REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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

VOL. XVI.

Containing the Cases of TRINITY and MICHAELMAS Terms, in the 52d and 53d Years of GEO. III. 1812.

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JUDGES

OF THE

COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEYS-GENERAL.

Sir VICARY GIBBS, Knt.
Sir THOMAS PLUMER, Knt.

SOLICITORS-GENERAL.

Sir THOMAS PLUMER, Knt.
Sir WILLIAM GARROW, Knt.

A

TABLE

OF THE

CASES REPORTED

IN THIS SIXTEENTH VOLUME.

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

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Y

CASES

ARGUED AND DETERMINED 1812.

IN THE

Court of KING'S BENCH,

IN

Trinity Term,

In the Fifty-second Year of the Reign of GEORGE III.
1812.

MEMORANDA.

AT the beginning of this term Sir *Vicary Gibbs*, His Majesty's Attorney-General, was made a Judge of the Court of Common Pleas, in the place of Mr. Justice *Lawrence*, who had previously resigned from ill health. Mr. Justice *Gibbs* took for the motto of his rings, on being called Serjeant, "Leges Juraque."

The office of His Majesty's Attorney-General remained vacant for some time afterwards, owing to the arrangements not being complete for the new Ministry, upon the atrocious and lamentable assassination of Mr. *Perceval*, as he was going into the House of Commons on the 11th of *May*; till on the 27th of *June*, when Sir *Thomas Plumer*, the Solicitor-General, was promoted to be Attorney-General, and *William Garrow*, Esq. one of His Majesty's learned Counsel, and Attorney-

1812.

General to His Royal Highness the Prince Regent, as Prince of *Wales*, was appointed His Majesty's Solicitor-General, and knighted. At the same time *Joseph Jekyll*, Esq. one of His Majesty's learned Counsel, and Solicitor-General to the Prince, was promoted to the office of His Royal Highness's Attorney-General; and Mr. Serjt. *Shepherd*, His Majesty's learned Senior Serjeant, was appointed to be the Prince's Solicitor-General.

Friday, May 29th.

BURKS *against* MAINE and Another, Bail of RENTON.

A return of non est inventus procured by the plaintiff against the principal, in order to found proceedings against the bail, is irregular, if the principal were at the same time in custody of the same sheriff who made the return, though at the suit of another person; and the subsequent proceedings against the bail will be set aside.

HEATH obtained a rule, on behalf of the bail, for setting aside the writ of scire facias issued against them, and the subsequent proceedings, upon the ground of irregularity; inasmuch as the defendant *Renton*, having been arrested by the sheriff of *Middlesex*, at the suit of the plaintiff, and having put in bail in *Trinity* term 1811, and judgment having been recovered against him, and a writ of capias ad satisfaciendum lodged with the sheriff, was afterwards arrested by the same sheriff on the 1st of *November* last, at the suit of another party, and committed to his custody, and continued therein until the 11th of *November*, when he was removed by habeas corpus into the King's Bench prison: and while he was in the sheriff's custody, the attorney of the present plaintiff, (who was also attorney for the plaintiff in the other suit,) procured a return by the sheriff of non est inventus, for the purpose of proceeding against the bail; on which the scire facias against them was grounded.

Peake

Peake opposed the rule, and referred to *Hunt* v. *Coxe* (*a*), and *Barry* v. *Barry* (*b*), as shewing that the Court considered the lodging the ca. sa. against the principal in the sheriff's office, and getting the return of non est inventus, as little more than form, and intended merely to intimate to the bail that the plaintiff meant to proceed against them: and shewing also, that the sheriff's return was binding for this purpose.

But *the Court* said that the party procured the return of non est inventus at his own peril; and here he had procured a false return to be made to the prejudice of the bail. They referred to *Forsyth* v. *Marryatt and Grover*, *Bail of Clark* (*c*), as in point to shew the irregularity, and made the

Rule absolute.

(*a*) 3 *Barr.* 1360. (*b*) 2 *Stra.* 717. (*c*) 1 *New Rep.* 251.

BUSK *against* BELL.

Saturday, *May* 30th.

A licence to trade to an enemy's country, granted to one set of *British* merchants, cannot be used to cover a trading by other *British* merchants, without connecting them together; as by shewing that the licensees were agents at the time for the others.

THIS was an action upon a policy of insurance on goods by the ship *Christiana*, at and from *St. Petersburgh* to *London*; in which the loss was averred to be by capture: and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, the principal contention was upon the fact, whether the loss was by hostile capture or by collusion; which fact his Lordship left to the jury, who found a verdict for the plaintiff. But a question of law arose at the trial, which it was reserved to the defendant's counsel to move, upon the application of the trading licence, covering the adventure, to the persons in whom the interest in the goods was averred in the declaration and proved to be, who

1812.

BUSK against BELL.

were *Dawson*, *Burrell*, and *Gascoigne*, *British* merchants residing at *Wakefield* in *Yorkshire*. The licence issued by one of the secretaries of state, in pursuance of his majesty's order in council, under the authority given by the statutes 43 *Geo.* 3. *c.* 153. *s.* 16. and 48 *Geo.* 3. *c.* 126. *s.* 2. was granted *to Messrs.* Robinson, Clarkson, *and Co., of* London, *merchants;* permitting *them* to load and export, on board the vessel *Christiana*, *Schimmels*, master, to any port in the *Baltic*, a cargo of *British* manufactures, &c. and *to import from thence* a cargo of grain, if importable, &c., and such goods as are permitted by law to be imported, &c. provided that the name of the vessel, her tonnage, and time of her clearance from her port, should be indorsed on the licence; (all which, with other stipulations, were regularly complied with in this case: and a licence was necessary to legalize the voyage, inasmuch as *Russia* was at war with this country at the period of the adventure and assurance in question.

Carr, in moving in the last term to enter a nonsuit, or for a new trial, stated two objections to the plaintiff's right to recover under this licence; first, that there was no connection in fact proved by agency or otherwise between the grantees of the licence and the persons in whom the interest in the goods insured by the policy was averred to be. But secondly, if there were any connection between them, yet that the licence being specifically granted to *Robinson*, *Clarkson*, and Co., and not extending to *others*, or to *other British merchants*, as is commonly provided for in such licences, could not be used to protect any other property than their own. These licences, he said, were to be construed, like grants of the king, most strictly; and the very absence in the particular

case

1812.

BUSK *against* BELL.

case of the common words of addition and extension shewed that the government intended to confide personally in the individuals named to import as well export goods in this adventure; which personal privilege they could not communicate to others. A rule nisi having been then granted,

Barrow and *Peake* now shewed cause, contending that it was the particular cargo and adventure which was intended to be licensed, and not the identical persons named; the persons to whom the licence was transferred being also *British* merchants, and the national character of the adventure therefore remaining unaltered. In *Feize* v. *Thompson* (*a*), and *Feize* v. *Waters* (*b*), a special property in the cargo was held sufficient for the grantee of the licence to cover the adventure. [*Bayley*, J. Had you any evidence in this case to shew that *Robinson*, *Clarkson*, and Co., were the agents of *Dawson* at the time when the former took out the licence?] They were so in fact; *Robinson* and Co. chartered the ship, and shipped the homeward-bound cargo for *Dawson* and Co.

Lord ELLENBOROUGH, C. J. There was no evidence of agency given at the trial; but the plaintiff may mend his case at a subsequent trial. At present the rule must be made absolute for a new trial; for I cannot say that a licence to import a cargo given to one set of persons will warrant an importation by another set of persons, unless the latter can connect themselves with the parties licensed (*c*).

Per Curiam, Rule absolute for a new trial on payment of costs.

(*a*) 1 *Taunt.* 321. (*b*) 2 *Taunt.* 248.
(*c*) See *Klingender* v. *Bond*, 14 *East*, 484.

Monday, *June* 1st.

YARBOROUGH and Others *against* The Governor and Company of the Bank of ENGLAND.

Trover lies against a corporation; and if it be essential to their conversion of the property, (*i. e.* in this instance the detainer of Bank-notes by the Governor and Company of the Bank of *England*) that they should have authorized it under their seal, such authority will be presumed after verdict: but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorized under their seal.

THE plaintiffs declared in trover against the corporation of the Governor and Company of the Bank of *England*, for three promissory notes of the Bank of *England*, payable on demand, each for 100*l.*, describing them by their dates and numbers; to which the defendants pleaded the general issue: and after a verdict for the plaintiffs before Lord *Ellenborough*, C. J. at *Guildhall*, it was moved in the last term to arrest the judgment, on the ground that the action of trover, which was founded in tort, did not lie against a corporation: but it was at the same time explained by *Bosanquet*, who made the motion, that the objection did not originate with the Bank, who merely lent their names upon this occasion to protect the true owner of the notes, Mr. *Sidney* of *Furnival's-Inn*, who had been robbed of them on the 22d of *June* last, and had immediately given notice to the Bank to stop payment of them, under his indemnity. That the plaintiffs, who were bankers at *Doncaster*, had several months afterwards received them in the course of their business in exchange for their own notes, from a person who gave in the name of Capt. *Johnson*, but whom they did not know; and consequently all means of tracing the property were lost. And the real contest in this action was between Mr. *Sidney* and the plaintiffs; Mr. *Sidney* imputing negligence to them in the transaction.

The case was argued on *Saturday* last by *Taddy*, against the rule, and by *Garrow* and *Bosanquet*, in support

port of it; when the Court said that they would look into the authorities before they delivered judgment; which was now pronounced by

Lord ELLENBOROUGH, C. J. In this case, which was argued on *Saturday*, the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation, they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot, as a corporation, be subject to a capias or exigent, (the process in trespass,) because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a mandamus, for instance, is directed, is liable eventually to an action for a false return. The case of *Argent* v. *The Dean and Chapter of St. Paul's*, in this court about the year 1781 (*a*), was an action for a false return to a mandamus

(*a*) This case was referred to by *Buller*, J. in *Rooke* v. *The Earl of Leicester*. 2 *Term Rep.* 16., as of *E.* 23 *G.* 3.; and I find the following note of it cited in another case of *Crookson* v. *Lord Lonsdale*, in *Hil.* 29 *Geo.* 3., *B. R.* where the defendant had cast an essoign by attorney; which case was ultimately decided on the ground that a distringas had issued pending a judge's order to stay proceedings, which was therefore set aside for irregularity. Bnt there *Buller*, J. added, that as to the question of the essoign, let us never hear that doubt again. Mr. *Lowndes*

1812.

YARBOROUGH *against* The Bank of ENGLAND.

mus respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. *Vidian's Entries*, p. 1. is an action for a false return against the mayor and commonalty of the city of *Canterbury*, for a false return to a writ of mandamus to restore an alderman to his precedency of place, &c. It states the mayor and corporation as *attached* to answer, and the return as falsely and *maliciously* made.

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has industriously collected all the cases, and it appears clearly that no essoign lies in a personal action.

ARGENT *against* The Dean and Chapter of ST. PAUL'S.

There is no essoign in a personal action, nor can it be cast by a corporation.

LAW shewed cause against a rule for quashing the essoign cast by the defendants in this cause, and that they should appear and accept a declaration generally. It was an action on a false return to a mandamus to restore the plaintiff to the office of verger. He contended that though in common cases a corporation cannot cast an essoign, not being capable of making a personal appearance, but being obliged to appear by attorney, (stat. 12 *Ed.* 2. *st.* 2.); yet in an action on a false return the defendants were sued as individuals, and not in their corporate capacity, and therefore in such an action were entitled to an essoign, being individually answerable for the tort. *Com. Rep.* 86. 1 *Ld. Ray.* 564. *Carth.* 171. On the other ground on which the rule had been moved, that there can be no essoign in a personal action, he admitted that it had been questioned, and that Lord *Coke*'s opinion, 2 *Inst.* 125. was so; but that by late determinations it seemed to have been altered. 2 *Wils.* 164. That the case in *Stra.* 1194. was not an authority against it, but related to the capias. He cited also *Booth* on real actions, 14 *C.* 5. 1 *Brown* 193.

Lord MANSFIELD, C. J. There are two objections to the essoign, and either is decisive. 1st, The return is made under the seal of the corporation, and the action is against the body, and a corporation can have no essoign. 2dly, The law is now established that an essoign lies not in a personal action.

BULLER, J. The case in *Wilson* is against the essoign in a personal action. It appears that the practice did once prevail by 2 *Inst.* and then it was thought wrong. It has since been altered or grown obsolete; and it has now neither practice nor right in favour of it.

The

1812.

YARBOROUGH *against* The Bank of ENGLAND.

The instances of actions against corporations for false returns to writs of mandamus, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries. *Bro. Corporations, pl.* 48. A corporation cannot be aiding to a trespass, nor give a warrant to do a *trespass without writing;* and cites 4 *Hen.* 7. 9.: and certainly it appears by that case, and by the sequel of it in 4 *Hen.* 7. 16., that a corporation cannot give a command to enter into land, without deed, nor do a thing which vests or devests a freehold, nor *accept a disseisin made to their use, without deed.* But many little things, it is said, require no command: by which must be meant no special commanding, as a command to servants to chase cattle out of their lands, or to make hay; being things which it is incident to a servant to do, and which he is bound to do without command: and if he do it, it is good, and the command is not material, for he may do it without command. A corporation cannot do a *tort but by their writing under their common seal:* per *Fitzjames' Justice; Bro. Corporations, pl.* 34., cites 14 *Hen.* 8. 2. 29.; which imports that *by their writing* they may. A corporation may be defendants in an action of quare impedit, and the hindrance is an act of *tort. Butler* v. *The Bishop of Hereford and the University of Cambridge. Barnes C. P.* 350. To which a multitude of other instances may be added. *Rast.* 497. *Ast.* 378. 2 *Mod. En.* 291. *Winch.* 625. 700. 721. 733. 2 *Lut.* 1100. 3 *Lev.* 332. The stat. 9 *H.* 4. *c.* 5. recites the practice, in assizes of novel "disseisin and other pleas of land, of naming the mayor "and bailiffs and commonalty of a franchise, as dissei- "sors, in order to oust them of holding plea thereof; "and directs the inquiry before the judges of assize, "whether

1812.

YARBOROUGH *against* The Bank of ENGLAND.

"whether they be disseisors or tenants, or be named "by fraud;" which plainly proves that they may be considered as disseisors; and there are instances of trespass against corporations. In 44 *Ed.* 3. 2. *pl.* 5., which was after 22 *Ass. pl.* 67., cited in the argument, trespass was brought against the mayor and commonalty of *Hull* and another person; and the objection made was not that trespass would not lie against the corporation, but that as a natural person was joined with them, there must be different processes; a distress against the former, and a capias against the latter. But the objection does not appear to have prevailed. In 8 *H.* 6. 1. 14., trespass was brought against the mayor, bailiff, and commonalty, and one of the commonalty; and the objection was not that trespass would not lie against the corporation, but that it could not be supported against them and an individual of their body; and *Bro. Corporations, pl.* 24. says, the better opinion was that the writ was good; and 14 *Hen.* 8. 2. says it was so awarded, and that in that case all the justices agreed to it. *Brook* also puts the case, "if mayor and "commonalty disseise me, and I release to 20 or 200 "of the commonalty; this will not serve the mayor and "commonalty;" and the reason is because the disseisin is in their *corporate* character, and the release is to the individuals. And the case is put "that if mayor and "commonalty disseise one of their own body, he shall "have assize against them;" which clearly imports that the corporation, as such, might be disseisors. Also, in 4 *Hen.* 7. 13. trespass was brought against the mayor and commonalty of *York*: they justified under a right in the inhabitants to have common: but this was adjudged no plea, because the right in natural persons gave no right

1812.

YARBOROUGH *against* The Bank of ENGLAND.

right to the corporation, and the trespass was alleged in the corporation. They then pleaded as bailiffs in aydant but it was adjudged they could not be bailiffs aiding to a trespass, "nor could they give warrant *with-* "*out writing* to commit a trespass;" which implies that by proper writing, namely, by deed under their common seal, they might. In the present case, which is after verdict, it must be presumed that a competent conversion was proved; and if it be essential to such conversion that there should have been an authority from the company under seal to detain the notes on their behalf, that such authority was proved. The fact, by reference to my notes, is that it was admitted that the bank detained the notes in question, under an indemnity; and as no objection was taken to the terms of the admission, a competent detention, *i. e.* through the means of servants properly authorized to detain on their behalf, was thereby admitted; and therefore the presumption of due proof, after verdict, is in effect warranted by the facts of the case, if it had been material, which it by no means is, to resort to them. In the case of *The King* v. *John Biggs*, 3 *P. Will.* 419., it was made a question upon a special verdict in a case of capital felony, for erasing an indorsement upon a bank note, whether a person intrusted and employed by the Governor and Company of the Bank of *England* to sign notes on their behalf, was competently authorized for that purpose, not having been, as the special verdict expressly found, so entrusted and employed *under their common seal.* There is a long and learned argument of the reporter, Mr. *Peere Williams*, in which the authorities, as to what acts a corporation may do by their servant without an authority under their common seal, are drawn together. The majority of the judges

1812.

YARBOROUGH *against* The Bank of ENGLAND.

judges who sustained the conviction must have been of opinion that an authority under their common seal was not essentially necessary for such a purpose; indeed according to the report in 1 *Stra.* 18. of the same case, the doubt of the judges must have turned upon another point, namely, upon the import of the word *indorsement*, (*i. e.* the writing alleged to be erased;) and whether it could be satisfied by an erasure of what was written on the face of the note. As to which Sir *John Strange* in his report says, "That it was held by all the "judges that the defendant was guilty; for the writing "on the face of the note, was of the same effect as an "indorsement, and being introduced by the Company "instead of writing on the back, and always accepted "and taken to be an indorsement, was within the "words of the indictment." The objection of the want of authority under the common seal is not even noticed in the report of this case by Sir *John Strange*. However, if there would have been any thing in the objection in this case, if made at the trial, there is nothing in it after verdict, when it must be presumed, as I have already stated, that all the competent proof which could be made in support of the action was made, and of course that an authority under seal for the detention of the notes was proved, if such proof were at all necessary.

Rule discharged.

1812.

Monday, June 1st.

GRAY *against* COOKSON and CLAYTON.

THIS was an action of trespass, in which the first count of the declaration charged that the defendants assaulted the plaintiff, and without reasonable or probable cause committed him to the house of correction, and kept him there until he sued out a writ of habeas corpus, by which he was removed from thence to and before the Court of K. B., and was afterwards by that Court discharged from the imprisonment; by means of which he was injured in his business of a woollen draper, and put to expense, &c. There were other counts, stating the assault and imprisonment more generally. The defendants (who were justices of the peace, acting as such in this transaction,) pleaded the general issue.

The stat. 20 *G.* 2. *c.* 19. *s.* 4. empowering justices of peace upon complaint made on oath by any master against his apprentice for any misdemeanor, miscarriage, or ill behaviour in his service, to hear and determine the offence, and commit the offender, is not repealed by stat. 6 *G.* 3. *c.* 25. *s.* 1., empowering the justices to oblige an apprentice absenting himself from his master's service to serve out, after the expiration of the apprenticeship, such time of absence, or to make satisfaction for it; and in default of such satisfaction, to commit the apprentice: for the remedy given to the master by the latter statute is cumulative to the punishment inflicted on the apprentice by the former statute for his offence.

The statute 5 *Eliz.* *c.* 4. avoiding all indentures of apprenticeship other than for seven years, is to be construed as rendering indentures made for a less time voidable only, and not void.

But such indenture cannot be avoided by the mere act of an apprentice absenting himself from his master's service, which is an offence under the stat. 20 *Geo.* 2. *c.* 19.

And generally it seems that no act can be relied on as such an avoidance, in an action of trespass against the convicting magistrates, except it appears on the face of the conviction.

So a refusal of the apprentice to return into the service of his master, when urged to it by the magistrates themselves in the course of the inquiry upon the complaint of the master, on a prior absenting himself by the apprentice from the service, is not available in support of such action against the conviction.

But where the master had agreed by indorsement (unstamped) on the indenture to cancel it, "*provided* the apprentice *made no engagement* or entered into any person's service in the town of *N.*;" it was held that the apprentice setting up a trade for himself in *N.* was a breach of the condition, which entitled the master to recal him back into his service.

It seems also that if a conviction be good upon the face of, the production and proof of it at the trial will justify the convicting magistrates under the general issue in an action of trespass, as well in respect of such facts therein stated as are necessary to give them jurisdiction, as upon the merits of the conviction.

But the stat. 43 *Geo.* 3. *c.* 141., extends to protect magistrates against actions of trespass only in the case of a conviction *quashed*; giving to the party grieved a remedy by action on the case.

At

1812.

GRAY *against* COOKSON, and Another.

At the trial before *Chambre*, J. at *Newcastle*, the plaintiff, a woollen draper at *Newcastle*, after proving the regular notice to the defendants of the process, and the service of it within the time limited by law, proved the habeas corpus writ directed to the keeper of the house of correction, tested the 23d of *January* 1810, by virtue of which he was brought up before this Court, with the original warrant of his commitment for one calendar month, as an apprentice, for having absented himself without his master's consent. This warrant had been issued by the defendants, whose signatures to it were admitted; and on the production of it, this Court had before discharged the plaintiff. But it also appeared that after the first warrant of commitment had been delivered with the plaintiff to the keeper of the house of correction, on the 17th of *January* 1810, he had received another warrant of commitment on the 20th, and that he had both those warrants at the time of his bringing the plaintiff before this Court in obedience to the habeas corpus; but that in consequence of advice by the plaintiff's attorney, he had only produced to the Court the first warrant. It was also proved that when the parties were before the magistrates on the 17th of *January*, previous to the commitment, *Spencer*, the master of the apprentice *Gray*, insisted upon his return into his service for the remainder of his term; and that on the plaintiff's part it was insisted, that the indenture which had been laid before the defendants was at an end. That Mr. *Cookson*, the mayor of *Newcastle*, then asked the plaintiff if he would return into *Spencer*'s service; and he refusing, the first warrant of commitment was filled up and executed, and the plaintiff was sent away in custody. At the close of this evidence it was objected, on the part of the defendants,

that

1812.

GRAY, *against* COOKSON, and Another.

that an action of trespass was not maintainable since the st. 43 *G.* 3. *c.* 41. (*a*) which protects magistrates from actions in this form for mistakes committed by them in the execution of their duty: but the learned Judge, doubting whether the statute extended to this case, where there had been no *conviction quashed*, but the party had been discharged on the ground of the illegality of the warrant of commitment, issued without any information on oath in the presence of the party so committed, directed the cause to proceed; with liberty to the defendants to move the Court to enter a nonsuit. Thereupon the defendants called a witness, who produced the conviction (hereafter stated), which he also proved to have been drawn up and signed on the 10th of *August* 1810, after the commencement of this action, which was on the 16th of *July* preceding. It was also proved that *Spencer*, the master, was sworn to the truth of his information, upon his application to the magistrates, before the plaintiff was apprehended upon the warrant then granted. That when the plaintiff was brought before the magistrates, he was informed of the nature of the charge made by *Spencer* against him, of absenting himself from his master's service; but neither of the witnesses would swear that any oath was administered to *Spencer* in the presence of the plaintiff, though one of them believed that it had, and spoke with certainty to the fact that the former information was read over to the plaintiff, and the indenture was then produced by *Spencer*, and the indorsement on it was pointed out. And it was also in proof that the plaintiff, at the time of the complaint made, had a shop in *New-*

(*a*) See the case of *Massay* v. *Johnson*, 12 *East*, 67, where a similar question arose upon this act.

castle,

1812.

GRAY *against* COOKSON, and Another.

castle, where he was carrying on the business of a woollen draper. The following exhibits were also proved.

1. An indenture of the 16th of *June* 1808, between the plaintiff, a minor, and his father, of the one part, and *William Spencer*, of the town and county of *Newcastle-upon-Tyne*, woollen draper, of the other part; whereby the plaintiff, with the consent of his father, bound himself an apprentice to *Spencer* in his trade for 3 years and 9 months from the day of the date, to become void on the death of the father before the end of that period. On the 17th of *April* 1809, the following indorsement was put upon the indenture: "I agree to cancel this indenture as against *John Gray* and *William Gray* his son, *provided the said* William Gray *makes no engagement* or enters into any person's service in the town of *Newcastle-upon-Tyne:* in such case this indenture to remain valid, and the present agreement to be void. As witness my hand this 17th of *April* 1809. *William Spencer.*" 2. A notice from *Spencer* after that indorsement, and after the plaintiff had set up in business in *Newcastle*, but before the application to the magistrates, requiring the plaintiff to return to him and serve out the remainder of his time. 3. The information and complaint upon oath of *Spencer*, taken before the defendants on the 17th of *January* 1810, stating that the plaintiff, his indentured apprentice for a term not expired, had in his service been guilty of divers misdemeanors, miscarriages, and ill-behaviour towards the informant; and particularly that the plaintiff had absented himself from the service of the informant without his consent and without just cause. (Upon which the defendants, on the same day, issued their warrant for the plaintiff's apprehension to answer that

that complaint, which was also in proof.) 4. The conviction, bearing date the 17th of *January* 1810; which stated that on that day *W. Spencer* came before the defendants, justices, &c. and informed them that *W. Gray*, the indentured apprentice of the informant for a term yet unexpired, had *in his service been guilty of divers misdemeanors, miscarriages, and ill-behaviour* towards the informant, and particularly that he *W. G. had absented himself from the service of the informant, without his consent, and without just cause.* Whereupon *W. Gray* afterwards on the said 17th *January* 1810, being duly brought before the said justices in the presence of *W. Spencer* to answer and make his defence to the charge, &c. *admitted that he had absented himself from the service of the said* W. S., but said further in his defence that the indenture of apprenticeship, under which he was so bound, *had been agreed to be cancelled*, and that the said *W. S. had agreed to let him leave his service*, and had repeatedly told him that he *W. S.* had far too many people in his shop, a great many more than he had employment for, and had often expressed to him *W. G.* that he might have his liberty; on account of which they had agreed to part. And *W. G.* produced *an unstamped indorsement, signed* by *W. S.*, *but not sealed*, made on the said indenture of apprenticeship, (which was set out). The conviction then stated, that it appeared to them (the justices) by the indenture, that no sum was paid to *Spencer*; and that *Spencer* deposed that *W. G.* had *made an engagement* in the town of *Newcastle-upon-Tyne by setting up the trade there of a woollen draper.* Whereupon the justices convicted *W. Gray* of the offence charged against him, according to the form of the statute, and adjudged him to be committed to the house of correction in and for

1812.

GRAY *against* COOKSON and Another.

the said town and county for one calendar month. And he was accordingly committed on the same day. 5. The second warrant of commitment spoken of as having been received by the keeper of the house of correction on the 20th of *January* 1810; which bore date as of the 17th, the day on which the plaintiff was committed.

The learned judge, on summing up the evidence to the jury, advised them, if they found for the plaintiff, (as he thought they should, subject to the question of law,) to give moderate damages, as there was no reason to suppose that the defendants had acted intentionally wrong; and they found a verdict for the plaintiff with 120*l.* damages.

This case was discussed upon a motion for setting aside the verdict and entering a nonsuit, or for granting a new trial; which was made in last *Michaelmas* term by *Topping* on behalf of the defendants, and was now supported by *Clayton*, Serjt., *Richardson*, and *Cookson*; and opposed by *Hullock* for the plaintiff; in which several points were made. First, it was contended on the part of the defendants, that the production of a subsisting conviction was conclusive in an action of trespass, particularly since the st. 43 *G.* 3. *c.* 141.; which, assuming that a subsisting conviction would protect the convicting magistrates in a collateral action, provides that even in the case of a conviction *quashed*, they shall only be liable to damages in an action on the case. For the general point the case of *Strickland* v. *Ward* (*a*) was

(*a*) *Winchester* summer assizes, 1767, coram *Yates*, J. cited in *Lovelace* v. *Curry*, 7 *Term Rep.* 633, 4., vide note (*d*), in *Massey* v. *Johnson*, 12 *East*, 74.

referred

1812.

GRAY *against* COOKSON and Another.

referred to; and *Massey* v. *Johnson* (*a*) for the construction of the statute. And it was insisted that to make convicting magistrates trespassers, it must be shewn that they had no jurisdiction as to the subject-matter of the conviction; for if they had, their judgment was decisive on the fact. But if there were any doubt of this, the action of trespass, they contended, was taken away by the late statute, which, though it only provides in terms for the case where *a conviction shall have been quashed*, yet must necessarily be taken to extend to all cases where a magistrate, having power to convict, had actually made a conviction; otherwise he would be placed in a better condition where his conviction, being bad, had been quashed, than where he had made a good conviction; a distinction which the legislature could never have contemplated. With respect to the period when the conviction was formally drawn up, after it had been in fact made, it was not considered in *Massey* v. *Johnson* as material; but that it was sufficient to draw it up at any time before it was given in evidence in defence of the magistrates in any collateral proceeding. On the other hand, it was insisted that the conviction, shewn to have been drawn up in its present form so long after the time when it purports to have been made, and after proceedings had upon the commitment in execution of it before this Court, was too late, and could not be resorted to as evidence to defend the magistrates against this action. That though there was no time limited by statute for drawing it up, it ought to be done within a reasonable time, and at all events before the

(*a*) 12 *East*, 67.

1812.

GRAY against COOKSON and Another.

next practicable quarter sessions after the adjudication to which court all convictions were properly returnable (*a*) for the purpose of being filed. But if an indefinite time were to be allowed, no person would be safe in bringing an action, however informal the instrument under which he was committed, as a more regular conviction might afterwards be drawn up, and ante-dated to the time of the commitment. [*Bayley*, J. If the magistrate do not return his conviction to the sessions, may not the party apply for a mandamus?] That would not remedy the mischief in many cases. [Lord *Ellenborough*, C. J. The formal conviction, when issued, would properly bear date at the time when in fact it took place; and will not the Court give credit to it, as to a conviction made at that time, when produced in a collateral proceeding, such as the action of trespass, however they may inquire of the time upon any other occasion when the conviction is directly impeached.] The fact of the conviction itself is traversable, and therefore it is not strictly a record. Before the act of the 7 *J.* 1. *c.* 5. (*b*) enabled justices of peace, sued for acts done by virtue of their office, to plead the general issue, they could only have justified specially by pleading all the facts necessary to shew a legal conviction, and that they thereupon convicted the plaintiff; and the plaintiff might have taken issue upon any one fact thus set out; and every fact necessary to prove the justification must have been shewn at the trial to have existed when the action commenced, amongst others, the conviction itself.

(*a*) *Rex* v. *Eaton*, 2 *Term Rep.* 285., and *Rex* v. *Barker*, 1 *East*, 188., were cited.

(*b*) Made perpetual by 21 *J.* 1. *c.* 12.

Lord

1812.

GRAY *against* COOKSON and Another.

Lord ELLENBOROUGH, C. J. When the conviction is produced at the trial as of the date when it took place, it would so appear; and it still comes to the same question, whether the Court in a collateral inquiry will look out of the record of conviction for the time when it took place: but I think that we ought to give credit to it. Then as to the objection upon the stat. 43 *G.* 3. *c.* 141. to the form of the action, that act applies only to the case of a conviction quashed. Magistrates were before protected in an action of trespass by a subsisting conviction good upon the face of it; and the act meant to protect them still further to a certain extent in a case where before they were left unprotected by the quashing of the conviction. Even before this statute, I had always considered that if a conviction were produced at the trial which would justify the imprisonment, that was sufficient.

It was next contended on the part of the plaintiff, that the justices in this case had no jurisdiction, and therefore that the conviction was a nullity: and *Crepps* v. *Durden* (*a*) was referred to, where trespass was maintained against a magistrate, who had convicted a baker by four several convictions, each in the penalty of 5*s*., for exercising his business on the same day, being a *Sunday*, when the act which gave the penalty had only made the exercising of any such calling on the Lord's day one entire offence, whether done in one or more instances on the same day. But Lord *Ellenborough*, C. J. and *Bayley*, J. observed, that the objection in that case had appeared upon the face of the four convictions given in evidence, which shewed that the plaintiff had been con-

(*a*) *Cowp.* 640.

victed

1812.

