetual yearly rent-charge of £9, to be payable, clear of all deductions (except property or income-tax), by equal half-yearly payments, on the 5th of April and 5th of October in each year, and the first payment to be due on the 5th of April then next, and to be issuing from and out of and charged and chargeable upon the said lands, messuages, and hereditaments, To hold the said rent-charge unto the said R. B. Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said R. B. Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares.

There was a covenant by William Orme with R. B. Orme, Lawton, and Kerfoot, to pay the rent-charge at the times and in manner appointed for payment thereof, and a power of distress over the lands, &c., in case of non-payment.

The moiety of the rent-charge of £9 due on the 5th of April, 1872, was paid by William Orme to and equally divided between the said R. B. Orme, Lawton, and Kerfoot.

It was contended by the objector that R. B. Orme had not been in the actual possession of the rent-charge for six calendar months previous to the last day of July, 1872, as required by the 2 Wm. 4, c. 45, § 26

It was contended by the party objected to, upon the authority of *Heelis v. Blain*, 18 C. B. (N. S.) 90; 34 L. J. (C. P.) 88, that the Statute of Uses, 27 Hen. 8, c. 10, operated to give to the grantees the actual possession of the rent-charge on the execution of the indenture.

The revising barrister, upon the authority of that case, held that the claim was good.

Herschell, Q. C., for the appellant.

John W. Mellor (*Kenelm Digby* with him), for the respondents.

BOVILL, C. J. In this case, Robert Byron Orme claimed to be put on the list of voters for the southeastern division of the county of Lancaster in respect of his right and interest in a "freehold rent-charge." Objection was taken to the claim on the ground that the claimant had not been in the actual possession of the rent-charge for six months, within the terms of § 26 of the Reform Act, 2 Wm. 4, c. 45. Upon the facts stated by the revising barrister, it is clear that he had not been during the prescribed period in the actual perception or receipt of the rent. In two cases before this court it has been decided that, to entitle a person to be registered in respect of a rent-charge, he must have been in actual possession, in the sense in which those words "actual possession" are ordinarily understood. The first of these was *Murray v. Thorniley*, 2 C. B. 217; 15 L. J. (C. P.) 155, where, after much consideration, the court unanimously came to the decision that that was the proper construction of the Statute as applied to rent-charges. The same point arose again in *Hayden v. Twerton*, 4 C. B. 1; 16 L. J. (C. P.) 88. In that case the party claiming to be registered was the assignee of a rent-charge. The matter was again carefully considered, and the court held that the case was governed by the decision in *Murray v. Thorniley*. It is true that Maule, J., in giving judgment there, did refer to some of the grounds upon which the previous decision was founded, and stated that he was not prepared to say that he should have come to the same conclusion as the court came to in that case; but he concurred with the rest of the court in confirming the principle on which it was decided.

Now, after those two decisions, I think it is hopeless for the respondents in this case to contend that we are not bound by what has been treated as the law ever since the year 1846; viz., that the possession of a rent-charge, to satisfy the Reform Act, must be a possession in fact.

The question afterwards arose in a different form. In *Heelis v. Blain*, 18 C. B. (N. S.) 90; 34 L. J. (C. P.) 88, a new view of the matter was suggested, viz., that when the grant of the rent-charge did not take effect at common law, but by the Statute of Uses, 27 Hen. 8, c. 10, the Statute executed the use in possession; and so the grantee became at once in actual possession. The case was argued entirely upon that footing. The rent-charge there undoubtedly came within the Statute, and it was held that the person to whose use the grantee was seised was by the effect of the Statute of Uses to be deemed to be in possession of the rent-charge so as to satisfy the words "actual possession" in § 26 of the Reform Act. So far from dissenting from the previous cases of *Murray v. Thorniley*, and *Hayden v. Twerton*, the court expressly adopt them, and hold that the possession to satisfy § 26 must be an actual possession; but they came to the conclusion that the claimant in the case then before them was to be deemed to have been in such actual possession by the operation of the Statute of Uses.

Assuming these cases to have been correctly decided, there are, then, two classes of cases, — one, where the grant of the rent-charge takes effect at common law, in which case the grantee or assignee must have been in the actual possession by receipt of the rent in order to be entitled to be registered; the other, where the grant of the rent-charge operates by virtue of the Statute of Uses, in which case it has been held that the *cestui que use* is at once to be deemed in actual possession, within the meaning of the Reform Act. That brings us to the question whether the grant of the rent-charge in the case now before us operates at common law or under the Statute of Uses. The subject is one of interest to conveyancers, and one which may have a material effect on titles, and therefore we thought it right to adjourn the argument in order to give counsel an opportunity to look more fully into the authorities. The matter has now been very ably argued, and the points have been very clearly put.

Our first duty is to ascertain what is the true legal effect of the limitations in the deed granting this rent-charge. It commences by granting to Orme, Lawton, and Kerfoot a perpetual yearly rent-charge of £9. If it had stopped there, that would have been a grant to the three as joint-tenants. The deed, however, proceeds, in the *habendum*, “to hold the said rent-charge unto Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares.” If the terms of the *habendum* be divided, there would be a grant to the three persons as joint-tenants, and a limitation of the use to them as tenants in common. Now, is the deed to be so read? or is the whole to be read together for the purpose of ascertaining what is the true limitation? The office of the *habendum*, according to 1 Sheppard's Touchstone, p. 101, is to determine the effect of the deed, and it should “be construed as near the intent of the parties as may be.” In order to ascertain the intention of the parties, it is necessary that the whole deed should be looked at; and, if that be done in the present case, there can be no doubt that the intention of the parties was that the grant of the rent-charge should be to the three as tenants in common. That the rule is as I have stated, there are many instances in the books to prove. In Co. Lit. 183 b, it is said: “If a lease be made to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the general intendment of the premises; and so hath it been oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them, *et semper expressum facit cessare tacitum.*” Many other instances, which it is unnecessary to go through in detail, are to be found in Viner's Abridgment, Grant (I. a.), pl. 3, and Sheppard's Touchstone, pp. 101-6.

Now, in order to show what is the true effect of a deed of this

description, several authorities have been referred to; and, amongst those cited on the part of the respondents, was the case of *Jenkins v. Young*, Cro. Car. 230, more fully reported under the name of *Meredith v. Joans*, Cro. Car. 244. That case is thus stated in *Sanders on Uses*, p. 91: "M. gave his land to E. R. and his wife, *habendum* to the said baron and feme, to the use of them and the heirs of their two bodies, and, for want of such issue, remainder to E. M. and his heirs: the question was whether the baron and feme had an estate-tail or an estate for their lives only. It was argued that the estate out of which the use should arise was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin; but the judges conceived that there was a difference where an estate was limited to one and the use to a stranger, for there the use should not be more than the estate out of which it was derived; but not when the limitation was to two, *habendum* to them, to the use of them and the heirs of their bodies, for this was *no limitation of the use*, nor was it executed by the Statute, but it was a limitation of the *estate* to them and the heirs of their bodies *by the course of the common law*." That case is also important as showing that we must look at the whole of the *habendum* to see what was the intention of the parties. So construing it, it was held to be not a limitation of the use, but a limitation of the estate which took effect by the common law. It is extremely difficult, if this be the right view of that case, to distinguish it in principle from the present. In that sense it is that the case is adopted by Mr. Booth in the *Collection of Cases and Opinions*, vol. 2, p. 291, edit. by Sugden. That learned author very clearly explains that the use must be derived out of the seisin of some third person. The case is referred to by *Sanders* without disapprobation; as also by Mr. Butler in his *Notes to Co. Lit.* 271 b, and in *Watkins on Conveyancing*, p. 245; and it has been acted upon as law by conveyancers for a long series of years. Is there, then, any reason why we should not adopt the same view in construing the limitation of the rent-charge in the present case? If we were to do otherwise, the result would be a repugnancy between one part of the deed and another part, because then, in the one part the limitation would be to the three persons as joint tenants, and in the other part it would be to them as tenants in common, which clearly would not be carrying out the intention of the parties. The rule was, shortly after the passing of the Statute, thus laid down by Bacon, in his *Reading upon the Statute of Uses*, p. 65, edit. of 1806: "The whole scope of the Statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore, the Statute ought to be expounded that, where the party seised to the use and the *cestui que use* is one person, he never taketh by the Statute, except there be a direct impossibility or impertinency for the use to take effect by the common law."

Suppose the question had arisen here, without reference to the Statute of Uses, as to what was the true construction of the limitation,

could any one have doubted that the object and effect of the deed were that the three persons named should take the rent-charge as tenants in common? If so, the Statute of Uses cannot alter the common law construction of the deed. The case of *Doe v. Prestwidge*, 4 M. & S. 178, has also an important bearing upon this question, as showing that the whole limitation in the *habendum* is to be taken together, and a rational interpretation to be put upon it. There, the limitation was to Thomas and Henry and their heirs, *habendum* to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever. There was, therefore, a difference between the two parts of the *habendum*, the limitation of the use being such as to create a joint-tenancy. The matter was argued, and further time was given to Reader, the counsel for the plaintiff, to consider it; and upon a subsequent day, "he admitted that Thomas and Henry took as tenants in common," "although, if it had been an use executed by the Statute, the consequence would be that they were joint-tenants." That case is cited by various text-writers; and I do not find that it is questioned by any of them, except that in 3 Bythewood and Jarman's Conveyancing, p. 324, the learned editor (Sweet) says: "This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument." That room has been afforded here, and the result shows that there is no authority to contradict it. There is also an important passage in the 7th edition of Sheppard's Touchstone, by Preston, at p. 106, where that very great conveyancer says: "But if a grant be made to a man and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for lives, this *habendum* and declaration of use are one entire limitation at the common law, and the grantee hath merely an estate for the lives," which passage is very applicable to the present case. It is, indeed, only acting upon the general rule of construction of a deed, which is, that, in order to ascertain the intention of the grantor, regard must be had to the whole of the instrument, and especially of the *habendum*. So dealing with the deed in the present case, the effect of it seems to me to be that the three persons named take the rent-charge as tenants in common. Each takes a legal estate in an undivided third part of the rent; and, no third party intervening, there is nothing for the Statute of Uses to operate upon. The party claiming, therefore, taking by force of the common law, the case is entirely out of the operation of the Statute of Uses. Consequently, it cannot come within the decision in *Heelis v. Blain*, but is governed by the two previous cases of *Murray v. Thorniley*, and *Hayden v. Thorton*.

The decision of the revising barrister, therefore, must be reversed, on the ground that the claimant had not been in actual possession of the rent-charge for the period required by § 26 of the Reform Act of 1832.

BRETT, J. In this case Orme claimed to be registered as a voter in

respect of a rent-charge ; and, in order to substantiate his claim, it was necessary for him to bring himself within § 26 of 2 Wm. 4, c. 45 ; that is, to show that he had been in " actual possession " of the rent-charge for six months previously to the last day of July. In point of fact he had not been in actual receipt of the rent for the required period, the first payment having only become due on the 5th of April preceding ; and the question is, whether, notwithstanding this, the claimant has brought himself within § 26.

It seems to me that there are two canons or rules of conduct which the court in dealing with these revising appeals ought to observe. The first is, to construe the words of these Statutes according to their ordinary meaning ; and the second is, to adhere loyally to former decisions, unless clearly satisfied that they are wrong. Now, the first case which is applicable to the present is that of *Murray v. Thorniley*, 2 C. B. 217 ; 15 L. J. (C. P.) 155. It was there held that " actual possession " in § 26 of the Reform Act meant a possession in fact as contradistinguished from a possession in law. The next case was *Heelis v. Blain*, 18 C. B. (N. S.) 90 ; 34 L. J. (C. P.) 88, where it was held that, though the grantee of a rent-charge under a grant at common law is not entitled to be registered until he has been in the actual receipt of the rent for six months prior to the last day of July, since until such receipt he had only a possession in law, and not the actual possession required by 2 Wm. 4, c. 45, § 26, it is otherwise where he acquires the rent-charge by a conveyance operating under the Statute of Uses, for then the person to whose use the rent-charge is limited is by virtue of the Statute of Uses to be deemed to be in actual possession. It follows, therefore, if we observe the rule of conduct I have referred to, that, if the deed conveying the rent-charge in the present case operates at common law, the case is governed by *Murray v. Thorniley* ; and that, if it operates under the Statute of Uses, then the case is governed by *Heelis v. Blain*, and we are bound to hold, whatever be our opinion of that case, that the possession given by the Statute of Uses is the possession required by the Reform Act. The result is, that the question for our determination is whether the deed conveying the rent-charge in respect of which Orme claimed in this case was one which operated at common law or by virtue of the Statute of Uses.

The result of the authorities cited is this : You must first look at the whole deed of conveyance ; and wherever the grant in the *habendum* and the declaration of uses is to the same person, if the description is general in the one part and specific in the other part, the latter is to override the former ; and, so reading it, it is a common-law conveyance, and the Statute of Uses has no application at all. In *Jenkins v. Young*, Cro. Car. 230, the limitation was to E. R. and his wife, in the form of a declaration of uses ; but, inasmuch as the *habendum* was general in its terms, and not inconsistent with the declaration of the use, it was held that it was " a limitation of the *estate* to them and the heirs of

their bodies *by the course of the common law.*" The case put in Sanders on Uses, p. 91, is open to the same observation. The limitation was to A., B., and C., and their heirs, to the use of A., B., and C., for their lives and the life of the survivor. There again the *habendum* was general, and the supposed declaration of use specific; but there was no inconsistency, and therefore the *habendum* was read as specific, and the conveyance was held to be a common law conveyance. In *Doe v. Prestwidge*, 4 M. & S. 178, the *habendum* was to two persons, their heirs and assigns, as tenants in common, and not as joint-tenants; that which was called the declaration of uses was general, "to the use of them, their heirs and assigns;" but, inasmuch as the *habendum* was specific, it was held that the whole must be read as if the declaration of uses had been as specific as the limitation, and so the deed took effect as a common-law conveyance. This seems to me to be the result of the opinions of Lord Bacon, Mr. Booth, Mr. Butler, and Lord St. Leonards.

Apply that to the present case. The grant is to Orme, Lawton, and Kerfoot and their heirs, — *habendum* "to Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares." The *habendum* is general, and the declaration of uses specific; therefore the *habendum* is to be read as if it were as specific as the declaration of the use. Consequently the conveyance is a common-law conveyance of the rent-charge to the three as tenants in common.

I should have been prepared to go the length of Mr. Herschell's argument and to say that the Statute of Uses does not apply, unless there be some person named in the declaration of the use who is not named in the grant. It is not necessary, however, to go that length in the present case: it is enough to say that, one part of the *habendum* being general, and the other part specific, the whole is to be read together, and the intention collected from that part which is specific.

The result is that this must be taken to be a common law conveyance, and not a conveyance operating by force of the Statute of Uses. The case is, therefore, within *Murray v. Thorniley*, and is not within *Heelis v. Blain*. I therefore think the decision of the revising barrister was wrong, and that the appeal must be allowed.

GROVE, J. I am of the same opinion. The question turns upon § 26 of the Reform Act, 2 Wm. 4, c. 25, which enacts that no person shall be registered as a county voter in any year in respect of his estate or interest in any lands or tenements, as a freeholder, unless he shall have been "in the actual possession thereof, or in the receipt of the rents and profits thereof," for his own use, for six calendar months at least next previous to the last day of July in such year. *Prima facie*, the meaning of those words is clear and simple: "actual possession" would seem to mean an actual and not a constructive possession

or receipt of the rent. The proviso which is engrafted upon that section would seem to show that that is its true meaning,—“provided always, that, where any lands or tenements, which would otherwise entitle the owner, holder, or occupier thereof to vote in any such election, shall come to any person at any time within such respective periods of six or twelve calendar months, by descent, succession, marriage, marriage-settlement, devise, or promotion to any benefice in a church, or by promotion to any office,” such person shall be entitled to be inserted as a voter. This was the meaning put by this court in *Murray v. Thorniley*, 2 C. B. 217; 15 L. J. (C. P.) 155, where it was held that the possession required by that section was an actual possession, as contradistinguished from a possession in law; and there would have been no difficulty in this case but for the decision in *Heelis v. Blain*, 18 C. B. (N. S.) 90; 34 L. J. (C. P.) 88, where, the use being in a person different from the person who took the fee, the Statute of Uses applied, and it was held to give such a possession as amounted to actual possession. Now the question arises, whether the Statute of Uses is confined to a case where the use is not limited to the same persons as those to whom the rent-charge is granted. It seems to me to be clear, as well from the language of the preamble as from the enacting words of § 1, that the Statute was intended only to meet the case of a limitation of the use to persons other than those to whom the rent-charge is granted. The object of the Statute was to prevent conveyances from being otherwise than *bona fide*, and to make the ostensible and the real ownership of the estate always identical. We all know how that object was defeated, viz., by repeating the words “to the use of.” The Statute, as I have already observed, in terms applies only to the case where the use was limited to a different person from the grantee or feoffee. One exception is that mentioned in *Sammes's Case*, 13 Rep. at p. 56 a, where it was resolved that, “if a man maketh a feoffment in fee to one, to the use of him and the heirs of his body, in this case, *for the benefit of the issue*, the Statute according to the limitation of the uses divests the estate vested in him by the common law, and executes the same in himself by force of the Statute; and yet the same is out of the words of the Statute 27 Hen. 8, which are, where any person, &c., stand or be seised, &c., to the use of any other person; and here he is seised to the use of himself; and the other clause is, where divers and many persons, &c., be jointly seised to the use of any of them, &c.; and in this case A. is sole seised: but the Statute of 27 Hen. 8 hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So, if a man seised of lands in fee-simple by deed covenants with another that he and his heirs will stand seised of the same land to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee; in that case, by the operation of the Statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the

limitation of the use." In Bacon on Uses, edit. 1806, p. 63, it is said, "that the whole scope of the Statute was to remit the common law and never to intermeddle where the common law executed an estate; therefore the Statute ought to be expounded, that, where the party seised to the use and the *cestui que use* is one person, he never taketh by the Statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." All the other authorities are in favor of the plain and obvious construction of the words of the Statute. In Sanders on Uses, 5th ed., p. 91, after quoting the case of *Jenkins v. Young*, Cro. Car. 230, it is said: "So, if an estate be conveyed to A., B., and C., and their heirs, to hold unto the said A., B., and C., their heirs and assigns, to the use of the said A., B., and C., for and during the natural lives of them and the life and lives of the survivor and survivors of them, it would seem that this is not a Statute use, but that A., B., and C. will take an estate of freehold for their lives by the common law." In the present case the grantees of the rent-charge and the *cestuis que use* are the same persons; and the question we have to determine is whether the use is executed by the Statute. It has been ingeniously argued by Mr. Mellor that, as by the terms of the grant the grantees would *prima facie* take as joint-tenants, the limitation of the use to them as tenants in common so changed the character of the estate to which the use attached as to make it in some sense a limitation to different persons. But then comes the case of *Doe v. Prestwidge*, 4 M. & S. 178, which is somewhat the converse of this case, where the *habendum* was to T. and H. and their heirs, as tenants in common, and not as joint-tenants, and the use was to them, "their heirs, and assigns" generally, and it was held that the general words were controlled by the specific words, and that T. and H. took as tenants in common. Counsel for the plaintiff, after time for consideration, admitted that, although, if this had been an use executed by the Statute, the consequence would be that T. and H. were joint-tenants, yet that, where the person seised to the use and *cestui que use* is the same person, the Statute does not operate, — "except (as Bacon says) there be a direct impossibility or impertinency for the use to take effect by the common law." That was in effect the judgment of the court. Is there here any direct impossibility or repugnancy in holding that the grantees here take as tenants in common? I think not. The specific words of the declaration of uses clearly show that the intention was not only to limit the use, but to give the original estate to the three persons named and their heirs as tenants in common. If so, the Statute of Uses does not apply.

There may be a difficulty in saying that the possession given by the execution of the use by the Statute is different from the possession in law which was held in *Murray v. Thorniley* to be insufficient to satisfy § 26 of 2 Wm. 4, c. 45; but it is unnecessary to consider that on the present occasion, for we are not now called upon to overrule the case of *Heelis v. Blain*, 18 C. B. (N. S.) 90; 34 L. J. (C. P.) 88.

DENMAN, J. I am of the same opinion. The only question raised by the revising barrister in this case is, whether the circumstances bring it within *Heelis v. Blain*, 18 C. B. (N. S.) 90; 34 L. J. (C. P.) 88. He decided that they did; and that, I think, was a wrong decision. *Heelis v. Blain* was very carefully decided, so as to leave untouched the two previous cases of *Murray v. Thorniley*, 2 C. B. 217; 15 L. J. (C. P.) 155, and *Hayden v. Twerton*, 4 C. B. 1; 16 L. J. (C. P.) 88. I observe that Earle, C. J., in his judgment in *Heelis v. Blain*, Hop. & Ph. at p. 198, says: "If it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear, from the cases of *Murray v. Thorniley* and *Hayden v. Twerton*, that there would have been no actual possession of the rent-charge to entitle the claimant to be registered." The case of *Heelis v. Blain* certainly may be called a refined decision in favor of the franchise. It was there held that "actual possession" in § 26 of the Reform Act of 1832 is satisfied by the execution of a conveyance to uses of a rent-charge, although no part of the rent has been received. The question now is whether this was or was not a grant operating by virtue of the Statute of Uses. I am clearly of opinion that it was not. The Statute of Uses has no application where the grant is to three persons and their heirs, *habendum* to the same three, their heirs and assigns, to the use of the same three, their heirs and assigns for ever, as tenants in common; because they do not satisfy the words of § 1, they not being seised "to the use of some other person or persons," but to the use of themselves. It is said here that the Statute of Uses applies, because they are by the first part of the *habendum* joint-tenants, and by the limitation of uses they take as tenants in common. I will not say that that is an absurd argument, because it is at least as plausible an argument as some which have prevailed in cases of this sort. But I agree with the rest of the court that this case is not within *Heelis v. Blain*, and that it is within *Murray v. Thorniley* and *Hayden v. Twerton*, and therefore that our judgment should be for the appellant.

Decision reversed.

NOTE. — THE STATUTE OF USES IN WILLS. "In the opening of the work it was observed, that a power given by a will was a common law authority. But here we must consider whether a devise to uses through the medium of a devisee, as a devise to A. and his heirs, to the use of B. and his heirs, will not take effect under the Statute of Uses. Upon this point a difference of opinion has been expressed: Butl. n. to Co. Lit. 271 b, III. § 5; Powell on Devises, 272; and see 1 Sand. on Uses, 195; and Fonbl. n. (c) to 2 Treat. Eq. p. 24, 2d edit. The Statute of Uses would equally operate on the 1 Vict. c. 26, and, indeed, the subject is exhausted by the learning which has been displayed upon it. Of course an immediate devise to A. for life, remainder to B. in fee, would be good, although no seisin was raised to serve those estates; or, in other words, lands may be devised without the aid of the Statute of Uses, and it is not material that the limitations are termed *uses*; and powers may be created in like manner. They will be common-law authorities, and the appointee will be in, not by the Statute of Uses, but by the devise. *Dike v. Ricks*, Cro. Car. 335. On the other hand, it seems equally clear that where a seisin is raised by will to feed uses created by it, such uses will be executed into estates by the Statute of Uses.

“ In support of the contrary opinion, it is insisted that the Statute of Uses cannot refer to the Statute of Wills, which was not then in contemplation. It is said to be difficult to conceive how uses created under the testamentary power given by the Statute of Wills can be within the Statute of Uses ; and that it may be argued that a Statute can never be considered as relating to anything which did not exist at the time of its passing. But this is well answered by Coke, who in *Vernon's Case*, Rep. I, addressing himself to the precise objection, said ‘ It is frequent in our books, that an Act made of late time should be taken within the equity of an Act made long time before,’ of which he gives many instances. And see *Williams v. Drewe*, Willes, 392 ; *Lane v. Cotton*, 1 Com. 100 ; *In Re Perrin*, 2 Dru. & War. 147. In the principal case, that part of the Statute of Uses which relates to jointures, was holden to be within the equity of the Statute of Wills. It appears to have been thought in *Andrews's Case*, in 18 Eliz. Mo. 107, that the Statute of Uses would operate on uses created by will ; and in *Popham and Bampffield*, 34 Car. II. 1 Vern. 79, and *Burchet and Durdant*, 2 Will. & M. 2 Ventr. 311, the same point was admitted both at the bar and by the court. In the case of *Hore and Dix*, 12 Car. II. 1 Sid. 26, 4th resol., it was resolved, that an use could not be raised without a deed. And as to the case of a devise of land to uses, by a will in writing, which is not a deed, it was said, that that went upon another reason, *scil.* rather upon the Statute of 32 H. VIII. of Wills, than upon the Statute of 27 H. VIII. of Uses. This case has been treated as an authority, that the use is executed by the Statute of Wills, and not by the Statute of Uses ; but on the contrary, it appears to admit that the Statutes may have a concurrent operation. It was in like manner admitted in *Broughton and Langley*, 2 Ann. 2 Ld. Raym. 873 ; 2 Salk. 679, that a devise of lands may be by express words to the use of another than the devisee, and that such devise will be executed by the Statute of Uses. In later times the same point has been repeatedly ruled, or treated as clear, *Hopkins v. Hopkins*, 1 Atk. 589 ; *Bagshaw v. Spencer*, 1 Ves. 143 ; *Wright v. Pearson*, Fearn. Cont. Rem. 128 ; *Perry v. Phelps*, 1 Ves. jun. 255 ; *Thompson v. Lawley*, 2 Bos. & Pull. 311 ; *Doe v. Finch*, 4 Barn. & Adol. 283 ; and there is not a single case in which the point has been doubted. It must be considered therefore as settled, upon principle as well as authority, that the Statute of Uses may operate on uses created by will : and that where a seisin is created to serve the uses, the Statute will in most cases transfer the possession to them. It is not denied that a devise unto and to the use of one, will vest the legal estate in him, although ulterior uses are declared in favor of others ; but this, perhaps, it may be said, is not by the operation of the Statute of Uses, but depends on an irresistible inference of the testator's intention, in analogy to the resolutions on limitations to uses in deeds. *Robinson v. Comyns*, For. 164 ; *Brydges v. Brydges*, 3 Ves. 120 ; and *Doe v. Passingham*, 6 Barn. & Cress. 305 ; 9 Dowl. & R. 416.” Sugd. Pow. (8th ed.) 146-148.

See *Baker v. White*, L. R. 20 Eq. 166, 171.

SECTION VIII.

TRUSTS.

NOTE. — Trusts form the subject of a separate course. Only two cases are here given, — to point out differences between Uses and Trusts.

NEVIL v. SAUNDERS.

CHANCERY. BEFORE LORD JEFFREYS, C. 1686.

[*Reported 1 Vern. 415.*]

LANDS were given by will to trustees and their heirs, in trust for Anne the defendant's wife and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to the said Anne, or to such person or persons as she by any writing under her hand, as well during coverture as being sole, should order or appoint the same, without the intermeddling of her husband, whom he willed should have no benefit or disposal thereof; and as to the inheritance of the premises, in trust for such person or persons, and for such estate and estates, as the said Anne by any writing purporting her will, or other writing under her hand, should appoint; and for want of such appointment, in trust for her and her heirs.

The question was, whether this was an use executed by the Statute, or a bare trust for the wife: and the court held it to be a trust only, and not an use executed by the Statute.

LLOYD v. SPILLET.

CHANCERY. BEFORE LORD HARDWICKE, C. 1741.

[*Reported 2 Atk. 148.*]

JOHN STAMP, being seised of a considerable real estate, and possessed of a large personal estate, made his will dated the 28th of March, 1721, and afterwards a codicil of the 10th of October, 1721, and appointed John House and John Spillet his trustees, to see what he had done in his life-time be continued as he ordered, and then gave his cousins Anne and Mary Jobson £15 a year a-piece during their lives, and directed his trustees to improve all his estate to the best advantage, and that the yearly profits thereof should be given to and for the yearly maintenance of such ministers, as were called by the name of Presbyterian and Independent ministers, that do not receive above £40 a year for their preaching; the testator afterwards added Richard Froome to the other two trustees, and on the 7th of December,

1721, there was an indenture of release duly executed between John Stamp, of the one part, and House, Froome, and Spillet of the other part, witnessing that Stamp, as well for and in consideration of the natural love and affection which he bore unto his cousins House, Froome, and his friend Spillet, and also in consideration of ten shillings paid by them, granted to them several messuages and farms therein mentioned, to hold to them, their heirs and assigns, to the use of them, their heirs and assigns for ever; provided always, &c. that if Stamp should at any time during his life tender or pay to House, &c. 10s. on purpose to make void the said deed and the estates thereby conveyed, then the deeds and the estates thereby limited should be void. John Stamp did also execute a deed-poll of his personal estate to House, Froome, and Spillet, whereby John Stamp, in consideration of ten shillings, and other good causes, bargained and sold to House, &c. all his goods and chattels, to hold to them, their executors, &c. and put them in possession of all the premises by the delivery of five shillings to them; and it was agreed between the parties, that Stamp should have the rents and profits of the premises during his life for the maintenance of himself and family, and a power was reserved to Stamp to make void this deed by any deed or writing, and to dispose of the premises as he should think fit; and he had power also to revoke the lease and release.

The bill is brought by the plaintiffs as heirs at law to John Stamp, and the end of it is, that the defendants may convey John Stamp's real estate to the plaintiffs and their heirs, and account for the rents and their share of the personal estate, and deliver up the deeds of bargain and sale, and lease and release, and the title-deeds.

The defendants insist on their right to the real and personal estate by virtue of the will and conveyances of John Stamp, and in regard it is by his will declared that if his heirs should commence any suit relating to his will, that then it should be void: they submit to the court, that if the plaintiffs had any title to their annuities of fifteen pounds each, they have forfeited the same by bringing this suit.

First, With regard to the personal estate: I am of opinion there are no grounds for the present plaintiffs to be relieved, according to the prayer of their bill.

For here is an assignment, or bill of sale of all his goods and chattels, and all other his substance whatsoever, movable or immovable, quick or dead, to his trustees during his life, for the maintenance of himself and family, with another proviso to revoke the uses of this deed by any other deed or writing, or even by cancelling without any form or ceremony whatsoever.

A man makes a will antecedent to a deed, in which he has given away all his personal estate to charitable uses.

Now, whether a man after a will made reserves a trust in what was his personal property before, or acquired after, the will is ambulatory, till his death, and therefore, as to the next of kin, there is no

pretence that the personal estate is devisable under the Statute of Distributions.

Secondly, As to the legal estate, whether it will pass by the lease and release without a consideration.

Now, there are no grounds whatsoever to say that the legal estate did not pass by the lease and release. For the considerations in it are such as will operate by way of transmutation of possession.

In the first place, here is a consideration expressed of natural affection to two persons, who are not disputed to be very nearly related to the grantor, and here is likewise the consideration of ten shillings; but there is no manner of doubt the estate would have passed even without the last pecuniary consideration, under the Statute of Uses, for natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear.

But then it has been insisted, here is not a sufficient consideration to pass the beneficial interest in this estate.

The consideration of ten shillings, it is said, is only a form in the conveyance, and not sufficient of itself to pass the estate: neither will the consideration of natural love and affection alone pass it.

But I do not think these observations material in the present case.

Consider how it stood at common law before the Statute of Uses; there was no necessity then that there should be any consideration expressed to pass the estate.

As, for instance, in the case of feoffments, there was no consideration at all mentioned in them, and yet the estate passed by them from the operation of law.

In process of time, for the sake of avoiding forfeitures to the Crown, when the contests arose between the two Houses of York and Lancaster, and likewise to avoid wardships, both of them with a fraudulent intention to cheat the Crown, and the lord, of what the law gave them, uses were introduced, and were exactly the same with what trusts are now, and I wonder how they ever came to be distinguished.

The doctrine of a resulting use first introduced the notion that there must be a consideration expressed in the deed of feoffment, or otherwise nothing could pass, but it would result to the feoffor.

And so it is insisted on here, that though the legal estate passes by the Statute of Uses, yet the beneficial interest will not pass, as there is not what the court calls a valuable consideration, and consequently there is a resulting trust for the heir.

I am now bound down by the Statute of Frauds and Perjuries to construe nothing a resulting trust but what are there called trusts by operation of law; and what are those? Why, *first*, When an estate is purchased in the name of one person, but the money or consideration is given by another; or *secondly*, Where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law, and they cannot be said to be trustees for the residue.

I do not know in any other instance besides these two where this court have declared resulting trusts by operation of law, unless in cases of fraud and where transactions have been carried on *mala fide*.

But in the present case there is no fraud at all in the grantees, but a scheme in the plaintiff's ancestor to secure the charity at all events, supposing he should revoke his will.

It has been said, that it was not the intention to give this estate to the defendant, and consequently the heir at law is entitled: for the heir at law does not want an express intention; and it is certainly so in the case of a will, but it is otherwise with regard to a deed.

For there, since the Statute of Frauds and Perjuries, the lines are exactly drawn with regard to resulting trusts, and the heir at law must show an express trust for him in order to entitle himself.

A man that conveys a trust to another, and barely for himself, or for the use of his heir at law, does not generally insert a power of revocation, as has been done in the present case.

Upon the whole, I am of opinion that the legal estate did well pass, and the beneficial interest likewise; nor do I believe there was any intention that there should be a resulting trust for the heir at law, but the whole design of the plaintiff's ancestor was to secure the charity at all events.

LORD HARDWICKE therefore said, he saw no cause to vary the decree of the 8th of November, 1734, and ordered the same should be affirmed; but declared that the plaintiffs, the heirs at law of John Stamp, were entitled to the two annuities of fifteen pounds each, devised to them by the testator for their lives, and directed the arrears and growing payments to be paid to the plaintiffs.

[NOTE. — "There needed no consideration to give effect to a conveyance at the common law; nor when, before the Statute of Uses, land was actually conveyed to uses, did equity require, as the condition of granting its peculiar process, any inducement beyond the obligation imposed on the conscience of the trustee. But if the land was not actually conveyed, then a bargain and sale for money or money's worth, or a covenant in consideration of marriage, or of blood, to stand seised of the land to uses, was necessary to raise the use; though a pre-contracted marriage, or a remote degree of consanguinity, as that of a cousin, was held sufficient. After the Statute, uses arose upon actual conveyances, without any consideration; upon bargains and sales, for considerations merely nominal; upon covenants to stand seised, for the same considerations as before. With respect to fiduciary interests, however, the old rules now underwent some important modifications. If the land was actually conveyed — it mattered not whether by feoffment, or lease and release, at the common law, or by bargain and sale, under the Statute — upon express trusts, then such trusts, though declared in favor of a stranger, without a shadow of consideration, were enforced; but if the intention was suffered to rest in contract, then a substantial consideration, as money or money's worth, or the value of a prospective marriage, was requisite to evoke the extraordinary aid of equity, — evoked in order, not merely to execute, but to establish the trusts. Between the strongest natural affection and mere friendship, between moral duty towards a wife or child and bounty to a stranger, equity no longer made any distinction, but regarded as volunteers all whose claims had not the support of a really valuable consideration; and for a volunteer, equity would not do more than administer a trust regularly constituted." 1 H. yes, Conv. (5th ed.), 102.]

BOOK IV.

NATURE AND INCIDENTS OF OWNERSHIP IN REAL
PROPERTY.

CHAPTER I.

GOLD AND SILVER MINES.

CASE OF MINES.

EXCHEQUER CHAMBER. 1567.

*[Reported Plowd. 310.]*¹

FIRST, all the Justices and Barons agreed, that by the law all mines of gold and silver within the realm, whether they be in the lands of the queen, or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.

Also HARPER, SOUTHCOTE, and WESTON, Justices, agreed, that if gold or silver be in ores or mines of copper, tin, lead, or other base metal in the soil of subjects, as well the gold and silver as the base metal entirely belongs of right to the subject, who is the proprietor of the soil, if the gold or silver does not exceed the value of the base metal; but if the value of the gold or silver exceeds the value of the copper or other base metal, then it was their opinion that the Crown should have as well the base metal as the gold or silver; and in such case it shall be called a mine royal, and otherwise not; but if the base metal exceeds the value of the gold or silver, then it draws the property of the whole to the proprietor of the land. But they three agreed, that forasmuch as the information sets forth that the ore and mine of copper contained in it gold or silver, and the defendant has not denied it, but has fully confessed it, thereby it shall be taken that the gold or silver

¹ Only a part of the judgment on p. 336 is given.

were of the greater value, for the best shall be intended for the queen ; and therefore they assented, with all the other Justices and Barons, that judgment should be given against the earl, and for the queen. But all the other Justices and Barons of the Exchequer unanimously agreed, that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence ; and in such case it shall be called a mine royal, for the records don't make any distinction herein, but they are general, and prove that all ores or mines of copper, or other base metal, containing or bearing gold or silver, belong to the king. And where WESTON said, that there is a text in the civil law to this effect, viz. that by the negligence or poverty of the proprietor of the soil *possunt fodi omnia metalla in alieno solo, invito domino, quia utile est reipublicæ, et aliter non* ; to this SAUNDERS, Chief Baron, said, that the same law says, *quod optima legum interpret est consuetudo*, and here there is *consuetudo*, for the precedents and the accounts prove that from time to time it has been a custom and usage, that the kings of this realm have had the profit of such mines of base metal containing or bearing gold or silver, without any distinction with regard to the value of the gold or silver, be the same greater or less than the base metal. Wherefore he and all the others (except the three above-mentioned) took it that the whole ore and mine belonged to the queen, although the base metal be of the greater value. And here it is confessed by the defendant, that the ore and mine of copper contains in it gold or silver, so that it agrees with the precedents. And therefore as well the other three as all the rest unanimously agreed, that judgment should be given for the queen upon this plea, although they differed in the matter itself, and in the reasons of the judgment, as it is shown before.

Also they all agreed, that if the ore or mine in the soil of a subject be of copper, tin, lead, or iron, in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the Crown by prerogative, for in such barren base metal no prerogative is given to the Crown.¹

¹ See Sts. 1 W. & M. c. 30, § 4 ; 5 W. & M. c. 6 ; also 3 Kent, Com. 378 note (b) ; *Moore v. Smaw*, 17 Cal. 199.

CHAPTER II.

WILD ANIMALS.

SUTTON v. MOODY.

KING'S BENCH. 1697.

[Reported 1 *Ld. Raym.* 250.]

TRESPASS *quare clausum suum fregit et centum cuniculos suos ad-tunc et ibidem inventos venatus fuit occidit cepit et asportavit.* Upon not guilty pleaded, verdict for the plaintiff and entire damages. *Gould*, Serjeant, moved, in arrest of judgment, that conies are *feræ natura*, and therefore there is no property in them in any; therefore since the plaintiff has laid property in them by the word [*suos*] it is ill, and no damages ought to have been given for them. But if the action had been for having hunted in *warena sua*, and killed *cuniculos suos* there found, it had been good, for then he would have had a privileged property in them. The same law for fish taken in *separali piscaria*. F. N. B. 87; *Greenhill v. Child*, Cro. Car. 399; March, 48; W. Jones, 440. But generally there is no property in things which are *feræ natura*, and therefore trover does not lie for a hawk, without alleging that he was reclaimed; and in such an action it was adjudged against the plaintiff, though it was alleged in the declaration, that he was possessed of the hawk as of his proper goods, Dier, 306 b, pl. 66. *Sed non allocatur.* For *per* HOLT, Chief Justice, a warren is a privilege, to use his land to such a purpose; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore if a man keeps conies in his close (as he may), he has a possessory property in them so long as they abide there; but if they run into the land of his neighbor, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B. and hunts it, and kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.¹

¹ So held in *Churchward v. Studdy*, 14 East, 249 (1811).

"I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by

being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeds when he said that 'If A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.'

"I have some difficulty in understanding why the wrongdoer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser, to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighboring land? And why not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold that if the trespasser deprived the owner of the land where the game was started of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner, and not for himself." *Per* LORD CHELMSFORD, in *Blades v. Higgs*, 11 H. L. C. 621, 639.

CHAPTER III.

BORDER TREES.

DIG. 47, 7, 6, 2. If a tree has extended its roots into the land of a neighbor, the neighbor cannot cut them off, but he can bring suit to have it declared that there is no right to have it projecting like a beam or tile. If a tree is nourished by roots in a neighbor's land, yet it belongs to him in whose land it had its origin.

INST. 2, 1, 31. If Titius put another's plant into his own ground, it will belong to him; and conversely if Titius puts his plant into Mævius's ground, it will be Mævius's plant, provided only that in each case it has struck root; but before it has struck root it continues his whose it was. But to such a degree is the property in a plant changed from the time of its striking root, that if a neighbor's tree encroach on the ground of Titius so as to strike its roots into his land, we say that the tree belongs to Titius; for reason does not allow a tree to be considered as belonging to any one but him in whose land it has struck root: and therefore a tree placed near a boundary, if it strike root in the neighbor's land, becomes common property.¹

MASTERS v. POLLIE.

KING'S BENCH. 1620.

[Reported 2 Roll. R. 141.]

TRESPASS *quare clausum fregit et asportavit* his boards. The defendant justifies because that there was a great tree which grew between the closes of the plaintiff and of the defendant, and that part of the roots of this tree extended into the close of the defendant, and that the tree was nourished by the soil, and that the plaintiff cut down the tree and carried it away into his own close, and sawed it into boards, and the defendant entered and took some of the boards and carried them away, *prout ei bene licuit*, and on this the plaintiff demurred.

Harris. The plea is not good, for although some of the roots of the

¹ Bracton (lib. 2, c. 2, § 6, fol. 10), after giving the substance of the passage from the Institutes, adds, "Nor can the neighbor cut off the roots. And this is true, if my tree has struck root in a neighbor's land, without which roots it cannot live, because it ought to be common; but if it can live well enough without those roots, it will not be common."

tree are in the defendant's soil, yet the body of the main part of the tree being in the plaintiff's soil, therefore all the rest of the tree belongs to him also, and so Bracton holds; but if the plaintiff had planted a tree in the soil of the defendant, then it will be otherwise, *quod Curia concessit*. But MONTAGU, Chief Justice, said the plaintiff cannot limit the roots of the tree, how far they shall grow and go; *vide* 2 Edw. IV. 23.¹

ANONYMOUS.

KING'S BENCH. 1622.

[*Reported 2 Roll. R. 255.*]

If a tree grows in a hedge which divides the land of A. and B., and by the roots takes nourishment in the land of A. and also of B., they are tenants in common of this tree; and so it was adjudged.

WATERMAN *v.* SOPER.

NISI PRIUS. 1698.

[*Reported 1 Ld. Raym. 737.*]

It was ruled by HOLT, Chief Justice, at Lent assizes at Winchester, upon a trial at Nisi Prius 1697-8: 1. That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2. Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons.

HOLDER *v.* COATES.

NISI PRIUS. 1827.

[*Reported 1 Moo. & M. 112.*]

TRESPASS for cutting a tree of the plaintiff.

The plaintiff's land, and that of the defendant, adjoined each other, the plaintiff's land being rather the higher, and the separation between

¹ See s. c. 2 Roll. R. 207.

the two being by a hedge belonging to the plaintiff, and standing at the extremity of his ground, on the bank or declivity descending to that of the defendant. The trunk of the tree stood in the defendant's land, but some of the lateral or spur roots grew into the land of both parties; and evidence was given on the part of the plaintiff to show that there was no tap root, and that all the principal roots, from which the tree derived its main nourishment, were those which grew into the plaintiff's land. The defendant, on the other hand, gave evidence that there was a tap root, growing entirely in his land, and that the spur roots grew alike in the lands of both parties.

On the part of the defendant it was contended that, upon the evidence, the tree must be taken as belonging entirely to his land; but that, at all events, it derived part of its nourishment from his land, and that the plaintiff and defendant in that case would be tenants in common of the tree, according to the rule in the case of *Waterman v. Soper*, 1 Lord Raym. 737; and in that case the action of trespass could not be supported.

LITLEDALE, J. There is another case on that subject (*Masters v. Pollie*, 2 Roll. Rep. 141), in which it was considered that, if a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so. However, if the question becomes material, I will give you leave, on the authority of that case, to move to enter a nonsuit.

His lordship, in summing up to the jury, said, that with respect to any question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, he did not see on what grounds the jury could find for either party; but that the safest criterion for them would be, to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil, and of the roots within it, they could ascertain where the tree was first sown or planted; if they thought it was first set in the land of the plaintiff, they would find a verdict for him; for the defendant, if the tree had originally been set in his. If they could form no opinion on this subject, he would afterwards give them his direction on the questions which they would then have to consider.

The jury saying that they could not tell in whose ground the tree first grew, a verdict for the defendant was taken by consent, on terms agreed on between the parties.

Russell. Serjt., and *Whitcombe* for the plaintiff.

Campbell and *Ludlow*, Serjt., for the defendant.

LYMAN v. HALE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1836.

[Reported 11 Conn. 177.]

THIS was an action of trespass *quare clausum fregit*, alleging, that the defendant, on the 19th of October, 1835, entered upon the plaintiff's land, described in the declaration, and gathered, carried away and converted to his own use a great number, viz. twenty bushels, of the plaintiff's pears, growing and being upon a certain pear-tree of the plaintiff standing upon the land described. On the trial before the County Court, November term, 1835, it was proved and admitted, that at the time of the alleged trespass, the plaintiff owned and possessed the *locus in quo*; that the defendant, at the same time, as a tenant, was also in the lawful possession of a lot of land adjoining, on the south side, to the plaintiff's land, the latter being raised two or three feet above the former; that a pear-tree then was, and for many years had been, standing and growing on the plaintiff's land, a little more than four feet from the line between his land and that occupied by the defendant; that the trunk of this tree, at the distance of five feet above the ground, was about seventeen inches in diameter, and grew up perpendicularly about eight feet, and then divided itself into several branches, some of which had extended to some distance across the line and over the defendant's land; and that from these branches the defendant picked and gathered six bushels of pears and converted them to his own use, claiming a right to do so. For the taking and appropriation of these pears, the action was brought.

It was proved, on the part of the defendant, that two of the roots of the tree, one of about two inches in diameter, and the other a little smaller, together with several others from an eighth to half an inch in diameter, had entered his land.

The plaintiff offered testimony to prove, and claimed that he had proved, that this tree had, for more than twenty-five years, stood in the same situation in which it did at the time of the alleged trespass, and extended its branches, in like manner, over the defendant's land; and that, during all that time, the plaintiff had exclusively gathered and appropriated to his own use the pears from the parts of the tree projecting over the defendant's land, as well as from the other parts, and had the sole use and occupancy thereof, claiming exclusive title thereto; and that neither the defendant, nor those under whom he claimed, had ever gathered the pears, or exercised any right of ownership over the tree, or the fruit thereof, or claimed any title thereto. This claim of the plaintiff was resisted by the defendant.

The plaintiff claimed, that from the facts proved and admitted, the branches of the tree, which extended over the defendant's land and the

pears growing thereon, as well as the other parts of the tree, belonged to him and were his property; and that the defendant had no right to gather the pears from such projecting branches and appropriate them to his own use, as he had done; and consequently, that the plaintiff was entitled to recover in this action; and he requested the court so to charge the jury.

The plaintiff further claimed, that if from the facts proved and admitted, he had no title to the pears gathered by the defendant, yet if the jury should find, that the plaintiff had, for more than fifteen years next before the alleged trespass, exclusively gathered and appropriated to his own use the pears growing upon the branches projecting over the defendant's land, and exclusively exercised acts of ownership over the tree and such branches, claiming title thereto, he had thereby become the owner thereof, and had the sole property in the pears gathered by the defendant; and requested the court so to instruct the jury. The defendant claimed, that from the facts proved and admitted, he was either the tenant in common or joint owner with the plaintiff, or the exclusive owner of the pears so gathered by him; and that in either case, he had a right to gather them and appropriate them to his own use, and consequently that the action could not be maintained; and he requested the court so to charge the jury. The defendant also resisted the plaintiff's claim to the pears from fifteen years' exclusive enjoyment, and requested the court to charge the jury in opposition to such claim.

The court charged the jury as follows: "The owner of land has not only a right to the soil, but the right, in contemplation of law, includes everything in a direct line upward to the heavens, and everything downwards to the centre of the earth. The owner of the surface of the ground owns all that is over and under it.

"If a tree stand in the division line between two persons' lands, they are tenants in common of the tree, or are joint owners of it. If one plants a tree near the extreme limits of his land, and the roots do not extend into the land of the adjoining proprietor, he who planted it will own the whole tree, although the branches overhang and overshadow the land of the adjoining proprietor; but if the tree so planted, in growing extend its roots into the land of the adjoining proprietor, whereby it derives a portion of its sustenance from the land of both, they are tenants in common of the tree; and the universal practice in Connecticut has been for each to take the fruit overhanging his own land.

"As it regards the usage, or the right by possession, the law is, that to obtain it, the person claiming it is bound to show, by strict proof, that he has had actual, exclusive, uninterrupted, and adverse possession, for the period of fifteen years, under a claim of title. It is also necessary, that the possession should have been definitely marked, and certain, and invariably the same; and if the possession claimed is land, it must be marked by definite boundaries.

“ In this case, the court instruct you, that if you find the roots of the tree extended into the land of the defendant, and the branches overhung it, he had a right to gather the fruit on those branches, unless the plaintiff has acquired an exclusive right by possession.”

The jury returned a verdict for the defendant; and the plaintiff, having filed a bill of exceptions, brought a writ of error in the Superior Court. The judgment of the County Court was then affirmed; whereupon the plaintiff brought the case before this court, by motion in error.

Hungerford and *Cone*, for the plaintiff in error.

Johnson and *Chapman*, for the defendant in error.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed, is, whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on, in the argument, that the mere fact, that some of the branches overhang the defendant's land, creates such a joint ownership. Indeed, such a claim could not have been made, with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. “ Thus ” (it is said) “ if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance.” 2 Roll. 144, 1, 30; *Rex v. Pappineau*, 2 Stra. 688; *Cooper v. Marshall*, 1 Burr. 267; *Welsh v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; Com. Dig. tit. Action on the case for a nuisance, D. 4. And in *Waterman v. Soper*, 1 Ld. Raym. 737, the case principally relied on, by the defendant's counsel, it is laid down: “ That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A.”

The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground, the charge proceeded, in the court below; and on this, the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon, in support of the principle, are, the cases already cited from *Ld. Raymond*, and an anonymous case from *Rolle's Reports* (2 Roll. 255). The principle is, indeed, laid down in several of our

elementary treatises. 1 Sw. Dig. 104 ; 3 Stark. Ev. 1457 n. ; Bul. N. P. 84. But the only authority cited is the case from *Ld. Raymond*. And it may well deserve consideration, whether that case is strictly applicable to the case at bar ; and whether it carries the principle so far as is necessary to sustain the present defence. That case supposes the tree to be *planted* on the "extremest limit" — that is, on the *utmost point or verge* — of A.'s land. Is it not then fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line ? And in the case cited from *Rolle*, the tree stood *in the hedge*, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree ? We think not ; and if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principles to practice ; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to practice ? And here, it should be remembered, that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone, which creates the tenancy in common. And how is the fact to be ascertained ?

Again ; if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold ? And how are these proportions to be determined ? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor ? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties ?

Again ; suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it ? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line ; and whether he can safely cut them, without subjecting himself to an action ?

And again ; on the principle claimed, a man may be the exclusive owner of a tree, one year, and the next, a tenant in common with another ; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by

the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those, which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. Rep. 141, it was adjudged, that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J. in the case of *Holder v. Coates*, 1 Moo. & Malk. 112. He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Pop. Rep. 161, 163; *Norris v. Baker*, 3 Bulstr. 178; see also 20 Vin. Abr. 417; 1 Chitt. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury, in the court below, was, on this point, erroneous.

It is, however, contended, that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged, that land comprehends everything in a direct line above it; and therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds, that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use. *Beardslee v. French*, 7 Conn. Rep. 125; *Welsh v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 2 Phill. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the court below, and that it be reversed.

The other judges ultimately concurred in this opinion; Williams, Ch. J., having at first dissented, on the ground of a decision of the Superior Court in Hartford county (*Fortune v. Newson*), and the general understanding and practice in Connecticut among adjoining proprietors.

*Judgment reversed.*¹

¹ So *Skinner v. Wilder*, 38 Vt. 115.

GRIFFIN v. BIXBY.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1841.

[Reported 12 N. H. 454.]

TRESPASS, for breaking and entering the plaintiff's close, in Litchfield, November 1, 1838, and on other days, &c.

Plea, the general issue.

Hugh Nahor, the former husband of Elizabeth Bixby, who is one of the defendants, was the owner of a farm in Litchfield. Upon his death, her dower in said farm was set off, April 12, 1815, by a committee appointed for that purpose. In the return of the committee they described the southerly line of the tract set off as running from "a pine tree marked, with stones at the root," north 82 degrees east, "to the east end of said lot." There are acknowledged monuments at each end of this line, but the return of the committee did not designate any intermediate monuments.

The defendants offered evidence, that at the time the dower was set off, the committee in fact surveyed and marked a line through a tract of wood-land, varying somewhat from a straight line, extending further south, and thus including the *locus in quo*; and that there has since been a cutting of wood, by the occupants, on both sides, up to this marked line.

The plaintiff derives title from the heirs of Nahor, to the land adjoining the dower, and he contended that this evidence could not be received to control the return of the committee.

There was evidence that a part of the distance between the corners was cleared, and a fence built, which varies from a straight line, but corresponds with the first monument found in the woods.

There was further evidence tending to show that one or more of the trees alleged to have been marked upon the line as monuments, had been cut and carried away.

The questions arising upon the foregoing case were reserved for the consideration of this court.

Farley, for the plaintiff.

J. U. Parker, for the defendants.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor, the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line. *Allen v. Kingsbury*, 16 Pick. R. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments

were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return. *Brown v. Gay*, 3 Greenl. R. 126; *Ripley v. Berry*, 5 Greenl. 24; *Esmond v. Tarbox*, 7 Greenl. R. 61; *Thomas v. Patten*, 13 Me. R. 329; *Prescott v. Hawkins*, 12 N. H. 20, 26; and see 1 U. S. Digest, 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact; which strengthens the case, and shows the propriety of the rule. *Jackson v. Ogden*, 7 Johns. R. 241; *Clark v. Munyan*, 22 Pick. R. 410.

As to the second question: in *Waterman v. Scoper*, 1 Ld. Raym. 737, cited for the defendants, Holt, C. J., ruled that if A. plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B., next adjoining, A. and B. are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in Co. Lit. 200 b, it is said, "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt v. Porter*, 8 B. & C. 257, it was held that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted that for an entire destruction of the wall by one, trespass might have been sustained.

Without going to the extent of the ruling in Lord Raymond, we are of opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. See cases cited in *Odiorne v. Lyford*, 9 N. H. Rep. 511.

HOFFMAN v. ARMSTRONG.

COMMISSION OF APPEALS OF NEW YORK. 1872.

[Reported 48 N. Y. 201.]

APPEAL from judgment of the General Term of the Supreme Court in the Seventh Judicial District, affirming a judgment for the plaintiff entered on a verdict. The action is for assault and battery. (Reported 46 Barb. 337.)

The facts are these : Dr. Hoffman and the defendant were the owners of adjoining lands, separated by a line fence. There was a cherry tree standing upon the land of Dr. Hoffman with limbs overhanging the land of the defendant. The plaintiff, who was a sister of Dr. Hoffman, and lived with him, went upon the line fence and undertook to pick cherries from a limb of the tree which overhung the defendant's land. He forbade her, and on her still persisting, the defendant attempted to prevent her by force, and did her a personal injury.

The court held, and so charged the jury, that "every person upon whose lands a tree stands owns the whole of that tree, notwithstanding portions of it may overhang the lands of another; and in this case, as it is conceded that the body or trunk of the tree was wholly upon the land of Dr. Hoffman, he was entitled to all the fruit growing thereon, and hence, if the defendant attempted to prevent the plaintiff from picking such fruit by violence he was a wrong-doer, and this action lies against him. If he touched her at all, with the intention of preventing her from picking the cherries while she was standing on the premises or fence of Dr. Hoffman, although they were upon the limbs overhanging his yard, then this action lies against him, and your verdict should be for the plaintiff."

The defendant excepted to the several legal propositions contained in the charge, and requested the judge substantially to charge that the limbs of the tree overhanging the land of the defendant belonged to him, that he was entitled to the fruit thereon, and that he had the right to prevent the plaintiff from picking it by the application of all necessary force, if she refused to desist after being requested to do so. This was refused, and exceptions were taken to such refusals.

Amasa J. Parker, for the appellant.

II. V. Howland, for the respondent.

Lorr, Ch. C. The only material question presented in this case is, whether the owner of land overhung by the branches of a fruit tree standing wholly on the land of an adjoining owner is entitled to the fruit growing thereon.

The defendant claims that the ownership of land includes everything above the surface, and bases his claim on the maxim of the law, "*Cujus est solum ejus est usque ad cœlum*," and that consequently he was the

owner of the overhanging branches and the fruit thereon. The general rule unquestionably is, that land hath in its legal signification an indefinite extent upward, including everything terrestrial, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hands of man, as houses and other buildings. (See Co. Lit. 4 a; 2 Black. Com. 18; 3 Kent's Com., p. 401; 2 Bouvier's Ins. § 1570.)

This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit, — and no one can lawfully obstruct it to his prejudice, — yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging. It would be a violation of his right, for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof. (See *Aiken v. Benedict*, 39 Barb. 400.)

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by Allen, J., in giving the opinion of the court in *Dubois v. Beaver*, 25 N. Y. Rep. 123, etc., that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie*, 2 Rol. Rep. 141; *Holder v. Coates*, 1 Moody & Malkin, 112.

The ground or reason assigned in those cases for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates, and not the ground or maxim on which the defendant's claim is based.

We have not been referred to any case showing that where no part of a tree stood on the land of a party, and it did not receive any nourishment therefrom, that he had any right therein, and it is laid down in Bouvier's Institutes (section 1573) that if the branches of a tree only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow. (See also *Masters v. Pollie*, 2 Rol. Rep. 141; *Waterman v. Soper*, 1 Ld. Raymond, 737.)

The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself.

It follows, from the views above expressed, that the ruling of the judge at the Circuit was right, and the judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

NOTE. — "I cannot see how that a bare denial of a thing detained shall make a conversion: *Thumblethorpe's Case*, a lessee, at the end of his term, leaves a timber log on the ground; afterwards he demands it. A denial of this, without some other act done,

shall not make a conversion of this, if he doth not remove this, and so makes some other special conversion. *Legere* in one sense is to gather. If upon evidence to a jury, there a denial is good evidence to prove a conversion, but if he saith that he had locked it up, and brought it into the court, here *stabitur presumptioni donec in contrarium probetur*; this is no conversion, if the contrary be not proved." *Per* COKE, C. J., in *Isaack v. Clark*, 2 Bulst. 306, 314 (1615).

"If trees grow in my hedge, and the fruit of such a tree hangs over your land, and falls on your land, I can justify the collection of it, if I do not make too long a stay there or break down his [your] hedge. Because ripe fruit naturally falls." *Per* DODERIDGE, J., in *Millen v. Fawdry*, Latch, 119, 120 (1626).

CHAPTER IV.

WASTE.

ST. 52 HEN. III. ST. OF MARLBOROUGH (1267), c. 23, § 2. Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

ST. 6 EDW. I. ST. OF GLOUCESTER (1278), c. 5. It is provided also that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompence thrice so much as the waste shall be taxed at.¹

REG. BREV. 73. The king to the sheriff, &c., greeting. If A. shall give you security of prosecuting his claim, then summon B. by good summoners that he be before our justices at Westminster on the octave of St. Michael to show wherefore since it has been provided by the common council of our realm of England that it is not lawful for any one to commit waste, sale, or destruction of lands, houses, woods, or gardens demised to them for term of life or of years, the same B. has made of the lands, houses, woods, and gardens in L., which the said A. demised to him for the term of the life of the said B. (or which the said A. demised to him for a term of years, or which F., the father or mother or other ancestor of the said A. whose heir he is, demised to the said B., for the life of the said B. or for a term of years) waste, sale, and destruction, to the disherison (*ad exhaeredationem*) of A., and against the form of the Statute aforesaid, as he says: And have there the summoners and this writ.

¹ "Albeit tenant in tail *apres* possibility of issue extinct doth hold but for life, and so within the letter of this law, yet is he out of the meaning thereof in respect of the inheritance which was once in him, in respect whereof his estate is by law punishable of waste, but his assignee shall be punished for waste by this Statute." 2 Inst. 302.

ANONYMOUS.

KING'S BENCH. 1345.

[Reported Fitz. Ab. Wast, pl. 30.]

WASTE, and it was found by the inquest, where it was pleaded for the party that there was no waste, that as to a kitchen, it was burned by a strange woman without the knowledge of the defendant (because he was living elsewhere); and that to rebuild this kitchen he cut the oaks in the woods and hedges near the close; and that the house is now better than it was before the fire; and that he had also cut down a certain number of oaks in the woods and hedges near the close and sold them, and had cut down some to repair the houses, and had cut down one which lay there yet unsold.

Pole prayed judgment on the verdict for the plaintiff because all that is found should be adjudged waste by the form of his plea, wherefore the defendant ought to have pleaded this matter if he wished to have availed himself of it.

WILUGHBY [C. J.]. The fire is waste for the want of good watch.

THORPE [J.]. Now lately here on a writ of waste it was found by an inquest taken on default that the Welsh arrived on the sea-coast and burned a manor, and it was adjudged no waste, so here.

WILUGHBY [C. J.]. Against the Welsh the party can never have disturbance. But do you think if your household [*?main*] lodges a stranger who puts the houses in fire and flame, that that will not be adjudged waste? As if he would say it was. Wherefore the fire is adjudged waste, and so the kitchen is wasted; but the cutting to repair the house is not waste, and as to that which is cut and not sold, that is waste, and that which is cut for repairs, although it was not pleaded, is adjudged no waste, wherefore the court awards that the plaintiff recover the place wasted and treble damages.

THE ABBOT OF SHIRBOURNE'S CASE.