GRAY *against* COOKSON and Another.

victed of four several offences in exercising his calling of a baker on the same *Sunday*, when by law he could only be convicted of one such offence on the same day. By collating and bringing together the four convictions, it appeared that the justice of peace had exercised a jurisdiction in respect of three of the convictions, which was not given to him by any law; for after the first conviction he was functus officio. The Court therefore desired *Hullock* to confine his objections to such as appeared upon the face of the present conviction.

Hullock then objected, first, that the stat. 20 *Geo.* 2. *c.* 19. *s.* 4. on which the conviction was founded, was impliedly repealed by the stat. 6 *Geo.* 3. *c.* 25. *s.* 1. giving to the master of an apprentice absenting himself from his master's service a different compensation; upon the principle of the case of *John Caruthers* (*a*), that an affirmative statute, giving a new rule, repeals a prior statute concerning the same matter. Secondly, that the indenture of apprenticeship not being for 7 years as required by the stat. 5 *Eliz.* *c.* 4, was void, and not merely voidable. But if voidable, then, thirdly, that it had been avoided by the apprentice, the plaintiff, having quitted his master's service: for which *Guppy* v. *Jennings* (*b*) was cited. These three objections were afterwards stated and answered fully by the Court, which makes it unnecessary to say more of them in this place. But during the discussion upon the last point, *Hullock* was desired by the Court to point out the particular act of avoidance on which he meant to rely: to which he answered at first, that when the apprentice was before Mr. *Cookson* the magistrate, he was asked

(*a*) 9 *East*, 44. The general rule is laid down in *Harcourt* v. *Fox*, 1 *Show.* 520. there referred to.

(*b*) 1 *Anstr.* 256.

whether he would return into his master's service, which he refused to do; and this, *Hullock* contended, was an election by the apprentice to avoid the indenture, which avoidance he might originate before the magistrates, independently of the prior act of leaving his master, for which he was then questioned, and which he insisted upon his right to do by virtue of the agreement between him and his master indorsed upon the indenture. [Lord *Ellenborough*, C. J. asked how his refusal to return to his master when asked by the magistrates, which did not appear upon the face of the conviction, could be taken notice of by the Court as an original avoidance of the indenture? He observed that the case of *Crepps* v. *Durden* was only an authority for noticing what did appear upon the face of the conviction. The plaintiff might certainly shew that the magistrates had no jurisdiction, by any matter which appeared upon the face of the conviction.] In *Welch* v. *Nash* (*a*) it was said by *Lawrence*, J. that the justices cannot give themselves jurisdiction in a particular case by finding that as a fact, which is not the fact: and the Court there held that the action of trespass lay against the party who justified under an order of justices for diverting a highway. [*Bayley*, J. That was the case of an order of justices, and not of a conviction. The only act of avoidance relied on by the apprentice before the magistrates was the prior act of leaving his master's service, and neglecting to return when called upon; for which he was then questioned upon the complaint of his master, as stated in the conviction.] In this stage of the argument it seemed to be the opinion of the Court that *Hullock* could not rely on any act of avoidance

(*a*) 8 *East*, 394. 403.

which

1812.

GRAY *against* COOKSON and Another.

which did not appear upon the face of the conviction: upon which he said, that as he was concluded from adverting to any fact not stated in the conviction, he should contend that the plaintiff had not contracted any engagement to do away the effect of the conditional avoidance of the indenture, indorsed by mutual consent upon it; which made the fourth point reserved by the Court for consideration.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. This was a motion for a new trial, which was argued on the part of the defendant in support of the rule for the new trial, on *Saturday*. The defence made below to the action of trespass and false imprisonment, in which the plaintiff had recovered a verdict against the defendants for 120*l.*, was founded on a conviction of the plaintiff by the defendants, who in their character of aldermen are justices of peace for the town and county of *Newcastle-upon-Tyne*, and which conviction was given in evidence by them on the general issue, under the stat. 7 *Jac.* 1. *c.* 5. The conviction was founded upon the stat. 20 *G.* 2. *c.* 19. *s.* 4. empowering two or more justices, upon application or complaint *upon oath*, by any master or mistress against any *such* apprentice, (i. e. by reference to the 3d sect. such apprentice upon whose binding out no larger a sum than 5*l.* of lawful *British* money was paid; which was the case here, as nothing was taken with the apprentice,) touching or concerning any misdemeanor, miscarriage, or ill behaviour in such his or her service; (which oath such justices are thereby empowered to administer;) to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, &c.

1812.

GRAY *against* COOKSON and Another.

&c. for a time not exceeding one calendar month. The first question which was argued in this case was whether this provision of the stat. 20 *Geo.* 2. *c.* 19. was repealed by implication by the stat. 6 *Geo.* 3. *c.* 25. *s.* 1., which empowers the justices to oblige such apprentices, absenting themselves before the expiration of their apprenticeships, to serve for such time as they shall be absent, or to make satisfaction for their absence; or, in default of giving security for such satisfaction, to commit them. But we thought that the remedy given by this statute to the master for the loss of his apprentice's service was cumulative, and did not repeal the penal provision of the stat. 20 *G.* 2. *c.* 19. as applied to the misdemeanor itself. It was then contended that the conviction was bad, for want of any jurisdiction in the defendants, the convicting justices, on another ground, namely, that the indenture of apprenticeship was not warranted by the stat. 5 *Eliz.* *c.* 4., under which the binding took place, not being for a term of 7 years, as required by the 26th sect. of that statute, and all other indentures made otherwise than by the statute is limited, being declared by *s.* 41. of that statute to be "void in law to all intents and purposes." Perhaps, in order to raise this objection, it should properly have appeared on the face of the conviction, that the indenture was in fact made for a less term than 7 years: which no where appeared. It may however be inferred from the conduct of the parties; the one of whom insisted upon an avoidance of the indenture by the act of the parties; the other resisting such avoidance; thereby by their mutual consent admitting that the indenture was in its original frame a *voidable* instrument. And it was admitted by the plaintiff's counsel, on the authority of *The King* v. *The Inhabitants of St.*

1812.

GRAY *against* COOKSON and Another.

St. Nicholas in Ipswich, *Burr. S. C.* 91. and 2 *Str.* 1066., that the indenture was voidable only on this account, and not void. But it was further said by the plaintiff's counsel, that the indenture, so in its nature voidable, had been avoided by the plaintiff, the apprentice, before the conviction took place. And the fact of avoidance relied upon was an unstamped indorsement, signed by the plaintiff's master, but not sealed with his seal, made on the indenture of apprenticeship in the words following, that is to say, "I agree to cancel this indenture as "against *John Gray* and *Wm. Gray*, his son, (i. e. the "plaintiff,) provided the said *W. Gray makes no engage-* "*ment*, or *enters into any person's service in the town of* "Newcastle-upon-Tyne: in such case this indenture to "remain valid, and the present agreement to be void. "As witness my hand this 17th of *April* 1809. *Wm.* "*Spencer*," (i. e. the master.) It appears by the evidence stated on the face of the conviction, that *Wm. Gray* the apprentice had made an engagement in the town of *Newcastle-upon-Tyne*, by setting up the trade there of a woollen draper. And the question is whether the fact last stated amounts to a breach of that agreement on the part of the apprentice which is contained in the proviso, and on the breach of which the indenture was to remain valid, and the agreement for vacating the same was to become void: in other words, whether the making an engagement in the town of *Newcastle-upon-Tyne*, by setting up the trade there of a woollen draper, (it not appearing on the face of the conviction to have been the trade carried on by *Spencer* the master,) be a *making an engagement in the town of* Newcastle-upon-Tyne, within the meaning of this proviso. The stipulation against *making an engagement*, as coupled with the context of *entering*

1812.

GRAY *against* COOKSON and Another.

vering into any person's service in the town of *Newcastle-upon-Tyne*, in plain sense imports *an engagement of trade or business*, and seems to be equivalent to a stipulation, that he should neither engage in any business himself, nor be employed in any as servant to another within the town of *Newcastle-upon-Tyne*. And if that be, as we think it is, the true meaning of the stipulation contained in the proviso, then was the indenture unavoided at the time when the absence commenced, which is the subject of the conviction. And according to the case of *The King* v. *Evered*, K. B. *Trinity*, 17 *G.* 3., with a MS. note of which I have been favoured, indentures, though voidable, cannot be avoided by merely doing that which is forbidden by, and in violation of them as long as they continue at all in force. In that case two justices had committed one *Robert Collehall*, an apprentice, to *Shepton Mallett* bridewell, for running away from his master. Amongst other objections to the commitment was this, that the binding, being only for 6 years, was contrary to the stat. 5 *Eliz. c.* 4. *s.* 26, which required it to be for 7 years at least; and that by *s.* 41. all indentures otherwise made are void. That in the case of *The King* v. *The Inhabitants of St. Nicholas, Ipswich*, (already referred to,) Lord *Hardwicke* had expressly adjudged that such an indenture was voidable by the parties. That the apprentice had in this case done every thing in his power to avoid the indenture, having left his master, and said he would live no longer with him under his control; and that it would be extremely hard that he should be subjected to punishment only for using that liberty and exercising those rights which the law gave him. Lord *Mansfield*, C. J. It has been adjudged that an infant may bind himself for his own benefit, and it is settled in

the

1812.

GRAY *against* COOKSON and Another.

the case in *Strange*, that a binding for four years gives a settlement. *Aston*, Justice. *Supposing the indentures voidable, I cannot conceive that the apprentice's running away can avoid them.* Had he served regularly, and during such services declared his intention to depart, it might have been different. *Here he would make use of his offence in order to avoid the punishment that attends it; but it is too late to do it before a justice when charged with a crime. Willes* and *Ashhurst*, Justices, being of the same opinion on this ground, the rule for the apprentice's discharge would have been discharged, but for an objection to the frame of the commitment, which is collateral to the present question. Upon the authority of these cases, we are of opinion that the indenture of apprenticeship in this case was voidable only, and not void; and that it was not avoided by any act other than the act of delinquency on the part of the apprentice, which was the subject of the punishment in question; and which on the authority of the last-mentioned case, as well as the reason of the thing, is not available for the purpose of avoiding an indenture of apprenticeship. On these grounds, therefore, we are of opinion that the defendants, the justices, had by law the authority which they in fact exercised in this case, by a commitment under this conviction; and that they were therefore entitled to have been acquitted under the general issue pleaded by them.

Rule absolute for entering a nonsuit.

1812.

Monday, June 1st.

GRAHAM and Others *against* WADE.

THIS was an action brought to recover two and a half year's rent of certain buildings and land demised to the defendant in the year 1800, for a term of 58 years, at an annual rent of 80*l.* The demised premises consisted of one third part of a larger property, and at the date of the lease the entire premises were rated to all parochial and parliamentary taxes, and the taxes then payable for the whole were 60*l.*, of which the proportion for the demised premises was 20*l.* The lease contained a covenant for the payment by the defendant of 80*l.* yearly rent, "all taxes *thereon* being to him allowed. "And also (the defendant) shall and will, at his own "proper costs and charges, at all times during the con- "tinuance of this demise, pay and discharge all such *fur-* "*ther or additional rates and taxes* as shall or may be "assessed or imposed on the said hereby *demised premises*, "or on any *additional buildings or improvements*, which "he the said *J. Wade*, his executors, &c. shall or may "at any time during this demise erect, build, or make "on the premises hereby demised, or any part thereof." Also this covenant on the part of the lessors: "That "they will at all times during the continuance of this "demise bear and pay all manner of rates, taxes, and "assessments whatsoever, which shall or may be rated "or assessed on the said demised premises, or any part "thereof, or on the said *J. Wade*, his executors, &c. "*in respect of the said yearly rent of* 80*l.*; save and ex- "cept as to such *further or additional* taxes or assessments "as may be assessed or charged on the said hereby de-

Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes *thereon* being to him allowed; and also that he would pay all *further or additional* rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlords to pay all rates on the premises or on the tenant, *in respect of the said yearly rent of* 80*l.*, *except* such *further or additional* taxes as may be assessed on the demised premises; the tenant is bound to defray all increase of the old as well as any new rates beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent.

1812.

GRAHAM *against* WADE.

"mised premises." Since the year 1800 the amount of the rates and taxes payable in respect of these premises had considerably increased; and the question made at the trial, before the Lord Chief Baron, in *Surry*, was, whether the lessors, or the tenant, were to defray such increase. If the burden were to be borne by the tenant, he had not paid enough money into Court to cover the rent demanded: if by the lessors, they were not entitled to recover in this action.

The plaintiffs insisted that the increased rates and taxes were payable by the defendant under his covenant to discharge all *further and additional* rates and taxes, that is, in extension of the old or addition of new rates and taxes beyond the proportion of the 20*l.* rates and taxes assessed on the premises at the time of the demise, to which extent of 20*l.* only he was to be allowed to deduct rates and taxes out of the 80*l.* rent. The defendant contended that he was entitled to deduct out of the rent reserved the whole extension of the old rates and taxes existing at the time of the demise, though exceeding the 20*l.*, their amount at that time, and was only bound to pay any *new* rates or taxes which might be imposed upon the premises subsequently to that period. With this latter construction the Lord Chief Baron agreed; considering that, otherwise, this inequality would be produced in the situation of the parties, that the landlords would have all the benefit of a reduction in the old rates and taxes below the 20*l.*, while the burden of every increase of them would be thrown upon the tenant: and upon this consideration he nonsuited the plaintiffs.

A rule having been obtained in the last term for setting aside the nonsuit, it was now opposed by *Comyn*,

Comyn, and supported by *Garrow* and *Taddy*. By these latter it was said to have been the intention of the landlords to secure at all events a neat rent of not less than 60*l.*, that is allowing 20*l.* out of the 80*l.* reserved: but that according to the defendant's construction, if the taxes were to increase much beyond their then amount, the landlords, so far from receiving any thing, might have to pay something to their tenant for his occupation of the premises, which could never have been intended. It would also be an unequal and improbable arrangement that the landlords should pay the additional and further taxes for improvements of which the tenant was to have all the present benefit.

Lord ELLENBOROUGH, C. J. There is considerable obscurity in the wording of the deed; but the sense of it seems to be that the tenant covenanted to pay the 80*l.* yearly rent; and all taxes *thereon*, (that is, as the amount of the taxes then stood with reference to the rent reserved,) were to be allowed to him out of the 80*l.*; for it goes on to provide that the tenant shall pay all such *further or additional* rates and taxes as should be assessed on the demised premises; (that is, in their then condition,) as also on any additional buildings or improvements which the tenant might make. The landlords take a point at which they will be taxed; and let the taxes vary as they will beyond that point, they are only to be taxed according to the then ad valorem rate on the 80*l.* reserved rent. The remainder therefore beyond the 20*l.* rate on the premises is to be borne by the tenant.

GROSE, J. If a different construction were to prevail than that which my lord has stated, it might happen, if the

1812.

GRAHAM *against* WADE.

the rates were greatly increased, that the landlords would have nothing to receive from the tenant.

BAYLEY, J. (*a*). At the time of making this lease there were then rates and taxes to the amount of 20*l.* a-year assessed upon the premises worth 80*l.* a-year rent; and the landlords agreed that so long as the premises remained charged with that rate upon the 80*l.* a-year reserved rent, they would take their proportion of the burden, which then amounted to 20*l.*: but if that rate were to be increased, the tenant was to take that further and additional charge upon himself; the landlords still remaining liable for their proportion upon the 80*l.* as before. This appears to be the sense of the deed, though it is not so clearly expressed as it might have been. The tenant covenants to pay "all such *further or additional* rates and taxes, &c.: *further than or additional* to what but the existing amount of the rate on the estimated value of the premises as they then were at 80*l.* a-year rent? and also the further and additional rates on any additional buildings or improvements which the tenant might make. Then comes the landlords' covenant, that they would pay all rates, &c. on the premises or on the tenant, *in respect* of the yearly rent of 80*l.*, *except* such *further or additional* taxes as might be charged on the premises.

Rule absolute.

(*a*) *Le Blanc*, J. was absent on a special commission at *Lancaster*, and did not come into Court till the 5th of *June*.

1812.

BERTIE, Clerk, *against* BEAUMONT.

Monday, June 1st.

A servant put into the occupation of a cottage, *with less wages on that account*, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over the defendant's close to such cottage. And it matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent.

THIS was an action on the case for an obstruction to a private right of way, in which the plaintiff declared that at the time of the grievance on the 1st of *January* 1808 he was lawfully *possessed of* and *occupying* a certain *messuage* and two acres of land, with the appurtenances, in the parish of *Buckland*, in the county of *Surrey*; and then claimed, in respect of such his own occupation, a certain way *for himself and his servants* over a certain close of the defendant to the said messuage and land, &c.; and alleged an obstruction to the said way by the defendant. At the trial before the Lord Chief Baron, in *Surrey*, the plaintiff called a witness of the name of *Howell*, who stated himself to be a labourer in the plaintiff's service, and described the cottage, in respect of which the right of way was claimed, as divided into two parts; the one occupied by himself for the last 12 years; the other by a Mrs. *Dove*, who had occupied her portion for some years past at an annual rent of 50*s*. That *he paid no rent, but had less wages by* 5*l*. *a-year, on account of his paying no rent in money: and was only a weekly servant.* That one *Flint* who lived there before him, had paid 5*l*. a-year for it. That Mrs. *Dove* was tenant to a Mr. *Bish* before the plaintiff bought the cottage, and had continued to live in it since. It was thereupon objected that such occupation by *Howell* was not the occupation of the plaintiff, as alleged in the declaration, but in effect as a tenant: and his Lordship, considering the occupation of one portion of

1812.

BERTIE *against* BEAUMONT.

the cottage by Mrs. *Dove* to be clearly in the character of tenant; and that the occupation of the other part by *Howell* was in effect at a like rent of 5*l.*, though not actually paid in money as rent, but deducted out of his wages in lieu of rent, and therefore also in the character of tenant; which disproved the allegation that the messuage, &c. was in the occupation of the plaintiff at the time of the obstruction complained of; directed a nonsuit.

This was moved to be set aside by *Onslow*, Serjt. in the last term; and *Garrow*, *Lawes*, and *Nolan* now opposed the rule, and contended that *Howell*'s occupation of the moiety of the premises was as tenant in his own right, and not merely as a servant of the plaintiff, living in the plaintiff's house; such as is the occupation of a servant living in a lodge or park-gate house. It is true that *Howell* was a weekly servant or labourer of the plaintiff; but that was not incompatible with his occupation of this house as a tenant at the annual rent of 5*l.* and such in fact was the rent he paid for it, though to save the trouble of paying with one hand and receiving with the other, the sum of 5*l.* a-year was deducted out of his wages: but the mode of payment cannot alter the character of the payer. He cited *The King* v. *Matthews* (*a*). [Lord *Ellenborough*, C. J. There was no question made of this sort in that case. The argument here goes this length, that if the gate-keeper of a gentleman's park occupying the lodge, or a gardener an outhouse in the garden, hired as a yearly servant, were dismissed from

(*a*) *Cald.* 1.

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1812.

BERTIE *against* BEAUMONT.

the service for misconduct, they would still have a right to continue their occupation of the respective houses as tenants, till the tenancy were legally put an end to: for in all such cases they would have less wages on account of the convenience of their occupation.] In those cases the places occupied, though detached, are constituent parts of the master's domicile, which denotes their occupation to be entirely in the character of servants; but the messuage in question was no part of the plaintiff's domicile either in fact or in law, but both before and after the division of it had been occupied by tenants paying rent; and the other moiety of it was still occupied in that manner. They also suggested a doubt whether the occupation of a moiety only of the cottage, in respect of which the right of way was claimed, would satisfy the allegation in the declaration: but Lord *Ellenborough*, C. J. said that if the plaintiff occupied any part of that which gave him a right of way, the allegation was satisfied. Another doubt was suggested as to the fact, whether *Howell* had not occupied this part of the cottage and paid rent for it before he was taken into the plaintiff's service; which it was admitted would make a difference in the case: and the Court said that they would refer to the Lord Chief Baron to ascertain that fact; but it was at last agreed that no such evidence had been given.

Lord ELLENBOROUGH, C. J. I cannot consider that *Howell* stood in the relation of a tenant to the premises. The plaintiff put him in possession of them as his hired servant, and, as any person so circumstanced might be expected to do, he allowed the man less wages on account of the convenience to him of the occupation. If the man

1812.

BERTIE *against* BEAUMONT.

had been in the occupation of it before as a tenant paying rent, I should have thought that he still continued to occupy it in the same character, if no new agreement had been entered into in that respect when he was taken into the plaintiff's employ, and that he was only to pay his rent in service instead of money. But no rent had ever been paid by him before, nor did he ever stand in the relation of tenant to the plaintiff. Then if his occupation were merely that of a servant, it was in law the occupation of the master. This has been often held in cases of burglary, and was so held recently in the case of the *Whitehaven* bankers (*a*).

GROSE, J. This was the occupation of the plaintiff through the medium of his servant, which is in law the virtual occupation of the master and not of the servant.

BAYLEY, J. (*b*) agreed.

Rule absolute.

(*a*) *Rex* v. *Stock and Another*, 2 *Taunt.* 339.
(*b*) *Le Blanc*, J. was absent at *Lancaster*.

WAKE *against* TINKLER.

Tuesday, June 2d.

The defendant cannot plead by way of set-off a bond-debt of the plaintiff, assigned to the defendant by another, to whom and for whose use it was originally given.

THE plaintiff declared in assumpsit as indorsee of a promissory note made by the defendant; as also for goods sold and delivered, and upon the common money counts; and laid his damages at 160*l.* The defendant pleaded, first, non assumpsit. 2dly, That before the making of the promises stated in the declaration, to wit, on the 2d of *December* 1809, the plaintiff executed a bond

1812.

WAKE *against* TINKLER.

bond to one *W. Atkinson* in the penal sum of 260*l.*, conditioned for the payment of 130*l.* and interest on a day long since past; and that the bond being unsatisfied, *Atkinson*, before the commencement of this suit, to wit, on the 14th of *January* 1811, by a certain indenture under seal, made between him and the defendant, for certain good and valuable considerations therein mentioned, assigned, transferred, and set over to the defendant the said writing obligatory and all sums of money then due and owing, or to become due and owing by virtue thereof, and all the right, title, interest, property, and claim, &c. of him *Atkinson* of and in the same, &c.; and that the defendant has from thence hitherto remained and still is the assignee of the said writing obligatory, and entitled to all the money due thereon, &c.; and that the said writing obligatory is still in full force, &c.; and that at the time of commencing this suit there was and still is due and owing from the plaintiff, by virtue of the said writing obligatory so assigned, &c. to the defendant, more money than is due and owing from him to the plaintiff upon the supposed promises in the declaration mentioned, to wit, 200*l.*; which the defendant offered to set off and allow according to the statute, &c. To this there was a general demurrer.

Bayley, who was to have argued in support of the demurrer, was stopped by the Court.

Reader, contrà, relied on *Bottimly* v. *Brook* (*a*), and *Rudge* v. *Birch* (*b*), which he said were not overruled in

(*a*) *M.* 22 *G.* 3. *C. B.* cited in *Winch* v. *Keely*, 1 *Term Rep.* 621.

(*b*) *M.* 25 *G.* 3. *B. R.* cited *ib.* 622. But see *Lane* v. *Chandler*, in the Exchequer, cited in *Scholey* v. *Mearns*, 7 *East*, 153.

1812.

WAKE *against* TINKLER.

Winch v. *Keeley* (*a*), and other cases, where it had been held that the equitable assignment of a bond did not enable the assignee (*b*) to sue upon it, but that he must sue in the name of the assignor, though the latter had become bankrupt. In the two first of these cases the plaintiff having sued upon a bond executed to him as trustee for another, the defendant was allowed to plead a set-off against the cestuy que trust. This case, he admitted, went a step further, because here the bond-debt set off against the plaintiff came to the defendant by assignment from a third party, and was not originally executed for the defendant's use: but this, he contended, did not vary the case in principle from the prior decisions, as all the authorities agreed that a bond-debt was assignable in equity; and it did not follow that because the assignee could not sue for it at law, he could not set it off. But finding the Court decidedly against him, he forbore to press the argument further.

Lord ELLENBOROUGH, C. J. If you could shew that this case ranged itself within the decisions of *Bottimley* v. *Brooke*, and *Rudge* v. *Birch*, we would hear you further; but I am much more inclined to restrain than to extend the doctrine of those cases. At any rate, however, the present case goes further than either of them: for here the bond-debt was assigned to the defendant who now pleads it as a set-off; and it was not originally taken by the obligee in trust for the defendant.

GROSE, J. The plea is bad both in form and substance.

(*a*) 1 *Term Rep.* 619.; and vide *Howell* v. *M'Ivers*, 4 *Term Rep.* 690

(*b*) Vide *Carpenter* v. *Marnell*, 3 *Bos. & Pull.* 40.

BAYLEY,

1812.

WAKE *against* TINKLER.

BAYLEY, J. We have nothing to do in this place with any other than legal rights. And if we could notice such an equitable assignment, 200*l.* could not have been due at the time upon the principal sum of 130*l.* given on the 2d of *December* 1809.

Judgment for the Plaintiff.

DUDLOW *against* WATCHORN and THIBAULT.

Tuesday, June 2d.

THE plaintiff declared in scire facias against the defendants upon their recognizance, as bail of *G. T. Stretton*, and stated the judgment recovered by the plaintiff in this Court against the principal for 100*l.*, and the issuing of the two writs of scire facias to the sheriff of *Middlesex*, against the bail, with his returns of nihil. The defendants pleaded that the plaintiff ought not to have execution against them for the said 100*l.* by virtue of their recognizance, because after the recovery of the said judgment, and before the issuing of the first writ of scire facias, no writ of capias ad satisfaciendum upon the said judgment by the plaintiff against *Stretton* was *duly* sued out and returned, or filed in the said Court, &c. *according to the custom and practice of the said Court.* The plaintiff replied, that after the recovery of the said judgment against *Stretton*, and before the commencement of this suit, the plaintiff sued out a writ of capias ad satisfaciendum upon the said judgment against *Stretton, directed to the Sheriff of* Middlesex, *being the county in which the venue in the said action against* Stretton *was laid;* by which writ, &c.; (setting it out;) to which the said sheriff returned non est inventus; as by the said writ of capias ad satisfaciendum, and the return thereof, duly affiled and remaining

The practice of the Court is pleadable where the very merits of the case depend upon it; therefore where bail sued in scire facias upon their recognizance pleaded that no ca. sa. was *duly* sued, returned and filed against the principal according to the custom and practice of the Court: to which the plaintiff in reply shewed a writ of ca. sa. issued into *Middlesex*, it is no departure for the defendants to rejoin that the venue in the action against the principal was in *London*; for that sustains the plea.

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1812.

DUDLOW *against* WATCHORN.

ing of record in the said Court, &c. more fully appears. The defendants rejoined that *the venue in the said action against* Stretton *was laid in the city of* London, and not in *Middlesex*, as alleged in the replication. To this the plaintiff demurred, because the defendants in their rejoinder had departed from the supposed ground of defence stated in their plea; having in their plea alleged that no writ of capias ad satisfaciendum against the principal was sued out, returned, and filed according to the custom and practice of the Court; when by their rejoinder they admit that the ca. sa. in the replication mentioned was sued out, but rely on the supposed insufficiency of the said writ on account of its not having been issued and directed to the sheriff of the county in which the venue in the original action was laid: and if the defendants meant to avail themselves of such a defence, they should have stated it in their plea, and not in their rejoinder.

Marryatt, in support of the demurrer, admitted that the capias ad satisfaciendum stated in the replication was irregular, and such as the party might have moved the Court to set aside; but it did not follow that such an irregularity in practice could be relied on in pleading, either by stating, as in the plea, that no writ of ca. sa. was *duly* sued out, &c.; or, in answer to the replication, stating the issuing in fact of a writ of ca. sa., by shewing that such writ was irregularly issued, which is a departure from the plea; the one in effect affirming that no writ issued; the other admitting the issue of it in fact, but insisting on its irregularity in practice; which the Court will not take notice of in pleading. [Lord *Ellenborough*, C. J. The allegation in the plea is not that no writ

1812.

DUDLOW *against* WATCHORN.

writ of ca. sa. issued, but that no such writ *duly* issued.] The insertion of the word *duly* cannot enable the party to take advantage of an irregularity in the practice: if the writ itself had appeared to be bad on the face of it, objection might indeed have been taken to it; but the objection cannot be shewn by pleading other matter, as in the rejoinder. The case of *Praed* v. *The Duchess of Cumberland* (*a*) is in point to shew that the rejoinder is a departure from the plea. There, to debt on bond given to secure an annuity, the defendant pleaded that there was no such memorial of the bond as is required by the annuity act; the replication set forth a memorial, containing the names of the parties, &c. and the consideration for which the annuity was granted: the defendant rejoined, that the consideration was untruly stated in the memorial: and this, on demurrer, was held to be a departure. [*Bayley*, J. The ground on which that judgment was affirmed in error (*b*) was that the rejoinder introduced a fact which went to vitiate the deed granting the annuity, and not to shew that there was no memorial of the bond.] In *Elliot* v. *Lane* (*c*), which was in scire facias against bail, they pleaded that there was no ca. sa. against the principal. The plaintiff replied by shewing a ca. sa. and a return of non est inventus: the defendant rejoined that the ca. sa. did not lie four days in the office: and this, on demurrer, was held to be a departure; though by the practice of the Court the proceedings were on that account irregular, and might have been set aside. Here indeed the plea is that no ca. sa. was *duly* issued; but as the writ issued was legal on the face of it, the party might have been taken by

(*a*) 4 *Term Rep.* 585. (*b*) 2 *H. Blac.* 280—4. (*c*) 1 *Wils.* 334.

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1812.

DUDLOW *against* WATCHORN.

the sheriff by virtue of it. The case of *Fisher* v. *Pimbley* (*a*), which will be relied on contrà, turned upon this distinction. To an action on bond conditioned to perform an award, the defendant pleaded no award. The replication set out an award: the rejoinder stated the whole award, in which was recited the bond of submission, by which it appeared upon the face of the award that it was not warranted by the submission; and upon demurrer, the plea of no award was held to be sustained by such rejoinder.

Bowen, contrà, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The argument for the plaintiff would be irresistible, if the allegation had been, as in the case of *Elliot* v. *Lane*, that there was no writ of capias ad satisfaciendum issued against the principal; but here the allegation is that none was *duly* issued, which refers to the purpose for which it is professed to be issued, that of charging the bail, and is equivalent in effect to saying that no ca. sa. was sued out in the manner required by the practice of the Court to charge the bail. Then the rejoinder shewing in answer to the replication setting out a ca. sa. sued into *Middlesex*, that it was issued into a wrong county, and therefore could not operate to charge the bail, sustains the bar, that no ca. sa. had duly issued, instead of being a departure from it. We must take notice of the practice of the Court in a case like this, where it is the very subject-matter of dispute, and is put in issue. For what purpose is the issuing of the ca. sa. at all in this instance, except as matter of practice?

(*a*) 11 *East*, 188.

GROSE,

GROSE, J. agreed.

1812.

DUDLOW *against* WATCHORN.

BAYLEY, J. alleging *that no writ of capias ad satisfaciendum* was *duly* sued out and returned or filed, &c. means that it was not so sued, returned, and filed as to enable the plaintiff to charge the bail: and if it be shewn not to have issued according to the practice of the Court for that purpose, it is shewn not to have been duly issued, &c.

Judgment for the Defendants.

RUCKER and Others *against* HILLER.

Tuesday, June 2d.

TADDY moved to set aside a nonsuit in this case, and stated that the plaintiffs sued as indorsees of a bill of exchange against the drawer; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall* were nonsuited, for want of proving notice to the drawer of the non-acceptance of the bill by the drawee; it appearing that the drawer, though he had no effects in the drawee's hands at the time of drawing the bill, or when it was presented for acceptance, had yet drawn in expectation of funds in time to satisfy the bill; having shipped goods upon his own account, which were on their way to the drawee; but not having remitted to him the bills of lading or invoices; in consequence of which the drawee had returned the bill when presented to him, marked "*no effects.*" This notification, he contended, dispensed with the necessity of giving notice of the dishonour to the drawer; as it would have been nugatory to give notice. [*Reader*, who was counsel for the defendant at the trial, observed, that the fact had turned out to be that the drawee had refused

Where one draws a bill of exchange with a bonâ fide reasonable expectation of having assets in the hands of the drawee; as by having shipped goods on his own account which were on their way to the drawee, but without the bill of lading or invoice; the drawer is entitled to notice of the dishonour, though in fact the goods had not come to the hands of the drawee at the time when the bill was presented for acceptance, (or he had rejected them), and he returned it marked "*No effects.*"

1812.