COMMON PLEAS. 1411.

[Reported Year Book, 12 Hen. IV. 5.]

THE Abbot of Shirbourne brought a writ of waste.¹

Norton traversed the waste except in a barn, and said that half of the barn had fallen before the lease, and as to the other half, he said that it was unroofed by a sudden storm, and before he could roof it, the plaintiff entered on him and was seised on the day of the purchase of the writ, and he demanded judgment, if he could maintain an action for this waste.

¹ Part of the case is omitted.

Skrene. We have alleged that he has done waste in a barn, which we let to him, and he says that the waste was made in one half before the lease, which is no answer to our action because, &c., and if he has made a new barn there himself, and waste has been done in that, our action is maintainable.

HILL [J.]. If the matter is so, allege it on your part, for his answer is good.

Skrene. Well, then as to the other half his plea is double, one is the sudden storm, the other is our entry on him, wherefore we pray he may be held to one of them.

HILL [J.]. The plea is not double, because the effect of this plea is your entry upon him before he could repair the unroofing.

Skrene. If I traverse the entry, he will rely against me [*reliera sur moy*] on the sudden storm, which excuses him from waste; for if I let houses for a term of years, and they are unroofed by sudden chance, I shall have no action of waste for that.

HILL [J.]. What you say is not law, for although at the beginning it will not be adjudged waste made by him, but by the act of God, yet if he suffers the house to be unroofed, by reason of which the timber is injured, he shall answer for this waste, because it is his own fault, and by law he is bound to roof the house.

Skrene. If the whole house is blown down by a sudden wind, I shall not make a new one.

HILL [J.]. I grant it; but when the timbers are standing, which are the substance of the house, and they fall for lack of roofing, it is clearly waste.

HANKFORD [J.]. If I do waste in tenements which I hold for term of years, and within the term I am put out by the lessor, it is a question whether he has an action of waste or not, namely, during the term; and it is proved here by the count that the term still continues; and yet if he wishes to say that the houses were unroofed by your fault and not by a sudden wind, he will be concluded by the entry which he made without cause, wherefore the plea seems double.

And then *Norton* alleged the cause of the entry of the plaintiff specially; viz., that the lease was made by indenture on condition, that if waste was done, he could re-enter, and by reason of the unroofing he re-entered, wherefore, &c.

HANKFORD [J.]. Again you prove by your plea that his entry was tortious, and so the plea is double.

HILL [J.]. The plaintiff can say that the defendant had sufficient time before his entry to have repaired the house, and did not repair it, and so prove the waste in the defendant's default, and so prove his entry lawful by the condition aforesaid; wherefore

HANKFORD [J.] to *Norton*. Be advised, &c.¹

¹ "Waste and destruction are nearly equivalent, and are used indifferently in reference to houses, woods, and gardens; but exile can be used when serfs are manumitted,

LIT. § 71. Also, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of

and wrongly ejected from their tenements; but the chance of fire, or an unexpected event of that kind, excuses all tenants." Fleta, lib. 1, c. 12, § 20.

"In an action of waste brought against tenant by the curtesy, tenant for life, tenant for years, or tenant in dower, which before hath been named in this Act, the entry of the plea of the tenant is *quod predict' (talis) non fecit vastum*, and yet all these by construction of law shall answer for the waste done by any stranger, for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrong-doer, and recover all in damages against him, and by this means the loss shall light upon the wrong-doer; for voluntary waste and permissive waste is all one to him that hath the inheritance. But if the waste be done by the enemies of the king, the tenant shall not answer for the waste done by them, for the tenant hath no remedy over against them. The same law it is if the waste be done by tempest, lightning, or the like, the tenant shall not answer for it. It is adjudged in 9 E. 2, that if thieves burn the house of tenant for life, without evil keeping of lessee's for lives fire, the lessee shall not be punished therefore in an action of waste; *nota* the case of fire, &c." 2 Inst. 303.

"Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common law jurisprudence of the United States." 4 Kent, Com. 82.

In *Cook v. Champlain Transportation Co.*, 1 Denio, 91 (1845), the plaintiffs, assignees of a lease of land, brought an action against a steamboat company for carelessly setting fire to a mill on the demised premises by sparks from the steamboat. The lease under which the lessees held provided that the buildings erected on the premises after the making of the lease (which was the case with the mill), should, "without damages of any kind, other than the natural wear of the same, revert to and become the property of the lessors." BEARDSLEY, J., delivering the opinion of the court, said: "Upon this state of facts, it was argued that the plaintiffs were bound to rebuild the mill for the benefit of the lessors, and therefore were entitled to recover its full value from the defendants; and if such was the liability of the plaintiffs, the consequence stated would seem to follow.

"This liability of the plaintiffs was placed on two distinct grounds:

"1. It was said the lessees were bound by their covenant to rebuild; that the covenant ran with the land, and bound their assignees; and therefore the plaintiffs were liable.

"2. That the destruction of the mill by tortious negligence was *waste*, for which the plaintiffs, being tenants for a term of years, were answerable to the reversioner, wholly irrespective of any express agreement, and therefore they were entitled to a corresponding redress from the defendants.

"I pass by the first ground stated, for the last seems decisive of the question. The plaintiffs claim that the mill was destroyed by the wrongful act of the defendants; and if so, it was waste, for which the plaintiffs, being tenants for years, were responsible. 'It is common learning,' said Heath, J., in *Attersoll v. Stevens* (1 Taunt. 198), 'that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed.' Chambre, J., in the same case, p. 196, said: 'The situation of the tenant is extremely analogous to that of a common carrier; to prevent collusion (and not on the presumption of actual collusion), both are charged with the protection of the property intrusted to them against all but the acts of God and the king's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so, in the other case, the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him.' Lord Coke is not

years is tied. But if tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee. As if I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the tending.

Co. Lit. 57 a. "If a house be leased to hold at will, the lessee is not bound, &c." For the Statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive waste, the lessor hath no remedy at all.

"But if tenant at will commit voluntary waste, &c." And true it is, that if tenant at will cutteth down timber trees, or voluntarily pull down and prostrate houses, the lessor shall have an action of trespass against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; and so hath it been adjudged.

Co. Lit. 53 a, 53 b. Waste, *Vastum dicitur a vastando*, of wasting and depopulating: and for that waste is often alleged to be in timber, which we call in Latin *maremium*, or *maresnium*, or *maresnium*, it is good to fetch both of them from the original. First, *timber* is a Saxon word. Secondly, *maremium* is derived of the French word *marreim*, or *marreïn*, which properly signifieth timber.

An action of waste doth lie against tenant by the curtesy, tenant in dower, tenant for life, for years, or half a year, or guardian in chivalry, by him that hath the immediate estate of inheritance, for waste or destruction in houses, gardens, woods, trees, or in lands, meadows, &c., or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz., voluntary or actual, and permissive. Waste may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars

less explicit, for he says: 'Tenant by the curtesy, tenant in dower, tenant for life, years, &c., shall answer for the waste done by a stranger, and shall take their remedy over.' (1 Inst. 54 a; see also 2 Id. 145, 303; 1 Chit. Gen. Pr. 388; 4 Kent's Com. 77; 2 R. S. 334, § 1; 1 Inst. 57 a, note 377; 2 Roll. Abr. 821; 3 Black. Com. 228; Comyn's Land. and Ten. 188.)

"The plaintiffs thus being bound to answer to their landlord for the full value of the building which was destroyed, were entitled to recover a like amount from the defendants," pp. 103, 104.

"As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account." *Per* WAITE, C. J., in *United States v. Bostwick*, 94 U. S. 53, 68. See *White v. M'Conn*, 1 Ir. C. L. 205.

or rafters, planchers, or other timber of the house are rotten. But if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down, it is waste unless he re-edify it again. Also, if glass windows (though glazed by the tenant himself) be broken down, or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

Though there be no timber growing upon the ground, yet the tenant, at his peril, must keep the houses from wasting. If the tenant do or suffer waste to be done in houses, yet if he repair them before any action brought, there lieth no action of waste against him, but he cannot plead *quod non fecit vastum*, but the special matter.

A wall, uncovered when the tenant cometh in, is no waste if it be suffered to decay. If the tenant cut down or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste.

If the tenant build a new house it is waste, and if he suffer it to be wasted, it is a new waste. If the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same again with such materials as remain, and with other timber which he may take growing on the ground for his habitation; but he must not make the house larger than it was. If the house be discovered by tempest, the tenant must, in convenient time, repair it.

If the tenant of a dove-house, warren, park, vivary, estanges, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is waste; and to suffer the pale to decay, whereby the deer are dispersed, is waste.

And it is to be observed that there is waste, destruction, and exile. Waste properly is in houses, gardens (as is aforesaid), in timber trees (viz., oak, ash, and elm, and these be timber trees in all places), either by cutting of them down, or topping of them, or doing any act whereby the timber may decay. Also, in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. If the tenant cut down timber trees, or such as are accounted timber, as is aforesaid, this is waste; and if he suffer the young germins to be destroyed, this is destruction. So it is, if the tenant cut down underwood (as he may by law), yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.¹

Cutting down of willows, beech, birch, aspe, maple, or the like, stand-

¹ See *Phillipps v. Smith*, 14 M. & W. 589.

ing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is destruction; and for all these, and the like destructions, an action of waste lieth. The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non existentes marium, nec portantes fructus, nec folia in æstate*, is no waste; but turning of trees to coals for fuel, when there is sufficient dead wood, is waste.

If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste. Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and were not open when the tenant came in, is waste; but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable. So it is, if the tenant repair not the banks or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable.

If the tenant convert arable land into wood, or *e converso*, or meadow into arable, it is waste, for it changeth not only the course of his husbandry, but the proof of his evidence.¹

The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new: and he may take also sufficient ploughbote, firebote, and other housebote.

The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition; he cannot sell trees, and with the money cover the house.² Burning of the house by negligence or mischance is waste.

Co. Lit. 53 b. No person shall have an action of waste, unless he hath the immediate state of inheritance.

Co. Lit. 54 a. If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee, in this case, where it is said in the Register, and in F. N. B., that an action of waste doth lie, it is to be understood after the death or surrender of B. in the mean remainder, for during his life no action of waste doth lie.

But if a lease for life be made, the remainder for years, the remainder in fee, an action doth lie presently during the term in remainder, for the mean term for years is no impediment.

There is waste of a small value, as Bracton saith, *Nisi vastum ita*

¹ See *Atkins v. Temple*, 1 Ch. Rep. 13; *Fermier v. Maund*, Ib. 116; *Cole v. Greene*, 1 Lev. 309.

² See *Gower v. Eyre*, G. Coop. 156.

modicum sit propter quod non sit inquisitio facienda. Yet trees to the value of three shillings and four pence hath been adjudged waste, and many things together may make waste to a value.

Co. Lit. 54 b. A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine, that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be known of all men.¹

COUNTESS OF SHREWSBURY'S CASE.

KING'S BENCH. 1600.

[Reported 5 Co. 13.]

THE Countess of Shrewsbury brought an action on the case against Richard Crompton, a lawyer of the Temple, and declared, that she leased to him a house at will, & *quod ille tam negligenter & improvide custodivit ignem suum, quod domus illa combusta fuit*: to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brook in the abridgment of the case of 48 E. 3, 25; Wast. 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive against lessee for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If lessee at will commits voluntary waste, *scil.* in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him. For as it is said in 2 and 3 Phil. & Mar. Dyer 122 *b*, when tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry: and there 15 E. 4, 20 *b*, is cited, that if a bailee of goods as of a horse, &c. kill them, the bailor shall have a general action

¹ See Co. Lit. 316 a.

of trespass, for by the killing the privity was determined. But it was agreed that in some cases, when there is a confidence reposed in the party, the action upon the case will lie for negligence, although the defendant comes to the possession by the act of the plaintiff. As 12 E. 4, 13 a, b, where a man delivers a horse to another to keep safe, the defendant *equum illum tam negligenter custodivit, quod ob defectum bonæ custodiæ interiit*; the action on the case lies for this breach of the trust. So 2 H. 7, 11, if my shepherd, whom I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an action upon the case lies: but in the case at bar it was a lease at will made to the defendant, and no confidence reposed in him; wherefore it was awarded, that the plaintiff take nothing by her bill.

BOWLES'S CASE.

KING'S BENCH. 1615.

[Reported 11 Co. 79.]

LEWIS BOWLES, Esq., brought an action upon the case upon trover against Haseldine Bury the younger (which began in the King's Bench, Hil. 10 *Jacobi Regis*, Rot. 1319), and declared that he was possessed of thirty cart loads of timber, and lost them, and that they came into the hands of the defendant, and that he 20 Feb. *anno 9 Jac. Regis*, at Norton, in the county of Hertford, converted them to his own use; and upon not guilty pleaded, the jury gave a special verdict to this effect. Thomas Bowles, Esq., grandfather of the said Lewis, was seised of the manor of Norton-Bury, in the said county in fee, and, 1 Sept. *anno 12* by indenture, betwixt him on the one part, and William Hide and Leonard Hide of the other part, in consideration of a marriage to be had betwixt the said Thomas Bowles and Anne, daughter of the said William Hide, &c. covenanted, that after the said marriage had and solemnized, that the said Thomas, his heirs and assigns, would stand seised of the said manor of Norton-Bury, to the use of the said Thomas and Anne, for the term of their lives, without impeachment of waste, and after their deceases, to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c. and for want of such issue, to the use of the heirs males of the body of the said Thomas and Anne lawfully begotten; and for want of such issue, to the use of Thomas Bowles, son and heir apparent of Thomas Bowles the grandfather, and the heirs males of his body issuing, and for want of such issue, to the use of the heirs of the body of the said Thomas and Anne lawfully issuing. Which marriage was solemnized accordingly, and the said Thomas the grandfather, and Anne, had issue John; and afterwards the said Thomas the grandfather died without any issue on the body of Anne, but the said John; after whose death the said Anne entered into the said manor,

and was thereof seised. with the said remainder over, as aforesaid, and afterwards the said John Bowles died, and afterwards Thomas the son conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diana his wife. and the heirs males of his body; and the said Anne being so seised of the said manor, with the remainder over as aforesaid, viz. 20 Feb. an. Reg. Jac. reg. 9, a barn, parcel of the said manor *per vim ventorum et tempestat' penitus subvers. et ad terram deject' fuit*, and that the said thirty cart loads of timber, in the declaration mentioned, were parcel of the said barn, and that the said timber was sound and fit for building, wherefore the defendant, as servant of the said Anne, and by her command, took the said timber, and carried it out of the limits of the said manor to Radial, in the same county; and afterwards the said Anne, 24 Feb. anno 9 Jac. Reg. made her last will, and thereof made Robert Osborne and Leon. Hide, Knts. her executors, and died, after whose death the plaintiff seized the said timber, and afterward the defendant, by the command of the said executors, converted it to his use; and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the court.

And in this case two questions were moved. 1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c. if the clause of "without impeachment of waste," shall give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole court.

1. That till issue, Thomas the grandfather and Anne, were seised of an estate tail executed *sub modo*, *sc.* until the birth of issue male, and then by the operation of law the estates are divided, *sc.* Thomas and Anne become tenants for their lives, the remainder to the issue male in tail, the reversion to the heirs males of Thomas and Anne, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but (exists) with this implied limitation until they have issue male. *Vide Chudleigh's Case* in the First Part of my Reports, fol. 120, and *Archer's Case*, fol. 66 b.

2. That tenant in tail, after possibility, has a greater pre-eminence and privilege, in respect of the quality of his estate, than tenant for life, but he has not a greater quantity of estate than tenant for life; in respect of the quality of his estate, it tastes much of the quality of an estate in tail, out of which it is derived: and, therefore, 1. She shall not be punished for waste. 2. She shall not be compelled to attorn. 3. She shall not have aid. 4. On her alienation no *Consimili casu* lies. 5. After her death no writ of intrusion lies. 6. She may join the mise in a writ of right in a special manner, *temp.* E. 1; *Wast.* E. 125; 39 E. 3, 16 a, b; 31 E. 3; *Aid.* 35; 43 E. 3, 1 a; 45 E. 3, 22; 46 E. 3, 13 a, 27; 11 H. 4, 15 a; 7 H. 4, 10 b; 2 H. 4, 17 b; 42 E. 3, 22; 3 E. 4, 11 a; 21 H. 6, 56; 10 H. 6, 1 b; 13 E. 2; *Entre Congeable*, 56; 28 E. 3, 96 b; 26 H. 6; *Aid.* 77; F. N. B. 203. 7. In an action brought by her,

she shall not name herself tenant for life. 18 E. 3, 27 a, a woman brought a *Cui in vita, quod clamat tenere ad vitam*, and maintained it in her count by a gift in special tail to her and her husband, and that her husband is dead without issue, and the writ for variance of the title abated. 8. In an action brought against her, she shall not be named tenant for life, *sc. quod tenet ad terminum vitæ*. Mich. 39 & 40 Eliz. Rot. 3316, in *Communi Banco, inter Veal et alios quer' et Read def' in quid juris clamat*, and the note of the fine supposed that the defendant *tenet ad terminum vitæ*, the defendant demanded oyer of the writ, and of the note of the fine, and had it, and pleaded that he was seised in fee, *absque hoc quod*, the day of the note levied *tenuit pro termino vitæ*, and the jury found that he held as tenant in tail after possibility of issue extinct; and it was adjudged *pro defendente*; for tenant in tail, after possibility, shall not be in judgment of law included in a writ or fine, &c. within the general allegation of a tenant for life. *Vide* 19 E. 3, 1 b.

But as to the quantity, he has but an estate for life; and therefore, if he makes a feoffment in fee, it is a forfeiture of his estate, 13 E. 2; *Entre Cong.* 56; 45 Ed. 3, 22; 21 E. 3, 96 b; 27 Ass. 60; F. N. B. 159. So if fee or tail general descends or remains to tenant in tail after possibility, &c. the fee or estate tail is executed, 32 E. 3, Age 55. 50 E. 3, 4; 9 E. 4, 17 b. And by the Stat. of W. 2, he in reversion shall be received upon his default, 2 E. 2. Resceit 147; 41 E. 3, 12; 20 E. 3; Resceit—; 38 Ed. 3, 33. *Vide* 28 E. 3, 96 b; 39 E. 3, 16 a. b. And an exchange betwixt tenant for life and tenant in tail, after possibility, is good; for their estates are equal.

3. It was resolved, that the estate of a tenant in tail, after possibility, ought to be a remnant and residue of an estate tail, and that by the act of God, and not by the limitation of the party *dispositione legis*, and not *ex provisione hominis*: and therefore if a man makes a gift in tail upon condition, that if he does such an act, that he shall have but for life, he is not tenant in tail after possibility of issue extinct, for that is *ex provisione hominis*, and not *ex dispositione legis*: but it ought to be the remnant and residue of an estate tail, and that by the act of God and the law, *sc.* by the death of one donee without issue. Lit. 6 b; Doct. and Stud. lib. 2, cap. 1, fol. 61; 2 H. 4, 17 b; 26 H. 6; Aid. 77.

If tenants in special tail recover in assise, and afterwards one dies without issue, and afterwards he who survives (who is tenant in tail after possibility) is re-disseised, he shall have a re-disseisin, for it is the same freehold he had before, for it is parcel of the estate tail: and because the wife in the case at bar had the estate for life by limitation of the party, and the estate which she had in the remainder, *sc.* of the tenancy in tail after possibility, was not a larger estate in quantity, and therefore could not merge the estate for life, as has been said before, for this cause the wife was not tenant in tail after possibility.

4. It was resolved, that in this case the wife should have the privilege of a tenant in tail after possibility for the inheritance which was once in her; for now when John the issue male is dead, the privilege

which she had in respect of the inheritance which was in her in remainder shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder as well as of a possession; and therefore if a lease for life is made, the remainder to husband and wife in special tail, the husband dies without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrenders to her, as he may (for the life of him in the remainder is higher than the other life) now is she tenant in tail after possibility of possession: and like this case if the father is enfeoffed to him and his heirs with warranty, and the father enfeoffs the son, &c. and dies; in this case the son, although he has the land by purchase, yet he shall take the benefit of the warranty as heir, for he cannot vouch as assignee, and the warranty betwixt the father and him is lost, as it is adjudged in 43 E. 3, 23 b. So here, although the wife cannot claim the estate of tenant in tail after possibility, yet she may claim the privilege and benefit of it. And it was observed, that tenants in special tail at the common law had a limited fee simple; and when their estate was changed by the Statute *De Donis conditional*, yet there was not any change of their interest in doing of waste: so when by the death of one donee without issue the estate is changed, yet the power to commit waste, and to convert it to his own use, is not altered nor changed for the inheritance which was once in him, *vide* Hil. 2 Jac. Rot. 229, *inter Brooke and Rogers, in Communi Banco*, if a timber tree becomes *arida, sicca, non portans fructus nec folia in æstate, nec existens mæremium*, yet because it was once an inheritance, &c. no tithes shall be paid for it, for that the quality remains, although the state of the tree is altered.

5. That if tenant for life or for years fells timber, or pulls down the houses, the lessor shall have the timber; and because this point was resolved in this court upon a solemn argument in *Liford's Case* at Mich. term, which *vide* before in this book, I will make the shorter report. 1. It is apparent in reason, that the lessee had them but as things annexed to the soil; and therefore it would be absurd in reason, that when by his act and wrong he severs them from the land, that he should gain a greater property in them than he had by the demise. 2. It is without question (as it is resolved in the said case) that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and therefore be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance; and as to *that*, the resolutions in *Herlaken-den's Case*, in the Fourth Part of my Reports, fol. 63 a, were affirmed for good law, and *Page's Case* in the Fifth Part of my Reports, fol. 76 b, for although he cannot punish them in an action of waste at the common law because it was his own act, and in his lease he has not made provision by covenant or condition; yet the inheritance and general ownership remains in the lessor, and the lessee (as hath been said) has but a

special interest in the houses and timber-trees so long as they are annexed to the land, and this appears by the Statute of Marlebridge, c. 23. *Item firmarii vastum, &c. non facient, nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens quod hoc facere possint.* whereby it appears, that the lessees for life or years, which then were, could not rightfully fell the trees, or pull down the houses, unless the lessor had granted by deed to do it. In which it was also observed, that at the time of the making of the same Act, the said clause of "without impeachment of waste" was in use, which proves that it was to such purpose that the lessee might commit waste, and dispose it to his own use, which he could not do without such clause.

3. Every lessee for life and years ought by the law to do fealty upon his oath, and it would be against his oath to waste the houses and timber-trees. And, *nota*, reader, upon this Statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them that they shall not do waste before any waste was done, as it was against tenant in dower, and tenant by the curtesy at the common law. *Vide* Bract. 316, the judgment in waste at the common law. Tenant in dower or by the curtesy have as high an estate as lessee for life; and it appears that it was not lawful for tenant by the curtesy or in dower to do waste, *ergo* no more for tenant for life: the only difference was, that a prohibition of waste lay against tenant in dower, and by the curtesy, at the common law, and not against the lessees till the said Statute of Marl. And to prove what interest the lessee for life has in the trees at the common law, it appears by Bracton (who wrote before the Statute of Glou'), lib. 4, tract' *De Assisa novæ dis. c. 4, f. 217.* *Si quis vastum fecerit, vel destructionem in tenemento quod tenet ad vitam suam, in eo quod modum excedit, et rationem, cum tantum conceditur ei rationabile estoverium, facit transgressionem, et si talis impediatur, ille tenens assisam non habebit, intentio talis liberabit a disseisina, quia in eo quod tenens abutitur male utendo, et debitum usum et modum debitum excedendo, non potest dicere quod dissesisitus est, quia tantum rationabilis usus ei conceditur;* which proves directly, that it was a wrong in the lessee for life to do waste, or destruction at the common law. And it was resolved, if an house falls down *per vim venti* in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the curtesy, &c. that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation: as if they fell a tree for reparation, they have a special property to that purpose in it, and therewith agree 44 E. 3, 5 b; 44 E. 3, 44 b; 29 E. 3, 3; and 10 E. 4, 3 a. But the said particular tenants cannot give or sell the tree so felled, for the general property is in the lessor; and therefore, Lit. f. 15, holds, that if I bail goods to another to manure his land, now he has a special property in them to that purpose: and in that case, if he kills them, a general action of trespass lies against him. See 11 H. 4, 17 a, & 23 b.

6. The pre-eminence and privilege which the law gives to houses which are for men's habitation was observed. First, an house ought to have the priority and precedency in a *Præcipe quod reddat* before land, meadow, pasture, wood, &c. F. N. B. 2, &c.; for his house is his castle, *et domus sua est unicuique tutissimum refugium*. 2. The house of a man has privilege to protect him against arrest by virtue of process of law at the suit of a subject, *vide Semaine's Case*, in the Fifth Part of my Reports, fol. 91 b. 3. It has privilege against the king's prerogative, for it was resolved by all the judges, Mich. 4 Jac. that those who dig for saltpetre, shall not dig in the mansion-house of any subject without his assent; for then he, or his wife or children, cannot be in safety in the night, nor his goods in his house preserved from thieves and other misdoers. 4. He who kills a man *se defendendo*, or a thief who would rob him in the highway, by the common law shall forfeit his goods: but he who kills one that would rob and spoil him in his house, shall forfeit nothing. 3 E. 3; Corone 330 & 26 Ass. 23, &c. 5. If there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood, or corn: but if there be two joint-tenants of an house, the one shall have a writ *De reparatione facienda* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur*, F. N. B. 127 a, b. If a man is in his house, and hears that others will come to his house to beat him, he may call together his friends, &c. into his house to aid him in safety of his person; for, as it has been said, a man's house is his castle and his defence, and where he properly ought to remain: but if a man be threatened if he comes to such a fair or market that he shall be beaten, in that case he cannot make such assembly, but he ought to have remedy by surety of the peace. 21 H. 7, 39 a.

7. The clause of "without impeachment of waste" gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate; and therefore to examine it in reason. 1. These words *absque impetitione vasti*, are as much as to say, without any demand for waste; for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a demand, and *sine impetitione* is without any manner of demand or impeachment: then this word *demand* is of a large extent; for if a man disseises me of my land, or takes my goods, if I release to him all actions, yet I may enter into the land, or take my goods, as Lit. holds, f. 115, and therewith agree 19 Ass. 3; 19 H. 6, 4 b; 21 H. 7, 23 b; 30 E. 3, 19, for by the release of the action, the right or interest is not released, but if in such case I release all demands, that will bar me, not only of my action, but also of my entry and seizure, and of the right of my land, and of the property of my goods; as it was resolved in *Chauncy's Case*, 34 H. 8; Br. Release 90; 2 H. 7, 6 b, the king made one sheriff *sine computo*, thereby he shall have the revennes which belong to his office to collect to his own use. But if the words had been *absque impetit' vasti per*

aliquod breve de vasto, then the action only would be discharged, and not the property in the trees, but that the lessor after the fall of them might seize them: and this difference appears in 3 Edw. 3, 44 a, b, in *Walter Idle's Case*, where a lease was made without being impeached, or impleaded for waste, upon which it was collected that these words "without being impleaded," without these words "without being impeached for waste," were not sufficient to bar the lessor of his property, and that if the lessor had granted that the lessee might do waste, he thereby had power not only to do waste, but also to convert it to his own use; and that the words of the said Act of Marlebridge, and the Statute *De Prærogativa Regis*, c. 16, do prove where it is said, that the king shall have *annum, diem, et vastum, sc.* which is as much as to say, that he shall have the trees, &c. at his own disposition.

2. It was said, that the continual and constant opinion of all ages was, that those words gave power to the lessee to do waste to his own house, and it would be dangerous now to recede from it, and as it is said in 38 Edw. 3, 1 a, by the judges (so we say in this case) we will not change the law which has been always used; and it is well said in 2 Hen. 4, 18 b: It is better that there should be a defect, than that the law should be changed; and the opinion of Wray, C. J., and Manwood, cited in *Herlakenden's Case*, was not judicial but *prima facie* upon an arbitrament without any argument, and perhaps upon the sight of 27 Hen. 6, Waste 8; and therefore, although the Chief Justice argued in this case, against their opinions, yet it was with great reverence to them, saying with Aristotle in the like case, *amicus Plato, amicus Socrates, sed magis amica veritas*; and *qui non libere veritatem pronunciat, proditor veritatis est*.

And the truth of this case appears by Littleton in his Chapter of Conditions, fol. 82, where he puts this case, If a feoffment be made upon such condition, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor; in that case if the husband dies, living the wife, before any estate in tail made to them, then ought the feoffee by the law to make an estate to the wife as near the condition and as near the intent of the condition as he can make it, *sc.* to lease the land to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband of her begotten, the remainder to the right heirs of the husband; and the reason why the lease shall be made in this case to the wife without impeachment of waste is, that the estate shall be to the husband and his wife in tail, and if such estate had been made in the life of the husband, then after the death of the husband she had had an estate in tail, which estate is without impeachment of waste, and so it is reasonable that a man should make an estate as near the intent of the condition as he can, which case directly proves, that tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure as tenant in tail had. That these words without

“impeachment of waste,” are sufficient words to give tenant for life such power, *vide* 2 H. 4, 5 b, and the *Lord Cromwell's Case* in the Second Part of my Reports, fol. 81 a, b, 82 a; and for this clause of without impeachment of waste, 3 Ed. 3, 44; 8 Ed. 3, 4 a, b, 35 a; 24 Ed. 3, 32; 43 Edw. 3, 5 a; 5 Hen. 5, 8; 27 Hen. 6; Waste, 8; 4 E. 4, 36 a; 20 Hen. 7, 10; 28 H. 8; Dyer, 10; and so the *Quære* in the said book of 27 H. 6, well resolved.

And see the opinion of Statham in abridging the said book against it.

But the said privilege of without impeachment of waste, is annexed to the privity of estate, 3 Edw. 3, 44, by Shard and Stone; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage, 5 Hen. 5, 9 a. If a man makes a lease for years without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged for waste, 28 Hen. 8; Dyer, 10 b. If a lease is made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, now he is punishable for waste, for the first estate is gone and drowned; so of a confirmation. It was adjudged in *Erven's Case*, Mich. 28 and 29 Eliz. that where tenant in tail after possibility of issue extinct granted over his estate, that the grantee was compelled in a *Quid juris clamat* to attorn, for by the assignment such privilege is lost; and that judgment was affirmed in the King's Bench, in a writ of error, and therewith agrees 27 H. 6; Aid. in Statham; *vide* 29 E. 3, 1 b.

The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste: for it appears in the Register 72 that such assignee in an action of waste against tenant in dower shall recite the Statute of Gloucester; *ergo*, he shall not have a prohibition of waste at common law, for then he should not recite the Statute. *Vide* F. N. B. 55 c; 14 H. 4, 3; 5 H. 5 (7) 17 b.

Lastly, it was resolved, that the said woman by force of the said clause of without impeachment of waste, had such power and privilege, that though in the case at bar no waste be done, because the house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life by force of the said clause of “without impeachment of waste.” And for this cause judgment was given *per omnes Justiciarios una voce, quod querens nihil caperet per billam*.

ASTRY *v.* BALLARD.

KING'S BENCH. 1677.

[*Reported 2 Mod. 193.*]

TROVER and conversion for the taking of coals. — Upon not guilty pleaded, the jury found a special verdict, That one J. R. was seised in fee of the manor of Westerly, and being so seised did demise all the messuages, lands, tenements, and hereditaments, that he had in the said manor, for a term of years to N. R. in which demise there was a recital of a grant of the said manor, messuages, lands, tenements, commons, and *mines*, but in the lease itself to R. the word “*mines*” was left out. Afterwards the reversion was sold to the plaintiff Astry and his heirs by deed enrolled; and at the time of this demise there were certain *mines* of coals open, and others which were not then open; and the coals for which this action of trover was brought, were digged by the lessee in those *mines* which were not open at the time of the lease: and, Whether he had power so to do? was the question.

It was said, That when a man is seised of lands wherein there are *mines* open, and others not open, and a lease is made of these lands in which the mines are mentioned, it is no new doctrine to say, that the close mines shall not pass. Men's grants must be taken according to usual and common intendment, and when words may be satisfied, they shall not be strained farther than they are generally used; for no violent construction shall be made to prejudice a man's inheritanee, contrary to the plain meaning of the words. *A mine* is not properly so called until it is opened, it is but *a vein* of coals before; and this was the opinion of Lord Coke in point, in his First Inst. 54 b, where he tells us, that if a man demise lands and mines, some being opened and others not, the lessee may use the mines opened, but hath no power to dig the unopened mines.

And of this opinion was the whole court; and TWISDEN, Justice, said, That he knew no reason why Lord Coke's single opinion should not be as good an authority as Fitzherbert in his *Natura Brevium*, or the Doctor and Student.

VANE *v.* LORD BARNARD.

CHANCERY. BEFORE LORD COWPER, C. 1717.

[*Reported 2 Vern. 738.*]

THE defendant on the marriage of the plaintiff his eldest son with the daughter of Morgan Randyll, and £10,000 portion, settled (*inter alia*) Raby Castle on himself for life, without impeachment of waste,

remainder to his son for life, and to his first and other sons in tail male.

The defendant the Lord Barnard having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, &c. to the value of £3,000.

The court upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August 1714, and for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master to see it done at the expense and charge of the defendant the Lord Barnard; and decreed the plaintiff his costs.

WHITFIELD v. BEWIT.

CHANCERY. BEFORE LORD MACCLESFIELD, C. 1724.

[Reported 2 P. Wms. 240.]

ONE seised in fee of lands in which there were mines, all of them unopened, by deed conveyed those lands and all mines, waters, trees, &c. to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A. for life, remainder to his first, &c. son in tail male successively, remainder to B. for life, remainder to his first, &c. son in tail male successively, remainder to his two sisters C. and D. and the heirs of their bodies, remainder to the grantor in fee.

A. and B. had no sons, and C. one of the sisters died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A. having cut down timber sold it and threatened to open the mines; the heir of the grantor being seised of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A.'s opening of any mine.

1st Obj. As to the plaintiff's claim of the moiety of the moneys arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity, that the moneys produced by the timber should be brought into court and put out for the benefit of the sons as yet unborn and which may be born. That these contingent remainders being *in gremio legis* and under the protection of the law, it would be most reasonable that the moneys should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the

same if there were a son *in ventre sa mere*; or the plaintiff might bring trover, and then what reason had he to come into equity?

CUR.: The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them.

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill in this court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by the tenant for life. This was the very case of the *Duke of Newcastle* versus *Mr. Vane*, where at Welbeck (the duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shows *quo animo* it was done, not to repair but to sell.

2dly, it was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like *Saunders's Case* in 5 Co. 12, where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But LORD CHANCELLOR *contra*. A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water, was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor King on a rehearing.

BEWICK v. WHITFIELD.

CHANCERY. BEFORE LORD TALBOT, C. 1734.

[Reported 3 P. Wms. 267.]

A. WAS tenant for life, remainder to B. in tail, as to one moiety, remainder as to the other moiety to C. an infant in tail, remainder over. There was timber upon the premises greatly decaying; whereupon B. the remainder-man, brought a bill, praying, that the timber that was decaying might be cut down, and that the plaintiff the remainder-man in

tail, together with the other remainder-man, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

LORD CHANCELLOR. The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.¹

2dly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

3dly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down. B. that is the tenant in tail (and of age), of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid, the other moiety belonging to the infant, must be put out, for the benefit of the infant, on government or real securities, to be approved of by the Master.

¹ BATEMAN v. HOTCHKIN.

CHANCERY. BEFORE LORD ROMILLY, M. R. 1862.

[Reported 31 *Beav.* 486.]

A QUESTION arose as to the right of a tenant for life impeachable for waste to a fund derived partly from wood blown down by a storm.

The question was brought before the Master of the Rolls in Chambers, who gave the following opinion in writing:—

“That in the case of waste committed by a tenant for life by cutting timber, the produce of the sale of it is part of the inheritance, and as the tenant for life can gain no advantage by his own wrongful act, the produce is invested and accumulated for the benefit of the first estate of inheritance.

“In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale of it belongs to the inheritance, that is, the money must be invested in Consols, and the interest paid to the tenant for life.”

Mr. Speed, for the plaintiff.

Mr. C. Hall, for the tenant for life.

THE MASTER OF THE ROLLS. I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description.

See *Stonebraker v. Zollickoffer*, 52 Md. 154.

CLAVERING v. CLAVERING.

CHANCERY. BEFORE LORD KING, C. 1726.

[Reported 2 P. Wms. 388.]

THE defendant was tenant for life of lands in Durham, but not without impeachment of waste; the plaintiff was the remainder-man in tail, and in these lands there were several mines of coals, which were open before the defendant the tenant for life came to the estate, and the tenant for life opened the earth in several places, but (as it was said) with design only to pursue the old vein of coals. And the plaintiff moved for an injunction to stay the defendant from opening the earth in any new place.

LORD CHANCELLOR. This was determined in the great cause of *Hellier v. Twiford*, in which I was of counsel, the matter was tried at the assizes in Devonshire before Mr. Justice Powel, and held great part of the day; there it was proved by witnesses to be the course of the country, and a practice well known in those parts among the miners, that any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein; and that otherwise the working in the same mines would be impracticable, because the miners would be choked for want of air, if new holes should not be continually opened to let the air into them; and the same vein of coal frequently runs a great way, and (as Lord Chancellor expressed it) the same mine of coals was very knowable and easy to be discerned; besides, that to stop the working might be the ruin of the colliery for ever; and in the present case it appeared that there was a fire-engine kept by the tenant for life of these mines, which carried off the water, without which the mines would be lost, and the working of this fire-engine cost £40 or £50 a week.

Then it was objected by the *Attorney-General*, that these mines were not opened when the settlement was made; having been opened by the person who by that settlement claimed an estate-tail, and was since dead without issue. whereas the settlement gave only the benefit of the mines then opened to the tenant for life.

SED PER CUR. It seems as if the tenant for life may work all mines which were lawfully opened by the precedent tenant in tail, though subsequent to the settlement.

So deny the injunction.

LORD CASTLEMAIN v. LORD CRAVEN.

CHANCERY. BEFORE VERNEY, M. R. 1733.

[Reported 22 Vin. Ab. 523, pl. 11.]

A. TENANT for life, remainder to trustees to preserve, &c. remainder to C. the plaintiff in tail, remainder over, with power for A. with consent of trustees to fell timber, and the money arising to be invested in lands, &c. to same uses, &c. A. felled timber to the value of £3,000 without consent of trustees, who never intermeddled, and A. had suffered some of the houses to go out of repair. C. by bill prayed an account and injunction. The MASTER OF THE ROLLS said, that the timber may be considered under 2 denominations, (to wit) such as was thriving, and not fit to be felled; and such as was unthriving, and what a prudent man and a good husband would fell, &c. And ordered the Master to take an account, &c. and the value of the former which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, &c. But as to repairs, the court never interposes in case of permissive waste either to prohibit or give satisfaction, as it does in case of wilful waste; and where the court having jurisdiction of the principal, viz. the prohibiting, it does in consequence give relief for waste done, either by way of account as for timber felled, or by obliging the party to rebuild, &c. as in case of houses, &c. and mentioned *Lord Barnard's Case*, as to Raby Castle, 2 Vern. But as to the repairs it was objected, that the plaintiff here had no remedy at law, by reason of the estate for life to the trustees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, &c. and that this was a point of consequence. *Sed non allocatur*. MS. Rep. Mich. Vac. 1733.¹

ROLT v. LORD SOMERVILLE.

CHANCERY. 1737.

[Reported 2 Eq. Cas. Ab. 759.]

THE case in effect was thus: A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant the Lord Somerville) for life, without impeachment of waste, remainder, to the plaintiff Rolt for life, without impeachment of waste, with several

¹ See *Powys v. Blagrave*, 4 De G. M. & G. 448.

remainders over. The defendant, the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and also took up lead water pipes that were laid for the conveyance of water to the capital messuage, and disposed thereof, and he also cut down several groves of trees that were planted for the shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life, without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either in law or equity, and if he was, yet the plaintiff could not call him to an account, because he was not a remainder man of the inheritance.

LORD CHANCELLOR HARDWICKE. Though an action of waste will not lie at law for what is done to houses, or plantations for ornament or convenience, by tenant for life, without impeachment of waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In *Lord Barnard's Case* the court restrained him from going on, and ordered the estate to be put in the same condition. In *Sir Blundel Charleton's Case* the Master of the Rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament or shelter of the estate, this court would have interposed; but here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance, yet as to the pulling down the houses and buildings, and laying the lead pipes, they may be restored, or put in as good condition again. In the *Case of my Lord Barnard* there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his life-time.

The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.¹

¹ I have been informed that this cause of *Rolt* and *Lord Somerville* was afterwards referred to two friends, and amicably settled. — REP.

PERROT v. PERROT.

CHANCERY. BEFORE LORD HARDWICKE, C. 1744.

[Reported 3 *Atk.* 94.]

THERE was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life,¹ with remainder to his first and every son in tail, reversion in fee to the defendant.

The first tenant for life² cuts down timber, the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

Mr. Attorney-General, for the plaintiff, showed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by *Mr. Solicitor-General*, for the defendant, that the timber which he has cut down are decayed trees, and will be the worse for standing, and that it is of service to the public that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years than it improves in goodness the twenty years immediately preceding.

That as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, that this court will not interpose, especially as the plaintiff is not entitled to come into this court, as he has not the immediate remainder, and besides has no remedy at law.

LORD CHANCELLOR. The question here does not concern the interest of the public, unless it had been in the case of the king's forests and chases; for this is merely a private interest between the parties; and it is by accident that no action at law can be maintained against the defendant, because no person can bring it but who has the immediate remainder.

Consider, too, in how many cases this court has interposed to prevent waste.

Suppose here the trustees to preserve contingent remainders had brought a bill against the defendant to stay waste for the benefit of the contingent remainders.

I am of opinion they might have supported it, but here it is the second tenant for life who has done it, and though he has no right to the timber, yet if the defendant, the first tenant for life, should die without sons, the plaintiff will have an interest in the mast and shade of the timber.

¹ Remainder to trustees to preserve contingent remainders. — REP.

² Before he had any son born. — REP.

The case of Welbeck Park, which has been mentioned, was a very particular one, because there, by the accident of a tempest, the timber was thrown down, and was merely the act of God.

Bnt this is not the present case, for here *a bare tenant for life* takes upon him to cut down timber, and it is not pretended that they are pollards only; and though the defendant's counsel have attempted to make a distinction between cutting down young timber trees that are not come to their full growth, and decayed timber, I know of no such distinction, either in law or equity.

Therefore, upon the authority of those cases, which have been very numerous in this court, of interposing to stay waste in the tenant for life, where no action can be maintained against him at law, as the plaintiff has not the immediate remainder, the injunction must be continued till the hearing.

OBRIEN *v.* OBRIEN.

CHANCERY. BEFORE LORD HARDWICKE, C. 1751. •

[*Reported Ambl.* 107.]

By indenture, dated 12th March, 1730, between the defendant, Henry O'Brien, and Margery, his wife, of the first part; Henry Stainer and Edward Hogan, of the second part; Richard Connell and Pool Hickman, Esqrs., of the third part; Francis Burton and Robert Hickman, Esqrs., of the fourth part; and William Stainer, of the fifth part; in consideration of a marriage thentofore had between the defendant, Henry O'Brien, and Margery, his wife; and in performance of certain articles, dated the 30th of October, 1730, the manors, &c., of Blatherwicke, in the county of Northampton, and Tixover, in the county of Rutland, were, amongst other estates, conveyed to trustees, to the use of the said defendant, Henry O'Brien, for life, *without impeachment of waste*; remainder to the first and other sons of the marriage between him and the said Margery in tail; remainder to the first and other sons of the said Henry, or any after-taken wife in tail male; remainder to the plaintiff, Donatus O'Brien, the father, for life, without impeachment of waste; remainder to his first and other sons in tail male, with other remainders over: Henry O'Brien, the first tenant for life, having conveyed his life estate to the defendant, Sir Edward O'Brien, and he threatening to cut down all the trees and timber growing on the estates in England, the plaintiff filed their bill against the defendants, praying an injunction to stay the defendants from committing any waste on the estate, stating the above settlement; that Henry had no issue by the said Margery, and that they had been long separated; that great part of the timber trees growing on the said estates were standing and growing in a walled-in park called Blatherwicke Park, and stood near

the capital seat of the family, and other houses upon the said estate, and either served for the shelter thereof, or were set in rows, walks, vistles, avenues, or clumps, and were great ornaments thereto; great part whereof were of a late growth, being planted about twenty-five years before, and many thousands of them were young saplings, greatly beneficial to the estate, but of very small value if cut down, not being worth above 2s. 6d. apiece, one with another.

Upon an affidavit of the above facts, *Mr. Solicitor-General, Mr. Wilbraham*, and *Mr. Waller*, this day moved that an injunction might be awarded to stay the defendants from committing any waste or spoil on the premises.

HIS LORDSHIP ordered that an injunction should be awarded to stay the defendants, &c., from cutting down any timber trees, or other trees growing on the said estate which were planted or growing there for ornament or shelter of the mansion-house, or that grew in vistles, planted walks, or lines for the ornament of the park, part of the premises in question; and also from cutting down any saplings growing on any other part of the estate in question, not proper to be felled, until answer, and other order to the contrary.

HARROW SCHOOL v. ALDERTON.

COMMON PLEAS. 1800.

[Reported 2 B. & F. 86.]

THIS was an action of waste on the Statute of Gloucester, for ploughing up three closes of meadow-land, and converting the same into garden-ground, and building thereupon, to the damage of the plaintiffs of £500. Plea, Not guilty.

The cause was tried before *Heath, J.*, at the Westminster sittings after last Trinity Term, when the jury found a verdict for the plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, *Cockell, Serjt.*, obtained a rule, calling on the plaintiff to show cause why the judgment should not be entered up for the defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application Bro. Abr. tit. Waste, pl. 123; Co. Lit. 54 a; 2 Inst. 306; Cro. Car. 414, 452; Finch's Law, lib. 1, cap. 3, § 34, adopted 3 Black. Com. 228; Vin. Abr. tit. Waste N; and Buller's N. P. 120.

Shepherd, Serjt., now showed cause.

LORD ELDON, CH. J. I confess, that when this application was first made, I was not aware, that under the circumstances of the case the defendant was entitled to demand judgment; but my Brother Heath has satisfied me that the application is supported by the current of

authorities. I do not indeed see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my Brother Shepherd. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the plaintiff has sustained; and in this case the jury have estimated the damage which these plaintiffs have sustained, by the alteration of their property, at three farthings only. The courts of common law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

HEATH, J. This doctrine prevailed as early as the time of Bracton, who wrote before the Statute of Gloucester. With respect to the distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furze-brake, in which game have bred, into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE, J. I am of the same opinion.

*Rule absolute.*¹

¹ "We are therefore of opinion that the pulling down a barn, taken absolutely, is such waste as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to waste, that is, the smallness of the value, and there are a great number of old authorities to say, that if the value be very small, the consequences of waste do not attach.

"They will be found collected in 2 Roll's Abr. 824; Comyn's Dig. Tit. Copyhold, M. 3, and Waste, E. 1; Viner's Abr. Tit. Copyhold, K. c., and Waste N; 2 Saunders, 259, *Green v. Cole*, notes. See also *The Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86. Some of these authorities are not directly in point, for they are decided upon the Statute of Gloucester, and in actions of waste, and between landlord and tenant. And it is laid down by Lord Chancellor Loughborough, in *Dench v. Bampton*, 4 Ves. Jun. 706 (see *Richards v. Noble*, 3 Mer. 673), that an action of waste will not lie between a lord of a manor and a copyholder. But they are illustrations of the principle, that where there are no damages there can be no waste; and to this effect is the case of *Barret v. Barret*, Hetley, 35, where C. J. Richardson said, 'The law will not allow that to be waste which is not any ways prejudicial to the inheritance.'

"Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by C. J. Richardson in *Barret v. Barret*, cited at the bar from Hetley's Reports. This case is entirely clear of the two former grounds; and as the jury have found that the defendant did no damage to the estate, it follows that there was no waste, and no forfeiture. The rule must, therefore, be made absolute." *Per* DENMAN, C. J., in *Doe d. Grubb v. Burlington*, 5 B. & Ad. 507, 516, 517 (1833).

See *Barry v. Barry*, 1 Jac. & W. 651; *Jones v. Chappell*, L. R. 20 Eq. 539.

FERGUSON v. ———

NISI PRIUS. 1797.

[*Reported 2 Esp. 590.*]

THIS was an action to recover damages for suffering an house of plaintiff's to be out of repair.

The case on the part of the plaintiff was, that the defendant had rented an house of him, as tenant at will, at a rent of £31 per annum, which he had quitted; after the defendant had given up the possession, the house was found to be very much out of repair, and the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair, which sum he sought to recover in the present action.

LORD KENYON said: It was not to be permitted to plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting on a new roof on an old worn-out house; this I think the tenant is not bound to do, and that the plaintiff has no title to recover it.

HERNE v. BEMBOW.

COMMON PLEAS. 1813.

[*Reported 4 Taunt. 764.*]

THE plaintiff declared in case in the nature of waste, and alleged certain buildings in the defendant's occupation to be ruinous, prostrate, and in decay for want of needful and necessary reparations. There was also a count for obstructing a way. The defendant suffered judgment by default. The premises were demised by the plaintiff to the defendant by lease, which contained no covenant to repair. Upon the execution of a writ of inquiry, the under-sheriff directed the jury to inquire what sum it would take to put the premises into tenantable repair. The jury however rejected that rule, and gave very small damages.

Shepherd, Serjt., now moved to set aside the inquisition, and that the case might be submitted to another jury, contending that the damages ought to have been the sum sufficient to enable the defendant to keep up the premises in as good repair as they were in when the defendant took them.

PER CURIAM. Whatever duties the law casts on the tenant, the law

will raise an *assumpsit* from him to perform (if there be no covenant in his lease for the performance), but that is a very different case from a declaration framed in tort like this. If this action could be maintained, a lessor might declare in case for not occupying in an husband-like manner, which cannot be. The facts alleged are permissive waste: an action on the case does not lie against a tenant for permissive waste. *Countess of Shrewsbury's Case*, 5 Co. 13. If therefore we were to grant this motion, the defendant would meet the plaintiff in a manner he would not like. *Rule refused.*

LUSHINGTON *v.* BOLDERO.

CHANCERY. BEFORE SIR JOHN ROMILLY, M. R. 1851.

[*Reported 15 Beav. 1.*]

IN 1785 the testator devised Aspenden Hall and other estates to Charles Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with similar limitations to William Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with remainder to Henry Lushington for life, without impeachment of waste, with remainder to his first and other sons in tail, with divers remainders over.

In 1812, Charles Boldero and Henry Lushington, and their partners, became bankrupt, and the assignees under their joint commission having proceeded to commit equitable waste by felling ornamental timber, this bill was, in 1813, filed by the eldest son of Henry Lushington, who was then and was now the first tenant in tail *in esse*. The plaintiff established his claim (see *Lushington v. Boldero*, 6 Mad. 149; and G. Cooper, 216), and the assignees were ordered to pay into court £6379 4s., the value of the timber and interest, to an account, intituled, "The Account of Timber felled by the Defendants, the Assignees of the Estate of Messrs. Boldero, Lushington, & Co., Bankrupts." This was done; and it was directed to accumulate, and be subject to the further order of the court. By accumulation, the fund in court now exceeded £26,000.

William Boldero died "several years since," without having been married. In 1850, Charles Boldero being still living, and ninety-five years of age, but having no issue, the plaintiff, the first tenant in tail *in esse*, presented his petition for payment to him of the fund in court. The case came before Lord Langdale on the 4th of November, 1850, when his Lordship thought, that the case could not be decided until it had been ascertained that Charles Boldero, who was living, should have no issue, and his Lordship therefore ordered the petition to stand over until after the death of Charles Boldero.

Charles Boldero died in August, 1851, and the application for payment was now again renewed.

Mr. Lloyd and Mr. Tripp, in support of the petition.

Mr. R. Palmer and Mr. Goldsmid, contra.

THE MASTER OF THE ROLLS. I shall first consider what would have been the effect if Charles Boldero had himself done this act. He was tenant for life without impeachment of waste, and having cut ornamental timber, the court compelled him to pay into court the amount for which the timber was sold; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine applicable to this and other similar cases is this: that no person shall obtain any advantage by his own wrong. But it is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund; his income for life would be thereby increased beyond what it would have been if the timber had not been cut.

It has been observed, that in all the reported cases the rule has been applied to the *corpus* of the fund; but that, I think, ought not to vary my judgment, because it depends upon this equitable and just principle, that no man shall obtain a benefit by his own wrongful act; the authorities, therefore, which lay down the principle in cases of *corpus* only, are equally applicable to any species of interest to be derived by a wrongful act.

It is then said, that this is a case in which the court does not impose a forfeiture, but only requires restitution; and that to deprive the tenant for life of the income, it would be to inflict a penalty upon him, inasmuch as he would have had the enjoyment and advantage of the shade and mast of the timber if it had not been cut. But this he deprives himself of by his own wrongful act, and for this reason the court refuses to give him any substitution or remuneration. It is also material to bear in mind, that if the timber had not been cut, it would have increased in value for the benefit of the reversioner, but that has been rendered impossible by the tenant for life having improperly cut it. If, therefore, it is impossible for the court to ascertain what portion of the interest ought to be attributed to the estate of the reversioner, and what portion to the enjoyment of the tenant for life, it is the tenant for life who has himself put the court into that situation, and made it incapable of arriving at a just conclusion. It is not a case in which the court can act on the principle of restitution. The case put, by way of analogy, of a tenant for life selling out the fund, and being compelled to restore it, is inapplicable, because the tenant for life cannot in this case restore the subject-matter.

There may be a great number of cases in which the timber would become of great value when the reversion fell in; and it is impossible for the court to ascertain what portion of it would have been enjoyed by the reversioner if the wrongful act had not been committed. Undoubtedly the tenant for life does in some cases directly gain an advantage, but it is not by reason of his own act. Thus, where by the act of God

a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying, and it cannot benefit the reversioner to allow it to remain standing, the court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the court will not allow him to gain any benefit from it; but the reversioner takes the benefit arising from an accretion of the fund, in lieu of the accretion of the timber.

Can I look at this case in any different point of view, because the assignees, and not the tenants for life, have done the wrongful act? The assignees stand for these purposes exactly in the same situation as the tenants for life; they are bound by the same equities, and are exactly in the same position, and the same observations apply to both. Nor am I able to separate, or to distinguish the case of Sir Henry Lushington from that of Charles Boldero; because, if the two tenants for life had concurred together, and had agreed between themselves that the one in possession should cut the timber, and that they should divide the produce in certain proportions, the court would have prevented either of them from gaining any benefit from the wrongful act which they concurred in performing. Here, they are the assignees of both; and I am unable to find any principle which says, that the assignees must not stand exactly in the same situation as the tenants for life would stand, and be bound by exactly the same equities. If Charles Boldero had died immediately afterwards, and Sir Henry Lushington had survived for a very long period, and the income of the proceeds of the timber had been applied during that period in payment of the joint creditors, they would have obtained a great benefit from the wrongful act of the assignees. I must hold them in exactly the same position as if the wrongful act had been committed by Sir Henry Lushington alone. I cannot separate the characters of the assignees; they are assignees for the joint creditors and of the joint estate; and I consider that I must treat the case exactly in the same way as if the two tenants for life, one only being in possession, had concurred in the wrongful act of cutting the timber.

It was suggested, that I should suppose the possible case of the commission having been superseded; and I was asked, whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, ought to be prejudiced by the wrongful act committed by his assignees. It would be hard if it were to be so; but I do not consider that question at present, because it does not arise before me. But, if the question did arise, it is manifest that the remark would apply just as much to the case of Mr. Charles Boldero's estate as to that of Sir Henry Lushington; nor can I find anything whatever in the fiduciary character of

the assignees, who, in matters of this description, stand in exactly the same position as the tenants for life, to prevent their being held liable precisely in the same manner as the tenants for life themselves. They have themselves done this wrongful act; and neither they nor the persons for whom they are trustees can gain any advantage by reason of it.

I am of opinion, therefore, that, upon the petition, I must make an order according to the prayer.

NOTE.—In the argument of this case, both before Lord Langdale and Sir John Romilly, two authorities which are in point were overlooked. In *Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759, Lady Somerville was tenant for life, without impeachment of waste, with remainder to the plaintiff Rolt for life, without impeachment of waste, with several remainders over. Lord Somerville cut down several groves of trees planted for the shelter and ornament of the mansion, and did other waste. Rolt, the tenant for life, filed a bill to compel the defendant to account for the moneys thus raised. To this the defendant demurred, and insisted that “the plaintiff could not call him to an account because he was not a remainderman of the inheritance.” Lord Hardwicke observed, “I cannot say the plaintiff is entitled to a satisfaction for the timber, which is a damage to the inheritance;” and the demurrer was allowed as to satisfaction on account of the timber.

The second case is that of the *Marquis of Ormonde v. Kynnersley*, or *Butler v. Kynnersley*, 7 Law J. (O. S.) Ch. 150; and 8 Law J. (O. S.) Ch. 67; and reported on other points in 5 Mad. 369, 2 Sim. & St. 15, and 2 Bli. (N. S.) 374, decided by Sir John Leach, and afterwards by Lord Lyndhurst.

In that case, equitable waste was, in 1805, committed by Clement Kynnersley, who was then in possession as the tenant for life, without impeachment of waste. The estate was limited in remainder to his first and other sons in tail, with remainder to the Marchioness of Ormonde and Job H. P. Clarke for life, in a moiety, with remainder, as to the whole, to her first and other sons in tail, with an ultimate remainder to Job H. P. Clarke in fee. Neither Clement Kynnersley nor the Marchioness of Ormonde had any issue, and Job H. P. Clarke had therefore the first vested estate of inheritance.

Upon a bill by the Marchioness of Ormonde for an account of the timber, a decree was, in the first instance, made by Sir John Leach, 5 Mad. 369, for an account of the timber (6th May, 1820).

There was a reference to arbitration; and on a motion to enforce the award (reported 2 Sim. & St. 15), (1824), it was suggested, that “the representative of Job H. P. Clarke (if any one) was entitled to the proceeds of the timber cut down.” (See 2 Bli. (N. S.) 385. The cause was reheard by Sir John Leach (23d April, 1825), who dismissed the bill, on the ground that the right to the money vested in Job H. P. Clarke (see 2 Bli. (N. S.) 386). The cause then went by appeal to the House of Lords (1828), and was remitted to Chancery, 2 Bli. (N. S.) 392, with liberty to appeal; and ultimately (20th April, 1830), Lord Lyndhurst dismissed the appeal with costs (7 Law J. (O. S.) Ch. 150, and 8 L. J. (O. S.) Ch. 67, and Reg. Lib. 1829, A, folio 2190), on the ground that the trees belonged to Job H. P. Clarke, as the person entitled to the first vested estate of inheritance, and that the plaintiff had no interest.

It is to be observed, that the decision of the *Marquis of Ormonde v. Kynnersley* is scarcely reconcilable: first, with the order for the investment and accumulation in *Lushington v. Boldero*, instead of for immediate payment to the plaintiff, the owner of the first estate of inheritance; nor, secondly, with *Wellesley v. Wellesley*, 6 Simons, 503, where, instead of directing payment to the plaintiff, the fund was paid into court, and formed part of the settlement fund; nor, thirdly, with the grounds on which the defence to the Statute of Limitations was overruled by Sir L. Shadwell and Lord Cottenham, in *The Duke of Leeds v. Lord Amherst*, 2 Phillips, pp. 120 and 125.—REP.

SMYTH v. CARTER.

BEFORE SIR JOHN ROMILLY, M. R. 1853.

[Reported 18 Beav. 78.]

IN 1852 the defendant became owner of a public-house and premises which had formerly been built on part of the waste of Bedminster, of which the plaintiffs were the lords of the manor. Rent had been paid by the previous owners to the plaintiffs.

The plaintiffs alleged, that the defendant was pulling down the house in order to erect a brewery in its place, which, as it would overlook the plaintiffs' residence, would form an intolerable nuisance. In July last, the plaintiffs obtained an injunction to restrain the defendant from so doing, and the defendant now moved to dissolve it.

Mr. Roupell and *Mr. C. M. Roupell*, in support of the motion.

Mr. R. Palmer and *Mr. Osborne*, for the plaintiffs.

THE MASTER OF THE ROLLS. Assuming the plaintiffs to be landlords, and the defendant tenant, I entertain no doubt, that this court will restrain a tenant from pulling down a house and building any other which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest will not affect the judgment of the court in any respect whatever. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change; and if he objects, the court will not allow a tenant to pull down one house and build another in its place.

In this case, the defendant alleges he is owner in fee, subject to a quit rent. I shall not now determine or express any opinion on that subject, but I shall preserve the rights of the parties until the question has been determined at law.¹

¹ "A doubt has been stated, indeed, in a note to 2 Saund. 252 b, whether a tenant for years is liable for permissive waste, and if he were not, then a covenant by the landlord to repair would not amount to an implied permission to the tenant to omit to repair. These doubts arise from three cases in the Common Pleas: *Gibson v. Wells*, 1 N. R. 290; *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392. Upon examining these cases, none of which appears to be well reported, the court seems to have contemplated the case only of a tenant at will in the two first cases, and in the last no such proposition is stated, that a tenant for years is not liable for permissive waste. We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53; *Harnet v. Maitland*, 16 M. & W. 257; though the degree of repairs required for a *tenant from year to year*, by modern decisions, is much limited." Per PARKE, B., in *Yellooly v. Gower*, 11 Exch. 274, 293, 294.

In *Doherty v. Allman*, 3 Ap. Cas. 709, fields, on which were buildings that had been used as store warehouses, and afterwards as artillery barracks and dwellings for

GENT v. HARRISON.

CHANCERY. 1859.

[*Reported H. R. V. Johns. 517.*]

GEORGE GENT, by his will dated the 8th of July, 1808, devised certain real estate to the use of George William Gent for life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gould Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to the plaintiff George Gent for his life without impeachment of waste, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to William Gent in fee.