RUCKER *against* HILLER.

refused to take the goods because they were damaged.]

Lord ELLENBOROUGH, C. J. Where the drawer draws his bill on the bonâ fide expectation of assets in the hands of the drawee to answer it, it would be carrying the case of *Bickerdike* v. *Bollman* (*a*) further than has ever been done, if he were not at all events entitled to notice of the dishonour. And I know the opinion of my Lord Chancellor to be that the doctrine of that case ought not to be pushed further. The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence to accept a bill, on which notice ought nevertheless to be given to the drawer: and if we were to extend the exception further, it would come at last to a general dispensation with notice of the dishonour in all cases where the drawee had not assets in hand at the very time of presenting the bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A bonâ fide reasonable expectation of assets in the hands of the drawee has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ultimately have failed to be realized. We held this opinion in the case of *Brown* v. *Maffy* (*b*) so lately as in last *Hilary* term; and cannot rescind our determinations. If we are still supposed to be in an error, the plaintiffs may bring another action, and tender a bill of exceptions.

(*a*) 1 *Term Rep.* 405. (*b*) 15 *East*, 216.

BAYLEY,

1812.

RUCKER *against* HILLER.

BAYLEY, J. The general rule requires notice of the dishonour to be given in due time to the drawer; and it lay upon the plaintiffs to shew that he could not possibly be injured by the want of it. It would be somewhat hard to call upon a drawer towards the end of six years after the bill given; and when he objected that he had no notice of the dishonour, to tell him that he had no effects in the drawee's hands at the time when the bill was presented; though they might have come to his hands the very day after, and the drawer might have settled his accounts with the drawee in the mean time upon the presumption that the bill was paid.

Per Curiam, Rule refused.

HUMPHRIES *against* CARVALHO.

Tuesday, June 2d.

THE plaintiff declared in assumpsit upon a special agreement made on (*Saturday*) the 21st of *Dec.* 1811, whereby he agreed to buy of the defendant, and the defendant sold to him, five casks of ipecacuanha at 13*s.* 6*d.* per pound, duty paid, the quality to be approved *on Monday then next*, paying for the same at a discount of 2*l.* 10*s.* per cent. in 14 days, or by bill at 4 months: and then alleged as a breach, that the defendant did not nor would, though requested on the *Monday* next, &c. the 23d of *December* 1811, produce the said

Where a broker sold on a *Saturday* certain goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality upon the *Monday* following, and sent the sold-note to the plaintiff on the *Saturday*, marked with the words "Quality to be approved on *Monday*;" but did not send the bought-note to the defendant then, because he had met and informed him of the contract on the same day; but the plaintiff not having signified his disapproval of the contract on the *Monday*, the broker sent the sold-note to the defendant on the *Friday*, with the words "Quality to be approved on *Monday*," struck out; which note the defendant returned within 24 hours, which by the custom of the trade signified his disaffirmance of the contract, as far as in him lay; yet held that at any rate the defendant could no longer disaffirm it after the *Monday*, when the plaintiff, not having signified his disapproval, was also bound by it.

casks,

1812.

HUMPHRIES *against* CARVALHO.

casks, &c. to the plaintiff for his approval and inspection as to quality, nor had the defendant yet delivered the said casks, &c.; but refused so to do. This was laid in various ways. At the trial before Lord *Ellenborough*, C. J. in *London*, the plaintiff called as a witness the broker who made the contract stated in the declaration between the parties; and he proved that he had agreed to purchase the five casks of ipecacuanha of the defendant for the plaintiff, at the price stated, on *Saturday* the 21st of *December* 1811, *subject to the plaintiff's approval of the quality on the* Monday *following*; and that the written note of the contract (commonly called the *bought-note*,) which he sent to the plaintiff on the *Saturday*, had these words on the face of it, "*quality to be approved on* Monday;" but no *sold-note* was sent on that day to the defendant, because the broker having met him on the same day, and told him that he had sold the ipecacuanha to the plaintiff, upon the terms stated, there was no occasion to send him a written note. The broker further proved that it was the custom of the trade for either party to return the contract, if he disapproved of it, within 24 hours. That the plaintiff not having returned the contract, nor signified any disapproval, the broker on *Friday* the 27th of *December* sent the sold-note to the defendant, with the words "*quality to be approved on* Monday" struck out; but the defendant returned it again immediately to the broker; upon which the broker went to the defendant on the same day, and insisted on his completing the contract; but he refused to do so, on account of its not having been sent to him on the *Monday*. On these facts his Lordship was of opinion that the defendant having agreed on the *Saturday* to the actual sale of the commodity, at the price stated, subject to

1812.

HUMPHRIES *against* CARVALHO.

to the plaintiff's approval of the quality on the *Monday*, and the plaintiff having accepted the contract on those terms, and not having returned it on the *Monday*, which was to be taken as an approval by him of the contract, both parties were bound by it; and under that direction the jury found a verdict for the plaintiff for 41*l.* 18*s.* 9*d.*

Scarlett now moved to set aside the verdict, and enter a nonsuit, or for a new trial, upon the ground that by the terms of the contract it was not enough that the plaintiff did not signify his dissent on the *Monday*; but not having then signified his approval, that the contract at least remained open until he had so done, and that in the mean time it was open to the other contracting party to disaffirm it; for every contract must in its nature be binding upon both parties, or open to be disaffirmed by each. As in *Cooke* v. *Oxley* (*a*), where the contract stated was that the defendant had proposed to the plaintiff to sell and deliver to him goods at a certain price; whereupon the plaintiff had desired the defendant to give him time till 4 o'clock of the same day to agree or dissent to the proposal; and thereupon the defendant proposed to the plaintiff to sell and deliver to him the goods upon those terms, if the plaintiff would agree to purchase them upon the terms, and would give the defendant notice thereof before 4 o'clock on that day: and then the plaintiff averred that he did agree and did give the required notice; but that the defendant on request did not deliver the goods. After verdict, the judgment was arrested, because the engagement was not mutually binding, and therefore nudum pactum.

(*a*) 3 *Term Rep.* 653.

Lord

1812.

HUMPHRIES *against* CARVALHO.

Lord ELLENBOROUGH, C. J. Here there was a sale-note sent, and an actual sale made by the defendant through the intervention of the broker, who communicated to the defendant on the same day that he had sold the goods; and it was not merely an offer to sell, as in that case; but the buyer had an option of renouncing the purchase on the *Monday*, which he did not do; and therefore it stood absolute.

GROSE, J. agreed.

BAYLEY, J. (*a*) The argument of the defendant is, that if a contract give an option to one of the parties to determine it, the law will give the like option to the other, until both are bound: but here neither of the parties had an option after the *Monday*; for the plaintiff not having renounced the contract within that time, must be taken to have approved of it. The question in *Cooke* v. *Oxley* arose upon the record; and a writ of error was afterwards brought upon the judgment of this Court; by which it appears that the objection made was that there was only a proposal of sale by the one party, and no allegation that the other party had acceded to the contract of sale.

Rule refused.

(*a*) *Le Blanc*, J. was absent at *Lancaster*.

1812.

LEWIS *against* TAYLOR.

Tuesday, June 2d.

An unqualified person going out with the qualified owner of greyhounds to course a hare, which was killed by the dogs, is not liable to the penalty of 5*l.* given by stat. 5 *Ann.* *c.* 14., for using a greyhound to kill game; although he took an active part in the sport by beating the bushes in order to find a hare, and took it up after it was killed.

THIS was an action of debt for penalties upon the game laws, tried at the last *Aylesbury* assizes before *Heath*, J. One count charged the defendant for the penalty of 5*l.*, upon the stat. 5 *Ann.* *c.* 14, for using a greyhound to kill game, not being qualified so to do. In support of which it was proved that *W. Goldby*, a farmer, who was by his own estate qualified to kill game, went out with greyhounds and other dogs to course and kill hares; that the defendant, who was not qualified, was in company with *Goldby* when he coursed and killed a hare; that the defendant took an active part in the sport, by beating the bushes in order to find a hare, and after the hare had been killed by a greyhound he alighted from his horse, went over a gate, and took up the hare. Upon this evidence the learned Judge was disposed to have nonsuited the plaintiff; but upon the authority of a case which was cited from *Burn's Justice* (*a*), as having been decided by Mr. Justice *Lawrence* at *Stafford* in 1804, in which an unqualified person partaking of the sport in company with one who was qualified was held not to be protected from the penalty of the statute; he suffered the plaintiff to take a verdict for the penalty of 5*l.*; with liberty to the defendant to move the Court to set it aside and enter a nonsuit, if the evidence did not support the charge.

Storks accordingly moved the Court for this purpose in the last term, and referred to the case of *The King* v.

(*a*) 2 Vol. of the last edit. See *Rex* v. *Taylor*, 15 *East*, 462.

1812.

LEWIS *against* TAYLOR.

Newman and Others (*a*), where, upon an information being moved for in this court against magistrates for having unduly convicted two unqualified persons in penalties upon the game-laws for using greyhounds to kill the game, though they offered to prove in their defence that they were out at the time with a qualified person, to whom the dogs belonged, Lord *Mansfield* expressed a strong opinion against the conduct of the magistrates, and only discharged the rule upon the terms of their paying the whole costs of the application. And in *Molton* v. *Rogers* (*b*), Lord *Ellenborough* also gave his opinion, that an unqualified person, joining in the sport with the owner of the dogs, who was qualified, was not liable to the penalty.

King now appeared to shew cause against the rule; but the Court expressing a decided opinion in favour of the defendant, he submitted to it without further discussion.

Lord ELLENBOROUGH, C. J. There is no evidence against this defendant upon the charge of using a greyhound for killing the game. The dogs belonged to a qualified person, who was out with them at the time. This is not a solitary amusement, and there is nothing to prevent a qualified person from taking others with him to aid him in the pursuit of the game; and he is the person using the dogs: the others have no other use of them than as his servants, and contemplating with him the pleasure of the chace. The learned Judge's first thoughts were best. If indeed an unqualified man

(*a*) *Hil.* 13 *Geo.* 3. *Loft's Rep.* 178.

(*b*) 4 *Esp. N. P. Cas.* 217. See *Rex* v. *Taylor*, 15 *East*, 462.

used

1812.

LEWIS *against* TAYLOR.

used his own greyhound for the purpose of sporting, though in the same company with a a qualified person, the case would admit of a different consideration: but there can be no ground for recovering the penalty against this defendant, who went out with the dogs of another who was qualified, and which other was using them himself: the defendant's picking up the hare after it was killed is no using of the dogs to kill the game. We had occasion to consider this question very lately in the case of a servant (*a*).

The other Judges agreed; and *Bayley*, J. noticed that the words of the statute of *Anne* are *keep or use* any greyhounds, &c.: but this defendant neither kept the dog, nor was it under his controul at the time it was used to kill the hare.

Rule absolute for entering a nonsuit.

(*a*) *Rex* v. *Taylor*, 15 *East*, 460.

NEALE *against* LEDGER.

Wednesday, *June* 3d.

SCARLETT moved to set aside an award made under these circumstances; each of the parties named an arbitrator, and the two so named were to choose a third, and the award was to be made by the three or any two of them. The two first named, having each proposed a third to the other, and neither of them liking to abandon his own, though not disapproving of the other's choice, agreed to toss up which of the two proposed should be

Where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three or any two of them, and each of the arbitrators proposed to the other a third, who was admitted to be a fit person; but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot; held that this was within their authority, and that an award made by such third arbitrator in conjunction with the one by whom he had been originally proposed, could not be impeached on that account.

1812.

NEALE *against* LEDGER.

nominated as the third arbitrator; which having been accordingly done, the award was afterwards made by such third arbitrator so appointed, in conjunction with the one by whom he had been originally proposed. But he contended that the two first named arbitrators had only authority to nominate a third, who was agreed upon by both: whereas this mode of appointment excluded the choice of one of them. And he cited *Harris* v. *Mitchell* (*a*), and *Hewitt* v. *Penny* (*b*), as directly in point, where the like mode of choosing an umpire by two arbitrators was holden to vitiate the umpirage.

Lord ELLENBOROUGH, C. J. This was not a tossing up between the two arbitrators which should nominate the third in exclusion of the other, which would have been bad, according to the cases cited; but after having each of them nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, agreed to submit their opinion to this mode of selection of one out of the two fit persons. I cannot see any objection to this. The mode of appointing twelve jurors, out of all those who are returned as fit to serve, is by lot.

Per Curiam, Rule refused.

(*a*) 2 *Vern.* 485. (*b*) *Sayer*, 99.

1812.

DOE, Lessee of MARY BRIERLY, *against* Sir CHARLES PALMER, Bart.

Wednesday, June 3d.

THIS was an ejectment for tithes of corn, grain, and hay, arising from 500 acres of land, which was brought upon two several demises of the lessor of the plaintiff; one upon the 12th of *October* 1810, and the other on the 12th of *October* 1811; and at the trial before *Heath*, J. at the last assizes at *Aylesbury*, it was admitted that the lessor of the plaintiff was the proprietor of the tithes, and that one *Thomas Botham* being her lessee by assignment under an agreement which only operated to create a tenancy from year to year, on the 1st of *March* 1810 assigned all his interest in the same to the defendant. That on the 22d of the same month the lessor of the plaintiff gave due notice to *Botham* to quit at the following *Old Michaelmas*, and also in *March* 1811 gave due notice to the defendant to quit at the following *Old Michaelmas*, all the great tithe of corn, grain, and hay, which he held or claimed to hold under her: and there was evidence to shew that the defendant was in possession of the tithes up to the 11th of *October* 1811; for he tendered rent for them up to that period; which tender was made after the day. The learned Judge was of opinion that the lessor of the plaintiff, by her notice to the defendant in *March* 1811 to quit at the following *Michaelmas*, had admitted him to be her tenant up to that time, and therefore could not recover upon the demise on the antecedent notice to *Botham* to quit at *Michaelmas* 1810. And there being no proof that the defendant had occupied or been in possession of the tithes after the expiration

In ejectment against a lessee of tithes for holding over, after the expiration of a notice to quit, some evidence must be given to shew that he did not mean to quit the possession: as by his declaration to that effect, or even his silence when questioned about it; or, as it seems, by shewing that the defendant, who claimed by assignment from the original lessee, had entered into the rule to defend as landlord. But a second notice to the defendant to quit at *Michaelmas* 1811, is a waver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at *Michaelmas* 1810.

1812.

DOE, Lessee of BRIERLY, *against* PALMER.

expiration of the notice to quit in 1811, he nonsuited the plaintiff; giving leave to move the Court to set aside the nonsuit, and to enter a verdict for the plaintiff, if the Court should be of opinion that it ought to be done.

Blossett, Serjt. moved accordingly in the last term, and stated the question ultimately made at the trial to be whether the subject-matter of the ejectment being *tithes*, all of which had been taken for that year before the expiration of the notice to quit, and those tithes being incapable from their nature of any actual and visible possession or pernancy except at one period of the year which was then passed, it was necessary to do more than to prove the actual taking of the tithes by the defendant at the proper season, so as to throw upon him the burthen of proving that he had disclaimed any right to take them in future before this ejectment was brought? The proof offered on the part of the lessor of the plaintiff was all, he contended, which the subject-matter was capable of affording till the succeeding harvest of 1812. 2 *Blac. Com. c.* 2. shews that the estate of the tithe-renter does not consist in the actual taking of the tithe, but in the right to take it, which is a continually subsisting right. There was nothing to mark a change of possession after the 11th of *October* 1811; nothing to shew that the defendant had afterwards renounced the possession which he held at that time, and therefore it must be presumed to have continued. In explanation of the fact of giving the second notice; which it was contended had done away the first, to which the same objection of non-possession did not apply; he said that Mrs. *Brierly* had then had no notice of the assignment, and had not then received any rent of the defendant to fix him with the possession.

Lord ELLENBOROUGH, C. J. then observed that as there was a clear possession by the defendant proved in *October* 1811, and he did not, when served with the notice to quit, renounce his possession, it seemed fair to presume that things continued in the same state, in the absence of all evidence of their having been altered. But the rule nisi was granted, as to both the demises, upon these questions; 1st, Whether the first notice to quit, after the expiration of which there was a clear possession by the defendant proved, was waved by the second; 2dly, Whether there was any such possession proved after the second notice to quit expired.

Sellon, Serjt. and *Best* now opposed the rule, and contended that the first notice to quit was waved by the second, as acknowledging the tenancy to be subsisting after the expiration of it. As to the second, that the action was brought prematurely, there being no one act or expression of the defendant's proved to shew that he held or meant to hold over; and the Court would not presume that he meant to be a trespasser.

Blossett, Serjt. in support of the rule argued upon the efficacy of the first notice, that it was not waved by the second, upon the authority of *Messenger* v. *Armstrong* (*a*): For here the circumstances explained the second notice; for after the first notice to *Botham*, the lessor had notice of the change of possession by the assignment to the defendant: but *Botham*'s tenancy having expired at *Michaelmas* 1810 could not be set up again by another notice to the defendant in *March* 1811. The giving a

(*a*) 1 *Term Rep.* 53.; and see *Doe* v. *Humphreys*, 2 *East*, 237.

person

1812.

DOE, Lessee of BRIERLY, *against* PALMER.

person notice to quit does not operate to create a tenancy in him. [Lord *Ellenborough*, C. J. It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy: and if the party obey the notice, how can he be deemed a trespasser, on account of a prior notice to another person? Nothing appears to shew that the defendant had knowledge of any other notice to quit than the one which was served upon him. *Bayley*, J. The second notice gives the defendant to understand that if he quit at *Michaelmas* 1811, he will not be considered as a trespasser.] As to the second notice, he argued that unless some act expressive of the defendant's intention to give up the tithes at *Old Michaelmas* 1811 were proved to have been done by him, it was impossible for the lessor of the tithes to know whether the defendant had given up the possession or not till the succeeding harvest; and no recovery could be had in ejectment till half a year more after that time. [*Bayley*, J. If a demand were made of the lessee after the expiration of the notice whether he meant to give up the tithes, and he were silent, that would be evidence for the jury that he did not mean to give them up. Lord *Ellenborough*, C. J. There could be no delivery up in fact of the subject-matter, but at most only a symbolical delivery, or a declaration of the lessee to that effect. Where the lessee's intention however is doubtful, the lessor always has it in his power to bring it to the test, by demanding of the other whether he means to give them up: and if he be silent, the inference would be that he did not mean to do so.] He then observed that in fact the defendant was not the tenant in possession who was served with the notice of declaration, but had come in, upon the rule of court, to defend as landlord. The notice of declaration

was

was in fact served upon the farmers of the defendant's own estate His defending therefore under that rule was evidence of his claiming to continue in possession.

Lord ELLENBOROUGH, C. J. The rule of court by which the defendant was permitted to come in and defend, not having been given in evidence at the trial, could not be taken notice of; and as it is not to be presumed that the defendant meant to hold over without some evidence of it, we cannot set aside the nonsuit except upon payment of costs. But I am inclined to think that the plaintiff's case would have been made out, if that rule had been proved.

BAYLEY, J. It would be better for the plaintiff to have the rule of Court ready to be proved at the next trial, if he should be obliged to go to trial again; as that may be evidence that the defendant considered his right to the tithes as continuing after the expiration of the notice to quit. But it would be as well if in the mean time the plaintiff applied to the defendant to know if he meant to hold over.

Per Curiam, Rule absolute on payment of costs.

1812.

Friday, June 5th.

MITCHELL *against* STAVELEY.

To debt on bond, conditioned to perform an award, under a reference of *all matters in difference between the parties*, it is a good plea in bar that at the time of the submission certain negotiable bills of exchange, drawn by the defendant and accepted by the plaintiff, were then outstanding, and that an indemnity of the defendant against such bills was a matter in difference between the parties, which was notified to the arbitrators before the award made, and that they made no award concerning it: and that some of the bills had not been paid by the plaintiff, and the defendant was still liable to the holders: though it appeared by the award set forth that the arbitrators stated therein that they had heard the allegations of the parties, and examined all the accounts, bills of exchange, &c. and all other evidence and proofs produced to them touching the matters in difference, and awarded of and concerning the same, that the defendant should pay to the plaintiff 1500*l.* in full of all claims and demands upon him, &c.; and so proceeded to award concerning other specific matters; but without mentioning such outstanding bills, or any indemnity concerning the same.

THE plaintiff declared in debt on a bond, dated 10th of *July* 1804, in the penal sum of 4000*l.*; which bond was alleged in one count to be lost by accident, and in another, to be in the possession of the defendant, and therefore could not be proffered to the Court by the plaintiff; and also for goods sold and delivered, work and labour, and upon the money counts. The defendant took several issues to the country, and then pleaded,

4thly, As to the first count, that the bond was given with a condition, purporting that *all matters in difference* between the parties were referred to the award of *W. C.* and *J. C.*, arbitrators; and to be void if the defendant performed the award of the said arbitrators, *of and concerning the premises;* so as it was made in writing and ready to be delivered to the parties on or before the 10th of *August* 1804: and then the defendant averred that no award was made *of and concerning the premises* aforesaid, according to the said condition. To this plea the plaintiff replied an award made on the 14th of *July* 1804, in manner and form as set forth in the 5th plea; of which the defendant then had notice; and that on the 1st of *November* 1808 an instalment of 50*l.*, part of the 1500*l.* awarded, became due and in arrear from the defendant to the plaintiff; the instalments before then due having been paid and satisfied to the plaintiff by the defendant.

And

And then he alleged a breach in the nonpayment of that instalment. To this the defendant demurred generally.

5th plea.

5thly, to the same count, that the bond was made subject to the same conditions as before set forth, and that the arbitrators, on the 14th of *July* 1804, made their award in writing, &c. purporting that they had been attended by the said parties, and heard their allegations, and carefully examined *all the accounts, books, notes, bills of exchange, deeds, and other papers and writings, and all other evidence and proofs produced* to them the arbitrators, *touching the matters in difference;* and having duly considered the same, did award and determine *of and concerning the same*, 1st, that the defendant should pay to the plaintiff 1500*l.* in full of all claims and demands upon him, on any account whatsoever, up to the date of the said writing obligatory, to be paid by instalments of 50*l.* every three months; the first payment to be made on the 1st of *November* then next, &c.; until the whole 1500*l* should be fully paid: 2dly, that the defendant should on the same 1st of *November*, pay to the plaintiff the costs then incurred in an action then lately commenced by him in *B. R.* against the defendant, to be settled as between party and party by Mr. *Ramsden*, attorney in *Halifax;* 3dly, that a moiety of all debts and sums of money owing to the then late partnership between the plaintiff and defendant should be recovered, got in, or received by the plaintiff, by virtue of the assignment thereof, some time then ago executed by the defendant to him, or otherwise howsoever; (as so much thereof as should be so recovered or received before the said 1500*l.* should be paid by the instalments aforesaid, after deducting one-half of the expenses attending the recovery thereof,) be taken in part-payment of the said 1500*l.*;

1812.

MITCHELL *against* STAVELEY.

1500*l.*; and as to such parts of the said debts as should be recovered or received by the plaintiff after the 1500*l.* should have been paid to him as aforesaid, the plaintiff should duly account for and pay one moiety thereof to the defendant on demand, after deducting half the expenses as aforesaid: 4thly, that the defendant should receive to his own use all dividends and sums of money which should be paid in respect of a debt of 622*l.* 16*s.* 6*d.* then already proved by the plaintiff under a commission of bankrupt against the defendant, and that the plaintiff should execute an assignment thereof to the defendant on demand; and should also *indemnify* him against all claims and demands not exceeding 160*l.*, which Messrs. *Ingrams* might have against them jointly on their late co-partnership account: and, 5thly, that as soon as the 1500*l.* should have been fully paid, and the debts owing to the partnership got and received or liquidated and settled, and one moiety thereof accounted for and paid by the plaintiff to the defendant, subject as aforesaid, and the said assignment of the dividends on the debt of 622*l.* 16*s.* 6*d.* executed by the plaintiff as aforesaid, the parties should execute mutual releases to each other of all claims and demands up to the date of the writing obligatory. And then the defendant averred that no other award was at any time made or published in anywise relating to the premises so submitted as aforesaid: *and that there had not been nor were at the time of making such writing obligatory any sum of money due or owing from the defendant to the plaintiff, or any claims or demands alleged or pretended by the plaintiff against the defendant on any account whatsoever to the extent of the said* 1500*l.*, *but to a much less extent only, that is, to the extent of* 1023*l.* 13*s.* *and no more.* To this plea the plaintiff demurred

murred, and stated for special cause of demurrer, that the defendant had therein pleaded matter which it was not competent to plead, inasmuch as, if it existed, *it was matter of application to the Court to set aside the award, and not matter of plea.*

6thly, The defendant pleaded that the writing obligatory was made conditioned as before mentioned, and the award before stated was made, and no other, and that the said 1500*l.* thereby awarded was so awarded to the plaintiff not only for and in respect of matters in difference between him and the defendant before and at the time of making the same writing obligatory, but also *for and in respect of other claims and demands of the plaintiff against the defendant, which did not exist at that time, but arose afterwards, by reason of the plaintiff's having before then accepted certain negotiable bills of exchange drawn upon him by and for the accommodation of the defendant, and which bills at the time of making the writing obligatory had been negotiated, but remained unpaid.* The plaintiff also demurred to this plea, for the same cause as was stated to the 5th plea. 6th plea.

7thly, The defendant pleaded the condition of the bond and the making of the award, as in the last plea, and that no other award or umpirage was made. And further, that at the time of making the same writing obligatory certain negotiable bills of exchange drawn by the defendant upon and accepted by the plaintiff, and before that time negotiated, were and remained unpaid in the hands of the holders thereof respectively, *and that the indemnity or security of the defendant as the drawer of such bills from being called upon for payment of the same by the respective holders thereof, was at the time of making such writing obligatory a matter in difference and a controversy* 7th plea.

between

1812.

MITCHELL *against* STAVELEY.

between the plaintiff and defendant: and that the said arbitrators *before the making of their said award*, viz. on the 10th of *June* 1805, *had notice thereof*, but *have not made or given any award or direction touching or concerning the matter and controversy last aforesaid.* And that divers of the said bills of exchange to a large amount in the whole have not yet been paid by the plaintiff, *and that the defendant hath been and still is liable to pay to the several holders of such bills the sums of money respectively mentioned in those bills.* To this the plaintiff demurred generally.

8th plea. The 8th plea, after stating, as before, the condition of the bond and the award made, and further that the action mentioned in the award as then before commenced by the plaintiff against the defendant in *B. R.* was pending, and that the costs then incurred were a matter in difference between the parties, alleged that the arbitrators, before the making of their said award, had notice thereof, but had not by their award ascertained or determined the amount of the costs, *or awarded the same to be taxed by any proper officer* in that behalf, and have attempted to delegate their authority respecting such costs to Mr. *Ramsden*, in the award named, who is not any officer for the taxation of costs. To this the plaintiff replied, that after the making of the award, to wit, on the 1st of *October* 1804, Mr. *Ramsden*, in the award mentioned, took upon him to settle, and did settle the costs therein mentioned at 50*l.*; of which the defendant then had notice; and that the defendant afterwards paid that sum to the plaintiff for such costs, which the plaintiff accepted in full satisfaction and discharge thereof; and that afterwards, on the 1st of *November* 1804, and on divers days between that and 1st of *November* 1808, the

1812.

MITCHELL against STAVELEY.

the defendant paid to the plaintiff divers instalments due by virtue of such award; *and as well the defendant as the plaintiff assented to and then ratified and confirmed the said award;* and then he alleged a breach of the condition of the bond, in the non-payment of the instalment due on the 1st of *November*, 1808. To this the defendant demurred generally.

9th plea.

The 9th plea, stating the condition of the bond and the award made, as before stated in the 5th plea, alleged that the defendant (before the making of that award, which was on the 14th of *July* 1804,) on the 8th of *March* 1803, being a trader, and indebted to *J. H.* in 100*l.* and upwards, became bankrupt, and a commission issued against him on the 9th of *March* 1802, under which he was declared a bankrupt, and obtained his certificate on the 1st of *August* 1804 (after the award). And that *the claims and demands of the plaintiff upon the defendant, for which the award was so made, accrued to the plaintiff before the defendant so became bankrupt.* The plaintiff replied, that though a small part of his several claims and demands on the defendant submitted to the arbitrators by the bond, &c., to wit, 50*l.*, part thereof, accrued to the plaintiff before the defendant became bankrupt as aforesaid, yet that the residue of such claims and demands accrued to the plaintiff after the defendant's bankruptcy, and that the said bond of submission was sealed and delivered, *and the award made, after the defendant became bankrupt;* and that after such award, to wit, on the 1st of *November* 1804, the defendant paid to the plaintiff divers instalments due under and by virtue of the said award; and *that as well the defendant as the plaintiff assented to and then ratified and confirmed the said award:*

and

1812.

MITCHELL *against* STAVELEY.

and then he alleged a breach as before. To this the defendant demurred generally.

Bowen for the plaintiff, contended, as to the 5th, 6th, and 7th pleas, that they only contained matters for application to the summary jurisdiction of the Court, to set aside the award, and not matters which were pleadable: and referred to *Veale* v. *Warner* (*a*), *Wills* v. *Maccarmick* (*b*), and *Braddick* v. *Thompson* (*c*), to shew that no objection can be taken to an award in pleading, which does not appear on the face of it; and that partiality or improper conduct in the arbitrators can neither be given in evidence on the general plea of nil debet, nor be pleaded specially to an action of debt on the submission bond. The 5th plea states that 1023*l.* 13*s.* and no more, was due to the plaintiff, in contradiction to the award, which states that 1500*l.* was due. This in effect is to impute to the arbitrators misconduct or neglect, either of which was a proper subject for an application to the Court to set aside the award, which the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 2. requires to be made before the last day of the next term after the award made (*d*). [*Bayley*, J. Such an application can only be made when the submission to the award is made by a rule of Court: for otherwise, the party must proceed as at common law.] The reason why it was not done in this case was because the submission was lost by an accident. But how can the Court see that the arbitrators have exceeded their jurisdiction? The award is equivalent to a verdict and judgment for

(*a*) 1 *Saund.* 323. 326. (*b*) 2 *Wils.* 148. (*c*) 8 *East*, 344.

(*d*) *Zachary* v. *Shepherd*, 2 *Term Rep.* 781. was referred to; and see *Lowndes* v. *Lowndes*, 1 *East*, 276.

1500*l.*

1500*l.*, after which a defendant could not be permitted to dispute the items on which it was founded. The 6th plea states that some of the items composing the sum total awarded arose after the submission upon certain outstanding bills before accepted by the plaintiff for the accommodation of the defendant, but not then paid: but that was a subject for the equitable jurisdiction of the Court, and was brought before the arbitrators. The 7th plea is that the award does not indemnify the defendant against the outstanding bills for which he was liable: but that also was a proper subject for the equitable jurisdiction of the Court; for if the question were brought before the notice of the arbitrators, and they thought that no indemnity should be given by the plaintiff, their judgment would conclude it; as in *Birks* v. *Tippel* (*a*): and by *Randall* v. *Randall* (*b*) a general award, founded on a general reference of all matters in difference, without noticing all the particular items, may be enforced by attachment, unless the particular matter omitted appeared upon the face of the submission: but even in the latter case, an award upon all the points submitted may be dispensed with; as in *Simmonds* v. *Swaine* (*c*); if such omission do not affect the justice of the award upon the other points decided; except where the submission is with a clause *ita quod fiat de premissis*. In the last case *Chambre*, J. referred to *Payne* v. *Cook* in the Exchequer-chamber, where the doctrine was laid down, that as there was no clause in the submission that the award should be made on all the points submitted, if the matters omitted were not necessarily dependent on and connected with the other points, the

(*a*) 1 *Saund.* 33. (*b*) 7 *East*, 81. (*c*) 1 *Taunt.* 549.

1812.

MITCHELL against STAVELEY.

award was good. Now here it does not appear that the arbitrators did not notice the defendant's claim to an indemnity: but if they had not, it is not available by way of plea, but was only ground of application to the Court, not going to the entire justice of the award. The negotiable bills were accepted by the plaintiff; he therefore was the person first liable to the holders, and consequently, as between these parties, was entitled to be credited with the amount in account.

Lord ELLENBOROUGH, C. J. At any rate this was a matter in difference between the parties, which was submitted to the arbitrators under the reference of all matters in difference. And without saying at present how far the award is good upon the other matters which they have decided, it is sufficient to say that the 7th plea states that a certain other matter not noticed in the award was in difference between them, of which notice was given to the arbitrators, but that their award is altogether silent upon the subject. They were called upon to act on a matter in controversy, and have not acted. The award therefore is not only not final, but there is no award at all respecting one of the matters in difference referred, which is stated to have been notified to the arbitrators. It was a condition of the submission that they were to award upon all matters in difference between the parties. That is an important difficulty against which the plaintiff has to contend, and it would be to no purpose to amend the pleadings.

LE BLANC, J. The submission was of all matters in difference; and it is stated that the indemnity of the defendant as a drawer of certain bills accepted by the plaintiff,

plaintiff, and then outstanding, was at the time of making the submission a matter in difference between these parties, and that it was notified to the arbitrators; but there is nothing stated in the award respecting the outstanding bills, or any indemnity against them.

1812.

MITCHELL *against* STAVELEY.

Per Curiam, Judgment for the Defendant on the 7th Plea.

RIGHT, Lessee of GEORGE DAY, *against* JOAN DAY.

Friday, June 5th.

THIS ejectment, which was brought to recover certain lands called *West Sugworthy* in the parish of *Roborough* in the county of *Devon*, was tried at the last assizes at *Exeter* before *Graham*, B. when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

Under a devise to the son of the testator of the residue of the testator's estates, &c.; but in case he should die under 21, *or* (which is to be read as *and*) should leave no issue male or female, then to the testator's daughter surviving, and her heirs male or female; but in case his son and daughter should both die, *leaving no issue*, then to his cousin and his heirs; the son takes a fee with an executory devise to the daughter, upon the event of his dying under 21, *and* without leaving issue; with another executory devise over.

Thomas Day, being seised in fee of the premises in question, by his will duly executed and attested, after devising to his wife *Elizabeth Day* an annuity for six years, and after the expiration thereof, an estate called *Fillafin* for her life, and giving pecuniary legacies to his daughter *Frances Day*, and other persons severally, devised as follows: "All the rest, residue, and remainder of my estates, lands, goods, and chattels, I give and bequeath unto my son *George Day*, whom I make my sole executor. But in case my son shall die under the age of 21 years, *or* shall leave no issue male or female, then I give all my said lands and estates unto my said daughter *Frances Day*, she being surviving, and her heirs male or female. But in case my son and daughter shall both happen to die, *leaving no issue*, then I give and bequeath my lands and

1812.

RIGHT, Lessee of DAY, *against* DAY.

estates unto my cousin *George Day* and heirs, paying unto my wife 20*l.* yearly out of the said estates: but then she is to relinquish her right to *Fillafin*. But then it is my will, and I bind the said *George Day*, to pay unto my cousins *J. D.*, *F. B.*, and *H. C.*, and my daughter-in-law *M. H.* 50*l.* each, to be paid them by the said *George Day* in one year after he shall inherit or occupy the said estates and lands." Upon the death of *Thomas Day* the testator, *George Day* his son entered and became possessed of the premises; and having attained his age of 21 years, and having lawful issue, namely, the said *George Day*, the lessor of the plaintiff, and other children, by his will duly executed and attested, devised to his wife *Joan Day* (the defendant) all his messuage or tenement, with the appurtenances, called *West Sugworthy*, for her life; she keeping the premises in good repair. *Geo. Day*, the son, afterwards died, leaving *Geo. Day*, the lessor of the plaintiff, his eldest son and heir at law, and other lawful issue, and the defendant *Joan Day* his widow; which latter after his death was possessed of the premises. If the lessor of the plaintiff were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Bayley argued for the lessor of the plaintiff, that *George Day*, the son of the devisor, took only an estate tail, and not the fee. He admitted that the words first used were large enough to pass the fee; but he contended that the subsequent words, "But in case my son and daughter shall both happen to die, *leaving* no issue," then over to the cousin, restrained it to an estate tail in the son.

W. Courtenay for the defendant, contended that *George Day*, the son, took in fee, with an executory devise over,

to

to take effect in the event of his dying under 21, *and* without issue. But the Court thought the case too clear for argument.

Lord ELLENBOROUGH, C. J. A multitude of decisions, such as *Fairfield* v. *Morgan* (*a*), *Eastman* v. *Baker* (*b*), and *Denn* v. *Kemeys* (*c*), following *Sowell* v. *Garrett*, which is reported in *Moore*, 422. 2 *Rol. Rep.* 282. and other books, have established that the disjunction word *or*, in a devise of this kind, is to be construed as the copulative *and*, to avoid the mischief which would otherwise happen of carrying over the estate if the first devisee died under the age of 21, though he had left issue; when it was the apparent intention of the devisor that both events should happen, the dying under 21, *and* without issue, before the estate should go over. Then at the age of 21 the testator contemplated that the devisee would take the fee, and consequently the power of disposing of the estate in what way he pleased; the testator leaving it to the devisee, after his attaining 21, to make what provision he pleased for his issue, if he had any: but only providing in the event of the devisee dying before 21, that the estate should not go over from the issue.

GROSE, J. agreed.

LE BLANC, J. If the question had rested merely on the operation of the words relied on by the plaintiff's counsel, it would have been very different; but here the residue of the testator's estates, &c. is first given to the son; but in case he should die under 21, *or* (which the

(*a*) 2 *New Rep.* 38. (*b*) 1 *Taunt.* 174. (*c*) 9 *East*, 366.

courts

1812.

RIGHT, Lessee of DAY, *against* DAY.

courts have read *and*) should leave no issue, then to the daughter surviving and her heirs male or female. He thereby provides that the estates should not go over to the daughter but in the event of the son dying under 21, and without leaving issue: and then he makes provision in case both his son and daughter should die leaving no issue, that the estates should go over to his cousin; that is, if the son died under 21 and without issue, and if the daughter died without issue. The event therefore on which the estate was to go over did not happen.

BAYLEY, J. The words, dying without issue, as they occur in this will, do not mean a dying without issue indefinitely, but under such special circumstances as would enable the estates to go over to the daughter after the son's death; that is, in case he died under 21 and without issue; and to the cousin after the death of the daughter without issue.

Postea to the Defendant.

BORASTON *against* GREEN.

Friday, June 5th.

Trover does not lie by an in-coming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right after the end of the term at *Lady-day* "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, *so as the same exceeded not 29 acres, and was summer fallowed and well manured*, &c. and at harvest to reap and carry away the same:" for neither is trover the proper action to try a question as to the right to the land, nor does the proper remedy for any mismanagement of the land during the former term appertain to the in-coming tenant, but to the landlord. And however the in-coming tenant might maintain an action against the off-going tenant for a breach of the custom of husbandry in the place, in not leaving one-third of the away-going crop of wheat sown upon a clover brush; yet the custom of the country could have no place where the off-going tenant held under a lease expressly making a different provision in respect of the away-going crop, or where he continued to hold over after the expiration of such a lease without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms.

THIS was an action on the case, in which the first count stated that the defendant, on the 1st of *January* 1806, and from thence till *Lady-day* 1810, was the tenant and occupier of a certain farm and lands, &c. in the parish of *Stoke St. Milborough*, in the county of *Salop*, which he held as tenant from year to year for so long as he and his landlord pleased; such year ending at *Lady-day*. That the defendant quitted at *Lady-day* 1810 the said farm and lands, &c., and ceased to be tenant thereof; and that the plaintiff was the next succeeding and in-coming tenant and occupier of the said farm, &c. That long before and at the time when the defendant entered upon and quitted the said farm, &c. there was and still is an ancient custom within the said parish, that every tenant of any farm and lands within the same parish holding from year to year, such year ending at *Lady-day*, and who hath sown any of his lands with wheat on a clover brush at the wheat seedness next before the expiration of his tenancy, and hath afterwards reaped the wheat growing on such lands as and for a part of his away-going crop, hath been used and accustomed and of right ought to have and take to his own

use

1812.

BORASTON *against* GREEN.

use two-third parts only of such wheat, and to leave the other third for the in-coming tenant. And then the plaintiff averred that the defendant, at the wheat seedness next before the expiration of his said tenancy, and of his so quitting the said farm, &c. sowed 50 acres of the said land with wheat on a clover brush; and that afterwards, and whilst the plaintiff was the tenant of the said farm, &c. to wit, on the 1st of *August* 1810, the defendant cut down and reaped the wheat growing on the said lands so sown by him; but did not leave one-third part of the wheat for the plaintiff as such in-coming tenant, but took and carried away the whole, and converted the same to his own use, contrary to the custom. There were other counts laying the like custom in case of tenancies for term of years ending at *Lady-day:* and there was another count in *trover* for so many sheaves of wheat in the straw, and so many quarters of wheat and loads of straw: to all which the general issue was pleaded.

At the trial before Mr. Serjt. *Marshall*, who sat for Mr. Justice *Lawrence*, at *Shrewsbury*, it was proved on the part of the plaintiff, that he entered upon the farm at *Lady-day* 1810, at which time there was a field of five acres in turnips, and 16 acres of clover brush. The defendant was then sowing wheat for the off-going crop on all the fallows, which were eight or 10 acres, but only on six acres of the clover brush, leaving the other 10 acres unsown. That according to good husbandry the turnips ought to have been eaten off by stock during the winter, which would have fitted the land for *Lent* corn in the spring. That *Lent* corn, and not wheat, ought, according to good husbandry, to have been sown after the turnips, and was much better for the in-coming tenant; and that the sowing with wheat was bad husbandry. That

1812.

BORASTON *against* GREEN.

That the best of the turnips were drawn and carried into an adjoining piece, and were consumed there by the cattle; the rest was eaten off. That the land had been fallowed for turnips, and ploughed and manured several times in the summer of 1809. It was admitted on the part of the defendant that he had reaped and carried away all the wheat sown on the fallow, on the clover, and on the turnips. It was also proved to be the custom that the in-coming tenant should have a third of all wheat sown upon a clover brush; which was explained to be what was sown at one ploughing on clover; and that it was so called whether eaten or mown off; though eating off enriched and hardened a light soil, as this was, which made it hold the wheat better; while mowing the land impoverished it.

On the part of the defendant, a lease was proved, by which this farm was demised by Mr. *Hall* the landlord to one *Hudson* for 21 years from the 5th of *April* 1782; in which was a covenant by *Hudson not* at any time during the term *to sow* any part of the lands demised *upon the Brush*, but at all times to manage and manure them in a good and husbandlike manner, and not wilfully to impoverish and make barren the same. And a covenant by *Hall*, that it should be lawful for *Hudson* to make use of convenient pieces of land belonging to the said premises until *May-day* next after the end of the said term for his and their cattle to eat and spend all such hay, straw, or fodder, as should then be or remain upon the demised premises; and until harvest then next following, to fence in and take care of and preserve *all such hard corn as shall be sown* on the said premises the winter seedness precedent thereto, *so as* the same *exceeded not* 29 *acres* in the whole, and *be summer fallowed*, and *well manured with muck*

1812.

BORASTON *against* GREEN.

muck or lime; and at such harvest to reap, order, carry, and place such hard corn in a convenient part of the barns belonging to the said demised premises, and there to thresh out, &c. and carry away the same before corn harvest then next following, leaving the straw thereof upon the premises for the use of the said *Hall*, his heirs and assigns. That *Hudson* had assigned the remainder of his lease after some years to the defendant, who continued to hold after the expiration of it in 1803, the same as before, till *Lady-day* 1810, when he gave it up.

It was thereupon contended for the defendant, that the custom could not apply to this case, where the holding was upon a special contract, at first under the indenture, and afterwards by an implied agreement under the same terms, by which the defendant had a right to take hard corn sown, not exceeding 29 acres, as an away-going crop; and therefore that this action could not be sustained. To this it was answered for the plaintiff, that the defendant whose term was now expired had no right to take any part of the produce grown upon the land afterwards, unless by custom or special agreement: that if he disclaimed to be bound by the custom, he must make title to the corn under the terms and conditions of the covenant, which he could only do by shewing that the land so cropped (not exceeding 29 acres) had been *summer fallowed, and well manured:* whereas the corn taken by him was proved to have been sown partly upon a clover brush, and partly upon turnip land ploughed and sown contrary to good husbandry and the terms of the covenant. In reply, it was contended for the defendant that he was at all events entitled to the corn; and if improperly raised, he was answerable for it to his landlord; but that no question could be made of that between him and the in-coming tenant.

1812.

BORASTON against GREEN.

tenant. The cause however was permitted to proceed; reserving leave to the defendant to move to enter a nonsuit. The defendant then went into evidence to negative the custom, which is not material to be stated: and finally two questions were left to the jury: 1st, as to the existence of any custom, as stated in the special counts of the declaration; and if they found the custom, then they were directed to find a verdict for the plaintiff, and give him the value of one-third of the wheat sown upon the clover brush, which was 21*l.* But if they thought the custom not proved, then they were to find for the defendant on the four special counts. 2dly, Whether the sowing of wheat on turnip land at the season and in the manner described by the plaintiff's witnesses was contrary to good husbandry: and if so, then they were instructed that by the construction of the covenant the defendant could have no claim to the way-going crop from land so sown, and were directed to find for the plaintiff upon the 5th count, in trover, and give him the value in damages of the crop so sown and taken away by the defendant: otherwise, to find for the defendant. The jury found for the plaintiff on both the grounds submitted to them, and gave him 63*l.* in damages.

Jervis moved in the last term to enter a nonsuit, or to reduce the damages from 84*l.* to 21*l.* He contended, 1st, that the plaintiff could not recover on the custom, because it appeared that the defendant had held under a lease, which being a special contract between the parties, excluded any implied contract under the custom; and when the defendant held on after the expiration of the lease, it must be taken, in the absence of any evidence to the contrary, that he held on upon the terms contained

1812.

BORASTON *against* GREEN.

tained in the expired lease. 2dly, That the plaintiff could not recover on the count in trover, as this form of action did not lie to try the right to land, or to the produce of land taken by the party as claiming an interest in the soil. And it was no answer to say that the crop had been taken contrary to the covenant in the lease; for that could not alter the question of property, as between the in-coming and out-going tenant, though it might subject the latter to an action of a different sort by the landlord, as for a breach of the implied agreement to cultivate the land according to the covenants in the expired lease.

Dauncey and *Abbott* now shewed cause against the rule; and premised that at the time when the corn was cut the plaintiff was the tenant of the farm, which the defendant had before quitted, and therefore the defendant could only entitle himself to enter on the land, and take the growing crop, by custom or by special contract; without one or other of which he would have been a trespasser, and the tenant in possession might recover the crop when severed in an action of trover. The right to the away-going crop, whether claimed by custom or special contract, would not give the off-going tenant a right to the possession of the land, but only a licence to enter and take the crop. It is clear that if there be a custom, such as is laid and proved in this case, the action lies by the in-coming tenant for the breach of it; and that would at any rate entitle the plaintiff to retain his verdict for the one-third of the wheat carried off from the clover brush. As to the wheat sown on the turnips, there was no custom to give it to the off-going tenant, and the jury have found against it. Then he could only entitle himself to

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1812.

BORASTON against GREEN.

it under a contract; but the covenant, in reference to which he claimed the right to the away-going crop, only gave it to him upon a condition, "*so as* the same exceeded not 29 acres, *and was summer fallowed, and well manured with muck or lime;*" which not having been complied with, no right vested in the defendant. The plaintiff was thereupon entitled to recover the whole value of the wheat sown on the turnips. [*Bayley*, J. The land belonged to the defendant when the wheat was sown by him.] If tenant at will sow corn, and afterwards he himself determine the will, he is not entitled to emblements; and tenant for life is only entitled to them, because he shall not be prejudiced by the act of God. [Lord *Ellenborough*, C. J. asked what authority there was for the plaintiff's recovering upon the count in trover, when the proper remedy, if any, was by an action of trespass quare clausum fregit, to try the defendant's title to enter upon the land and take the profits. The action of trespass would never be heard of again in such cases, if trover would lie for the value of the crop taken by the hand of the owner, or by the mouths of his cattle.] The plaintiff's claim by custom was found by the jury. [Lord *Ellenborough*, C. J. The defendant held over upon an implied contract, which excludes the custom: and by the contract, his right continued to go upon the land and take off the crop.] The legal possession of the farm must be taken to have been in the plaintiff at the time, who was in the actual occupation of all the other parts of it; and the defendant, whose term in the land was expired, had at most only a conditional licence to enter, but did not bring himself within the terms of the condition: and if he could not have protected himself against the landlord for the act of taking the crop, he could have

no

1812.

BORASTON *against* GREEN.

no right against the in-coming tenant. [Lord *Ellenborough*, C. J. The vice of the argument is that it assumes that because the defendant did not comply with the terms of the contract under which he held the land, therefore the contract itself was nullified: but that is not founded; the contract still subsisted, though the landlord would have an action for the breach of it.] The defendant could not take the produce of the land at all, without the condition annexed. It is clear that he could not have taken the produce of any 29 acres of the farm, but only of 29 acres of a given description, such as had been before well manured and summer fallowed, which it is not pretended was the case with respect to the land in question. The plaintiff has not received any damage from the mere breaking in and entering upon the land, but from the subsequent conversion of his property.

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

Lord ELLENBOROUGH, C. J. The defendant held the farm upon the terms of the expired lease, which puts an end to the question. The plaintiff claims the 21*l.* for the one-third of the wheat sown upon the clover brush, according to the custom of the country; but the terms of the defendant's holding had no reference to the custom; for that is only a contract which the law raises in the absence of any particular contract between the parties; and here there was at one time a subsisting lease between them; and after that was expired the tenant must be taken to have continued to hold under the same terms; for the breach of which the landlord would have a similar remedy, varying only in the form

1812.

BORASTON *against* GREEN.

of the action. Then as to the 63*l.* for the remainder of the wheat, the plaintiff's argument is that the defendant being only entitled to hold under the terms of the lease, and not having complied with the condition of manuring and summer fallowing the ground on which the crop was raised, he is denuded of all right to the crop, and that having cut it down and carried it away, the in-coming tenant is entitled to maintain trover for it. Now looking at the lease, it appears that there are, not one, but three conditions, on the non-performance of which it must be contended that the lease entitled the landlord or the in-coming tenant to claim as his own the growing crop sown by the off-going tenant: these are, that the quantity sown should not exceed 29 acres, that it should have been summer fallowed, and well manured with muck or lime. Then would it be contended, that if the quantity sown had exceeded the 29 acres by a pole, that would have given the growing corn to the landlord, or the in-coming tenant, as his property, and made the off-going tenant a trespasser for entering on the land. Then would the neglect of summer fallowing, or of not well manuring the land, change the property. That is a matter we all know which is open to great difference of opinion: and is the claim of property to be in abeyance till that question is ascertained? It would introduce strange confusion into the remedies of the law if the crops sown by the tenant were to be considered as his own, or the landlord's property, according as he had or had not complied with the terms of his covenant. We cannot per saltum treat the whole of his claim to take the growing crop as a wrong and damage done to the landlord or to the succeeding tenant, to enable them at once to bring trover or trespass; and it would be most incon-

1812.

BORASTON *against* GREEN.

incongruous to say that trover lies by the in-coming tenant for the off-going crop when severed, because there has been an inadequate performance of the conditions on which the off-going tenant was to raise and take such crop.

GROSE, J. agreed.

LE BLANC, J. not having returned into court till after the argument of the case, declined giving any opinion upon it.

BAYLEY, J. It is not true, as stated in the declaration, that in every case of a tenancy from year to year, expiring at *Lady-day*, the in-coming tenant is entitled by the custom of the parish to one-third, and the off-going tenant to two-thirds of the away-going crop of wheat sown on a clover brush: it is so where there is no express agreement to the contrary; and it may be so even in the case of a deed which is altogether silent as to the away-going crop: but if the parties provide for it by their special contract, the right to the crop must depend entirely upon the provisions of the lease: and it will be the same where the tenant holds on after the lease is expired. That disposes of the plaintiff's claim for the 21*l.* which is founded upon the alleged custom of the country. But then it is contended that the off-going tenant's right to the away-going crop depending upon the terms of the lease, he cannot claim it unless he has complied with all those terms by which he bound himself to cultivate the land for raising the off-going crop: and that not having done so, the in-coming tenant may maintain trover for the value of it when severed and taken away. But trover is not the form of action in which such a question can be tried. If he sow the land, it is on a

1812.

BORASTON *against* GREEN.

claim of right to reap the crop, and he continues in fact in possession of the land on which the crop grows for that purpose. It is said, however, that he is not the legal tenant of the land at the time of the off-going crop taken: but that is begging the question; for it is considered that the right reserved to the tenant to take the crop is a prolongation of the term as to the land on which it grows, and that the possession of the land continues in the tenant till the crop is taken. It has been held that the landlord may distrain upon the off-going crop for the old rent. On what ground could that have been so held but that the tenancy still continued as to that part of the land? At common law the landlord could only distrain during the term; then the statute (*a*) extended that remedy to six months afterwards: but in *Bevan* v. *Delahay*, 1 *H. Blac.* 5. the Court of *C. B.* held that the landlord was entitled to distrain on the off-going crop, though more than six months had elapsed after the end of the term. Therefore as to that part of the land on which the crop was growing, I consider that the possession of the off-going tenant continued. Then it would be unheard-of to be trying in an action of trover for the produce, whether the land had been properly summer-fallowed or manured by the tenant. If it has not, the landlord will have his remedy against the tenant upon his covenant or agreement for the abuse of the land; but the landlord is the proper party to have that remedy, and not the in-coming tenant.

Rule absolute for a nonsuit to be entered.

(*a*) 8 *Anne*, c. 14.

1812.

Friday, June 5th.

OAKLEY *against* DAVIS, one, &c.

In trespass for an assault and false imprisonment, the defendant having justified the assault and imprisonment under a writ sued out by him as attorney for *J. M.* against the defendant, indorsed for bail for 100*l.*, which was delivered to the sheriff, who, by virtue thereof, arrested and detained the plaintiff; if the plaintiff (instead of traversing the plea, as he ought to do, if the arrest were irregularly made by the sheriff's officer, without a sufficient warrant from the sheriff,) new-assign that the trespass complained of was upon *another and different occasion* than that stated in the plea, *and after the supposed arrest* therein mentioned; the defendant, on proof of the fact as before stated, is entitled to a verdict.

THE plaintiff declared in trespass, and charged the defendant in the four first counts respectively for taking and detaining his goods on different days, and afterwards converting them to the defendant's use; and also for breaking and entering the plaintiff's dwelling-house at *Abergavenny*, &c. and making and continuing a great disturbance and affray therein for a long time, viz. for 32 days: upon which counts no question arose. The 5th count was for assaulting the plaintiff on the 28th of *December* 1810, and imprisoning him and detaining him in prison without any reasonable or probable cause for 10 months from that day. The defendant pleaded not guilty to all the counts; and 2dly, as to the assault and imprisonment, &c. of the plaintiff, he pleaded that before and at the time when, &c. he was and from thenceforth hath been, and still is an attorney of the Court of K. B., and that on the said 28th of *November* 1810, as the attorney of one *J. Morgan*, and by virtue of a certain retainer in that behalf, he caused to be issued out of the court a writ of latitat directed to the then sheriff of *Monmouthshire*, by which he was commanded to arrest the plaintiff, &c. to answer the said *J. Morgan* in a plea, &c.; which writ was indorsed for bail for 100*l.*, &c.; and that the defendant, as such attorney as aforesaid, afterwards, and before the return of the writ, to wit, on the 1st of *December* 1810, delivered it to the then sheriff of *M.* to be executed in due form of law; by virtue of which writ the said sheriff afterwards, and before the return thereof, namely, on the day and year in the last

count

count mentioned, being the said time when, &c. within his bailiwick, took and arrested the plaintiff, and detained him in his custody under and by virtue of the said writ and for the cause therein specified, for the time mentioned in the last count; which are the same supposed trespasses, &c. To this the plaintiff replied by a new assignment, that he brought his action against the defendant, for that the defendant, at the said time when, &c. in the fifth count mentioned, *on another and different occasion than* as in the said plea is mentioned, *and after the supposed arrest* in that plea mentioned, and without any legal or sufficient warrant or authority for so doing, assaulted, beat and ill-treated the plaintiff, and imprisoned him, and detained him in prison as in the fifth count mentioned; which said trespass, assault, and imprisonment above newly assigned is another and different trespass, assault, and imprisonment than that mentioned in the second plea, and thereby attempted to be justified, &c. To this new assignment the defendant pleaded not guilty.

The cause was tried before Mr. Serjt. *Marshall*, who sat for Mr. Justice *Lawrence*, at *Monmouth*, in the last spring, when it appeared by the evidence on this part of the case that on the 28th of *December* 1810 the plaintiff was arrested at *Monmouth* by a sheriff's officer in the presence of the defendant, who delivered the warrant, dated the 12th of *December*, to the officer for that purpose, and directed him to take charge of the plaintiff. That the defendant after the arrest offered to liberate the plaintiff if he would give him authority to sell off some of his effects at *Abergavenny*, where it appeared the plaintiff had before lived; which the plaintiff refusing, the defendant directed the officer to take him to gaol; which was done. But it also appeared that the defendant, who was an

1812.

OAKLEY against DAVIS.

attorney, had required the property to be given up to him in liquidation of the debt of one *John Morgan*, who proved that he had in the *November* before given the defendant directions to do what he could to recover his money. It further appeared that when the sheriff's warrant for the arrest of the plaintiff was made out and delivered to the defendant, it was issued without the name of any of the three special bailiffs in it, which appeared on its production at the trial; but a blank was left for them, and only the defendant's name as attorney in the cause was put in a corner of the warrant. The taking of the plaintiff's goods upon the other counts on prior days was proved to the amount of 10*l.*: for which no authority was shewn. But upon the new assignment in the replication to the 5th count, it was objected for the defendant, that the plaintiff was not entitled to recover, without giving evidence of two arrests and imprisonments, that is, of a different imprisonment for a different cause than that stated and justified in the defendant's plea to that count; whereas the evidence shewed it to be the same; though the arrest was illegal, by reason of the warrant, which had been delivered in blank out of the sheriff's office, having been afterwards filled up with the names of the persons, one of whom made the arrest. It was thereupon agreed that the jury should assess the damages separately for taking the goods, and for the imprisonment of the plaintiff; and that the defendant should have leave to move the Court to set aside the verdict for the damages on account of the imprisonment. The jury found for the plaintiff 100*l.* damages for the imprisonment, and the like sum for seizing his goods.

In the last term a rule nisi was obtained for reducing the verdict to 100*l.*, i. e. for the trespass in taking the goods,

goods, and to shew cause why the verdict for the damages upon the plea of not guilty to the new assignment should not be set aside, and a verdict entered for the defendant upon that issue.

1812.

OAKLEY *against* DAVIS.

Jervis and *Puller* now opposed the rule; and after referring to *Scott* v. *Dixon* (*a*), and *Cheeseley* v. *Barnes* (*b*), as giving the rule where it is proper to reply, and where to new-assign, contended that the plaintiff could not properly have traversed the plea in his replication in this case, but was driven to new-assign. The substance of the second plea is that what the defendant did was merely in his character of attorney, making use of the process of the law to enforce his client's demand: and so far as he acted in that character, the plaintiff, not intending to proceed against him, but only for that which he did in his own personal character, without any such authority, was obliged to new-assign to the plea of an arrest under process, by discriminating and shewing that the trespass which he complained of was upon another and different occasion than that which was justified by the plea, namely, *after the arrest in the plea mentioned*, and without any legal or sufficient authority. [*Bayley*, J. There was no arrest by the sheriff; and therefore the plaintiff might have traversed that allegation in the plea.] In that case the plaintiff could not have new-assigned upon the illegal and oppressive conduct of the defendant in his personal character, which was the gist of the complaint. The new assignment is in the nature of a replication, not admitting that any one trespass meant to be complained of was justified; but in substance stating, that however

(*a*) 2 *Wils.* 3. (*b*) 10 *East*, 80.

true

1812.

OAKLEY *against* DAVIS.

true it was that the writ mentioned in the plea did issue, yet that the defendant afterwards, and after the arrest made, of his own wrong, and without any justification by the writ, committed the trespass complained of. [Lord *Ellenborough*, C. J. How could the plaintiff new-assign upon the trespass stated and justified by the plea, when he might have traversed the fact pleaded. The new assignment admits that the declaration stands well answered by the plea; but it states in effect that the defendant is under a mistake, for that the plaintiff complains of a new and substantive trespass not answered by the plea. Now here the proof was not of another but of the very same trespass of which the plaintiff complained; for there was but one arrest and one imprisonment, which is answered by the plea.] If there had been a legal warrant under the writ, that might have been an answer; but here there was no legal arrest under the writ: and this differs from the case in *Wilson* (*a*), where the arrest was legal; and from *Atkinson* v. *Matteson* (*b*), where there were two assaults charged; and here there is only one.

LE BLANC and BAYLEY, Justices, referred to a case decided in last *Hilary* term, which had been tried before Lord C. J. *Mansfield*, and came on upon a motion for a new trial; where in trespass the defendant pleaded that the place where, &c. was part of a common which had been allotted to him; to which the plaintiff new-assigned that the trespass complained of was in another place: and upon its being admitted in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it; the

(*a*) 2 *Wils.* 3. (*b*) 2 *Term Rep.* 172. 177.

Chief

Chief Justice said that that was decisive against the plaintiff's recovery; and the verdict passed against him. This case was recollected by all the Court, and thinking it in point to the present, they made the rule absolute.

1812.

OAKLEY *against* DAVIS.

Abbott for the defendant.

GOODTITLE, Lessee of CHARLES LUXMORE, *against* SAVILLE and Others.

Friday, June 5th.

THIS ejectment was brought, and tried at *Exeter* in the spring of 1812, before *Chambre*, J. for the recovery of an estate called *Okehampton Park* and other lands, claimed by the lessor of the plaintiff under a proviso for re-entry contained in the after-mentioned lease. The declaration contained three counts on several demises by Mr. *Chas. Luxmore*, who was assignee of the reversion of the premises in question, under a conveyance from Lord Viscount *Courtenay*, about *Christmas* 1804; the first of these demises being on the 1st of *January* 1810; the second on the 1st of *August* 1811; and the third on the 13th of *January* 1812. The defendant, Mr. *Saville*, was

Under a beneficial long lease, reserving liberty to the lessee to cut down and dispose of all timber and coppice, &c. (the value of which was included in the purchase,) then growing or thereafter to grow during the term; subject, however, to a proviso that *when and so often* as the lessee should intend, during the term, to sell the timber, &c. growing on the premises or any part thereof, he should immediately thereupon give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it; and on the lessor's neglect or refusal to purchase, the lessee might dispose of it absolutely; if the lessee, soon after the execution of the lease, bonâ fide intend to cut down the whole of the then growing timber and coppice, &c. and give notice in writing to that effect, and the lessor do not accept the purchase, but disclaims it; the lessee may proceed to cut down the whole in different seasons according to his convenience, and is not obliged to give a fresh notice at every succeeding cutting: and this, though the lessor had in the interval assigned his interest in the land to another.

But after such assignment, it is sufficient for the lessee, after ejectment brought by the assignee of the lessor for a forfeiture, to give such assignee notice to produce the original notice in writing of the intention to cut the whole, and he is not bound to shew that he applied for the same to the original lessor (who had left the country) or to his agents, or gave them notice to produce it; for it will be presumed to have been delivered up to the assignee of the reversion as a document relating to the estate; and on default of its production at the trial, he may give parol evidence of it.