By certain codicils the testator revoked the ultimate devise in fee, and declared that the remainder of his real estates should go as the law might direct.

The testator died in 1838, and George William Gent entered and continued in possession of the devised estate until the 17th of March, 1855, when he died, without having had any issue male. John Gould Gent then entered, and continued in possession until the 26th of May, 1856, when he died, without having had any issue male. John Gent had previously died without having had any issue male. The plaintiff then entered, and had since continued in possession, and had never had any issue male. The bill alleged that the plaintiff had been unable to discover the testator's heir. In the year 1820 George William Gent cut a quantity of timber, and invested the greater part of the proceeds of the sale of it in the names of the trustees to preserve; and this fund consisted, at the date of the bill, of a debenture for £5,000 of the North Western Railway Company. The rest of the proceeds, amounting to £739 14s. 6d., were retained by the said George William Gent.

The trustees paid the income of the fund so invested to George William Gent, John Gould Gent, and the plaintiff, during their successive occupations.

In 1848 George William Gent cut other timber, which he sold; and married soldiers, were demised, part in 1798, for a term of 999 years, and part in 1824, for a term of 988 years. The buildings having been for some time unoccupied, and, as was said, falling into decay, the assignees of the leases proposed to change the buildings into dwelling-houses. The reversioner brought a bill for an injunction to restrain the making of these changes, on account of the proximity to his private residence of the buildings proposed to be altered. The Vice-Chancellor of Ireland granted a perpetual injunction; but the Court of Appeal ordered the injunction to be dissolved, without prejudice to the plaintiff's right to proceed at law, and the House of Lords affirmed the order.

it was agreed that the amount so received and appropriated should be taken to be £1,000, and the date of receipt Midsummer, 1854.

In 1856, John Gould Gent cut and sold other timber, and received the proceeds; and it was agreed that the amount should be taken to be £900, received on the 2d of January, 1856.

The said sums of £1,000 and £900 were paid by the executors of George William Gent and John Gould Gent respectively to the trustee who held the other fund.

The plaintiff, by his bill, claimed to have all the capital which had arisen from the sales of timber, and to be paid by the executors of George William Gent and John Gould Gent the amounts received by their respective testators as income of the fund in which the proceeds of the timber were invested. There was some conflict of evidence as to whether the timber was properly or improperly cut.

Mr. Rolt, Q. C., *Mr. Shapter*, Q. C., and *Mr. Busk*, for the plaintiff.

Mr. Willcock, Q. C., for the representatives of George William Gent.

Mr. Speed, for the representative of John Gould Gent.

Mr. Chapman, for the trustee.

VICE-CHANCELLOR SIR W. PAGE WOOD. The plaintiff would be put in very considerable difficulty if this were treated otherwise than as a proper cutting, followed by the investment of the proceeds for the purposes of the trust. The authorities seem to go to the full extent, that, where timber is properly cut for the benefit of the estate (as the Vice-Chancellor of England says in the case of *Waldo v. Waldo* [12 Sim. 107]), either by the act of the court, or out of court by the act of trustees, which the court has adopted, there it is treated as so much of the estate. Thus, in a much earlier case, *Mildmay v. Mildmay* [4 B. C. C. 76], before Lord Thurlow, the court preferred not treating the proceeds as money, because that would change the character of the fund, but directed them to be invested in land, the effect being, that the tenant for life, although impeachable for waste, would obtain the benefit of the money when so invested. Therefore, where the timber is properly cut, the purchase-money of the timber follows the land, and the tenant for life, although impeachable for waste, receives the income during his life; and when you reach the first tenant for life unimpeachable for waste, as in the case of *Phillips v. Barlow* [14 Sim. 263], he takes the capital. There would therefore be no difficulty if the plaintiff in this case had treated the timber as having been properly cut, and the fund as being his from the date of his coming into possession of the estate; but he seeks the past interest on this ground (and it is only on this ground that he can seek it), that when the tenant for life, by his own wrong, creates the fund, as in *The Duke of Leeds v. Lord Amherst* [2 Ph. 117], and some other cases, the tenant for life shall not be allowed to avail himself of his own wrong, and to receive the interest from a fund which would never have existed but for his own wrongful act. But the cases which were cited have been cases of equitable

waste, where, the whole matter having to be administered in equity, the legal right which might spring from such a wrongful act could never have arisen. In the case of legal waste, you have only to consider the legal consequences of the wrongful act as to which trover may be brought. There is no account asked for in this bill, for the whole amount is ascertained and settled, which was one of the points that arose in the last cited case of *Hony v. Hony* [1 S. & S. 568]. No account is asked of what timber has been cut, what it has been sold for, and the like. No account has been rendered, but the tenant for life, who has now come into possession unimpeachable for waste, comes into court with this simple case. He says: "I find the exact value of the timber cut; I ask for that value; I ask to have it paid to me; I ask to have the back interest paid on that; I do not ask for anything else: and I, being legal tenant for life unimpeachable for waste, say, this is my money." In that state of things, if he has any right at all, it is plainly a legal right, treating the original act as a wrong. There is nothing which the Court of Chancery is called upon to do; and, therefore, he should be left to his remedy at law. But who may have the legal right, is, I think, a matter of great doubt. I am by no means satisfied at present, that, when the timber was cut, assuming the cutting to have been a wrongful act from the first moment, it did not belong to the first person having an estate of inheritance. The limitations are to the tenants for life, with contingent remainders to their issue, and then a remainder to the tenant for life unimpeachable for waste, and remainders in tail to his issue. All the authorities are uniform in this respect, that, where there has been an improper fall of timber on the estate by a person having a limited interest, the first owner of the inheritance is the person who has a right to bring trover, passing over all the intermediate estates. It certainly does not appear that there was, in any of these cases, an intervening tenant for life unimpeachable; but there were contingent remainders, that might come into *esse* and defeat the estate of inheritance vested in the heir or the person taking in remainder, as the case might be. The reason of the thing was this: that there must be the property in somebody when the wrongful act is done. The court will not allow the tenant impeachable for waste to avail himself of his own wrong; and the law therefore vests the timber wrongfully cut in the person having the first legal estate of inheritance. The answer made by Mr. Rolt is, "that the tenant for life, although in remainder, if he is unimpeachable for waste, as in *Lewis Bowles' Case*, has not merely an immunity from liability for waste, but the actual property in the timber. But how has he the property? The doctrine laid down in the 7th resolution in *Lewis Bowles' Case* is this: The clause without impeachment of waste gives a power to the lessee which will produce an interest in him, if he executes his power during the pendency of his estate. That is to say, if he ever comes into possession of the estate, and ever exercises his power of cutting the timber thereupon, the timber belongs to him; and the reason of its belonging to

him, which is fully argued out, is this : It is said, if it had been without impeachment of waste by any writ of waste, then, by old authority, the action only would be discharged, and the lessor, after the fall of the timber, might nevertheless seize it ; but when it is without impeachment of waste altogether, then the effect is, that the tenant for life cannot be interfered with in any manner in respect of that waste ; and as soon, therefore, as he has exercised his power thereupon, the timber at once becomes his own property. But how does that prove, that, when the trees are felled by the wrongful act of some one preceding him, before his property has arisen thereupon, the property is in him ? To say the least, that is a doubtful proposition ; and that point I am asked to decide, not having the heir before me. The question is, whether such a point as that ought to be decided without the presence of the heir, and against the heir. I think the answer is plain, that, without hearing the heir upon it, I can come to no such conclusion. And further than that I see no reason to go. There seems to be considerable reason for a contention by the heir that his position is just the same in respect of a person having a possible power, which may arise if ever his estate arises, as it is in respect of the contingent interests of unborn issue, in favor of whom the law does not interfere to prevent the heir's right accruing at once, so as to enable him to bring trover immediately after the timber is cut. But there are further difficulties in the plaintiff's way, if he chooses to treat this as a tort. In the first place, of course the tort arose when the act was committed ; and, if the plaintiff had a remedy by an action of trover, I apprehend the action should have been brought some twenty years ago, when the act took place. That is the first difficulty. But, secondly, suppose the plaintiff has any right of action now of any kind, his remedy is clearly at law. He is the legal owner, and if he chooses to proceed at law by an action of trover, there is his remedy. In what respect does he want the aid of this court ? He asks for no injunction ; he asks for no account ; he asks nothing which he has not got at law. Why should he come here to insist on his right ? It is put in this way : It is said, a person commits a wrong, and hands over the fund which has resulted as the produce of his wrong to another, and says, " Take care of that ; I have injured somebody or other. and I ask you to hold the proceeds for anybody who may be interested in them." I apprehend, even supposing the form of action might be varied, and that it might be an action for money had and received to plaintiff's use, the remedy would still be at law. It is not for me to determine the question, whether it should be an action of trover, or an action for money had and received. Still, taking it either way, what does the plaintiff come here for ? In truth, it is only by treating the cutting as rightful, as an act which the court would recognize, that the plaintiff can have any ground for coming to this court. On that view, considering that the trustees were applied to in the first instance, there might be ground for directing an inquiry whether this cutting ought to be regarded as an act of the trustees, which the court would recognize, as it

did in *Waldo v. Waldo*. If that were so, the plaintiff would be entitled to the whole of the money produced; but he would be clearly wrong in asking for the intermediate interest. If, on the other hand, he says: "You, the trustee, having received this sum of money as the proceeds of a wrongful act, ought to have held it for all the persons interested; you should not have paid any income to the wrongdoer himself, but you should have held it for me," — that contention entirely fails, because, if the act was wrongful, the remedy is at law, and not here. If he chooses to treat the timber as rightfully cut, then the tenant for life was entitled to interest, and all the plaintiff can get is the principal, his title to which does not seem to be disputed. What seems right for me to do is this, — either to dismiss the bill altogether, if the plaintiff insists on treating the cuttings as wrongful acts from the commencement, in which case I ought to dismiss it with costs; or else, if the plaintiff is content to treat the cuttings as rightful, then to make a decree for the payment to him of the capital derived from the proceeds of that timber. But I cannot do this unless the plaintiff waives any inquiry as to whether the cutting was rightful or not.

Mr. Rolt having consented to waive any inquiry, and to treat the timber as rightfully cut, the minutes of decree were as follows: —

Dismiss the bill, with costs, as against the representatives of George William Gent and John Gould Gent; and, the plaintiff not asking any inquiry whether any of the timber was wrongfully cut, the funds in the hands of the trustee to be transferred to the plaintiff; the trustee's costs to come out of the fund.¹

TURNER v. WRIGHT.

CHANCERY, BEFORE LORD CAMPBELL, C. 1860.

[Reported 2 De G. F. & J. 234.]

THE LORD CHANCELLOR.² In this case the plaintiff, by his bill, prayed an injunction "to restrain the cutting of any timber, or at any rate of any ornamental timber," growing upon the lands devised in fee to the defendant, subject to an executory devise over to the plaintiff.

¹ "The only point remaining is, whether this tenant for life, not being tenant without impeachment of waste, has any property in the underwood cut, before his estate comes into possession. It is rightly assimilated to the case of tenant for life without impeachment of waste, supposing it only to relate to timber and not to underwood. Upon that it is clear, that tenant for life without impeachment of waste cannot maintain trover. That was decided in the Court of King's Bench a few years ago upon a case reserved at the assizes upon the Home Circuit, and I think in Kent, which, I suppose, is not in print, or it would have been found by the counsel. There it was determined, that notwithstanding an estate for life without impeachment of waste in being, yet timber falling or cut vested immediately in the owner of the inheritance; for tenant for life without impeachment of waste has no right to the timber cut before his possession." *Per* BULLER, J., in *Pigot v. Bullock*, 1 Ves. Jr. 479, 483, 484.

See *Baker v. Sebright*, 13 Ch. D. 179.

² Only the opinion is given.

The decree of the Vice-Chancellor declared, "that the defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid."

The result of the decision is, that the defendant is punishable of legal, but not of equitable, waste. After great consideration, I agree with the Vice-Chancellor on both questions.

As to the first, my opinion is clear and decided. The defendant is tenant in fee-simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee-simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be that the first taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life and sans waste. He could not have intended that the first taker, to whom he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life-estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him punishable of waste.

So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The *onus* seems to lie upon the plaintiff to show, by authority, that tenant in fee-simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The plaintiff's counsel relied on *dicta* to be found in the reports of three cases, *Robinson v. Litton*, 3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26; *Stansfield v. Habergham*, 10 Ves. 273, and *Wright v. Atkyns*, 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143. According to Vesey, Jr., a very careful and accurate reporter, Lord

Eldon did say, in *Stansfield v. Habergham*, "I should by dissolving this injunction contradict what has been understood to be the doctrine of this court: that, where there is an executory devise over, even of a legal estate, this court will not permit the timber to be cut down." But this doctrine is not to be found in any text-writer, and it has never been acted upon. In *Wright v. Atkyns*, the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In *Robinson v. Litton*, Lord Hardwicke was influenced by the consideration that the tenant in fee-simple with an executory devise over was the infant heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by Cruise, 6 Cruise, 428, 429; and the infant, though seised of the legal estate in fee, was entitled to the rents and profits only until he attained twenty-one, *i. e.*, for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in *Atkyns*, the circumstance of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction. 3 Atk. 209.

Therefore, as to legal waste, I think there is no authority to outweigh the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this court ought to interfere by injunction. Tenant in fee-simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own, so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous *Raby Castle Case* (*Vane v. Lord Barnard*, 2 Vern. 738) shows that such things may not be done by tenant for life sans waste, and tenant in fee with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and what is denominated malicious waste, *viz.*, equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the condition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his

own. In the present case, the devise being by the testator of "all his said mansion-house and estate at Brattleby and North Kelsey, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed, Mr. Daniel contended that, in the absence of malice, this court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to A. in fee, subject to an executory devise over to B. in fee, and that A. from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that B. and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower-garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by B. for an injunction, would this court interfere? Mr. Daniel answered: "A., acting *bona fide*—No." Nevertheless I cannot help thinking that in spite of A.'s *bona fides*, what A. contemplated would be in the nature of a destruction of the subject devised, and would certainly be in contravention of the intention of the devisor, so that B. would be entitled to an injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a court of equity by injunction can well be drawn other than the recognized and well-established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.

I am willing, with Vice-Chancellor Page Wood, to accept the clew by which Lord Justice Turner, in *Micklethwait v. Micklethwait*, 1 De G. & J. 504, 524, proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the Vice-Chancellor, who is reported to have added: "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical." *Turner v. Wright*, John. 740-751. Where an estate tail is created with successive estates tail in remainder, the estate entailed is "limited to go in a course of succession," but a tenant in tail is punishable of equitable as well as legal waste, because he may at any

time bar the entail, and give himself a pure and absolute fee-simple. Again, a tenant for life sans waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste) may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainder-man or reversioner, if not severed from the soil in his lifetime; whereas the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenant for life sans waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the Crown, and tenant in tail under an Act of Parliament which precludes the barring of the entail. Such tenants in tail are considered dispunishable of waste; this being an incident of tenancy in tail, probably arising from the power which generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the *Marlborough Case*, 3 Madd. 498, although the court would not interfere on the mere ground that the tenant in tail was prohibited by Statute from barring the entail; yet, having regard to the enactment "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house. 3 Madd. 549.

There is an analogy which entirely accords with the distinction made by the Vice-Chancellor in this decree between legal and equitable waste, viz., the case of "tenant in tail after possibility of issue extinct," who is dispunishable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the Vice-Chancellor, as he pronounced it, should in all respects be affirmed, and that the appeal must be dismissed with costs.

Mr. Rolt, Sir Hugh Cairns, and Mr. Kay, for the plaintiff; *Mr. Daniel and Mr. Speed*, for the defendant.

HONYWOOD v. HONYWOOD.

CHANCERY. 1874.

[*Reported L. R. 18 Eq. 306.*]

WILLIAM PHILIP HONYWOOD by his will devised all his real estates to trustees, upon trust to manage the same, and, after certain payments therein mentioned, to pay the rents and profits to his wife during her life or widowhood, with remainders over.

The testator died in 1859, and the suit was instituted by Mrs. Honywood for the administration of his estate. Various inquiries had been directed by the decree, and orders had been made from time to time for felling part of the timber on the estate, and directing that some part of such felled timber might be used for repairs on the estate, and that the remainder might be sold, and the proceeds paid into court and invested, and the income thereof paid to the widow as tenant for life.

It appeared that part of the money thus paid into court represented the proceeds of the sale of trees, which, according to the evidence of the agent for the estate, were ripe and fit to be cut, and would not improve but lessen in value, and that it would be for the benefit of the estate if they were cut.

The question which came before the court, on further consideration of the suit, was, as between the plaintiff, as equitable tenant for life, and the remainderman, whether the proceeds of the sale of the trees, which were felled in the regular course of thinning, or which were fit to be cut, and would not improve by standing, and which were injurious to the other timber, belonged absolutely to the plaintiff, or whether she was only entitled to the income thereof when invested.

Mr. Fischer, Q. C., and *Mr. Hanson*, for the plaintiff.

Mr. Southgate, Q. C., and *Mr. Freeling*, for the trustees of the will, and *Mr. Crossley*, for the heir-at-law.

SIR G. JESSEL, M. R. As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is, depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of usable wood in them, sufficient, according to a text-writer (see *Gibbons on Dilapidations*, p. 215; *Countess of Cumberland's Case*, Moore, 812; *Herlakenden's Case*, 4 Rep. 63 b), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that

is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country,—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities,—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age, but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favor of the owners of timber estates, that is, estates which are cultivated merely for the produce of salable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all.

The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy “germins,” as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course of the proper management of this estate, any oaks, ashes, and elms under twenty years old have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste.

Then the only other question to be decided is, in whom is the prop-

erty of the timber cut down vested? There, I think, the law is reasonably clear. If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the court to have it cut down, there the court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money.

The same course, as I understand it — there is a decision of Lord Lyndhurst, in *Ormond v. Kynnersley*, 7 L. J. (Ch.) 150, the other way, but modern decisions have settled the law — is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement; that is, to go along with the estate according to the settlement giving the income to the tenant for life, and so on.

Then we come to the property in trees not timber, that is, those which are not timber either from their nature or because they are not old enough or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down wrongfully, and commits waste, the property is still in him, though he has committed a wrong, and would be liable to an action in the nature of waste. I am not sure that would follow in equity. My impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity.

If the present tenant for life has cut down oak, ash, or elm under twenty years of age, in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she will be entitled to the proceeds of the trees so cut down; and assuming, when I come to look at the affidavits, that there are some which show that there is such a class of tree cut down, as I understand is actually

the case, then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to.

As regards the future, I think I have said enough, without any further declaration, to show what the tenant for life will be entitled to.

PYNCHON *v.* STEARNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846.

[*Reported 11 Met. 304.*]

THIS was an action of waste, in which the plaintiff alleged that the defendant held two parcels of land in Springfield, as tenant for life — the plaintiff having the next estate of inheritance — and had committed sundry acts of waste thereon. Trial before *Shaw*, C. J., whose report thereof was as follows: —

The plaintiff gave in evidence the last will of Edward Pynchon, proved May 30th, 1830, by which he devised the two parcels of land described in the plaintiff's declaration; viz., Pond Meadow and Great Meadow, to his wife, Susan Pynchon, so long as she should remain his widow, remainder to his brother, the plaintiff, in fee: Also an assignment of the same parcels, by said Susan, to the defendant, for her life, reserving a yearly rent of thirty dollars. There was evidence tending to show that these parcels of land adjoined each other, and together extended from Main Street, easterly, to and beyond Chestnut Street.

The plaintiff relied on the four following acts of waste: 1st. That the defendant had destroyed fences, or permitted them to fall down or decay, by means of which there was danger that the abutments and landmarks of the estate would be lost, or rendered doubtful, to the damage of the inheritance. 2d. That the defendant had laid out a street or open way, across the land, from one public highway to another, viz., from Main Street to Chestnut Street, by which the character of the land was changed, to the injury of the inheritance, and by which there was danger that the rights of the inheritance might be lost or impaired. 3d. That in order to fit that part of the land, so laid out for a street, for travel, the defendant had ploughed furrows or dug drains along the side thereof, and drawn in large quantities of earth, to raise the same, and thereby had so changed the surface, that it ceased to be meadow and pasture land. 4th. That the defendant had erected several wooden houses on the land, and had, for that purpose, caused some portion of the soil to be thrown out from under the sites of those houses, in order to form cellars under them, and to raise the land around them; and had thus changed the character and condition of the land.

As to all that part of the land, nearest to Main Street, called Pond Meadow, the defendant denied the right of the plaintiff to maintain this action, on the ground that the plaintiff, on the 13th of July, 1839, had

taken of the defendant a lease thereof during the life of the aforesaid Susan Pynchon, so that the defendant had ceased to be tenant for life, and the plaintiff had become tenant for life, entitled to the possession; and that the relation of tenant for life and remainderman no longer subsisted between the parties. The lease was given in evidence, and the execution thereof admitted. The judge sustained the defendant's objection, and instructed the jury that, as to that part of the land, the action could not be maintained.

As to the alleged acts of waste, on the other parcel of land, the defendant made several answers: As to removal or decay of fences, and the loss of boundaries, he denied the fact; and the evidence was left to the jury, with directions not excepted to. As to the other alleged acts of waste, the defendant denied that they amounted to waste. And the jury were instructed that the opening of a way through the land, from one highway to another, was not waste. As to the subverting of the soil, and carrying on earth to raise it, and as to the plaintiff's digging out of a part of the soil for cellars of houses, and raising the soil about the houses, evidence was offered, and, though objected to, was admitted, tending to show that it was a useful and beneficial mode of husbandry, on similar meadow ground, occasionally to break it up and cultivate it, and again lay it down to grass; that as the soil in question was low and wet, the carrying of earth thereon would benefit it, and make it worth more for agricultural purposes, than if it had not been done; that it would cost but little to level it and fit it for cultivation. Whereupon the jury were instructed, that if breaking up meadow land, occasionally, was a judicious and suitable mode of husbandry, the changing of the surface of the soil from meadow, by breaking up and cultivating it, was not waste; that if the cost of levelling would be small, and if, after deducting such cost, the land, over which the road had been built, and on which the houses had been erected, would, in case of their removal, be equally (or more) valuable for agricultural purposes, including ploughing and cultivation, and fitting and laying it down to grass, as if it had not thus been changed and built upon, then the laying out and filling up of the road, and removing the soil, for the building of houses and the erection of houses thereon, did not constitute waste.

The jury were also requested to say (if they should find that the estate would be of less value for agricultural purposes, supposing the buildings to be all removed), whether it would, on the whole, be equally or more valuable to the owner of the inheritance, on the hypothesis of the buildings' remaining thereon at the determination of the life estate.

The jury returned a verdict for the defendant, and, on being inquired of, stated that they were of opinion, that the estate would be worth more to the owner of the inheritance, for agricultural purposes, even if the houses were taken off, than if the acts of the defendant, in raising and filling up the road, and digging the soil for building, had not been done.

Verdict to be set aside, and a new trial granted, if any of the foregoing instructions, unfavorable to the plaintiff, were wrong.

D. Cummins and *F. Cummins*, for the plaintiff.

B. R. Curtis and *R. A. Chapman*, for the defendant.

WILDE, J. This is an action of waste, and the case comes before us on exceptions to the instructions to the jury at the trial. The premises described in the writ were formerly the property of Edward Pynchon, and were devised by him to Susan Pynchon, his wife, so long as she should remain his widow, remainder to the plaintiff. The defendant holds under an assignment from the said Susan.

It was proved at the trial, that the plaintiff had taken of the defendant a lease of part of the premises during the life of the said Susan; and it was ruled by the court that, as to that part of the premises, the action could not be maintained. That this ruling was correct, cannot, we think, admit of a doubt. By this lease to the plaintiff, he became the owner of the whole estate. The estate for years immediately merged in the remainder in fee; and the plaintiff entered, as it is understood, before the alleged waste. If, however, the lease had been given after the waste, no action of waste could be maintained after the merger of the estate, and after the entry of the plaintiff under the lease from the defendant.

If it be said that the reservation in the lease to the plaintiff prevented the merger, the answer is, that the reservation did not, and could not, by the well-established rules of construction, limit or divest the estate expressly demised to the plaintiff. The defendant only reserved the right to erect buildings on the premises; but no estate for life or for a term of years is reserved; and if it had been reserved, it would have been repugnant to the terms of the lease limiting and demising the estate for life to the plaintiff.

As to the stipulation for the payment of rent, we consider that as a personal covenant of the plaintiff. No right of entry is reserved for the non-payment of rent; and that covenant can no more prevent a merger than it can prevent the vesting of the estate demised.

As to the alleged acts of waste on the other part of the premises, the plaintiff relied upon sundry facts which are not disputed; namely, that the defendant had opened a way through the premises from one public highway to another; and that the defendant had subverted the soil, by digging out part of the soil for cellars of houses by him erected; and that he had ploughed the lands, dug drains, and had drawn in large quantities of earth, thereby raising the land and changing the surface thereof. The defendant introduced evidence to show that these acts of the defendant were beneficial and not prejudicial to the plaintiff, and did not constitute waste. On this evidence the jury were instructed that the opening of the way was not waste; and that if breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing the surface by breaking up and cultivating it, was not waste; and that the removing the soil for the building of houses, and the erect-

ing them, and digging drains, if the estate on the whole would be equally or more valuable to the owner of the inheritance, would not be waste.

The general rule of law in respect to waste is, that the act must be prejudicial to the inheritance. It is defined by Blackstone (3 Bl. Com. 223) to be "a spoil and destruction of the estate, either in houses, woods, or lands." It is true, however, that it has been held in England, that to change the nature of the property by the tenant, although the alteration may be for the greater profit of the lessor, was waste. So in England, if the tenant converts arable land into wood, or *e converso*, or meadow into plough or pasture land, it is waste. Bac. Ab. Waste, C. 1. The reasons given are, that it changes the course of husbandry, and the evidence of the estate. But these reasons are not applicable in this Commonwealth, and consequently such changes here do not constitute waste, unless such changes are prejudicial to the inheritance. So the doctrine is laid down by Mr. Dane, and it is, we think, supported on satisfactory reasons. 3 Dane Ab. 219. When our ancestors emigrated to this country, they brought with them, and were afterwards governed by, the common law of England; excepting, however, such parts as were inapplicable to their new condition. 2 Mass. 534; 8 Pick. 316. That the principle of the common law under consideration was then inapplicable to the condition of the country is obvious; nor has it been applicable at any time since; for it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required. A conformity, therefore, to this usage, cannot be deemed waste. Even in England, "if a meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the ploughing of it is not waste." Bac. Ab. Waste, C. 1; Com. Dig. Waste, D. 4. As to the effect of such changes upon the evidence of title to lands, it is evident that it can have none in this State. Our conveyances are very simple. The land conveyed is described by metes and bounds, or by some general and certain description of its limits, without any designation of the kind of land conveyed, whether it be arable land or grass land, wood land or cleared land, pasture or meadow.

As to the other acts complained of, we think they cannot be deemed waste, unless they may be prejudicial to the plaintiff; and that the instructions to the jury, in this respect, were therefore correct. To erect a new house on the land where there was not any before, is not waste. Bac. Ab. Waste, C. 5. So there seems no authority for holding that the opening of a way by the defendant, for his convenience, and draining the land, are acts of waste. And as to raising the land, by carrying thereon quantities of earth, whatever may be the law of England, it is not in this Commonwealth waste, unless it may be prejudicial to the plaintiff.

The ancient doctrine of waste, if universally adopted in this country,

would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided. *Winship v. Pitts*, 3 Paige, 259, and other cases cited by the defendant's counsel.

In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.

For these reasons, we are of opinion that the instructions to the jury were correct.

*Judgment on the verdict.*¹

MOORE v. TOWNSHEND.

SUPREME COURT OF NEW JERSEY. 1869.

[*Reported 4 Vroom, 284.*]

THIS was an action on the case in the nature of waste, to recover damages for permissive waste, tried at the Cumberland Circuit. The plaintiff, on the 5th of November, 1853, by a lease, under seal, demised to the defendant the premises known as the Eagle Glass Works, in the county of Cumberland, together with one hundred and fifty moulds, and all the tools of every description connected with the glass manufactory business at that manufactory; to hold for the term of two years and eight months, at a yearly rent of one thousand dollars. The lease contained a covenant, by the tenant, for the re-delivery of the moulds and tools, to the lessor, at the expiration of the term, in as good condition as they were in at the time of the demise, reasonable wear and tear and fire excepted. It also contained the following clause: "It being understood and agreed between the said parties that said Moore has the privilege of laying out one hundred dollars per year in repairs on said property, and deducting the same from the rent." There was no other covenant in the lease on the subject of repairs. It was shown, at the trial, that twenty-one dollars and fifty cents had been expended in repairs during the continuance of the lease, of which sum six dollars and ninety-five cents had been deducted from the rent, the balance of which had been paid.

The jury found a verdict for the plaintiff, and assessed his damages at five hundred and fifty dollars.

A rule to show cause why a new trial should not be granted, was allowed; and the following reasons were assigned for setting aside the verdict. 1. Because an action on the case will not lie against a tenant

¹ See *Keeler v. Eastman*, 11 Vt. 293; *Clemence v. Steere*, 1 R. I. 272; *M'Cullough v. Irvine*, 13 Pa. 438, 443.

for years for permissive waste. 2. Because the lease between the parties measures and limits the liability of the tenant, in the matter of repairs.

Argued at November Term, 1868, before the CHIEF JUSTICE and Justices DALRIMPLE and DEPUE.

For the rule, *J. T. Nixon* and the Attorney-General, *George M. Robeson*.

Against the rule, *F. F. Westcott* and *Mr. Browning*.

DEPUE, J. The action on the case, in the nature of waste, has almost entirely superseded the common law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted.

At common law, waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years. 2 Inst. 299, 305; Co. Lit. 54. The reason of this diversity was, that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and if he did not, it was his negligence and default. 2 Inst. 299; Doct. & Stu., ch. 1, p. 102. This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. To remedy this inconvenience the Statute of Marlbridge (52 Hen. 3, ch. 23) was passed. But as the recompense given by this Statute was frequently inadequate to the loss sustained, the Statute of Gloucester (6 Edw. 1, ch. 5) increased the punishment by enacting that the place wasted should be recovered, together with treble damages. 1 Cruise Dig. 119, §§ 25, 26; *Sackett v. Sackett*, 8 Pick., p. 313, *per* Parker, C. J. The Statute of Marlbridge is in the following words: "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tene-ments that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously." 2 Inst. 145. The word "fermor" (*firmarii*) in this Statute comprehended all such as held by lease for life or lives, or for years, by deed or without deed (2 Inst. 145, note 1), and also devisees for life or years (2 Roll. Abr. 826, l. 35). By the Statute of Gloucester, "it is provided, also, that a man, from henceforth, shall have a writ of waste, in the Chancery, against him that holdeth by law of England or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall lease the thing that he hath wasted, and, moreover, shall recompense thrie so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in

the Great Charter." 2 Inst. 299. At the common law, a tenant at will was punishable for voluntary waste, but not for permissive waste. *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784; *The Countess of Shrewsbury's Case*, 5 Rep. 14; *Harnett and Wife v. Maitland*, 16 M. & W. 258. Tenants in dower, by the curtesy, for life or lives, and for years, were included in the Statute of Gloucester. Tenants at will were always considered as omitted from the Statute of Marlbridge as well as from the Statute of Gloucester, and, therefore, continued to be punishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste, was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the Statute of Gloucester, is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant, and thus protect the inheritance from spoil or destruction.

The language of the Statute of Marlbridge is, "shall not make (*non facient*) waste," and in the Statute of Gloucester, in speaking of guardians, the words used are, "he which did waste" (*que aver fait waste*). The settled construction of these Statutes in the English law until a comparatively recent period was, that they included permissive waste as well as voluntary waste. In a note in exposition of the Statute of Marlbridge, Lord Coke, in commenting on the words "*non facient*," says: "To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the Statute of Gloucester, ch. 5, *que aver fait waste*, and yet is understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste." 2 Inst. 145; 7 Bac. Abr. 250; 3 Bl. Com. 225; 2 Saund. 252; 4 Kent, 76. So under the prohibition to do waste, the tenant is held to be bounden for the waste of a stranger, though he assented not to the doing of waste. Doct. & Stu., ch. 4, p. 113; 2 Inst. 303; *Fay v. Brewer*, 3 Pick. 203; 1 Washburn, R. Prop. 116. It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease by whomsoever it may be committed, *per* Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198; with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White v. Wagner*, 4 Harr. & Johns. 373; 4 Kent, 77; *Heydon and Smith's Case*, 13 Coke, 69. The instances in the earlier reports in which lessees for life or years, were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the Statute, which subjected them to the

action of waste. *Griffith's Case*, Moore, 69, No. 187; *Ib.* 62, No. 173; *Ib.* 73, No. 200; Keilway, 206; *Darcy v. Askwith*, Hobart, 234; *Glover v. Pipe*, Owen, 92; 3 Dyer, 281; 2 Roll. Abr. 816 l. 40; 22 Vin. Abr. Waste, "c" and "d," pp. 436-440, 443; Co. Lit. 52 a, 53 b; 5 Com. Dig. Waste, d 2, d 4; Bissett on Estates, 299, 300. So uniformly had the courts determined that lessees for life or years, had committed waste by the application of the common law rules, with respect to waste, whether of omission or commission, that the learned commentator on English law says, "that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste." 2 Bl. Com. 283.

This construction of the Statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of *Gibson v. Wells*, 4 B. & P. 290, in the year 1805, which was followed by the case of *Herne v. Bembow*, 4 Taunt. 764 (1813). These cases, it is insisted, have settled the construction against the liability of a tenant for years for permissive waste. *Gibson v. Wells* is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the Statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In *Herne v. Bembow* it does not clearly appear that the lease was for a term. It is certain that the opinion of the court proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton, it appears to have been decided, without argument or consideration. The opinion is a *per Curiam* opinion, and the only case cited is *The Countess of Shrewsbury's Case*, 5 Co. 14, which was a case of a tenancy at will.

The only subsequent case which sustains these cases is *Torriano v. Young*, 6 C. & P. 8; a case at Nisi Prius. In other cases where *Herne v. Bembow* was cited, the English courts show no disposition to follow it. In *Jones v. Hill*, 7 Taunt. 392, Gibbs, C. J., expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 A. & E. 540, and in *Beale v. Sanders*, 3 Bing. N. C. 850, a decision of that question is avoided; and in *Harnett v. Maitland*, 16 M. & W. 256, 261, Parke, B., on *Gibson v. Wells*, *Herne v. Bembow*, and *Torriano v. Young* being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also punishable for permissive waste. Text-writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt upon a principle that had previously been set at rest. 2 Saund. 252 b, note i; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495, and note e; 2 Bouvier's Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124,

and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions, 385; Ferrard on Fixtures, 278, 281, note; 1 Evans' Statutes, 193, note; Broom on Parties, 257; 4 Kent, 76, 79; Elmes on Dilapidations, 257.

Independent of authority, the true construction of the Statute of Gloucester, leads to the conclusion that tenant for life or years, was made liable for permissive as well as voluntary waste. Before either this Act or the Statute of Marlbridge was passed, waste was recognized in the law, as an injury to the inheritance, resulting either from acts of commission or of omission. Neither of these Statutes created new kinds of waste, but gave a new remedy for old wastes, leaving what was waste, and what not, to be determined by the common law (2 Inst. 300); and by the Statute of Gloucester the writ of waste was suable out of Chancery as well against lessee for life or years, as against tenant by the curtesy, or in dower, putting the former, as to the newly created remedy, on the same footing as the latter. "It hath been used as an ancient maxim in the law, that tenant by the curtesy, and the tenant in dower, should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done; and when an action of waste was given after, against a tenant for term of life, then he was taken to be in the same case, as to the point of waste, as tenant by the curtesy, and tenant in dower was, that is to say, that he should do no waste, nor suffer none to be done." Doct. & Stu., ch. 4, p. 113. No distinction can be made between lessee for life and lessee for years. Both are mentioned in the Statute conjointly; and each derives his interest in the premises from the act of the owner of the inheritance.

The second section of the Act for the prevention of waste, which is in force in this State (Nix. Dig., 4th ed., 1022) provides that no tenant for life or years, or for any other term, shall during the term *make* or *suffer* any waste, sale or destruction of houses, gardens, orchards, lands, or woods, or anything belonging to the tenements demised, without special license in writing, making mention that he may do it. The third section is in substance the same as the Statute of Gloucester. The Act was passed in 1795. The use of the words "*make or suffer*," in the second section, which are equivalent to Coke's interpretation of *facient* in the Statute of Marlbridge, manifests an intent to adopt as the law of this State, the doctrine of the English courts, as to the liability of tenants for life or years for permissive waste, which was universally received at the time of the passage of the Act.

The second reason assigned involves the effect of the lease in this action.

Premising that the act or omission, to constitute waste must be either an invasion of the lord's property, or at least be some act or neglect which tends, materially, to deteriorate the tenement, or to destroy the evidence of its identity (Burton's Comp. R. Prop. 411; *Doe ex dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 Saund. 259 a,

note o; *Pynchon v. Stearns*, 11 Met. 304; 1 Washburn R. Prop. 108); and that the action is founded partly upon the common law and partly upon the Statute, and does not depend for its support on any covenants of the tenant (22 Viner, Abr. 457, Waste M. 4; 3 Bl. Com. 227; *Kinlysides v. Thornton*, 2 W. Black. 1111; *Marker v. Kenrick*, 13 C. B. 188); it is obvious that we must resort to the Statute for the conditions on which the tenant is excusable for the waste done.

There is a class of cases in which tenants have been held not to be liable for waste resulting from non-repair where the lessor has entered into a covenant to make the repairs for the want of which the injury has happened. These cases go upon the ground that the injury was caused by the lessor's own default, on which he can base no right to recover. There is no such covenant in the lease now under consideration.

The Statute forbids waste by the tenant "without special license, in writing, making mention that he may do it." The consent of the landlord by parol will not be sufficient authority. *McGregor v. Brown*, 6 Seld. 114. The words usually employed for this purpose are "without impeachment of waste," but any words of equivalent import will be sufficient, provided they amount to a license to do the acts. The defendant, to bring himself within the Statute, relies on that part of the lease which relates to the re-delivery of the personal property leased, in connection with the stipulation giving the defendant the privilege of expending a portion of the rent in each year for repairs. The covenant as to the personal property is entirely distinct from the obligations of the tenant, with respect to the real estate. The privilege of expending a portion of the rent reserved in repairs, is not a license to the tenant to omit a duty put upon him by the Statute, growing out of the relations between the parties. To construe a privilege given by the landlord to expend his money in the reparation of the demised premises, as a license to the tenant to omit his duty, to the spoil or destruction of the inheritance, would be an entire subversion of the obvious intent of the landlord. If it falls short of a license for the act complained of, it does qualify or abridge the obligations of the tenant which exist independent of the provisions of the lease.

It was further insisted that if any action lies, it should be an action *ex contractu*, and not in *tort*. As already observed, the gravamen of the action is the breach of a statutory duty. An action on the case founded in *tort* will lie for the breach of a duty though it be such as that the law will imply a promise on which an action *ex contractu* may be maintained. *Brunell v. Lynch*, 5 B. & C. 589. To the same effect are the cases of *Kinlysides v. Thornton* and *Marker v. Kenrick*, already cited, in which it was held that an action on the case in the nature of waste, will lie, although the act complained of might also be the subject of an action for the breach of an express covenant.

BEASLEY, C. J., and DALRIMPLE, J., concurred.

Rule discharged.

GAINES v. GREEN POND IRON MINING COMPANY.

NEW JERSEY COURT OF ERRORS AND APPEALS. 1881.

[Reported 33 N. J. Eq. 603.]

APPEAL from a decree of the Chancellor.¹*Mr. Barker Gummere*, for the appellants.*Mr. Henry C. Pitney*, for the appellees.

VAN SYCKEL, J. The bill in this cause was filed by the complainants as owners of the remainder in fee of a large tract of wild lands in the county of Morris, to restrain the defendants, who, it is alleged, have only a life estate in said lands, from cutting timber and working the iron mines on said premises, and also praying for an account.

Two principal questions are raised by the defendant's answer: First, whether Robert L. Graham, through whom the complainants derive their title, was the legitimate son of Charles M. Graham, the third. Second, whether, if Robert's legitimacy is established, the working of the mines by the life tenants, under the circumstances shown in this case, is waste.

The complainants allege that Charles M. Graham was married clandestinely to Cornelia Ludlow in July, 1847, and they admit that it was not followed by open cohabitation. Under such circumstances the law will cast upon the complainants the burden of proving the fact of marriage by very clear and persuasive evidence.

It is not deemed necessary to discuss the testimony on this branch of the case; it is sufficient to say that a careful consideration of it has left no doubt in my mind that the Chancellor is justified in the conclusion he reached upon this point.

The complainants, therefore, as owners of the remainder in fee, are entitled to protect their estate against waste by the life tenant, or those claiming under her.

The land in question is very rough and mountainous, and almost all of it unfit for cultivation. On it there is a thin covering of wood and timber, with a large deposit of valuable iron ore underlying it. About the year 1812 Dr. Graham, then owner of the fee, excavated the iron ore for the purpose of manufacturing copperas, sulphur being combined with it in such proportions as made it available for that purpose. He made at least two openings, from ten to fifteen feet deep, out of which the ore was raised, and carried on this business for several years. There was erected upon the premises a building used for pounding the ores, and other apparatus for treating them. There was no digging for ore from the time Dr. Graham quit working (about 1812 or 1814) until about forty years ago, when a small quantity of ore was taken out and tested

¹ The opinion sufficiently states the case.

at two different forges in the neighborhood, and was considered to be without value as iron ore, on account of the sulphur it contained. From that time there has been no mining upon these premises until the Green Pond Iron Company commenced its operations in 1872.

By the strict rule of the common law, the opening and working of a mine by a tenant for years, not opened in the lifetime of the previous tenant in fee, was, equally with the cutting of timber, an undoubted waste of the estate. In *Hoby v. Hoby*, 1 Vern. 218, the widow was held to be dowable of a coal work. It was resolved in *Saunders's Case*, 5 Coke, 12, that "if a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it, for inasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his intent is as general as his lease."

The tenant for life, subject to waste, cannot open a new mine. *Whitfield v. Bewitt*, 2 P. Wms. 240.

And if a lease of land be made, and some mines are open and some not, the open mines only can be wrought. *Astry v. Ballard*, 2 Lev. 185.

But a tenant for life may open the earth in new places in pursuit of an old vein of coals, when the coal mine had been opened before he came in possession of the estate. *Clavering v. Clavering*, 2 P. Wms. 388.

Stoughton v. Leigh, 1 Taunt. 402, was a case directed out of the High Court of Chancery for the opinion of the law judges.

The case involved the right of the widow to dower in certain mines on an estate of which her husband had died seised. The mine had been opened and wrought, but had ceased to be worked long prior to the husband's death. The question was whether the widow, in virtue of her estate in dower, was entitled to work the abandoned mine for her own benefit.

The judges answered that the widow was dowable of all the mines which had been opened and worked in her husband's lifetime, and "that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband, in his lifetime, or by those claiming under him, since his death."

In *Viner v. Vaughan*, 2 Beav. 466, Lord Langdale said: "A tenant for life has no right to take the substance of the estate by opening mines or clay-pits; but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it, and for this reason that the author of the gift has made them part of the profits of the land."

A temporary injunction was granted, so that the right of the life tenant to work the clay-pits might be passed upon. That this case did not receive a thorough consideration, is shown by the fact that *Stoughton v. Leigh* was not referred to.

This subject was carefully considered by Lord Romilly, in *Bagot v. Bagot*, 32 Beav. 509, where he says: "With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in working those mines. It is always a question of degree to be established by evidence, whether the working of a mine which has been formerly worked, is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months, or two years, previously to the tenant for life coming into possession, must still be considered an open mine. A mine which has not been worked for one hundred years cannot, I think, be properly so treated. My present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working, might, without committing waste, be worked again by a succeeding tenant for life. But, if the working of the mine had been abandoned by the owner of the inheritance many years previously, with a view to some advantage which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, I doubt whether a succeeding tenant for life could properly treat that as an open mine."

In *Elias v. Griffith*, L. R. (4 App. Cas.), 465, Lord Selborne says: "Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life, or other owner of an estate impeachable for waste, may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt if a mine or quarry has been worked for commercial profit, that must, ordinarily, be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e. g.*, for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification not previously known, into the law of mines.

"The other observation which I desire to make is, that when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or quarry; and for this, authority is to be found in the cases which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot*, and *Cowley v. Wellesley* [L. R. 1 Eq. 656]."

In *Elias v. Griffith*, L. R. 8 Ch. Div. 521, Lord Cotton remarked that, "To enable a termor, or tenant for life punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor."

The case of *Clavering v. Clavering*, 2 P. Wms. 388, which recognizes the right of the life tenant to open new pits or shafts, for the working of an old vein of coal, has never been overruled in the English courts.

These citations show that, in England, the life tenant has a right to use a mine for his own profit, where the owner of the fee, in his lifetime has opened it, even though he may have discontinued working upon it for a long period of years.

The rule by which the right of the life tenant is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital, or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use.

A mere cessation of work, for however long a period, will not defeat the life tenant's right, but an abandonment for a day, with a view, in the language of Lord Romilly, "to some advantage to the property, which the fee owner considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral," would extinguish any claim on the part of the life tenant. If the fee owner should sink a shaft, and afterwards erect a dwelling-house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate, so clearly, his intention to devote his estate to other uses than mining, that the life tenant could not base any right upon the prior opening.

The distinction between mere cessation of use and such an abandonment as has been adverted to, is recognized in the cases in this country.

In the New York Supreme Court, a widow was held to be dowable of a bed of iron ore, although the openings which had been made by the husband had been partly filled up and the work discontinued in his lifetime. *Coates v. Cheever*, 1 Cow. 460.

Chief-Justice Shaw, in *Billings v. Taylor*, 10 Pick. 460, expresses the like view: "Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death, by the heir or his assignee."

Stoughton v. Leigh, *Coates v. Cheever*, and *Billings v. Taylor*, are cited with approbation by Chancellor Green, in *Reed v. Reed*, 1 C. E. Gr. 248.

The American cases have modified the law of waste, to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped lands. *Hustings v. Crunckleton*, 3 Yeates, 261; *Findlay v. Smith*, 6 Munf. 134; *Ballentine v. Poyner*, 2 Hayw. 110; *Neel v. Neel*, 7 Harris, 323; *Irwin v. Covode*, 12 Harris, 162.

In *Neel v. Neel*, a coal mine had been opened and worked for family use, and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case, Judge Lowrie said: "It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, &c., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, to make new openings in the ground."

In support of these views he cites the English and American cases, and expresses himself without reference to the Statute of 1848.

Chancellor Kent says: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country." 4 Com. 76.

The cases referred to will show a strong inclination to amplify the privileges of the life tenant.

In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored.

When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose, has some support in the adjudications in this country, and is certainly not without reason to uphold it.

To maintain the right of the appellant in this case, it is not necessary to broaden the rule to that extent.

The openings in this case were such as, under the English cases, will establish the right in the life estate to pursue the workings upon the veins which had been opened.

It is sufficient to show that openings were made and ore taken out with a view to profit, and it is wholly immaterial whether the ore was used in the manufacture of copperas or for some other commercial purpose.

The evidence shows a mere cessation of the work, not such an abandonment, in the legal sense of that term, as will defeat the right of the life tenant. The length of time during which cessation continued is immaterial, so long as the fact of abandonment is not established.

The decree of the Chancellor, so far as it denies the right of the appellants to work the veins of ore upon which the openings had been made in the lifetime of the owner of the fee, and so far as it enjoins such work, should be reversed, and in other respects affirmed.

*Decree unanimously reversed.*¹

¹ See *Kier v. Peterson*, 41 Pa. 357 ; *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344.

CHAPTER V.

TITLE-DEEDS.

LEATHES v. LEATHES.

CHANCERY. 1877.

[Reported 5 Ch. D. 221.]

THIS was a motion on behalf of the plaintiff, who was tenant for life in remainder of a settled estate under a will, that he might be at liberty to deposit in court the title deeds of the estate, and that they might be retained in the custody of the court till the hearing of the action, when they might be secured for the benefit of the several persons interested in the estate.

The deeds had come into the plaintiff's possession during the lifetime of his father, the testator, for whom he acted as solicitor.

The defendant, the first tenant for life, claimed to be entitled to the custody of the deeds, but the plaintiff alleged that he had long resided in Australia, also that, as there was a contest respecting the ownership of part of the estate, the defendant might make use of the deeds by showing them to those who had an adverse claim, to the prejudice of those entitled in remainder.

Ince, Q. C., and *Chester*, in support of the motion.

Chitty, Q. C., and *Langworthy*, for the defendant.

JESSEL, M. R. A legal tenant for life of freeholds is entitled to the custody of the title deeds as a matter of right, except in cases where he has been guilty of misconduct so that the safety of the deeds has been endangered, or where the rights of others intervene, and it becomes necessary for the court to take charge of the title deeds in order to carry out the administration of the property.

In *Garner v. Hannynghton*, 22 Beav. 627, 630, Lord Romilly held that "the legal tenant for life is *prima facie* entitled to the custody of the title deeds." The question came before the Court of Exchequer in *Allwood v. Heywood*, 1 H. & C. 745, when the full court held that it was but reasonable that the plaintiff, who was legal tenant for life, should have the custody of the title deeds. There are many *dicta* to the same effect, including a passage in Sugden's *Vendors and Purchasers*, p. 446, n.

The only case the other way is that of *Warren v. Rudall*, 1 J. & H. 1, 13, where the deeds were in court, and Vice-Chancellor Wood stated the rule thus: "With respect to the title deeds, it is a settled doctrine

that this court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder; but in the case of a stranger tenant for life the court will interfere; and this is in fact a particularly strong case, because the deeds are in court, and I am asked to deliver them out. The reversioner has no connection with the tenant for life; the title deeds must remain in court." There is a *dictum* of Lord Hardwicke in *Pyncent v. Pyncent*, 3 Atk. 571, to the same effect; but it is quite contrary to law, for the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question.

Now I come to consider what are the circumstances in which the court will interfere. First, the court will interfere when there is any danger to the safety of the deeds if left in the custody of the tenant for life; and, secondly, where the court is carrying out the trusts of the property, and the deeds are wanted for that purpose. Beyond these cases the court cannot go.

The case of *Stanford v. Roberts*, Law Rep. 6 Ch. 310, was referred to. In that case there was a pending suit affecting the estate; and, as I understand the case, the Lords Justices were of opinion that there was an actual duty to be performed by the trustees, and Lord Justice James observed: "This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question, then, is where, having regard to the purposes of the suit, the deeds can be most conveniently kept. The Vice-Chancellor has, in the exercise of his judicial discretion, held that it is most convenient to allow them to remain where they are, and with that discretion we shall not interfere."

The other case referred to was that of *Jenner v. Morris*, Law Rep. 1 Ch. 603, 606. That was rather a peculiar case. A suit had been instituted for raising portions out of a settled estate. Pending the suit, the tenant for life took a number of the leases to Paris. He afterwards, under an order of the court, brought the whole of the title deeds and leases into court for the purposes of the suit. After the purposes of the suit had been satisfied and the portions raised by mortgage, he applied to have the title deeds and leases given up to him. This application was opposed by the mortgagees, and refused by Vice-Chancellor Kindersley. When the case came before the Court of Appeal, Lord Justice Knight Bruce said: "I cannot, without the consent of the mortgagees, concur in an order for delivery of these documents to a tenant for life who on a former occasion has, without any necessity, taken a number of them out of the jurisdiction." Therefore the sole ground of his decision was, that the tenant for life had taken them out of the jurisdiction, and that in his opinion there was danger to the deeds if they remained in his custody. Lord Justice Turner did not agree, but by consent an order was made for the delivery of the deeds to the tenant for life upon his giving security for their safe custody, and

for their production at reasonable times, and for their return into court if ordered.

In the present case, the first reason in support of the motion that I have to consider is, that the tenant for life has for many years resided in Australia. That is no reason at all. Secondly, it is urged that there is a contest as to the ownership of a portion of the estate, and that the tenant for life might show the deeds to the adverse claimants. There appears, however, no ground for such a suspicion.

The motion must be refused.

NOTE. — HEIRLOOMS. “And note, that in some places chattels as heirlooms (as the best bed, table, pot, pan, cart, and other dead chattels movable) may go to the heir, and the heir in that case may have an action for them at the common law, and shall not sue for them in the ecclesiastical court; but the heirloom is due by custom, and not by the common law.” Co. Lit. 18 b.

CHAPTER VI.

EMBLEMENTS.

LIT. § 68. TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end.¹

Co. LIT. 55 a, 55 b. "*Yet if the lessee soweth the land, and the lessor after it is sown, &c.*" The reason of this is, for that the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the Commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots, or sow hemp or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acorns, &c., there the lessor may put him out notwithstanding, because they will yield no present annual profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corn sown, &c., but to every particular tenant that hath an estate uncertain, for that is the reason which Littleton expresseth in these words (*because he hath no certain nor sure estate*). And therefore if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God. And the same law is of the lessee for years of tenant for life. So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corn, and if his wife die before him he shall

¹ In tenancies for years the law is otherwise in Pennsylvania. *Stultz v. Dickey*, 5 Binn. 285 (1812).

have the corn. But if husband and wife be joint-tenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said that she shall have the corn. If tenant *pur terme d'aufer vie* soweth the ground, and *cestuy que vie* dieth, the lessee shall have the corn. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enseint* with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God, and it is good for the Commonwealth that the ground be sown. But if the lessee at will sow the ground with corn, &c., and after he himself determine his will and refuse to occupy the ground, in that case the lessor shall have the corn, because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband, the lessor shall have the emblements, because that the determination of her own estate grew by her own act. But where the estate of the lessee being uncertain is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c., there he that hath the right paramount, or that entereth for any forfeiture, &c., shall have the corn.

MR. SPENCER'S CASE.

COMMON PLEAS. 1622.

[Reported *Winch*, 51.]

Harvy, Serjeant, came to the bar, and demanded this question of the court, in the behalf of Mr. Spencer: A man was seised of land in fee, and sowed the land, and devised that to I. S., and before severance he died; and whether the devisee shall have the corn, or the executor of the devisor, was the question; and by HOBERT, WINCH, and HUTTON, the devisee shall have that, and not the executor of the devisor; and HARRIS said, 18 Elizabeth, *Allen's Case*, that it was adjudged, that where a man devised land which was sowed for life, the remainder in fee, and the devisor died, and the devisee for life also died before the severance, and it was adjudged that the executor of the tenant for life shall not have that, but he in remainder; and WINCH, Justice, said that it had been adjudged, that if a man devise land, and after sow that, and after he dies, that in this case the devisee shall have the corn, and not the executor of the devisor, *nota bene*.¹

¹ See *Anon. Cro. El.* 61.

LATHAM *v.* ATWOOD.

KING'S BENCH. 1638.

[*Reported Cro. Cur.* 515.]

TROVER and conversion of two hundred and fifty pounds of hops. Upon not guilty pleaded, the case appeared to be :

A woman, tenant for life, takes to husband the plaintiff, 5 Car. 1, the remainder being to the defendant for his life. These hops were growing out of ancient roots, being within the land in question; the wife dies the 19th August, 9 Car. 1, the hops then growing and not severed, &c.

The question was, Whether these hops appertained to the husband or to him in remainder? because she died so small a while before the gathering of them; and they are such things as grow by manurance and industry of the owner, by the making of hills and setting poles.

THE COURT, upon the motion of *Grimston*, who was of counsel with the plaintiff, held, that they are like emblements, which shall go to the husband or executor of the tenant for life, and not to him in remainder; and are not to be compared to apples or nuts, which grow of themselves. Wherefore adjudged for the plaintiff.

PEACOCK *v.* PURVIS.

COMMON PLEAS. 1820.

[*Reported 2 Brod. & B.* 362.]

REPLEVIN for growing corn. Cognizances for half a year's rent, due the 12th of May, 1819. Pleas. First, *non tenuit*; second, a writ of *feri facias* issued upon a judgment recovered by the plaintiff, in Hilary term, 1819, against W. Peacock, under which the sheriff seized the corn on the 28th April, 1819, and, having paid the landlord one year's rent, sold the corn (not saying by agreement in writing) to the plaintiff, who then became possessed of the same. There were also pleas, stating a custom for a waygoing crop. General demurrer and joinder.

Hullock, Serjeant, for the defendant.

D'Oyley, Serjeant, for the plaintiff.

DALLAS, C. J. Though this question is not altogether new, there certainly are no decisions expressly in point. But different cases have been referred to: first, one in Willes; next, a case containing a *dictum* of the late Lord Chief Baron; and I shall begin by adverting to these, before I proceed to investigate the principles on which the present case

must turn. In the case in Willes, the question now before us was not decided, although it was presented for the consideration of the court; because, upon the facts of that case, it became unnecessary to decide it. But it was certainly stated, that if the present question should occur, "it might have required very good consideration, it being a point of great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law, and, therefore, cannot be distrained for rent, is expressly holden in Co. Lit. 47 a, and several other books; and we are inclined to be of this opinion." "But we think we have no occasion to enter any further into this matter, because we are all clearly of opinion, that if there had been no execution in the present case, yet the corn could not be distrained." That case, therefore, only proves the court to have thought, that this point, if presented for decision, would have required their best consideration. *Gwilliam v. Barker* was similar, in fact, to the present case, though the question before the court in that case is not the question here.

It is admitted that a *dictum* is to be found in that case, in favor of the landlord's right to distrain, but that was not the point on which the decision turned; and this *dictum* of a moment is perhaps impaired by what follows. "I do not think the Statute applies to corn in the blade; it would be a monstrous thing to cut it in such a state." So that it seems inconsistent with the argument used to-day, and with the Statute, because by the Statute, corn in the blade may be distrained. This, therefore, being a new question, that is, a new question in judgment, and one on which no express decision can be found, we must recur to principle, in order to arrive at a decision; and, in considering the point on principle, we must look to the reason and sense of the thing. With respect to an execution on goods, the course of the sheriff is clear and easy; he seizes, makes a bill of sale, delivers the goods to the purchaser, and retires; and why does he deliver the goods? because he can deliver them, and is therefore bound to do so: that makes it necessary for us to consider the distinction between goods and growing corn. It is admitted, the law authorizes growing corn to be seized; and why? To satisfy the judgment.

But the writ of *feri facias* would be quite nugatory towards such a purpose, in a case like the present, if the right of the party were to cease the moment the bill of sale is executed, and if he were not allowed to wait till the corn became ripe and valuable, in order to reap the benefit of his purchase. With respect to goods, it is true, the sheriff, or the person purchasing of him, is bound to remove them within a reasonable time; but it is to the delivery that the law looks, and that must be made within a reasonable time; so here, the sheriff is bound to deliver, and in a reasonable time; but being so bound, when is it he can deliver? when the corn is ripe; and, after that period, it must not remain an unreasonable time. The question, therefore, always is, What is a reasonable time for delivery? and I fully agree

with the counsel for the plaintiff, that the delivery of the crop and the satisfaction of the judgment, are the objects of the law; that not only things actually in the hands of the sheriff are *in custodia legis*, but that, virtually, all things taken in execution remain in such custody till the sheriff can deliver them, so as to give effect to the judgment. If there be any doubt as to this, we should refer to the Statutes respecting landlords; by those Statutes, growing corn is considered as goods; and the provisions touching a distress of such corn are, that it is to be distrained as if it were goods and chattels. I put, therefore, the same construction on this case, in favor of creditors, as obtains, under the Statutes, in favor of landlords. My opinion clashes with no authority; and being called on to decide on principle, I think, on principle, the defendant had no right to distrain.

PARK, J. The question was well put by the counsel for the defendant, with the addition which was made by my Brother Burrough; and that is the fair question in this case. If the decision of the court were any other than it is to be, the effect of the law would be entirely destroyed; because, how could the law be available to execution, if those who purchased under a sheriff were not allowed to retain what they had bought? But the doctrine is not entirely new; for, though there was no direct decision on the point in the case in Willes, the language of the court there, is a pretty strong argument, to show that their opinion was against what the defendant contends for. I agree with the counsel for the plaintiff in his argument, that if the law authorizes this property to be taken under an execution, it authorizes everything which will make that execution available. Here, all was done which was requisite to render the seizure legal; the landlord had his deduction fairly allowed at the time, and the purchaser must be allowed to retain what the law has given him.

BURROUGH, J. I have a high opinion of whatever proceeded from the late Chief Baron Thompson, but I do not think that which has been ascribed to him was his deliberate opinion; and the intimation of the court in Willes is an authority the other way. I am clearly of opinion that these goods were in the custody of the law. For, how does the case stand? Here is a judgment creditor, who purchases growing corn under an execution, but he has no satisfaction till the corn is carried away, and till then, he is under the protection of the law. The case of assignees and executors differs from the present: they stand only in the place of the bankrupt and testator, and there is a continuation of the same right of property; here, the property is transferred from one hand to another. Supposing we were not to decide as we have done, it would only alter the practice, and cause executions to be kept alive from term to term, it being clear that the landlord is entitled to no more than one year's rent on the execution of a *feri facias*.

RICHARDSON, J. I am of opinion, that crops in the hand of the sheriff's vendee are protected from distress; and this is a necessary consequence of allowing such crops to be liable to seizure. That, how-

ever, is clearly so, though little on the subject is to be found in the books. It has always been held as undoubted, which perhaps is the reason why so little appears; such crops are *fructus industriales*, which would go to the executor, and therefore have been considered seizable as goods and chattels. But, where the law authorizes a seizure, it authorizes all that which will make the seizure available. Now here the seizure would be utterly unavailable, if the purchaser could not retain that which he bought under the sheriff's sale. *Eaton v. Southby* [Willes, 131], comes very near the present case, though there it was not necessary to decide the point; but the Chief Justice, in delivering the judgment of the court, thought growing crops might be protected after sale by the sheriff. Though the Statute of 11 Geo. 2, gives landlords great powers, which they did not possess before, yet it only enabled them to distrain crops in the same manner as other goods. But other goods must always be taken as subject to any prior rights which may have attached to them: here, a right had attached to the crop in question, incompatible with the landlord's distress. In order, therefore, to make the writ of *fiery facias* available to the purposes for which, by law, it was intended, there must be, in this case, —

Judgment for the plaintiff.