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1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

the assignee of the terms created by the lease. The indenture bore date the 24th of *March* 1798, whereby Lord Viscount *Courtenay*, in consideration of 12,500*l.* paid to him by *H. Holland*, Esq., and of the yearly rents and heriots reserved, and the covenants, reservations, restrictions, and agreements therein mentioned, granted to Mr. *Holland*, *Okehampton Park*, in the county of *Devon*, containing 1485 acres, "*together with all timber and other* "*trees, coppice, and other wood, now standing and growing,* "*or hereafter to grow on the said park; with liberty* to "and for the said *H. Holland*, his executors, &c. *to cut* "*down and dispose of such timber* and other trees, coppice "and other wood, during the term hereinafter granted, "*for his and their own use and benefit;* except, and subject "to the proviso and agreement hereinafter contained:" and also a plot of ground adjoining called *Park Kempleys;* excepting the timber and other trees growing or to grow on such plots; "and also all saplings growing or to grow on *Okehampton Park* of less than six inches in diameter, except such as shall be standing and growing on any plot of land belonging to the said park, which shall be grubbed up by the said *H. Holland*, his executors, &c. for the cultivation and improvement thereof;" habendum the said park and plot of ground and other the premises granted to *H. Holland*, his executors, administrators, and assigns, for a term of 40 years thence ensuing, and also for a concurrent term of 99 years determinable upon three lives, at a rent of 22*l.* 10*s.* for the park, and 5*l.* 5*s.* for a heriot, on the death of each of the lives, in succession, and of 5*s.* rent for the plot, with 5*s.* heriots. Then followed covenants by Mr. *Holland* for payment of rent, repairs, &c. and doing suit and service at the lord's court: with a proviso for re-entry of the grantor, his heirs and assignees, "if

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

" if the said *H. Holland*, his executors, &c. do not well and truly perform and keep all and singular the covenants, conditions, reservations, restrictions, and agreements therein contained, on his and their part to be performed," &c. The grantor then covenanted for quiet enjoyment; and then followed this clause of agreement between the parties, " that *when and so often* as " the said *H. Holland*, his executors, &c. shall intend, " during the continuance of the said several terms or " either of them, to sell and dispose of the timber and " other trees, coppice and other wood, growing or to " grow on the said premises, or any part thereof, he the " said *H. Holland*, his executors, &c. shall and will, " immediately thereupon, give notice in writing unto " the said Lord Viscount *Courtenay*, his heirs or assigns, " of such his or their intention so to do; and thereupon " the said Lord Viscount *Courtenay*, his heirs or assigns, " shall be entitled to the option of purchasing such timber and other trees, coppice, and other wood, in order " to prevent the same from being cut down, in case he " or they shall think fit to preserve the same to stand on " the premises, at such price or prices as such timber, " &c. contained in such notice shall be estimated to be " worth by two indifferent persons, &c. and when " such notice shall have been given as aforesaid, in case " Lord Viscount *Courtenay*, his heirs or assigns, shall, " within one month then next after, signify to *H. H.* " his executors, &c. his or their intention of purchasing " the same, then and from thenceforth *H. H.*, his executors, &c shall have no power to sell and dispose " thereof to any other person or persons without the " privity and consent of Lord Viscount *Courtenay*, his " heirs or assigns; unless Lord Viscount *Courtenay*, his " heirs

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

" heirs or assigns, shall neglect or omit to ascertain the " value of such timber in manner aforesaid, and to pay " the estimated value thereof within six months from " the time of his or their signifying an intention of pur- " chasing such timber, &c.; but after the expiration " thereof *H. Holland*, his executors, &c. shall be at " liberty to sell, cut down, and dispose of such tim- " ber in such manner as he or they shall think fit, " any thing thereinbefore contained to the contrary " notwithstanding."

The substance of the evidence given by the plaintiff's witnesses was this. Mr. *Luxmore*'s agent living at the town of *Okehampton*, adjoining the premises, proved that he had received the reserved rent from the defendant's agent from the time of the reversion purchased by Mr. *Luxmore* in 1804 down to *Michaelmas* 1810. That a great deal of timber was cut in *Okehampton Park* in 1799, during Mr. *Holland*'s time, when the witness bought some of the lops of the trees. That he knew of no intention on the part of the defendant, after his purchase of the term, to fell timber again, in 1804, 1805, or 1806; during which years it was proved by other witnesses that there were considerable falls of timber, and other wood: and there was another considerable fall in 1811. These several falls were clearly proved by many of the witnesses to be notorious in *Okehampton* and the neighbourhood. On the part of the defendant a note was read from another agent of Mr. *Luxmore* to the defendant's agent in 1808, containing an account of rents due to Mr. *Luxmore* from the defendant; in which the balance was only 2*d*. The brother of the late Mr. *Holland*, the original lessee, then proved that in *October* 1798 he saw Mr. *Holland* deliver a paper to Lord *Courtenay*'s bailiff,

now

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

now dead, which paper he heard read, but could not tell whether it was now in existence or not (*a*). Soon after he and his brother went by invitation to Lord *Courtenay* at *Powderham Castle*, and staid there two days; during which time there was much conversation between his brother and Lord *Courtenay*, as to what Mr. *Holland* meant to do with the timber and with the park. Mr. *Holland* said he had had the wood surveyed, and had been deceived in the value; that a great deal of it was fit for little else than burning limestone. Lord *Courtenay* said it was an odd purpose to apply timber to: and *acknowledged having received a notice of Mr.* Holland's *intention to cut down all the timber and other wood in the park:* all that he had granted to him by his lease: adding, *that he* (Lord *C.*) *had not the means to purchase it, and that Mr.* Holland *was at liberty to cut down every stick that was in the park, hollies, and every thing else.* Another witness also proved that Lord *Courtenay* was at *Okehampton* in 1799 or 1800, after or during the time of a fall, when the timber was lying on the ground; and shortly after on his return to *Powderham Castle*, his lordship

(*a*) Notice was proved to have been given to the lessor of the plaintiff to produce a written notice, sent by Mr. *Holland* to Lord *Courtenay* at this time, of his intention to cut down and sell and dispose of *all* the timber and other trees, coppice, and other wood, &c. in *Okehampton Park*. The plaintiff's counsel disavowed having or knowing of any such notice; and objected that before parol evidence could be given of it, the defendant should at least have shewn, that notice had been given to Lord *Courtenay*'s agent at *Powderham* (his lordship having quitted the kingdom) to search for and produce the paper in question, said to have been sent to him by Mr. *Holland*. The learned Judge, however, was of opinion that the paper in question, being a document relating to the reversionary estate, must be presumed, if in existence, to have been handed over with the title-deeds of the estate to Mr. *Luxmore*, the purchaser of the reversion; and therefore, upon the non-production of it in pursuance of the notice served upon him, he let in the parol evidence of its contents. This objection was repeated again upon the motion for a new trial, and over-ruled by the Court.

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

mentioned to the witness the quantity of timber that Mr. *Holland* had thrown in the park, and said *that he was sorry to hear that Mr.* Holland *had determined to clear the park of timber.* Within two years afterwards, the witness, being again at *Powderham*, was asked by Lord *Courtenay* what was going on in *Okehampton Park*, when the witness answered, *that Mr.* Holland *was continuing to clear the park as fast as he could.* Lord *Courtenay* said, *he had heard that Mr.* Holland *had complained of his bargain; but he hoped that now he had thrown so much timber, his bargain would not turn out a bad one at last.* That in other conversations Lord *Courtenay* had also expressed to the witness that Mr. *Holland* was proceeding to clear the park as fast as he could: and this was not confined to a particular fall, but referred generally to clearing the park. To another witness, who was regretting to Lord *Courtenay* in 1799 that so much of the timber was cut down as would spoil the picturesque beauty of the park, his lordship answered that he had disposed of the place to Mr. *Holland*, and had nothing to do with it. The defendant also proved the notoriety and extent of the fall in 1804, when the timber was previously advertised, and some of it sold by auction. That it took two seasons to cut. And that there was the like notoriety of other cuttings in 1805 and 1806. That the cuttings were all of timber that had arrived at maturity, and some were past it. The learned Judge, on summing up the evidence, told the jury that if they were satisfied that Mr. *Holland* before his assignment to the defendant had given a written notice to Lord *Courtenay* the then reversioner, as required by the agreement in the lease, of his intention to cut down and dispose of the wood; and that such notice was not partial, extending only to particular parts of the wood,

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

but expressed a general intention to cut down and dispose of the whole, as seemed to be admitted in the conversations by Lord *Courtenay*, in such case, as Lord *Courtenay* had declined to avail himself of that notice by complying with the terms on his part; he thought the defendants were entitled to a verdict. That the price of the wood being included in the consideration of 12,500*l.* paid for the lease by the lessee, it appeared to him that such notice entitled the lessee to be repaid the whole estimated value within the stipulated period, if the lessor chose to purchase: and that Lord *Courtenay* having waved the purchase, he thought that at the expiration of such limited period the lessee's interest in the wood became absolute, and the lessor's option was at an end, and consequently that no forfeiture had arisen. The jury found a verdict for the defendant.

Lens, Serjt. in the last term moved for a new trial, on the ground that the construction put upon the proviso in the lease was erroneous; for that though the lessee might have cut down the whole of the timber at one continuing fall, if he had given notice of such his intention; yet if he did not cut down the whole, but stopped his cutting, he could not commence a new and distinct cutting again, without first giving a new notice and option to the lessor. The words of the proviso, that "when *and so often*" as Mr. *Holland* intended to sell the timber, he should immediately thereupon give notice in writing of it to Lord *Courtenay*, strongly pointed to this construction. But here there had been a considerable interval between the cuttings in different years, without any new notice. It could not vary the construction of the

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

the deed, that this was the case of a forfeiture, if the verdict were wrong.

Best, Serjt., *Jekyll*, and *Burrough*, shewed cause against the rule, and contended that one notice was sufficient within the meaning of the proviso, if it were co-extensive with the cutting which ensued; and the terms "when *and so often*," &c. were adapted to the case where a part only being intended to be cut down at one time, and other parts at other times, limited notices only were delivered, and not a general notice extending to the whole. They relied on the consideration that Mr. *Holland* had, in the first instance, purchased and paid for the whole of the growing timber; and therefore any proviso restricting his general power of disposition ought to be construed very strictly. Nothing but a power of pre-emption was meant to be reserved to the lessor. But if the construction were even doubtful, the defendant would be entitled to the advantage of it in an action for a forfeiture. There is no limitation of time for cutting down the timber after a notice given; it is not required to be done in the same season. But there is nothing to shew that the intention to cut down the whole, of which notice was once given, was ever abandoned: on the contrary, portions of it were cut down almost every year, as the wants of the market required. They also contended that a general notice having been once given, there was an end of the proviso, and it could not be recalled or set up again by any intermission in the cutting: and cited *Dumpor*'s case, 4 *Rep.* 119 *b.*

Lens, Serjt., *Pell*, Serjt., *Gaselee*, and *Gifford*, contrà, insisted that the intention of the deed was to give the lessor

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

lessor the option of purchasing from time to time as the tenant thought fit to exercise his power of cutting; but a general notice to cut the whole, when the tenant only meant to cut a part at the time, was illusory and a fraud upon the covenant. The operation of the notice was to be measured by the execution of it which ensued, and which, like all other acts, must be done within a reasonable time according to the subject-matter. Every time the lessee stopped his hand and suspended his cutting, the deed meant to give the lessor a new chance of preemption before the axe could be laid to the root again. [Lord *Ellenborough*, C. J. You did not attempt to impeach by any evidence the lessee's intention to cut the whole when the notice was given.] That question was not left to the jury. [*Le Blanc*, J. No such question was made at the trial to go to the jury.] But supposing him to have had the intention, yet if he afterwards in fact relinquished it, the argument still holds good. [Lord *Ellenborough*, C. J. The lessee could not have cut down at once the whole of what he was entitled to cut during his term, because he was entitled to all the timber, &c. which should grow during the term.] The parties could never have meant to enter into a covenant which one of them could put an end to immediately, by giving a general notice. If the lessee pondered upon it, the lessor was to have the like benefit of his option: if it remained for the benefit of the one, it ought to remain for the benefit also of the other.

Lord ELLENBOROUGH, C. J. In the construction of covenants of this sort, they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

tion upon them, according to the apparent intention of the contracting parties. It is not disputed that if the lessee had an intention to cut down the whole of the timber, and gave notice of it, he had a right to cut all of it: and the only consequence arising from his delay in cutting down all is to draw in question the genuineness of his intention to cut down the whole: but the case was not put by the plaintiff to the jury in that way, to which the evidence tended, inasmuch as the lessee did not follow up his notice, but ceased cutting after he had began, and resumed it again at several times afterwards. The evidence given at the trial was only applicable to that view of the case, whether he really did intend to cut down the whole, or only to acquire an option of cutting it down at any time when he should be disposed so to do. The words "*when and so often*" are not immaterial; because the lessee might have successive purposes of successive falls and sales of the timber: but here the notice is that he should cut down the whole; though such a notice could not in fact apply to the whole growth of timber during the term, but only to that which was then growing and capable of being cut down. It could be no detriment however to Lord *Courtenay* that the lessee did not immediately proceed to fell all the growing timber; for it was drawing nourishment all the time from the soil of the lessee himself, and it was to his own detriment to leave it standing, so as to prevent the application of the land to other purposes. It might, perhaps, be a question (but I give no opinion upon that point,) whether another court would not, upon application under these circumstances, give the lessor a new option to purchase. But sitting here, I cannot but say that if the lessee have once bonâ fide enter-

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

entertained and properly communicated his intention to the lessor to cut down the whole of the timber, and the latter has not availed himself of his right of purchase, the lessee has acquired the right of cutting it down. The lessor may bring another ejectment, if he can impeach the intention of the lessee to cut all the timber of which he gave notice: but at present I see no ground to impugn the construction put by the learned judge at the trial upon the clause in question of the lease.

GROSE, J. I do not know how upon any sound ground to dissent from the construction put at the trial upon the lease. The only questions are whether Mr. *Holland* really meant to cut down all the timber; and whether he gave due notice of such his intention to the lessor. Now as to his intention I cannot doubt it, because Lord *Courtenay* himself so understood it at the time. Then I can only consider the notice as communicating that intention, as it was understood by every person at the time.

LE BLANC, J. This ejectment is brought on the ground of a forfeiture of the term demised; and certainly the Court must be thoroughly satisfied of the construction of the lease contended for, as establishing such forfeiture, before they give an opinion which is to destroy the lease. That lease was granted in 1798, and contains a proviso, that "*when and so often*" as the lessee shall intend to sell the timber, &c. growing or to grow on the premises, he shall immediately thereupon give notice in writing to the lessor of such his intention, who shall be entitled to the option of purchasing it in order to prevent its being cut down. The question

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

arises on the words "*when and so often*," whether a fresh notice is to be given at every fall, or whether upon any one intention of the lessee to cut down all the timber, &c., and such intention manifested by a notice to that effect, he may proceed to cut down a part in one season, and other parts at future periods; or whether he is bound to follow up such his intention immediately, by cutting down the whole at once? Now the words "when and so often" are to be construed according to the subject-matter; and this was a renewing subject-matter; for the timber and coppice would grow from time to time during the continuance of the term; and therefore to give the lessee the benefit of his purchase from time to time as the wood was fit to be cut, it required not merely one notice, but different notices at different periods, as there was a fresh growth of wood, which was not growing at the time of the lease granted. Besides, there was evidence in this case of an entire disclaimer by Lord *Courtenay* of any intention to avail himself of the notice given to him; and there was no evidence offered to impeach the fact that there was a bonâ fide intention on the part of the lessee to cut down all the timber, &c. then growing, of which he had given notice. Then why are we to say that the lessee was concluded from following up his general notice in a subsequent season. He could not cut it all down in one season without manifest loss; after giving notice to entitle him to cut at all, he must find purchasers to take it. As to any hardship upon the lessor by this construction, though Lord *Courtenay* had once renounced the benefit of the proviso, if he afterwards wished to pay the price for the timber and preserve it, I am not satisfied that there is not another mode by which he might

1812.

GOODTITLE, Lessee of LUXMORE, *against* SAVILLE.

might be let in to purchase it; but that is not now necessary to be decided. It is sufficient for the present purpose that there has been no forfeiture, unless the Court could say that the lessee was obliged to give a fresh notice on every occasion when he carried into execution his original intention of cutting down the timber, which I see no reason for saying.

BAYLEY, J. had left the court before judgment was given.

Rule discharged.

LUMLEY and RAISBECK *against* HODGSON.

Saturday, June 6th.

An action for use and occupation is maintainable without attornment upon the stat. 4 & 5 *Ann.* *c.* 16., *s.* 9 & 10., by the trustees of one whose title the tenant (defendant) had notice of before he paid over his rent to his original landlord; though the tenant had no notice of the legal title being in the plaintiffs on the record.

THIS was an action for the use and occupation of certain copyhold messuages, warehouses, and an acre of land in *Bishopswearmouth*, in the county of *Durham;* and it was brought to recover a year and a half's rent from the defendant, as tenant, which had accrued after the surrender of the premises, (as aftermentioned,) by one *Michael Hutton* to the plaintiffs, calculated up to the 13th of *May* 1810, when the defendant quitted the premises; and which rent the defendant had actually paid to Mr. *Hutton*, his former landlord, of whom he had taken the premises. The circumstances of the case appear in the following bill and answer in a suit in Chancery, which were admitted and read in evidence.

The bill, which was for a discovery, was filed by these plaintiffs against the defendant; to which he put in his answer, stating that on the 13th of *May* 1807,

1812.

LUMLEY *against* HODGSON.

he became tenant from year to year to *Michael Hutton* of the premises in question, which were copyhold, at a rent of 100*l.* a-year, (including the fixtures, valued at 40*l.* a-year,) payable half-yearly. That money transactions to a considerable amount had passed between *Robert Wilkinson*, *G. Snowden*, and the plaintiff *Lumley*, who were bankers at *Stockton*, and *M. Hutton*, who acted as their agent; and that if any surrender was made of the premises by *Hutton* to *Lumley* and *Raisbeck*, in trust for *Wilkinson*, his heirs, &c., as stated by the bill, such surrender was, as the deponent believed, intended only as a security for any balance due from *Hutton* to the banking-house. That the deponent admitted that he was tenant from year to year of the premises at the date of the surrender; but denied that *Hutton* gave him any notice of it at the time. *That* Lumley *and* Wilkinson *called upon the deponent in* 1808, (whether on the 14th of *March* or afterwards he could not say,) *when* Wilkinson *informed him that the premises which he* (the deponent) then occupied belonged to him, (*Wilkinson*,) and inquired what rent the deponent paid for the same, when the deponent informed him, &c. *and told* Wilkinson *at the same time that* M. Hutton *had not informed the deponent that he had surrendered the premises to* Wilkinson; *and that he* (the deponent) *could only pay his rent to one landlord, and that it was of little consequence to him to whom he paid his rent, provided he was safe in doing so.* That neither *Wilkinson* nor *Lumley* then demanded any rent of him, but in a few days afterwards one *R. Hull*, a clerk of *Wilkinson*, *Snowden*, and *Lumley* called on the deponent, and demanded of him, on their account, payment of rent for the premises, when the deponent informed *Hull*, as the truth was, that at that time he owed

owed no rent, having paid *M. Hutton* all the rent due at the preceding half-year. That he afterwards informed *M. Hutton* of the applications made by *Wilkinson* and by *Hull*, *when* Hutton *insisted that the deponent should pay his rent to no other person than himself;* in consequence of which the deponent continued to pay his rent as it became due to *M. Hutton* down to and including the 13th of *May* 1810, when he quitted the premises and ceased to be tenant. That some time in the summer of 1809 he went to *Lumley*'s house, in *Bishopswearmouth*, by appointment, where he was introduced to *Lumley* and *Raisbeck;* and *Wilkinson* then inquired of him whether he meant to pay the rent for the premises to him (*Wilkinson;*) to which the deponent replied that it made no difference to him to whom he paid his rent provided he was made safe in doing so: *and he then informed* Lumley, Raisbeck, *and* Wilkinson *of the directions he had received from* Hutton *not to pay the rent to any other person than to him* (Hutton). That a notice to quit on the 13th of *May* 1809, dated the 31st of *October* 1808, was given to him *by Wilkinson*, upon the receipt of which he consulted with *Hutton*, who then directed and insisted that the deponent should not pay any attention to it; for that *Wilkinson* had no right to give any such notice. That the deponent never considered himself as the tenant of *Wilkinson*, nor ever paid him any rent in respect of the premises. That after the receipt of the notice to quit, in 1808, *Hutton* informed the deponent that he had made a transfer of the premises *to the house at* Stockton, meaning, as the deponent understood, *Wilkinson*, *Snowden*, and *Lumley*, as a guarantie or security for any balance which *Hutton*, on the settling of his

1812.

LUMLEY *against* HODGSON.

his accounts with the house, might owe them; and *Hutton* then and at other times informed the deponent that if a proper allowance were made to him from the house, as their agent, he should not owe them any thing.

In addition to this the steward of the manor court of *Houghton* produced an admission of the plaintiffs on the 13th of *August* 1807, to the premises in question, upon the surrender of *Robert* and *Michael Hutton*; which admission was stated to be upon such trusts as *Robert Wilkinson* who had purchased the premises should direct, and on default of appointment, and in the mean time, in trust for *Wilkinson* and his heirs. It was then contended for the plaintiffs, that the rent followed the reversion; and that as the defendant had notice of their title before he paid the rent to *M. Hutton*, he was answerable for it to the plaintiffs. To this it was objected for the defendant, that he had no notice of the title of the plaintiffs on the record, whatever notice he might have had of *Wilkinson*'s title, as it appeared upon his answer: the demands for rent having either been made by *Wilkinson*, as for himself, or by a clerk for the banking-house, consisting of *Wilkinson*, *Snowden*, and *Lumley*; and that the stat. 4 & 5 *Ann. c.* 16. *s.* 9 & 10., which makes grants and conveyances good without attornment of the tenants, provides that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, before notice shall be given to him of *such grant by the conusee or grantee.* The learned judge was of opinion that this was not sufficient notice of the title of these plaintiffs, and thereupon directed a nonsuit. This was moved in the last term to be set aside, on the ground that

1812.

LUMLEY *against* HODGSON.

that notice of the title of *Wilkinson*, the cestui que trust, was sufficient to enable his trustees, who held the legal title on his behalf, to sue the defendant as their tenant, without attornment.

Topping and *Hullock* shewed cause. Before the stat. 4 *Ann. c.* 16. *s.* 9. no action for use and occupation could have been maintained against the tenant of the land, without an attornment; and though that act dispenses with the attornment after a conveyance, yet it provides (*s.* 10.) that the tenant shall not be prejudiced by payment of his rent to the original landlord before notice of the title of the grantee or conusee. Now that must mean notice of the legal title, which alone is capable of being enforced at law; notice of the title of the plaintiffs on the record; a notice therefore by *Wilkinson*, who was only the cestui que trust, does not satisfy the statute; and was no notice of the title of the plaintiffs.

Holroyd, contrà, contended that notice of the title of the beneficial owner of the land was sufficient, after which the tenant paid over the rent to his original landlord at his peril. This was a mere contrivance between the defendant and his first landlord to deprive *Wilkinson* of his rent. If after such notice of *Wilkinson*'s title, in the presence of the trustees, the defendant had paid his rent to *Wilkinson*, it would have been good against the trustees: as in *Gree* v. *Nolle* (*a*), the entry of the cestui que trust was held sufficient to avoid the statute of limitations. [*Bayley*, J. The entry of an agent would be sufficient;

(*a*) 1 *Ld. Ray.* 716.

1812.

LUMLEY *against* HODGSON.

ficient; and they considered the cestui que trust as an agent.] Here the tenant had notice of every thing which the act intended he should have, to guard against surprise; but he disregarded the warning, and wrongfully paid over the rent, as before, to his original landlord.

Lord ELLENBOROUGH, C. J. On consideration of the words of the statute, I think that the tenant, after the notice he received, should have withheld the payment of his rent to the original landlord, and paid it over either to the cestui que trust or to his trustees. The statute says that no attornment in these cases shall be necessary; but it provides that the tenant shall not be prejudiced before notice given to him of the new grant or conusance made to the grantee or conusee. Then has such notice been given in this case? He certainly had notice, in the presence of the trustees, that the cestui que trust had a good title; and if after that he had paid the rent to him, such payment would have been good against the plaintiffs on the record, who are his trustees, and the inconvenience meant to be guarded against by the statute would have been obviated.

GROSE, J. The defendant had notice enough to put him upon his guard; after which he paid the rent at his peril to the original landlord.

LE BLANC, J. The proviso was only introduced into the statute in order to prevent the tenant from being drawn in to pay rent to the original landlord before notice: but here he had previous notice of the title of the

the cestui que trust, after which it was his duty to have seen to whom the surrender had been made.

1812.

LUMLEY *against* HODGSON.

BAYLEY, J. The statute enables the action for use and occupation to be brought without attornment of the tenant; but it provides that the tenant shall not be prejudiced by paying his rent over to the old landlord without notice given to him of the title of the grantee or conusee; but in order to bring him within that protection he must have made the payment without notice that the old landlord had conveyed away his estate; for after notice of such a conveyance, which the defendant received, it is a fraud to continue paying his rent to the old landlord.

Rule absolute.

FORSTER and Others *against* JURDISON and KIMBERLEY.

Saturday, June 6th.

THIS was an action upon a bill of exchange for 50*l.*, dated the 16th *June* 1810, drawn by the defendants on *J. Losh*, payable at two months after date to the order of the defendants; which was accepted by *Losh*, and indorsed by the defendants to the plaintiffs, who presented it for payment on the 18th of *August*, which

The holders of a bill of exchange having presented it for payment to the acceptor without effect, gave regular notice of the dishonour to the drawers, who lived at a distance, but informed them at the same time, that having reason to believe that a friend of the acceptor's would take it up in a few days, they would, in order to save expense, hold the bill till the latter end of the week, unless they heard from the drawers to the contrary: held that such notice gave the holders a remedy upon the bill against the drawers, though no further notice of non-payment was given to them at the end of the week: but if the construction of the letter bound the plaintiffs to give such further notice at the end of the week, they were only answerable for the neglect in their implied character of agents for the drawers, which they had taken upon themselves without disturbing their remedy upon the bill itself.

1812.

FORSTER *against* JURDISON.

was refused; of which the defendants had notice, and by reason of the premises became liable to pay the money. The declaration also contained the common money counts. At the trial before *Wood* B., in *Cumberland*, the drawing, indorsement, and acceptance of the bill, were duly proved; and further, that when it was presented for payment to *Losh*, the acceptor, at *Carlisle*, where the plaintiffs, who were bankers, also lived, which was on *Saturday* the 18th of *August*, (the bill becoming due on the next day, *Sunday*,) *Losh* told the plaintiffs that he was not able to pay it, but wished them to keep it a week and he should be able to pay it. The plaintiffs on the same day wrote to the defendants, who lived at *Birmingham*, this letter: "*Carlisle*, 18th *August* 1810. Gentlemen, *Losh*'s acceptance to you for 50*l.* was noted for non-payment to-day, but we have reason to believe that a friend of his will advance the money for him in a few days. We shall therefore *hold the bill till the latter end of the week*, without putting any more expense upon it, unless we hear from you to the contrary. (Signed) *Forster* and Co." It was further proved that about the 17th of *October* an agent of the plaintiffs, (having before called on the 13th) presented the bill for payment to the defendant *Kimberley* at *Birmingham*, who said that *Jurdison* was gone upon a journey, and would be at *Carlisle* soon, and would call and settle the bill: after which it was sent back to the plaintiffs at *Carlisle*: and on the 2d of *December*, *Jurdison*, being in company with *Losh* at *Carlisle*, said that he had been taken on account of *Losh*'s stock, who could not lift (*i. e.* pay) the bill: that he (*Jurdison*) was afraid of being arrested; and had provided money to lift it with if he should be arrested. It

1812.

FORSTER *against* JURDISON.

was objected by the defendant's counsel, that it was incumbent on the plaintiffs to have given the defendants notice that the acceptor had not taken up the bill *at the latter end of the week*, mentioned in their letter, as the time to which they would hold it; whereas they had not given any evidence of such notice till the 13th of *October* following: by which laches it was contended that the defendants were discharged, and that the subsequent evidence did not prove a waver of want of notice, or any promise to pay the bill. The learned Judge was of opinion that the defendants were discharged by the laches of the plaintiffs in not giving them notice at the end of the week, mentioned in their letter, that the bill was not paid; but left it to the jury to say whether they inferred from the conversation with the defendants that they had waved the want of notice, and again undertaken to pay the bill; in which case they should find for the plaintiffs, otherwise for the defendants; and the jury found a verdict for the defendants. This question was again discussed upon a rule for a new trial, which was obtained by *Park* in last *Michaelmas* term; against which

Topping and *Walker* now shewed cause; and admitting that as no answer had been returned by the defendants to the letter of the plaintiffs, giving notice of the dishonour, but informing the defendants that for the chance of payment from a friend of the acceptor's, they would hold the bill till the latter end of the week, unless they heard to the contrary; that was to be taken as an assent by the defendants that the plaintiffs should keep the bill for that time; yet they contended that the effect

of

1812.

FORSTER *against* JURDISON.

of such postponement was no more than a prolongation of the time that the bill had to run; and therefore it was incumbent on the plaintiffs at the latter end of the week to give fresh notice of the new default to the defendants; without which they had fair reason to conclude that it had been taken up by *Losh*. Wherever certain notice of a fact is necessary, and the first notice is not absolute in its terms, reason points out that a second notice is necessary to be given. By not hearing again, the defendants were deluded into security that the bill had been paid, which prevented them from taking the necessary steps against the acceptor: and the waver of notice, if necessary, was negatived by the jury.

Park and *Holroyd*, contrà, were stopped by the Court.

Lord ELLENBOROUGH, C. J. The question in this case is a question of law, whether the holders of a bill of exchange, who upon the dishonour of it by the acceptor had a right of action vested in them at the time absolutely against the drawers, meant to devest themselves of that right by the letter of the 18th of *August*. They therein say in effect, we give you notice of the dishonour; but as we have reason to believe that by holding back the bill in our hands for a few days longer, till the latter end of the current week, we may be able to get the money and save you further expense, we shall do so, unless we hear from you to the contrary. Then have they not done every thing which was incumbent upon them to do? By that letter they took on themselves an agency on behalf of the defendants

fendants to get payment; and if these can shew that they had been damnified by not receiving any further notice from the plaintiffs till *October*, the law will give them a remedy against the plaintiffs so acting in their character of agents for the defendants. It therefore appears to me that the learned Judge went further in his direction to the jury than he need have done. The plaintiffs did every thing necessary to give themselves a title under the bill: they gave notice of its dishonour, which is all that the law-merchant bound them to do, in order to give them a remedy on the bill; and that which they did afterwards was merely in their character of agents: in that character they continued to hold it for the defendants; and if by their negligence as agents the defendants were injured, they have their remedy by an action for such neglect, upon the implied assumpsit in the letter, if it will bear such a construction.

The other Judges concurred; and *Bayley*, J. added that after the notice received by the defendants, they were bound to look after *Losh*.

Rule absolute.

1812.

Saturday, June 6th.

DICKINSON *against* R. BOWES, THOMAS KAY, and Others.

Payment of a promissory note, made payable at a certain place named in it, must be demanded there before the makers can be sued on it. But upon such demand proved in an action by the holder against the makers, it is no objection to the plaintiff's recovery that one of the makers, whose real name was *John Key* (who had suffered judgment by default,) was sued on the joint promise by the name of *Thos. Kay*; it being proved that the real person had been served with the process, though under a mistaken christian name; and the variance between *Key* and *Kay*, which were sounded alike, not being material. There had also been a part-payment on the notes duly presented.