GRAVES v. WELD.

KING'S BENCH. 1833.

[Reported 5 B. & Ad. 105.]

TROVER for clover, the clover hay, and clover seed. Plea, not guilty. At the trial before *Taunton, J.*, at the Dorsetshire Summer Assizes, 1832, a verdict was found for the plaintiff, subject to the following case: —

The plaintiff being possessed of a close under a lease for ninety-nine years, determinable on three lives, in the course of the spring of 1830, sowed it with barley; and in May of the same year, he sowed broad clover seed with the barley. The last of the three lives expired on the 27th of July, 1830, the reversion then being in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little of the clover plant which had sprung up was cut off and taken together with the barley. In January, 1831, the plaintiff gave up the possession of the close to the defendant. According to the usual course of good husbandry, broad clover is sown about April or May, and the crop is fit to be taken for hay about the beginning of June in the following year. The clover in question was cut by the defendant about the end of May, 1831, which was more than a twelve-month after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the

crop is made thicker; if not so fed off, the shoots would be killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself; but more frequently with barley, flax, oats, or wheat. The part of the clover plants cut off with the barley at the time of mowing it, makes the barley straw better as fodder; but the clover is sown for hay, or seed, and not to improve the barley straw. When the clover grows up high, it is injurious to the barley. It is the common course of husbandry, to take for hay a second crop of the clover in the autumn of the year after it is sown; and a second crop was so taken by the defendant in the autumn of 1831. But when it is intended for seed, no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat. There was no covenant in the lease as to the away going crop, or binding the tenant to any particular course of husbandry.

The learned judge took the opinion of the jury on the two following questions: First, whether the plaintiff received any benefit from taking the clover with the barley straw, sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. Secondly, whether a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would sow clover with his barley in the spring, where there was no covenant that he should do so; and, whether, in the long run, and on the average, he would repay himself in the autumn for the extra cost incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the court was, whether the plaintiff was entitled to the clover cut in May, 1831, as emblements.

The case was argued in this term.

Follett, for the plaintiff.

Gambier, for the defendant.

DENMAN, C. J. In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that

the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not *the crop growing at the end of the term*. The last *cestui que vie* died in July; the barley and the clover were then growing together on the same land, and a crop of *both*, together, was taken by the plaintiff in the autumn of that year; though the crop of clover of itself was of little value. Thus the plaintiff has *had one crop*; and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground; but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends, are Littleton, § 68, and Coke's Commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him." Lord Coke, Co. Lit. 55 a, says, "The reason of this is, for that the estate of the lessee is uncertain, and, therefore, lest the ground should be unmanured, which should be hurtful to the Commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots or sow hemp or flax, or any other *annual* profit, if after *the same be planted*, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have *that year's crop*. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acorns, &c., there the lessor may put him out notwithstanding, because they will yield *no present annual profit*." These authorities are strongly in favor of the rule contended for by the defendant's counsel; they confine the right to things yielding present *annual* profit: and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*, Cro. Car. 515, they were

held to be “like emblements,” because they were “such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:” that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. Mr. Cruise, in his Digest, i. 110, ed. 3, says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who *planted* the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, in which teazles were held by the Court of Common Pleas to be so. But this point was not argued, and the court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it *may be*, that *in* the year when the plant is fit to gather, so much labor and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant Hill in 9 Vin. Abr. 368, in Lincoln’s Inn Library, which Mr. Gambier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine *after* harvest, whereas here it determined before.

The weight of authority, therefore, is in favor of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes, which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something *more* than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant’s rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment. *Judgment for the defendant.*¹

¹ See *Reiff v. Reiff*, 64 Pa. 134; *Evans v. Iglehart*, 6 G. & J. 171, 188 *et seq.*; *Flanagan v. Seaver*, 9 Ir. Ch. 230.

COOPER v. WOOLFITT.

EXCHEQUER. 1857.

[Reported 2 H. & N. 122.]

THE declaration alleged that W. Cooper, in his lifetime and at the time of his death, was seised in fee of certain land called the "Clay pits," and being so seised sowed the same with a crop of corn and barley, which was growing thereon at the time of his death; and that at the time of the committing of the grievances hereinafter mentioned, the plaintiffs, as executors, were entitled to the said crop of corn and barley, which was then growing on the said land, and to a right of way, &c., for the purpose of cutting and carrying away the said crop of corn and barley; that the crop was ripe and ready to be cut; yet the defendant obstructed the said way, and prevented the plaintiffs from entering and carrying away the said corn, &c.

Plea. That W. Cooper, by his last will, devised the said land, called the "Clay pits," unto one M. Woolfitt, to hold the same to the use of M. Woolfitt, her heirs and assigns forever, whereby M. Woolfitt became seised of the said land called the "Clay pits," and entitled to the crop of corn and barley growing thereon; and that M. Woolfitt being so seised and so entitled to the said crop of corn and barley, the defendant, as the servant of M. Woolfitt, committed the supposed grievances.

Replication. That W. Cooper, by his will, gave and devised the said land to M. Woolfitt, chargeable, nevertheless, with the payment of a legacy of £20 thereafter bequeathed to Samuel Cooper, to hold the same, chargeable as aforesaid, unto and to the use of M. Woolfitt, her heirs and assigns forever. And, by his will, he gave and bequeathed to M. Woolfitt and Sarah Cooper, in equal shares, all his moneys, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever *not thereinbefore specifically bequeathed*; and by a codicil to his said will, duly executed, &c., he revoked the said bequest, in favor of the said M. Woolfitt, of one half part of the residue of his personal estate and effects, and bequeathed such one half part to the plaintiff, Henry Cooper, and afterwards died without altering his said will and codicil as to the said bequest, and that the corn and barley in the declaration mentioned was not specifically bequeathed by the will or codicil, or otherwise.

The defendant demurred to the replication. He also rejoined: That W. Cooper, by his said will, bequeathed to the said Samuel Cooper, the legacy of £20, to be payable at the end of twelve calendar months next after his decease, by M. Woolfitt, out of the close of land called "Clay pits," &c. And he also bequeathed unto Joseph Cooper

absolutely, all that his post windmill, with the sails, gear and appurtenances; and that the said W. Cooper, by his said will, gave and bequeathed unto M. Woolfitt and the plaintiff, Sarah Cooper, in equal shares, all his moneys, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever not thereinbefore specifically bequeathed, subject to the payment of all his just debts, his funeral and testamentary expenses, as well as to the payment of legacies of £20 apiece unto James Cooper and E. Cooper, and he appointed them, the said M. Woolfitt and Sarah Cooper, joint executrixes of his said will; and that the said W. Cooper, by his said codicil, charged his aforesaid mill and appurtenances bequeathed to the said Joseph Cooper with the payment of the said two legacies of £20 apiece to the said James Cooper and E. Cooper, in exoneration of his residuary personal estate, and he appointed the plaintiff, Henry Cooper, joint executor with the said Sarah Cooper of his will.

The plaintiff demurred to the rejoinder.

Bittleston, for the defendant.

Joseph Brown, for the plaintiff.

POLLOCK, C. B. The question is, whether, under the large words employed by the testator in the bequest of personalty, the growing crops are so clearly given to the legatee as to take them out of the operation of the rule of law which, in case of a devise of the ground on which the crops stand, gives them to the devisee. A devisee takes more than the heir would have done; for he is not *hæres factus*, but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land, and as such to all crops growing on the land at the time of the testator's decease, unless it appears with certainty that the testator intended some one else to take them. Here it is impossible to say that it is clear that the testator intended to give these crops to the executors. I am therefore of opinion that there must be judgment for the defendant.

MARTIN, B. I am of the same opinion. The replication shows that the testator having given to M. Woolfitt the close called "the Clay pits," bequeathed to H. Cooper and S. Cooper all his personal estate whatsoever and wheresoever not thereinbefore specifically bequeathed. It is said that this applies to the crops growing on the land in question. But according to the well-established rule, they go to the devisee of the land unless expressly given by the will to some one else.

BRAMWELL, B. I am of the same opinion. It is said that the general bequest of the personal estate, not thereinbefore specifically bequeathed, shows that the emblements were not to go to the devisee of the land. But, in fact, this amounts to nothing, because in every case where an executor is appointed all the personal effects vest in him.

CHANNELL, B. I am of opinion that the defendant is entitled to judgment upon each of the demurrers. The law is thus stated in Shephard's Touchstone, by Preston, p. 472: "As between an executor

and devisee the emblements belong to the devisee, unless they are expressly bequeathed." Here there is nothing either in the will or the codicil to cut down the effect of the devise to M. Woolfitt.

Judgment for the defendant.

IN RE ROOSE.

CHANCERY. 1880.

[*Reported 17 Ch. D. 696.*]

MARGARET ROOSE, widow, deceased, by her will, dated the 24th of July, 1879, gave all her real estate to her daughter, Grace, the wife of Thomas Williamson, during her life, for her separate use, and after her decease to her children. The testatrix then proceeded as follows: "I give unto my granddaughter, Catherine Williams, the sum of £1,000, and all the household furniture, farming stock, goods, chattels and effects which shall be in and about Froudeg at the time of my decease." And the residue of her personal estate the testatrix gave to her trustees, Thomas Evans and Owen Jones, — whom she also appointed executors, — upon trust for sale, and to hold the proceeds upon trusts for the benefit of her said daughter, Grace Williamson, her husband and children.

One of the questions raised in the action — which was for the administration of the personal estate of the testatrix — was whether the crops growing upon the testatrix's freehold farm called Froudeg at the time of her death passed to Grace Williamson as the devisee of the said farm, or to Catherine Williams as legatee of the "farming stock."

Ince, Q. C., and J. Maurice Lloyd, for the plaintiffs.

Russell Roberts, for Grace Williamson.

JESSEL, M. R. I am of opinion that I am bound by authority to hold that the specific legatee took the growing crops in question. This case seems almost identical with the reported cases. The words in *Cox v. Godsolve* were "stock of my farms," and the question was whether the corn growing passed to the defendant John Godsolve, who was devisee in remainder of the land sown, or whether it passed to his mother under a bequest of "all my goods, chattels, and stock of my farms." The argument was that you could not give the corn to the devisee of the land by implication against an express bequest. The judgment of Lord Holt was that the gift of the corn was to the mother and not to the son; that is to say, he held that the words "stock of my farms" included growing crops.

The point came before Lord Ellenborough, in 1807, in *West v. Moore*, where he treated the law as settled. There a testator bequeathed the "stock upon my farm, and all other my personal estate of what nature or kind soever;" and it was held that that passed the growing crops as against the devisee of the land. What Lord Ellenborough says is this (8 East, 343): "The case of *Cox v. Godsolve*, 6 East, 604 n., before Lord Holt, is in terms so much the same as this,

that it must conclude it: though but for that case I should have been more inclined to think that stock on the farm meant movable stock." That shows that Lord Ellenborough decided upon the words "stock upon my farm" and nothing else.

Then the point seems next to have come, in 1825, before Lord Gifford, Master of the Rolls, in *Blake v. Gibbs* (note to *Vaisey v. Reynolds*, 5 Russ. 13). That was the case of a testatrix who was tenant for life only of a plantation in Jamaica on which the growing crops in question stood. The only question was whether the word "stock" included the growing crops. By her will the testatrix devised "all and every her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses, and other live and dead stock" upon the plantation. The question was, what was the meaning of the words "and other live and dead stock." It was argued on the authority of *Cox v. Godsalve* and *West v. Moore*, 8 East, 339, that a bequest of the stock upon a farm would include growing crops. In delivering judgment, Lord Gifford says this (5 Russ. 16): "The two cases, which have been cited, prove, that the emblements are part of the stock, and will pass under the description of stock on a farm; and I cannot help thinking that the claim of the specific legatee is stronger here than in either of those cases, from the circumstance of the testatrix having been only tenant for life."

Then the point seems to have come, in 1828, before Sir John Leach in *Vaisey v. Reynolds*, *Ibid.* 12, and what he says is very odd. There the gift was of "all and every my book debts, moneys in hand, stock in trade in my dwelling-house, shop, and malting; and also my farming stock of every kind and description whatsoever;" and Sir John Leach held that the growing crops did not pass under the gift of the farming stock, as against the devisee of the land, because there was no gift of the residuary personal estate to the legatee of the farming stock. I must say I think he was entirely wrong. No one would hold that a general bequest of personal estate would pass growing crops as against the devisee of the real estate, — that under a gift of the real estate to A. and of the personal estate to B., A. would not take the growing crops, yet that is the substance of Sir John Leach's decision. As Lord Holt's decision in *Cox v. Godsalve* is reported, we cannot tell what his reasons were; but Lord Ellenborough says, in *West v. Moore*, that a gift of the "stock on my farm" will pass the growing crops as against the devisee of the land; and Lord Gifford, in *Blake v. Gibbs*, also says that the growing crops will pass under the description of stock on a farm. But Sir John Leach says this (5 Russ. 17): "In the case of *Cox v. Godsalve*, where the words of the gift to the executor were 'stock of my farms,' there were other words in the gift which comprised all personal estate. And in *West v. Moore*, where the words of the gift to the executor were, 'stock upon my farm,' the whole personal estate of every nature and kind was, in terms, comprised in the gift. These cases were between the executor and the devisee of the land."

That is not quite correct: in *Cox v. Godsalve* it is true that the mother, who was the legatee of the stock, was one of the executors, but the stock was not given to her as an executor. Then Sir John Leach goes on: "And the rule is, that, although crops on the ground are personal estate, and, generally speaking, pass to the executor, yet, as between the executor and the devisee, the devisee will take them with the land, unless the intention of the testator appears to be otherwise. In these two cases such intention seems to have been inferred, rather because the executor was plainly meant to take the whole personal estate, than from the mere force of the words 'stock of my farm,' or 'stock upon my farm.'" All I can say is, having read the case before Lord Ellenborough, I think Sir John Leach made a mistake. Lord Ellenborough says "stock upon my farm," in so many words, passes the growing crops, showing that those were the words he relied upon. I am therefore of opinion that the distinction taken by Sir John Leach between those two cases and the case before him is quite untenable. Then the last case is *Rudge v. Winnall*, 12 Beav. 357, in 1849, before Lord Langdale, M. R. There the testator devised real estate to his trustees and executors, in trust for A., and bequeathed "all his live and dead stock" and the whole of his personal estate to the same trustees and executors upon trusts for various persons. *Vaisey v. Reynolds*, 5 Russ. 12, was cited in the argument, and the Master of the Rolls held that the growing crops formed part of the personal estate of the testator; but I cannot find from the report whether he so decided on the ground of the gift of the whole personal estate or of the gift of "live and dead stock;" consequently that case does not help me any further than the previous cases.

In the present case the gift is in these terms: "I give unto my granddaughter Catherine Williams the sum of £1,000 and all the household furniture, farming stock, goods, chattels and effects, which shall be in and about Froudeg at the time of my decease." Now, the words "farming stock" would of themselves pass the growing crops, and they would not form part of his general personal estate as against the legatee of the farming stock. The question is whether they pass to the legatee as against the devisee of the real estate. As Lord Ellenborough said in *West v. Moore*, the question is one of intention. What he says is this (8 East, 343): "The case of *Cox v. Godsalve*, before Lord Holt, is in terms so much the same as this, that it must conclude it: though but for that case I should have been more inclined to think that stock on the farm meant movable stock." By which he means that *Cox v. Godsalve* decided that stock on the farm included stock that was not movable. Then, after saying that, as against the executors, the standing corn goes to the devisee of the land, he proceeds: "This is founded upon a presumed intention of the deviser in favor of his devisee. But this again may be rebutted by words which show an intent that the executor shall have it." Then he notices the case before Lord Holt, observing that the only difference between that case and the

one before him was that in the former case the legatee of the stock was not the sole executor, and that there was no material distinction between the two cases: and he winds up by saying, "and a construction having been once put upon these words, the question is now concluded." So that he says the question was concluded by the construction put upon the words "stock on the farm," that is, without reference to any other words.

Now, in my opinion, a construction having been put upon these words, I must treat the question as concluded. I must, therefore, hold that in using the words "farming stock in and about Froudeg," the testator intended to include, and that they did include, the growing crops, and I so decide.

TERHUNE v. ELBERSON.

SUPREME COURT OF JUDICATURE OF NEW JERSEY. 1810.

[*Reported 2 Penning. 533.*]

THE action below was an action of trespass, for cutting down and taking away eighty bushels of rye, and twenty bushels of wheat of the plaintiff below, Elberson, by the defendant below, Terhune, the 7th July, 1810.

The defence set up, was, that the defendant below purchased the land on which he cut the wheat and rye of the plaintiff below, the 4th May, 1810, and had gone into possession of the premises under the said deed, on which the wheat and rye was cut at the time of cutting it, which fact appeared by the record.

It was contended by the plaintiff below, that although he did sell the land on which the wheat and rye was cut, to the defendant, in May, and give him possession thereof, yet that this sale did not convey the wheat and rye growing on the land. That whoever sowed in peace should reap in peace. The cause was tried by a jury, and verdict and judgment for the plaintiff for \$30, with costs.

BY THE COURT. The doctrine of emblements does not apply to this case. The sale and conveyance of the land in fee simple, carried with it the wheat and rye growing on the land, unless the wheat and rye was specially reserved, which was not pretended.

Let the judgment be reversed.

SMITH v. PRICE.

SUPREME COURT OF ILLINOIS. 1865.

[Reported 39 Ill. 28.]

WRIT of error to the Circuit Court of Marion county; the Hon. *Silas L. Bryan*, judge, presiding.

The case is stated in the opinion of the court:

Messrs. Willard and Goodnow, for the plaintiff in error.

Mr. H. K. S. O'Melveny, for the defendant in error.

MR. JUSTICE LAWRENCE delivered the opinion of the court. This was a bill in chancery filed by Smith, plaintiff in error, to enjoin Price, the defendant in error, from removing certain fruit-trees growing in a nursery, and certain ornamental shrubbery, from a tract of land sold by the latter to the former. Price answered (the oath to his answer having been waived), and on the coming in of the answer a motion was made to dissolve the injunction. A replication was filed and the case seems to have been irregularly set down for final hearing at the same time with hearing the motion to dissolve, and to have been finally disposed of upon the pleadings, and the affidavits filed for and against the motion. As no exception was taken to this proceeding, it was probably had by consent. The court rendered a decree making the injunction perpetual as to a part of the trees, and dissolving it as to a part; and from this decree the complainant prosecutes a writ of error.

The defendant admits a sale of the land by himself to the complainant, and that the latter went into possession under the contract of purchase, but insists that one of the terms of the sale was a verbal reservation of the nursery trees and some other ornamental shrubbery. The proof made in the affidavits upon this point is uncertain and contradictory.

While fruit-trees and ornamental shrubbery grown upon premises leased for nursery purposes would probably be held to be personal property, as between the landlord and tenant, yet there is neither authority nor reason for saying that, as between vendor and vendee, such trees and shrubbery would not pass with a sale of the land. They are annexed to, and a part of the freehold. As between vendor and vendee, even annual crops pass with the land where possession is given. *Bull v. Griswold*, 19 Ill. 631. Under the contract of sale and the delivery of possession by Price to Smith, the latter became the owner of the trees as well as of the soil, and it would be a violation of the most familiar rules of evidence to receive proof of a verbal arrangement contemporaneous with the written contract and impairing its legal effect. The parties, in executing the written instrument, deliberately made it the exclusive evidence of the terms of their agreement. This instru-

ment shows a sale of the land in such terms as to pass the trees. No reservation is made, and to permit the vendor now to show that there was a verbal agreement for their reservation, would be to permit him to prove a verbal contract, inconsistent with the legal import of that executed by the parties under their hands and seals. This the law forbids. We find nothing in the case to make it an exception to this familiar principle, and it is therefore unnecessary to advert to the evidence in detail. As the record shows that Price had actually removed a part of the shrubbery, and claimed the right to move much more, it was a proper case for an injunction, and the decree will be reversed and the cause remanded, with instructions to the court to proceed in conformity with this opinion. *Decree reversed.*¹

BRACKETT v. GODDARD.

SUPREME JUDICIAL COURT OF MAINE. 1866.

[*Reported 54 Me. 309.*]

ASSUMPSIT on account annexed, for \$60, for money paid by the plaintiff to the defendant, for logs and down timber, the title to which, the plaintiff alleged, was not in the defendant at the time of sale. The writ also contained a count for money had and received for same amount.

It appeared from the report that the defendant owned, in the summer of 1863, a timber lot in Hermon; that he cut down a large number of hemlock trees thereon, peeled the bark therefrom and removed it from the lot, — intending to prepare the trees by cutting off the tops and haul them off as logs to be sawed during the ensuing winter. The trees were severed from the stumps, and they lay as they fell, with the tops on. In the felling the choppers endeavored, so far as practicable, to have them lie in a good position for peeling and afterwards hauling them off.

In the fore part of the fall of the same year, the defendant conveyed the lot by deed of warranty, without any reservations, to one Works. On the 20th of the following November, after Works had entered into possession of the lot under his deed, the defendant sold the hemlocks thus cut, to the plaintiff, by a bill of sale. To recover back the money paid for the bill of sale, this action was brought.

Previous to the commencement of this suit, the plaintiff demanded the hemlocks of Works, who refused to deliver them or permit the plaintiff to take them. Thereupon the plaintiff sued Works in trover therefor, and entered his action in court, which action was continued from term to term for several terms, when that action was by agree-

¹ See *Noble v. Bosworth*, 19 Pick. 314, *post*; *Strong v. Doyle*, 110 Mass. 92.

ment of parties entered "neither party." At a certain term of the court, during the pendency of that action, the plaintiff wrote to the defendant, then residing at Manchester, N. H., asking him to come to Bangor as a witness. The defendant went to Bangor at the time requested. For his travel and attendance as a witness, he filed an account in set-off in this action.

The court were to render such judgment as the legal rights of the parties entitled them to.

D. D. Stewart, for the plaintiff.

A. W. Paine, for the defendant.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property, and may be seized and sold on execution. *Staples v. Emery*, 7 Greenl. 201. So, wheat or corn growing is a chattel, and may be sold on execution. *Whipple v. Tool*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed (2 Kent, 346). or by Statute, as in this State by R. S. c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. Hop-poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop-raising, are part of the real estate. *Bishop v. Bishop*, 1 Kenan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks Richardson, C. J., in *Kittredge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the Statute of 1867, c. 88, defining

the ownership of down timber. It would have been otherwise, had they been cut into logs or hewed into timber. *Cook v. Whitney*, 16 Ill. 481.

The defendant, at the plaintiff's request, travelled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by Statute. -

CUTTING, KENT, WALTON, DICKERSON, and BARROWS, JJ., concurred. TAPLEY, J., did not concur.

*Offset allowed. — Defendant defaulted, to be heard in damages.*¹

LEWIS v. McNATT.

SUPREME COURT OF NORTH CAROLINA. 1871.

[Reported 65 N. C. 63.]

THIS was an action of trespass *vi et armis*, commenced in the year 1860, and tried before his Honor, Judge *Russell*, at the Spring Term, 1870, of the Superior Court of Bladen county, upon the issue joined on the plea of not guilty.

The plaintiff declared for the loss of certain turpentine, some in barrels and some on the trees, and for an injury to his slaves, caused by the defendant in going upon a tract of land which the plaintiff held under a lease, and driving off his slaves and seizing the turpentine. The testimony disclosed the fact that the plaintiff was engaged in making turpentine with another person, and that they were partners, that the turpentine which had been lost was the property of the partnership, and that the slaves alleged to have been injured were the property of the plaintiff alone, and the injury to them was his individual loss, and not that of the partnership. The defendant contended that the plaintiff could not recover because of the non-joinder, but the court held that the defendant could not take advantage of the non-joinder under the general issue, and that the plaintiff could recover his proportional share of the loss, and to this ruling the defendant excepted.

The defendant also contended that the plaintiff could not recover both for the injury to his slaves, and for the damage sustained as a partner for the loss of the turpentine, but the court held otherwise, and the defendant again excepted.

There was evidence that a large part of the turpentine consisted of what is called "scrape," being that portion which does not run into the box but remains on the face of the tree, and which is removed after it

¹ See *Noble v. Sylvester*, 42 Vt. 146, *post*.

has formed in sufficient quantity, by scraping it from the tree. It was proved that the lease under which the plaintiff held, had expired before the trespass was committed, and the defendant contended that the plaintiff could not recover for the scrape turpentine remaining on the trees.

His Honor charged the jury that if the plaintiff had cultivated the trees and manufactured the scrape it was his property, and was not a part of the tree going with the realty, and that the plaintiff had a right to remove it, although his lease might have expired, and if the defendant drove away his slaves and prevented them from removing it the plaintiff could recover for the loss of it.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

W. McL. McKay, for the defendants.

Bragg and Strong, for the plaintiff.

DICK, J. Crude turpentine which has formed on the body of the tree, and is usually known as "scrape," is personal property, and belongs to the person who has lawfully produced it by cultivation. *State v. Moore*, 11 Ire. 70. It is an annual product of labor and industry, and although it adheres to the body of the tree it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements.

A lessee of turpentine trees, even after the expiration of his lease, has the right of "entry, egress and regress" to remove the "away-going crops" which he has produced by his labor, provided he does so within reasonable time. He has a right to the occupation of the premises for that purpose, and if this right is refused by the owner of the land, the lessee is entitled to recover the value of the property detained. *Brittain v. McKay*, 1 Ire. 265.

The "scrape" must be removed before the sap begins to flow in the subsequent spring, for then the new turpentine mingles with the old "scrape," which cannot be taken away without interfering with the rights of the owner of the trees.

In this case, it appeared, that the lease of the plaintiff had terminated, but there was no evidence as to the time when he entered for the purpose of removing the "scrape."

The charge of his Honor was, therefore, too general in its terms, as the plaintiff had no right of entry after the new turpentine had begun to flow, and for this error there must be a *venire de novo*.

The question of pleading raised on the trial by the defendant's counsel is attended with some difficulty on account of the change in our system of procedure. At common law in actions in form *ex delicto*, and which are not for the breach of a contract, if a party who ought to join, be omitted, the objection can only be taken by a plea in abatement, or by way of apportionment of damages on the trial; and the

defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit on the plea of the general issue. 1 Chitty, P. 76.

Under the C. C. P. § 8, par. 1, all civil actions pending in the courts when the present Constitution was approved by Congress, and which were not founded on contract, are to be governed by the C. C. P., "as far as may be according to the state of the progress of the action, and having regard to its subject, and not to its form." A different provision is made as to actions founded upon contracts made previous to the C. C. P. *Merwin v. Ballard*, at this term.

The C. C. P. § 62, provides that the parties who are united in interest must be joined as plaintiffs or defendants, &c. If a necessary party to an action be omitted, and the defect appears upon the face of the complaint, the non-joinder must be taken advantage of by demurrer. C. C. P. § 95. If it does not appear upon the face of the complaint, the objection may be taken by answer. C. C. P. § 98. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." C. C. P. § 99. It does not appear from the transcript at what term of the court the issues were joined in this case, and the defendant might have put in a plea in abatement at any time before pleading in bar of the action. If the issues were not joined when the case was transferred to the Superior Court, he would have been entitled to have objected to the non-joinder of a necessary party by answer, as the defect does not appear in the pleadings. As the defendant went to trial without taking any such objection, the charge of his Honor must be sustained.

Venire de novo awarded. Let this be certified.

NOTE. — On the sale of growing timber and crops, see Langdell, Cases on Sales.

CHAPTER VII.

MANURE.

YEARWORTH v. PIERCE.

KING'S BENCH. 1647.

[*Reported Aleyn*, 31.]

SLANDER. Thou art a thief, and hast stolen my dung. After a verdict for the plaintiff it was moved, that the words were not actionable, because dung is an indifferent word to signify either dung in a heap, which is a chattel, or dung spread or scattered upon the ground, which is parcel of the freehold, and then no felony may be committed of it. But upon good debate judgment was given for the plaintiff, because the first words being plainly actionable, the effect of them shall not be taken away by subsequent words ambiguous; for when subsequent words should qualify the words precedent, they ought to carry in them a strong intendment that they were spoken in such a sense as was not actionable; and then also ROLL held they ought to be brought in by way of explanation by the word "for," as to say Thou art a thief, for thou hast, &c.; but if the words are, Thou art a thief, and hast stolen, &c., there the latter words are cumulative. But BACON denied the difference, and cited *Clerk and Gilbert's Case*, Hob. 331, where that difference is denied, and said, that 8 Car. in the Common Pleas, where the words were, Thou art a thief, and hast robbed thy kinsman of his land, the court was divided in opinion; but after upon conference with all the Justices at Serjeants' Inn, it was adjudged for the plaintiff. And ROLL denied both those eases to be law; and said, that this latter case was resolved upon consideration of that in Hobert, which hath been often denied for law in this court. And he said, that he had conferred with Sir Robert Barkley and Sir John Bramston, and their opinions concur with him in this point. And ROLL held, that if the defendant had said thou hast stolen my dung, without any other words, they would have been actionable; for dung in common parlance is understood of dung in a heap, which was agreed to be a chattel, of which felony may be committed, and goeth to the executors; but if it lieth scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold.

LASSELL v. REED.

SUPREME JUDICIAL COURT OF MAINE. 1829.

[Reported 6 Greenl. 222.]

THIS case, which was trespass *quare clausum fregit*, came before the court upon a case stated by the parties.

The defendant had been the lessee of the plaintiff's farm, for the term of one year, ending April 15th; on which day he left the premises, leaving thereon a quantity of manure, lying in heaps about the barn and in the farmyard, so frozen that it could not then be removed without great inconvenience. It was afterwards taken away by the defendant, between the 10th and the 30th of May, as soon as it conveniently could be removed; doing no other damage than was unavoidable in effecting that object; and this act was the trespass complained of. Some of the cattle kept on the farm belonged to the lessor and were leased with the premises; others belonged to the defendant. Some of the hay also, was purchased by the defendant, and the residue was cut on the farm. The lease was referred to in the statement of facts, as containing covenants for the breach of which the lessor had recovered judgment; but none of them related to the surrender or mode of management of the farm, or in any manner touched the cause of this action.

The parties agreed that if the opinion of the court should be wholly with the defendant, he should have judgment for costs; that if he had a right to take away the manure at the end of his term, and not afterwards, the plaintiff should have judgment for nominal damages and costs; but if he had no right to the manure, the plaintiff should have judgment for its value, being fifteen dollars, and costs.

Johnson, for the defendant.

Crosby, for the plaintiff.

MELLEN, C. J. Upon examination of the lease referred to in the statement of facts, we do not perceive any covenants on the part of Reed which have any direct bearing on the questions submitted for our decision. Nothing is said as to the management of the farm in a husband-like-manner, or surrendering it at the end of the year in as good order and condition as it was at the commencement of the lease. The lease is also silent on the subject of manure. The same kind of silence or inattention has been the occasion of the numerous decisions which are to be found in the books of reports between lessors and lessees, mortgagors and mortgagees, and grantors and grantees, or those claiming under them, in relation to the legal character and ownership of certain articles or species of property, connected with or appertaining to the main subject of the conveyance or contract. A few words, inserted in such instruments, expressive of the meaning of the parties respecting

the subject, would have prevented all controversy and doubt. In the absence of all such language, indicating their intention as to the particulars above alluded to, courts of law have been obliged to settle the rights of contending claimants, in some cases according to common understanding and usage; thus window blinds, keys, &c., are considered as part of the real estate (though not strictly speaking fixtures), or rather as so connected with the realty as always to pass with it. In other cases, as between landlord and tenant, the question has been settled upon the principles of general policy and utility; as in the case of erections for the purpose of carrying on trade, or the more profitable management of a farm by the tenant. It does not appear by the facts before us, that there is any general usage, in virtue of which the manure made on a farm by the cattle of the lessee during the term of his lease is considered as belonging to him exclusively, or to the lessor, or to both of them; and we have not been able to find any case directly applicable to the present. There being no usage, nor such decision, nor expressed intention of the parties to guide us, the case is one which must be decided on the principles of policy and the public good; for we do not deem the case cited from *Espinasse* as applicable. The opinion there given was founded on certain expressions in the lease, by means of which the lessee was considered as a trespasser in removing the manure from the farm at the end of the lease.

What then does policy and the public good dictate and require in the present case? Before answering the question we would observe that we do not consider the case in any way changed by the fact that a part of the fodder was carried on to the farm by the defendant, and a part of the cattle on the farm were those leased; for the purposes of the lease, such fodder and such cattle must be considered as belonging to the tenant during the term; and he must be considered as the purchaser of the fodder growing on the land, by the contract of lease, as much as if he should purchase it elsewhere on account of the want of a sufficiency produced by the farm; because a farm not yielding a sufficiency would command the less rent on that account. Numerous cases show that a tenant, at the termination of his lease, may remove erections made at his own expense for the purpose of carrying on his trade; because it is for the public good that such species of enterprise and industry should be encouraged; and where the parties are silent on the subject in the lease, the law decides what principle best advances the public interest and accords with good policy, and by that principle settles the question of property. It is our duty to regard and protect the interests of agriculture as well as trade. It is obviously true, as a general observation, that manure is essential on a farm; and that such manure is the product of the stock kept on such farm and relied upon as annually to be appropriated to enrich the farm and render it productive. If at the end of the year, or of the term where the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the

ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the lessee; or else the farm, destitute of manure, must necessarily be leased at a reduced rent or unprofitably occupied by the owner. Either alternative is an unreasonable one; and all the above-mentioned consequences may be avoided by denying to the lessee what is contended for in this action. His claim has no foundation in justice or reason, and such a claim the laws of the land cannot sanction. It is true that the defendant did not remove and carry away any manure, except what was lying in heaps, probably adjoining the barn in the usual places; but still if he had a right to remove those heaps, why had he not a right to travel over the farm and collect and remove as much as he could find scattered upon the ground during the summer and autumn by the cattle in their pastures? In both instances the manure was the product of his cattle; yet who ever claimed to exercise such a right, or pretended to have such a claim? The argument proves too much, and leads to impossibilities in practice, as well as to something in theory which bears a strong resemblance to an absurdity.

We do not mean to be understood by this opinion, as extending the principles on which it is founded to the case of tenants of livery stables in towns, and perhaps some other estate, having no connection with the pursuits of agriculture; other principles may be applicable in such circumstances; but as to their application or their extent we mean to give no opinion on this occasion.

The case most nearly resembling the present is that of *Kittredge v. Woods*, 3 N. Hamp. Rep. 503, in which it was decided that when land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. The Chief Justice observed that the question would generally arise between lessor and lessee, and very plainly intimates an opinion that a lessee, after the expiration of his lease, would have no right to the manure left on the land. On the whole, we are all of opinion that the defence is not sustained, and that the defendant must be called. According to the agreement of the parties, judgment must be entered for \$15.00 and costs.¹

STAPLES *v.* EMERY.

SUPREME JUDICIAL COURT OF MAINE. 1831.

[Reported 7 Greenl. 201.]

THIS was an action of trespass for taking and carrying away from the barn yard of the plaintiff, thirty cords of manure, in the month of May, 1828.

¹ See *Lewis v. Jones*, 17 Pa. 262; *Hill v. De Richemont*, 48 N. H. 87.

In a case stated by the parties, it was agreed that one Elwell, who was the owner of the farm from which the manure was taken, had mortgaged it to the plaintiff, who had entered for condition broken, in August, 1827. The farm, however, had for many years, and until September, 1830, been in the sole occupancy of Elwell the mortgagor; and the manure was taken under an execution against Elwell, committed to the defendant, as a constable, for collection.

J. and E. Shepley, for the plaintiff.

J. Holmes, for the defendant.

MELLEN, C. J. The only question decided in *Lassell v. Reed*, 6 Greenl. 222, was, that a tenant for one year, ending April 15, had no right to remove and convert to his own use, at or after the end of the lease, the manure made and accumulated on the premises during the continuance of the lease. In some peculiar respects the present action differs from that; for in this it appears that before the manure in question was made, the plaintiff had entered under the mortgage for breach of the condition; but it also appears that Elwell, the mortgagor, for many years before such entry, had been in possession of the land, and ever since the entry, which was in August, 1827, had continued in possession, up to the time when the statement of facts was signed in September, 1830; and from this last fact we are to consider Elwell, during all that time, as a disseisor of Staples, or as a tenant at will under him; but as a wrong is not to be presumed, and as none is alleged on his part, we ought to consider him, and so the plaintiff's counsel contends, as a tenant at will, liable to the uncertainties of such a tenancy, and entitled to its privileges; liable to have the lease terminated at the pleasure of the lessor or owner, but entitled to emblements, if terminated unreasonably, according to well-settled principles. It is important to attend to the reasoning of the court, which led to the decision, in the case of *Lassell v. Reed*. They say, "it is obviously true, as a general observation, that manure is essential on a farm; and that such manure is the product of the stock kept on such farm, and relied upon as annually to be applied to enrich the farm and render it productive. If at the end of the year, or of the term, when the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the tenant; or else the farm, destitute of manure, must be leased at a reduced rent or unprofitably occupied by the owner." In the case before us the above reasoning is inapplicable, because none of the contemplated consequences could follow. Suppose a tenant for five years should, the second, third, and fourth years, sell all the manure and manage the land without any; whose loss would it be? He would be injuring himself, destroying his own profits to a certain extent, and rendering himself less able to pay his rent. Still, would he not have a right to proceed in this manner?

At least might he not convert it to his own use in this imprudent manner without being a trespasser, or the purchaser's being liable in an action of trespass or trover? And has the owner any other remedy than an action for damages for bad husbandry and mismanagement of the farm? In the case supposed, the manure is a part of the annual produce of the farm; and, as such, belongs to the tenant; and might be attached and sold on execution to satisfy the debts of such tenant, without rendering the officer or the creditor a trespasser. That is to say, a tenant, as in the case supposed, may injure himself and impair his own profits; but the manure of the season next before the known term of the lease, is the produce of that season and designed for the use of the farm the following season, at which time the owner is to occupy or have the control of the land as in the above-mentioned reported case. Now, all the observations made on this head apply to the lease at will in the case under consideration. Elwell was in possession, as tenant at will, in August, 1827. The manure was made during the following winter, and the tenancy at will has never been determined; of course, the rights of no one have been impaired, but Elwell's; or rather the loss of profits by reason of the seizure and sale of the manure has been only his loss; the same having been a part of the annual profits designed for his own use and benefit, and which would have been so applied had not the sale prevented it. The hay and fodder cut on the land by Elwell in the summer of 1827, belonged to him as tenant, and that hay and that fodder were the materials of which the manure was composed, which is the subject of dispute, and which, had it not been taken and sold, would have increased his crops in 1828; and a similar alternation of profits and manure to increase them, probably occurred annually for two years, at least, afterwards; for the facts before us do not show any interruption of the natural order observed in such business on a farm. On this view of the cause we think the plaintiff is not entitled to maintain this action. As we have before observed, this case differs from *Lassell v. Reed*, and we do not mean to extend the principle of that decision beyond the peculiar facts, or to intimate any opinion as to the question whether manure, lying in heaps or yards, passes to the grantee by an absolute deed of land, where no mention is made of it as a subject of the conveyance. A nonsuit must be entered.¹

MIDDLEBROOK v. CORWIN.

SUPREME COURT OF NEW YORK. 1836.

[Reported 15 *Wend.* 169.]

ERROR from the Orange Common Pleas. Middlebrook sued Corwin in a justice's court, for several loads of manure carried away from a farm occupied by one Van Cleft as tenant to Middlebrook for a year.

¹ But see *Perry v. Carr*, 44 N. H. 118.

The farm was stocked by Middlebrook with twenty milch cows, a pair of working cattle, and other cattle. The manure was sold by the tenant to the defendant, and taken from the barn-yard of the farm shortly before the expiration of the tenant's term. The justice rendered judgment in favor of the plaintiff, which was reversed by the Orange Common Pleas, on *certiorari*. The plaintiff below sued out a writ of error.

W. F. Sharp and *H. G. Wisner*, for plaintiff in error.

C. G. Bradner, for defendant in error.

NELSON, J. It is laid down in several books, that manure in heaps, before it is spread upon the land, is a personal chattel. 11 Viner, 175, tit. Executors; Toller's Law of Executors, 150; Matthew's Executor, 27. It further appears that it is common to insert a covenant in the lease of a farm, to leave the manure of the last year upon it. All this would seem to imply that the article belongs to the tenant, and that without a covenant he might remove it. If a farm is leased for agricultural purposes, good husbandry, which without any stipulation therefor is implied by law, would undoubtedly require it to be left; if rented for other purposes, this conclusion might not follow. In *Watson v. Welch*, tried in 1785, in summing up to the jury, the judge said that it was matter of law to determine what was using the land in a husband-like manner, and expressed the opinion that under a covenant so to work a farm, the tenant ought to use on the land all the manure made there, except that when his time was out, he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising therefrom. Woodfall's Landlord and Tenant, 255; 1 Esp. N. P. part 2, p. 131. Perhaps this rule should be taken with some qualifications. The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question. 4 East, 154; Doug. R. 201; Holt's N. P. R. 197; 2 Barn. & Ald. 746. This is reasonable, because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. What may be good husbandry in respect to one particular soil, climate, &c. may not be so in respect to another. Independently, however, of the usage and custom of the place, the rule of Mr. Justice Buller, I apprehend, may be the correct one. In the recent case of *Brown v. Crump*, 1 Marsh. 567, Chief-Justice Gibbs said, that he had often heard him (Mr. Justice Buller) lay down the doctrine, "that every tenant, where no particular agreement existed dispensing with that engagement, is bound to cultivate his farm in a husband-like manner, and to consume the produce on it. This is an engagement that arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." Without carrying the doctrine to this extent, we may, I think, safely say, upon authority, that where a farm is let for agricultural purposes, no stipulation or custom in the case, the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture.

Case is the appropriate action for the injury complained of. 1 Chitty's Pl. 142. The tenant having no authority himself to remove the manure, could give none to the defendant. The judgment of the Common Pleas must be reversed, and that of the justice affirmed.

Judgment accordingly.

GOODRICH *v.* JONES.

SUPREME COURT OF NEW YORK. 1841.

[*Reported 2 Hill, 142.*]

ON error from the Tioga C. P. Jones sued Goodrich before a justice, in trover, for taking and converting manure and boards (*inter alia*) the alleged property of Jones. The proof before the justice was, that in September, 1835, Jones contracted to sell a farm to Goodrich, for a money consideration payable 20th April, 1836. Under this agreement, Jones, by Goodrich's consent, conveyed a part of the farm to one Vose, and the residue to Goodrich, who claimed and converted to his own use certain fence boards lying on Vose's part; and certain manure in the barn-yard on his own part. This was after the deeds were executed. At the time of the deed to Vose, the boards were on the premises. They had all been in fence on that part, and some still remained so; though a good many of them were displaced, some let down and some blown down. The manure lay in the barn-yard, on Goodrich's part, where it had been accumulating for a long time. The conversion of both by Goodrich was proved; but the justice holding that both passed by the deeds, rendered a judgment for him (Goodrich). On *certiorari* by Jones, the C. P. reversed the judgment, on the ground "that the manure was personal property, and did not pass to the vendee." Goodrich brought error to this court.

N. W. Davis, for the plaintiff in error.

J. J. Taylor, for the defendant in error.

COWEN, J. The Common Pleas appear to have taken the same view of Goodrich's, or rather Vose's, title to the boards, as did the justice. There cannot be a doubt that they were right. Fences are a part of the freehold; and that the materials of which they were composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature. *Vide Walker v. Sherman*, 20 Wend. 639, 640.

With regard to the manure, we have held that even as between landlord and tenant, it belongs to the former; in other words, it belongs to the farm whereon it is made. This is in respect to the benefit of the farm, and the common course of husbandry. The manure makes a part of the freehold. *Middlebrook v. Corwin*, 15 Wend. 169. Nay, though it be laid up in heaps in the farm-yard. *Lassell v. Reed*, 6

Greenl. 222; *Daniels v. Pond*, 21 Pick. 367; see *Staples v. Emery*, 7 Greenl. 203. The rule has always been still stronger in favor of the vendee as against vendor, and heir as against executor. In *Kittredge v. Woods*, 3 N. Hamp. Rep. 503, it was accordingly decided, that manure lying in a barn-yard passes to the vendee. *Vide* also *Daniels v. Pond*, before cited.

The case of *Kittredge v. Woods* was very well considered; and the right of the vendee to the manure, whether in heaps or scattered in the barn-yard, vindicated on principle and authority I think quite satisfactorily.

There are several English *dicta* which conflict with our views of the right to manure, as between landlord and tenant, and that of the court in New Hampshire, as between vendor and vendee. And *vide* 2 Kent's Com. 346, note *c*, 4th ed., and *Carver v. Pierce*, Sty. 66. But they may all be considered as repudiated by *Middlebrook v. Corwin*. *Vide* the introductory remarks of Mr. Justice Nelson, 15 Wend. 170.

The judgment of the Common Pleas must be reversed; and that of the justice affirmed. *Judgment reversed.*¹

NEEDHAM v. ALLISON.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1852.

[Reported 24 N. H. 355.]

TROVER, for forty-five loads of manure, April 1, 1848.

It appeared that on the 13th of September, 1847, the defendant conveyed to the plaintiff his farm in Dublin, in this county, which the defendant then occupied. By a clause in the deed he reserved the possession until the first of April, 1848, and agreed at that time to give the plaintiff the possession.

At the date of the conveyance there was some manure about the barns and yards, all of which was carried out in the fall and spread upon the land for the use of the plaintiff.

At that time there was in the barn, hay and other fodder belonging to the defendant, and a portion of it was fed out to his cattle in the course of the ensuing winter season, and the manure was thrown out of the windows, and a portion of it lay about them and another part about the barn-yards. Prior to April 1, 1848, the defendant sold all the manure made from his stock kept by him on said farm, and from his said hay and fodder, and the same was in part drawn away from said farm by the purchaser, and the residue was sold by the purchaser to the plaintiff, and by him used on the farm.

A verdict was taken, by consent, for the plaintiff, for the value of the manure made from said hay and stock after said conveyance, and

¹ See *Ruckman v. Outwater*, 4 Dutch. 581, *contra*.

before the first of April, 1848, on which judgment is to be entered, or the verdict set aside, as the court shall adjudge.

Chamberlain, for the plaintiff.

Wheeler, for the defendant.

BELL, J., delivered the opinion of the court. It is settled here that manure, as between the buyer and seller, passes with the land, whether it is drawn out upon the land for the purpose of use there, or is lying in heaps, or otherwise, about the barns or yards; *Kittredge v. Woods*, 3 N. H. Rep. 503. The same is regarded as the law elsewhere in this country. *Stone v. Proctor*, 2 D. Chip. 115; *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 379; *Lassell v. Reed*, 6 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Daniels v. Pond*, 21 Pick. 371.

That principle, however, does not reach this case, since there is here no question except in relation to the manure made upon the premises subsequently to the sale, and while the defendant may be regarded as a tenant of the purchaser.

In England, in the case of manure made by a tenant of merely agricultural property, in the ordinary course of husbandry, Chancellor Kent seems to be of the opinion that the custom is for the outgoing tenant to sell or take away the manure. 2 Com. 347, n. a. He cites *Roberts v. Barker*, 1 C. & M. 809; and the cases of *Higgon v. Mortimer*, 6 C. & P. 616; *Hutton v. Warren*, 1 M. & W. 466; 2 Gale, 71; *Beatty v. Gibbons*, 16 East, 116, support that view, while the cases of *Brown v. Crump*, 1 Marsh. 567; *Putney v. Sheldon*, 5 Ves. 147, 260, n., and *Onslow v. —*, 16 Ves. 173, seem to countenance a different rule, where there is no special contract or custom of the country.

In this country, in some of the States it has been held that the manure made by the tenant during his term, is his property, which he has the right to remove or sell, and which may be attached and holden as his property for the payment of his debts. *Staples v. Emery*, 7 Greenl. 201; *Southwick v. Ellison*, 2 Iredell, 326.

In others, it is held that in the absence of special agreement, or a special custom, the rules of good husbandry require that the manure made upon a farm, in the ordinary course, should be expended upon it; that such manure is an incident of the freehold, and belongs to the landlord, subject to the right of the tenant to use it in the cultivation of the land; and that the tenant has no right to remove or dispose of it, or to apply it to any other use, either during or after the expiration of his tenancy. *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 379; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*, 6 Greenl. 222; *Daniel v. Pond*, 21 Pick. 371; to which add Kent's opinion, 2 Com. 347, n. a.

But it is urged upon us, that whatever may be the rule as to agricultural property, it is here immaterial, because the tenancy was not for agricultural purposes, in the ordinary course of husbandry. By his deed, the defendant reserved the possession of the property from its

date in September, till the first of April following. He owned the hay and stock from which this manure was made. He was under no obligation to keep either upon the place, except for his own convenience, and he was bound by no duties to the purchaser resulting from contract, either express or implied, except that of giving up the possession on the first of April.

It was substantially, so far as this question is concerned, a reservation of the buildings merely, since the season of farming operations was chiefly passed, and the rights of the parties were rather like those of the lessor and lessee of livery stables, or the like, than those of farming tenants. There would seem to be no doubt that as to this kind of buildings there would be no pretence that the lessor would have any claim to the manure, except such as might result from express contract. *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222.

This view strikes us as just and reasonable, and most consistent with the reasonable understanding and expectations of the parties. No one can doubt that this must have been the idea of the defendant, or he would have made his reservation clear in this respect. And it is not easy to imagine that the plaintiff should leave it a subject for a doubt, if he supposed he was to have this manure, and it was so understood.

Upon this ground we are of opinion there must be

Judgment for the defendant.

SAWYER v. TWISS.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1853.

[Reported 26 N. H. 345.]

TROVER, for fifty loads of manure. Plea, the general issue. The manure in question was made on a farm owned and occupied by the defendant, and was lying in heaps about the barn on said farm. The farm was subject to a mortgage to one Moore. Some of the cattle which made the manure were owned by Moore, and kept by the defendant for him, at a certain price per week, and the rest were owned by the defendant, but were subject to a personal mortgage to Moore. The manure was attached by a deputy sheriff, as the personal property of the defendant, and sold by him at public auction, on an execution issued on a judgment rendered by a justice of the peace against the defendant, and was purchased by the plaintiff in this suit.

Subsequently to the sale, and before the plaintiff had removed the manure, the defendant took it and used it on the farm.

It was agreed that judgment be rendered for the plaintiff, for the value of the manure and interest, or for the defendant, as the opinion of the court should be on the above case.

E. S. Cutter, for the plaintiff.

Clark and Bell, for the defendant.

. BELL, J. It has been decided here, that as between grantor and grantee of a farm, the manure lying in heaps in the fields, or deposited about the barns and barn-yards on the premises, passes with the real estate. It is an incident and appurtenance of the land, and part of the real estate, like the fallen timber and trees, the loose stones lying upon the surface of the earth, and like the wood and stone fences erected upon the land, and the materials of such fences when placed upon the ground for use, or accidentally fallen down. *Kittredge v. Woods*, 3 N. H. Rep. 503; *Needham v. Allison*, 4 Foster's Rep. 335; *Connor v. Coffin*, 2 Foster's Rep. 538.

Elsewhere, it has been held, upon reasons which seem to us entirely satisfactory, that manure made by a tenant upon a leased farm, in the absence of any special contract or custom, belongs to the farm as an incident necessary for its improvement and cultivation. It is the property of the lessor of the farm, subject to the right of the tenant to use it in the cultivation of the land. The tenant has no right to remove it or use it for any other purpose, and it is not liable to be attached or holden for his debts. *Wetherbee v. Ellison*, 19 Vt. Rep. (4 Wash.) 379; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*, 6 Greenl. 222; *Daniel v. Pond*, 21 Pick. 371; 2 Kent's Com. 347, note a. And this doctrine is recognized here in *Needham v. Allison*, and *Connor v. Coffin*, above cited.

Some authorities of ancient date lay down the law that manure in heaps, before it is spread upon the land, is a personal chattel, which goes to the executor and not to the heir. 11 Vin. Ab. 175, Executors 32, and *Carver v. Pierce*, Sty. 66, and *Yearworth v. Pierce*, S. C. All. 31, there cited; 1 Vin. Ab. 444, Actions for words R. a. 5; S. C. Toll. Exors. 150; Math. Exors. 27. And we regard the doctrine as correct, that manure generally is personal property, and as such goes to the executor. *Pinkham v. Gear*, 3 N. H. Rep. 484. But we think it may be doubted whether, notwithstanding the single decision on which these books rest, there is not a great weight of argument as well as of authority for holding that, even as between the heir and the executor, the manure made upon a farm, in the ordinary course of husbandry, is to be regarded as belonging to the farm, and an incident of the real estate. In *Needham v. Allison*, it was held that the rule would be different as to manure made in stables and otherwise, not in the course of husbandry.

It is not easy to draw any line of distinction between manure in heaps and that which is spread upon the land; and we are of the opinion that whatever rule is adopted with regard to the manure upon a farm, which is not absolutely incorporated with the soil and become entirely undistinguishable from it, must be applied to all, in whatever form it may be, whether it is in heaps at the barn windows, or lying about the barn-yards, whether it is drawn out in piles for the purpose of fermentation, or mixed with other ingredients for compost, or it has been drawn out and thrown down in small parcels, for the purpose of being spread upon the

land or placed in the hills of corn or potatoes. Whatever the rules of good husbandry or considerations of sound policy require us to decide in regard to this article, in one of its forms, is equally necessary and proper to be held in relation to it in all its states. We consider it as being very closely analogous to the muck and marl beds which are found on many farms, and which are extensively used in many places as dressing for land, or mixed into compost for the same purpose. We regard it, too, as having strong resemblances, as to its connection with the realty, with the fences upon the land, which, though attached to the land in many cases by gravity alone, are yet beyond question parts of the realty itself. *Ripley v. Paige*, 12 Vt. 353; *Gibson v. Vaughan*, 2 Bailey, 389; *Goodrich v. Jones*, 2 Hill, 142.

Adopting, then, the opinion which we think supported by the strongest reasons, that the manure made upon a farm, in the ordinary course of husbandry, is to be regarded as an incident or appurtenant of the real estate, — a part of the freehold, — the owner of the fee must of course have the authority and right to sell and dispose of it, to remove it from the land at his pleasure; and when so separated it becomes, like the trees and fencing materials when separated, or like muck and marl when dug up and removed, merely personal property. But this right of the owner is a personal right, clearly so in the other cases mentioned, and it is not in the power of any officer, for the security of a debt, to attach and remove standing trees or fences, however slight their connexion with the earth, nor to dig or remove muck or marl, to dig plaster or coal, or carry away the loose stones from the surface. And upon equally strong, perhaps much stronger, grounds we think an officer cannot be permitted to remove the manure upon a farm, which is indispensable to its beneficial cultivation.

In one respect the resemblance fails between such manure and the fences, muck, &c., to which we have compared it. It is an article of annual production, and it strikes many persons, that as the tenant is in general entitled to the produce of the property he hires, during the time he hires it, he must also be entitled to the manure as a part of the annual produce. But the duty of a tenant to treat his leasehold according to the rules of good husbandry is quite as strong as his right to take the annual produce. If this duty comes in conflict with the supposed right, it seems to us that sound policy, as it regards the community, forbids that a tenant should take, as a part of the produce of a farm, that which is necessary to its cultivation, and the removal of which is an appropriation not of the profits, but substantially of a part of the capital of the property leased.

Manure, regarded as a part of the annual produce of a farm, differs essentially from the crops generally and other productions of a farm. They are raised for the purpose of removal; they are designed, perhaps with the exception of hay and fodder, to be sold and disposed of as a part of the income and profits of the land, while the manure is never, unless by the most thriftless husbandman, sold or disposed of off

the farm, nor used for any purpose but the improvement of the land. The annual crops are liable, by our law, to attachment and execution, when they have become mature and fitted for harvesting, and not before. They may then be properly removed, but the manure can never be removed from a farm or used elsewhere, consistently with sound public policy or private advantage.

Upon the views suggested, we are of opinion that the manure made upon a farm in the ordinary course of husbandry, is a part of the real estate, and that it cannot be attached or taken on execution separately from the land; that when so attached the owner has no other rights over it than he has over the fences, except that of using it for the purpose of improving the land; that he may be restrained from removing or disposing of it otherwise, pending the attachment, and that an officer attaching and removing such manure, without consent of the owner, is liable as a trespasser, and that neither he nor his vendee acquires any right to such manure by a levy upon and sale of it.

There must, therefore, be *Judgment for the defendant.*

FAY v. MUZZEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[Reported 13 Gray, 53.¹]

ACTION of contract upon the probate bond of Elizabeth Muzzey as administratrix of the estate of her husband, Benjamin Muzzey, brought for the use of Moses G. Cobb, administrator *de bonis non* of said Benjamin. Trial in this court in Middlesex at October term, 1852, before *Cushing, J.*, who reported the following case for the judgment of the full court:—

“The case, after default of the defendants, was referred to an auditor, who reported that he found due to the plaintiff from the defendants the sum of \$4,872.68; and also the further sum of \$47.58 for manure, unless upon the following facts the court should determine otherwise as matter of law: It was proved that a large pile of manure, containing some eight or ten cords, not broken up nor rotten, and not in a fit condition for incorporation with the soil, stood on the land of the said Benjamin at the time of his decease, and so continued until after the appraisal returned by said Elizabeth into the probate court; and this manure was taken from the barn-yard of the homestead of said deceased.

“Also the further sum of \$31.72, unless upon the following facts the court should determine otherwise as matter of law: It was proved that certain other manure, duly set down in said Elizabeth’s inventory, and

¹ Part of this case relating to another point is omitted.

without controversy the personal property of said Benjamin at the time of his decease, was, after the date of her said appraisal, by her authority spread upon the lands which descended from her intestate; that this was done judiciously, in an agricultural view, and in the usual course of good husbandry. This manure was taken from the hotel stable standing on the land of said deceased. All the real estate of the deceased was afterwards sold for the payment of debts."

This case was argued in writing.

M. G. Cobb, for the plaintiff.

J. P. Converse, for the defendants.

HOAR, J. 1. The court are of opinion that manure from the barnyard of the homestead of the intestate, standing in a pile upon his land, although "not broken up nor rotten, and not in a fit condition for incorporation with the soil," is not therefore assets in the hands of his administratrix, and that she is not chargeable therewith as a part of his personal estate. Manure, made in the course of husbandry upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This has been so decided as between landlord and tenant, in the cases of *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222; and *Middlebrook v. Corwin*, 15 Wend. 169. The reason of the rule is, that it is for the benefit of agriculture, that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such is unquestionably the general usage and understanding, and a different rule would give rise to many difficult and embarrassing questions.

The same doctrine was applied, as between vendor and vendee, in *Kittredge v. Woods*, 3 N. H. 503, and in *Goodrich v. Jones*, 2 Hill (N. Y.), 142. The doctrine as to fixtures and incidents to the realty is always most strictly held, as between heir and executor, in favor of the heir, and against the right to disannex from the inheritance whatever has been affixed thereto. *Elwes v. Maw*, 3 East, 51.

The circumstance that a thing is not permanently affixed to the freehold, but is capable of detachment, and is even temporarily detached from it, is not conclusive against the right of the owner of the land. Thus keys of doors go to the heir, and not to the executor. *Wentworth on Executors*, 62. And in *Goodrich v. Jones*, *ubi supra*, it was held, that fencing materials, which have been used as a part of the fence, accidentally or temporarily detached from it, without any intent of the owner to divest them permanently from that use, do not cease to be a part of the freehold. In *Bishop v. Bishop*, 1 Kernan, 123, the same principle was applied to the case of hop-poles, which had been taken up and laid in heaps for preservation through the winter; and it was held, that they would pass by a conveyance of the land.

2. The manure from the hotel stable, which is agreed to have been personal estate, and was included in the inventory, must be accounted for by the administratrix; and it is no sufficient account to say that she has expended it upon the real estate which has since been sold for the payment of debts. There is no way in which it can be made certain that it has increased the amount received from the sale of the real estate; and if this were established, an administratrix has no right thus to expend the personal property of her intestate.

CHAPTER VIII.

FIXTURES.

NOTE. — As the subject of the annexation of buildings to land runs by imperceptible degrees into that of the annexation of fixtures, cases on it are included in this chapter.

HENRY'S CASE.

COMMON PLEAS. 1505.

[*Reported Year Book, 20 Hen. VII. 13, pl. 24.*]

ACTION of trespass brought against executors by one Henry after the death of his ancestor for the taking of a furnace which was fixed and annexed to the freehold with mortar. And the opinion of the court, viz. LORD READ, Chief Justice of the Common Bench, FISHER, and KINGSMILL, his fellows, was that the taking was tortious. For those things which cannot be forfeited by outlawry in personal actions, nor be attached in assise, nor distrained by the lord for rent, such things the executors will not have; but a furnace or table fixed to the ground with posts, or a paling, or a bed covering, timber or board annexed to the freehold, or a door and windows, and such other like things which are annexed to the freehold, and are made for a profit of the inheritance, cannot be forfeited by outlawry nor attached on distress. *Ergo ex consequente sequitur* that the executors will not have such things, and although the testator could have given these things in his lifetime, *non sequitur* that they will have them. And so the executors will not have any documents concerning the land, although the testator bought them, for they are appurtenant to the inheritance. And if the lessee for years makes any such furnaces for his advantage, or a dyer makes his vats and vessels to carry on his business [*pur occupier son occupation*] during the term, he can remove them; but if he suffers them to remain fixed to the land after the end of the term, then they belong to the lessor; and so of a baker. And it is no waste to remove such things within the term, according to some; and that will be contrary to the opinions aforesaid; for then it will not be adjudged parcel of the freehold. But in H. 42 E. III., it remained therefore doubtful, whether this was waste or not. T. 21 Hen. VII. 26.¹

¹ So a mortgagee in possession, after decree on a bill to redeem, but before possession taken, can remove his fixtures. *Taylor v. Townsend*, 8 Mass. 411.