THIS was an action on 56 promissory notes of the defendants, payable to bearer, for one guinea each. One of the defendants, sued by the name of *Thomas Kay*, (whose real name was *John Key*, commonly pronounced *Kay*,) suffered judgment by default: and at the trial of the cause, at the assizes in *Cumberland*, before *Wood* B., against the others, who had pleaded the general issue, it was objected, on proof of that fact, that the plaintiff was not entitled to recover, because the defending partners never had such a person as *Thos. Kay* a partner with them. The plaintiff, in answer, entered into proof to shew that the real person intended to be sued, and who was actually served with the process, though misnamed, was *John Key*, one of the partners with the other defendants in the firm called the *Workington* Bank, who had signed the notes; and further shewed that another of the defendants, who was attorney for the rest, had declared that *Dickinson* had brought an action and made a blunder in proceeding against *John Key* by the name of *Thos. Kay*. It was still, however, objected for the defendants, that a plea in abatement was not necessary in this case; and that the plaintiff, to sustain this action, must shew a joint promise made by the other defendants with *Thomas Kay*, and not with *John Key*. The learned Judge, however, was of opinion that the misnomer was no objection; it being proved that the real partner had been sued and served with the process, though under a mistaken *christian* name; and that the variance between *Key* and

Kay

Kay was immaterial. Then another question arose upon the notes, which were in this form:

"*Workington* Bank, 3d *July* 1809. One Guinea. On demand I promise to pay *at the Banking house here* to *R. W.*, or bearer, the sum of 1*l.* 1*s.* 0*d.* value received.

"For *Bowes, Hodgsons, Key*, and Co.
"*J. Hodgson.*"

Thirty-two of these notes were presented at the banking-house at *Workington*, and 5*s.* 3*d.* paid on each guinea in part discharge of the notes; and therefore if the first mentioned objection were not well founded, the plaintiff was entitled to recover the remainder of the money due on those notes. But as to the rest, it was objected that the plaintiff could not recover on them, not having been presented for payment at the place where they were made payable. It was said in answer, that as presentment was not alleged in the declaration (*a*), it was not necessary to prove it; and further, that the defendants should have pleaded that they were ready to pay at the place, as in a case of tender. The learned Judge said that the objection appeared upon the record; but to prevent a presumption of presentment after verdict, he held that the place of payment being embodied in the note was of the essence of the contract, as much as the time; and that the plaintiff was not entitled to recover on the unpresented notes, for want of a presentment at the appointed place. But he reserved both the points for the consideration of the Court, and the verdict was to be entered accordingly.

(*a*) The form of the count was the same as in the first part of the count stated in the next case.

The

1812.

DICKINSON *against* BOWES and Others.

The last point was accordingly moved in the last term, by *Park* (with *Littledale*) for the defendants; and *Topping* and *Courtenay* jun., now appeared for the plaintiff: but the Court did not think it necessary to hear any argument.

Lord ELLENBOROUGH, C. J. said that it had been already decided upon demurrer (*a*) that if the particular place of payment be embodied in the note, it was part of the condition on which it was made payable that it should be presented for payment at that place.

The Court therefore directed the verdict to be entered for 25*l.* 4*s.*, the residue of the sum due upon the notes which had been presented at the banking-house at *Workington*; for which they were of opinion that the plaintiff was entitled to recover (*b*).

(*a*) Vide *Saunderson* v. *Bowes*, 14 *East.* 500. (*b*) See the next case.

Saturday, June 6th.

HOWE *against* BOWES and Others (*a*).

Though, where a promissory note is made payable at a particular place, a demand of payment must be made there, in order to give the holder a cause of action; yet if the makers (who had become insolvent) shut up and abandon their shop, that is evidence of a declaration to all the world of their refusal to pay their notes there.

THE plaintiff declared in assumpsit, as the holder of a promissory note made by the defendants on the 2d of *January* 1809, *at Workington Bank*, that is, at *Penrith* in the county of *Cumberland*, whereby the defendants then and there promised *on demand* to pay to one *R. W.* or bearer *there*, that is to say, *at Workington Bank aforesaid*, five guineas, value received: which note was afterwards, and before payment of the sum therein

(*a*) See the last case.

specified

1812.

HOWE *against* BOWES.

specified, duly assigned and delivered to the plaintiff, by which he became the bearer thereof, and entitled to the said sum therein specified: of which premises the defendants afterwards had notice, and by means thereof, and by force of the statute, became liable to pay the said sum, &c. when they should be thereunto afterwards requested; and being so liable, in consideration thereof afterwards promised the plaintiff to pay him, &c. when they should be thereunto afterwards requested. And then the plaintiff averred that after the making of the note, and before the exhibiting of his bill against the defendants in this behalf, " they became insolvent, *and then and from thenceforth, until and at the time of the exhibiting of the bill aforesaid, ceased and wholly declined and refused to pay at* Workington *Bank aforesaid,* the sum or sums of money specified in any note or notes issued by them from such bank, to wit, at *Penrith* aforesaid, &c. There were other similar counts upon other notes of the same bank, and also a count for money had and received, and another upon an account stated; to all which the general issue was pleaded.

At the trial before *Wood* B., in *Cumberland,* the plaintiff proved the notes, and also, in the opinion of the learned Judge, the allegation in the declaration, in excuse of the non-presentation of the notes at the bank, that the defendants became insolvent, and before and until the exhibiting of the bill declined and refused to pay them at the *Workington* Bank; [which proof was now stated to be that the shop was shut up, and that no payments were made there for some time before the action brought: but there was no proof of these particular notes having been presented there for payment.] This point was left to the jury,

1812.

HOWE *against* BOWES.

who found the fact as alleged, and gave a verdict for the plaintiff for 30*l.* 9*s.*, subject to two points of law appearing on the record; 1st, Whether a presentment at the appointed place was necessary: and if necessary, 2dly, Whether insolvency, as alleged in the declaration and found, is a sufficient excuse for non-preferment at the place?

Park [with *Littledale*] moved in last *Michaelmas* term to set aside the verdict as contrary to the evidence, and against law; and *Topping* and *Courtenay* jun. now opposed the rule nisi then granted. The latter urged that the objection was rather matter of law upon demurrer, than upon a motion for a new trial; the jury having, with the approbation of the learned Judge at the trial, found the truth of the fact alleged, that the defendants, after they became insolvent, had ceased and wholly declined and refused to pay any of their notes (including the notes in question) at their bank at *Workington*. If (as the fact was now asserted to be) the house was shut up and abandoned by them, it was nugatory to present the notes for payment there, and it was equivalent to a declaration by them that there was no necessity to make such presentation, as the notes, if presented, would not be paid. The defendants' counsel, on the other hand, denied that there was any evidence given of an application for payment and refusal of the notes in question, which they contended to be necessary, but only general proof of insolvency of the defendants, which was not sufficient; and they requested the Court to refer to the learned Judge for a more particular statement of the evidence on this point from his notes.

Lord

1812.

HOWE *against* BOWES.

Lord ELLENBOROUGH, C. J. observed, that the mere allegation of insolvency, as an excuse for not presenting the notes for payment at the place, would be impertinent; but in this case the allegation (the truth of which, as reported by the learned Judge, was left to the jury and found by them) went further, that the defendants had ceased and wholly declined and refused payment of any of their notes at the place. How then can the question arise? The shutting up of the house might be considered as a refusal to pay the notes there.

Park then urged that if the Court should refuse a new trial on the ground that the question appeared on the record, they would grant the defendants a rule nisi for arresting the judgment.

BAYLEY, J. Here is a general allegation on the record of a refusal to pay at the place, which is found by the verdict.

Lord ELLENBOROUGH, C. J. As it is not disputed that the banking shop was shut up, and that any demand of payment which could have been made there would have been wholly inaudible, that is substantially a refusal to pay their notes to all the world. Therefore, unless for our own satisfaction as to the fact, we shall wish to refer to the Judge's notes, the rule will stand discharged.

No further mention of the case was made in court.

Saturday, June 6th.

BEATY *against* GIBBONS.

Where the out-gone tenant had covenanted with his landlord to leave the manure made by him on the farm and sell it to the in-coming tenant at a valuation, to be made by certain persons; the effect of such covenant is to give the out-gone tenant a right of on-stand for his manure upon the farm; and the possession of and property in it remains in him in the mean time: and therefore if the in-coming tenant remove and use it before such valuation, he is answerable to the out-gone tenant in trespass.

IN trespass for taking a quantity of manure and dung, the goods of the plaintiff, to which the defendant pleaded not guilty, the plaintiff, at the trial before *Wood*, B., in *Cumberland*, shewed that he had recently before the cause of action quitted a farm, which he had occupied under the lease after-mentioned, and which was now tenanted by the defendant, who had succeeded him. That the plaintiff had left five dunghills on the farm, part of which had been taken away and used by the defendant, without any satisfaction previously made to the plaintiff. The defence set up was that the dung had been left upon the farm when the plaintiff quitted it, pursuant to a covenant in his lease; and the fact of its having been left on the farm when the plaintiff quitted it was proved. The covenant referred to was contained in an indenture of the 3d of *July* 1795, whereby Sir *James Graham* demised the farm to the plaintiff from *Candlemas* 1795, so far as respected the land, &c., and from *Lady-day* in the said year, so far as respected the houses and buildings, for 15 years then next ensuing the respective terms, at the yearly rent of 110*l.* payable half-yearly at *Whitsuntide* and *Lammas*. And the plaintiff (inter alia) covenanted with his landlord to consume and expend upon the demised premises all the hay and straw which should grow thereon, and the dung and compost therefrom arising should lay upon and bestow in manuring and improving the demised premises, *and at the end or expiration of the said term* should *sell and dispose of all such dung and compost as should then be upon the premises*

to

1812.

BEATY *against* GIBBONS.

to the said Sir James Graham, *or to the succeeding tenant*, the value thereof to be paid and determined by the foreman and any two of the jury of the said manor for the time being; one of the jurymen to be named by the landlord, and the other by the tenant; and failing thereof, both jurymen shall be named by the foreman of the jury for the time being; or by any other general rule to be established by any by-law that shall be made in the court of the said manor during the said demised term; such by-law being approved by a majority of the jury. The learned Judge being of opinion that the legal possession of the manure being in the defendant, the present tenant, the plaintiff, could not maintain trespass for taking it, but must sue for the price of it either upon the covenant, or as for goods sold; and therefore nonsuited the plaintiff. A rule nisi having been obtained by *Holroyd* in last *Michaelmas* term for setting aside the nonsuit;

Scarlett, (who was with *Park*,) now shewed cause against it, and contended that the plaintiff had no such legal possession of the manure, which by his covenant he was obliged to leave on the farm for the use of the in-coming tenant, as would enable him to maintain trespass for it against such in-coming tenant, who had possessed himself of it. The plaintiff had no right to take it away, but only to the value of it, to be ascertained in a certain way. The covenant is with the landlord, and if the landlord have not complied with it, the plaintiff's remedy lies against him.

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

Lord

1812.

BEATY *against* GIBBONS.

Lord ELLENBOROUGH, C. J. The out-going tenant being bound by his covenant not to carry away the dung, which was his property, from off the premises, but to sell it to the in-coming tenant for a price to be ascertained in a certain manner, the effect of the covenant is that he must in the mean time have a right of on-stand on the farm for it till he can sell it to the in-coming tenant; and the property must remain in him, to enable him to sell it. Therefore he had such a continuing possession of and property in it, as enabled him to maintain the action of trespass for the taking of it by the in-coming tenant before it was sold. The covenant in question must be construed cum sociis.

The other Judges concurred; and *Bayley*, J. added that the in-coming tenant had no right to use the dung, without the plaintiff's consent, till it was paid for.

Rule absolute.

Wednesday, June 10th.

The KING *against* The Inhabitants of LEEK WOOTTON.

The settlement of a son, coming into a parish with his father under a certificate, as part of the father's family, not having before gained any settlement of his own, shifts with the settlement of the father in the certificated parish, though such son were named in the certificate.

TWO justices removed *Joseph Bromwich*, his wife, and three children by name, from *Leek Wootton* to *Milverton*, both in the county of *Warwick*. The order was in the usual form, that the paupers had come to inhabit in *Wootton*, and were chargeable to that parish, not having gained a legal settlement there. The sessions on appeal quashed the order, and stated the following case for the opinion of the Court.

Some time before and at the time of making the order of removal, *Joseph Bromwich* and his family resided in the city

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

city of *Coventry*, within which the removing magistrates had no jurisdiction; but he had applied to the overseers of the parish of *Leek Wootton* for relief before the order was made. In *April* 1790 *Michael Bromwich*, the father of the pauper *Joseph*, being resident in *Leek Wootton*, went from thence with his family, of which the pauper was one, to reside with his (*Michael*'s) father *Joseph Bromwich* at *Milverton*, who rented a tenement there at a rent of 6*l.* a-year; but the same was of the yearly value of 10*l.* He had no lease thereof, but was tenant from year to year. He made a will, and dying in *May* following, devised his interest in this tenement to his son *Michael*, and appointed him his executor. *Michael* continued in possession and remained in this tenement many years, and paid the last rent due from his father as his executor. In 1791, and while he was in possession of the tenement, *Michael* applied to *Leek Wootton* for, and the parish officers there granted a certificate, by which they acknowledged him, his wife, *Joseph* (the pauper) and several other children by name, to be their inhabitants and legally settled in their parish of *Wootton*. *Joseph* was then about 12 years of age, and continued to reside at *Milverton* with his father on this tenement five years after the death of *Joseph Bromwich* the elder, but never gained any settlement in his own right.

Reader and *Morice*, in support of the order of sessions, argued, first, upon the merits, that though *Michael*, the father of the pauper *Joseph*, gained a settlement in *Milverton* subsequent to the certificate granted to him and his family from *Leek Wootton* parish, by reason of his occupying the tenement in *Milverton* of 10*l.* a-year in value, (which is one of the modes by which a certificated person

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

person may gain a settlement in the certificated parish); yet that the pauper *Joseph* his son could not gain a derivative settlement from his father in the same parish, inasmuch as he (the son) was expressly named in the certificate, and therefore resided under it suo jure, and not merely as part of his father's family, under that general description; which distinguished this from most of the cases upon the subject, such as *Rex* v. *Hampton* (*a*), *Rex* v. *Heath* (*b*), and *Rex* v. *Mortlake* (*c*), in neither of which the derivative settlement was held to be gained, because the pauper was not named in the certificate except under the general description of the father's family. And they particularly relied on *Rex* v. *Testerton* (*d*), and *Rex* v. *Bath Easton* (*e*), as in point; the former of which was distinguished from *The King* v. *Darlington* (*f*), because the children were named in the certificate. [*Le Blanc*, J. Is it meant to be contended that the child of a certificated man could be removed from his father's family, because he was named in the certificate?] It is a necessary consequence of the cases decided; and this very point was pressed upon Lord *Kenyon* in *Rex* v. *Darlington*. They argued further from the terms of the stat. 9 & 10 *W.* 3. *c.* 11. that no person who shall come into any parish by virtue of a certificate shall gain a settlement there by any act whatever, unless he or they shall take a lease of a tenement of 10*l.* a-year, or execute an annual office in the parish. This excludes any other method of obtaining a settlement, and consequently excludes a derivative settlement. [Lord *Ellenborough*, C. J. That statute recites the former act of the 8 & 9 *W.* 3. *c.* 30.

(*a*) 5 *Term Rep.* 266. (*b*) *Ibid.* 583. (*c*) 6 *East*, 397.
(*d*) 5 *Term Rep.* 258. (*e*) 8 *Term Rep.* 446.
(*f*) 4 *Term Rep.* 797.

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

which mentions the *person* coming into the parish *with his or her family*. The certificate act does not require the names of the children forming part of the *family* to be introduced into the certificate, though it may answer a convenient purpose by identifying them more easily afterwards.] The certificate operates upon each person named in it, as if he had been the only person certified. The case of *The King* v. *Coldashton* (*a*), which seems to bear the other way, was long antecedent to *The King* v. *Testerton*, and so far as it may be deemed contrary to, was overruled by the latter. In the former case, the child who was deemed to have acquired a derivative settlement was indeed named in the certificate; but it was within the age of nurture; whereas here the child was 12 years old at the time, and capable of gaining a settlement in his own right. Another objection was made to the order in this case, that the paupers removed were not inhabiting at the time in the parish which procured the order: but it was observed that no such objection was made before the sessions; and the Court afterwards considered that to be a sufficient answer.

Park and *Reynolds*, contrà, relied principally on the cases of *The King* v. *Coldashton* (*a*), and *The King* v. *Deddington* (*b*), as ruling the present; which they observed had been overlooked in *The King* v. *Testerton*, and *R.* v. *Bath Easton*, and diminished their authority. *R.* v. *Deddington* was the case of a derivative settlement acquired by purchase in the certificated parish, though such a mode of acquiring a settlement is not named in the certificate act; but the Court thought that a derivative

(*a*) *Burr. S. C.* 444. (*b*) *Burr. S. C.* 528.

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1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

settlement might be acquired by the children of the purchaser, though named in the certificate. The act having made no distinction between children named and those not named in the certificate, the Court will not make any, where the authorities are at least balancing. They also objected that there was no new taking of a lease of the tenement after the grant of the certificate as required by the stat. 9 & 10 *W.* 3. But *Le Blanc*, J. referred to *The King* v. *Findern* (*a*), where the Court held that that was immaterial.

Lord ELLENBOROUGH, C. J. Where there are conflicting decisions upon the construction of a statute, the Court must refer to that which is and ought to be the source of all such decisions, that is, the words of the statute itself. Some cases have been cited upon this occasion which are certainly of great weight, but which are in contradiction to the prior cases of *Coldashton* and *Deddington*; and therefore the Court are obliged to refer to the fountain-head of all, the statute, to see which of them most corresponds with the words of it; and upon the best consideration I think that the cases of *Coldashton* and *Deddington* range more strictly within the words of the stat. 8 & 9 *W.* 3. *c.* 30. and 9 & 10 *W.* 3. *c.* 11. The second of these statutes recites the former, which empowers the granting of such certificates to provide for the person mentioned in the certificate, with his or her family; and the legislature evidently meant that the certificate should be entire to protect the pater-familias and his family, whether named or not; and the naming of any of the family is mere matter of convenience, in order

(*a*) 2 *Const.* 583. and *Cald.* 426.

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1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

the more easily to identify them, but is not directed to be done by the legislature, nor are any powers taken away from or given to such children on account of their being named or not named in the certificate. The stat. 8 & 9 *W.* 3. says that when any person coming to inhabit and reside in any parish shall at the same time bring and deliver a certificate to the parish officers, thereby owning the person or persons mentioned in the certificate to be an inhabitant or inhabitants of the parish certifying; every such certificate shall oblige the parish to provide for *the person* mentioned in the certificate, together *with his or her family*, when chargeable. Now the person to be named in the certificate is the pater-familias, with his family, if he happen to have any; and then, and not before, it shall be lawful for any *such* person and his or her children, &c. to be removed. I am aware that the word *such* is not in the enacting part of the clause; but I think it must to complete the sense be incorporated there, being in the antecedent part of the statute. The scope and object of the act was to protect the residence of a father or mother coming with their family into another parish, without casting a burthen upon it, or enabling them to gain a settlement there except in the two ways mentioned. There is nothing in the act which requires the nomination of the constituent parts of their family, and it is mere artificial reasoning which makes the distinction between such of the children as are and such as are not named in the certificate; a distinction which the act itself does not make. Then as the child, though named, was still to be considered only as a constituent part of the family, it brings it to the question, Whether he was ousted of his derivative settlement from the father? Upon that point I think that the language of

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

of Lord *Mansfield* is founded in reason, and not opposed by the act, that the children of all parents must have the settlement of the father until they acquire another for themselves. I think therefore that the pauper in this case, continuing part of his father's family at the time, derived the settlement from him, and was not repelled from it by the circumstance of being named in the certificate.

GROSE, J. agreed.

LE BLANC, J. The sessions have sent this case for the opinion of the Court upon the question, Whether the pauper acquired a derivative settlement from his father? We must therefore take it that the son came into the certificated parish as part of his father's family, never having gained a settlement in his own right; though that is not stated in the case. Then coming into the parish as part of his father's family under the certificate, with only a derivative settlement from his father, the question is whether, while he continued part of his father's family, a settlement gained by his father there will not also be communicated to the son; whether the settlement of the son will not also shift with that of the father? The cases of *Testerton* and *Bath Easton* have not decided that the son, coming into a parish and continuing as part of his father's family under a certificate, is not capable of having his derivative settlement shift with his father's settlement; they only decided that a child named in the certificate so far stood in a different situation from that of a child who was not named, as that the settlement of a son so named, who had ceased to be part of the father's family, should not shift with that of his father.

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

ther. Now here the son had gained no settlement of his own at the time, but was living with the father as part of his family; and the cases of *Coldashton* and *Deddington* have decided that the settlement of a son so circumstanced, though named in the certificate, shall vary with the subsequent settlement of the father; and that if he come into the parish as part of the father's family with a certificate, his being named in it does not prevent the shifting of his settlement with his father's. This case therefore is distinguishable from those of *Testerton* and *Bath Easton*.

BAYLEY, J. The true construction of the certificate act seems to be that a pauper having an independent settlement of his own, and not merely a derivative settlement from the father, shall not, if named in the certificate, gain a settlement in the certificated parish, except in one or other of the ways permitted to the father himself; but if the child come into the parish under the certificate with his father, having only a derivative settlement from the father, what is there to prevent his settlement shifting with that of his father, as in other cases? The act does not say it shall not; and the cases say that though named in the certificate he shall be treated as part of his father's family, and his settlement shift with his father's. It is said indeed that by the words of the act, the settlement of a certificated person can only be acquired in the certificated parish by two modes, and that this is not one of them. But I think the fallacy of the argument is this, that the children do not come into the parish under the certificate *suo jure*, but only as part of the father's family and under his protection. The cases of *Coldashton* and *Deddington* have decided this point.

1812.

The KING *against* The Inhabitants of LEEK WOOTTON.

point. And if this were not the true construction, this inconvenience would follow, that however young the children might be coming with their father into the parish with a certificate naming them, if the father gained a new settlement there, he would be settled in one parish, and the children in another.

Order of Sessions quashed.

Saturday, June 13th.

The taking of a tenement which, by having been cropped by the landlord with clover and grass seeds, when let to the tenant, was worth 10*l.* a-year, but without that circumstance would have been of much less annual value, will confer a settlement.

The KING *against* The Inhabitants of PURLEY.

RICHARD EMMONS, *Ann* his wife, and his six children, were removed by the order of two justices from the liberty of *Woodley* and *Sandford* to the parish of *Purley*, both in the county of *Berks*; and the sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper, *Richard Emmons*, having been legally settled in *Purley* from *Michaelmas* 1808 to *Michaelmas* 1809, occupied a cottage and garden in the liberty of *Woodley* and *Sandford*, in the parish of *Sonning*, in the county of *Berks*, as tenant from year to year; and which cottage and garden was of the annual value of 4*l.* He also held a piece of land in the parish of *Tilehurst* in the same county, for one year from *Michaelmas* 1808 until *Michaelmas* 1809, at the rent of 6*l.* 10*s.* for that year. It had been cropped by the landlord with clover and grass seeds previously to letting thereof to the pauper, and in consequence of its being so cropped it was worth 6*l.* 10*s.* for that year; but had it not been so cropped by the landlord, it would have been worth only 2*l.* 5*s.* per year. The pauper, during the whole of the said year from *Michaelmas* 1808 to *Michaelmas* 1809, resided on his said cottage and garden in the liberty of *Woodley* and *Sandford*.

W. E.

1812.

The KING *against* The Inhabitants of PURLEY.

W. E. Taunton endeavoured to support the order of sessions, on the ground that the land which the pauper held in *Tilehurst* was only of the accidental value of so much as, with the rest, amounted to 10*l.* a-year, during the period that he had it; that is, made so much by the labour and property of another bestowed on it; whereas in order to confer a settlement, the taking should be of a tenement which is communibus annis of that value. That in fact the pauper did no more than purchase of the landlord the value of the crop.

Lord ELLENBOROUGH, C. J. He occupied a tenement which, during that year, was in fact of the value of 10*l.*: how it became of that value is immaterial: it might have happened that the crop was worth more in that year.

Per Curiam, Both Orders quashed.

Abbott and *Burnal* were to have opposed the orders.

The KING *against* The Inhabitants of HOLM EAST WAVER QUARTER.

Saturday, June 13th.

TWO justices by their order removed *Jane Anderson*, single woman, and her child *Mary Anderson*, aged five years, from *Holm East Waver Quarter*, in the parish of *Holm Cultram*, to the parish of *Aicton*, both in *Cumberland*. The sessions, on appeal, quashed the order as to the mother, but confirmed it as to the child, subject to the opinion of this Court upon the following case.

A father having purchased a tenement for less than 30*l.*, devised it in trust to be let to farm during his daughter's life, and to pay her the rents after deducting the expenses. Held that by 40 days residence thereon by permission of the trustee, after the father's death, she gained a settlement.

Jane

1812.

The KING *against* The Inhabitants of HOLM EAST WAVER Quarter.

Jane Anderson, who was previously settled in *Aicton*, resided with her father *Daniel Anderson*, who was also settled in the same parish, upon an estate in the removant township, which he had purchased for less than 30*l.*, and continued to reside with him till his death. The father died leaving a will, by which he devised this estate, consisting of a cottage and land, under the annual value of 10*l.*, to a trustee, in trust, after his death, to let the same to farm during the natural life of his daughter, *Jane Anderson*, the pauper, and to pay her the rents thereof (after deducting the expenses) during her life; and after her death, in trust to and for the use of his right heirs. The pauper *Jane Anderson* continued to reside upon the premises for more than 40 days after the death of her father in the removant township; the trustee never having interfered. The question was whether *Jane Anderson* had such an estate in the premises, as to gain a settlement by her residence thereon for more than 40 days after her father's death.

P. Courtenay argued for the settlement in *Holm East Waver Quarter*, that it was not necessary to have the legal title in an estate to gain a settlement in the parish, but an equitable title was sufficient; and cited *Rex* v. *Offchurch* (*a*). The Court said that the same point had been ruled in a later case.

Fell, contrà, said that, without meaning to disturb *The King* v. *Offchurch*, or *Rex* v. *Coldashton* (*b*), or *Rex* v. *Horsley* (*c*), the cases were not to be understood as going further than this, that when a party has an exclu-

(*a*) 3 *Term Rep.* 114. (*b*) *Burr. S. C.* 460. (*c*) 8 *East*, 405.

sive

1812.

The KING *against* The Inhabitants of HOLM EAST WAVER Quarter.

sive right to enforce the conveyance to him of the legal title, such a right coupled with the occupation of the property is sufficient to confer a settlement; upon the same principle that a settlement may be gained by a sole executor (*a*) before probate, or by a sole next of kin (*b*) before administration granted. Here the pauper only occupied as tenant to the trustee of a tenement under the annual value of 10*l.*

Lord ELLENBOROUGH, C. J. This species of settlement does not depend upon any term in a statute, but is an excepted case in the law, standing upon the rule, that a man shall not be removed from his own, while his trustee permits him to occupy it, and from which nobody else has a right to remove him. Here the pauper did not reside in the character of a tenant. (*Fell* having observed that she was only entitled to receive the surplus rents after deducting the repairs;) his lordship, after alluding to the different opinions held in *Shapland* v. *Smith*, observed that whether the estate here were legal or equitable, it was still the pauper's own, and she could not be removed from it by an order of justices.

Orders confirmed.

(*a*) *Rex* v. *Stone*, 6 *Term Rep.* 295. (*b*) *Rex* v. *Owresbury*, last term.

HUBBARD *against* BIGGS.

Monday, June 15th.

Where a noli prosequi is entered on any of the counts in a declaration, there is no rule for allowing costs on such counts.

HOLROYD moved for the Master to review his taxation of costs; and stated that the first count in the declaration was for a false return against the sheriff of *Wilts*, stating that upon an execution against a debtor of the plaintiff's, he had taken goods and chattels sufficient

1812.

HUBBARD *against* BIGGS.

cient to levy the whole debt, but that he only levied a less sum than the debt, and returned that he had levied the smaller sum, which he had paid to the plaintiff, and nulla bona ultra. There was a second count to the same effect, with some variations. And a third count upon the stat. 5 *Eliz.* for extortion in taking of the plaintiff more than he ought to have done for levying the sum which he had returned as levied. At the trial the plaintiff had agreed to take a verdict for the deficiency of the levy upon the first count, and entered a noli prosequi on the other counts; and thereupon the Master had only allowed the costs of the first count; but not of the others: and

The Court approved of the taxation, and denied the motion (*a*).

(*a*) See *Tidd's Pract.* 2d edit. 887.

Monday, June 15th.

FAIR and Another, Assignees of WILSON, a Bankrupt, *against* M'IVER and Another.

Third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance: held that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons.

THE plaintiffs declared in assumpsit as assignees of the bankrupt, upon a special agreement, and stated in the first count, that whereas on the 23d of *November*

1810,

1812.

FAIR *against* M'IVER

1810, at *Liverpool*, in consideration that *E. H. Wilson*, before he became a bankrupt, at the special request of the defendants, would sell and deliver to them 47 tons of iron at the price of 15*s.* by the cwt., the defendants promised *Wilson* to pay him for the said iron by a bill of exchange, drawn at three months' date, or made equal to cash in three months, on delivery of the goods, and which said bill of exchange should be satisfactory to *Wilson*. That *Wilson*, confiding in that promise and undertaking, afterwards, on the 29th of *November* 1810, sold and delivered the said quantity of iron to the defendants on the terms aforesaid: but though *Wilson*, before he became bankrupt, afterwards, on the last mentioned day, requested the defendant to pay him the said price of the iron by such bill of exchange as aforesaid, yet the defendants refused, &c., nor would, before his bankruptcy, when requested, or at any other time, nor have they since paid to the plaintiffs, as such assignees, the said price of the said iron by a bill of exchange payable in three months from the date thereof as aforesaid, or made equal to cash in three months, which was satisfactory to *Wilson*, or otherwise howsoever, but have wholly neglected and refused so to do. There were other special counts laying the agreement for the payment in different ways, as by a bill of exchange accepted by a banker payable in three months down on delivery of the goods; by a bill of exchange accepted by a banker payable at three months, in one month from the day of sale; by a good and approved bill of exchange at three months, in one month from the day of sale, &c.: and there were also the common counts for goods sold and delivered, and the money counts.

1812.

FAIR *against* M'IVER.

The value of the goods sought to be recovered in this action was 708*l.*, and at the trial before *Le Blanc*, J. at *Lancaster*, the delivery of the goods by *Wilson* to the defendants to that amount, on the 29th of *November* 1810, was not disputed, nor the bankruptcy of *Wilson* on the 23d of *January* 1811, by his executing a deed of assignment of all his property; but the only question made was upon the defendants' right to set off a bill of exchange for 700*l.* (*a*), drawn by *Rippon* and Co. on the 12th of *October* 1810, and accepted by *Wilson*, payable to the order of the drawers at three months' date, which bill was accepted before the sale of the goods to the defendants, of which bill the defendants claimed to be the bonâ fide holders. The circumstances under which this bill came into the defendants' hands were disclosed in the written examinations of the defendant *M'Iver*, taken before the commissioners upon *Wilson*'s bankruptcy, upon the 28th of *August* and 6th of *November* 1811, and which were read in evidence on the part of the plaintiffs. By these it appeared, in substance, that *M'Iver*, who with the other defendant carried on the business of ship-chandlers and rope-makers in *Liverpool*, in *November* 1810 directed his broker to apply to *Wilson* to purchase about 47 tons of iron *at a price payable by a bill to be equal to cash at the end of three months from the delivery of the goods*; that the iron was purchased accordingly, and delivered, with a bill of parcels, to *M'Iver*; of which bill of parcels contradictory accounts were given, whether it was or was not sent to Messrs. *Perry* and *Firmison*; but the iron was deposited in the defendants' cellar in *Liverpool*. That soon after the delivery

(*a*) The difference was paid into court.

Wilson

1812.

FAIR *against* M'IVER.