ANONYMOUS.

COMMON PLEAS. 1506.

[*Reported Year Book, 21 Hen. VII. 26, pl. 4.*]

IN trespass the case was this. A man was seised of a house in fee simple, and made a furnace, viz. of lead, in the middle of the house, and it was not fixed to the walls of the house. He made executors and died, the heir entered, and the executors took the furnace, viz. of lead, and the heir brought an action of trespass.

Pollard. It seems that the action lies; for such things as are fixed and annexed to the freehold will descend to the heir with the inheritance, and so they will pass by feoffment with the freehold; as where vats are fixed in the ground, or in a brewhouse or dyehouse, they are appurtenant to the freehold, and altered from the nature of a chattel. And where a paling is made to enclose an enclosure or pond, the executors will not take it, but the heir will have it. So of things fixed to the inheritance they belong and pass with the inheritance and the freehold. And so in some cases such things as are not annexed to the land and the freehold descend and pass with the inheritance as the windows: they are not fixed, and yet neither the executors nor the termor will take them, but the heir will have them, because a house is not perfect without the doors and windows. But it is otherwise with glass, for a house is perfect enough, although it has no glass; and so there is a diversity. But in the case here, this furnace is altered by this fixing from the nature of a chattel. For it is adjudged in our books that an attachment in assise for a furnace is not good; and the reason is that it is not a removable chattel; and so the action here for the heir seems maintainable.

Grevill. Although this furnace is so fixed to the land, yet it is not therefore proved that it will go with the inheritance, so that it cannot be severed from the inheritance, for by such a reason if anything was fixed to the land by the tenant for term of years, it will be immediately called parcel of the inheritance, and the termor will not take it; and this is not so, for although he fixes a post in the ground during the term, and he retakes it within the same term, yet the lessor will not retake it. And in our case here it appears that this furnace was fixed to the ground within the house, so that the inheritance is none the worse for it, and where a furnace was fixed to the wall of the house, the better opinion in 42 E. III. was that it is not waste, although the termor takes it; and so it seems here, that the executors will take it, and the action is not maintainable.

Eliot. There is a difference when such a thing is fixed by the reversioner, and when the termor; for when it is done by the reversioner, and then he leases it rendering a certain rent, now it is made parcel of the reversion, for it makes the rent which is reserved on such a lease more than it would be if such a fixing had not been made. As where one

makes vats and fixes them in a dyehouse or brewhouse, and then leases the house rendering a certain rent, now, by common reason, the rent is the greater, wherefore neither the termor nor the executor will take them ; but where they are put in by the termor, he takes them : but here he who had the fee simple fixed this furnace, in which case the executors cannot take it, for the reason aforesaid.

KINGSMILL, [J.] After it is fixed to the freehold, it is incident to the freehold, although it is not parcel of the freehold, and it will go and pass always with the freehold ; and although he to whom the freehold belongs after such fixing is outlawed, this furnace will not be distrained nor forfeited, and the reason is because it is annexed and fixed to the freehold ; and for this reason the heir will have them after the death of his father, for such posts as are fixed by the father will belong always to the heir, and never to the executors. And where one is seised of land in fee, and buys documents concerning the same land, and dies, in that case the heir will have the documents, and not the executors ; and the reason is because they concern the title to the land, although they are but chattels in themselves. And where one has fixed vats in a brewhouse or dyehouse and dies, the heir will have them ; for when they are fixed, they are for the continual profit of the house, and therefore there is more reason that the heir should have them, whose is the freehold to which they are joined, than the executors, who have nothing to do with the freehold. But as to the lessee for term of years, if he has fixed such a thing to the ground, and not to the wall, he may well retake it during the term, (but if he lets it after the term, the lessor will take it,) for the taking of it is not any waste, because the house is not injured by it. But in the case here, it seems that the action is maintainable for the reasons aforesaid.

FISHER, [J.,] was of the same opinion.

READ, [C. J.] The executors will take all kinds of chattels which belonged to their testator, but that is where they are properly in the nature of chattels ; now here when this furnace was annexed and fixed to the land, it is as to a thing of higher nature, and in a way is made incident to it. As in the case that has been put of sleeping tables, the heir will have them after the death of the father, and not the executors, and in reason it follows that when they are joined to the inheritance, it is in accordance with reason that they pass with the inheritance until they are severed by him who has authority to sever them, and that is he in whom is the inheritance. And as to the reason which has been given that the testator might have severed, and given or sold them, and that the executors can in like manner, that is no reason, for the testator could give the trees, and so cannot the executors ; and as has been said at the bar, the furnace cannot be attached in assise nor distrained, and so by all the cases aforesaid it seems that the action lies ; and so was the opinion of the whole court. *Quod nota.*¹

¹ See Keilw. 88, pl. 3.

² *Nota*, reader, Mich. 18 & 19 Devon : it was adjudged in C. B. that waste might

SQUIER v. MAYER.

BEFORE SIR NATHAN WRIGHT, LORD KEEPER. 1701.

[*Reported Freem. C. C.* 249.]

HELD, that a furnace, though fixed to the freehold, and purchased with the house, and also hangings nailed to the wall, shall go to the executor, and not to the heir, and so determined, contrary to *Herlakenden's Case*, 4 Co., *qu'il dit nest ley quoad præmissa*.¹

POOLE'S CASE.

NISI PRIUS. 1703.

[*Reported 1 Salk.* 368.]

TENANT for years made an under-lease of a house in Holborn to J. S., who was by trade a soap-boiler. J. S., for the convenience of his trade, put up vats, coppers, tables, partitions, and paved the back-side, &c. And now upon a *feri facias* against J. S., which issued on a judgment in debt, the sheriff took up all these things, and left the house stripped, and in a ruinous condition; so that the first lessee was liable to make it good, and thereupon brought a special action on the case against the sheriff, and those that bought the goods, for the damage done to the house. *Et per* HOLT, C. J., it was held, —

be committed in glass annexed to windows, for it is parcel of the house, and shall descend as parcel of the inheritance to the heir, and that the executors should not have them; and although the lessee himself at his own costs put the glass in the windows, yet in being once parcel of the house he could not take it away, or waste it, but he should be punished in waste; and upon the said judgment a writ of error was brought in B. R., and there the judgment was affirmed. *Nota* also, *inter Warner & Fleetwood*, Mich. 41 & 42 Eliz. in C. B., it was resolved *per totam curiam*: that glass annexed to windows by nails, or in other manner, by the lessor or by the lessee, could not be removed by the lessee, for without glass it is no perfect house; and by lease or grant of the house it should pass as parcel thereof, and that the heir should have it, and not the executors; and peradventure great part of the costs of the house consists of glass, which if they be open to tempests and rain, waste and putrefaction of the timber of the house would follow, which agrees with the judgments given before. It was likewise then resolved, that wainscot, be it annexed to the house by the lessor or by the lessee, is parcel of the house; and there is no difference in law if it be fastened by great nails or little nails, or by screws, or irons put through the post or walls (as have been invented of late time); but if the wainscot is by any of the said ways, or by any other, fastened to the posts or walls of the house, the lessee cannot remove it, but he is punishable in an action of waste, for it is parcel of the house; and so by the lease or grant of the house (in the same manner as the ceiling and plastering of the house), it shall pass as parcel of it." *Herlakenden's Case*, 4 Co. 62 a, 63 b (1589).

¹ See *accord. Beck v. Rebou*, 1 P. Wms. 94; *Harvey v. Harvey*, 2 Stra. 1141.

1st, That during the term the soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favor of trade and to encourage industry: But after the term they become a gift in law to him in reversion, and are not removable.

2dly, That there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney-pieces, which he held not removable.

3dly, That the sheriff might take them in execution, as well as the under-lessee might remove them, and so this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might: And the reason is, because in that case the tenant hath only a bare power without an interest; but here the under-lessee hath an interest as well as a power, as tenant for years hath in standing-corn, in which case the sheriff can cut down and sell.

CAVE v. CAVE.

BEFORE SIR NATHAN WRIGHT, LORD KEEPER. 1705.

[*Reported 2 Vern. 508.*]

A QUESTION arising whether some pictures and glasses belonged to the heir or to the executor: the LORD KEEPER was of opinion,¹ that although pictures and glasses generally speaking are part of the personal estate; yet if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir. The house ought not to come to the heir maimed and disfigured. *Herlakenden's Case*, wainscot put up with screws shall remain with the freehold.²

LAWTON v. LAWTON.

BEFORE LORD HARDWICKE, C. 1743.

[*Reported 3 Atk. 12.*]

THE material question in the cause was, whether a fire-engine set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainder-man.

There was evidence read for the plaintiff, a creditor of the tenant for life, to prove that the fire-engine was worth, to be sold, three hundred and fifty pounds; and that it is customary to remove them; and that in

¹ Only that part of the case which relates to fixtures is here given.

² See *D'Eyneourt v. Gregory*, L. R. 3 Eq. 382; *Snedeker v. Warring*, 12 N. Y. 170.

building of sheds for securing the engine, they leave holes for the ends of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another.

That the testator, the counsel for the plaintiff said, was dead, greatly indebted, and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place.

Mr. Wilbraham compared it to the case of a cider-mill which is let in very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron Comyns, at the assizes at Worcester, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor.

Evidence was produced on the part of the defendant, to show that the engine cannot be removed without tearing up the soil, and destroying the brick work.

Mr. Clark, of counsel for the defendant, cited Finch, fol. 135, under the head of Distress; and the case of *Wortley Montague v. Sir James Clavering*, about two years ago before Lord Hardwicke.

LORD CHANCELLOR. This is a demand by a creditor of Mr. Lawton, who set up the fire-engine, to have the fund for payment of debts extended as much as possible.

It is true the court cannot construe the fund for assets, further than the law allows, but they will do it to the utmost they can in favor of creditors.

This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts.

Now it does appear in evidence, that in its own nature it is a personal movable chattel, taken either in part, or in gross, before it is put up.

But then it has been insisted, that fixing it in order to make it work, is properly an *annexation* to the freehold.

To be sure, in the old cases, they go a great way upon *the annexation* to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold.

Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term.

What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done.

Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire-engines, and in brewhouses especially, pipes must be laid through the walls, and supported by walls;

and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.

This being the general rule, consider how the case stands as to the engine, which is now in question.

It is said, there are two maxims which are strong for the remainder-man: First, That you shall not destroy the principal thing, by taking away the accessory to it.

This is very true in general, but does not hold in the present case, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it.

Secondly, It has been said, that it must be deemed part of the estate, because it cannot subsist without it.

Now collieries formerly might be enjoyed before the invention of engines, and therefore this is only a question of *majus* and *minus*, whether it is more or less convenient for the colliery.

There is no doubt but the case would be very clear as between landlord and tenant.

It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man.

But even in these cases, it does admit the consideration of public convenience for determining the question.

I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir.

One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers.

The case too of a cider-mill, between the executor and the heir, mentioned by Mr. Wilbraham, is extremely strong; for though cider is part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor.

It does not differ it in my opinion, whether a shed over such an engine be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences.

This is not the case between an ancestor and an heir, but an *intermediate* case, as Lord Hobart calls it, between a tenant for life and remainder-man.

Which way does the reason of the thing weigh most, between a tenant for life and a remainder-man, and the personal representative of tenant for life, or between an ancestor and his heir, and the personal representative of the ancestor? Why, no doubt, in favor of the former, and comes near the case of a common tenant, where the good of the public is the material consideration, which determines the court to construe these things personal estate; and is like the case of emblements, which shall go to the executor, and not to the heir or remainder-man,

it being for the benefit of the kingdom, which is interested in the produce of corn, and other grain, and will not suffer them to go to the heir.

It is very well known, that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up.

These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.

Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for the increase of assets; and decreed accordingly.¹

LAWTON *v.* SALMON.

KING'S BENCH. 1782.

[Reported 1 *H. Bl.* 259 note.]

IN this action of trover, brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works, called salt pans, a case was reserved by consent, which stated, that the testator, some years before his death, placed the salt pans in the works; that they were made of hammered iron, and riveted together; that they were brought in pieces, and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych houses; that they might be removed without injuring the buildings, though the salt works would be of no value without them, which with them were let for £8 per week.

The question was, whether the executor or the heir at law were entitled to them?

Mingay, for the plaintiff.

Davenport, for the defendant.

LORD MANSFIELD, after stating the case, said: All the old cases, some of which are in the Year-Books, and Brooke's Abridgment agree that whatever is connected with the freehold, as wainscot, furnaces,

¹ "In the case of *Lawton v. Lawton* it was determined it [an engine] should go to executors, partly on the reasons there mentioned, and partly on the authority of the case of a cider-mill, there cited to have been so adjudged by Lord C. B. Comyns; that of *Lawton v. Lawton*, was the case of creditors; but that makes no difference, because the question is, Whether part of the real or personal estate?" *Per* LORD HARDWICKE, C., in *Dudley v. Warde*, Ambl. 113, 114. See *D'Eynecourt v. Gregory*, L. R. 3 Eq. 382; and *Wadleigh v. Janvrin*, 41 N. H. 503.

pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases, for the benefit of trade, between landlord and tenant, that many things may now be taken away, which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between tenant for life and a remainder-man, if the former has been at any expense for the benefit of the estate, as by erecting a fire-engine, or anything else by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man, as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find, that between heir and executor, there has been any relaxation of this sort, except in the case of the cider-mills, which is not printed at large. The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it, unless there is a salt work; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir, in lieu of them. But the heir gains £8 per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. Wilbraham, in his opinion, takes the distinction between executor and tenant. For these reasons, we are all of opinion, that the salt pans must go to the heir.

Postea to the defendant.

ELWES *v.* MAW.

KING'S BENCH. 1802.

[*Reported 3 East, 38.*]

LORD ELLENBOROUGH, C. J.¹ This was an action upon the case in the nature of waste, by a landlord, the reversioner in fee, against his late tenant, who had held under a term for 21 years, a farm consisting of a messuage, and lands, out-houses, and barns, &c., thereto belonging, and who, as the case reserved stated, during the term and about 15 years before its expiration, erected at his own expense a beast-house, earpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant previous to the expiration of his lease pulled down the erections, dug up the foundations, and carried away the materials; leaving the premises in the same state as when he entered upon them. The case further stated, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the court was, Whether the defendant had a right to take away these erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. 1st, Between different descriptions of representatives of the same owner of the inheritance; viz., between his heir and executor. In this first case, *i. e.*, as between heir and executor, the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2dly, Between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favorably for executors than in the preceding case between heir and executor. The 3d case, and that in which the greatest latitude and indulgence has always been allowed in favor of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

But the general rule on this subject is that which obtains in the first-mentioned case, *i. e.*, between heir and executor; and that rule (as

¹ The opinion sufficiently states the case.

found in the Year Book, 17 E. 2, p. 518, and laid down at the close of *Herlakenden's Case*, 4 Co. 64, in Co. Lit. 53, in *Cooke v. Humphrey*, Moore, 177, and in *Lord Darby v. Asquith*, Hob. 234, in the part cited by my brother Vaughan, and in other cases) is that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favor of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book 42 E. 3, 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 H. 7, 13, a. & b., which was the case of trespass against executors for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favor of tenants is doubted afterwards in 21 H. 7, 27, and narrowed there, by allowing that the lessee for years could only remove, within the term, things fixed to the ground, and not to the walls of the principal building. However, in process of time the rule in favor of the right in the tenant to remove utensils set up in relation to trade became fully established; and accordingly, we find Lord Holt, in *Poole's Case*, Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c., fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that during the term the soap-boiler might well remove the vats he set up in relation to trade; and that he might do it by the common law, and not by virtue of any special custom, in favor of trade, and to encourage industry; but that after the term they became a gift in law to him in reversion, and were not removable. He adds, that there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete his house, as hearths and chimney-pieces, which he held not removable. The indulgence in favor of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck v. Rebow*, 1 P. Wms. 94; *Ex parte Quincey*, 1 Atk. 477, and *Lawton v. Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term.

In deciding whether a particular fixed instrument, machine, or even building should be considered as removable by the executor, as between him and the heir, the court, in the three principal cases on this subject (viz. *Lawton v. Lawton*, 3 Atk. 13, which was the case of a fire-engine to work a colliery erected by tenant for life; *Lord Dudley and Lord Ward*, Ambler, 113, which was also the case of a fire-engine to work a colliery erected by tenant for life,— these two cases before Lord Hardwicke, — and *Lawton, Executor, v. Salmon*, E. 22, G. 3; 1 H. Blac. 259, *in notis*, before Lord Mansfield, which was the case of salt pans, and which came on in the shape of an action of trover brought for the salt pans by the executor against the tenant of the heir at law), the court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, “A colliery is not only an enjoyment of the estate, but in part carrying on a trade.” And in the case in 3 Atk. he says, “One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers.” Upon the same principle Lord Ch. B. Comyns may be considered as having decided the case of the cider-mill; *i. e.*, as a mixed case between enjoying the profits of the land and carrying on a species of trade; and as considering the cider-mill as properly an accessory to the trade of making cider.

In the case of the salt pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, “The salt spring is a valuable inheritance, but no profit arises from it unless there be a salt work; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.” Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant, on the ground of their being such utensils of trade; still it would not have affected the question now before the court, which is the right of a tenant for mere agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever: and to which description of buildings no case

(except the *Nisi Prius* case of *Dean v. Allaly*, before Lord Kenyon, and which did not undergo the subsequent review of himself and the rest of the court) has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's *Nisi Prius*, 34, of *Culling v. Tuffnell*, before Ch. J. Treby, at *Nisi Prius*, he is stated to have holden that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures: "they were not fixed in or to the ground." In the case of *Fitzherbert v. Shaw*, 1 H. Blac. 258, we have only the opinion of a very learned judge indeed, Mr. Justice Gould, of what would have been the right of the tenant, as to the taking away a shed built on brick-work, and some posts and rails which he had erected, if the tenant had done so during the term; but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *Nisi Prius*; and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton v. Robart*, 2 East, 88, it was the case of a varnish house, with a brick foundation let into the ground, of which the wood-work had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade: and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning which obtains in modern times in favor of the interests of trade; upon which ground it might be properly supported; goes further, and extends the indulgence of the law to the erection of green-houses and hot-houses by nurserymen, and indeed by implication to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension. The *Nisi Prius* case of *Dean v. Allaly* (reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, 2 vol. 11), is a case of the erection and removal by the tenant of two sheds, called Dutch barns, which were, I will assume, unquestionably fixtures. Lord Kenyon says, "The law will make the most favorable construction for the tenant, where he has made necessary and useful erections, for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills, and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term." Lord Kenyon here uniformly mentions the

benefit of trade, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known, allowed, exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favor of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation at all; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

Vaughan, Serjeant, and *Torkington*, for the plaintiff.

Balguy and *Clarke*, for the defendant.

Postea to the plaintiff.

BUCKLAND *v.* BUTTERFIELD.

COMMON PLEAS. 1820.

[*Reported 2 Brod. & B. 54.*]

ACTION on the case, in the nature of waste, by tenant for life, aged 70, against the assignees of her lessee from year to year, who had become bankrupt. The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At Buckingham Lent Assizes, 1820, before *Graham*, B., the case proved was, that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt and brought from a distance, was by him erected on a brick foundation fifteen inches deep: upon that was bedded a sill, over which was framework covered with slate; the framework was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with

sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding-door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house, to which it had been attached, became exposed to the weather. Surveyors who were called, stated that the house was worth £50 a-year less after the conservatory and pinery had been removed. The learned judge having stated his opinion that the plaintiff ought to recover at least for the pinery, and probably for the conservatory, the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for her, £300 damages. *Peake*, Serjt., having obtained a rule *nisi* for a new trial,

Blosset, Serjt., showed cause against the rule.

Peake, in support of the rule.

DALLAS, C. J. This was an action on the case, tried before Graham, B., at the last Aylesbury Assizes. The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold, and to make the removal of it waste? In *Elwes v. Mawe* will be found at length all that can relate to this case and to all cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject-matter itself of the inquiry. Nothing will, here, depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscots, Lord Hardwicke treats it as a very strong case. Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord Kenyon in 2 East, 88, referred to at the bar. The

case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present, but it has been cited for the *dictum* of Lord Kenyon, which seems to treat green-houses and hot-houses erected by great gardeners and nursery-men as not to be considered as annexed to the freehold. Even if the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present: but in *Elwes v. Mawe*, speaking of this *dictum*, Lord Ellenborough says, there exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall to warrant such an extension. Allowing, then, that matters of ornament may or may not be removable, and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned judge, in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste.

*Rule discharged.*¹

WINN v. INGILBY.

KING'S BENCH. 1822.

[Reported 5 B. & Ald. 625.]

TRESPASS for breaking and entering plaintiff's house, and taking his fixtures, goods, and chattels. Justification under a writ of *fi. fa.* directed to the defendant, Ingilby, as sheriff of the county, under which the defendant, Hauxwell, his bailiff, peaceably entered the premises, and seized, &c. Replication *de injuria*, &c. At the trial at the last assizes for Yorkshire, before *Cross*, Serjeant, the only question was, whether the defendants were justified in seizing, under the execution, some fixtures, consisting of set pots, ovens, and ranges. It appeared that the house where these were fixed was built on the plaintiff's own freehold, and the learned serjeant was of opinion that under these circumstances they were not seizable by the sheriff under an execution.

The plaintiff accordingly had a verdict; and now

Littledale moved to enter a verdict for the defendants.

PER CURIAM. The verdict is right, for these were fixtures which would go to the heir, and not to the executor, and they were not liable to be taken as goods and chattels under an execution. Here, the house where they were fixed was the freehold of the plaintiff, which distinguishes this case from those cited.

Rule refused.

¹ See *Jenkins v. Gething*, 2 J. & H. 520.

THRESHER *v.* EAST LONDON WATER WORKS COMPANY.

KING'S BENCH. 1824.

[*Reported 2 B. & C. 608.*]

COVENANT on a lease. Breach, non-repair of premises. Plea, performance of the covenant. The cause was tried at the sittings at Guildhall after Trinity term, 1823, when a verdict was found for the plaintiff, damages £500, subject to the opinion of the court upon a case, stating in substance as follows. The lease upon which the action was brought, was a lease by indenture made by the plaintiff's ancestor to the defendants in the year 1791, reciting a former lease between the parties under whom the plaintiff and defendant claimed, made in the year 1756 for thirty-nine years; and which would not expire until 1795, and was in force at the time of making the lease in question. An under-lease of part of the premises was granted in 1783, by the lessees in the lease of 1756, to one Joseph Matthews for thirty-one years, and which, consequently, would not expire until 1814, several years after the expiration of the lease of 1756. The underlease of 1783 was granted in consideration of a former underlease, which had become vested in Joseph Matthews, and there was a covenant to repair, and to leave at the end of the term the premises so repaired, together with all such erections and buildings as then were or should be at any time thereafter built or set up in, upon, or about the same, or any part thereof. In 1780, Matthews erected a lime-kiln on the premises, at the expense of £160, and T. Ayres and Joseph Watford, the assignees of the term granted to Matthews, erected a similar lime-kiln on the premises in 1790. It also appeared by the underlease of 1783, that a warehouse and stable were then standing on the premises thereby demised. Both these lime-kilns were therefore existing in 1791, when the lease in question was granted. The lime-kilns were built of brick and mortar, and the foundations let into the ground. They were erected for the purpose of carrying on the trade of a lime-burner. The chalk and coals used in the business were brought up the river Thames, and the lime sold on the premises to customers. By the lease of 1791, the demise was of a piece of ground formerly called the Osier Hope, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756; and the premises were said to be in the occupation of the several persons therein named, and among others, of James Ayres, lime-burner, *habendum* the said piece of ground, wharves, and buildings thereon erected and built. The lessees covenanted to repair, uphold, and maintain this piece of ground, erections, and buildings, wharves, cranes, and ponds, and the hedges, ditches, pales, and fences, belonging to the premises, and the said pre-

mises so repaired, upheld, and maintained, to leave and yield up at the end of the term. The action was brought for the removal of these lime-kilns. The lease of 1783 afterwards became vested in one Meeson, who, after the expiration of the term thereby granted, held the premises thereby demised for some time, as tenant from year to year, to the defendants, and pulled down the lime-kilns four years ago. The question in the cause was, whether the removal of those lime-kilns was a breach of the covenant to repair contained in the lease of 1791?

Amos, for the plaintiff.

Campbell, for the defendant.

ABBOTT, C. J., delivered the judgment of the court; and, after stating the facts of the case, proceeded as follows:—

The question in the cause is, whether the removal of the lime-kilns be a breach of the covenant to repair, contained in the lease of 1791.

On the behalf of the defendants three grounds of objection were taken:

First, that lime-kilns are not buildings within the meaning of a covenant to repair buildings; but this is answered by the case, in which it is found that they were erected with brick and mortar, and their foundations let into the ground.

Secondly, that, being erected for the purpose of trade, they were removable generally.

Thirdly, that, upon the true construction of the several leases set forth in the case, they were removable, or rather that they were not to be considered as having been demised by the lease of 1791.

By this lease of 1791 the demise is of a piece of ground formerly called the Osier Hope, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756, and the premises are said to be in the several occupations of persons therein named, and among others of James Ayres, lime-burner, *habendum* the said piece of ground, wharves, and buildings thereon erected and built. The lessees covenant to repair, uphold, and maintain the said piece of ground, erections and buildings, wharves, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises; and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term.

Now it is settled, by the case of *Naylor v. Collinge*, 1 Taunt. 19, that buildings erected for the purpose of trade, under a lease containing such a covenant, cannot be removed by the lessee, the terms of the covenant being general, and containing no exception. And this is highly reasonable, because the expectation of buildings to be erected during a term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved. And if buildings for trade erected during a lease cannot be removed without the breach of such a covenant, neither can buildings erected before, and existing at the date of a lease, be removed without a breach of the covenant, unless there shall be some very special matter to take them out of the operation of

the covenant. Whether any matter capable of having such an effect can exist *dehors* the deed may be questionable; but it is enough for the purpose of the present cause to say, that no such matter exists in this case.

Such matter was supposed to be derivable from the former lease of 1756, and the underlease of 1783.

In the lease of 1756 the premises are described as all that piece of ground called the Osier Hope, with the use of a crane, then standing on part of it, and part of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off by pales, and part of which was formerly an osier ground, but then converted into three ponds or reservoirs. It does not appear by the case whether any covenant to repair was contained in this lease, and the instrument is probably lost, and its contents known only by the recital of it in the lease of 1791, in which it further appears, that the lessees had applied for a further term of thirty-one years, which is granted at a considerable increase of rent. There is, therefore, nothing in this lease of 1756 that can restrain or qualify the covenant to repair in the lease of 1791; and it has not been shown by what reason or rule of law the lessees of 1791, having accepted a lease (by indenture) of ground and buildings thereon, could be allowed to say that the ground only, and not the buildings thereon, should be deemed to pass by that lease. It would be very difficult to maintain such a proposition, by the circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, even if such under-lessee, as between him and his own immediate lessor, had a right to remove the buildings; for the original lessor might very reasonably say, that he had nothing to do with any contract between other parties. But, upon adverting to the under-lease of 1783, the foundation of such an argument is wholly removed, because, by the terms of that under-lease, the under-lessee, Matthews, has covenanted, not only to repair and uphold the premises demised to him, but also to leave, at the end of the term, those premises so repaired and upheld, together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon, or about the same, or any part thereof. So that, according to the case of *Naylor v. Collinge*, the under-lessee himself could not have removed those lime-kilns without a breach of his covenant made with his own lessors.

For these reasons our judgment is in favor of the plaintiff; and the *postea* is to be delivered to her. *Judgment for the plaintiff.*¹

¹ See *Loughran v. Ross*, 45 N. Y. 792.

GRYMES v. BOWEREN.

COMMON PLEAS. 1830.

[*Reported 6 Bing. 437.*]

CASE for injury to the reversion. At the trial before *Garrow*, B., at the last Norfolk Assizes, it appeared that the defendant, who occupied as tenant from year to year certain premises belonging to the plaintiff, had, at his own expense, erected on the premises a pump, which he took away when he quitted them.

The pump was attached to a stout perpendicular plank; this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches. The pin, which had a head at one end and a screw at the other, passed entirely through the wall.

The tube of the pump passed through a brick flooring into a well beneath. This well had originally been open, but the defendant had arched it over when he erected the pump; and, in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed.

Under the direction of the learned Baron (who thought the pump parcel of the freehold, inasmuch as it could not have been the subject of larceny at common law), the jury found a verdict for the plaintiff, damages £4, with leave for the defendant to move to enter a nonsuit.

Wilde, Serjt., having obtained a rule *nisi* accordingly,

Storks, Serjt., now showed cause.

Wilde, contra.

TINDAL, C. J. It is difficult to draw any very general and at the same time precise and accurate rule on this subject; for we must be guided in a great degree by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant, than as between persons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles: and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the in-coming to the out-going tenant, is confirmatory of this view of the question.

Looking at the facts of this case; considering that the article in dispute was one of domestic convenience; that it was slightly fixed; was

erected by the tenant; could be moved entire; and that the question is between the tenant and his landlord, — I think the rule should be made absolute.

PARK J. The rules with regard to property of this description vary according to the relation in which parties stand towards each other. The rule as between heir and executor is more strict than as between landlord and tenant, and even as between landlord and tenant it has been relaxed in modern times; for in *Lawton v. Lawton*, 3 Atk. 13, Lord Hardwicke held, that wainscot might be removed by the tenant, although it would have been waste to have removed it in the time of Hen. 7.

Perhaps we ought not to look with too much nicety as to the mode in which articles are fixed, when it has been holden that the tenant may remove ovens, coppers, and the like. The present case, however, is clearly distinguishable from *Buckland v. Butterfield*, where a conservatory was deeply fixed in the soil, and formed part of the house to which it was attached: and, however I may regret it, seeing that the value in dispute is so small, I am compelled to say that the verdict which has been given is wrong.

GASELEE, J., concurred.

BOSANQUET, J. I am of opinion, that this pump was removable by the tenant. Whether property of this kind be removable or not, depends in some degree on the relation between the parties: and in the relation of landlord and tenant the rule is less strict than in others: it is more so as between heir and executor, and as between executor and remainder-man. My apprehension has been lest we should be thought to lay down any principle which would apply to cases different from the present. But considering that this is a case between landlord and tenant; that the pump was erected by the tenant; that it is an article of domestic use; and can be removed entire, — I think the verdict ought to be set aside. *Rule absolute.*

THE KING v. OTLEY.

KING'S BENCH. 1830.

[*Reported 1 B. & Ad. 161.*]

UPON appeal against an order of two justices, whereby Samuel Stammers and his four children were removed from the parish of St. Mary, Lambeth, in the county of Surrey, to the parish of Otley, in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this court on the following case: —

Samuel Stammers, the pauper, rented of James Bedwell, of Ipswich, carpenter, in the appellat parish, a windmill called a smock-mill, a brick-built cottage, and a small garden, at the rent of £30 per annum,

during the space of six years, and three quarters of another year, ending midsummer, 1827; and during the whole of that time held, occupied, and actually paid for the same the said sum of £30 per annum, and was rated to and paid several rates for the relief of the poor of the parish of Otley in respect of the cottage and garden, and also of the mill, at the estimated value of £6 per annum. The cottage and garden, with the mill, are together of more than the annual value of £10, but the cottage and garden, exclusively of the mill, are not of that annual value. The mill is of a circular form, and of wood, having a foundation of brick twelve inches high from the ground, in which the wood-work is not inserted, but rests upon it by its own weight alone. No part of the machinery of the mill touches the ground or any part of the foundation; the whole is confined to the wooden part of it, which has two floors; but on the ground within the brick foundation, planks are laid down so as to form a flooring, and the mill would work as well upon the ground as upon the brick foundation. Some time after the erection of the mill, the tenant placed mortar on the inside and outside of the sill or bottom part of the wood-work of the mill, for the purpose of excluding the weather, mortar so placed not acting as a cement between wood and brick work; and he also fixed posts in the ground, which, sloping towards the mill, supported steps by which the mill was entered. The question for the opinion of the court was, Whether the mill in question was a tenement, by the renting of which the pauper could acquire a settlement in Otley?

Thesiger in support of the order of sessions.

Barnewall and *Ross*, contra.

BAYLEY, J. The question is, Whether the mill be parcel of a tenement? To be so, it must be part and parcel of the freehold. Now, it is not parcel of the freehold unless it be affixed to it, or to something previously connected with it. Here the mill was not affixed to the land, but merely rested on a foundation of brick. The sessions have found that if it had stood upon the ground, it would have worked as well. If it had, the only difference would have been, that it probably would have rotted. This is analogous to the case of a barn set upon pillars; and that is nothing more than a chattel. The windmill in this case would clearly have gone to the executor, and not to the heir.

LITTLEDALE, J. This is precisely within the case of *The King v. The Inhabitants of Londonthorpe*, 6 T. R. 377. It is attempted to be distinguished, because the tenant in that case had permission from the landlord to put up the mill, and it was treated by both as a chattel; but that circumstance can make no difference. Suppose there were two mills in two distinct townships, and one of the townships treated the mill as a tenement, and the other, as a mere chattel. That would make no difference. It must depend upon the nature of the building, and not upon the mode of treating it, whether it be a tenement or not.

PARKE, J. I am of the same opinion. To constitute a tenement, it is necessary that the structure should be affixed to the soil, or to

something annexed to the soil. Here the windmill rested merely upon the brick foundation, without being annexed to it by cement.

*Order of sessions quashed.*¹

HALLEN v. RUNDER.

EXCHEQUER. 1834.

[*Reported 1 C. M. & R. 266.*]

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the defendant had bargained for, and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had sold to the defendant divers chattels, fixtures, and effects, then lying and being in and fastened to a certain dwelling-house and premises, at and for a certain price, to wit, the price of £40 10s.; the defendant undertook to pay the said sum of £40 10s., when he should be thereunto afterwards requested; and that, although the plaintiff afterwards requested the defendant to pay him the said sum of £40 10s., yet, that the defendant did not, nor would then or at any other time pay him the same or any part thereof. The second count was in *indebitatus assumpsit*, for the price and value of goods, chattels, fixtures, and effects, bargained and sold, and for the price and value of other goods, chattels, fixtures, and effects sold and delivered, and for money lent, money paid, money had and received, and for money due upon an account stated. The defendant pleaded the general issue.

At the trial, before *Gurney, B.*, at the sittings in London, after last Michaelmas Term, it appeared in evidence that the plaintiff had for several years, prior to the 25th of March, 1833, occupied a house in Nelson Square, under the defendant, and that a few days before that day, when the plaintiff was on the point of removing to another house, the defendant called upon the plaintiff, and requested him not to remove the fixtures, saying, she would take them at a fair valuation; and it was agreed that each party should appoint their own broker. It further appeared, that, when the plaintiff entered the house as tenant to the defendant, he had paid £23 for fixtures to the out-going tenant; and that prior to his quitting the house, he had added very considerably to the quantity of fixtures. The plaintiff gave up possession of the house

¹ "We are aware that in England, by some, if not by most, of their cases, where wooden buildings are erected on brick or stone foundations, and are not let into or fastened to the brick or stone work, and are only held to their places by their own weight, they have been held to be personal property only. *Ree v. Otley*, 1 Barn. & Adol. 161, and *Wansborough v. Maton*, 4 Adol. & Ellis, 844, are cases of this sort. But this has never been considered as the law with us, and to hold it to be so at this day would in effect change the character of very many, if not of most, of the wooden buildings in the State, from real estate into mere personal chattels." *Landon v. Platt*, 34 Conn. 517, 524. See *Snedeker v. Warring*, 12 N. Y. 170.

on the 24th of March, leaving the fixtures on the premises. On the following day, the plaintiff sent for, and obtained the key of the house from the defendant's son, for the purpose of having the fixtures valued, and the key was accordingly delivered to the plaintiff's broker, who, together with one Sexton, a broker, who met him there on the defendant's behalf, valued the whole of the fixtures at £40 10s., and they both signed the appraisement at that valuation. After the valuation was made, the key was returned to the defendant. On the trial it was proved by Sexton, the defendant's broker, that the defendant had desired him to go to the house in question to look at some fixtures and stoves; that she said, she did not know whether she would agree with the plaintiff for them or not, but that he was to appraise them. It was objected for the defendant, first, that there was no contract in writing proved, inasmuch as the appraisement was not signed by the defendant, or by her authority, and therefore that the sale was void under the 17th section of the Statute of Frauds; and, secondly, that this form of action was not maintainable: that the fixtures, not having been severed, continued to be part of the freehold, and could not be considered as goods and chattels; and therefore, that *indebitatus assumpsit* was not maintainable, and that the action ought to have been special on the agreement. The learned Baron told the jury that if they believed that the defendant had authorized the broker to appraise the fixtures, he was of opinion that she had given him authority to sign the appraisement; and consequently, that there was a sufficient note in writing, if that were necessary. The jury found a verdict for the plaintiff for the amount of the valuation. The learned judge gave the defendant leave to move to enter a nonsuit; and accordingly in Hilary term last—

F. Kelly, moved either for a nonsuit or a new trial. The court granted a rule *nisi*, against which,

Thesiger and *Petersdorff*, showed cause.

Kelly, in support of the rule.

The judgment of the court was delivered by PARKE, B. In this case, which was argued before my Brothers Bolland, Alderson, Gurney, and myself, all the questions were disposed of by the court in the course of the argument except one; namely, whether the plaintiff could recover the amount of the valuation of the fixtures upon any count in this declaration. The first count stated, that in consideration that the defendant had bargained for and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had then and there sold to the defendant divers chattels, fixtures, and effects, then lying in and being fastened to a certain dwelling-house and premises, at the price of £40 10s., the defendant undertook to pay the price so agreed upon. The second count stated that the defendant was indebted to the plaintiff in £50 for the price and value of goods, chattels, fixtures, and effects, bargained and sold by the plaintiff to the defendant at her request; and in the like sum for the price and value of other goods, chattels, fixtures, and effects, sold and delivered by the

plaintiff to the defendant at her request; and in the like sum upon an account stated; and the question is, whether these counts, or any part of them, are applicable to the plaintiff's case. We think that the first count, or that part of the second count which charges the defendant with the price and value of fixtures bargained and sold, or indeed that which states her to be indebted for fixtures sold and delivered, is upon the evidence supported, and it is unnecessary to say whether the other part of the second, upon the account stated, was or was not sustained. The situation of the plaintiff was this, upon entering as tenant to the defendant, he had paid upwards of £20 for the interest which a former tenant had in certain chattels which had been annexed to the freehold, but which that tenant had a right to sever and remove whenever he pleased during his term; and the plaintiff had also, during his term, annexed other chattels to the freehold, which also he had the like right of removing. Shortly before the expiration of this term, the plaintiff agreed with the defendant, his lessor, that he should forbear to remove all these chattels so annexed, which he was about to do, and that they should be taken by the defendant on a valuation to be made by two appraisers. This valuation was ascertained by two brokers, both of whom must, upon the finding of the jury, be taken to have been properly appointed for this purpose: the value was fixed at £40 10s. The plaintiff left the chattels attached to the freehold, and the defendant took possession of them.

When chattels are thus fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels, as stated by Lord Chief Justice Gibbs in *Lee v. Risdon*, 7 Taunt. 191, and in the very able work of Messrs. Amos & Ferard on Fixtures; but, whilst annexed, they may be treated for some purposes as chattels: for instance, in the execution of a *fi. fu.* they may be seized and sold as falling under the description of goods and chattels — *Poole's Case*, 1 Salk. 368 — in like manner as growing crops of corn or other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. The case above cited of *Lee v. Risdon*, however, decides that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt v. Shew*, 4 B. & A. 206, they were held to fall under the description of "goods, chattels, and effects" in an action of trespass, we cannot consider the previous authority as overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Lord Chief Justice Abbott certainly does not mention that circumstance as the ground of the decision.

The plaintiff, therefore, cannot recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up

to the defendant all his interest in and right to enjoy these effects as chattels. And after the contract is executed, and the plaintiff has given up possession to the defendant, the question is, whether he may not declare as for fixtures bargained and sold, or sold and delivered. The term "fixtures" has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, in which sense it is used in the Treatise on Fixtures above referred to. And it has certainly been the practice, since the decision in *Lee v. Risdon*, to declare for the amount of valuations of such fixtures between one tenant and another, or the tenant and landlord, in a count in *indebitatus assumpsit* for fixtures. Although this may not be the most accurate mode of describing the real contract between the parties, we think it is sufficient, and that the plaintiff may recover upon it; and the case bears a strong analogy to that of a contract by a tenant to give up to his landlord or successor those growing crops to which he is entitled by the common law or the custom of the country, as emblements, and the value of which after the contract is executed may certainly be recovered on a count for crops bargained and sold. See *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 224. This question on the form of the declaration was indeed decided by the court on a motion for a rule *nisi*; but as it was suggested by the learned counsel for the defendant, that the court so decided under the impression that this was a sale of an interest in land, within the 4th section of the Statute of Frauds, leaving the point to be discussed whether the appraisement was a sufficient memorandum in writing, we have allowed the point to be argued, and given it full consideration, and decided it. We are quite satisfied that this is not a sale of any interest in land, for the reasons given in the course of the arguments; and the judgment of the court, and particularly of Mr. Justice Littledale in *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611, upon the subject of growing crops, is an authority to the same effect; but treating this as not being a sale of any interest in land, we think the declaration is sufficiently adapted to the case.

Rule discharged.

MACKINTOSH v. TROTTER.

EXCHEQUER. 1838.

[Reported 3 M. & W. 184.]

TROVER for fixtures, furniture, &c. Plea, that the goods and chattels in the declaration mentioned were not, nor were any of them, the property of the plaintiff. At the trial before *Coltman, J.*, at the last Liverpool Assizes, it appeared that the action was brought by the plaintiff, an innkeeper at Liverpool, to recover from the defendants, his assignees under a fiat in bankruptcy, which he alleged to be void, the value of

certain tenant's fixtures and household furniture, which they, as his assignees, had put up to sale by auction, together with the lease of his house and the goodwill of his business. The fixtures and furniture were sold in one lot, for £79 8s. 8d., and it was proved that the former still remained affixed to the freehold, not having been removed by the purchaser. It was contended, for the defendants, that the fixtures were not recoverable in trover. The learned judge was disposed to think that the defendants, by selling them, had, as between themselves and the plaintiffs, treated them as goods and chattels: he however desired the jury to assess the value of the fixtures separately; and they, having stated their value at £55, a verdict passed for the plaintiff for £79 8s. 8d., leave being reserved to the defendants to move to reduce the damages by the sum of £55. *Cowling* obtained a rule accordingly.

Cresswell, *Wightman*, and *Addison*, now showed cause.

Alexander and *Cowling*, in support of the rule.

PARKE, B. *Minshall v. Lloyd* [2 M. & W. 450] is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point, — that the principle of law is, that, whatsoever is planted in the soil belongs to the soil: *quicquid plantatur solo, solo cedit*; that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an *excrescence* on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my Brother Alderson go; and I think it was a correct decision.

BOLLAND and GURNEY, BARONS, concurred.

*Rule absolute.*¹

¹ "When an exception to the general law of fixtures was introduced in favor of trade fixtures, was the principle of that exception this, that they were never affixed to the freehold at all, or was it that, although affixed to the freehold, there was an exception to the right of removal? Was this exception with respect to trade fixtures an exception to the general rule, that they are affixed to the freehold which depends on the nature of the annexation; or was it an exception to the rule that they were incapable of removal during the term? If they were affixed to the freehold substantially, it was not an exception to that portion of the rule, but an exception in favor of trade fixtures to the rule that the tenant could not remove them, and they still remained affixed to the freehold; they were still fixtures affixed to the freehold, and, unless removed, would go to the landlord. Now, if the exception was an exception to the affixing to the freehold, to their becoming part of the freehold, one is utterly at a loss to comprehend, if they are trade fixtures, why, if they are not removed during the term, they go to the landlord. Why should they go to the landlord, except because they are annexed to his freehold, and have not been removed? Why should they? I confess I am utterly at a loss to know, except that a suggestion has been made — I do not mean for the first time — but a suggestion has been made that after the term it would be a trespass to go on the premises to remove the fixtures belonging to the tenant; the tenant has no longer a right to go on the premises. It would be a trespass on his part to go and get his fixtures; and therefore we consider — for this is the suggestion — that inasmuch as though he had the right to remove them, he has not removed them: he meant to abandon them, and make them a present to the landlord. I must say, anything more unsatisfactory to my mind than that I can hardly imagine.

WEETON *v.* WOODCOCK.

EXCHEQUER. 1840.

[Reported 7 *M. & W.* 14.]

TROVER for a steam-engine boiler. Pleas, 1st, not guilty; 2dly, that the plaintiffs were not possessed as of their own property: on which issues were joined. At the trial before *Erskine, J.*, at the last Liverpool Assizes, it appeared that the defendants were the assignees of one J. F. Taylor, a bankrupt. The plaintiffs, together with one Philip Newton (since deceased), had demised to Taylor, by indenture, a cotton factory, with the warehouse, counting-house, engine, and engine-house, &c., &c., implements, tackle, furniture, and machinery,

Clearly, to my mind, the exception was not an exception to the annexation to the freehold to their being fixed to the freehold; but the exception in favor of trade was, that they are capable of being removed by the tenant within the term. It appears to me that that is the principle of the exception. Some cases have been referred to with reference to the language of the judges; and, no doubt, it may, upon a somewhat hypercritical examination, be considered as rather tending to be an exception as to fixtures affixed to the freehold; but I have examined the language of all the cases, and it appears to me that it would be unreasonable and unfair to those very judges to say that that was in their mind. The question was not in their minds at the moment whether the exception was an exception in favor of trade fixtures so as to make them not affixed to the freehold, or an exception as to the right of removal. The question in their minds was, are these fixtures affixed, and, if affixed, are they trade fixtures; and if they are trade fixtures, are they not capable of being removed during the term? . . . Now I made the observation that I was at a loss to understand upon what sensible principle, if a tenant does not move his trade fixtures within the term, they go to the landlord. It has been suggested, as I have already observed, that the tenant must be supposed to have meant to make the landlord a present of them. As I have said, that is not satisfactory to my mind. I think they go to the landlord for this reason, because they are affixed to the freehold, and are not removed within the term; otherwise, supposing that besides the fixtures there was a vast number of utensils not affixed to the freehold at all, — the utensils of a brewery, for example; I cannot enumerate the various articles that would be used in one species of manufactory or another, but, of course, in every manufactory, besides the fixed machinery, there must be a vast quantity of loose machinery, mere chattels, never fixed to the freehold, and of course not forming part of the freehold. Supposing that the tenant should have omitted, through inadvertence or accident, at the expiration of the term to remove all those loose fixtures, do those go to the landlord? and why not? Why should not the same observation be made on his not removing them during the term? It must be assumed that he meant to make the landlord a present of them. Then the house, utensils and articles remain the property of the tenant: and why do not the others remain his property? Why does not the same principle apply to these? It appears to me that, as to one, it consists of chattels which are not affixed to the freehold, and with regard to the other, they cease to be chattels as long as they remain affixed to the freehold, and they become part of the freehold; and the only exception is, not to their being affixed to the freehold, or to others being part of that freehold, but as to the right of removal which in favor of trade is given to the tenant." *Per* KINDERSLEY, V. C., in *Gibson v. Homersmith R. Co.*, 32 L. J. (N. S.) Ch. 337.

the property of the plaintiffs and Newton, to the said factory and steam-engine belonging; and therewith used and enjoyed, &c., &c., for a term of seven years from the 12th of May, 1836. The lease contained covenants by Taylor to keep the premises in repair, to keep up a good steam-engine, with a boiler of beaten iron of certain dimensions, and at the end or sooner determination of the term, to leave and deliver up possession of the premises, and all the things therein, in good repair, or to pay the lessors the value of such as were not so left; with a proviso for re-entry in case of the bankruptcy of Taylor, and a fiat issuing thereon, or upon non-performance of any of the covenants. The steam-engine boiler in question was set up by Taylor during his tenancy, and annexed to the engine. It was built round with brick, and firmly fixed to the floor and walls of the engine-house; being, according to the statement of the witnesses, more firmly annexed than it was usual at a subsequent period to annex such boilers. In April, 1838, Taylor committed an act of bankruptcy, and on the 16th of that month a fiat in bankruptcy issued against him, under which the defendants were appointed assignees, and took possession of the bankrupt's property. A breach of the covenant to repair had been committed previously to the issuing of the fiat; and on the 30th of May, 1838, the plaintiffs made an entry on the premises, in order to enforce the forfeiture. The assignees, however, retained possession, and about the 20th of June following sold the boiler, and it was subsequently removed from the premises. It was contended for the plaintiffs, first, that they were entitled to recover under the covenant, to keep up the engine and boiler, and to leave them on the premises at the determination of the term; and further, that independently of the language of this particular covenant, they were entitled to the boiler as being a fixture, and not having been removed during the term. The learned judge left it to the jury to say whether the boiler was a fixture; and if so, whether it had been disannexed within a reasonable time after the entry of the plaintiffs. The jury found it to be a fixture, and that it had not been disannexed within such reasonable time; and a verdict was entered for the plaintiffs for £87, leave being reserved to the defendants to enter a nonsuit, if the court should be of opinion that the plaintiffs were not entitled under the covenant, and that the defendants, as assignees of the lessee, had a right to remove the boiler so long as they remained in possession.

In Michaelmas Term, *Wightman* obtained a rule accordingly; against which, in Easter Term,

Cooling (*Cresswell* with him), showed cause.

Wightman and *Crompton*, contra.

ALDERSON, B. In this case we took time to consider whether the assignees of the bankrupt had, under the circumstances, proved the right of removing the tenant's boiler, which was a fixture. It appeared that the landlord had made, on the 30th of May, 1838, an entry to avoid the lease after a forfeiture committed, and that subsequently to

that entry, though not (as the jury have expressly found) within a reasonable time after it, the assignees, still continuing in possession, removed and sold the boiler in question. The point is, whether they had the right so to do.

The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. That was the rule on which this court acted in *Minshall v. Lloyd*, 2 M. & W. 460, in which Mr. Baron Parke, in giving his judgment, puts it on the ground that there was "no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants." In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants. And further, even if they had the right, in a case where the entry determining the tenancy is the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury have found that they did not avail themselves of that privilege. The rule, therefore, for a nonsuit must be discharged.

*Rule discharged.*¹

FISHER *v.* DIXON.

HOUSE OF LORDS. 1845.

[Reported 12 Cl. & F. 312.]

THIS was an appeal against a decree of the Court of Session, arising out of the following circumstances:—

The late John Dixon was an extensive coal and iron mine owner, and was at the time of his death engaged in working mines, some of which were his freehold property, having been purchased by himself, while of the rest he was tenant under leases for various terms. A very valuable portion of his property consisted of engines employed in the business he carried on. By his will and codicils he made a provision for his daughter of a sum of £4,000, which he vested in trustees, and directed to be applied to her sole benefit, independently of any control or right of her husband. Upon his death she declined the provision made for her in her father's will, and claimed *legitim*, or child's portion, in his property. To enforce this claim she instituted a suit in the Court of Session (in which her husband joined for conformity's sake) against her brothers, who were the executors under her father's will, and the general dis-

¹ See *Deeble v. M'Mullen*, 8 Ir. C. L. 355; *Pugh v. Arton*, L. R. 8 Eq. 626; *Ex parte Brook*, 10 Ch. Div. 100.

ponees of his property. The respondent, one of those brothers, had become, by the death of the other, sole heir-at-law to his father. In this suit she alleged that the share of her father's personal property, to which she was entitled as *legitim*, amounted to £12,000. The respondent in his defence declared his readiness to account for the personal or executory effects of his late father, in order that the appellant's share therein might be ascertained, but insisted that these executory effects did not include either the heritage left by the deceased or such machinery or other articles as were *fundo annexa*. The appellant put in pleas in law, insisting that, —

“The trade or employment of manufacturing iron or lime, and of digging coals to be used in these manufactories, or for sale, or in other words, the trade of a coal-master, or iron-master, or lime-worker, is of a personal nature, and all instruments, engines, and utensils, whether fixed or loose, which are necessary and subservient to such a trade, are legally to be held and treated as personal or movable effects or personality; that instruments, engines, and utensils, which, taken either in part or in gross, are movable before they are placed in a particular spot, do not lose their movable or personal character, though affixed to an heritable subject, unless they be so affixed *perpetui usus gratia*, in contradistinction to trade, such as the windows of a mansion-house; and that the fund out of which *legitim* is payable consists of the whole movable or personal estate, as before described, that belonged to the deceased Mr. Dixon.”

The Lord Ordinary, before whom the cause was appointed to be heard, referred it to an officer of the court, with instructions for him to report as to the nature and amount of the deceased's property. The referee reported that the engines, colliery utensils, and rails were claimed by the defenders as heritable property, but that he considered it doubtful whether some of these articles came under that description, and he therefore made a list of those which he deemed to be of a doubtful or disputable nature. The Lord Ordinary, not being satisfied with this report, remitted the cause to Mr. Smith, of Deanston, as a scientific person, to report exactly on the facts as to each part of the machinery, the nature of which was in dispute. Mr. Smith made his report, in the course of which he described all the machinery as capable of being moved and replaced, but said that the removal would be very expensive; that it would more or less deteriorate the value of the machinery; that for that reason machinery was often left by the tenant, and its value made a matter of arrangement between him and the landlord; and that some parts — such as the steam-engine for pumping the mines — must, if removed, be instantly replaced, or very serious damage would arise to the mines; that the articles which were movable were all of them more or less essential to the going of the different works, though, if taken away, they could be readily supplied; that it was usual to have spare articles of most of the classes described about well-regulated works, these articles being equally valuable if taken

to any other work where they were wanted. He also referred to the practice of the country, and said, "that the practice at coal and iron-works similar to those of the deceased is to remove the mechanism of the engine and other machinery from one part of the premises to another as occasion may require. . . . The practice is for the tenant at the termination of his lease to remove the whole of such engines and machinery, if not previously belonging to the landlord. . . . And in the event of the exhaustion of the mineral field, or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery is removed by the tenant or worker of the field, or by the proprietor (if his property), and the general premises dismantled as far as it may be profitable to do so." Mr. Smith made out a list of the various articles, to which he attached the character of heritable or of movable.

The case was further debated before the Lord Ordinary, and the appellant then put in accounts, made up from time to time by the testator, to show the state of his affairs; and likewise inventories of purchases by himself, or by himself in conjunction with others, in all of which papers the lands and the leases of them were described as "heritable," and the steam-engines and the rails laid down were described as "movable property." It was also submitted on behalf of the appellant, as a proposition of law, that the principle that annexation to land converts that which is itself movable into a fixture could not be applied to articles used in trade and to the fittings up of collieries.

The respondent, in answer to the argument, attempted thus to be drawn from the manner in which the testator had in his accounts treated the steam-engines and rails, proved that in those same accounts houses were likewise included under his arrangement of "movable property," from which he insisted that the deceased's mode of expressing himself in these papers was no indication of his deliberate intention, and could have no effect upon the case.

The Lord Ordinary, thinking the point raised in the case to be one of difficulty, referred it to the Lords of the second division, and their Lordships determined to consult the Lords of the first division and the permanent Lords Ordinary. Cases were therefore prepared for their opinions, and the great majority of their Lordships finally expressed an opinion to the effect that the machinery which was fixed to the soil, and could not be used without being so fixed, and which were necessarily so fixed for the purpose of the profitable use of the land, were heritable; but that the tools employed in the machinery, but not necessarily affixed thereto, and capable of being employed elsewhere in the same manner, and parts of machinery prepared for fixing, but not actually affixed, were movable. See 5 Bell, M., D. & Y., p. 775.

Mr. Turner and *Mr. Sandford*, for the appellant.

The Lord Advocate and *Mr. Kelly*, for the respondents.

LORD COTTENHAM.¹ I concur in the opinion that this interlocutor

¹ The speeches of Lords Brougham and Campbell are omitted.

ought to be affirmed; and when we separate and distinguish the real case from some of the points which have been endeavored to be introduced into it by way of argument, it does appear to me to be free from all doubt. The point which has been already alluded to — namely, that this is not a case between the real and personal representative, but that it is a case between two kinds of heirs — appears to me to be totally destitute of foundation. *Legitim* can only be claimed by means of showing it to be personal estate. The preliminary question is, therefore, Is this personal estate, or is it property attachable to the freehold, and therefore descendible to the heir? The moment we see that the *legitim* can only be claimed in consequence of the property being part of the personal estate, the question, of course, assumes its natural shape, Is it personal estate, or not? That preliminary question, therefore, being decided, it entirely disposes of the ground on which this has been attempted to be distinguished from the other cases which have arisen with respect to the claims of heirs, and those who are interested in the personalty. The principal stress of the argument on the side of the appellant has been, that this is to be protected, because it is necessary for the encouragement of trade that this property should be considered as not belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property, which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the control of the person who erected this machinery.

If, therefore, this be clearly a question of real or personal estate, and if the rule, which in some cases has been acted upon, of making a departure from the established principle in favor of trade, has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder-man, because the departure which has taken place there, in some cases, has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of better using that land, having erected upon and affixed to the freehold, and used, for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, Is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare

the land, and to take away all the machinery necessary for the enjoyment of the land? Let us consider for a moment, if that is the principle, to what extent is it to go. It is put by Lord Cockburn (and a very strong illustration it is), if the owner of the land should dig a well, and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? He thinks it is not. Where is the distinction between the two cases? Such machinery is capable of being taken away with very little, if any, damage to the land. Although, therefore, machinery is in its nature, generally, personal property, yet, with regard to machinery, or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law; and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself. The principle, probably, would go a great deal further; but it is more advisable to confine the observations I have to make to the particular circumstances of this case. There is no case whatever which has been cited in which that doctrine has been recognized, except the one which has been referred to (the *Cider-mill Case*), as to which we really know nothing, except that at the Worcester Assizes, a good many years ago, a cider-mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a cider-mill fixed to the freehold or not, we do not know. We know nothing, except that this machine, called a cider-mill, was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And, with that exception, there is a uniform course of decisions, wherever the matter has been discussed, in favor of the right of the heir to machinery erected, under the circumstances, in the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say, that we must hold that all that belongs to that machinery, although more or less capable of being used in a detached state from it; still, if it belongs to the machinery, and belongs to the *corpus*, the article, whatever it may be, must necessarily follow the same principle, and remain attached to the freehold. I do not go into the detail of the particular items which have been objected to. I have looked them through, and quite concur with my noble and learned friend, that if any exception were to be taken with respect to particular articles, as to whether they ought to be adjudged to one or to the other, it would have been for the respondent, and not for the appellant, to take such exception.

The interlocutor was affirmed, with costs.¹

¹ See *Bain v. Brand*, 1 Ap. Cas. 762.

WHITEHEAD v. BENNETT.

CHANCERY. 1858.

[Reported 27 L. J. Ch. 474.]

THIS suit was instituted for the administration of the estate of W. Barker. A portion of the property consisted of certain plots of land near Manchester, upon which there was a building that had been used as a lunatic asylum. The receiver who had been appointed by the court, entered into an agreement, dated the 19th of September, 1852, with W. Ireland, whereby it was agreed that a lease of the buildings and premises should be granted to W. Ireland for the term of twenty-one years, at a rent of £42 per annum, with a covenant on the part of the said W. Ireland to repair the premises. Under this agreement Ireland took possession of the premises, and converted the building thereon into a cotton-mill, and he also erected on the land a bleaching-house, a drying-stove, a dye-house, an engine-house, and a lime-house, and also a building erected upon cross beams, resting upon two walls and forming a passage. A dispute afterwards arose as to the terms of the lease, and the lessee claimed a right to remove the buildings which he had erected, on the ground that they were trade fixtures, used for the purpose of his business. An injunction was obtained to restrain the removal of the buildings; and upon a reference to chambers, evidence was obtained as to the nature of the buildings, and from the report of a gentleman competent in such matters, who had been sent down by the court to examine the premises, it appeared that the various buildings erected by the lessee were made of brick, with brick foundations let into the soil to the depth of from five inches to five feet. The question now came on upon an adjournment from chambers, as to the right of the tenant to remove the buildings.

Mr. Eddis, appeared for W. Ireland, the tenant.

Mr. Karlake, for the trustees; and

Mr. Bazalgette, for other parties in the suit.