Wilson called at the defendants' counting-house for the payment according to the terms of the invoice, when *M'Iver* offered him in payment the bill in question, for 700*l.*, accepted by *Wilson* himself; which he refused to take in payment of the iron; and *M'Iver* refused to pay for it in any other way. That the defendants had before that time received the bill from *Perry* and *Firmiston, as he* (M'Iver) *believed, in the regular course of business.* That when *M'Iver* made the purchase of the iron he had no knowledge of the insolvency of *Wilson*, but had previously heard that *Wilson* had not been regular in his payments, *and intended at the time to pay for the iron by the bill in question;* but did not inform either the broker or *Wilson* of such intention to pay *Wilson* by one of his own acceptances. In the last examination *M'Iver* also stated that he received the bill in question from *Perry* and *Firmiston*, (who were iron-masters in *Staffordshire*,) about the latter end of *November* 1810, though it was not entered in his cash-book till the 12th of *January* 1811, (for which no satisfactory reason was assigned;) that this bill was passed to *Perry* and *Firmiston* on account of ropes sold to them: but *M'Iver* also admitted that at that time *P.* and *F.* were only indebted to the defendants in about 400*l.*; that the bill in question had been placed to their credit, and the surplus was to be settled for in account for ropes. That some time before the purchase of the iron was made, *Firmiston* informed him (*M'Iver*) that he was in doubt as to *Wilson*'s affairs being in good order, and whether he was not embarrassed, and said *that* M'Iver *had therefore better secure the bill of which he was in possession, if it could be done;* and *that the purchase of the iron in question from* Wilson *was agreed upon between him* (M'Iver) *and* Firmiston *as the*

mode

1812.

FAIR *against* M'IVER.

mode of securing the bill. Upon the subsequent production of the bill of parcels sent with the iron, there appeared to be written upon it "payable bill drawn at three months." *M'Iver* further stated that after the iron had been deposited in his cellar, and when he found that he could not dispose of it advantageously, not being in the trade, *it was taken out of his possession by an order from* Perry *and* Firmiston; by whom it was afterwards sold, as he believed, on account of the defendants; but the defendants had received no account of the sales, and he did not know who was to bear or receive the loss or profit upon the re-sale: but he considered that *Perry* and *Firmiston* were bound in honour to make good any loss to the defendants, and he expected *P.* and *F.* to pay them the profit if any; but that there was no understanding between them upon the subject, whether the defendants were to bear any loss by the transaction. The learned Judge thought, at the trial, that this was a contrivance between the defendants and *Perry* and *Firmiston* to obtain iron in value for *Wilson*'s acceptance, which the defendants knew had been before offered by *P.* and *F.* to *Wilson* for payment, and been refused by him; when, if *P.* and *F.* had applied in their own names for the iron, it would not have been sold to them: and under this view of the case, which he left to the jury, they found a verdict for the plaintiffs.

Topping in the last term moved to set it aside, and enter a nonsuit, on the ground that the defendants were entitled to set off, under the stat. 5 *Geo.* 2. *c.* 30. *s.* 28., the bankrupt's prior acceptance against the present demand by the assignees, as they might without question have done in case there had been no bankruptcy, and the action for the iron had been brought by *Wilson.*

1812.

FAIR *against* M'IVER.

And referred to the opinion of *Buller*, J. in *Hankey* v. *Smith* (*a*), as shewing that mutual credits exist between the holder and the acceptor of a bill. He admitted that the case might have been different, if the assignees had brought trover instead of assumpsit, in order to disaffirm the contract, on the ground of fraud in a creditor's endeavouring, by a contrivance of this sort, to get payment of his whole debt out of an insolvent estate; but this action affirms the contract: for which he referred to *Smith* v. *Hodson* (*b*).

Park and *Littledale* now shewed cause against the rule; and distinguished this from *Smith* v. *Hodson*, where the assignees of a bankrupt meaning to set aside a fraudulent preference of a creditor by the bankrupt in the sale of goods, brought assumpsit, instead of trover, and thereby affirmed the contract, and let in a set-off; but here the sale of the goods by the bankrupt was good, and not meant to be disaffirmed, and therefore assumpsit was the proper form of action: but the question turns on the set-off being fraudulent, being not only against the terms of payment contracted for, but for the secret benefit of other parties, to whom the goods would not have been furnished by the then insolvent; and the whole transaction is in truth no other than a contrivance to bring home certain creditors of the bankrupt's estate at the expense of the rest of them. Here were no mutual credits. [Lord *Ellenborough*, C. J. observed that the terms of the bill bargained for excluded the idea of mutual credits.]

(*a*) 3 *Term Rep.* 507. 509. in notis.

(*b*) 4 *Term Rep.* 211. and vide 1 *East*, 375. *Eland* v. *Karr*.

Topping

1812.

FAIR *against* M'IVER.

Topping and *Scarlett*, in support of the rule, said there was no fraud in fact or in law in making a person pay a bill which he justly owed, of which *Perry* and *Firmiston* (supposing the defendants to have acted as their agents) were in possession before the bankruptcy of *Wilson*, or his sale of the goods in question. But if the transaction were meant to be impeached as fraudulent, the action should have been trover to disaffirm, and not assumpsit, which affirms it and lets in the set-off: for if the sale were fraudulently procured by the defendants, no doubt trover would have lain. The defendants might have sued *Wilson*, as the legal indorsees of the bill, if there had been no bankruptcy, and it would not have been competent to *Wilson* to have set up the defence of fraud to the action. Then neither can his assignees deny the mutual credits between the indorsees and acceptor of a bill, in a form of action which affirms the dealing between the parties. [*Le Blanc* and *Bayley*, Justices, asked whether the acceptor of a bill, sued in the name of an indorsee who was a mere trustee for another, might not set off a debt due from the cestuy que trust; and suggested that the title of the legal holder might be examined into, where it went to affect the right of set-off.] The whole argument proceeds on the supposition of a fraud, the fact of which they denied, as well as the mode of raising the question. The transaction was two months before the bankruptcy.

Lord ELLENBOROUGH, C. J. The question is whether the recovery in this action by the assignees upon the sale of the goods by the bankrupt can be sustained without letting in the set-off in question? It is argued that in bringing an action founded upon the contract of sale, the assignees

1812.

FAIR *against* M'IVER.

assignees have affirmed that the transaction was fair throughout; but that is stated with too much latitude: the plaintiffs by suing on the contract of sale only affirm that nothing on the part of the bankrupt was fraudulent; but they do not thereby admit that there was no fraud in the parties against whom they are endeavouring to enforce it: these defendants may have meditated and atchieved fraud, but that will not preclude the plaintiffs from recovering against them upon their contract. Here it appears that the defendants had combined with *Perry* and *Firmiston* that a bill of *Wilson*'s held by *Perry* and *Firmiston*, which they had considered to be a bill of depreciated credit and not likely to be paid, should be passed off against *Wilson* the acceptor in exchange for certain goods of his. And to conceal this purpose *Perry* and *Firmiston* shift the bill into the hands of the defendants, who then apply to *Wilson* as indifferent customers for the purchase of the goods to be paid for by *a* bill, (not *that* bill) at 3 months' date, or made equal to cash in 3 months, and which should be satisfactory to him. They held out to him a bill which should be available to him as cash. *Wilson* contemplated no fraud, and is not estopped or concluded by the medium of fraud of the defendants, nor by the terms of the contract to claim payment for the goods against them. Therefore even if he had continued solvent, and had brought the action in his own name, he would not have been concluded. Then if the bill in question would have been no payment for the goods within the terms of the contract, how can it be a good payment by way of set-off; which involves a more difficult question, how far, supposing it could avail between the parties really interested, it could be set off by these defendants, who took the indorsement of it not for themselves but for *Perry* and *Firmiston*,

1812.

FAIR *against* M'IVER.

Firmiston, and merely for the purpose of getting the bankrupt's goods without paying for them. *Wilson* was not justly and truly indebted to the defendants at the time of the sale; and though they might have brought an action against him on the bill, yet upon the statute (*a*), by way of claim under the commission, they must have sworn that he was then justly and truly indebted to them upon the bill; which they could not have done for that purpose, as they held it merely as trustees for *Perry* and *Firmiston*. As to the case of *Eland* v. *Karr* (*b*), where a party upon a sale of goods had stipulated for ready money payment only, which was held to be satisfied by a payment made with his own bill, I defer to the authority, but am not convinced by it.

LE BLANC, J. (*c*). This was a question of mutual credit between these parties at the time of the bankruptcy; and if there were any fact which ought to have been decided by a jury, the case ought to go to a new trial, because the only reason why the defendants' counsel did not go to the jury was upon the opinion expressed by me at the trial. The only question I could have put to the jury was whether *Wilson* was in insolvent circumstances at the time of this transaction, and whether the defendants were the bonâ fide holders of the bill on their own account. But on reading the examination of one of the defendants there could be no doubt upon these facts, because that examination and the whole transaction itself shewed that the parties acted upon a firm persuasion that *Wilson*'s circumstances were bad, and that the defendants were not the bonâ fide holders of the bill for themselves,

(*a*) Vide stat. 8 *Geo.* 2. *c.* 24. *s.* 5. (*b*) 1 *East*, 375.

(*c*) *Grose*, J. was not in court at this time.

selves, but that it was put into their hands by *Perry* and *Firmiston*, not in the ordinary course of trade, but for the specific purpose of being set off in payment against these goods. I am not therefore removed from the opinion which I entertained at the trial.

1812.

FAIR *against* M'IVER.

BAYLEY, J. The case is not free from difficulties, but upon the whole I think the verdict is right. As between *Wilson* and the defendants, the defendants cannot say that they were not the real buyers of these goods; for they held themselves out as such to him: but the plaintiffs, as the assignees of *Wilson*, are not precluded from shewing that the defendants were not the real owners of the bill, but that they combined with *Perry* and *Firmiston*, who were the real owners, to set it off as payment for these goods, which were to be paid for in another mode which should be available to *Wilson* as cash. We ought not therefore to give assistance to the defendants in carrying their meditated fraud into execution. The question comes to this, whether the defendants were entitled to pay *Wilson* for the goods with this bill? And I think they were not, because I do not think that they were the real bonâ fide holders of it as purchasers, but merely held it as trustees for *Perry* and *Firmiston*; and as such trustees I do not think that they could set it off against a demand upon them in their own right. It is true that a banker, who is the legal holder of such securities, may prove the debt under the acceptor's commission; but if he held them as trustees merely for another, he could not prove the debt, if the cestuy que trust were indebted to the bankrupt's estate. And here I do not think that the defendants could have proved the amount of the bill under the commission as a debt due to them; for they could

not

1812.

FAIR *against* M'IVER.

not have sworn that *Wilson* was justly and truly indebted to them upon it. The case of *Smith* v. *Hodson* was different from this, because that went upon a contract between the bankrupt and the defendant, that there should be a sale of the bankrupt's goods upon the eve of his bankruptcy to the defendant; and if that were a bonâ fide sale, and not intended to give an undue preference, there could be no action sustained to recover back the value, because the defendant was entitled to hold the goods by the contract of sale. It therefore became necessary for the assignees, in order to give themselves any right of action for the value, to say that there had been no sale, and to disaffirm it by their action; because if they affirmed the sale, they affirmed the whole transaction with all its consequences of set-off, &c. But here it is admitted by the plaintiffs that there was a sale of the goods by the bankrupt to the defendants, and they only seek to recover payment for them; but it does not follow that because there was a sale the defendants can pay for the goods by a bill of the bankrupt's, of which they were not the bonâ fide holders in their own right, and therefore cannot set it off.

Rule discharged.

1812.

Tuesday, June 16th.

JOHN BELL, R. G. BEASLEY, and WALTER BELL, surviving Partners of WILLIAM BELL, deceased, *against* ANSLEY.

Joint owners of property insured for their joint use and on their joint account, cannot recover upon a count on the policy, averring the interest to be in one of them only.

THIS was an action on a policy of insurance on goods on board the ship *Herald*, as in the case of *Bell* v. *Bromfield* (*a*), on a voyage at and from *Virginia* to her port or ports of discharge in the United Kingdom, or any ports or places in the *Baltic*, backwards and forwards, &c. The same evidence was given, and the same general questions arose in this as in the other case: The policy was effected by the plaintiffs acting as a house of agency; and the only additional point made was upon the interest, which was averred in the different counts to be, 1st. in *John Bell*; 2dly, in *John Bell* and *Wm. Cumming*; 3dly, in *John Brown*, *Wm. Cumming*, and *James Brown*. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, the proof of interest in the goods, as it appeared by a letter of the 26th of *January* 1810, from *John Bell*, in *Virginia*, to *Wm.* and *John Bell* and Co., merchants, in *London*, and so found by the jury, was in *John* and *Wm. Bell* and *John Brown*; and it was upon the order for an insurance contained in that letter that the insurance was effected on the 27th of *March*. The loss was averred to be by hostile capture, and the terms of the averment in the declaration as to the interest in *John Bell*, under which alone it was admitted that the plaintiffs could recover, if at all, were that the goods were loaded on board the said ship

(*a*) 15 *East*, 364.

in

1812.

BELL *against* ANSLEY.

in *Virginia*, on the 7th *March* 1810, "and that the said *John Bell* then and from thenceforth until and at the time of the loss, &c., *was interested* in the said tobacco, &c. to a large amount, to wit, to the amount of all the monies ever insured thereon." And the only question was whether joint-owners could recover a loss insured on their joint account, upon an averment of interest in one of them only.

This question was discussed upon a rule for setting aside a verdict taken for the plaintiff at the trial, and entering a nonsuit, by leave of Lord *Ellenborough*, C. J. before whom the case was tried at *Guildhall*. The rule was supported in the last term by *Garrow*, *Holroyd*, and *Scarlett*; and opposed by *The Attorney-General*, *Park*, and *J. W. Warren*. The case was then directed to stand over for the consideration of the Court; and their opinion was now delivered by

Lord ELLENBOROUGH, C. J. This was a question of variance. The declaration was upon a policy, and upon the only count that could be supported, the interest was averred to be *in* John Bell; and the policy was stated *to be made to and for the use and benefit and on the account of the said* John Bell. The persons really interested were John Bell *and his brother* William Bell, and the policy was really made for their *joint use* and benefit, and on their *joint account*: and the question is whether, where several are jointly interested, and a policy is made on their joint account, it is sufficient to state that one of them was interested, and that the policy was made on his account: and we are of opinion it is not. By the stat. 19 *Geo.* 2. *c.* 37., insurances without interest, by way of gaming, except in certain excepted cases, are made null

null and void to all intents and purposes; and since that statute the constant practice has been to state in whom the interest is, and for whom the policy was made, and to make that statement according to the real fact. It was contended upon the argument that the only object of the statement was to shew that the policy was not a wager policy, and that this object was sufficiently answered by specifying the name of any one of the interested parties. But we are of opinion that this is not the *only* object, and that the underwriters are entitled to have it stated truly upon the record whose interest the policy was to protect. Though an action upon a policy may be brought in the name of the person who effected it, though he be not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible in evidence against the plaintiff, and what would be a defence against them is in many instances a defence against the plaintiff: and with a view to apprize the underwriter *whose* declarations it may be material for him to be prepared to prove, and whose case he is to meet, he ought to be truly informed by the record for whose interest and on whose behalf the policy was made. It certainly is material also, in point of public policy and convenience, that a disclosure of the true interest meant to be covered by the policy should be made, in order to exclude the property of enemies from the benefit of *British* insurance. Two cases were relied on by the plaintiff, *Page* v. *Fry*, 2 *Bos. & Pull.* 240., and *Hiscox* v. *Barrett* (a MS. case,) at *Guildhall* in *December* 1747, before *Lee*, C. J. The case of *Page* v. *Fry*, however, is clearly distinguishable: there, the interest was averred to be in *Hyde* and *Hobbs*: the policy was on goods,

1812.

BELL *against* ANSLEY.

goods, for which *Hyde* and *Hobbs* had paid, but the concern being too large for them, they had offered *Hacks* a joint concern, which he had accepted. It did not appear that *Hacks* even knew of the insurance; and the question discussed was, not upon the allegation that the policy was made upon the account and for the benefit of *Hyde* and *Hobbs*, but upon the allegation that *Hyde and Hobbs were interested* in the goods to a large amount, to wit, *to the amount of all the money ever insured thereon.* The counsel argued it upon the allegation of *interest* only. Lord *Eldon* says, The question is, whether *Hyde* and *Hobbs* had such an interest in the whole cargo as will support the averment in question? And, after commenting upon an insurable interest, he concludes, I think the plaintiff (meaning probably *Hyde* and *Hobbs*,) had a sufficient interest throughout the intirety of the cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in this declaration. *Heath*, J. says, I do not see why a joint tenant or tenant in common has not such an interest in the intirety as will entitle *him to insure.* A policy made by a person so interested is not to be considered as a wager policy. *Rooke*, J. said, I think *Hyde* and *Hobbs* had such an interest in the cargo as will satisfy the terms of the averment. And *Chambre*, J. says, The averment in substance is nothing more than that the parties, *for whose benefit the insurance was made*, had *an interest* in the subject of the insurance: they are not bound by the terms of the averment to shew any thing more than that *they* have an interest; and if they shew an interest to the extent of one hundredth part of the cargo, it will be sufficient. The spirit of the stat. 19 *G.* 2. only "requires that the policy shall not be a gaming policy." This case, therefore, seems to have

proceeded entirely upon the allegation, that *Hyde* and *Hobbs* were interested in the cargo, without taking into consideration the circumstance of its being made for the use or on the account of any other person than them; and, on the contrary, considering them, and them only, as the persons making it, and without once referring to the allegation, *that it was made for their use and on their account.* The other case was that of *Hiscox* v. *Barrett*, before Lord C. J. *Lee* at *Guildhall*, *December* 21, 1747. It was an action on an open policy of insurance on goods; and in the declaration it was averred that the plaintiff *was interested* in the goods. On evidence it appeared that the plaintiff had indorsed upon the policy a declaration of trust, that it was for the benefit of *himself and one Reynolds*. But this did not appear upon the record; and the goods were proved to belong *jointly* to the plaintiff and *Reynolds*. The defendant subscribed the policy for 100*l.*, and *had paid* 50*l. into court*, because *Reynolds* was jointly interested, and therefore the plaintiff entitled only to a moiety; and that the action was improper; for the plaintiff having averred that *he* was interested, the action was brought by him as one of the cestui que trusts, who could not bring it alone: and he could not be interested in any other manner, because as a bare trustee he had no interest; and this being an open policy, he must recover upon an interest. But the Chief Justice inclined to think "that the action was properly brought; "and that the plaintiff was entitled to recover the whole "sum subscribed; because he was the person with "whom the contract was made, and appears to be *inte-* "*rested to the value:* and though he has upon the policy "declared that another person is jointly interested with "him, yet there is no hardship on the defendant, who

1812.

BELL *against* ANSLEY.

" is to pay no more than the sum he subscribed; and " the plaintiff is answerable to *Reynolds* for his share." However, he offered to reserve the point if the defendant's counsel thought they could support it; but they declined it, and there was a verdict for the plaintiff. If this case were now to be decided, the payment of money into court would clearly have excluded the objection; but as the case then stood, and the law was then held, the objection ought not to have prevailed. It does not appear that *Reynolds* was interested when the policy was effected; and if he were not, then the policy was well effected upon the only interest meant to be covered by it. Here the plaintiffs were not, as in that case, the persons with whom the contract was made; as far as that circumstance can operate as a ground for the judgment. The second ground assigned for the judgment, that the defendant will only have to pay once, and that the plaintiff would be answerable to *Reynolds* for his share, is certainly not a tenable one. This case, therefore, cannot be relied upon as an authority for the defendant upon the point now in question. Upon the ground, therefore, that it is a material allegation, namely, the allegation *on whose account* and *for whose use and benefit* a policy is made; and that the statement ought to be according to the truth; we are of opinion that the variance in this case was fatal, and that the rule for a nonsuit should be made absolute.

STEPHENS *against* DERRY.

Tuesday, June 16th.

THIS came on upon a rule to shew cause why the plaintiff should not bring the postea into court and file the plea roll, so that the defendant might enter a suggestion thereon, that the debt recovered in this action did not amount to 5*l.* (4*l.* 15*s.*), and that at the time of commencing the action the plaintiff and defendant were both resident and seeking their livelihood within the city of *London*, and the defendant liable to be summoned to the court of requests there, pursuant to the statute 39 & 40 *G.* 3. *c.* 104. (public local.) It appeared from the defendant's affidavit, that at the time the debt was contracted he was employed as clerk to and boarded with Mr. *Hughes*, who had apartments in the plaintiff's house within the city. That at the commencement of this action the plaintiff resided and still resides within the city, and the defendant was and still is employed as clerk (*a*) to and resides with certain solicitors within the city, by which he obtains his livelihood: and that the debt was contracted within the city, and not elsewhere. By the plaintiff's affidavit it appeared that the debt was contracted for clothes, which were delivered in the city, but that before and at the time and for six months afterwards the defendant lodged with his wife in the county of *Middlesex*, first at *Backhill*, and then at *Pentonville*, where they now reside, and where the wife carries on the business of a mantua-maker, and that they have no property within the city of *London*.

Under the *London* court of requests act, 39 & 40 *G.* 3. *c.* 104. a husband domiciled in *Middlesex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London*, as a person *seeking his livelihood* there; for that means seeking the *whole* of his livelihood there.

(*a*) At weekly wages, as appeared by another affidavit.

1812.

STEPHENS against DERRY.

Topping and *Espinasse* were heard against the rule; and *Park* and *Gaselee* in support of it. The latter referred to *Holden* v. *Newnham* (*a*), and *Jefferies* v. *Watts* (*b*).

Lord ELLENBOROUGH, C. J. In order to entitle a party to be sued in *London* by seeking his livelihood within the city, he should seek the whole of his livelihood there, and not be in a state of vagrant existence for this purpose, seeking it partly within and partly without the city. Here the defendant seeks for employment at a certain office in the city, where he may get process, which he is to serve elsewhere. The statute must have a sober construction; for it would be extravagant in its terms, if taken in their greatest latitude; and it must mean that a party shall only be privileged to be sued in the city court, as seeking his livelihood within the city, where he so carries on his business there, as that is the only proper place to find him, in order to serve him with process; for otherwise, if a man kept a stand within the city for only half an hour in the day, though all the rest of the time he carried on business elsewhere, he would be privileged to be sued there only. If he seek his livelihood partly in the one place and partly in the other, there is no reason why he should be sued only in *London*. Here the defendant may be said to seek his livelihood substantially in the place where he is domiciled, and where his wife continually carries on business.

GROSE, J. I consider this man as seeking his livelihood in the place where he lives and carries on his business.

(*a*) 13 *East*, 161. (*b*) 1 *New Rep.* 153.

LE BLANC,

1812.

STEPHENS against DERRY.

LE BLANC, J. The question is brought before the Court for the first time for the construction of the words, "seeking his livelihood," in the act; the Court therefore should put such a construction as will fall in with the views of the legislature, and yet avoid the inconvenience which would ensue from too extended an interpretation of these general words. The question is whether this man was residing or seeking his livelihood at the time within the city of *London*. It is not pretended that his place of domicile was not elsewhere; and as to seeking his livelihood, that must mean seeking the whole of his livelihood within the city: it is the only sensible construction which can be put upon those words in the act. How else can we interpret what is a seeking of his livelihood there? for otherwise if a person only went his round occasionally in the city to seek for employment, though his general residence were elsewhere, he must always be sued in *London*; as may happen to be the case of porters, newspaper-carriers, and the like; which never could have been within the contemplation of the legislature. Now this person may fairly be said to seek his livelihood where he resides with his wife in *Middlesex*; for the trade carried on by her agency is his trade; he is liable for the debts contracted in it, and entitled to the profits: but if we were to put the construction on the act now contended for, every tradesman who supplied her with goods in *Middlesex* would be obliged to sue her husband in *London*. In the case of *Kaye* and *Freshfield*'s clerk (*a*), it did not appear that he carried on business any where else than in their office

(*a*) 13 *East*, 161.

in

1812.

STEPHENS *against* DERRY.

in *London*; yet the Court was not prepared to say that he was within the act.

BAYLEY, J. was of the same opinion.

Rule discharged.

Friday, June 12th.

GILBERT, Clerk, *against* Sir MARK SYKES.

A wager by which the defendant received from the plaintiff 100 guineas on the 31st of *May* 1802, in consideration of paying the plaintiff a guinea a-day as long as *Napoleon Bonaparte* (then first consul of the *French* republic) should live; which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void on the grounds of immorality and impolicy.

THE plaintiff declared in assumpsit upon a wager, and stated the consideration and promise to be, that if he would then pay the defendant one hundred guineas, on the 31st of *May* 1802, the defendant would pay him one guinea a day so long as *Napoleon Bonaparte* should live: and then averred the payment to the defendant of the 100 guineas, which he accepted: and that *N. B.* was still living; of which the defendant had notice; and further, that though the defendant did pay to the plaintiff a guinea a-day for a long time after the making of the promise and after the receipt of the 100 guineas, namely, up to the 25th of *December* 1804, yet that he had not paid the guinea a-day since; and so the plaintiff concluded to his damage of 2296*l.* at that rate, from the defendant's breach of promise.

At the trial at *York* before *Thompson*, B. the facts stated in the declaration were proved, together with other circumstances of subsequent confirmation of the wager by the defendant, which in the ultimate consideration of the case left no doubt as to the fact of the defendant's final acceptance of it; though there was material evidence, in the circumstances under which the wager was originally proposed and taken up, which was at the defendant's own table after dinner, and in the opinion of those who were

were present at the time, to invalidate the serious acceptance of it on the part of the defendant, if he had continued to act under the original impression upon himself and the company present; but he seemed to have considered himself as bound in honour, against that impression, to persevere in the bet; not being willing to accept the option of cancelling it, as a favour, which had been offered to him by the plaintiff. The jury however, under all the circumstances of the case, negatived the bet by finding a verdict for the defendant, on the ground that it was not a serious engagement at the time. And to set aside this verdict as against evidence a motion was made, and a rule nisi granted, in the last term; in the discussion of which the principal question was ultimately resolved into the legality of such a wager as this. For this purpose the only other material facts necessary to be stated are that at the time of the wager made, *Bonaparte*, then first consul of the *French* republic, was at peace with this country, though he shortly after became, and was at the time of the action brought, an open enemy of the king's; and that the bet arose out of a conversation concerning the probability of his assassination or other violent death.

Topping, *Scarlett*, and *Hullock*, shewed cause against the rule, and upon the matter of law argued, first, that the action would not lie, because the plaintiff had no particular interest in *Bonaparte*'s life, and therefore not within the stat. 34 *Geo.* 3. *c.* 48., considering it in effect as an insurance on the life. They cited *Atherford* v. *Beard* (*a*), though they admitted that *Da Costa* v. *Jones* (*b*) went to establish that a wager upon an indifferent subject, with-

(*a*) 2 *Term Rep.* 610. (*b*) *Cowp.* 729.

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1812.

GILBERT *against* SYKES.

out interest, was allowed by law. Secondly, that the wager was in effect a contract for an annuity on *Bonaparte*'s life; and that since the annuity act, 17 *Geo.* 3. *c.* 26. no such contract could be created without writing memorialized. Upon this head it was further argued, that at common law an annuity could not be granted but by deed, as not lying in livery; and cited 2 *Blac. Com.* 317. which classes annuities amongst incorporeal hereditaments; and other books, as *Co. Lit.* 172. *a.* 144. *b.* 145. *a.* Thirdly, that no contract which was not to be executed within a year, as this was not, could be enforced without writing, by the 4th section of the statute of frauds; and they cited *Fenton* v. *Emblers* (*a*), *Peter* v. *Compton* (*b*), and *Boydell* v. *Drummond* (*c*). Fourthly, that the wager was void on the ground of impolicy, as giving an interest to a subject (the plaintiff in this instance) in the life of a foreign sovereign who might be and had actually become an enemy: and that at all events it could not be enforced during the war. And they cited *Gamba* v. *Le Mesurier* (*d*). Fifthly, that it was void on the ground of immorality, as tending to encourage assassination. Upon the two last grounds they noticed *Andrews* v. *Herne* (*e*), and *Lord March* v. *Pigot* (*f*), which were referred to upon moving for the rule. As to the first of these, which was a promise to pay 20*l.* if *Charles Stewart* should be king of *England* within six months, they denied that it was law, as well because of its obvious impolicy, as upon the rejection of its authority by *Buller*, J. in *Good* v. *Elliott* (*g*). And as to *March* v. *Pigot*, it was an indecent wager between two heirs upon the lives of their

(*a*) 3 *Burr.* 1278. (*b*) *Skin.* 353. (*c*) 11 *East*, 142.
(*d*) 4 *East*, 407. (*e*) 1 *Lev.* 33. 1 *Keb.* 56. and 65.
(*f*) 5 *Burr.* 2802. (*g*) 3 *Term Rep.* 697.

fathers;

fathers; but at least it contained nothing of a public nature. They further cited *La Caussade* v. *White* (*a*) *Houssen* v. *Hancock* (*b*), *Allen* v. *Herne* (*c*), *Atherford* v. *Beard* (*d*), *Shirley* v. *Sankey* (*e*), and *Hartley* v. *Price* (*f*).

Garrow, *Park*, *Littledale*, and *Brougham* opposed the rule. As to the first ground of objection to the wager, that the parties had no particular interest in the subject-matter but what they created to themselves by their own contract, however better it might have been if the Courts had originally refused to take cognizance of idle wagers, yet there were so many instances in which they had been sustained, that it was now too late to reject them merely on the ground of the parties' want of a particular interest in the subject-matter. And Mr. Justice *Buller* stood alone in *Atherford* v. *Beard*, and in *Good* v. *Elliott*, in considering that such a wager was within the operation of the stat. 14 *Geo.* 3. To the second objection they answered that this was not an annuity either in form or substance: no such contract was in the contemplation of either of the parties. To warrant the denomination of it as an annuity, the parties must at least have contemplated its duration for a year, and not from day to day only as this was, though it might last for years. No writ of annuity would have laid for it. The annuities mentioned in the old books relate only to real property. Then to bring it within the annuity act (17 *Geo.* 3. *c.* 26.) there must be a grant in writing to secure it, without which none of the regulations of the act are applicable to it. [Lord *Ellenborough*, C. J. told the plaintiff's counsel that they

(*a*) 7 *Term Rep.* 535.
(*b*) 8 *Term Rep.* 575.
(*c*) 1 *Term Rep.* 56.
(*d*) 2 *Term Rep.* 610.
(*e*) 2 *Bos. & Pull.* 130.
(*f*) 10 *East*, 22.

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1812.

GILBERT *against* SYKES.

might relieve themselves from arguing this point; for the annuity act certainly related to written securities. Neither was the case within the stat. 14 *Geo.* 3. Thirdly, this is not within the 4th clause of the statute of frauds, as a contract not to be executed within a year, like that in *Boydell* v. *Drummond* (*a*), which necessarily contemplated a duration of several years, and which could not consistently with the terms held out to the subscribers be executed within a year. But here one of the parties at least must have contemplated that it would be executed within 100 days, otherwise he was certain of being a loser. And *Fenton* v. *Emblers* (*b*) rather supports the construction that this clause of the statute only relates to contracts which are expressly to be performed beyond the year. [Lord *Ellenborough*, C. J. said that they might relieve themselves from this part also of the argument.] Fourthly, it is not immoral, as giving an interest to one of the parties to procure the death of a third person by violent means. No such motive can fairly and lawfully be imputed to any person; nor is that the natural and obvious tendency of the contract. It is not to be presumed that any person, having an interest of this sort in an event, will endeavour to accomplish it by all means however wicked and detestable. Nothing is more common in the grants of leases, especially of ecclesiastical leases, than to limit their duration to the lives of the king and royal family and other eminent persons, the notoriety of which precludes all doubt. The objection, if well founded, would go to invalidate all leases for lives. They relied on Lord *March* v. *Pigot* (*c*). Neither fifthly, is it against public policy to allow of such a

(*a*) 11 *East*, 142. (*b*) 3 *Burr.* 1278. (*c*) 5 *Burr.* 2802.

wager,

1812.