KINDERSLEY, V. C. My opinion is, that these are not trade buildings, removable at the pleasure of the tradesman. It is extremely difficult to come to a conclusion upon the authorities as to any principle which can be safely enunciated. I have carefully considered the subject as to the possibility of deducing any rule from the cases cited, but have been unable to do so. Still there are, no doubt, general principles upon which these cases are founded. In the first place, the question has arisen between the executor and the heir; and, secondly, between the tenant for life and the remainderman; and, lastly, between the landlord and tenant. Again, there have been different views taken by the court with reference to agricultural buildings, trade buildings, and the ordinary fixtures which a tenant puts in for his own convenience. In

this case the most favorable instance arises, namely, the right of removal as between landlord and tenant; and, moreover, the things sought to be removed are of the most favorable character, as being trade fixtures in the sense that they are buildings erected for the exclusive purposes of trade. With respect to anything in the nature of machinery, engines, or plant, or things substantial and solid, such as vats, utensils, &c., these are all clearly within the right of removal as between landlord and tenant. In all these cases, the things sought to be removed might either be taken away bodily, where they are capable of being set up again elsewhere, or if, by reason of their bulk or complexity, it should be necessary to take them to pieces, they could be put together in the same form in some other place. There is no dispute about the right of the tenant to remove such fixtures when they retain the general character of trade fixtures. Take the case, for instance, of a large steam-engine, which it is impossible to remove in its integral condition, yet the right of removal will apply to such an article, notwithstanding that you must take it to pieces. It certainly may be metaphysically argued from this, that a building of the most substantial and solid character, let ten feet into the ground, with cement, is capable of removal, brick by brick, and of being put together in another place in the same form; but the common-sense of mankind would determine that an engine is a very different thing from a house, although every stone, brick, tile, and chimney-pot might be removed; one, however, is the case of removal of materials, and the other of taking to pieces and restoring to their former state, actual portions of the engine. It would be impossible to admit the validity of such an argument without laying down a rule never intended to be enunciated, and which would alter the broad distinction between trade fixtures and buildings used in trade. Suppose the case of a building or utensil which, by the rule of law, a tenant might remove as a trade fixture, if there is anything which is a mere accessory or adjunct to it, and has no other existence or purpose, then if you may remove the principal thing, you may also remove the accessory. Among the many cases upon this subject, there is not one which has determined that even in the most favorable circumstance of landlord and tenant, a tenant has a right to remove any building which he has erected, merely because it is used only for the purpose of trade; and if the argument used in this case is allowed to prevail, it can only do so in such a manner as may be followed up to its legitimate consequences, and it would be laying down a rule that whatever a tradesman erected, however substantial, and however firmly let into the freehold, yet if the identity is preserved, the tenant might remove it. Such a rule is established nowhere. Not only is there no such decision, but there is not even a *dictum* that can bear any such construction. The strongest authority is the case of *Elwes v. Maw*, which was a case of agricultural fixtures, and certainly in that case there are *dicta* which appear distinct at first sight, and if it could be found that Lord Ellenborough ever laid down such a rule of

law as that which has been contended for in this case on behalf of Mr. Ireland, I should gladly have followed it; but I can find no such decision. It is evident that those *dicta* refer only to the particular case in question. Assuming, then, that these buildings were erected solely for the purposes of trade, has the tenant a right to remove them? and are they capable of removal? There is no law, practice, or authority, having regard to the nature of these buildings, to justify the court in saying that they come within the description of trade fixtures so as to bring them within the cases cited. If they are to be so considered, it would be laying down a very alarming rule, not only generally, but particularly with respect to that district of the North of England, in Lancashire and Yorkshire, where the most valuable structures, involving enormous expense, and constituting the whole value of the land, are built for the sole purpose of trade. No doubt great favor has been shown, and should always be shown, towards trade, and the modern cases have relaxed the rigor of the old authorities in this respect; but some limit must be put to this indulgence, and the cases seem to me to have gone quite as far as they ought to go. The question, then, turns upon the nature of these particular buildings. With respect to that which is erected upon the walls forming a passage, it is incapable of being removed in an integral condition, and the same observation applies to the engine-house, although it may in some sense be called an accessory to the engine. But it is not a mere shed; on the contrary, it is a brick building, let into the soil. Take the common case of those gigantic buildings which are raised story after story, fitted with spinning-jennies, drums, wheels, &c., which can only be used in such a building. It is clear, *ex concessis*, that you might remove the machinery, or the engine, however large, which is usually in the lower portion, and which works the whole machinery; but if the argument as to accessories were carried out, you might allow the entire building to be removed, and it is impossible to see where such a doctrine would stop. The present case is precisely the same on a smaller scale; and with respect to all and each of these buildings, my opinion is, that they cannot be brought within the proper legal definition of trade fixtures, removable by the tenant.

LONDON LOAN AND DISCOUNT COMPANY v. DRAKE.

COMMON PLEAS. 1859.

[Reported 6 C. B. (N. S.) 798.]

THE first count of the declaration was trover for goods; the second was for wrongfully depriving the plaintiffs of the use and possession of divers goods and fixtures of the plaintiffs in and affixed and fastened to a certain dwelling-house and premises in St. Mary Axe; and the third was for seizing and taking certain goods and fixtures of the plain-

tiffs in and affixed and fastened to the said house and premises in the said second count mentioned.

The defendant pleaded not guilty, and a traverse that the several goods and fixtures in the several counts mentioned were the goods and fixtures of the plaintiffs. Issue thereon.

The cause was tried before *Crowder, J.*, at the sittings in London after last Trinity Term, when the following facts appeared in evidence: One Robinson, who was tenant of the premises in question (an eating-house in St. Mary Axe) under a lease, of which seven years were unexpired, on the 4th of September, 1857, borrowed a sum of money of the plaintiffs, giving them by way of collateral security a bill of sale upon all his furniture and effects upon the premises, including certain tenant's fixtures. The bill of sale contained an absolute assignment of all the goods and effects therein comprised, subject to a proviso making the same void if Robinson should repay the money borrowed by certain instalments; and also an agreement, that, in case default should be made in payment of the money, or if, amongst other things, the said goods and effects should be distrained for rent, it should be lawful for the plaintiffs to enter into and upon the premises, or wherever else the said goods and effects should be, and to receive and take into their possession and thenceforth to hold to the same, &c. Default having been made by Robinson, the plaintiffs, by one Priest, on the 30th of March, 1858, entered upon the premises for the purpose of making a seizure, but found that the landlord had already distrained for arrears of rent, and that his broker was in possession. Priest, however, claiming the fixtures, left a man also in possession; but the fixtures were not severed.

On the 8th of March, 1858, Robinson had given his landlord an authority to distrain the fixtures; and on the 5th of April he made a formal surrender of the term to him. A fresh lease was afterwards granted by the landlord to Drake, — the tenant's fixtures which had formerly belonged to Robinson still remaining upon the premises unsevered from the freehold. The plaintiffs made a formal demand of the fixtures upon the defendant, who declined to give them up, saying that he had purchased them from Robinson.

Upon these facts being proved, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for £23 2s., if the court should be of opinion that they were under the circumstances entitled to recover in respect of the fixtures.

Atherton, Q. C., obtained a rule *nisi*.

Day showed cause.

J. Brown (with whom was *Lush, Q. C.*), in support of the rule.

WILLIAMS, J. The question in this case is, whether, if a lessee mortgages tenants' fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them.

The principles of law applicable to this point are well settled; the

difficulty lies in the application of them. It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant: and it is plain that the right of his assignee can extend no further. On the other hand, it is laid down, as to a surrender, in Co. Lit. 338 b, that, "having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching *any right or interest* they had before the surrender) the estate surrendered hath in consideration of law a continuance." This doctrine has been fully adopted and acted on in modern cases,— as, in *Pleasant v. Benson*, 14 East, 234; *Doe d. Beadon v. Pyke*, 5 M. & Selw. 146; *Pike v. Eyre*, 9 B. & C. 909, 4 M. & R. 661. And see *Ex parte Bentley*, 2 M. D. & De Gex, 591.

The question is thus reduced to the inquiry whether the mortgagee's right to sever the fixtures from the freehold is a "right or interest" within the meaning of this rule of law. And we are of opinion that it is. Certainly it is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. But we think that it is so far connected with the land that it may be considered a right or interest in it, which if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender.

We are, therefore, of opinion that the plaintiffs may maintain an action against the defendant for preventing them from exercising their right to sever, and may in such action recover the value of the fixtures as severed.

*Rule absolute.*¹

WALMSLEY v. MILNE.

COMMON PLEAS. 1859.

[Reported 7 C. B. (N. S.) 115.]

CROWDER, J.² This was an action by the assignees of a bankrupt, to recover from the defendant certain articles alleged to be part of the bankrupt's estate. It was tried before my Brother *Byles* at the last Spring Assizes at Liverpool, when a verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

The facts were these: Moore, the bankrupt, being the owner of a vacant plot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground,

¹ See *Saint v. Pilley*, L. R. 10 Ex. 137.

² The opinion gives the facts sufficiently.

and set up all the articles sought to be recovered in this action. They consisted of a steam-engine and boiler used for the purpose of supplying with sea-water the baths which had been erected on the premises; also a hay-cutter and malt-mill or corn-crusher, and grinding-stones, all (except the grinding-stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to the things themselves. The upper mill-stone lay in the usual way upon the lower grinding-stone. All these fixtures were put up for the purposes of trade.

The rule was argued before my Brothers Willes and Byles, and myself; and, in the course of the argument, a great many cases were cited, which we desired time to consider before delivering our judgment.

On the part of the plaintiffs it was contended, first, that the articles in question were not fixtures at all, because not permanently attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the bankrupt; or, secondly, that, if fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees.

The case of *Hellawell v. Eastwood*, 6 Exch. 295, was cited in support of the first proposition. There, cotton-spinning machines called mules had been distrained for rent; and the question was as to the validity of the distress. It appeared that these mules were fixed by means of screws, some into the wooden floor, some into lead which had been poured in a melted state into holes in stone for the purpose of receiving the screws: and it was considered by the Court of Exchequer as a question of fact whether the machines so fixed were parcel of the freehold. It was said, that, whether a chattel attached to the soil was a fixture was always a question of fact, depending upon the circumstances of each case, and principally on two considerations, — first, the mode of annexation to the soil or fabric of the building, and whether it could be easily removed, without injury to itself or the building; and, secondly, the object of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, and the more complete enjoyment and use of it as a chattel. The judgment of the court proceeded upon both considerations. They said that the mules never became part of the freehold, as they were only attached slightly, and could be easily removed without any damage; “and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machinery steadier and more capable of convenient use as chattels.”

Now, without expressing any opinion upon that case, it is sufficient on the present occasion to observe, that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at bar are not fixtures forming part of the freehold; for, we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary

purpose. The bankrupt was the real owner of the premises, subject only to a mortgage, which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable, as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding-stones were also permanent erections, intended by the owner to add to the value of the premises. They, therefore, resemble in no particular (except being fixed to the building by screws) the "mules" put up by the tenant in the case of *Hellawell v. Eastwood*.

But, secondly, it was contended on the part of the plaintiffs, that, assuming the articles in question to have been so affixed as not to be removable according to the general rule of law, yet that, as they were trade fixtures, they might be removed, and so would pass to the bankrupt's assignees.

The whole of the plaintiffs' argument upon this head was founded upon the well-established exception to the general rule, that, where a tenant puts up fixtures for the purpose of trade during his term, he may before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiff, that, if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration, the fixtures in question were such as would have passed to the assignees. But they denied that any such tendency existed in the present case. And this leads us to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee, — which it is really difficult to express in any other legal terms. A mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or *like* a tenant at will: but he has never been designated as tenant for any term. Lord Ellenborough, in *Thunder d. Weaver v. Belcher*, 3 East, 449, called him a tenant at sufferance; and Lord Tenterden, in *Doe d. Robey v. Maisey*, 8 B. & C. 767, 3 M. & R. 107, said: "The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee." He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing crops.

All the cases, therefore, which show, that, where a tenant for years has put up trade-fixtures, he may remove them before his tenancy expires, have no application to the case at bar. But, two cases of mortgagee and mortgagor in possession were cited by the plaintiffs' counsel as strongly supporting their clients' title to the verdict. One was,

Trappes v. Harter, 2 C. & M. 177, decided by the Court of Exchequer, in which Lord Lyndhurst delivered the judgment of the court; and the other was, *Waterfall v. Peningstone*, 6 Ellis & B. 876, in which our present Chief Justice, then Mr. Justice Erle, delivered the judgment of the Court of Queen's Bench.

Trappes v. Harter was a decision in favor of the assignees of a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to pass them. The mortgage enumerated various fixtures, but did not refer to the fixtures in dispute; and this omission, together with other circumstances in the case, induced the court to be of opinion that they were intentionally omitted in the mortgage-deed, and therefore did not pass by it. That case, then, "must be regarded as having been decided on its own peculiar circumstances," as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us. The other case, of *Waterfall v. Peningstone*, was also that of a bankrupt mortgagor in possession and a mortgagee, where the question was, whether the bill of sale of the fixed machinery, drawn in the shape of a mortgage, required registration under the 17 & 18 Vict. c. 36. This partly involved the consideration as to whether the fixtures were to be deemed goods and chattels within that Act: and *Hellowell v. Eastwood* was cited in the argument, and recognized as a valid authority by the court. But the species of mortgage was of a peculiar description. There had been a prior mortgage of the premises with the fixtures then thereon. Afterwards, for a further consideration, a mortgage was made of the fixtures which had been subsequently annexed, by themselves: and the court was of opinion that they did not pass by the prior mortgage, "because the tenor of the instrument shows that the parties did not so intend:" and they held that the separate mortgage of these fixtures was within the 17 & 18 Vict. c. 36, requiring the deed to be registered; and, for want of such registration, they decided that the fixtures passed to the assignees. In the present case, however, there do not appear any circumstances tending to show an intention existing between Moore, the bankrupt, and his mortgagee, that the fixtures annexed subsequently to the date of the mortgage should not become part of the mortgaged estate: and, in the absence of such intention, the current of authorities in the Bankruptcy Court shows that such an annexation of fixtures would inure to the benefit of the mortgagee.

In *Ex parte Belcher*, 4 Deac. & Ch. 705, which was decided in the Court of Review, in 1835, it was held that fixtures annexed to the freehold after the mortgage by the mortgagor in possession, and which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The Chief Judge (afterwards Mr. Justice Erskine) there says, after adverting to the relaxation of the general rule of law in favor of trade-fixtures put up by the tenant: "But that is not the present case. Again, it is said that the property

in question did not pass by the mortgage-deed. Now, it always appeared to me, that, where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term, and part of the freehold; and, if the inheritance be afterwards sold or let, it goes with the freehold: and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon." And, in another part of his judgment, he says: "Again, it is urged, that, as to those articles which were attached after the execution of the mortgage-deed, they could not pass to the mortgagee. But there has not been cited any authority, or even *dictum*, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that, where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between those which were affixed *before* and those affixed *after* the date of the mortgage-deed. In that point of view also, I am of opinion that all the fixtures alike passed to the mortgagee." There is also a very elaborate and learned judgment of Mr. Commissioner Holroyd, reported in 2 Mont. D. & De G. 443 (1841), in which the whole subject is fully considered, and a similar opinion very clearly expressed. To the same purport are the decisions in the Court of Review: *Ex parte Broadward*, 1 Mont. D. & De G. 631 (1841); *Ex parte Price*, 2 Mont. D. & De G. 518 (1842); *Ex parte Bentley*, *Ibid.* 591; *Ex parte Cotton*, *Ibid.* 725; and *Ex parte Tagart*, 1 De Gex, 351 (1847).

The effect of annexing fixtures of a similar character to those in the present case by the owner of the inheritance, was much discussed in the House of Lords, in the Scotch case of *Fisher v. Dixon*, 12 Clark & Fin. 312. There, the question was considered as if arising between the heir and executors: and Lords Brougham, Cottenham, and Campbell delivered very decisive opinions in favor of the heir. The subject-matter of the annexation in that case was, steam-engines and machinery for the purpose of working an iron mine. Lord Cottenham, after having dismissed as wholly inapplicable the cases of landlord and tenant, says: "Then, the case being simply this, the absolute owner of the land having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, Is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land and take away all the machinery necessary for the enjoyment of the land?" He answers: "Although machinery is generally in its nature personal property, yet, with regard to machinery or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose *that* can be the rule of law: and so with respect to other erections upon land. It is not necessary to go beyond

the present case, which is a case of machinery erected for the better enjoyment of the land itself." In *Mather v. Fraser*, 2 Kay & J. 536, which was a case of bankrupt mortgagor in possession decided by Vice-Chancellor Wood in 1856, *Fisher v. Dixon* was, amongst numerous other cases, cited before the Vice-Chancellor. In giving judgment, the Vice-Chancellor says: "They (the mortgagors) conceived that the most profitable purpose for which they could use the land would be the business of copper-roller manufacturers. I apprehend, therefore, that the case comes clearly within that of machinery affixed to land by the owner of the land for the purpose of better and more beneficially using and enjoying the land of which he is the owner; and, although the means of such use and enjoyment be manufacture or trade, still I am of opinion that all such of the articles in question as are affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, are within the authority of *Fisher v. Dixon*, partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself. These later decisions are in accordance with the earlier cases of *Wynn v. Ingleby*, 5 B. & Ald. 625; *Colegrave v. Dias Santos*, 2 B. & C. 76; 3 D. & R. 255; *The King v. The Inhabitants of St. Dunstan's*, 4 B. & C. 686; 7 D. & R. 178, and *Place v. Fagg*, 4 M. & R. 277.

In *Wynn v. Ingleby*, it was held, that certain articles, consisting of set-pots, ovens, and ranges fixed up by the owner of a house, would go to the heir and not to the executor, and could not therefore be seized under a *fi. fa.* against the owner. In *Colegrave v. Dias Santos*, in which there was a question whether stoves, closets, shelves, brewing vessels, locks, blinds, &c., passed to the purchaser of a house, upon a sale and conveyance of the house, the court said that some of the articles, viz. the stoves, cooking-coppers, mash-tubs, water-tubs, and blinds, might be removable as between landlord and tenant, but would not belong to the executor, but to the heir, and were, as between those persons, parcel of the freehold. In *The King v. The Inhabitants of St. Dunstan's*, Mr. Justice Bayley said that stoves, grates, and cupboards were parcel of the freehold, and though they might be removed by a tenant during his term, yet they would go to the heir, and not to the executor. And in *Place v. Fagg*, the property in question was the stones, tackling, and implements necessary for the working of a mill. There had been a mortgage of the mill; and it was held, that, by that mortgage, the stones, tackling, and implements necessary to the working of the mill passed to the mortgagee.

And we may observe here, in reference to a point made by one of the learned counsel for the plaintiff, that at all events the verdict must be for the plaintiff for the upper mill-stone, that *Liford's Case*, 11 Co. Rep. 50, citing *Wyston's Case*, 14 H. 8, fo. 25 b, disposes of that point. The law is correctly stated in Amos on Fixtures, p. 257, where, in speaking of things constructively annexed to the freehold, he mentions a mill-stone, "which, though not annexed to the freehold, is yet essentially parcel of the mill."

We think, therefore, that, when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage-deed in the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action.

The verdict, therefore, must be entered for the defendant.

*Rule absolute.*¹

James Wilde, Q. C., and *Milward*, for the plaintiffs.

Atherton, Q. C., and *V. Williams*, for the defendant.

EX PARTE ASTBURY.

COURT OF APPEAL IN CHANCERY. 1869.

[*Reported L. R. 4 Ch. 630.*]

THIS case came before the court on appeal from an order of *Mr. Registrar Tudor*, acting for the Commissioner of the Birmingham

¹ On a subsequent day it was intimated by the court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels. — REP.

In *Hellawell v. Eastwood*, 6 Ex. 295 (1851), the question was whether "certain cotton spinning-machines, called 'mules,' some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them," were distrainable for rent. It was held that they were distrainable. PARKE, B., delivering the opinion of the court, said: "The only question, therefore, is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causa*, or in that of the Year-Book, *pour un profit del inheritance* (20 Hen, 7, 13), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

"Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor. (*Per* Lord Lyndhurst, C. B., *Trappes v. Harter*, 2 C. & M. 177.) They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels, and were therefore liable to the defendants' distress. The plaintiff's rule is, therefore, discharged, and the defendants' rule is absolute."

Court of Bankruptcy, made on a special case submitted for his decision.

It appeared from the special case that on the 28th of June, 1867, the firm of Messrs. Job Richards & Co., iron manufacturers at Smethwick, which comprised the present bankrupts, Job Richards and Richard Hill, and also T. and L. Jenkins, being at that time indebted to Lloyd's Banking Company, Limited, deposited with them the lease of their rolling mills at Smethwick, accompanied by a memorandum in the following terms:—

“Memorandum. We, the undersigned, Job Richards, L. Jenkins, Richard Hill, and Thomas Jenkins, trading together as iron-masters at Smethwick, in the county of Stafford, under the style or firm of Job Richards & Co., have this day deposited with Lloyd's Banking Company, Limited, the deed mentioned in the schedule hereunder written, to be retained by the company by way of a continuing security to them for payment on demand of all moneys and liabilities already paid or incurred, or which the company may at any time advance, pay, or incur to or for the said firm of Job Richards & Co., whether on current account or by the discount of or otherwise in respect of bills of exchange, promissory notes, or other negotiable securities drawn, accepted, or indorsed by the said firm, together with interest, commission, banking charges, law and other costs, charges, and expenses; and for a more effectual security we undertake at our own expense, when required by the company, that we and all other necessary parties will execute to the said company, or as they shall direct, a mortgage of all our estate and interest in the said deed, which mortgage shall contain a power of sale and all usual clauses.”

The account was continued as an open account with the four partners up to the month of August, 1867, when the partnership between the bankrupts and Messrs. Jenkins was dissolved, and the bankrupts took the assets and debts of the old firm, including a balance of upwards of £10,000 due to Lloyd's Banking Company.

On the 11th of January, 1868, the bankrupts executed to the banking company a legal mortgage of the mills; and on the 18th of January the banking company took possession under the mortgage. On the 30th of January a petition of bankruptcy was filed against them, and they were declared bankrupts, and Messrs. Astbury, Bloomer, and Dickenson were appointed assignees.

The mortgage deed had a schedule annexed to it, containing a list of certain chattels used in the rolling mills, which were the subject of the present dispute between the assignees and the mortgagees. These chattels consisted of a considerable number of iron rollers described as finishing rolls, colting rolls, guide rolls, hard rolls, and bolting down rolls; and also four patent weighing machines, and four straightening plates.

It was admitted in the special case that the rolls and other chattels comprised in the last-mentioned schedule were necessary to the carry-

ing on of the bankrupts' business. If they had been removed, others of a similar description must have been substituted.

The assignees contended that the mortgage security was void against them so far as related to the duplicate rolls and other unfixed machinery and chattels.

It was admitted in the argument that the mortgage deed of the 11th of January, 1868, could not be supported against the assignees, by reason of its having been made on the eve of bankruptcy; but the mortgagees claimed the chattels as fixtures attached to the iron mills, under the equitable mortgage and deposit of the 28th of June, 1867. The assignees admitted that one set of rolls passed with the machine to the equitable mortgagees. Evidence was adduced before the registrar as to the nature of the chattels, in which the following facts were proved:—

The rolls were loose iron rollers, which were fitted into the rolling machine. The machines, when made, were fitted with one set of rollers, and others were ordered and supplied according to the work required, different sized rolls being used for different descriptions of iron. When the rolls first came from the manufacturer they had to be fitted to their bearings in the machines by filing their ends, and when so fitted they were grooved according to the size of the iron which they were intended to roll. At the date of the equitable mortgage there were several duplicate rolls which had been used or were ready for use, and others which had been supplied by the manufacturers, but had never been fitted to the machine.

There were four weighing machines, which were placed in holes dug in the ground and faced with brickwork. The machines rested on the brickwork at the bottom of the holes, the weighing plates being on a level with the surface of the ground. It was stated in the evidence that the machines might be removed without injuring the brickwork, and that similar machines were often placed upon wheels instead of resting on the ground.

The straightening plates were broad plates of iron for straightening the bars of iron when taken out of the furnace. They were laid on brickwork and bedded in the earth of the floor, and the rest of the flooring was composed of iron plates, which fitted round them so as to make an even surface.

The Registrar was of opinion that the rolls passed with the mills to the mortgagees, as being part of the machinery; from this decision the assignees appealed. But he held that the weighing machines and straightening plates did not pass; and the mortgagees appealed from this decision.

Mr. Jessel, Q. C., *Mr. Little*, Q. C., and *Mr. Archibald Smith*, for the assignees, the appellants in the first appeal.

Mr. Fry, Q. C., and *Mr. Finlay Knight*, for the respondents, the mortgagees.

SIR G. M. GIFFARD, L. J. The questions in cases of this description

are, for the most part, much more questions of fact than of law, for to my mind the law has been settled, but the facts necessarily differ more or less in each particular case.

With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In *Mather v. Fraser* it was decided that the article must be an essential part of the machine. I think that was all that it was necessary to lay down in that case. The *dictum* of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 312, was that all "belonging to the machine" would pass; and I should say in this case the proper test to lay down would be that the chattel must be "something which belongs to the machine as part of it."

Now, these machines were rolling machines, and there appear to be connected with rolling machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered, it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not now speaking of rolls which can be considered as, in any sense, unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. I think, therefore, that each set of rolls necessarily belongs to the machine as part of it. I do not think that this is at all affected by the *dictum* of Fitzherbert; but if it was, my answer would be, that this subject has been considered much more of late years than it was in olden times, and that the matter decided was with regard to a question of distress. If it were desired to reduce the question to an absurdity, it would be by supposing a case of duplicate latch keys to a door, and holding that one only should pass, and not the other. The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term "belonging to the machine as part of it."

Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size.

Then we come to another and different class of rolls, and there I confess I differ from the registrar who has given his opinion in this case. I allude to those rolls which had been made for the purpose of being used in this machine, and had been sent to the mill for that purpose, but had never been fitted to the machine, and which required something more to be done to fit them to the machine in order that

they might be used in it. I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine.

Therefore I am of opinion that, as regards the duplicate rolls, as regards the rolls of different sizes, as regards all the rolls which have been actually fitted to the machine, they belong to the machine as part of the machine, — they are, in fact, essential parts of the machine. But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it. Therefore, in that respect the order will be varied.

The second appeal was then argued.

SIR G. M. GIFFARD, L. J. The two points which remain to be disposed of in this question are, first, as to the straightening plates; and, secondly, as to the weighing machines. I cannot agree to the suggestion of Mr. Jessel that because the mortgagor in this case was a leaseholder and not a freeholder the articles which are fixtures will not pass to the mortgagee. Whether he is a freeholder or a leaseholder, the same rule clearly and indubitably would apply, and the only question is, whether the straightening plates and the weighing machines are fixtures.

With regard to the straightening plates, two cases were cited, one of the *Metropolitan Counties Society v. Brown* [26 Beav. 454], and another of *Beaufort v. Bates* [3 De G. F. & J. 381]. The latter case clearly has no application, for that was a case in which, there being chattels which, as between the lessor and lessee, the lessee might remove, an execution creditor of the lessee was held entitled to take them. As regards the former case, the point was wholly different from the point in this case, because there the straightening plates certainly were not fixed in the mode in which these straightening plates appear from the evidence to be fixed. It is only necessary to read some portions of the evidence to show that these straightening plates are clearly fixtures, and, in fact, just as much part of the floor as any pavement would be, and, certainly, it would be astonishing to me if an ordinary pavement were regarded as a thing that could be removed by a mortgagor, as against his mortgagee. [His Lordship then referred to the evidence, and continued:] Upon this evidence I must assume that the plates round the straightening plates are part of the ordinary floor of the place, and that the straightening plates are just as much part of the ordinary floor as the plates around them. I look upon these straightening plates as in the same position as a flagstone laid down and let in,

and certainly if anything in the world is a fixture I should conceive that a flagstone laid down and let in would be a fixture. In fact, the registrar seems to have fallen into this mistake by laying rather too much stress on what was said in the case of *Mather v. Fraser*, 2 K. & J. 536, as to nothing being a fixture which could stand by its own weight. No doubt a flat plate will rest by its own weight, but if you have it laid in, embedded, and overlaid with that which is part of the permanent floor, and the permanent floor cannot be removed without damage to the freehold, as it clearly cannot be here, I can have no doubt whatever but that the straightening plates are fixtures.

But, then, with regard to the weighing machines, I think the case is wholly different. The evidence is clear that weighing machines of this description are frequently put upon wheels, and are so used. As regards these weighing machines, it appears that where they are placed inside the building the floor is prepared for them, and where they are placed outside the soil is prepared for them; that is to say, a square receptacle is made and is bricked, and when that square receptacle is made and bricked, the weighing machine is placed in it, and may, of course, be taken out again, for it is not fixed by nails, or by screws, or in any other way. One of the witnesses says: "I took a piece of thin iron about half an inch thick, and trickled around the outside of it, and from that I could see there was some brickwork put up in order to secure the outside; there was a space all round of from five-eighths to three-fourths of an inch." Mr. Fry argued that the brickwork was the same thing as if there had been a frame, and that the brickwork is part and parcel of the machine. To that argument I cannot assent. Suppose in this case a number of brick places had been made, into which it had been convenient to put weights, beyond all doubt the weights would not have been fixtures. In the same way, if there had been a foundation of granite for a cannon or a large telescope, neither the cannon nor the large telescope would be a fixture. The preparation of the soil does not make the machine a fixture, nor does the fact of its being put into the receptacle so prepared for it make it a fixture.

Therefore, as regards the straightening plates the decision below will be reversed, and as regards the weighing machines it will be affirmed. There will be no costs of the appeal, and the deposit will be returned.¹

CLIMIE v. WOOD.

EXCHEQUER CHAMBER. 1869.

[Reported *L. R.* 4 *Ex.* 328.]

DETINUE for a steam-engine and boiler. Pleas: 1. Not guilty.
2. Not possessed. Issue thereon.

¹ See *Wadleigh v. Janvrin*, 41 N. H. 503; *Burnside v. Twitchell*, 43 N. H. 390.

The plaintiff was the purchaser of the articles in question from the trustees under an inspectorship deed of one Daniel Climie. Daniel Climie had the freehold of two pieces of land, which may be called (as colored on a plan produced at the trial) pink and green land, and upon them he, in the year 1864, erected an engine-house formed with brick pillars, partly open and partly enclosed, and with a slated roof. Into this building the engine was then put. It stood equally on each of the pieces of land. The boiler stood as to three-fifths, on the pink land, and as to two-fifths, on the green land.

The engine was screwed down to some thick planks which lay on the ground, and the boiler was fixed in brickwork. They were used for sawing timber in Climie's business of a contractor, and were clearly what are ordinarily called "trade fixtures."

In the year 1858 Climie mortgaged the pink land to Robert Craig in fee, and by him in July, 1866, it was sold (under a power) to a Mrs. Mumford. In January, 1865, he mortgaged the green land to Rock & Co. in fee.

In the same year, 1865, Climie executed the deed of inspectorship. In September, 1866, the engine and boiler were removed from the shed by the trustees of Climie at the request of Mrs. Mumford, who wanted them off the pink land. The plaintiff purchased them of the trustees about the same time. But while they were in the place to which the trustees had removed them they were sold by Messrs. Rock & Co., the mortgagees of the green land, to the defendant, who still detained them, and for this detention the present action was brought.

The cause was tried at the Middlesex sittings after Hilary Term last before *Pigott, B.*, and the jury having found, in answer to questions put to them by the learned judge, first, that they were trade fixtures, and fixed for the better use of them, and not to improve the inheritance; secondly, that they were removable without any appreciable damage to the freehold; and, thirdly, that the sale to the plaintiff was *bona fide*, — a verdict was entered for the plaintiff, with leave reserved to move to enter a verdict for the defendant on the ground that the property in the steam-engine and boiler did not remain in Climie, the mortgagor in possession.

A rule was obtained accordingly.¹

The Court of Exchequer made the rule absolute, and the plaintiff appealed.

Hon. G. Denman, Q. C. (*Simpson* with him), for the plaintiff.

H. Matthews, Q. C. (*Channell* with him), for the defendant.

Cur. adv. vult.

The judgment of the court (*Willes, Keating, Blackburn, Mellor, Montague Smith, Lush, Hayes, and Brett, JJ.*) was delivered by —

WILLES, J. The question in this case turns upon whether a claimant

¹ This statement of facts is printed from the report of the case in the court below.
L. R. 3 Ex. 257.

under the mortgagees of certain land or the purchaser from the mortgagor is entitled to an engine and boiler employed in a saw-mill on the mortgaged premises, and erected under the circumstances and in the manner proved at the trial. The Court of Exchequer held that the claimant under the mortgagees was entitled, and we are of opinion that their judgment ought to be affirmed. There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen, may be mentioned by way of illustration. On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land for the purposes of trade, or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration. Now in the present case we think, upon the evidence and findings of the jury, that the engine and boiler belonged to this last class, and if erected by a tenant, might have been removed by him during his term; and in this view we are supported by the authority of *Lyde v. Russell*, 1 B. & Ad. 394. The reasons, however, for a tenant with a limited interest being allowed to remove trade fixtures, are not applicable to the owner of the fee. Thus in *Fisher v. Dixon*, 12 Cl. & F. 312, they were held not to apply as between heir at law and executor, and the language of Lord Cottenham (at p. 328) explains the distinction between landlord and tenant on one hand, and heir at law and executor on the other. "The principal stress of the argument on the side of the appellant [the executor]," he says, "has been that this [machinery] is to be protected, because it is necessary for the encouragement of trade that this property should be considered not as belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land, and of the personal property which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the control of the person who erected this machinery." And we are of opinion, that the decisions which establish a tenant's right to remove trade fixtures do not apply as between mortgagor and mortgagee any

more than between heir at law and executor. The irrelevancy of these decisions to cases where the conflicting parties are mortgagor and mortgagee was pointed out in *Walmsley v. Milne*, 7 C. B. (N. S.) 115; 29 L. J. C. P. 97; and we concur with the observations made in that case by the Court of Common Pleas. Here, therefore, we have come to the conclusion that the verdict was rightly directed by the Court of Exchequer to be entered for the defendant who represented the mortgagees, and that the plaintiff, who had no claim beyond what he derived from the mortgagor, was not entitled to recover.

Judgment affirmed.

HOLLAND v. HODGSON.

EXCHEQUER CHAMBER. 1872.

[*Reported L. R. 7 C. P. 328.*]

BLACKBURN, J.¹ In this case George Mason, who was owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill and all fixtures which then were, or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants as trustees for the benefit of his creditors. The defendants under this last deed took possession of everything. The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages ultra. A case was stated showing the nature of the articles, and how and in what manner they were affixed to the mill. As the deed was not registered under the Bills of Sales Act (17 & 18 Vict. c. 36), it was by § 1 of that Act void as against the defendants as assignees for the benefit of creditors so far as it was a transfer of "personal chattels" within the meaning of that Act; and as by § 7 the phrase "personal chattels" is declared in that Act to mean *inter alia* "fixtures," it was void (as against these defendants) so far as it was a transfer of fixtures as such. Since the decision of this court in *Climie v. Wood*, Law Rep. 4 Ex. 328, it must be considered as settled law (except, perhaps, in the House of Lords) that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right, as against the freeholder, to sever the fixtures from the land; yet if he be a mortgagor in fee, he has no such right as against his mortgagee. Trade and tenant's fixtures are, in the judgment in that case, accurately defined as "things which are annexed to the land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected

¹ The opinion only is given; it states the case sufficiently.

them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." It was not disputed at the bar that such was the law; and it was admitted, and we think properly admitted, that where there is a conveyance of the land, the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision (so far as regards the registration) is confined to the case before us, where the mortgagor was owner to the same extent of the fixtures and of the land. If a tenant having only a limited interest in the land, and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V. C., in *Boyd v. Shorrocks*, Law Rep. 5 Eq. 72, but merely as guarding against being supposed to confirm it. In *Climie v. Wood* the jury had found as a fact that the articles there in question were tenant fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which and the mode of their annexation were described in the case. In the court below it was properly admitted that there was no real distinction between those looms and the articles which the Court of Queen's Bench, in *Longbottom v. Berry*, Law Rep. 5 Q. B. 123, decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs, without argument, leaving the defendants to question *Longbottom v. Berry* in a court of error.

The present case is therefore really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom v. Berry*, and was so argued. There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; see *Wiltshire v. Cottrell*, 1 E. & B. 674; 22 L. J. Q. B. 177, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory*, Law Rep. 3 Eq. 382. Thus blocks of stone placed one on the top of another without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land

though the same stones, if deposited in a builder's yard and for convenience' sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable; yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde v. Waters*, 16 C. B. 637; 24 L. J. C. P. 193. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably that indicated by Wood, V. C., in *Boyd v. Shorrocks*, that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Helwell v. Eastwood*, 6 Ex. 295; 20 L. J. Ex. 154 (decided in 1851), the facts as stated in the report are, that the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants under which a seizure was made of cotton-spinning machinery called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor, and secured by molten lead poured into them. It

may be inferred that the plaintiff, being the tenant only, had put up those mules; and from the large sum for which the distress appears to have been levied (£2000), it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact, though it seems assumed in the judgment that they had such a power. Parke, B., in delivering the judgment of the court, says: "This is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causa*, or in that of the Year-Book, *pour un profit del inheritance*, or merely for a temporary purpose and the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell v. Eastwood* had been approved in the Queen's Bench in the case of *Turner v. Cameron*, Law Rep. 5 Q. B. 306. It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which the judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by Parke, B., the facts upon which they considered it to have proceeded: "They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might in one sense be said to be fixed "merely for a temporary purpose;" but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant.

The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell v. Eastwood* does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court in their judgment determine what they have just declared to be a question of fact thus: "The object and purpose of the connection was not to improve the inheritance, but merely to render the machines steadier

and more capable of convenient use as chattels." Mr. Field was justified in saying, as he did in his argument, that as far as the facts are stated in the report, they are very like those in the present case, except that the tenant who put the mules up cannot have been supposed to intend to improve the inheritance (if by that is meant his landlord's reversion), but only at most to improve the property whilst he continued tenant thereof; and he argued with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case, as showing that the judges who decided *Hellawell v. Eastwood* thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt, by some of us, at least, to be a weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Wiltshear v. Cottrell*, to consider what articles passed by the conveyance in fee of a farm. Among the articles in dispute was a threshing machine, which is described in the report thus: "The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell v. Eastwood* was cited in the argument. The court (without, however, noticing that case) decided that the threshing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the threshing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory; and in *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. Ch. 361, Wood, V. C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land, for the purpose of carrying on a trade there, became part of the land. This was decided in 1856. And in *Walmsley v. Mitne*, 7 C. B. (N. S.) 115; 29 L. J. C. P. 97, the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V. C., of the effect of *Hellawell v. Eastwood*, came to the conclusion, as is stated by them, at p. 131, "that we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding stones were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell v. Eastwood*." It

is stated in a note to the report of the case that, on a subsequent day, it was intimated by the court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubt is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell v. Eastwood*, shown that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley v. Milne*, but in another view it strengthens it, as it shows that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell v. Eastwood*, must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is to be observed that Willes, J., though doubting, did not dissent. *Walmsley v. Milne* was decided in 1859. This case and that of *Wiltsherear v. Cottrell* seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Wiltsherear v. Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not so much affixed to the mill as an adjunct to it and to improve the usefulness of the mill as such, as either the threshing machine or the hay-cutter. If, therefore, the matter were to be decided on principle, without reference to what has since been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by Parke, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter which weighs strongly with us. *Hellawell v. Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather v. Fraser*, which was a decision directly between mortgagor and mortgagee. We find that *Mather v. Fraser*, which was decided in 1856, has been acted upon in *Boyd v. Shorrocks* by the Court of Queen's Bench in *Longbottom v. Berry*, and in Ireland in *Re Dawson*, Ir. Law Rep. 2 Eq. 222. These cases are too recent to have been themselves much acted upon, but they show that *Mather v. Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v. Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and

without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that if it were *res integra* we should find the same way. We think, therefore, that the judgment below should be affirmed.

*Judgment affirmed.*¹

LEE v. GASKELL.

QUEEN'S BENCH DIVISION. 1876.

[Reported 1 Q. B. D. 700.]

STATEMENT of claim, *inter alia*, that plaintiff sold to defendant a gas-meter and certain gas-fittings then in a certain mill. The plaintiff furnished defendant with a bill for the meter and fittings, amounting to £11 18s. 8d., which the defendant promised to pay, but has not paid.

Statement of defence: Defendant denies the sale as alleged, and that he received the bill and promised to pay it as alleged. That there was no note or memorandum of the bargain in writing signed by the defendant or his agent, nor did he accept part of the goods and actually receive the same, nor did he give anything as earnest money or as part payment, within 29 Car. 2, c. 3, § 17.

At the trial before *Brett, J.*, at the Manchester Spring Assizes, it appeared, as to this part of the plaintiff's claim, that the defendant was landlord of the mill in which the fixtures were, they were tenant's fixtures, and the tenant had become bankrupt, and the trustee sold them to the plaintiff, and he afterwards sold them to the defendant for the sum claimed. It was objected that the contract came within either § 4 or § 17 of the Statute of Frauds; and the learned judge directed judgment for the defendant, giving leave to move to enter judgment for the plaintiff.

J. Edwards, Q. C., for the plaintiff.

H. Collins and *C. Russell*, Q. C., for the defendant.

COCKBURN. C. J. The case of *Hallen v. Runder*, 1 C. M. & R. 266, is directly in point and binding upon us, and I think the principle on which it was decided was perfectly right. Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term. There is but a

¹ See *Chidley v. Churchwardens of West Ham*, 32 L. T. (N. S.) 486.

remote analogy between fixtures and growing crops, but there is this obvious distinction between them, — fixtures, when sold as fixtures, are intended to remain where they are; while as to growing crops, it is the express intention of the purchaser to remove them.

MELLOR and QUAIN, JJ., concurred.

Judgment for the plaintiff.

BOSTWICK v. LEACH.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1809.

[*Reported 3 Day, 476.*]

MOTION for a new trial.

This was an action of *assumpsit*.

The declaration stated, that the plaintiff was the owner of a grist-mill; and the defendant, having it in contemplation to build one within a short distance, and being desirous of procuring materials for it, as well as of securing to it, when built, the custom of such persons as usually went for grinding to the plaintiff's mill, proposed to the plaintiff that he should stop his mill on the first day of January then next, and the defendant would purchase the mill-stones, running-geers, bolt, tackling, tools and utensils, which belonged to and were removable from the mill, and would pay the plaintiff for the same the sum of four hundred dollars. To this proposition the plaintiff acceded, and had performed everything to be done on his part.

The defendant pleaded the general issue.

On the trial the plaintiff offered to prove his case by parol evidence. It was agreed, that the plaintiff's mill was what is commonly called a gig mill, standing on a small stream of water; that the mill-stones were laid in the mill for the purpose of grinding in the same manner as mill-stones are usually placed in such mills for that purpose, — viz., by the bed stones being laid upon the floor timber of the mill; that the running geers consisted of a horizontal water-wheel, the shaft of which was upright, which passed through the lower mill-stone for the purpose of turning the upper mill-stone; that the lower part of the shaft rested and turned on a pivot at the bottom; and that the wheel was turned by the water being received in the usual manner of mill-wheels of that description. It was also agreed, that the mill-stones, running-geers, &c., were, at the time of the contract, in actual use for the purpose of grinding, and have never since been removed, but might be removed without doing violence to the mill-house, and without even so much as the drawing of a nail. It was further admitted that the plaintiff stopped his mill on the first day of January, according to his agreement, and the next day gave notice thereof to the defendant.

The defendant objected to the admission of the evidence offered, on the

ground that the contract set forth in the declaration, and offered to be proved, was a contract for the sale of lands, tenements, or hereditaments, or some interest in or concerning them; and not being in writing, was, therefore, within the Statute of Frauds and Perjuries. But the court overruled the objection, and admitted the evidence.

A verdict being found for the plaintiff, the defendant moved for a new trial.

N. Smith and *Hatch*, in support of the motion.

Bacon, in the absence of *Allen*, opposed the motion.

BY THE COURT. The contract was not embraced by the Statute of Frauds and Perjuries. When there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the Statute. Such are the contracts for the purchase of gravel, stones, timber trees, and the boards and brick of houses to be pulled down and carried away.

The agreement not to use his mill, after a certain day, is not within the Statute of Frauds and Perjuries; for this Statute contemplates only a transfer of lands, or some interest in them. In this case, there was no transfer of any right, but only an agreement not to exercise a right. He parts with no interest to any person. There is no conveyance of the stream, or indeed of any interest whatever. Thus, it differs nothing in principle from the case where a man has carried on a trade in his house, or shop, and agrees, for a valuable consideration, not to carry on his business at that particular stand; and yet such contract has never been held to be within the Statute.

New trial not to be granted.

VAN NESS v. PACARD.

SUPREME COURT OF THE UNITED STATES. 1829.

[*Reported 2 Pet. 137.*]

MR. JUSTICE STORY delivered the opinion of the court.¹

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant, for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

¹ The opinion only is printed; it states the case.

By the bill of exceptions filed at the trial it appeared that the plaintiffs, in 1820, demised to the defendant, for seven years, a vacant lot in the city of Washington, at the yearly rent of \$112.50 cents, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down, and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence that, upon obtaining the lease, he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out of doors; and carpenter's work was done in the house, which was in a rough unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows, of plank and timber, fixed upon posts fastened into the ground, which stable he removed with the house, before the expiration of his lease.

Upon this evidence, the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant further offered evidence to prove, that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence; but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the examination of the witnesses for the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the city of Washington, which authorized a tenant to remove such a house as that erected by the tenant in this case; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage; and after their testimony was given, he prayed the court to

instruct the jury, that upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant could be justified in removing the house in question; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The court was divided, and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, What fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible, and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainder-man or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Maw*, 3 East's R. 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine, and its admitted exceptions in England. The court there decided, that in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections, solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade, and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is, or ought to be, on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.

There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log-hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might therefore deserve consideration whether, in case the doctrine were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State, upon the mere footing of its existence in the common law. At present, it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures, for the purpose of carrying on a trade or manufacture, is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII. 13 a and b, where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation, during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt, in *Poole's Case*, 1 Salk. 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade; and that he might do it by the common law (and not by virtue of any custom), in favor of trade, and to encourage industry. In *Lawton v. Lawton*, 3 Atk. R. 13, the same doctrine was held in the case of a fire-engine, set up to work a colliery by a tenant for life. Lord Hardwicke there said, that since the time of Henry the Seventh, the general ground the courts have gone upon of relaxing the strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "One reason which weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers." The case, too, of a cider-

mill, between the executor and heir, &c., is extremely strong; for, though cider is a part of the profits of the real estate, yet, it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord Hardwicke said (as we have already seen), that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw*, 3 East's R. 38, Lord Ellenborough expressly stated, that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is, whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord Kenyon (*Dean v. Allalley*, 3 Esp. Rep. 11; Woodfall's Landlord and Tenant, 219), is to the same effect.

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now what was the evidence in the present case? It was "that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and ser-

vants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature, the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and, unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R. 29, proceeds upon principles equally liberal; and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw*, in respect to erections for agricultural purposes. In our opinion, the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop. 2 Starkie on Evidence, Part IV. p. 453. In the very class of cases now before the court the custom of the country has been admitted to decide the right of the tenant to remove fixtures. Woodfall's Landlord and Tenant, 218. The case before Lord Chief Justice Treby turned upon that point. Buller's Nisi Prius, 34.

The third exception turns upon the consideration, whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact, was solely for their consideration, — open indeed to such commentary and observation as the court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with

more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court; and it is affirmed, with costs.¹

WHITE v. ARNDT.

SUPREME COURT OF PENNSYLVANIA. 1836.

[Reported 1 *Whart.* 91.]

WRIT of error to the Court of Common Pleas of Northampton county, to remove the record of an action in which Abraham Arndt was plaintiff, and William White, defendant.

The material facts appeared to be as follows: Jacob Arndt devised to his wife for the term of her life, a brick store, a stone house, and two lots of ground, in the borough of Easton, with remainder in fee to Abraham Arndt, the plaintiff. The widow afterwards married William A. Lloyd, who, with his wife, demised the premises to William White, for the term of three years, from the 1st day of July, 1829, at the rent of 300 dollars per annum. Mrs. Lloyd, the tenant for life, died about the 25th December, 1829. White, the defendant, continued to occupy the premises, and paid rent quarterly, to the plaintiff, until the 1st of April, 1832. The premises were sold by the plaintiff at public sale, on the 23d of February, 1832.

The present action was originally instituted before a justice of the peace, to recover the sum of seventy-five dollars, being one quarter's rent of the premises due on the 1st of April, 1832. After hearing, the justice rendered judgment for the full amount of the plaintiff's demand. The defendant having appealed to the Court of Common Pleas, the defendant declared in *assumpsit*; and issue having been joined on the plea of *non assumpsit*, the cause came on for trial on the 27th of January, 1835. The plaintiff having proved the occupation of the premises by the defendant, during the term of three months, and the amount paid by him for the preceding quarters, the defendant offered to prove, in substance, that with the knowledge and approbation of Mr. and Mrs. Lloyd, he had erected upon the lot of ground, a frame stable, and two frame shops, and had made other improvements of the property; that

¹ See *Cannon v. Hare*, 1 Tenn. Ch. 22, 36.

it was agreed between them (the said Lloyd and wife, and White) that White was to have the liberty of selling or removing the stable, and that the shops were to be taken by the owners of the lots at a valuation, or if a valuation could not be agreed upon, that he was to have the privilege of removing the materials: That when the premises were put up at public sale, he requested the crier, by a written paper, to give notice of his claim, but the plaintiff's agent refused to permit the notice to be read: That the purchaser took possession of these buildings, with the other parts of the property, and still retains them.

The plaintiff's counsel objected to this evidence, and the court refused to receive it; upon which a bill of exceptions was tendered; and the jury having found for the plaintiff, the record was removed to this court.

The only question argued was the admissibility of the evidence in the court below.

Mr. Brooke, for the plaintiff in error.

Mr. Porter, for the defendant in error.

ROGERS, J. It is a general rule of the common law, that whatever is annexed to the inheritance during the tenancy, becomes so much a part of it, that it cannot be removed by the tenant, although the improvements may have been made at his own expense. As in *Warner v. Fleetwood*, 4 Rep. 63, glass put in by the tenant, or wainscot fastened by nails, was held part of the inheritance. To this rule there are certain exceptions, nearly as old as the rule itself, as between landlord and tenant, that whatever buildings or other fixtures are erected for the purpose of carrying on trade or manufactures, may be removed by the tenant, *during the term*. The cases upon this subject are collected by Lord Ellenborough, in *Elwes v. Maw*, 3 East, 38; and by Mr. Justice Story, in *Van Ness v. Pacard*, 2 Peters' Rep. 145. As to substantial improvements, they are usually made a consideration for extending the term of the lease; or some collateral agreement is made, so as to allow of some compensation to the tenant. The latter was the course adopted by the parties to this contract. The tenant, White, erected on the premises several improvements, among which was a stable, and two shops, which, it is said, greatly enhanced the value. It was agreed at or about the time of the erection of these improvements, between White and Mr. and Mrs. Lloyd, who had an estate for life, that White was to have the liberty of selling or removing the stable, and that the barber's shop, and other small buildings erected by him were to be taken at a valuation; and that if a valuation should not be agreed on, White was to have the privilege of removing the materials of the shops. As between the parties to this contract, this agreement was a good consideration; and any violation of it on the part of Lloyd, would have subjected him to an action. And I am inclined to believe, on the authority of *Van Ness v. Pacard*, that if the estate of Lloyd had continued until the end of the term, White would have had a right to remove the buildings from the premises, without the consent of the

owner of the remainder, notwithstanding the general principle, that whatever is annexed to the freehold, becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The exception in favor of trade, which is founded on public policy, and intended to encourage manufactures and the improvements of the country, may well apply to this case; for the question does not depend, upon the size or form of the house, or the manner in which it is built; but the only inquiry always is, whether it was intended for purposes of trade or not; and I cannot believe that the nature of the business, whether agricultural or mercantile, can make any difference. But while these principles are conceded, I am unwilling to extend them beyond the duration of the estate which the tenant for life has in the premises, so as to subject the owner of the fee to payment for the buildings, or to compel him to allow them to be removed. In the case at bar, Lloyd's interest was in right of his wife, who had a life estate. On her death, the interest in possession vested in Arndt, the owner of the remainder in fee.

The death of Mrs. Lloyd put an end to White's lease. Now, there is no principle better established by authority than that, even as between landlord and tenant, fixtures must be removed *during the term*. After the term they become inseparable from the freehold, and can neither be removed by the tenant, nor recovered by him as personal chattels, by an action of trover, or for goods sold and delivered. 1 Atk. 477, *Ex parte Quincy*; 3 Atk. 13, *Lawton v. Lawton*, and the note; 2 Peters' R.; *Lord Dudley v. Lord Ward*, Ambl. 113; Co. Lit. 53 a; Brooke, Waste, 104, 142; *Cooper's Case*, Moore, 177; *Day v. Bitch*, Cro. E. 374; *Lord Derby v. Asquith*, Hob. 234; 4 Term, Rep. 745; 7 Term, Rep. 157.

It has been contended by the counsel for the plaintiff in error, that the tenant for life can bind the remainder-man by contract, so as to compel him either to pay for improvements which enhance the value of the property, or to permit them to be removed when it can be done without injury to the inheritance. For this position they rely on *Whiting v. Brastow*, 4 Pickering, 310, in which it is ruled, that a tenant for life, years, or at will, may at the determination of his estate remove such erections, &c., as were placed on the premises by himself, the removal of which will not injure the freehold, or put the premises in a worse plight than when he entered. In *Whiting v. Brastow*, the tenant removed a padlock used for securing a binn house, and movable boards fitted and used for putting up corn in bins. That was a case between landlord and tenant, and not between tenant for life and the remainder-man; the rule being that, as between the latter, in questions respecting the right to what are ordinarily called fixtures, as between tenant for life or in tail and the remainder-man or reversioner, the law is considered more favorable than between landlord and tenant. It is construed most strictly between the executor and heir, in favor of

the latter; more liberally between tenant for life or in tail and the remainder-man, or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. A distinction arises, also, between the cases, from the nature of improvements. In *Whiting v. Brastow*, the court treated the improvements as personal chattels; but this cannot be said of these erections which are of a permanent substantial kind, and which surely would not have gone to the executors of Mrs. Lloyd, if the buildings had been erected by her. It would have been waste in the tenant to have removed them; for it is in general true, that when a lessee having annexed anything to the freehold, during his term, afterwards takes it away, it is waste. Co. Lit. 53; Moore, 177; 4 Co. 64; Hob. 234.

Doty v. Gorham, 5 Pickering, 487, merely decides that a shop placed on the lands of the plaintiff, with his permission, was a chattel, and as such may be sold, on an execution against the owner and that the purchaser has a right to enter on the land and remove the shop. This principle it is not necessary to controvert, as the application of it is not perceived.

It must be remarked, that the agreement does not purport to bind Arndt, the owner of the remainder in fee, and seems to have been made under the belief and with the wish, that the life interest would last as long as the lease, which was but for three years. But if the intention were to bind him, the objection arises, that it is not competent for them to make an agreement, to affect the inheritance. On the falling in of the particular estate, the remainder-man or reversioner is entitled to all the improvements, which the law denominates fixtures, without regard to the manner they are constructed, the persons who may have erected them, or whether they may contribute to enhance the value of the property or not. If the tenant for life, or the person with whom he contracts, wishes to avoid the consequences, the improvements must be removed during the continuance of the first estate; or the assent of the remainder-man, or reversioner, must be obtained. There is nothing which shows any assent to the agreement by Arndt. The deposition of Lloyd proves nothing further than that the rent was made known to Arndt, and that he made no objection against White being the tenant for the remainder of the lease. But not a word was said, so far as appears, about this agreement. It is in general true, that where there is a lease for years, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. But that principle cannot fairly be made to apply to this case; for here, although the lease terminated at the death of Mrs. Lloyd, and the tenant continued in possession with the consent of Arndt, yet that would bind the parties to nothing more than what came within the terms of the lease. It would not include the case of a collateral agreement, independent of the lease itself. The agreement on which this case turns, was a collateral agreement, of which it does not appear that Arndt was

in any manner apprised, or to which there is not the slightest evidence he assented, either directly or by necessary implication.

*Judgment affirmed.*¹

NOBLE v. BOSWORTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[Reported 19 Pick. 314.]

SHAW, C. J. It will probably not be necessary to go much at large into the facts of this case, to explain the only material principle of law on which it is decided. The action is trespass for taking and carrying away one iron kettle and two copper kettles. There are two counts: one, *quare clausum*, charging the taking away of the kettles as aggravation; the other, *de bonis asportatis*, in which the *gravamen* is, the taking away and converting the same kettles.

The defendant, by deed of June 4th, 1835, duly executed, acknowledged and delivered, conveyed to the plaintiff a parcel of real estate, on which was a dye-house, and in that dye-house were the kettles in question. They were firmly set in brickwork, and constituted a valuable part of the estate, and were a part of the realty. By mutual agreement, the grantor retained possession till April, 1836, at about which time the kettles were taken down by the defendant and removed. The deed conveys the premises, including the dye-house and appurtenances, but making no mention of the kettles, either by expressly excepting or including them. The deed was not delivered at the time of its date, and probably not till some months after; but this is not material.

The defence relied upon was, that at the time the bargain was made for a sale of the premises, by the defendant to the plaintiff, June 4th, 1835, it was agreed by Bosworth, the owner of the dye-house, with one Chapin, to sell him the three kettles, that this was known to Noble, and it was understood and agreed, that by the deed from Bosworth to Noble, the kettles were not intended to be conveyed, and that although the agreement between Bosworth and Chapin from accidental causes fell through and was not executed, yet that the property in the kettles remained in the defendant, and did not pass by his deed to the plaintiff.

This presents two questions: first, whether the deed, by its ordinary effect and operation, transferred the property in these dye-kettles; and if so, then secondly, whether that effect can be controlled by the parol agreement made before or at the time of the delivery of the deed, that the kettles should not be considered as included in the deed.

As to the first, whatever doubt there might be, if kettles were erected in like manner by a tenant on the leased premises, for the purposes of

¹ See *Haftick v. Stober*, 11 Ohio St. 482.

his trade, or by a mortgagor after the estate had been mortgaged, we have no doubt, that where an owner erects a dye-house on his own land, and sets up dye-kettles therein, firmly secured in brick work, they become part of the realty, and pass by a deed of the land without express words. The legal effect and operation of such a deed is to vest the entire right and property in the kettles in the grantee. *Union Bank v. Emerson*, 15 Mass. R. 159.

2. Then is it competent for the grantor to control or restrain this legal effect, by proof of a parol agreement, made previously to or at the time of the delivery of the deed? The court are all of opinion, that it is not. It would be as well contrary to the general rule of the common law, which provides that the terms of an instrument in writing shall not be altered or controlled by a parol agreement, as against the provision of the Statutes, which requires that all rights and interests in real estate, shall be manifested by some instrument in writing, and that no action shall be brought on any agreement for the sale of lands, or any interest in or concerning the same, unless in writing. St. 1783, c. 37, §§ 1, 2, 3. It is as much against these rules to admit parol evidence, to prevent or restrain the legal inferences and consequences of a deed, as to control and alter its express provisions. *Pattison v. Hull*, 9 Cowen, 754. A deed passes all the incidents to the land as well as the land itself, and as much when not expressed, as when they are. If the parol agreement were made before the execution and delivery of the deed, it is to be regarded as part of the negotiation and discussion respecting the terms of the purchase and sale, which is considered as merged and embodied in the deed itself as the final and authoritative expression of the agreement and determination of the parties on the subject. If it was made at the time of the delivery of the deed, then it must be deemed an exception, reservation or defeasance, and being repugnant to the terms and effect of the deed, it is void.

For these reasons, the court are of opinion, that the verdict, which was for the defendant, must be set aside, and a new trial granted.

Lathrop, *I C. Bates*, and *Forbes*, for the defendant.

Wells, *Alvord*, and *W. G. Bates*, contra.

PEIRCE v. GODDARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[Reported 22 Pick. 559.]

TROVER. The writ contained two counts, one, for the conversion of a dwelling-house, and the other, for the conversion of the materials of a dwelling-house.

By an agreed statement of facts it appeared that Oliver G. Davenport, on the 16th of January, 1836, mortgaged to the plaintiff a lot of

land in Templeton, with a dwelling-house thereon, to secure the payment of a promissory note of that date for the sum of \$450, upon which there was still due the sum of about \$270; that after such mortgage was made, Davenport, having purchased another lot of land in Templeton, undertook to remove the house to such lot; but that after having removed it from sixty to eighty rods from its former site, he took it all to pieces and carried the materials to the subsequently purchased lot, and there erected a house of the same dimensions as the former house; that in the construction of the new house, he made use of the materials of the old house, so far as they would answer the purpose, together with new materials, which were furnished by himself; that the removal of the old house and the erection of the new one, were known to the defendant; but there was no evidence that he knew of the mortgage, other than what resulted from the record thereof.

It further appeared, that when the new house was completed, Davenport, for a valuable consideration, conveyed the lot on which it stood, together with the house, to the defendant, who occupied the same from that time until after the commencement of this action, when he sold the same to a third person.

A nonsuit or a default was to be entered, as the court should determine.

Washburn and *Hartshorn*, for the plaintiff.

C. Allen, for the defendant.

WILDE, J., drew up the opinion of the court. This action is submitted on an agreed statement of facts, by which it appears, that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterwards he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed, he, for a valuable consideration, sold the last-mentioned lot and house to the defendant.

There are two counts in the declaration: one, for the conversion of the newly erected house; and the other, for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist, that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house, cannot admit of a doubt; but it does not follow, that the property in the new house vested in the plaintiff.

The rules of law, by which the right of property may be acquired by accession or adjunction, were principally derived from the civil law,

but have been long sanctioned by the courts of England and of this country as established principles of law.

The general rule is, that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser, who wilfully takes the property of another, can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. 2 Kent's Com. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law, that if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners but the builders. Mol. de Jure Mar. lib. 2, c. 1, § 7.

Another similar exception is laid down by Chancellor Kent in his Commentaries, which is directly in point in the present case. If, he says, A. builds a house on his own land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them. 2 Kent's Com. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said, that if timber be taken and made into a house, it cannot be reclaimed by the owner; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held, that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed; and it was held, that he had a right so to do. But it was also held, that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff, for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the Year-Books, 5 Hen. 7, 16; and I am not aware of any modern decision or authority, in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 Fairfield, 429, cited by the plaintiff's counsel, was decided on the ground, that the building in controversy was personal property and had never become a part of the

freehold. In the present case it cannot be questioned, that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport, for the conversion of the new house. And it is equally clear, that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building, was the tortious act of Davenport, for which he alone is responsible.

*Plaintiff nonsuit.*¹

RICHARDSON v. COPELAND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1856.

[*Reported 6 Gray, 536.*]

ACTION of tort for the conversion of a steam-engine and boiler, which were manufactured and set up by John Putnam and others, under a contract with Josiah Richardson, upon his land in Leominster, in a building erected for the purpose of receiving them, and were used to run the machinery in the adjoining shop of said Richardson. The boiler was set into the brick-work in such a manner that it could not be removed without taking down the brick-work; and the engine was placed upon a granite block, and fastened by a bolt or pin. After the work was finished and the engine was in operation, said Putnam and others gave a bill of sale of the engine and boiler to Richardson; and at the same time received back a mortgage thereof, which was recorded as a mortgage of personal property; and afterwards, upon breach of the condition thereof, due notice was given of intention to foreclose the same as such a mortgage. Richardson subsequently became insolvent, and said real estate was sold by his assignees by order of the commissioner, on the petition of mortgagees thereof, (some of whose mortgages were made before the erection of the engine and boiler, and some since,) to one Harlow, who had full knowledge of the mortgage to Putnam and others, and of the proceedings thereon, and who afterwards sold the engine and boiler to the defendant, to be taken away, and the defendant removed them. The plaintiff afterwards purchased all the rights of Putnam and others, and gave notice thereof to the defendant, and demanded the property of him.

The plaintiff also offered to prove that, by the general usage and custom of trade between manufacturers and vendees of such property, it was regarded and treated in all respects as personal property. But the Court of Common Pleas held the evidence incompetent.

The parties submitted the foregoing case to this court, with an agree-

¹ See *Central Branch R. R. Co. v. Fritz*, 20 Kans. 430.

ment that if, upon the facts stated, the action could be maintained, or if the evidence offered was competent, the case should stand for trial; otherwise, judgment for the defendant.

N. Wood, for the plaintiff.

J. W. Fletcher and *C. Devens, Jr.*, for the defendant.

SHAW, C. J. This is an action of tort, in the nature of trover, to recover the value of a steam-engine and boiler. To maintain this action, the plaintiff must prove property in himself, and a conversion by the defendant.

Upon the facts stated, the court are of opinion that the engine and boiler, having been erected on the premises of Josiah Richardson, of which he was then the owner in fee, subject to several mortgages, became annexed to the freehold. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306. This real estate comprised a manufactory occupied and carried on by said Richardson, and the engine was erected to furnish power for such manufactory. The steam-boiler was permanently set in brick-work, and could not be removed without taking down the brick-work, and the engine was permanently annexed to the buildings. This permanent annexation of the engine and boiler to the freehold, *de facto*, rendered them part of the realty; and his agreement with the builders to give them a mortgage thereon as personal property, as against all those who took title to the estate in fee, was inoperative and void. No title to these articles passed as personal property to the mortgagees which they could assert against a third party. The engine and boiler thus remained part of the realty till Josiah Richardson become insolvent, and the estate passed to his assignees, subject to the right of the mortgagees of the real estate; it was rightly sold by order of the commissioner, on their petition, and a good title passed to Harlow, the purchaser. He afterwards severed them, and thus reconverted them into personal property, as he lawfully might, and sold them to the defendant, who thereby took a good title.

The evidence of usage was rightly rejected; it could not be received to control the operation of law, arising from the actual annexation of the engine and boiler to the freehold. If it be said, it might have tended to show the intent of the parties; the answer is, that the intent of the parties was manifest enough from the agreement of the parties and the mortgage. But the difficulty was, (by mistake of the law, no doubt,) that this intention was one which the law could not carry into effect, that of hypothecating a portion of the realty, as personal property, without severance.

The fact, that Harlow had full knowledge of the history of the mortgage, did not impair his right to be a purchaser.

It is to be observed, as a fact important to the present case, that the engine and boiler were purchased and set up in the factory by one who himself owned the freehold. Had they been so bought and placed by a tenant on leased premises, the case might have presented a different question.

*Judgment for the defendant.*¹

¹ See *Dudley v. Foot*, 63 N. H. 57.

ROGERS v. GILINGER.

SUPREME COURT OF PENNSYLVANIA. 1858.

[Reported 30 Pa. 185.]

ERROR to the Common Pleas of Bucks county.

This was an action of trover, brought in the court below, by William T. Rogers and Paul Applebach, assignees of William Beek, against Philip Gilinger, Samuel Groff, Matthew H. Crawford, and Henry C. Hill; in which the parties agreed upon the following statement of facts, to be submitted for the opinion of the court, and considered in the nature of a special verdict. The decision to be upon the merits of the case, without regard to form, and either party to have a right to sue out a writ of error.

“William Beek was the owner in fee of a tract of land in Doylestown township, Bucks county, upon which was erected a large frame building, on stone foundations, designed to be used for the purposes of agricultural and other exhibitions. By deed dated the 26th of October, 1856, recorded the same day in the recorder’s office of said county, in Miscellaneous Book No. 11, page 149, he assigned all his property (including the above) to the plaintiffs in trust for the benefit of his creditors.

“On the 28th of the same month, the building was blown down by a storm of wind. The foundations and floor were left nearly entire, but the whole building above the floor was a complete wreck, severed from its supports and broken up, so that it could not be replaced, or the materials be used in the construction of a similar building.

“Subsequently the sheriff levied upon the land, by virtue of an execution against Beek, issued on a judgment entered previously to the date of the assignment, and sold and conveyed the same to the defendants. The ruins of the building, at the time of sale, were in the same condition as immediately after it was blown down. The defendants took possession of the property, sold the ruins of the building and received the proceeds to their own use. The plaintiffs duly notified the defendants, that they claimed such parts of the building as were severed from the foundations, as personal property, and brought this action to recover damages for the taking of the same.

“The property was described in the advertisement by the sheriff, on the *ven. ex.* as containing about 28 acres of land, and that the improvements consisted of the wreck of the large exhibition house and all its materials, — the foundations, joists, and floor of the building being good, and more than one half of the doors, windows, roofing, and timbers could be used for the purpose of erecting another building of the kind. The property as advertised was struck off to the defendants for \$6000. The defendants afterward applied to the court for

a rule to show cause why the sale should not be set aside, and they relieved from their bid, on the ground of the uncertainty whether the said wreck and materials passed to them as purchasers at sheriff's sale, as part of the real estate; and the court refused to grant the relief requested, and confirmed the sale.

"The *ven. ex.*, return, and proceedings to set aside the sale, are considered as a part of this case.

"If the court should be of opinion that the parts of the building severed from the foundations were personal property, then judgment to be entered in favor of the plaintiffs for the sum of \$698, with interest from June 21st, 1856; but should the court not be of such opinion, then judgment to be entered in favor of defendants."

The court below (*Smyser*, P. J.) entered judgment in favor of the defendants. Whereupon the plaintiffs sued out this writ of error.

Watson, for plaintiffs in error.

C. E. and *J. L. Dubois*, for defendants in error.

STRONG, J. The owner of a lot of ground upon which had been erected a large frame building, conveyed the property to assignees in trust for the benefit of creditors. Prior to the assignment, a judgment had been recovered against the assignor, which was a lien upon the real estate conveyed. Two days after the assignment had been made, a storm of wind demolished the building, leaving the foundation and floors nearly entire, but breaking the superstructure so that its materials could not be replaced, or used in the construction of a similar building. While in this condition, the whole was levied upon and sold under executions founded upon the judgment against the assignor, and the voluntary assignees now claim that the ruins of the frame building did not pass at the sheriff's sale; that they were personal property, and that the purchaser under the *venditioni exponas* having used them, is responsible to the assignees in an action of trover.

It may be premised that the assignees stand precisely in the shoes of Beek the first owner. If he could not assert against the purchaser at sheriff's sale, supposing no assignment had been made, that the fragments of the building were personalty, neither can they. It may also be remarked that the purchaser under the judgment has obtained all upon which the judgment was a lien.

Now clearly Beek, the first owner, could not have torn down the building, and converted the materials from realty into personalty, without diminishing the security of the judgment, impairing its lien, and wronging the judgment creditor. Though the statutory writ of *estrepement* might not have been demandable until after levy and condemnation of the property, yet equity would have enjoined against any such wrong. The building, as such, constituted a large part of the creditor's security, and his lien embraced every board and rafter which made a constituent part of the structure. Nor were the rights of the assignees any more extensive. They were mere volunteers. They took the property as land only, encumbered as a whole, and in every part, by the

lien of the judgment. Their title was in one sense subordinate to the right of the judgment-creditor to take all which passed to them in satisfaction of his debt.

In *Herlakenden's Case*, 4 Rep. 62 a, it was resolved that if a lessee pulls down a house, the lessor may take the timber as a thing which was parcel of his inheritance. So in *Bowles's Case*, 11 Rep. 81 b, it was held that if the lessee cut down timber, the lessor may take it. Though severed, it is a parcel of the inheritance.

Nor will the *tortious* act of a stranger be allowed to injure the reversion. 2 M. & S. 494; 1 Term Rep. 55; *Garth v. Sir John Cotton*, 1 Vesey Sr. 524. These principles are reasserted in *Shult v. Barker*, 12 S. & R. 272; 7 Conn. 232; 3 Wendell, 104. Nor will a severance be with the intent to change the character of the thing severed, and convert it into personalty, prevent its passing with the land to a grantee. Thus it was held in *Goodrich v. Jones*, 2 Hill, 142, that fencing materials on a farm which have been used as part of the fences, but are temporarily detached without any intent to divert them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser.

Is the rule different when the severance occurs not by a *tortious* act, nor by a rightful exercise of proprietorship, without any intent to divert the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice no one (4 Co. 86 b), yet the maxim is not true if a tempest be permitted to take away the security of a lien-creditor, and transfer that which was his to the debtor or the debtor's assignees. If trees are prostrated *per vim venti*, they belong to the owner of the inheritance, not to the lessee. *Herlakenden's Case*, *ut supra*. He takes them as a part of the realty. True, he may elect to consider them as personalty, and this he does when he brings trover for their conversion; but until such election they belong to him as a parcel of the inheritance. If a tenant hold "without impeachment of waste," the property in the timber is in him; but if there be no such clause in his lease, and he remove from the land trees blown down, such removal is waste. That could not, however, be, unless, notwithstanding the severance, they continue part of the realty, for waste is an injury to the realty.

I am aware that it is said to have been held that if an apple-tree be blown down, and the tenant cut it, it is no waste. 2 Rolle Abr. 820. That may well be, for the falling of the tree is through the act of God, not of the tenant, and the *cutting* of the fallen timber is but an exercise of the tenant's right to estovers; but if he remove from the land *fallen* timber, it has been ruled to be waste.

What then is the *criterion* by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tem-

pest is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall by his election give it a different character. In *Shepherd's Touchstone*, 90, it is laid down that "that which is parcel, or of the essence of the thing, although at the time of the grant it be actually severed from it, does pass by a grant of the thing itself. And therefore by the grant of a mill, the mill-stone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it."

It must be admitted that the case before us is one almost of the first impression. Very little assistance can be derived from past judicial decision. There is supposed to be some analogy between the character of these fragments of the building and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested. Severance had never been contemplated. One of the best definitions of fixtures is that found in *Shean v. Rickie*, 5 Mees. & W. 171. They are those personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, or his personal representatives, though the property in the freehold may have passed to other persons. Yet even fixtures, which but imperfectly partake of the character of realty, go to the purchaser at sheriff's sale of the land, though they have been severed tortiously, or by the act of God. Thus where a copper-kettle had been detached from its site in a brewery by one not the owner, had remained detached for a long period, and while thus severed had been pledged by the personal representatives of the owner, it was still held to have passed by a sheriff's sale of the brewery under a mechanics' lien, filed before the severance. *Gray v. Holdship*, 17 S. & R. 413.

Without, however, discussing the question further, it will be perceived that in our opinion the broken materials of the fallen building must be considered as a parcel of the realty as between the assignees and the purchaser at sheriff's sale, and consequently that they passed by the sale to the purchaser.

The judgment is affirmed.

VAUGHEN v. HALDEMAN.

SUPREME COURT OF PENNSYLVANIA. 1859.

[Reported 33 Pa. 522.]

ERROR to the Common Pleas of Lancaster county.

This was a case stated, between Joshua Vaughen and Peter Haldeman, in the nature of a special verdict, with the right to sue out a writ of error; in which the following facts were stated for the opinion of the court:—

In 1846 Peter Haldeman purchased a large brick dwelling-house and lot of ground, in Second Street, in the borough of Columbia, and moved into it and occupied it with his family until the 20th April, 1856.

In July, 1853, for the more comfortable enjoyment of the property, and lighting the premises, he caused gas-pipes to be introduced into the several apartments of the house, and ornamental and handsomely finished chandeliers, such as are commonly used in good private parlors, and brackets or side-lights attached to them. Two chandeliers were screwed into pipes in the ceiling of the parlor, and the joints were covered with cement; the brackets were screwed into the pipes in the wall and cemented, — this being the common and usual mode of fastening gas-pipes.

On the 1st of January, 1856, the premises were sold by the sheriff, under an execution against Peter Haldeman, the defendant, and were purchased for \$7,175, by the plaintiff, Joshua Vaughen, to whom a deed was executed on the 20th of the same month. On the 21st, notice was given to the defendant, to quit the premises, at the expiration of three months. On the 8th April, 1856, on application of the plaintiff, a writ of *estrepement* to stay waste was granted, and placed in the hands of the sheriff.

The said Peter Haldeman, while this writ was in the hands of the sheriff, and before removing from the premises, notwithstanding a notice from the plaintiff not to do so, detached the said chandeliers and brackets, and carried them away.

It was agreed that if the court should be of opinion that Vaughen, the purchaser of the real estate, was legally entitled to the said chandeliers and brackets, or either of them, then judgment should be entered generally for the plaintiff, the damages to be ascertained by writ of inquiry; but if he was not entitled to them, or either of them, then judgment to be entered for the defendant; the costs to follow the judgment.

The court below (*Hayes*, P. J.) gave judgment for the defendant on the case stated; which was here assigned for error.

Stevens and North, for the plaintiff in error.

Fordney and Reynolds, for the defendant in error.

READ, J. Lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses, by means of candles, oil, or other fluids, have never been considered as fixtures, and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures.

This is still the law ; but it is supposed that the introduction of carburetted hydrogen gas may have changed the character of the apparatus, because it must be connected with the pipes through which the gaseous fluid is brought into the building. If such were the case, it would establish two different rules in relation to the same subject, depending entirely upon the medium used to produce light.

The first gas-works were established in London, fifty years ago ; and in 1835, the first ordinance was passed by the city of Philadelphia for their erection, since which period they have been gradually introduced into the cities, towns, and villages of the interior. The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fixtures, for the purpose of lighting the rooms and entries. These are called gas-fittings ; whilst the chandeliers, and other substitutes for the oil-lamps and candles, are called gas-fixtures, and are screwed on to the pipes and cemented, only to prevent the escape of gas ; and may be removed at pleasure, without injury either to the fittings, or to the freehold. There is, therefore, really nothing to distinguish this new apparatus from the old lamps, candlesticks, and chandeliers, which have always been considered as personal chattels.

Gas-stoves are largely used for bath, and other rooms, and are necessarily connected with the gas-pipes in the same way ; but no one would think of saying that they were fixtures, which it would be waste to remove. It is, therefore, more simple to consider all these gas-fixtures, whether stoves, chandeliers, hall and entry lamps, drop-lights, or table-lamps, as governed by the same rule as the articles for which they are substituted.

We find no reported decisions on this subject in the English courts ; but there have been some cases in our sister States, bearing directly upon this question. In *Lawrence v. Kemp*, 1 Duer's Reports (Superior Court of New York), 363, it was decided that gas-fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant ; and in *Wall v. Hinds*, 4 Gray, 256, the Supreme Court of Massachusetts held that a lessee could take away gas-pipes put in by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

The case now before us seems to have been directly decided in *Montague v. Dent*, 10 Richardson (S. Carolina Law Reports), 135, in December, 1856, by the Court of Appeals of South Carolina. Under a sale to foreclose a mortgage, a house and lot were sold, and a few days afterwards, the sheriff, under executions against the mortgagor, removed and sold certain gas-chandeliers, and pendant hall gas-burners, and the court held unanimously, that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the freehold. The reasoning of the court appears to us to be decisive of the present case, the only difference being that the house here, was sold under a judgment, and not under a mortgage.

By "A supplement to an Act entitled 'An Act relating to the lien of mechanics and others upon buildings,' passed the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six," which was passed 14th April, 1855 (Pamph. L., p. 238), it is enacted "that from and after the passage of this Act, the several provisions of the Act, to which this is a supplement, be and the same are hereby extended to plumbing, gas-fitting and furnishing, and erection of grates and furnaces."

By referring to the Senate Journal of 1855, it appears that the first section of this bill was amended in the Senate, by striking out all after the word "to" in the seventh line, and inserting in lieu thereof the words as follow, viz.: "plumbing, gas-fitting, furnaces, and furnace buildings" (p. 167); and upon the passage of the bill, by the unanimous consent of the Senate, it was amended in the first section, by striking out of the eighth line the words "furnaces, and furnace buildings," and by inserting in lieu thereof, the words "and furnishing, and erection of grates and furnaces." Notwithstanding, therefore, the punctuation of the Act, the word "gas-fitting" stands alone, the furnishing and erection of grates and furnaces relating to an entirely different subject.

It is not necessary to place a construction upon this Act, because in the present case the fittings and fixtures were introduced into an old house; but it would seem reasonable, that it should be confined to what is generally understood by the words "gas-fitting."

For these reasons, in addition to those assigned by the court below, the judgment must be affirmed.¹

¹ See *Johnson v. Wiseman*, 4 Met. (Ky.) 357 *contra*.

FORD v. COBB.

COURT OF APPEALS OF NEW YORK. 1859.

[Reported 20 N. Y. 344.]

APPEAL from the Supreme Court. Action to recover damages for an alleged illegal entry upon the plaintiff's premises, and taking, removing and converting twenty-three salt kettles. On the trial before a referee, it appeared that on the 6th September, 1855, one Orrin W. Titus was in possession of a lot of land, known as block No. 55, in the village of Liverpool, Onondaga county, upon which he had erected works for the manufacture of salt. On that day he purchased of the defendants fifty iron salt kettles, and certain iron arch pieces, arch fronts and grates, to be put up in said salt works, for the price of \$955.60, for which he gave his promissory notes, payable in November, July, and August next after the purchase. He also executed to the defendants a chattel mortgage upon said articles, which recited the sale and that the kettles, &c., were about to be taken from Syracuse to Liverpool, and to be set up in the aforesaid salt block. It was conditioned to be void if Titus should pay the notes at their maturity; otherwise to be an absolute transfer to the defendants. Titus was to remain in possession until default, unless the defendants should consider themselves insecure; in which case they had a right to take possession of the property and apply it to the payment of the debt, and Titus was to pay the deficiency, if any. The mortgage was duly filed in the clerk's office of Onondaga county, and was continued in force by refileing according to the Statute. Titus thereupon set the kettles in arches, upon the salt block, in such manner that they could not be removed, except by tearing off a portion of the upper bricks of the arch, and prying the kettles out by a plank and bars. It was proved to be the general custom to take the kettles from the arch, and to reset them every season before commencing boiling in the spring; and that these kettles had been taken out, reset in the fall of 1856, before the defendants took them, as afterwards mentioned; and that it would have been necessary again to take them out, and reset them the ensuing fall, if the defendants had not taken them.

Titus was the beneficial owner of the lots on which the salt works were erected, in June, 1855, though the legal title was in Horace White, from whom he had an executory contract. He, Titus, had put up the frame of the salt works, and had covered the building; and some time in that month he made a verbal agreement with the plaintiff, to sell him an undivided half of this property, and of other real estate, for \$2,000, nearly all of which was paid down. By this agreement, Titus was to put in the kettles, half the cost of which was included in the purchase price, finish the salt block and wall it; and this he accord-

ingly did by purchasing and putting in the kettles and otherwise; and he leased the whole to one Soule, who continued to run the salt works down to the time the defendants took the kettles. In October, 1855, Titus procured White, in whom the legal title was, to convey the lot to one T. O. Titus, and the latter, on the 21st March, 1856, by O. W. Titus' procurement, conveyed the same to O. W. Titus and the plaintiff, and in November, 1856, O. W. Titus conveyed his interest to the plaintiff.

On the 10th February, 1857, no part of the notes given for the purchase price of the kettles, except the first note for \$200, having been paid, the defendants entered upon the premises, and took and carried away twenty-three of the salt kettles, claiming them by virtue of the mortgage. They did no more damage than was necessary, but they were obliged to remove a part of the upper bricks of the arch, and to pry up the kettles, each of which weighed about 675 pounds, in the manner before mentioned; by which, as the referee found, the property was injured to the amount of \$50. The plaintiff was absent from the country, and did not know of the purchase of the kettles when it was made, or of the giving of the chattel mortgage, until the day the kettles were taken by the defendants. The referee held, as matter of law, that the kettles were a part of the realty, and that the plaintiff became the owner of them by his purchase of the land, and he awarded damages to \$461.77, for which judgment was entered; and it was affirmed at general term. The defendants appealed. The case was submitted upon printed briefs.

Philo Gridley, for the appellants.

James Noxon, for the respondent.

DENIO, J. The case is to be considered as though O. W. Titus was the owner of the land at the time he purchased the kettles and put them into the arch, and as though the plaintiff subsequently purchased the land from him, and took a conveyance of it without any notice of the defendants' claim to the kettles. This is the precise point of view in which the question has been regarded in the Supreme Court, and in the briefs which have been submitted by the counsel for the respective parties. The plaintiff, it is true, had made a verbal agreement with Titus, anterior to the time when the kettles were set, but the latter was in possession of the land as owner, with the plaintiff's consent, when he purchased and mortgaged the kettles; and it does not appear that the defendants had any knowledge of the verbal arrangement between Titus and the plaintiff.

I shall assume, that if Titus had paid for the kettles when he purchased them, instead of mortgaging them for the purchase price, the manner in which he annexed them to the freehold was such as would have converted them into a parcel of the realty; and that they would have passed to his subsequent grantee of the land, or would have gone to his heirs or devisees if he had died without conveying it. It is very clear that this would have been so at the common law and independently of

the provisions of the Revised Statutes. The case of the salt pans, decided by Lord Mansfield, where it was held that fixtures, very similar in their purpose and mode of annexation with these now in question, belonged to the heirs and not to the executors, has been very generally followed in England and in this country. *Lawton v. Salmon*, 1 H. Bl. 258, note; and see *Murdock v. Gifford*, 18 N. Y. 28, and cases cited. There is room for an argument, that the rule thus established has been modified by the provision of the Revised Statutes, which declares that "things annexed to the freehold or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support," shall go to the executor or administrator to be applied as part of the personal property. 2 R. S. 82, § 6, subd. 4. Apparently it was the intention of the Legislature to abolish the distinction, which had become well established, between the rights of a tenant to remove certain kinds of fixtures which he had himself annexed to the freehold of the demised premises, and those of the heirs or devisee. If that is the true construction of this provision, the kettles in question ought to be held to be personal property, and the plaintiff, who makes title only by means of a conveyance of the land, would have no case. But the important and unexpected consequences which it was seen would flow from such an interpretation have caused the courts to hesitate; and in *House v. House*, 10 Paige, 158, Chancellor Walworth decided that the millstones, bolts and machinery of a flouring mill were parcel of the real estate and descended to the heirs of the owner, holding, as I understand the case, that the rules of the common law upon the distinction referred to, still prevailed; and the present Chief Judge, in giving the opinion of this court in the case of *Murdock v. Gifford*, 18 N. Y. 28, seemed inclined to adopt the conclusion of the Chancellor. But the point was not necessary to the decision of that case, as the fixtures there in question were held to be personal property, according to the former decisions, in any aspect in which the question might be presented. The reasoning of the Chancellor, in *House v. House*, is not altogether satisfactory to my mind; but as the judgment in that case may be said to have become a rule of property, it should not be disturbed without the greatest consideration, and certainly not in a case like the present, which may be satisfactorily disposed of on other grounds.

Assuming then that these kettles would be parcel of the real estate if the owner of the land was the unqualified owner of them when they were put up in the arch, we are to determine as to the effect of the arrangement in this case by which the owner of the land and the owner of the kettles agreed, that notwithstanding their annexation to the freehold in the manner which was contemplated, they should continue to be personal property so far as should be necessary to give effect to the personal mortgage. It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the

parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams or other materials of which the walls of a house were composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to the things real with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate. The cases respecting trade fixtures put up by a tenant sufficiently exemplify this distinction. Thus, in the case of the salt pans, which Lord Mansfield held belonged to the heirs, no doubt was entertained by him but that they might lawfully have been detached and taken away if they had been put in by a tenant. "It would have been a different question," he said, "if the springs had been let and the tenant had been at the expense of erecting these salt works; he might very well have said, I leave the estate no worse than I found it." All the cases upon this branch of the law of fixtures proceed upon the idea that erections which would clearly be a part of the realty under ordinary circumstances, are personal chattels as regards the rights of a tenant who has put them up for the purpose of trade or manufacture. *Penton v. Robart*, 2 East, 88; *Elwes v. Maw*, 3 Id. 38; *Buckland v. Butterfield*, 2 Brod. & Bing. 55; *Holmes v. Tremper*, 20 John. 29; *Miller v. Plumb*, 6 Cow. 665. If a subject which would otherwise be real estate can be made personal by the creation of special relations between the parties, it is clear that the same parties may effect the same thing by express agreement. Accordingly, it has been repeatedly held that erections which, by the general rules of law, would belong to the freehold, have become chattels in consequence of a contract to that effect between the owner of the land and the party claiming the erections as personalty. In *Smith v. Benson*, 1 Hill, 176, a building used as a grocery and dwelling-house had been erected under an agreement with the proprietor of the soil that it might be removed at any time. One who claimed title under the party who erected it, but who had no interest in the land, mortgaged it as a chattel, and afterwards sold it as personal property. The question was between the mortgagee and the subsequent purchaser, and the former was allowed to recover in trover against the latter, who had converted the house. In answer to the objection that the building was real estate and therefore not the subject of such an action, Judge Cowen said that *prima facie* such a building would be a fixture and would not be removable; that the legal effect of putting it on another's land would be to make it a part of the freehold. "But the parties concerned," he added, "may control the legal effect of

any transaction between them by an express agreement." So in *Mott v. Palmer*, 1 Comst. 564, the defendant had sold and conveyed to the plaintiff by deed containing a covenant of seisin, a farm, certain of the fences standing upon which had been put up by a third person under an agreement with the defendant that he might take them off at his pleasure. This third party had recovered the value of the fences of the plaintiff, who had refused to let him take them off, in an action of trover, upon which the plaintiff sued the defendant, his grantor, for a breach of the covenant, and was permitted to recover the value of the fences. The recovery could be sustained only on the assumption that fences were *prima facie* parcel of the freehold, but might legally become personal property by force of such an agreement as was proved in the case. And in *Godard v. Gould*, in the present Supreme Court (14 Barb. 662), the plaintiffs had sold certain paper-making machinery, to be put up in a paper-mill, reserving, however, by express agreement, the title to the machinery as a security for the purchase money. It was accordingly put up, and afterwards the owner of the mill sold and conveyed it to the defendants, who had no notice of the plaintiffs' rights. The deed, besides describing the land on which the mill stood, purported also to convey all the machinery in it. The action was for the conversion of the machinery by the defendants; and a recovery in favor of the plaintiffs was sustained by the court. It was considered that the machinery was personal property, by force of the arrangement under which it was placed in the mill, though its mode of annexation and adaptation to the purposes of the mill were such that it would have passed by a simple conveyance of the real estate but for the agreement by which the plaintiffs retained the right of property in it. Many other cases to the same effect will be found referred to in "Hilliard on Real Property," ch. 1, §§ 18-28.

It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus, a house or other building, which from its size or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel, by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support; it is impossible that they should by any arrangement between the owners become chattels. The case of *Fryatt v. The Sullivan Co.*, 5 Hill, 116, was correctly decided upon this distinction. A certain steam-engine and boiler were leased, and the lessees took them to their smelting works, and affixed them so firmly to the freehold that they could not be removed without destroying the building in which they were placed. The defendants made title to the building, under a mortgage executed after the engine had been thus annexed, and the owner of the engine and

boilers brought trover for them. It was held, that the articles had been converted into real estate, and that the remedy of the plaintiff was against the party who wrongfully converted them from personal into real property; and that the action could not be sustained against the owners of the real estate.

The question in the present case, therefore, is, whether the method in which these salt kettles were affixed to the freehold was such that they can still be claimed as chattels, upon the principle of the first mentioned cases, or whether they are to be considered as real property within the one last referred to. There is no pretence that they were necessary to the support of the building, or that their own condition was essentially changed, or their value diminished, by being detached from the arch. They were of value after being removed, as second-hand kettles, and could be again put up in another arch; but taking them out involved the displacement of certain of the bricks of which the arch was composed. I do not think this a controlling circumstance, especially as it is found by the referee, that they required to be taken out and re-set as often as once a year, in the ordinary course of the business of manufacturing salt. This involved a certain amount of expense, whether it was done for the purpose of re-setting, or with a view of finally disconnecting them with the arch. I do not think that it required any such destruction of the subject, or serious damage to the freehold to which they were attached, as to render void the arrangement by which it was agreed that they should continue to be personal property, for the purpose of removal, in case default should be made in the payment of the purchase money. They were not so absorbed or merged in the realty, that their identity as personal chattels was lost; and unless such an effect has been produced, there is no reason in law or justice for refusing to give effect to the agreement, by which they were to retain their original character.

I conclude, therefore, that the defendants were entitled, as against O. W. Titus, to detach the kettles from the arch and take them away, after default had been made in the payment of the purchase price; and the only remaining question is, whether the plaintiff is in any better position than that which Titus occupied. The kettles were originally personal property. The agreement contained in the chattel mortgage preserved their character as personalty, which would otherwise have been lost by their annexation. They, therefore, continued to be personal chattels notwithstanding the annexation; and the plaintiff, by filing the mortgage, observed all the formalities required by law to preserve their lien upon that kind of property. The title to the kettles did not, therefore, pass by the conveyances to the plaintiff. Those conveyances embraced only the interests which the grantors had a right to dispose of, including any advantage which would accrue to the grantee by the *laches* of the former owners, in giving the constructive notice which the law required to be given; but I do not see that any such *laches* occurred. This seems to me the true state of the case upon

principle. But it is also sustained by authority. The case of *Mott v. Palmer*, already referred to, necessarily involved this point. It was held, that the covenant of seisin was broken at the time of the execution of the deed, because the fences which were embraced in the general description of the property professed to be conveyed, did not pass by it; and the reason they did not pass was, that they had been saved from merging in the freehold by an agreement in character precisely like the one set up by the present defendants. If it could have been maintained that they passed by the deed, because they were apparently parcel of the realty, and because the grantee had no notice of the special arrangement, no recovery for a breach of the covenant of seisin could possibly have been sustained. This decision, pronounced by our predecessors in this court, is of the highest authority with us, and is decisive of the point. There is a case equally in point, in the Supreme Court of New Hampshire [Maine]. The action was trover for a saw-mill, mill chain and dogs. The defendant made title under a deed of the land on which the mill stood; and the evidence showed that he had no notice of the special facts upon which they were claimed to be personal property. Those facts were, that the defendant's grantee, the owner of the land, was a party to an arrangement by which that mill had been sold to the plaintiff as personal property. It was decided that the action was maintainable, and the plaintiff had judgment. *Russell v. Richards*, 1 Fairf. 429. The case of *Godard v. Gould*, before referred to from the reports of the present Supreme Court of this State, is to the same effect.

These considerations lead to a reversal of the judgment of the Supreme Court in the present case, and to the award of a new trial.

JOHNSON, C. J., STRONG, ALLEN, GRAY, and GROVER, JJ., concurred; COMSTOCK, J., dissented.

*Judgment reversed, and new trial ordered.*¹

CLARY v. OWEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 522.]

ACTION of tort by the assignee in insolvency of Heman D. Burghardt, for the conversion of four water-wheels, with the shafts, couplings, and other machinery connected with them. At the trial in the Superior Court the plaintiff introduced evidence of the following facts:—

In 1854 Burghardt contracted with John E. Potter, who then owned certain real estate in Barrington, to furnish the water wheels and machin-

¹ See *Tift v. Horton*, 53 N. Y. 377.

ery, and to set them up in wheel-pits to be prepared by Potter on the premises, for the sum of \$3,500, of which \$500 was paid at once, and the balance was to be paid on the completion of the work, in notes secured by a mortgage of the property, or by a mechanic's lien.

In the latter part of 1854, Burghardt, in pursuance of this contract, constructed the wheels in question, which were made of cast iron and placed in pairs upon cast-iron shafts, and set them up in penstocks and a flume, the frame of which rested on a stone foundation built by Potter in all respects like the foundation of a building. The wheels were intended for the purpose of driving a paper-mill on the premises; they were outside of the paper-mill building, but the mill could not be used without them.

In January, 1855, before the completion of the wheels and fixtures, the mill was destroyed by fire; Potter failed, and abandoned the work; and Burghardt never fulfilled his contract and never received any payment or security, except the \$500 paid at the time of making the contract; never delivered the wheels, except in so far as setting them up as above described amounted to a delivery; never offered to return the money which he had received, and never called on Potter for any payment.

When the contract was made the premises were subject to certain mortgages, which were afterwards assigned to the defendants, who had previously had notice that Burghardt claimed to own the wheels and machinery, and who, a year after the fire, took possession of the premises, which were in the condition in which the fire had left them, to foreclose the mortgages, and afterwards purchased the equity of redemption.

Upon this evidence, *Putnam, J.*, ruled that the wheels having been placed on the premises after the execution of the mortgages, the action could not be maintained. The plaintiff then offered to show that, by the agreement between Burghardt and Potter, the wheels were to remain the property of the former until completed, and payment for them secured by mortgage; but the judge ruled that, even if that were proved, the plaintiff could not maintain his action, and directed a verdict for the defendants, which was returned, and the plaintiff alleged exceptions.

J. D. Colt, for the plaintiffs.

J. E. Field and *M. Wilcox*, for the defendants.

HOAR, J. It is conceded in the argument of the plaintiff's counsel, that the mill-wheels, for the value of which this action was brought, must be considered, as between mortgagor and mortgagee, fixtures belonging to the realty. They were essential to the operation of the mill, and were intended, when completed and paid for, to be permanently attached to the land. If the mortgagor had himself annexed them to the freehold, there could be no doubt that the mortgagee would hold them under his mortgage, and that they could not be severed without his consent. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306.

But it is contended that the mortgagor being in possession, and having agreed with Burghardt that the wheels should remain the personal property of the builder until they were completed and provision made for paying for them, the wheels, having been set up under this agreement, could not be claimed and held by the mortgagee.

If this position were tenable, it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself. But it is well settled that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount. The mortgagor cannot make a lease which will be valid against the mortgagee; and if the mortgagee enter, neither the mortgagor nor his lessee will be entitled to emblements. *Pow. Mortg. c. 7*; *Keech v. Hall*, 1 Doug. 21; *Lane v. King*, 8 Wend. 584; *Mayo v. Fletcher*, 14 Pick. 525. And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority.

Whether a person putting a building upon land by license of the mortgagor, under such circumstances that it would remain his personal property as against the mortgagor, would be allowed in equity to maintain a bill to redeem, if the mortgagee should enter, is a question involving very different considerations. A tenant under a lease may redeem, to protect his interest. *Rev. Sts. c. 107, § 13*; *Bacon v. Bowdoin*, 22 Pick. 401.

It has been suggested that the defendants cannot avail themselves of their title as mortgagees, because they acquired the title of the mortgagor also, and therefore the mortgages are to be regarded as paid or merged. But it has been often decided that the purchaser of an equity of redemption may take an assignment of the mortgage, and may keep the legal and equitable titles distinct, at his election, if he has any interest in so doing, so that they shall not merge by unity of possession. And a release of an equity of redemption operates as an extinguishment of the equity of redemption, and not as a merger of the estate conveyed by the mortgage. *Loud v. Lane*, 8 Met. 517.

*Exceptions overruled.*¹

¹ See *Tiff v. Horton*, 53 N. Y. 377; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Porter v. Pittsburg Steel Co.*, 122 U. S. 267.

GIBBS v. ESTEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 587.]

ACTION of tort for breaking and entering the plaintiff's close and digging up and carrying away a house. Answer, that the house was the personal property of the defendant Estey.

At the trial in the Superior Court before *Rockwell, J.*, there was evidence that the close was in 1850 owned by Ira Haskell; that he, while in possession of the land, assented to the erection of a house thereon by Warren Gibbs, and agreed that Gibbs should hold the house as personal property; and that this assent was given and agreement made after the cellar had been dug, the cellar wall and underpinning stone laid, the frame of the house erected, and while the work of building was still going on. The judge ruled that such assent and agreement, to be effective, must have been before or at the time when the frame of the house was erected.

The judge rejected evidence, offered by the defendants, of the declarations of Solomon Gibbs, Haskell's grantee and the plaintiff's grantor, while in possession of the land, that he neither owned nor claimed the house.

There was evidence that Estey bought the house of Warren Gibbs as personal property, and afterwards bought the equity of redemption of the land at a sale on execution against Solomon Gibbs; that he subsequently released to Solomon the rights acquired by this purchase, and remarked to him, at the time of delivering the release, that he should abandon his claim to the house, as he had been advised by counsel that he could not hold it. The judge instructed the jury that if, at the time of delivering such release, Estey verbally relinquished his claim to the house, neither he, nor any one claiming under him, could afterwards legally assert any title to it, by virtue of any previous title to it as personal property.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. T. Davis, for the defendants.

S. T. Spaulding, for the plaintiff.

DEWEY, J. The plaintiff has acquired an undisputed title to the real estate described in his writ by sundry conveyances passing the title of Ira Haskell as he held the same at the date of his deed to Solomon Gibbs. It is conceded that this title of Haskell was originally a valid one, and sufficient to pass the estate in the land; but it is contended that the house standing thereon, and which is the subject of the present controversy, was the personal property of Warren Gibbs, under whom

the defendants claim title. The question in the case is therefore whether this house was real estate and passed by the various conveyances as such, or was personal estate capable of being held and sold irrespectively of its connection with the land. If it was a part of the realty, it has duly passed to the plaintiff. The general rule is that a building like a house, erected on the land, will of course become a part of the realty, and as incident thereto will pass with the land. An exception to the rule has been held to exist in cases where the owner of the land has given permission to another person to erect a building upon such land, to be held and enjoyed as his own as personal property. Such separation of the personal from the real estate to which it is attached is to be established by evidence of assent to the erection of the same, before the structure is erected and has become attached to the realty, and thus had its character fixed. That essential element was wanting in the present case. It is shown in this case that the time of giving such assent was after the digging of the cellar, the laying of the cellar wall and underpinning stone, and the erection of the frame of the house thereon, and while the process of further completing the building was going on. The instruction of the court, that such assent, to be effective, must have been given before or at the time when the frame of the house was erected, was correct. After that period of time, the building, though it might be an unfinished building, was a building attached to the real estate, and would pass as such. The intention of the parties, if it existed, to change this to personal property, was one which the law could not carry into effect. *Richardson v. Copeland*, 6 Gray, 538. Such being the case, the house would in law pass by the various conveyances of the real estate upon a part of which it stood.

The declarations of Solomon Gibbs, one of the intermediate owners, while he owned the real estate, that the house was not owned or claimed by him, would not defeat the title legally in him, and which he has passed to the plaintiff.

It is unnecessary to consider the further question of the effect to be given to the evidence of the declarations of the defendant Estey, wholly relinquishing his claim to the house at the time of making his quitclaim deed of the land to Solomon Gibbs, the grantor of the plaintiff. In the view the court take of the case, the first ground is decisive in favor of the plaintiff, without any aid from these declarations.

*Judgment for the plaintiff.*¹

¹ Contra, *Fuller v. Tabor*, 39 Me. 519 (1855).

“It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So if the question here were between the petitioner and the savings bank, no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by parol, with

BRENNAN v. WHITAKER.

SUPREME COURT OF OHIO. 1864.

[Reported 15 Ohio St. 446.]

ERROR to the District Court of Lucas county.

The original action was prosecuted by the Brennans, plaintiffs, in the Court of Common Pleas of Lucas county, to recover from Whitaker and Phillips, defendants, damages for the alleged wrongful conversion, by the defendants, of two steam engine boilers, one large steam engine, a quantity of mill shafting, one drum, one balance wheel, the gearing for an upright saw, one muley saw and the gearing, and one poney engine.

The facts, as they appear in the record, are substantially as follows :

On the 9th of July, 1857, Farley & Ketcham, parties of the first part, executed a mortgage to the plaintiffs, parties of the second part, by which "the said parties of the first part for and in consideration of the sum of \$1231.51, to them in hand paid by the said parties of the second part . . . do grant, bargain, and sell unto the said parties of the second part, all and singular the goods and chattels hereinafter described, that is to say: The steam engine boilers now in the possession of said parties of the first part, designed to be used in their saw mill in Oregon township, Lucas county, Ohio, being the same purchased by them of the said J. & J. Brennan this day, together with the engines and machinery attached to said boilers. To have and to hold all and singular the said goods and chattels hereinbefore bargained and sold, or mentioned, or intended so to be, unto the said parties of the second

a parol license to sever them; and I am much inclined to think that trade fixtures might be. At all events there can be no doubt that the owner can in writing and for a valuable consideration convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least. The discussions of the question whether fixtures have passed by a deed or mortgage all assume, and many of them express that if the owner chooses to except the fixtures out of his conveyance of the fee, he may lawfully do so. Two or three decisions in England, which are thought to state the law too strongly against mortgagees, are yet supported on the ground that the particular conveyances may be construed as including or excluding the fixtures as the case may be. See *Waterfall v. Penistone*, 6 E. & P. 876; *Trappes v. Harter*, 2 C. & M. 153; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Colgrave v. Dias Santos*, 2 B. & C. 76; *Harlan v. Harlan*, 20 Penn. State, 303. So in *Richardson v. Copeland*, 6 Gray, 538, the Chief-Justice says: 'No title to these articles passed to the mortgagees which they could assert against a third party,' referring, no doubt, to a prior incumbrancer or an innocent purchaser of the land, as in *Hunt v. The Bay State Iron Co.*, and as the defendant in the case then before the court seems to have been in effect. The assignee is not a third party, in this sense." — *Per* LOWELL, J., in *Ex parte Ames*, 1 Low. 561, 567.

See *Madigan v. McCarthy*, 108 Mass. 376; *Aldrich v. Husband*, 131 Mass. 480; *Hines v. Ament*, 43 Mo. 298; *Meyers v. Schemp*, 67 Ill. 469.

part forever ; said goods and chattels now remaining and continuing in the possession of the said parties of the first part, in said Lucas county, Ohio."

The mortgage was given to secure the payment of the note of Farley & Ketcham to the plaintiffs, bearing the date of the mortgage, for the sum of \$1231.51, payable, with the interest, in one year ; it being the amount due for the purchase money of the boilers mortgaged, and was subject to the condition that if default was made in the payment of the note according to its tenor, the plaintiffs might " enter upon the premises of the said parties of the first part at any place or places where the said goods and chattels or any part thereof may be, and take possession thereof, whether the same shall have been attached to the freehold, and in law become a part of the realty or not, and to remove the same to any place or places they may deem best, and to sell and dispose of the same."

The mortgage was filed in the office of the recorder of Lucas county, on the 9th of July, 1857, and copies, with the requisite statements, again filed by the plaintiffs in the same place each year thereafter up to the time of the commencement of this action.

After the execution of the mortgage, the boilers were put by Farley & Ketcham into a saw-mill, erected by them on land of which they were the owners in fee. They were placed in an engine house, built principally of brick, on one side of and attached to the main building of the mill. The roof of the mill extended over and formed the covering of the engine house. The boilers were placed — one end on a cast-iron frame, called the fire-front, which formed the front of the furnace, and stood upon brick, the other end on iron stands also resting on the brick. Under the boilers were built, to support them, piers of brick, and the whole was enclosed in brick arches nearly surrounding the boilers, one end of which came up to the fire-frame, and the other was built into the end brick wall of the building. Usually the boilers are attached to the fire-front and brick work by stay bolts, but the witnesses were not able to say whether that was done in this case. The boilers could not be removed without taking down the brick work around them and a part of the building to make room for them to be taken out. To take the boilers out through the mill would not require the walls of the building to be taken down, but they could be taken out by removing a part of the wood work in front, or by making a hole in the lean-to or engine house, at the rear end of the boilers.

The engines were placed on wooden foundations and fastened to them with bolts. The large engine was in the brick building with the boilers, the other inside the main building. They were connected with the boilers by steam pipes. The main shaft was connected with the large engine by a connecting rod fastened with keys. The drum and balance wheel were placed on the main shaft and run with it. The gearing for the upright saw was connected by a belt running on the drum. The other saw connected directly with the shaft without any

belt. The engines could be taken out; but there was no opening large enough to take out the fly wheel; and perhaps the drum would be too large for the doors.

The mill was completed in the fall of 1857, and was after that time occupied by Farley & Ketcham as a saw-mill, the motive power being furnished by the engine and boilers. The building was designed for a saw-mill, and in its form and structure was adapted to the business of such a mill; and, as appears from a description of the building contained in the record, it would, without material alterations and additions, be comparatively of little value for any other purpose.

There was no water power connected with the mill, and it depended wholly on steam for its power.

On the 14th of January, 1859, Farley & Ketcham executed to the defendants a mortgage upon the real estate on which the mill was located and all its appurtenances, to secure an indebtedness owing by them to the defendants. The mortgage was duly recorded in the record of mortgages of Lucas county. This indebtedness was unpaid at the time of the commencement of this action, and the defendants were in the possession of the mill. The plaintiffs demanded possession of the property, but the defendants refused to permit them to take it away.

The plaintiffs claim that, at the time of receiving their mortgage, the defendants had notice of the mortgage to the plaintiffs. This is denied by the defendants. On the trial the Court of Common Pleas found this issue in favor of the defendants.

Upon this state of facts and finding the Court of Common Pleas gave judgment for the defendants.

To reverse this judgment a petition in error was filed by the plaintiffs in the District Court, where the judgment was affirmed, and the plaintiffs now seek in this proceeding to reverse this action of the District Court.

Hill and *Pratt*, for plaintiffs in error.

M. R. and *R. Waite*, for defendants in error.

WHITE, J. I. The plaintiffs seek to recover for a tort arising from the conversion of the property in controversy; and, in order to establish their title to such property, as against the defendants Whitaker and Phillips, rely upon the chattel mortgage. In order to ascertain the relation in which Whitaker and Phillips stand to this mortgage, it is proper, in the first place, to determine whether they had notice of its existence at the time they received their real estate mortgage. The issue, upon this question of notice, has been twice found in favor of the defendants, by the Court of Common Pleas, and this finding we are now asked to review, on the ground that it is against the evidence. On this point, we only deem it necessary to state, that the testimony in the court below was conflicting; and while, as original triers of fact, we would have been inclined to find differently, yet we cannot say that the finding is so manifestly wrong as to warrant this court in reversing the judgment on this ground.

II. The next question is whether as between Farley & Ketcham, the mortgagors, and Whitaker and Phillips, the mortgagees, in the real estate mortgage, the property in controversy, became a part of the freehold? We are of opinion that it did. A discussion of the general principles to be regarded in determining when additions of personal property become a part of the realty, is here deemed unnecessary. The only difficulty arises in the application of these principles to the solution of particular controversies as they arise; and whether an article has been annexed to the realty so as to become a permanent accession to it, must, in a great degree, be determined by the circumstances of each particular case.

Farley & Ketcham, who made the annexations in the present case, were the owners of the fee; and the question we are now considering arises between them, as mortgagors, and their mortgagees, Whitaker and Phillips, who, for the purposes of their security, are to be regarded as purchasers.

The building was erected for a saw-mill, and, in the form and nature of its structure, was adapted to the business of a mill of that description. The boilers and engines were the only motive power, and were designed so to be when the mill was built. They performed the office of a wheel and water-power, and their adaptation to the structure and the uses for which it was designed, as well as the mode of their annexation, show that they were intended to be permanent. They could not be removed without leaving the saw-mill incomplete. The building, itself, for any other purpose, would, without material alterations and additions, be comparatively of little value. The shafting, drum, balance wheel, gearing for the upright saw, and the muley saw and gearing, though differing from the boilers and engines in the mode of annexation, yet are to be regarded as fixtures.

The mode of annexation, alone, does not determine the character of the property annexed; but the appropriateness of the articles named to the mill, and their necessity to its completeness, are also to be looked to.

III. The remaining question is, whether the chattel mortgage to the plaintiffs, as against the real estate mortgagees, deprives the property in controversy of the character of fixtures? The plaintiffs claim that this is the effect of the chattel mortgage; and that they have the same right to recover the property from the mortgagees (Whitaker and Phillips), without notice, as they would have had against Farley & Ketcham, if the real estate mortgage had not been given.

It is not necessary to inquire what, as against mortgagees without notice, would have been the rights of a party, other than the owner of the freehold, who might have placed, in the same manner upon the premises, the property in question, under some agreement with the owner, for a temporary purpose, and with the right of removal; nor as to what would have been the effect, if the property had been annexed by the tortious act of Farley & Ketcham. The facts in this

case raise neither of these questions, and we forbear entering into an examination of the authorities cited bearing upon them. Here it was not only the intention of Farley & Ketcham to annex the property to, and make it a part of, the freehold, but their so doing was according to the understanding of the parties when the mortgage to the plaintiffs was executed. In the mortgage it said the boilers are "designed to be used in their (F. & K.'s) saw-mill," and power is given the plaintiffs on default of payment, "to take possession thereof (mortgaged property) whether the same shall be *attached to the freehold* and in law become *a part of the realty* or not." The right given to the plaintiffs, by the mortgage, to enter upon the premises and sever the property would, doubtless, have been effectual as between the parties. But the defendants were purchasers without notice of this agreement. The filing of chattel mortgages, is made constructive notice, only, of incumbrances upon goods and chattels. The defendants purchased, and took a conveyance of real estate, of which the property now in question was, in law, a part; and, in our opinion, it devolved upon the plaintiffs who sought to change the legal character of the property, and create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice. It is true that in the case of *Ford v. Cobb*, 20 N. Y. Rep. 344, it was held that an agreement which was evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land, without notice. But it seems to us to be the sounder rule, and more in accordance with principle, and the policy of our recording laws, to require actual severance, or notice of a binding agreement to sever, to deprive the purchaser of the right to fixtures or appurtenances to the freehold. *Fortman v. Goepfer*, 14 Ohio St. Rep. 565; 2 Smith's L. C. 259; *Fryatt v. Sullivan Co.*, 5 Hill, 116; *Richardson v. Copeland*, 6 Gray, 536; *Frankland et al. v. Moulton et al.*, 5 Wisconsin Rep. 1.

In the case last named, the owner of a steam engine, sold and assisted to annex the same to the realty, reserving a chattel mortgage on the same for a part of the purchase money; and it was held that the chattel mortgage was inoperative as against a prior mortgagee of the real estate. The mode of annexation was very similar to that existing in the case under consideration; and the holding that the chattel mortgage was inoperative as against a prior mortgagee of the real estate, as was likewise done in *Copeland v. Richardson*, *supra*, restricts the operation of agreements to sever what would otherwise be regarded as fixtures, more than is required to be done for the decision we make, in the present case. Whether the restriction upon the right of removal, that was applied in these cases, can be properly applied in favor of a mortgagee of the real estate, claiming the property added to the premises after his mortgage, as fixtures, and against a party claiming the

same property as personal chattels under a chattel mortgage from the owner, when the removal would leave the realty claimed by the mortgagee as a security, in as good plight as when his mortgage was taken, it is unnecessary now to inquire; and, upon this question, we express no opinion.

The judgment of the District Court will be affirmed.

BRINKERHOFF, C. J., and SCOTT, DAY, and WELCH, JJ., concurred.

McLAUGHLIN *v.* NASH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[*Reported 14 All. 136.*]

BILL in equity for an account of a partnership formed between the parties on the 1st of May, 1860, for the purpose of carrying on the business of tool-making, and dissolved on the 17th of December, 1861.

Upon the report of a master in chancery, to whom the case had been referred to state the account, the question was reserved for the determination of the full court, whether any of the following articles, the value of which was found by the master, were partnership property, under the circumstances hereinafter stated; namely, "engine and boiler, \$375; trip-hammer, \$100; shafting and belting, \$100; emery machine, \$40; blower, \$50; force-pump and piping, \$40; bench tools, \$10; vices, \$40; planing machine, \$275; forge tools, \$100; stock of iron and steel, \$150; grinding stone and shaft, \$30."

On the 1st of December, 1859, Ira Gerry executed to the plaintiff a bond for the conveyance of a lot of land in Stoneham, with the buildings thereon, upon his paying \$50 semi-annually for four years and a half, and \$1750 at the end of five years, with interest, and meanwhile paying all taxes levied on the premises, and a sufficient sum of money to keep the buildings insured against fire in the sum of \$1100; the obligee "to have the privilege of occupying and improving the premises without further charge" until the conveyance to him, or default in payment of the price. Gerry erected a shop on the premises, for which the plaintiff furnished some materials and labor. The articles in question were put into the shop by the plaintiff. When the partnership was formed, the defendant purchased an undivided half of them, and the firm agreed to pay to the plaintiff a stipulated rent for the use of the shop. In the summer of 1861 the condition of the bond was broken, and the plaintiff informed Gerry that he might collect the rent of the premises. Gerry never obtained the keys of the shop; but on the 20th of December, 1861, let the shop to the defendant, "claiming all that was fixed to the building as belonging to the real estate."

"The engine and boiler were set on brickwork, which was on the ground. The brickwork was built up to the fireplace, and under the

boiler and engine, and they rested on this brickwork. The boiler was raised up, the brickwork built up, and the boiler let down upon it, where it rested. There was no brickwork around it except as above stated. The engine and boiler could be removed without removing the bricks previously. The engine was of eight horse power. The engine and boiler were portable and in their own frames. It was formerly used on a wharf, and was originally on trucks, which were taken off, and kept on the premises. One half of the shop had no floor, except cement, upon the ground. The trip-hammer was on a block of wood, set in the ground, with a stone block for the hammer to rest and fall on; the other end was set in an iron frame, fastened with bolts to said block of wood, set in the ground. The shafting was fastened up with screws and bolts. The emery machine was set on the floor, and fastened with bolts. The blower was set and fastened in the same manner. The force-pump was fastened with screws to the side of the building, and operated by the engine. The vices were fastened to the work-bench with screws and bolts. The planing machine was set on the floor; it weighed a ton, and had no fastening. The largest anvil was set on a stone block, with pins running up through, for it to set on; it could be lifted off; the others were set on wooden blocks, with spikes at the sides, to keep them from jumping off; they could be and were frequently taken off. The grinding stone was on a movable frame."

J. P. Converse, for the plaintiff.

W. P. Harding, for the defendant.

GRAY, J. The articles which the defendant contends were fixtures, annexed to the freehold, and therefore not to be accounted for as personal property of the partnership, were put by the plaintiff into a building erected by Gerry, the owner of the land, of which the plaintiff was in possession under a bond from Gerry to convey it to him upon the payment of a price therein stipulated. The plaintiff had not the same right to remove fixtures annexed by him to the land so occupied by him, without paying rent to the owner, under a contract for its purchase, as an ordinary tenant would have against his landlord. *Hutchins v. Shaw*, 6 Cush. 58; *Murphy v. Marland*, 8 Cush. 578; *King v. Johnson*, 7 Gray, 239. His rights in this respect were no greater than those of a vendor or mortgagor against his vendee or mortgagee. A mortgage passes even trade fixtures, annexed to the freehold by the mortgagor, for the more convenient use and improvement of the premises, whether before or after the mortgage. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 42; *Walmsley v. Milne*, 7 C. B. (N. S.) 115. In ascertaining what are fixtures, regard is to be had to the object, the effect, and the mode of annexation.

The trip-hammer, firmly attached to a block set in the ground, the blower of the forge, the force-pump and its pipes for raising water on the premises, and the shafting fastened to the building by screws and bolts, having been annexed by the plaintiff to the freehold, and spe-

cially adapted to be used in connection therewith, became part of it, and could not be severed again without the consent of the owner of the land. *Winslow v. Merchants' Ins. Co.*, above cited; *Richardson v. Copeland*, 6 Gray, 536; *The Queen v. Lee*, Law Rep. 1 Q. B. 241.

But, under the circumstances stated in the master's report, the engine and boiler, which are expressly found to have been "portable and in their own frames," the planing machine, and the anvils, all of which simply rested on the floor or ground, without being fastened to the land; together with the forge tools and bench tools, the stock of iron and steel, the vices merely affixed by screws to the work bench; the grindstone in a movable frame, and the emery machine, both of inconsiderable size, more connected in use with the engine and boiler which were not fixtures than with any of the articles which were, and capable of removal without displacing or materially injuring any part of the building or land, and of being used elsewhere as well as on the premises; never lost the character of chattels, and must be accounted for as assets of the partnership. *Gale v. Ward*, 14 Mass. 352; *Winslow v. Merchants' Ins. Co.*, 4 Met. 315; *Park v. Baker*, 7 Allen, 78; *Horn v. Baker*, 9 East, 215; *Hellawell v. Eastwood*, 6 Exch. 312, 313; *Cresson v. Stout*, 17 Johns. 116; *Murdock v. Gifford*, 18 N. Y. 28.

The report of the master is to be recommitted to re-state the account in conformity with this opinion, unless the parties agree.

*Order accordingly.*¹

NOBLE v. SYLVESTER.

SUPREME COURT OF VERMONT. 1869.

[*Reported 42 Vt. 146.*]

TRÖVER for a stone. Pleas, the general issue and two special pleas. Replication joining the issue tendered and traversing the special pleas. Trial by jury, May term, 1868, *Barrett, J.*, presiding.

The defendant averred in his special pleas that, prior to the 12th day of April, 1833, the plaintiff owned a piece of land in Bethel upon which was a rock, and from this rock the plaintiff had loosened the stone in question and moved it a very little; that on said 12th of April, the plaintiff sold and conveyed to one Daniel Wallace said piece of land, having said stone thereon as aforesaid, by a warranty deed having the usual covenants of warranty, and made no reservation or exception of said stone in said deed or in the sale of said land; that said Wallace thereupon went into possession of said land, and has so remained ever

¹ See *Ogden v. Stock*, 34 Ill. 522; *Hinkley Iron Co. v. Black*, 70 Me. 473; *McConnell v. Blood*, 123 Mass. 47; *Murdock v. Gifford*, 18 N. Y. 28; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

Cf. *Raymond v. White*, 7 Cow. 319.

since, and said stone remained as the plaintiff left it for over thirty-two years, and until September, 1866, when said Wallace sold it to the defendant, who moved it off, and on to his own premises, and during all this time the plaintiff made no claim to it, but said Wallace always claimed it as his.

The plaintiff's evidence tended to show that he split out said stone with others about thirty-five years ago for the purpose of building a tomb with them; that they were black lime stone, and in layers about seventeen feet long and five feet wide, and from three to four inches thick; that he tried to take it off, but could not with the team he had, but raised it up, and propped it a little from the ground; that the plaintiff told Wallace what he got it out for, and what he intended to do with it, and reserved it in the sale of the land to him; that the defendant bought it of Wallace, and drew it off, and knew at the time, and previously, that the plaintiff claimed it; that the plaintiff never gave up his intention of building a tomb; that the plaintiff had at different times along said to certain persons that he reserved the stone in his sale of the land to Wallace; that plaintiff saw defendant and his men when they went to get it, and forbade their drawing it off; and tending to show its value.

The defendant's evidence tended to sustain the averments in his special pleas. The defendant claimed that the stone could be reserved or excepted only in the deed; but the court held otherwise, and allowed the plaintiff to give evidence of a parol reservation of it, to which the defendant excepted. The defendant objected to the plaintiff's proving his own sayings as to the stone after the date of the deed; but the court allowed him to prove them, to show that he had not abandoned his claim, to which the defendant excepted.

The defendant insisted that upon the evidence the plaintiff was not entitled to recover; but the court declined so to hold, and *pro forma* left the case to the jury, to find whether the plaintiff did with the stone as his evidence tended to show, and whether there was a parol exception of the stone at the time of the conveyance of the land, understood between the parties to the deed, and consented to by Wallace; instructing them that if they should so find, the plaintiff would be entitled to recover; and left it to them to find the facts upon the evidence, without commenting thereon, or giving them any charge on any other point (except as to the rule of damages), to which the defendant excepted.

Huntton and Gilman, for the defendant.

James J. Wilson, for the plaintiff.

PIERPOINT, C. J. It appears from the case that the stone in controversy was split out and removed from its original connection and position in the ledge, and laid up preparatory to its removal from the farm on which it was originally situated. This was done by the plaintiff, who was then the owner of the farm, and the object of splitting it out and putting it in such position was to remove it from the farm and

use it in the construction of a tomb. This being the case, the stone may be regarded as being governed by the same principles that are applicable to timber, fence rails, and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, etc., and if on the land at the time the premises are conveyed they will pass by the deed; but if they are there not for the purpose of being used upon the premises, but to be removed elsewhere, then they do not pass by the deed. So of this stone, it having been severed from the freehold, for the purpose of removing it from the premises, to be used for a specific purpose elsewhere, we think it would not necessarily pass by the deed; but as there was nothing about the stone, or the position in which it was placed, to indicate the use to which it was to be put, whether for fencing or underpinning, or the like, upon the premises, or for use elsewhere, it was a proper subject of explanation between the plaintiff and Wallace, at the time the deed was executed, and such explanation might well be by parol; it was not an exception of that which would otherwise pass by the deed, but the giving to Wallace a knowledge of facts showing that it would not pass, and thus avoiding all misunderstanding or controversy about it in the future. The fact that such information was accompanied by an exception in form, does not vary the principle. We think there was no error in admitting the parol testimony. And in submitting the question to the jury whether there was a parol exception or not, if there was error, it is not an error of which the defendant has any right to complain, as it was putting the case, in this respect, in quite as favorable a light as he could legally claim.

We think it was not error in the court to allow the plaintiff to show his own sayings in respect to his ownership of the stone made after the deed to Wallace, not for the purpose of proving what took place between him and Wallace at the time the deed was made, but for the purpose of showing that he had not abandoned the property, inasmuch as the defendant in his pleadings and proof sets up the fact that the plaintiff had permitted the stone to remain where it was when the deed was executed up to the time the defendant took it away, as one ground of defence, and we are to assume that the court, in admitting the testimony for that special purpose, took care that the jury should understand that they were not to use or regard it for any other.

But it is insisted, that even if the plaintiff did retain the property in this stone, so that the title did not pass to Wallace, still he has lost his right to it by suffering it to remain on the premises of Wallace, down to the time it was sold to the defendant, and he took it away.

The jury have found that the stone was excepted in the sale, and remained the property of the plaintiff; that it was left upon the premises with the knowledge and assent of Wallace, and remained there over thirty years before the defendant purchased it of Wallace. The case shows that Wallace never interfered with the stone in any manner,

never made any claim to it, never objected to its remaining there, or ever requested the plaintiff to remove it, but suffered it to remain there just as it was left when the deed was executed. The defendant now claims that the title to this stone became vested in Wallace by lapse of time, and we are called upon by his counsel to say, if thirty years under such circumstances is not sufficient to change the title, what time is sufficient? We do not feel called upon to give a definite answer to that question; but we feel safe in saying, when the property of one man is left upon the premises of another, with the knowledge and assent of the owner of such premises, that so long as such owner suffers such property to remain upon his premises, without objection or request to remove it, exercising no act of ownership over it and making no claim to it, just so long the title to the property remains the same, and is not divested from the one and vested in the other by mere lapse of time.

Wallace never was the owner of this stone, and if the plaintiff had abandoned it, it would not necessarily revert to Wallace; but the case does not show an abandonment, and it does not appear to have been put upon that ground at the trial below.

The lapse of time was an element proper to be considered by the jury in determining the question submitted to them, and it is claimed that the County Court erred in not giving the jury special instructions in respect to it. It does not appear that there was any controversy upon the trial as to the propriety of their considering it, and there was no request, from either side, that the court should give any specific charge upon it. The evidence upon this point, as upon all others, was submitted to the jury; it was doubtless commented upon by the counsel on both sides in their arguments, and we have no reason to suppose it was not duly considered and weighed by the jury. Under the circumstances it was no more error to omit to refer to this particular piece of testimony than it was not to refer to any or every piece of testimony put in on either side, and it has never been regarded the legal duty of the court to refer specifically to each and every piece of testimony in the case, in the charge, especially when there is no such request. We find no error in the trial below.

The judgment of the county court is affirmed.

DAVENPORT *v.* SHANTS.

SUPREME COURT OF VERMONT. 1871.

[*Reported 43 Vt. 546.*]

PETITION for foreclosure of a mortgage. The petition sets forth a mortgage, executed by John G. Shants & Co., to the petitioner, October 13th, 1866, of a mill and factory and tannery in Searsburg, with 200 acres of land, and three dwelling-houses thereon. "And also the factory, then in process of erection on the site of said Searsburg tannery, with the saw-mill, water-wheels, and all the machinery and shafting in said factory," to secure a note of \$1,000. The petition then sets forth the execution by Shants & Co., and the purchase by the petitioner, of another mortgage on the same premises, except the machinery, and also sets forth that the defendants, other than Shants & Co., claim an interest in said property.

The petition was taken as confessed by all the defendants, except Henry G. Root, who appeared and answered, admitting the facts set forth in the petition, or not denying them, except as follows:—

"That between the 3d day of August and the 27th day of October, 1866, this defendant, by his agent, Olin Scott, sold to the said John G. Shants & Co., various articles of machinery, consisting of a circular saw-mill and saw, and the belts to drive the same; the gears on two water-wheels; the upper piece of a large water-wheel shaft and box to the same; the counter-shafts to two water-wheels; the drum flanges and boxes to the said counter-shafts; and one extra saw collar; upon the condition that said machinery should be and remain the property of this defendant until the same should be paid for by said John G. Shants & Co.; the whole of said machinery amounting in value to the sum of \$919.86, which they agreed to pay this defendant for the same. All of which machinery, excepting the gears and upper shaft to the large water-wheel, and the counter-shaft and boxes to the same, were in place in the factory mentioned in said petition at the time of the alleged execution of the mortgages set forth in said petition, and the said excepted articles have, since said time, been placed in said factory. That there has been paid to this defendant, towards the purchase of said machinery, the sum of \$191 only; the remainder being still due, with the interest thereon.

"And this defendant claims and insists that his title to said machinery is paramount to that of the said John G. Shants & Co., and to that of the petitioner, and that the petitioner has no right to a foreclosure as to said machinery, or any part thereof, against the defendant.

"The petitioner replied, saying, that he never at any time, until long

after the execution of the several mortgages sought to be foreclosed by this petition, had any knowledge or notice actual or constructive of any contract or understanding between the defendant and the said John G. Shants & Co., by which the defendant had or claimed to have any right or claim to the saw-mill, water-wheels, and the machinery and shafting in the factory described in said mortgage; that he did, on the 13th day of October, 1866, in good faith, and relying upon the fact that no claims, liens or incumbrances existed of record upon any of the property or estate described in said mortgage, and upon the promise and assurance of both the members of said firm of John G. Shants & Co., that none existed in fact, loan to said firm, the full sum of one thousand dollars, and took said mortgage in good faith to secure the payment thereof; that if it is true that the defendant did reserve such a lien upon the several articles named in his answer to said petition for foreclosure, as is in said answer stated, yet it is also true that the defendant well knew the purpose for which John G. Shants & Co. purchased the same, and the defendant then and afterwards consented that they might attach and annex said water-wheels, saw-mill, shafting and machinery to their freehold, and make the same a part of and appurtenant to said freehold, and did by his agents and workmen assist the said John G. Shants & Co. in so doing. And insists that the lien created by his said mortgage is paramount to any lien or claim of the defendant to the saw-mill, water-wheels, machinery and shafting in said factory.

“*Stipulation.* — It is hereby stipulated that this cause shall stand for hearing upon petition, answer, replication, affidavits of Olin Scott and H. W. Scott, statement of facts, and notes and mortgages set forth in the petition. The facts stated in the answer are admitted to be true, excepting as varied or qualified by the replication in connection with the affidavits and statement of facts. The facts stated in the replication are admitted to be true, excepting as varied or qualified by the affidavits and statement of facts, and excepting that the averment respecting annexing ‘to the freehold of the said John G. Shants & Co., and make the same a part of, and appurtenant to said freehold,’ is not to be taken as an averment of facts, but as a conclusion of law. The facts stated in the affidavits and statement are admitted to be true.

“*Affidavits.* — Olin Scott, on oath, says: ‘I was at the mill of John G. Schantz & Co., in Searsburgh, in the fall or winter of 1866–7, for the purpose of getting pay for the job which I had done for them on account of H. G. Root, and looking around, I found that said John G. Schantz & Co. had built a wooden wheel which did not answer their purpose, and they were altering it. Without taking off my overcoat or gloves, I suggested something about cutting or enlarging a spout hole in the flume, and nothing more, and charged nothing for my advice. I never had anything to do with putting in the machinery which I furnished said Schantz & Co., on account of said Root, and none of said Root’s hands, so far as I know, had anything to do with putting said machinery into the mill of said Schantz & Co.’

“ Henry W. Scott, on oath, says: ‘ In 1866, I furnished an iron wheel for John G. Schantz & Co., and set it in place in the mill of said Schantz & Co., in Searsburgh, working at it myself. I did not in any way assist in putting in the machinery furnished said Schantz & Co. by Henry G. Root; the machinery furnished by said Root was not delivered at said mill until after I had finished my job and had set said iron wheel. I had no interest in said Root’s job, and he had none in mine.’

“ *Statement of Facts.* — At the time the mortgage was executed, there was in Shants’ factory a flume, with a water-wheel attached outside of the flume, which water-wheel was a wooden centre-vent wheel, with wooden vertical shaft, having cast-iron gudgeons and a bevel-gear attached. The bevel-gear on said water-wheel drove another bevel-gear on the counter-shaft. This counter-shaft had a pair of flanges attached, upon which flanges a wooden pulley was built, which pulley drove the saw-mill. The gudgeons, gears, shaft-boxes to same, and flanges were furnished by H. G. Root, and are now claimed by him. Within the flume aforesaid was an iron turbine water-wheel which was furnished and put in place by H. W. Scott, and which had a short shaft. There was also in the factory at the time aforesaid a circular saw-mill, with carriage and all fixtures to the same; also a 48-inch circular saw, together with all the necessary belts to drive the saw-mill. The whole was in running order, the saw-mill being driven by the wooden centre-vent water-wheel first named. The saw-mill, carriage, and fixtures, and the saw and belts were furnished by the said Root, and are now claimed by him. There were on the yard at the same time two bevel-gears, one piece cast-iron water-wheel shaft, with boxes, one counter-shaft, with boxes and flanges. The last-named iron-work was all furnished by the said Root, and are claimed by him. The last-named machinery was afterwards put into the factory by coupling the cast-iron shaft to the iron turbine water-wheel shaft and attaching to the aforesaid cast-iron shaft the gears and counter-shaft, with the flanges and boxes belonging to the same, and were built for that purpose. The turbine water-wheel and shaft are in the lower wheel-pit. The shaft coupled to the water-wheel, with the gears, counter-shaft, boxes and flanges, are in the basement-room over the wheel-pit and under the principal floor, on which floor the saw-mill is placed. The upper end of the shaft, which is coupled to the water-wheel, and the counter-shaft, are supported and attached to a frame-work by bolts, which frame-work is attached to the basement floor-timbers, and to the floor-timbers of the floor above by means of tenons, mortices and keys. The wooden water-wheel has a wooden shaft extending from the wheel-pit up into the basement room, where the gear is attached, and has gearing and counter-shaft, attached in the manner similar to the first-named counter-shaft, and supported in a similar manner. The saw-mill machinery, consisting of saw-arbor and boxes, with saw, the feed-works, gig-works, log-rolls and fixtures, are all attached to a wooden frame, which frame, with all

the machinery attached, is set on floor-timbers and fastened by means of two bolts, extending through the floor-timbers and frame aforesaid. The carriage to the saw-mill runs upon small iron rollers, which rest upon small iron chairs, which chairs are secured to a stick of timber that is laid down on the floor-timbers for that purpose. The chairs are screwed down with wood-screws. The rollers are not attached to the chairs, but rest on them. All the machinery mentioned above, including the water-wheels and appendages, were placed in the factory, which is a large two-story building, 33 × 90 feet, by John G. Shants & Co., for the purpose of prosecuting the business of manufacturing lumber, chair stock, &c., and is connected with and attached to the building, as machinery of that character usually is. So much of the property herein described as was furnished by H. W. Scott is not in controversy in this suit."

At the September term, 1868, decree, *pro forma*, foreclosing mortgage against all defendants, except Henry G. Root, and dismissing the petition as to Root, with costs. Appeal by petitioner.

H. H. Wheeler and *Charles N. Davenport*, for the petitioner.

———, for the defendant.

PECK, J. The bill having been taken as confessed as to all the defendants except Henry G. Root, and he alone defending, the only question is as to the right of the orator, under his mortgage from Shants & Co., to that portion of the property sold conditionally by Root to the said mortgagors.

The bill, and answer of Root, in connection with the written stipulation of the parties on file, leave no dispute as to the material facts in the case, and no time need be spent in repeating the facts thus agreed.

It must be regarded as settled as a general rule in this State, that a party may sell and deliver personal property, under a condition that it shall remain the property of the vendor until the price is paid; and that under such contract, the title will remain in the vendor until the condition is complied with, both as between the vendor and such conditional vendee, and also as between the original vendor and a *bona fide* purchaser without notice from such conditional vendee. The only question is whether the facts of this case take it out of the general rule.

The proposition of the counsel of the defendant Root is, that the whole property sold conditionally by Root to Shants & Co. was personal property as well after as before the sale, and cannot properly be claimed as fixtures or as parts of the realty. But we think as between mortgagor and mortgagee, if the title of the mortgagor were absolute, the defendant's proposition is not correct; and that under the recent decisions in this State, on being put in place in the mill and factory, as shown in this case, it became so far annexed to the realty as to pass under a mortgage of the real estate. But still the question remains as between the mortgagee under his mortgage, and the original owner under his conditional sale to the mortgagor, which has the paramount right.

First, as to that portion of the property which had been put in place in the mill and factory by the mortgagors after they thus purchased it of Root, and which was in the building and thus annexed at the time the orator took his mortgage. As to this property, the orator, as it appears having advanced his money and taken his mortgage in good faith, without notice of any lien or encumbrance upon it, and from its condition, having reason to suppose that the mortgagors' title to this property in question was the same as his title to the realty, to which it was annexed, and of which it was apparently parcel, seems to have a strong equity in his favor. While on the other hand the defendant Root, the unpaid vendor, who endeavored to secure himself, by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood, when he sold the property to Shants & Co., that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it necessarily must be annexed to the realty, substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property, he must be taken to have consented to, as he did not object. Root therefore having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice, who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root, and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property except that defendant Root have a right to that portion of

the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, — the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.

STRONG v. DOYLE.

SUPREME JUDICIAL COURT. 1872.

[*Reported 110 Mass. 92.*]

TORT for the conversion of thirty tons of manure. At the trial in the Superior Court, before *Wilkinson, J.*, the plaintiff introduced evidence that he sold and conveyed a farm to the defendant on February 11, 1870, by a deed describing it by metes and bounds, and containing no reservation except a right for the plaintiff to occupy the land until April 1; that the manure in question was on this farm; that the defendant, while negotiating for the purchase of the farm, made a separate and distinct oral agreement for the purchase of the manure; that it was agreed that the plaintiff should put up the manure for sale at auction, and the defendant should have it if he was the highest bidder; that in March the plaintiff advertised the manure for sale at auction; but that, at the time and place advertised, the defendant forbade the sale, claimed the manure under his deed, and afterwards spread it upon the land.

On this evidence the judge ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant, which was returned. The plaintiff alleged exceptions.

C. Delano and *J. C. Hammond*, for the plaintiff.

C. E. Smith and *S. T. Spaulding*, for the defendant.

COLT, J. It was said in *Fay v. Muzzey*, 13 Gray, 53, that manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This rule is applied in whatever situation or condition the material is before it is finally expended upon the soil. It is till then an incident of the real estate of such peculiar character that, while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it. Such an agreement, though it be unwritten, does not come within the Statute of Frauds, and is not to be rejected, although contemporaneous with the conveyance of the real estate. An oral contract for the sale of it is valid. In the case of fixtures which are not incorporated with, but merely annexed to the freehold, the rule is well settled that the Statute does not apply. *Browne on St. of Frauds*,

§ 234; *Hallen v. Runder*, 1 C., M. & R. 266; *Bostwick v. Leach*, 3 Day, 476.

In the case at bar, evidence was offered that the defendant, while negotiating for the farm and before its conveyance to him, made a separate and distinct agreement for the purchase of the manure, to be his only in case he was the highest bidder at public auction; that the plaintiff advertised the sale as agreed, and the defendant at the sale for the first time claimed that the manure belonged to him under the plaintiff's deed, and that it was afterwards spread upon the land by him. The deed was in the usual form, conveying the land only, and reserving only to the plaintiff the right of occupying until the first of April following.

In the opinion of the court, this evidence supports the plaintiff's title to the property in dispute. It proves an independent preliminary agreement, by which it was severed from its relations to the realty before the deed was made. It serves to ascertain the subject matter upon which the deed was intended to operate. 1 Greenl. Ev. § 286; *Ropps v. Barkcr*, 4 Pick. 239. Such an agreement, made upon good consideration, with the owner of land before it is conveyed, is, as a mode of severance, as effectual as a sale by the owner to a stranger, or an agreement between landlord and tenant by which the manure becomes personal property. *Noble v. Sylvester*, 42 Vt. 146; *Ford v. Cobb*, 20 N. Y. 344.

This case differs from *Noble v. Bosworth*, 19 Pick. 314, cited by the defendant. There the owner of land erected a dye-house upon it, in which dye-kettles, firmly secured in brick, were set up. And it was held that a verbal reservation of the kettles, before or at the time of the delivery of the deed of the land, was inadmissible to control the ordinary effect and operation of the deed. The property in dispute had been actually annexed to the building, and intentionally incorporated with the real estate by the owner for the purpose of permanent improvement. While in that condition before severance it was subject to the rules which govern the title and transfer of real estate, and passed by the deed. Here no act of severance was necessary to detach the manure from the land, and the agreement of the parties was sufficient.

Exceptions sustained.

WILLIAMSON v. NEW JERSEY SOUTHERN RAILROAD COMPANY.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1878.

[*Reported 29 N. J. Eq. 311.*]

ON appeal from a decree of the Chancellor. His opinion may be found in *Williamson v. N. J. Southern R. R. Co.*, 1 Stew. 278.

Messrs. Barker Gummere and A. Q. Keasbey, for the complainant.

Messrs. J. B. Vredenburg and Cortlandt and R. Wayne Parker, for Berthoud & Co.

Messrs. John Linn and Mercer Beasley, Jr., for the Lehigh Car Manufacturing Company.

Mr. Jacob Vanatta, for the Lackawanna Iron and Coal Company.

DEPUE, J. The Raritan and Delaware Bay Railroad Company was incorporated in 1854. Its corporate name was changed to The New Jersey Southern Railroad Company, in 1870. Under the powers granted in its charter, the company constructed a railroad from Port Monmouth, on the Raritan bay, to Atco, in the county of Camden, together with branch railroads from Eatontown to Long Branch, in the county of Monmouth; from Manchester to Toms River, in the county of Ocean; and from Atsion, in the county of Burlington, to Jackson, in the county of Camden.

On the 14th of September, 1869, the company made the complainant's mortgage, in trust, to secure bonds issued to the amount of \$2,000,000. The property mortgaged comprised all the railways, branches, rights of way, depots, station-houses, and the company's franchises then held or thereafter to be acquired, including its rolling stock, fixtures, tools and machinery, and all real estate of every kind, wheresoever situate, and all personal property, of every nature, kind or description then held or thereafter to be acquired. It also contained a covenant that the company would hold all after-acquired franchises and property, real and personal, in trust, for the mortgagee, and would make conveyance thereof accordingly, from time to time, as the same might be acquired.

The bill originally filed was an ordinary foreclosure bill, to which the New Jersey Southern Railroad Company and the trustees named in the second and third mortgages were the only parties. After bill filed and interlocutory decree thereon, other interests and rights under the complainant's mortgage were discovered, and claims were preferred by other persons of rights in some of the property, for the enforcement of which suits at law had been brought, and an amendment of the complainant's proceedings was deemed advisable. Supplemental bills were therefore filed, on the 11th of May, 1874, and the 20th of September, 1876. By these supplemental bills and orders and decrees made, from time to time, on several branches of the case, and submissions thereto by the parties, the Court of Chancery assumed jurisdiction over the rights, legal and equitable, of all the parties in or relating to the property in controversy. The Chancellor, on final hearing, so regarded the scope of the litigation, and the propriety, if not necessity, of such a course, clearly appears from so much of the record as has been removed into this court.

From the final decree the complainant has appealed. Of the defendants, Berthoud & Co., the Lehigh Car Manufacturing Company, and the Lackawanna Iron and Coal Company have also appealed. No

appeal was taken by the other defendants. The discussion in this court was confined to the rights of the parties appealing *inter sese*.¹

The Lackawanna Iron and Coal Company recovered a judgment against the New Jersey Southern Railroad Company, on the 19th of January, 1874, for damages and costs, amounting to \$42,258.68. Executions were issued into all the counties of the State through which the company's railroad extended, and levies were made between the 20th and 24th of January upon the cars, engines and rolling stock, and personal property of the railroad company. The Iron and Coal Company was made a party to this suit by the supplemental bill filed on the 11th of May, 1874.

The complainant's mortgage was duly recorded as a mortgage of real estate, soon after it was executed and delivered, and long before the judgment aforesaid was recovered, but was not filed in compliance with the Act concerning chattel mortgages of March 24th, 1864, which makes every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a copy thereof, be filed as is directed by the Act (Rev. p. 709). The Chancellor held that the rolling stock of a railroad company, mortgaged with the railroad, is part of the realty, and that if such rolling stock be personal property, the provisions of the above-mentioned Act requiring immediate delivery and continued possession of the chattels mortgaged or filing instead thereof, were inapplicable to such mortgages. The appeal of the judgment creditor denies the soundness of this legal proposition in both its parts.

The complainant's mortgage, in terms, is comprehensive enough to cover property, real and personal, in present ownership and afterwards to be acquired, of every kind and description which is susceptible of sale or mortgage, either at law or in equity. But that does not solve the problem for consideration, which is, whether the rolling stock of a railroad company is such a constituent part of its realty as that it would pass under a conveyance or mortgage of its road-bed and franchises without other words of description. For fixtures which are part of the realty, like easements, will pass under a conveyance as part of the lands granted without additional words.

Where property personal in its character is subjected to mortgage, in connection with real estate, the effect of the mortgage on such personal property is presented in three aspects: First, whether the mortgage attaches to after-acquired property; second, whether the mortgagee is entitled in equity to restrain its sale under subsequent executions;

¹ That part of the opinion which relates to the claims of Berthoud & Company, and of the Lehigh Car Manufacturing Company is omitted.

and, third, whether such property has become a fixture so as to be part of the realty itself. A failure to discriminate between these different aspects in which the legal questions may arise, has caused considerable confusion in the cases.

The first two of these propositions may be regarded as judicially settled in the affirmative. It has been held quite generally that, in equity, a mortgage will apply to after-acquired personal property if apt words of description be contained therein, and that a court of equity will, at the instance of the mortgagee, enjoin the sale of such property under subsequent executions. But these principles have been applied, indiscriminately, to property indisputably personal, such as unattached machinery in a factory, goods in a store and furniture in a house, as well as to the rolling stock of a railroad. In *Smithhurst v. Edwards*, 1 McCart. 408, the property protected from sale under execution was the after-acquired furniture in a hotel. Decisions of this class give no support to the proposition under consideration.

To sustain the views adopted by the Chancellor on this subject, counsel relied greatly on the decisions of the federal courts. An examination of those cases will show that the point has not been directly, or at least finally, adjudged.

The earliest, and perhaps the leading case, is *Coe v. Pennock*, decided by Judge McLean, as reported in 6 Am. Law Reg. 27, 2 Redf. Am. Railw. Cas. 546, and afterwards in the Supreme Court, and there reported *sub nom. Pennock v. Coe*, 23 How. 117. In that case the mortgage, which is set out in 23 How. 126, expressly enumerated, as part of the property mortgaged, "all the present and future-acquired property, . . . including engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property." The rolling stock having been levied on under execution, a bill was filed by the mortgagees to restrain a sale. The only question for decision was, as expressed by Justice Nelson in the Supreme Court, "whether or not the after-acquired rolling stock of the company placed upon the road attaches, in equity, to the mortgage, *if within the description*, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company." Nothing else was discussed in the Supreme Court, or decided in either court, but the validity of a mortgage of after-acquired property, — a question in nowise depending on the distinction between the realty or personalty of the property mortgaged. The property mortgaged being inadequate to pay the mortgage debt, the injunction was allowed, as it was allowed in *Smithhurst v. Edwards* to restrain the sale of furniture, under similar circumstances. The observations of Justice McLean, so often quoted, with respect to the connection of the rolling stock with the railroad, and the injury that would result from the separation of the rolling stock from the road and its sale under execution, are properly referable to the question of the propriety of interference by injunction to stay the sale; just as Chancellor Green, in *Smithhurst v. Edwards*, adverts to the

injury that would result to the rights of the mortgagor and mortgagee by a sale, under execution, of furniture mortgaged, as a reason for enjoining its sale under the execution.

In *Gee v. Tide Water Canal Co.*, 24 How. 257, the property levied on and offered for sale was land which was admitted to be necessary to the working of the canal. On bill filed by the company, the court enjoined the sale, on the ground that the property was necessary for the operations of the company's canal, and could not be dissevered from the franchises without destroying its useful existence.

In *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, a railroad company had divided its line of railway into two divisions, and had given separate mortgages on each division. The mortgages each enumerated rolling stock as part of the property mortgaged. There was also a subsequent mortgage on the entire road, its franchises and rolling stock. The court held that the company might assign particular parts of its rolling stock used over its whole line to separate divisions, and mortgage such parts with the division to which it was assigned; and that whether they did so was a question of intention. In the majority opinion, the question of the rolling stock being affixed to the realty was not discussed, and the decision was placed on the language of the mortgages as decisive of what was intended to be covered by them under their descriptive words. The judges who expressed opinions that the rolling stock was a fixture, dissented, holding that such rolling stock, being purchased by the common funds of the company, and fitted for use over the whole line, as a fixture, was attached to the whole line, and not to any part or division of it. The case is reconcilable with legal principles only on the assumption that the rolling stock was personal property, and was mortgaged as such.

In *Railroad Company v. James*, 6 Wall. 750, the case rested on a Statute of Wisconsin, which declared that "all rolling stock of any railroad company used and employed in connection with its railroad shall be and the same is hereby declared to be fixtures." R. S. Wis. 511, § 34. The *dictum* of the judge delivering the opinion of the court, who was one of the dissenting judges in *Minnesota Co. v. St. Paul Co.*, *supra*, that the rolling stock would have been fixtures independent of the Statute, was merely *obiter*.

In *Scott v. C. & S. R. R. Co.*, 6 Bissel, 529, the sole question was, whether a mortgage made by a railroad company, covering all after-acquired property, included after-acquired rolling stock. The judge, after reviewing the cases in the Supreme Court of the United States, held that it did, and declared, in his opinion, that it did not make any difference in the result, whether the property was real or personal.

In *Farmers Loan and Trust Co. v. St. Jo, &c. R. R. Co.*, 3 Dillon, 412, the mortgage expressly covered the rolling stock and other property appertaining to the railroad. It had been recorded as a mortgage of lands, but not as a chattel mortgage under the law of Kansas. The rolling stock having been seized under execution, the

question was one of registry. The opinion of the court, by Justice Miller, is quite short, and holds that rolling stock and other property, strictly and properly appurtenant to the road, is part of the road, and covered by the mortgage in question, which in terms embraced the rolling stock, and that it need not be recorded as a chattel mortgage to give it priority over executions. Under the language of the mortgage there could be no doubt that rolling stock was covered by it, and the report does not show whether the registry was deemed sufficient on the ground that the rolling stock was a fixture, or for the reason that, as chattels, it was such property as not to come within the purview of the Kansas Statute. At all events, I am not inclined to give this case the effect of a direct decision of the moot question of such weight as to settle the law in the federal courts.

The cases cited from the State courts are chiefly such as decide that a mortgage of after-acquired goods and chattels is valid, or such as hold that such property, when mortgaged, is not liable to be taken under certain kinds of process, under rules of procedure peculiar to the practice in such States. *P. & W. R. R. Co. v. Woelpper*, 64 Pa. St. 366, and *Cowry v. P. & T. W. R. R. Co.*, 3 Phila. R. 173, are cases of that kind. Where the question has been directly presented, whether the rolling stock of a railroad, included in a mortgage, of its road-bed and franchises, is real or personal property, the great weight of authority is in favor of its being considered as personalty. *Stevens v. B. & C. R. R. Co.*, 31 Barb. 590; *Beardsley v. Ontario Bank*, Id. 619; *Bermont v. P. & M. R. R. Co.*, 47 Id. 104; *Randall v. Elwell*, 52 N. Y. 521; *Hoyle v. Plattsburgh R. R. Co.*, 54 N. Y. 314; *Chicago, &c. R. R. Co. v. Howard*, 21 Wis. 44; *B. C. & M. Co. v. Gilmore*, 37 N. H. 410; *Coe v. Columbus R. R. Co.*, 10 Ohio St. 372; *City of Dubuque v. The Ill. Cent. R. R. Co.*, 37 Iowa, 56. In this State the point was directly decided by the Supreme Court in *State Treasurer v. S. & E. R. R. Co.*, 4 Dutch. 21, where it was held that the phrase, "road and equipments," in a railroad charter, did not include its rolling stock; and, in the opinion of Chief Justice Green, engines and cars were declared to be no more appendages of a railroad than wagons and carriages were appendages of a highway — both were equally essential to the enjoyment of the road — neither constituted any part of it. Furthermore, the third section of the Act of March 24th, 1869, which is now the thirty-eighth section of the Act concerning mortgages (Rev. p. 709), contains a plain legislative recognition of the rolling stock of railroads as chattels — to be considered as such when covered by mortgage. And in practice the engines and cars of railroad companies have frequently been seized under execution and distrained for taxes, as personal property, without any scruple as to their liability to seizure and sale as such.

One of the primary objects of law is the classification of property and the establishment of certain *indicia* by which its ownership may be determined. For this purpose all property is by law divided into two

kinds, real and personal, and the mode of enjoyment and methods of disposition are regulated by positive rules of law, which are founded on considerations of public policy, and established for the purpose of determining the ownership of property according to its kind. The method of transmuting property, personal in its nature, into realty, is as fixed and established in the law as the method of testamentary disposition. Such property does not become realty by mere use in connection with land. The implements of husbandry, though used only for agricultural purposes, do not thereby become part of the land. Nor will such property become realty by being included in a mortgage with lands any more than lands will become personalty by such an association. The stock of goods in a store, or the furniture in a hotel, do not become part of the lands, although mortgaged or conveyed with the premises on which they are situate.

The criterion for determining whether property ordinarily regarded as personal becomes annexed to and part of the realty, is the union of three requisites: First—Actual annexation to the realty or something appurtenant thereto. Second—Application to the use or purpose to which that part of the realty with which it is connected is appropriated. Third—The intention of the party making the annexation to make a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 511. This criterion was adopted by the Chancellor in *Quimby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260, and by this court in *Blancke v. Rogers*, 11 Id. 564, and by the Court of Appeals of New York in *McRea v. Central Nat. Bank*, 66 N. Y. 489.

Whether a chattel is a fixture or not depends upon the facts. The mere intention of the parties to make it part of the freehold does not make it a fixture. To accomplish that result there must be an actual annexation to the freehold, though the strength of the union is not material, if in fact it be annexed. The intent of the party affixing it is only important on the question whether he intended to make the chattel so annexed a temporary or a permanent accession to the freehold. *Rogers v. Brokaw*, 10 C. E. Gr. 497; s. c. *sub nom. Blancke v. Rogers, supra*. Cases of what is called constructive annexation are only apparent exceptions to this rule. The instances of constructive annexation such as the keys, doors and windows of a house removed for a temporary purpose, a millstone taken out of the mill to be picked, and saws and leather belting taken out to be repaired or laid aside for future use, and the like, are all cases where the chattel, by actual annexation, was once part of the realty and had been detached for temporary purposes without the intent to sever it from the freehold. Having once been part of the realty, removal temporarily without intent to sever permanently does not reconvert the chattel into personalty, and destroy its character as a fixture. *Ewell on Fixtures*, 43. This is all that is meant by constructive annexation. Cases of this description do not militate against the rule that actual annexation is the condition under which a chattel in the first instance becomes part of the realty; and

while the degree of annexation is unimportant, it will be found that the attachment to the realty is invariably such as to give a fixedness in location or localization in use.

The illustrations of doves in a cote, deer in a park, and fishes in a pond, are entirely inapplicable to the present subject. They go with the inheritance for special and peculiar reasons. In *Amos & Ferrard on Fixtures*, they are classified under the head of heir-looms, a class of property entirely distinct from fixtures. *A. & F. on Fixtures*, 168. Sir Edward Coke assigns them to go with the inheritance, because they are animals *feræ naturæ*, "and could not be gotten without industry, as by nets and other engines." *Co. Lit.* 8 a. This is the true foundation of the common law rule, for *Wentworth* saith that "young pigeons, being in the dove-house, not able to fly out, go to the executor; yet their dams, the old ones, shall go to the heir with the dove-house" (*Went. Off. Ex.* 143); and fishes confined in a trunk or the like go to the executor. *Co. Lit.* 8 a. In *Paulet v. Gray*, fishes in a pond were adjudged to belong to the heir, for the reason that "they are as profits of the freehold which the executor shall not have, but the heir, or he who hath the water." *Cro. Eliz.* 372. No analogy exists between these animals and machinery, such as engines and cars, by which the legal status of the one can be deduced from that of the other.

The criterion above stated of actual annexation to the freehold, as a rule for determining when chattels become part of the realty, is as well settled in this State as any other rule of property. Exceptions founded on fanciful and groundless distinctions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. "The general importance of the rule," says Judge Cowan, "which goes upon corporal annexation, is so great that more evil will result from frittering it away by exceptions than can arise from the hardship of adhering to it in particular cases." *Walker v. Sherman*, 20 *Wend.* 656.

Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But unattached machinery in a factory, the implements of husbandry on a farm, and furniture in a hotel, are similarly adapted for use in the factory, on the farm, or in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become part of the realty, engines and cars and the rolling stock of a railroad utterly fail to answer the requirement of the law. Cars which left Jersey City this morning, before the close of the succeeding week will be found scattered over the West or on the Pacific coast, their places in transportation through this State being supplied by cars

gathered from the railroads of other companies, many of which are located in other States. The suggestion that each one of these cars carries with it the attribute of realty in its journey through other States, or even over other railroads in this State, will show the incongruity of denominating that a fixture which, in its ordinary use, travels over other railroads, and is connected with the railroad of its owner in no other way than in its useful employment in the business in which the company is engaged. In *Randall v. Elwell*, *supra*, Judge Grover says: "I think no one would claim that a car of the New York Central which, in the course of business, had been run to Chicago, was part of its real estate while there; and, if not such, I can discover no principle upon which the character of the property should be changed when it reaches the Central track on its return trip to New York." After an examination of all the cases on the subject, Mr. Ewell declares it to be the better opinion, and one supported by the weight of authority, that the rolling stock of a railroad is simply personalty, and not a fixture. Ewell on Fixtures, 39.

Having reached the conclusion that the rolling stock of a railroad is personal property, the next inquiry will be, whether a mortgage of such property is within the provisions of the Statute requiring such mortgages to be filed.

In this State the legislative policy is to require the registry or filing of mortgages of all property which is visible and tangible, and to postpone the lien of every mortgage not registered or filed as prescribed by law, to the claims of third persons, the creditors of the mortgagor and subsequent *bona fide* purchasers or mortgagees. This is apparent from an inspection of the Statute (Rev. pp. 705-9.) The seventeenth and twenty-seventh sections provide for the registration of mortgages of lands, tenements and hereditaments; the thirty-ninth and fortieth provide for the registry or filing of mortgages of goods and chattels. The language of the sections relating to chattel mortgages is too clear to permit a doubt as to the legislative meaning. Its language is: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be," &c. Giving the words of this Statute their primary and legal signification, which is the cardinal rule for the construction of Statutes, this section must be construed to apply to all mortgages of property such as is comprised under the description of "goods and chattels," as distinguished from lands. Such a construction was made of the Statute of New York, which, in this respect, is in the same words as our Act; and the Act was held applicable to mortgages of the rolling stock of a railroad in connection with its lands. *Stevens v. B. & N. Y. R. R. Co.*, 31 Barb. 590; *Bement v. P. & M. R. R. Co.*, 47 Barb. 104; *Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 314. The court cannot interpolate any qualification of the plain language of the Statute upon any supposed inconvenience arising from its application to any particular class of

property which is within the operative words of the Act. That should be left to legislative action, as it was by the courts of New York. The question there has been set at rest by a Statute excepting out of the operation of the chattel mortgage Act mortgages by railroad companies on real and personal property which have been recorded as mortgages of real estate. N. Y. St. 1868, c. 779.

In this State an Act was passed in 1876, relating to the registry of mortgages given by certain corporations, providing that nothing in any of the laws of this State shall be held to require the filing of record of any mortgage given by any such corporation conveying the franchises, and including chattels then or thereafter to be possessed and acquired, if such mortgage shall be duly lodged for registry as a conveyance of real estate. (P. L. 1876, p. 307, § 4.) The legal construction of the Act we need not now consider.

The rights of the Iron and Coal Company in the property in controversy were fixed and became vested rights in January, 1874, when the levy was made under the executions. By the Act concerning executions, the property was bound by the execution from the time of delivery to the sheriff, and upon levy made, title under the execution would be good, even as against subsequent *bona fide* purchasers (Rev. p. 392, §§ 18, 20). By force of the last-mentioned Act, and the Act concerning chattel mortgages, as it then stood, the Iron and Coal Company, upon the levy being made, acquired a right in the property seized under its execution superior to that of the complainant under his mortgage. That right of priority, being a vested right, was not divested by the Act of 1876.

The general rule is, that all Statutes shall have a prospective effect only. "Words in a Statute," says Justice Paterson, "ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *United States v. Heth*, 3 Cranch, 399, 413. This rule of construction has been repeatedly enunciated and enforced by the courts of this State. *Den v. Van Riper*, 1 Harr. 7; *Jones v. Morris Aqueduct Co.*, 7 Vr. 206; *City of Elizabeth v. Hill*, 10 Vr. 556.

The protection of vested rights in property from being destroyed or impaired by after-legislation, has been placed on firmer grounds in this State. By the third section of the Act relating to Statutes, it is declared that the repeal of any statutory provision "shall not affect or impair any act done or right vested or accrued . . . before such repeal shall take effect; but every such act done, or right vested or accrued, . . . shall remain in full force and effect to all intents and purposes as

if such Statutory provision, so repealed, had remained in force." (Rev. p. 1120, § 3.) This Statute is only declarative of the law as judicially pronounced in *Hunt v. Gulick*, reported in 4 Hal. 205.

Indeed, a right partaking of the nature of property, such as became vested in the Iron and Coal Company upon the levy of its execution, is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation for either public or private purposes. This constitutional protection is thrown around property of every kind and description, and is not restricted to any particular mode of taking. A partial destruction or diminution in value is a taking within the meaning of the constitutional provision. *Glover v. Powell*, 2 Stock. 212; *Hale v. Lawrence*, 1 Zab. 248, 714; *Trenton Water Power Co. v. Raff*, 7 Vr. 335. If the levy had been upon lands, instead of goods and chattels, a subsequent Act of the legislature depriving the plaintiff in execution of his lien thereon, or impairing the value of his priority by substituting a subsequent encumbrancer in his place, would be so plainly an invasion of his right in the property as to be undeniably within the constitutional prohibition. If it might be done after the lien of the judgment attached, it would be equally competent for the legislature to do so after the title had actually passed by a sale and conveyance under the execution. The same principle must be applied to a levy on goods and chattels.

Nor is the form of the legislative change in the law a matter of any consequence. Whether it be in the shape of a legislative construction of a pre-existing Statute, or a positive enactment retrospective in terms, the substance of the thing only will be regarded. What may not be done directly in one way, cannot be done by indirection in the other way.

The Act of 1876 itself does not necessarily require a retrospective construction, and therefore will not be allowed that effect; and if the language used required such a construction, it could not be effective to deprive a party of prior vested rights acquired under the levy.

Another point made on the argument was, that even if the rolling stock of a railroad be goods and chattels, and a mortgage thereof be required to be registered or filed by the chattel mortgage Act, the complainant having taken actual possession of such property before the judgment of the Lackawanna Iron and Coal Company was recovered, the complainant's mortgage is entitled to priority over the judgment. The mortgage was made on the 14th of September, 1869, and possession of the rolling stock was not taken by the mortgagee until January 1st, 1874. The mortgage was not accompanied by an immediate delivery of the property mortgaged, but possession was taken before the judgment was recovered.

There is a distinction made in the Statute between the creditors of the mortgagor and subsequent purchasers or mortgagees, with respect to the avoidance of the mortgage for neglect to file the same, or to take

immediate possession. Purchasers or mortgagees, in order to take advantage of the failure of another mortgagee of chattels to comply with the Statute, must be subsequent purchasers or mortgagees, taking their title under the mortgagor in good faith. A purchaser or mortgagee acquiring his rights with notice of the existence of the antecedent mortgage, does not obtain his title in good faith. Consequently possession taken of the mortgaged property under a prior chattel mortgage, however long postponed, will give it priority over a subsequent purchase or mortgage, if possession be taken in fact before such subsequent sale or mortgage was made. But no such qualifications apply as against the creditors of the mortgagor. Their rights may have accrued prior or subsequent to the mortgage, and yet they will be entitled to the benefit of the Statute. Knowledge of the existence of a chattel mortgage executed by the debtor will not preclude a creditor from availing himself of the objection that the mortgage is void because it was not accompanied by immediate delivery of the things mortgaged, followed by an actual and continued change of possession. Thomas on Mortgages, 505; *Farmers Loan and Trust Company v. Hendrickson*, 25 Barb. 485; *Stevens v. Buffalo & N. Y. R. R. Co.*, 31 Barb. 590; *Thompson v. Van Vechten*, 27 N. Y. 568. The distinction between creditors and subsequent purchasers or mortgagees in this respect was recognized in the opinion of this court in *National Bank of Metropolis v. Sprague*, 6 C. E. Gr. 530. The Chancellor's construction of the Statute holding that possession of the chattels mortgaged, taken before judgment recovered, will not give validity to the mortgage as against the execution creditor, if the mortgage was not filed according to the provisions of the Act, and there was not an immediate delivery and continued change of possession of the things mortgaged, was correct.

Upon a careful consideration of the subject, I am constrained to dissent from the views of the Chancellor in holding the rolling stock of a railroad to be part of the realty, and that the complainant's mortgage, so far as it covered such property, was not within the provisions of the Act concerning chattel mortgages, as the Act stood when the rights of these parties became fixed. In my judgment, property of that kind must, under the law as established in this State, be regarded as goods and chattels, and a mortgage thereon be subject to the provisions of the Act relating to mortgages of property of that description. The complainant's mortgage, so far as concerns the rolling stock and other personal property subject to it, must be postponed to the judgment of the Lackawanna Coal and Iron Company.

The decree appealed from should be modified to conform to this opinion, and to that end must be reversed, and the record remitted to the Court of Chancery, with directions accordingly.

The Lehigh Car Company and the Lackawanna Iron and Coal Company having succeeded on their appeals, are entitled to costs in this court. Both parties having appealed from that part of the decree that related to the claim of Berthoud & Co., and neither succeeding on the

appeal, the affirmance in that respect is without costs. The costs of the complainant in this court to be considered as costs in the cause, payable out of the proceeds of the sale of the property generally.

Decree unanimously reversed.

WATRISS v. FIRST BANK OF CAMBRIDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 124 Mass. 571.]

CONTRACT for breach of a covenant contained in a written lease given by the plaintiff to the defendant, by which the lessee agreed "to quit and deliver up the premises to the lessor or her attorney peaceably and quietly at the end of the term, in as good order and condition . . . as the same now are." The breach complained of was the taking down and removal of a fire-proof safe and vault, a furnace with pipes and flues, and certain counters. The answer contained a general denial, and alleged that the defendant owned the property removed. Trial in this court, before *Ames, J.*, who reported the case for the consideration of the full court, in substance as follows: —

The plaintiff and one Hyde owned the premises as tenants in common, and by a lease dated January 1, 1861, demised them to the Harvard Bank for the term of five years, at the rent of \$300 a year. The lease contained a clause giving to the lessee the privilege, at its option, of renewing and extending its enjoyment of the premises for the additional term of five years upon the same terms; and the lessee agreed "to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessors," "and not make or suffer any waste thereof;" "nor make or suffer to be made any alteration therein, but with the approbation of the lessors thereto in writing having been first obtained;" and giving the lessors the right to enter to view and make improvements, and expel the lessee if it should fail to pay the rent as aforesaid, or to make or suffer any strip or waste thereof.

The lessee thereupon constructed in the building a fire-proof safe or vault, for the safe keeping of money, books, and securities; also a portable furnace in the basement, with the necessary pipes, flues, and registers for warming its rooms; and certain counters. The premises were occupied by the lessee as its banking rooms.

On May 16, 1864, the lessee was organized as a national bank under the laws of the United States, and its name was changed to the First National Bank of Cambridge, but there was no other change of its identity. In the course of the first term, a partition was duly had

between Hyde and the plaintiff, by virtue of which the plaintiff became the sole owner of the premises. Before the expiration of the term, the defendant elected to continue to hold under the lease for the five additional years, and a new lease was executed between the parties to this action, bearing date October 7, 1870, granting to the defendant a further term of five years from January 1, 1871, at the rent of \$800 a year. This lease contained the same clauses above quoted from the lease of January 1, 1861, and the following additional clause: "And provided also, that in case the premises, or any part thereof, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended, at the election of the said lessor or her legal representatives."

On or about November 5, 1875, the defendant, having concluded to remove its business to another building, proceeded to take down the vault, and remove the materials of which it was composed, and also the furnace, pipes, flues, registers and counters to its new banking rooms, contending that it had a right so to do.

It was agreed that the damage done by this proceeding to the building, if the property so removed could lawfully be considered as fixtures which the defendant, as an outgoing tenant, had a right to remove, was \$75; that the plaintiff was entitled, at all events, to recover that sum, with interest; and that the building could for that sum be restored to the same good order and condition as it was in at the date of the first lease. The jury returned a verdict for the plaintiff for \$75, and the judge reported the case for the consideration of the full court. If the plaintiff was entitled to recover a greater sum than the amount of the verdict, and if the alleged fixtures were removed wrongfully and in violation of her rights, the case was to stand for trial; otherwise, judgment was to be entered on the verdict.

S. H. Dudley, for the plaintiff.

J. W. Hammond, for the defendant.

ENDICOTT, J. It is stated in the report that the Harvard Bank, soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864, the Harvard Bank was organized as the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed, therefore, to the defendant upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. *Atlantic National Bank v. Harris*, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors; for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title, not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the mean time acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made no reference to the existing lease, or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease and occupation under it on January 1, 1871, was equivalent to a surrender of the premises to the lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate; but the tenant may remove them during his term, and if he fails to do so, he cannot afterwards claim them against the owner of the land. *Poole's Case*, 1 Salk. 368; *Gaffield v. Hapgood*, 17 Pick. 192; *Winslow v. Merchants Ins. Co.*, 4 Met. 306, 311; *Shepard v. Spaulding*, 4 Met. 416; *Bliss v. Whitney*, 9 Allen, 114, 115, and cases cited; *Talbot v. Whipple*, 14 Allen, 177; *Lyde v. Russell*, 1 B. & Ad. 394; Baron Parke in *Minshall v. Lloyd*, 2 M. & W. 450. This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined. *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Pick. 487, 490; *Martin v. Roe*, 7 E. & B. 237. See also *Whiting v. Brastow*, 4 Pick. 310, 311, and note.

There is another class of cases which forms an exception to the general rule. Where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance, and could remove their fixtures within a reasonable time after such termination. *Antoni v. Bellnap*, 102 Mass. 193. In *Penton v. Robart*, 2 East, 88, it was held that a tenant, who had remained in possession after the expiration of the term, had the right to take away his fixtures, and Lord Kenyon said, "He was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them." In *Weeton v. Woodcock*, 7 M. & W. 14, a term under a lease had been forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures; and Baron Alderson said that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." Mr. Justice Willes, commenting on these two last cases, in *Leader v. Homewood*, 5 C. B. (N. S.) 546, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." In *Mackintosh v. Trotter*, 3 M. & W. 184, Baron Parke, after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an exerescence on the term." He also refers to *Minshall v. Lloyd*, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron Parke says, under what may be considered an exerescence on the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to

the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in, as a trade fixture, under a previous lease, which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. The earliest case on the subject is *Fitzherbert v. Shaw*, 1 H. Bl. 258. A purchaser of lands having brought ejectment against a tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution for a given period; and it was held that the tenant could not, during the interval, remove the fixtures erected during the term, and before action brought, — on the ground that the tenant could do no act to alter the premises in the mean time, but they must be delivered up in the same situation they were in when the agreement was made and the judgment signed. This case was followed in *Heap v. Barton*, 12 C. B. 274, where there was a similar agreement, and Jervis, C. J., said that “if the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so.” In *Thresher v. East London Waterworks*, 2 B. & C. 608, it was held that a lessee, who had erected fixtures for purposes of trade on the premises, and afterward took a new lease, to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures, unless strong circumstances were shown that they were not intended to pass under the general words of the second demise; and a doubt was expressed whether any circumstances, *dehors* the deed, can be alleged to show they were not intended to pass. The case of *Shepard v. Spaulding*, 4 Met. 416, touches the question. A lessee erected a building on the demised premises, which he had a right to remove, but surrendered his interest to the lessor without reservation; afterward he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was of the whole estate, including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In *Loughran v. Ross*, 45 N. Y.

792, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See also *Abell v. Williams*, 3 Daly, 17; *Merritt v. Judd*, 14 Cal. 59; *Jungerman v. Bovee*, 19 Cal. 354; *Elwes v. Maw*, 3 East, 38; Taylor on Landlord and Tenant (5th ed.), § 552; 2 Smith's Lead. Cas. (7th Am. ed.) 228, 245, 257.

We are therefore of opinion that the defendant had no right during the second term to remove any trade fixtures placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them; but if they were permanent or trade fixtures, the plaintiff may recover for their removal.

*Case to stand for trial.*¹

STILLMAN v. FLENNIKEN.

SUPREME COURT OF IOWA. 1882.

[Reported 58 Iowa, 450.]

THIS is an action of replevin for a smutter of the alleged value of seventy-five dollars. The cause was tried to the court, and judgment was rendered for the defendant. The plaintiff appeals. The facts are stated in the opinion.

D. W. Clements and *W. E. Fuller*, for appellant.

Ainsworth and *Hobson*, for appellee.

DAY, J. The court found the facts of the case to be as follows:

"1st. That in the year 1877 Anderson and Stillman were the owners of the smutter in controversy in this case.

"2d. That at the time Patterson and Dykens were the owners of, or interested in, the East Auburn Mills.

"3d. That Anderson and Stillman loaned the smutter in question to Patterson and Dykens, the said Patterson and Dykens to pay for the use thereof, what would be equal to ten per cent per annum, on the cost of said smutter.

"4th. That said smutter was to be returned, but no time agreed upon for such return.

"5th. That said smutter was placed in the East Auburn Mill, by Patterson and Dykens, in the manner that such smutters are usually placed in mills, it being placed upon a platform about two and one half feet square, and something more than three feet in height, the platform not being nailed or cleated to the floor of the mill, but the smutter

¹ But see *Kerr v. Kingsbury*, 39 Mich. 150.

being held in position by braces from the joists of the mill above, and extending to the smutter, holding it firmly in place for use.

“ 6th. The smutter in question, when placed in the mill, was designed for, and used only for buckwheat and rye.

“ 7th. That there was another smutter in the mill, which had, previous to getting the one in question, been used for all purposes for which a smutter was used in the mill.

“ 8th. That about the time of obtaining the smutter in question, the arrangement of the mill was changed, and the first smutter so placed in the mill, as not to be available for use in grinding buckwheat and rye, and the smutter in question procured for use in grinding that class of grain.

“ 9th. That said smutter was placed in the mill in December, 1877.

“ 10th. That the power of said mill was water, and that for the purpose of operating the smutter in question, a counter-shaft was placed in said mill, running from the main or upright shaft over the smutter and connected therewith by belts, by which the smutter was operated.

“ 11th. That to remove the smutter it was not necessary to destroy or injure the mill, that is, the building, farther than to remove in part some spouting, or leaders, in which the grain or flour of the mill was conducted.

“ 12th. That on the 28th day of January, 1879, the sheriff of Fayette county, Iowa, by virtue of a special execution to him directed, sold to Flenniken Brothers the land on which the mill in question is situated, including the mill, machinery and fixtures therein.

“ 13th. That on the 30th day of January, 1880, the sheriff of said county of Fayette made his deed of said premises, mill, machinery and fixtures, to Flenniken Brothers, who took possession thereof by virtue of said deed.

“ 14th. That R. B. Flenniken is the defendant herein, and was a member of Flenniken Brothers, and that he is now the sole owner of the interest of said Flenniken Brothers.

“ 15th. That at the time of the sale, January 28th, 1879, the said Flenniken Brothers had no notice that the smutter in question was owned by plaintiff, or Anderson and Stillman.

“ 16th. The plaintiff is now owner of whatever interest Anderson and Stillman has owned, or would have in said smutter. By the foregoing, I mean that the interest of Anderson in said smutter is conveyed to the plaintiff.

“ 17th. That when Patterson and Dykens placed the smutter in question in the mill, it was with the intention that it should be removed and returned to Anderson and Stillman.

“ 18th. I find the value of the smutter to be \$75.

“ 19th. That when the smutter was loaned, Patterson [Anderson] and Stillman knew that it was to be placed in the mill as a part of the machinery thereof.”

As conclusions of law the court found : —

“1st. That as between other parties and purchasers, at a judicial sale, without notice, the smutter was a part of the realty and passed as such.

“2d. That R. B. Flenniken is the full and unqualified owner of the smutter in question, and entitled to the possession thereof.” The amount in controversy not exceeding one hundred dollars, the trial judge duly certified the questions of law upon which it is desirable to have the opinion of this court, all of which may be resolved into the single question, whether under the facts as found by the court, the smutter passed to Flenniken Brothers by virtue of their purchase at the sheriff's sale.

That as between Anderson and Stillman, and Patterson and Dykens, the smutter in question did not become a part of the realty, but was subject to removal, must be admitted. The question involved in this case is as to what character is to be impressed upon the smutter against a purchaser at sheriff's sale, without any notice of the arrangement existing between Anderson and Stillman, and Patterson and Dykens. In *Quinby v. Manhattan Cloth & Paper Co.*, 9 C. E. Green, 260 (264), it is said: “The true criterion as to fixtures to determine whether they are to be regarded as part of the realty or not, is not whether they may be detached and removed from the premises without injury to the freehold, although that, as is well understood, is oftentimes an important element in deciding the question. It is well established that whether property, which is ordinarily treated as personal, becomes annexed to and goes with the realty as fixtures, or otherwise must depend upon the particular circumstances of the case.” It appears from the facts as found by the court that the smutter was placed in the mill in the usual manner, and that without it the mill, without change in its arrangement, could not grind buckwheat and rye. It was then, to all appearances, an essential and necessary part of the mill.

In *Gray v. Holdship*, 17 S. & R. 413, the court say: “From the adjudged cases on this subject, I think we are warranted in saying that everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones and even the bolting cloth, are parts of the mill and of the freehold, and cannot be levied upon as personal property.” In *Farrar v. Stackpole*, 6 Greenleaf, 154, it was held that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land at the time of its conveyance by deed, pass with the realty, and that, by the conveyance of a saw-mill with the appurtenances, the mill chain, dogs and bars, being in their appropriate places at the time of the conveyance, passed to the grantee. In *Farris v. Walker*, 1 Bailey (S. C.), 540, it was held that a cotton gin attached to the gears in the gin house, on a cotton plantation, passed by a conveyance of the land. See, also, *Union Bank v. Emerson*, 15 Mass. 152; *Fryat & Campbell v. The Sullivan Co.*, 5 Hill, 116;

Bringholff v. Munzenmaier, 20 Iowa, 513; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Miller v. Plumb*, 6 Cowen, 665; *Wadleigh v. Janvrin*, 41 N. H. 503; *Powell v. Monson & Brimford Man'g Co.*, 3 Mason, 459; *Corliss v. McLagin*, 29 Me. 115; *Trull v. Fuller*, 28 Me. 545.

The rule is the same whether the sale is by the owner or by a public officer under the law. *Price v. Brayton*, 19 Iowa, 309; *Farrar v. Chariffetete*, 5 Denio, 527.

Without entering upon the hopeless task of citing and reconciling all the decisions upon this very vexed question of fixtures, we are clearly of opinion that under the facts found by the court in this case, the smutter must, as to a purchaser without notice, be regarded as constituting a part of the realty. *Affirmed.*¹

CARPENTER v. WALKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[Reported 140 Mass. 416.]

BILL in equity, filed February 11, 1884, in the Superior Court, against Otis Walker, Thomas E. Rich, and Paris Rich, alleging that the two last-named defendants, on June 19, 1883, executed a mortgage of certain chattels to the plaintiff; namely, a boiler and steam-engine and certain machinery, to secure their promissory note for \$1000, payable to the plaintiff or order, on demand; and that the defendant Walker had possession of the building in which said chattels were, and refused to deliver them to the plaintiff, or to allow him to take possession of them for the purpose of foreclosing his mortgage.

The prayer of the bill was, that Walker be restrained from preventing the plaintiff from taking possession of said chattels, and from moving, concealing, and disposing of the same; and for further relief.

The defendant Walker filed an answer, alleging title to the property by virtue of a mortgage, executed to him by the two last-named defendants on June 20, 1881, which conveyed a certain parcel of land with the buildings thereon. The answer also alleged that all the articles mentioned in the bill, except the boiler and engine, were in the building at the time the mortgage to Walker was made; that the boiler and engine were subsequently placed therein; and that all of the articles were fixtures.

The case was referred to a master, who found the following facts:

The engine, boiler, and machinery were used in a mill or factory building standing on the land mortgaged to Walker, and were used in carrying on the business of making sashes and blinds.

The boiler and engine were cast together, the engine being on top of

¹ *Contra*, see *Hill v. Sewald*, 53 Pa. 271; *Hendy v. Dinkerhoff*, 57 Cal. 3.

the boiler. Their united weight was fifty-six hundred pounds. Two iron legs projected from the rear end of the boiler and stood on timbers. There were also two small projections, one on each side of the boiler near its front end, but the front end rested on bricks, which were built up to form the ash-box and placed around and laid to prevent fire. A shed was built over the engine-house and boiler, the grist-mill building and the sash and blind building constituting one end and side of said shed. There was no doorway into this shed except an opening from the sash and blind mill, and the boiler and engine could not be removed except by removing the shed or by taking off some boards to enlarge the opening into the factory. The shed was built over the boiler and engine to protect them from the weather. The boiler and engine were not fastened to the building, nor to the land, except that the engine was belted to the main shaft, but they were kept in place by their own weight. They were called "Allen's Portable Boiler and Engine." I find the boiler, engine, and attachments to be portable, and that they retained the character of chattels.

There were ten or more machines described in the plaintiff's bill, all of which were used in the factory to make sashes and blinds, as follows: —

1. A jointing-machine, with circular saw and track: fastened at the bottom by cleats about the legs, which were nailed to the floor; and the feet of the machine were nailed to the floor.
2. A tongue-groover or matching-machine: wood, fastened with cleats and feet nails, and had not been moved since it was set up.
3. A planing-machine: cast-iron, screwed to the floor with Colt screws: this had not been moved since it was set up.
4. A circular saw and table: wooden frame, fastened by cleats and nails.
5. A heavy machine called a slat-planer: wood, with iron legs made to be bolted down to the floor.
6. A sticker: fastened to the floor by Colt screws, which are turned by a wrench.
7. A cut-off saw and table: wood frame, fastened by cleats and nails to the floor.
8. A slat-machine for tenoning: iron frame, screwed to the floor.
9. Boring-machine: wooden frame, held mainly by cleats.
10. Mortising-machine: iron, fastened by four screws to floor, steadied on top by braces nailed to ceiling.
11. Sand-paper machine: cleats round the bottom, and fastened to the floor above.

The said machinery was all connected with the shafting, directly or indirectly, by pulleys or gearing, and was run by belts. The machines stood over the shafting, which was under the floor and in a position convenient to be run by said shafting. None of the machines was very heavy. They were movable, and were sometimes, though not often, moved. They were adapted to do the work carried on in the mill, but could be used elsewhere in the same business.

The master found all of said machines to be personal property, and to be included in the plaintiff's mortgage, but not in the defendant Walker's; and all the shafting to be part of the realty, and to belong to said defendant.

Walker filed the following exceptions to the report:

"In that, upon the findings of fact as to the boiler and engine, the master has erred in his findings of law, that a boiler and engine, placed as this boiler and engine were placed, and resting upon a brick foundation as did this boiler, and used for conveying power to this sash and blind shop, were chattels, instead of real property included in and subject to the defendant's mortgage.

"In that, upon the findings of fact as to the machinery named from paragraphs 1 to 11, fastened to the building in the manner set forth in said report, and used for carrying on the business of manufacturing sashes and blinds in the building upon the land described in the defendant's mortgage, which building was built for that purpose, the master has erred in his finding of law, that such machinery is a chattel, instead of real property included in and subject to the defendant's mortgage."

Pitman, J., overruled the exceptions, and ordered a decree for the plaintiff; and the defendant Walker appealed to this court.

J. M. Cochran, for the defendant Walker.

A. J. Bartholomew, for the plaintiff.

HOLMES, J. Perhaps it would have saved perplexing questions, if, as between vendor and purchaser, or mortgagor and mortgagee, the rule of the common law had been adhered to more strictly, that whatever is annexed to the freehold by the owner becomes a part of the realty, and will pass by a conveyance of it. Y. B. 21 Hen. VII. 26, pl. 4; *Elwes v. Maw*, 3 East, 38; s. c. 2 Smith Lead. Cas. (8th Am. ed.) 191; *Fisher v. Dixon*, 12 Cl. & Fin. 312, 328, & seq.; *Mather v. Fraser*, 2 K. & J. 536; *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Gibson v. Hammersmith Railway*, 32 L. J. Ch. 337, 340; *Climie v. Wood*, L. R. 4 Ex. 328; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Meux v. Jacobs*, L. R. 7 H. L. 481, 490. The right of a tenant to sever chattels which he has attached to the realty might be admitted, and yet the property might be regarded as land until severed, as it seems to be in England. The language of *Hellawell v. Eastwood*, 6 Exch. 295, which looked the other way, has been criticised in the later cases, some of which we have cited.

But the later decisions of this Commonwealth establish that machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil. *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21.

It is more important to respect decisions upon a question of property

than to preserve a simple test; and, for this reason, the decree of the Superior Court must be affirmed. The master reports that he finds the articles in controversy to be personal property, and we cannot go behind this finding, unless the facts found specially require a different conclusion, as matter of law. The special facts are, that the boiler and engine were portable, and not attached to the realty, except that they were belted to the main shaft; but that they could not be removed except by removing a shed built over them to protect them from the weather, or by taking off some boards to enlarge the opening into the factory. The machines were fastened to the floor by cleats, screws, or nails. We cannot say, as matter of law, that these facts are inconsistent with the master's finding, in view of the cases cited. We must take that finding to exclude the articles having been put where they were as a permanent improvement to the building, whatever conjecture we might have formed but for the master's general conclusion.

Decree affirmed.