GILBERT *against* SYKES.

wager, as well for the unreasonableness of the presumption, that an interest of this kind would engage any person to swerve from their allegiance and duty, at the most imminent hazard to the party, as also because a wager on the life of a foreign sovereign appears to be more free from any objection of the kind than upon any other life whatever, from the event being far more removed from the control of either of the parties than in any other supposeable case. They relied on *Andrews* v. *Herne* (*a*), where, though the objection on the ground of public policy does not appear by the reports to have been taken; yet it cannot be supposed that the consideration of it was wholly overlooked by the Court. [Lord *Ellenborough*, C. J. There is nothing to be imputed to the Judges in *Andrews* v. *Herne*, that the objection in this view of it did not occur to them; for down to much later times, Lord *Mansfield* had tried causes upon bets on the sex of the Chevalier *D'Eon*, before the objection was taken on the ground of immorality. There are however precedents in *Herne* of declarations upon wagers so far back as the time of *Elizabeth* upon subjects in which the parties had no particular interest. *Andrews* v. *Herne* may therefore be taken as an authority that an action on a wager may be entertained without the parties having a special interest in the subject-matter, but not as an authority against the objection now taken on the ground of public policy. It cannot indeed be considered that any person, by means of an interest created in the duration of another's life, would be impelled to commit murder in this country, from the fear of the law if from no other fear; but against the murder of a person in a foreign country, there might not be the

(*a*) 1 *Lev.* 33. 1 *Keb.* 56. 65.

same

1812.

GILBERT *against* SYKES.

same salutary check. The objection however in this case, if well founded, stands upon a much broader basis. For can there be any thing more impolitic, as tending to produce the retaliation of an enemy against the persons of those who are most dear to us at home, than that the assassination of persons invested with the government of foreign countries should in any degree be encouraged, or any temptation held out for such a purpose, if this wager be made out to have such a tendency. I do not measure this upon the practical probability of the event, but on its tendency; in the same manner as Lord *Mansfield* in *Jones* v. *Randall* (*a*) puts by way of illustration the case of a wager laid with a peer of parliament upon the event of a cause there pending, tending to influence his decision, and therefore void; and yet there could be no probability of such an event.] They still denied that the tendency of such a wager as this was either immoral or impolitic: and mentioned another case of *Forster* v. *Thackeray*, *M.* 22 *Geo.* 3. (*b*), which was never finally decided: and observed that *France* being at peace with this country when the bet was made, the question was the same as if it had been made upon the life of any person here: and if legal then, the subsequent war could not illegalize the contract, nor could any objection of this sort be taken on the general issue.

Lord ELLENBOROUGH, C. J. Upon conferring with my brethren, I find that though we differ in some respects upon the grounds of our opinion, yet we all agree that there should be no new trial granted in this case. Wherever the tolerating of any species of contract has a

(*a*) *Cowp.* 37. (*b*) 1 *T. R.* 57. in notis.

tendency

1812.

GILBERT *against* SYKES.

tendency to produce a public mischief or inconvenience, such a contract has been held to be void. In addition to the several cases which have been alluded to in the argument, one more may be mentioned, where a contract on account of its mischievous tendency was held void; that was a case (*a*) where a note had been given for a certain sum to indemnify parish officers for the maintenance of a bastard child; and because of the interest which it created in them to be negligent of their trust, and not to take care of the life of the infant committed to their charge, the security was held void. This had been first decided before me, and similar questions afterwards arose before my Brothers *Heath* and *Lawrence*, and they each of them held the same opinion. It is therefore no new principle in the law, that if a contract have a tendency to a mischievous and pernicious consequence, it is void. I am aware, that in old cases, precedents of which are to be found in *Herne's Pleader*, actions have been maintained upon wagers open to an objection of this sort, but not decided upon that ground, which was not then adverted to. The first of these reported is *Andrews* v. *Herne*, where the bet was upon the life of one who was held to be King de jure; and yet no point was made as to the invalidity of the contract on the ground of its impolicy. The question, whether any suit could be maintained upon a wagering contract where the interests of third persons were involved in the discussion, came under consideration in *Cox* v. *Phillips* (*b*), before Lord *Hardwicke*; in which the validity of Mrs. *Constantia Phillips'* marriage with Mr. *Muilman* was drawn into discussion. The attempt to draw into question the in-

(*a*) 6 *East*, 110. *Cole* v. *Gower*. (*b*) *Rep. temp. Hardw.* 237.

1812.

GILBERT *against* SYKES.

terest of third persons was severely animadverted upon by Lord *Hardwicke*. The case in which the general question was most considered was *Dacosta* v. *Jones*, upon the sex of the person who passed under the name of the Chevalier *D'Eon*: but that was brought several times before the Court before any objection was taken upon the ground of its immoral tendency. Questions of the same sort had several times arisen before, but they had not undergone full discussion and consideration. *Jones* v. *Randall* was upon a wager whether a decree of the Court of Chancery would be reversed upon appeal in the House of Lords; and as that was between parties having no interest whatever in the decision, it was considered merely as an innocent wager; but Lord *Mansfield* then said, that if it had been with one of the judges or lords of parliament, it would have been clearly void on account of its mischievous tendency; and yet the danger of influencing such illustrious persons, who would not probably mix at all in the decision, would be infinitely remote: but notwithstanding the improbability of any mischief in fact, such a wager was deemed void on account of its tendency upon general rules of law. Then is not the interest created by this wager likely to induce more proximately mischievous consequences to the public than the other instances which have been considered as having that tendency. The mischief is the more to be regarded at a time when it has been announced by that enemy, in the preservation of whose life the plaintiff has thus created an interest to himself, year after year, that there is a large force collecting on the opposite coasts ready to be poured into this kingdom, and every *Sunday* the minds of the subjects are kept alive to the danger: and shall it be allowed to a subject to say that in case of such an

event

1812.

GILBERT *against* SYKES.

event happening, as an invasion of the kingdom by the *French* ruler, that the loss of 365 guineas a year depending upon that life, would have no operation upon his mind when opposed to the call of active duty towards his country: that the moral duties which bind man to man are in no hazard of being neglected when put in competition with individual interest: that it is not an object to us to prevent even the suspicion, and to repel from us the malignant imputation that we countenance in any manner the idea of assassinating an enemy, and thereby guard against any attempt on his part to retaliate upon a life most dear to us all. Wagers of this description have a tendency to encourage these notions, I cannot therefore consider them altogether innoxious. The wager in question arose out of a conversation respecting the probability of *Bonaparte*'s assassination; and these parties were not acting upon any remote speculation when one of them thought that the mischief which was to destroy his life would happen within a hundred days from that time. If the wager in its terms had been upon the probability of a person's assassination within that period, I should not have considered such a question as proper to be tried in the form of a wager which went to give any person an interest in the perpetration of so enormous an offence; and it matters little that this consideration was only an inducement to the bet more in the form of an annuity: the very computation of the price of such an annuity, little more than three months' purchase, shews that they contemplated a violent termination of the life. Upon the whole therefore, not without some degree of doubt whether Mr. Justice *Buller* was not right in saying that no wagers ought to be sustained where the parties have no special interest in the subject-matter; at any rate

1812.

GILBERT *against* SYKES.

where the subject-matter of the wager has a tendency injurious to the interests of mankind, I have no doubt in saying that it ought not to be sustained. I cannot indeed say that this verdict was founded on a ground upon which it could be sustained, that the bet was not deliberately entered into, for whatever doubt there was upon it at first, it was abundantly confirmed afterwards: but I think that an action should not be countenanced upon a subject in which the parties had not only no interest other than what they created to themselves by the bet, but the public have an interest to restrain it. Therefore founding my opinion upon all the circumstances in evidence in this case, I consider it as a wager against public policy and of immoral tendency, and that no new trial should be granted.

GROSE, J. I agree that there should be no new trial, but am not prepared to say that the action will not lie in this case: but it is enough if there be any mischief in the trial of such a question against granting a new trial. Now the subject of the bet is a matter of mere speculation on the life of an individual in which the parties had no special interest: there has been one trial upon it, and the jury have found a verdict against it; and I think that the time of a court of justice has been wasted enough already upon such a subject. I do not now enter upon the question whether the action lies: I have upon a former occasion fully considered it, and I then thought that the action would lie, and am not now prepared to say that it does not; but I do not think it necessary upon this occasion to enter into it: for if the discussion of it once has tended to public mischief, it will be more mischievous to agitate it again.

LE

1812.

GILBERT *against* SYKES.

LE BLANC, J. This is an application to set aside a verdict for the defendant, which was given by the jury upon consideration of all the circumstances attending this bet: but the Court do not think it material to discuss the ground on which that verdict was founded, being of opinion that the plaintiff ought not to recover upon a new trial. It appears from the learned Judge's report that the bet arose out of a conversation respecting the particular situation of the person to whom it refers, and the probability of his coming to a violent death by assassination; and it is clear that this contract was entered into upon that consideration; and indeed that is shewn by the very terms of it, taking it as an annuity; for it is at little more than three months' purchase. It is said that we ought not to look to the conversation which passed before the contract in order to affect the construction of it; but in all cases where the question is on the legality or illegality of a contract, Courts always look to the previous circumstances which led to it; and therefore I think that the previous conversation was evidence in this case. It has been often lamented that actions upon idle wagers should ever have been entertained in courts of justice: the practice seems to have prevailed before that full consideration of the subject which has been had in modern times; but the frequent discussion of it in these times has so far satisfied the minds of most lawyers, that they are satisfied that objections would have lain in many cases of wagers that have formerly been maintained without noticing such objections; and it is now clearly settled that the subject-matter of a wager must at least be perfectly innocent in itself, and must not tend to immorality or impolicy. Then, can a wager upon the life of a person, whether enemy or

1812.

GILBERT *against* SYKES.

friend, founded on the probability of its terminating by assassination or other violent death, be said to be innocent in itself? Such a wager does not come within the range of any of those cases where wagers have been sustained. With respect to *Andrews* v. *Herne*, which has been relied upon as most like this case, I have no hesitation in saying that the bet would never have been sustained in these days; being a bet between two subjects, whether the sovereign of the country would be restored to his crown, of which he had been forcibly deprived. The other case relied on, of Lord *March* v. *Pigot*, arose out of a conversation between two sons, as to which of their respective fathers would live the longest; upon which a third person stepped in and took up the bet with one of the young gentlemen; but that case was considered chiefly on the doubt, whether or not it was a bubble bet, as one of the fathers happened then to be dead. At any rate it was free from the present objection; for there was no previous conversation whether one or other of the fathers would come to his death by assassination or other violent means. But in my opinion it is both impolitic and immoral to bet concerning the life of a sovereign, whether he shall come to his death by assassination or other violent means.

BAYLEY, J. The discussion which has been had of this case has strongly illustrated the inconvenience of countenancing idle wagers in courts of justice: it occupies the time of the Court, and diverts their attention from causes of real interest and concern to the suitors: and I think it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to. This is the case of a mere idle

wager,

1812.

GILBERT *against* SYKES.

wager, in which the parties had no particular concern. It was induced by a conversation, not upon the probability of the person's death within a given time, in the course of nature, but by assassination or other violent means: the amount of the sum given shews that his death by violent means was in the contemplation of the wagering parties; and that, I think, for the reasons which have been stated, makes the wager both immoral and impolitic. It gives to one person a pecuniary interest in the violent death of another, by whatever means procured; an interest which he has no right to create by his own voluntary act; and this, when applied to the person of a foreign potentate, is also particularly impolitic; because it tends to create disgust against this country amongst foreign potentates to have such subjects discussed in our courts of law. And if this were allowable in one instance, a very considerable interest might be created by the same means in great numbers of persons in this country in prejudice to its true interests in case of an invasion.

Rule discharged.

TILBY *against* BEST.

Tuesday, June 16th.

If judgment be entered up for the penalty of a bond given to secur an annuity, and the defendant be taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorized the taking out execution for the arrears, the Court will set aside the execution in toto, and not merely charge the defendant pro tanto.

THIS came on upon a rule for setting aside an execution against the defendant, and for discharging him out of custody for irregularity; which execution had been taken out upon a judgment for the penalty of a bond, entered up under a warrant of attorney given to

1812.

TILBY *against* BEST.

secure an annuity. The objections urged by *Marryat* against the execution were two: first, that the plaintiff had taken his judgment for the penalty at common law, without suggesting breaches upon the statute of *William* (*a*); and supposing a release of errors (which had been given in this case) would release the error of not reviving by scire facias the judgment, which was otherwise out of date; yet parties could not enter into an agreement to rescind an act of parliament: but if the defendant could release his right of objection under the statute of *William*, he might equally release all right of objection under the annuity act, and thus the object of the legislature would be defeated. Here it was a term in the original contract and annuity deed, though not in the warrant of attorney, that the grant of the annuity should release all errors.

Topping and *Best*, on shewing cause, referred to *Henderson* v. *Lady Glencairn* (*b*), and *Osterbury* v. *Morgan* (*c*), and *Howell* v. *Stratton* (*d*), where the judgment was on a mutuatus. But this objection was answered by observing that there could be no irregularity in the commitment, or error on the record by the commitment in execution merely following the judgment.

Marryat then objected that the plaintiff had not pursued the authority given him by the warrant of attorney, which was only to take out execution *for the arrears* of the annuity, and not for the penalty.

Lord ELLENBOROUGH, C. J. The last objection is very strong; if the plaintiff had merely taken out exe-

(*a*) 8 & 9 *W.* 3. *c.* 11.
(*b*) 2 *Taun.* 235.
(*c*) 2 *Taunt.* 195.
(*d*)

cution

1812.

TILBY *against* BEST.

cution as for the arrears, though for too much, we might have aided him, by referring to the Master to see how much was due, and detaining the defendant charged in execution only for that sum: but here the execution having issued alio intuitu for the penalty, which is without any foundation in the special authority, and in no respect in pursuance of it, we think that the defendant is entitled to have his rule made absolute.

Per Curiam, Rule absolute.

EDWARD HERBERT'S Case.

Monday, June 15th.

A protection from the impress service, granted by the favour of the board of admiralty, though for a certain time, may be set aside at pleasure whenever in their judgment the exigency of the public service requires it: and it matters not that the impress warrant is of a prior date to such protection.

APPLICATION was made on the part of a seaman for a rule to shew cause why a writ of habeas corpus should not issue to bring him up for the purpose of his being discharged, as having been illegally impressed. The application was founded on an affidavit of *Thomas Herbert*, stating that on the 31st of *December* last he was master of the ship *Nantwich* of *London*, of 152 tons, and obtained from the board of admiralty an instrument called a ship's protection of that date, for three months, for which 10*s*. was paid; enjoining all commanders, &c. of the king's ships not to press 12 men and boys belonging to the *Nantwich*, provided their names, ages, and descriptions were inserted on the other side of the protection, and provided they were actually on board, or in the immediate service of the vessel, and that the protection was kept on board of her: and *Edward Herbert*, as chief mate, was brought in all respects by the affidavit within the terms of the protection. It then stated that he was impressed on the 1st of *February* following, within the three months, and was still detained.

Park,

1812.

HERBERT'S Case.

Park, in support of the rule, now insisted on the extensive danger and inconvenience to the trade of the country, if a person, who at the time was the acting commander of the vessel, and charged with the specific custody of the cargo on board, could be impressed at a moment's warning, against the faith of the protection, which was in force at the time. That at least such a protection was in force against any impress-warrant of a prior date issued; which was the case of the warrant under which *Herbert* was impressed.

Garrow and *Jervis*, in opposing the rule, said that such protections were in general observed, excepting where the special exigency of the service required a more rigid application of the public force. That the granting of these protections being mere matter of favour, they might be withdrawn at pleasure.

The Court agreed in this, and said that whatever the indulgence of the board of admiralty might be on these occasions, neither that board nor this Court could give any protection to this class of persons from the impress-service beyond that which the legislature had extended to them in certain cases, of which this was not one. And therefore such a licence could have no effect against the exigency of the public service. They also agreed that it made no difference that the press-warrant in this case had been issued before the licence.

Rule discharged.

1812.

ISAAC PRATT'S Case.

Tuesday, June 16th.

The Court discharged a mariner who had been impressed out of a fishing smack; he having had an impress protection granted to him by the board of admiralty, under the directions of the st. 50 G. 3. c. 108., though by the accident of the vessel's sailing before it reached him, he had it not to produce to the impress officer at the time, as he ought to have had, which warranted the officer in impressing him: and though the master had afterwards received a greater number of mariners on board than were described in the act.

THIS was also an application for the discharge of an impressed seaman, late a mariner on board the *Elizabeth* fishing smack, of 57 tons burthen, belonging to *Harwich*; a protection had been given by the board of admiralty, upon the application of the master of the vessel, under the stat. 50 *Geo.* 3. *c.* 108. *s.* 2., which limits the protections from the impress service to one mariner for every such vessel, besides the master and his apprentices. But when he was impressed on the 6th of *January* last, there were more mariners on board. Besides which the man had not got his protection on board at the time he was impressed; the reason of which now appeared to be that after it was granted by the board, it was sent down to *Yarmouth*, where the vessel then was, but she had sailed before it arrived there: but the circumstances were mentioned to the impressing officer at the time, and the protection was still in force.

Garrow and *Jervis* in opposing the rule, urged these defects; and referred to the terms of the protection, as requiring it to be produced by the person claiming under it.

But *The Court*, (without hearing *Scarlett* for the applicant,) thought him entitled to his discharge. Lord *Ellenborough*, C. J. said that however the impressing officer was warranted in taking the man at the time, as he had not his protection with him: yet now, when the question was whether he was truly entitled to be protected at the time, and it turned out that he really had a protection under the act of parliament, though he was not

1812.

PRATT'S Case.

not then able to exhibit it, by reason that the ship had sailed before it could reach him, the Court ought to give effect to it by setting him at liberty. And such protection given by the board of admiralty, under the act for the individual benefit of the person named in it, could not be abrogated as to him by the subsequent act of the master in taking other persons on board.

Rule absolute.

SMITH *against* LEWIS (*a*).

Bail having rendered their principal in time, according to the practice of the Court, are entitled to stay the proceedings in an action on their recognizance without costs, though the plaintiff commenced his action before he was served with notice of the render.

A RULE was obtained by *Espinasse* for the plaintiff to shew cause why the proceedings on the recognizance against the bail should not be stayed, and an exoneretur entered on the bail-piece, the defendant having surrendered. The capias ad satisfaciendum was returnable on the first day of this term (29th of *May*), and the defendant was rendered on the 30th, and notice of the render given on the evening of the 1st of *June*. On the 29th of *May* the bail had been served with writs in the action on their recognizance. The question now was whether the rule was to be made absolute except on payment of costs, in proceedings against bail till notice of the render was served.

Campbell relied upon *Perigal* v. *Mellish* (*b*), and *Abbott* v. *Rawley* (*c*), as in point against the bail; and contended that these cases were not over-ruled by *Byrne* v. *Aguilar* (*d*), in which the Court did not deny the plaintiff's right to costs under such circumstances, but only held that it was irregular to proceed against the bail after notice of the render.

(*a*) This note was communicated to me by Mr. *Espinasse*.

(*b*) 5 *Term Rep.* 363. (*c*) 3 *Bos. & Pul.* 13. (*d*) 3 *East*, 306.

The

1812.

SMITH *against* LEWIS.

The Court, however, said that the rule of *Trin.* 1 *Anne*, having directed that all proceedings against the bail should cease upon notice of the render, they were entitled to have the proceedings stayed unconditionally.

Rule absolute (*a*).

(*a*) See 15 *East*, 254., *Hughes* v. *Poidevin*.

M'IVER and Another *against* HUMBLE, HOLLAND, and WILLIAMS.

Tuesday, *June* 16th.

THIS was an action for goods sold and delivered; to which the defendant *Humble* pleaded non assumpsit, and the other two defendants severally pleaded their bankruptcy and certificates after the cause of action arose; on which a noli prosequi was entered as to them, and the cause proceeded to trial against *Humble* only. At the trial before *Le Blanc*, J. at *Lancaster*, the plaintiffs proved the delivery of the goods, on the 13th of *January* 1810, on board the ship *Susannah* at *Liverpool*, in consequence of a prior order given on the 2d by the clerk of a house trading there at that time under the firm of *Samuel Holland and Co.*, which order was given in the general name of *the owners of the ship* Susannah, and the bill of parcels was made out accordingly, "*Owners of Susannah, debtors to M'Iver and Co.;*" and the plaintiff's clerk at the time debited "*Samuel Holland and Co.* for the ship *Susannah.*" Then in order to shew that the defendant *Humble* was a part-owner of the *Susannah*, the plaintiffs produced in evidence the registers relating to that ship. 1. The certificate of registry de novo at *Liverpool*, under date of

Where the party sued as a partner for the value of goods furnished for "the *owners* of a ship," was neither a partner in fact at the time, (having parted with his share some time before,) nor held himself out as such, having before withdrawn his name from the description of the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change; he cannot be charged merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees.

the

1812.

M'IVER *against* HUMBLE.

the 8th of *June* 1808, obtained upon the oaths of *Samuel Holland* and *Thomas Strickland* of *Liverpool*, merchant, stating that they, "*together with Michael Humble*, of *Bawtry*, in the county of *York*, merchant, who is not now within the distance of 20 miles from this port," were *sole owners of the ship* Susannah, &c. 2. An indorsement on the certificate of registry, dated the 14th of *June* 1808, stating that *T. Strickland* had that day sold and transferred all his right and interest in the ship *Susannah* to *S. Holland* and *M. Humble*, merchants, and signed *S. Strickland*. 3. Another indorsement on the said certificate, dated the 21st of *November* 1809, recording a transfer made of a moiety of the ship by *Humble* and *Holland* to *T. S. Williams* on the 7th of *October* 1809, while the ship was at sea: and this was signed "*Ml. Humble*, by *Sl. Holland*, his attorney by power. *S. Holland*." 4. Another indorsement on the certificate of registry, dated the 7th of *March* 1811, [this was after the bankruptcy of the defendants *Holland* and *Williams*, which took place in *November* 1810, when the commission issued against them, under which *J. Gladstone*, *H. Jones*, and *J. Blair* were chosen assignees;] stating that "*J. Gladstone*, *H. Jones*, and *J. Blair*, assignees of the estate and effects of *S. Holland* and *T. S. Williams*, bankrupts, and also the said *S. Holland* and *T. S. Williams*, and *M. Humble*, of *Liverpool*, merchants, have this day sold and transferred all our rights, shares, and interests of, in, and to the said ship *Susannah*, to *Swinton Colthurst Holland* of *London*, and *W. Fairclough* of *Liverpool*, merchants, as witness our hands, &c.;" and this was signed by *Gladstone*, *Jones*, and *Blair*, the assignees, by *Holland* and *Williams*, the bankrupts, and by *Ml. Humble*, the defendant. It appeared further upon the cross-

cross-examination of the plaintiff's witness, that the partnership firm of *Samuel Holland* and Co. previous to and at the time of the goods in question furnished, consisted of *Holland* and *Williams*, the two bankrupts only; that for some time before *Humble* had resided in *Yorkshire*, retired from business, and that the assignees of *Holland* and *Williams* had called upon him to join in the transfer of the ship *Susannah*, because his name was upon the register as a part-owner, and no legal title could be made to a purchaser without his joining. On the part of the defendant *Samuel Holland* was called as a witness, who was objected to by the plaintiffs, on the ground of his being a defendant upon the record; but as he had pleaded his bankruptcy and certificate in bar, which was admitted by the plaintiffs having entered a stay of further proceedings against him, the learned Judge admitted his evidence: and he proved that *Humble* had no concern in the firm of "*S. Holland and Co.*;" which *Co.* was *Williams* alone. That the *Susannah* had at one time belonged to *Humble* and *Holland*, who in 1808 traded as merchants under the firm of *Humble* and *Holland*, and they sold her to *J. Kinnear* for 2700*l.*; and on the 31st of *December* in that year *Humble* ceased to be a partner, and *Williams* was taken into the firm, which was then changed to "*Sl. Holland* and Co.;" and this change in the name of the firm was painted upon the counting-house, and the winding up of the affairs of the old partnership was removed to another place in *Liverpool*; and circular letters announcing the change of partners were sent to the correspondents of the old firm; but there was no public advertisement of the change, nor any notice of it proved which could affect the plaintiffs. No alteration was made in the ship's register upon the sale of the *Susannah* to *Kinnear*, but he sent her to sea in

June

1812.

M'IVER *against* HUMBLE.

June 1809, and on her return in the *October* following, *Holland* and *Williams*, the then partners, re-purchased her of *Kinnear* for 2500*l.*, and fitted her out in *January* 1810, when the goods in question, consisting of rope, were furnished by the plaintiffs for the use of the ship in the manner before stated. Objection was taken, on the part of *Humble*, that there was no evidence to fix him as a part-owner of the ship at the time of the goods furnished in *January* 1810: but the learned Judge permitted a verdict to be taken for 228*l.* 9*s.*, the amount of the goods, subject to the question whether *Humble* continued liable from the circumstance of his name continuing on the register, as a part-owner of the ship down to a period subsequent to the delivery of the goods, and no legal conveyance of the interest out of him appearing in evidence till such subsequent period.

Park, *Holroyd*, and *Littledale* now shewed cause against a rule for setting aside the verdict and entering a nonsuit. They denied this to be like the late case of *Tinkler* v. *Walpole* (*a*), which proceeded upon the authority of another case in the Common Pleas (*b*), where the legal owner was held not liable without evidence of his assent to the conveyance to him on the register. Here *Humble* was one of the original owners with *Holland*, and it was proved that he continued as such upon the register with his own consent until after the goods in question were furnished: for he afterwards conveyed his title to another. [*Le Blanc*, J. The mistake arose from this, that when *Williams* was taken into the partnership and *Humble* went out; instead of *Humble*'s conveying his moiety to *Williams*, *Holland* the other partner, in his own right, and as attorney to *Humble*, conveyed a moiety to *Williams*,

(*a*) 14 *East* 226. (*b*) *Frazer* v. *Hopkins*, 2 *Taunt.* 5.

liams, thereby leaving an interest in the other moiety in *Humble*, which was not discovered till the bankruptcy, which was the occasion of his joining in the transfer in *March* 1811.] *Humble* confirmed by that act his continuing ownership to that time; which act was wanting in *Tinkler* v. *Walpole*, and in *Young* v. *Brander* (*a*). [Lord *Ellenborough*, C. J. Supposing at the time that the plaintiffs delivered the goods, they had looked at the registers to see who the owners were, they would not then have seen any thing to prove that *Humble* was an owner, but only that some person had affected to act in his name, as under a power of attorney from him; which would be no more than that person's assertion in writing that he had such an authority. But what is more decisive, the plaintiffs were not in fact deceived by it to give the credit; but they now stand merely upon the point of law, that *Humble* was a legal owner: and in that view there is nothing to prove him an owner by his own act on the face of the registers before the credit was given. For as to the subsequent act of his own recognition of ownership, it does not affect the question, upon whose credit the goods were furnished.] Any person looking at the register would at least be warranted in presuming that the oath of *Holland* was true; and if *Humble* suffers, it is by his own negligence in making a defective transfer of his share: and this appears from his own subsequent act before the action was brought, by which also the plaintiffs might have been misled to join *Humble* with the other defendants. Besides, after the first oaths taken by *Holland* and *Strickland*, *Humble* acted as owner.

Scarlett and *Richardson*, contrà, were stopped by the Court.

(*a*) 8 *East*, 10.

Lord

1812.

M'Iver against Humble.

Lord Ellenborough, C. J. A person may make himself liable as a partner with others in two ways; either by a participation in the loss or profit, or in respect of his holding himself out to the world as such, so as to induce others to give a credit on that assurance. The question is whether *Humble* made himself liable in either of these ways. If there had been an issue to try the fact, it would have appeared that in 1809 he ceased to be a partner, and his whole legal interest was intended to be conveyed out of him; but instead of his conveying his own moiety, his partner in his own name and as attorney for *Humble*, conveyed a moiety out of the entirety; the legal interest in the whole was therefore defectively conveyed out of him; but he then ceased in fact to be a partner. Then did he continue apparently to be a partner so as to induce the plaintiffs to credit him as such? There was no exhibition of partnership; no appearance of it to which the plaintiffs could have had access to induce them to credit him for these goods. It is urged, however, that his name now appears as owner on the certificate of registry. But it is to be noted that the register was not resorted to by the plaintiffs for information as to who were the owners to whom credit was to be given; nor was the credit in fact given upon it, though if recourse had been had to it, it would only have appeared that a person, saying that he acted as the attorney for *Humble*, had conveyed away his share for him; but that would have been no evidence, without more, against *Humble* in a legal view; though it might have induced a belief that he had given such a power of attorney, and have led to further inquiry. Then in 1811 the assignees of *Holland* and *Williams* prevailed on *Humble* to join in the conveyance of the legal title to the ship, pro majori cautelâ, when he

had in fact no longer any beneficial interest in it. But there was an ex post facto document, and could not have contributed to the exhibition and appearance of *Humble*'s ownership to the plaintiffs, and therefore does not range under that head of liability for their demand, but applies to a different sort of ownership for another purpose, which has been confounded together in the argument. Therefore, neither considering the case as it actually was at the time, or as it appeared to the plaintiffs to be, are they entitled to sustain their claim against *Humble*.

GROSE, J. agreed.

LE BLANC, J. It is much to be lamented that the register acts, which were passed for other and public purposes, should ever have operated upon the rights of individuals in other respects. Looking only to the facts of this case, it is clear that *Humble* was not a partner in the ship at the time when the credit was given by the plaintiffs: looking to the appearance exhibited to the world, he was no longer a partner; for the description of the firm at their counting-house was changed from *Humble* and *Holland* to *Holland and Co.*, and the winding up of the concerns of the old partnership was removed to another place; and circular letters sent to the correspondents of the house to announce the change. There was therefore every reasonable notification to the public that *Humble* had retired from the partnership; and it would be hard indeed to make him liable after this for goods furnished for the ship by persons who never could have looked to him for payment when they gave the credit, and could not have even seen that any legal title remained in him upon the registers till a year afterwards.

BAYLEY,

1812.

M'IVER *against* HUMBLE.

BAYLEY, J. To make *Humble* liable, he must either have been a partner in fact in the loss and profit of the ship, or he must have held himself out to be such. Now here he was not in fact a partner, and the goods were not furnished upon his credit, but upon the credit of *Holland* and *Williams*. But it is said that we must look for this purpose to the registers, to see who are the legal owners. The object however of the registry acts was to inform the government whether the owners were *British*, and to prevent ships belonging to foreigners from being navigated under the *British* flag; and the object was not to inform the tradesmen to whom they should give credit. The cases of *Young* v. *Brander* (*a*). and *Frazer* v. *Marsh* (*b*), both shew that a person may be deceived as to the true owner by looking merely at the registers, and that therefore, before trust is given, it is proper for the tradesman to inquire further.

Rule absolute for entering a nonsuit.

(*a*) 8 *East*, 10. (*b*) 13 *East*, 23.

Wednesday, June 17th.

NONNEN *against* REID.
The Same *against* KETTLEWELL.

The plaintiff was entitled to recover a loss of goods insured at and from *Landscrona* to *Wolgast*; though they were shipped at *Gottenburgh* before the ship arrived at *Landscrona*, and though the policy was declared to be *at and from the loading of the goods on board the ship*; it appearing that the underwriter was informed at the time that the goods were loaded on board at *Gottenburgh*; and that part of them were landed and reloaded at *Landscrona*, so as to enable the custom-house officers there to ascertain the quality of the whole, and to adjust the duties; and the policy being *free of average*. A mere representation that the cargo was *Swedish*, and neutral, which was true in fact, though contradicted by the *French* sentence of condemnation, was no objection to the plaintiff's recovery; nor the want of documents as *Swedish* property, required only by *French* ordinances. The exclusion of the *British* flag from *Swedish* ports, not appearing to be by *French* control, and *Sweden* not being a co-belligerent with *France*, was held not to be within the prohibition of the order in council of the 7th of *January* 1807.

THIS was an action against an underwriter upon two policies of insurance in the usual form effected on the 28th of *April* 1810, upon the ship *Tre Systrar*, valued

1812.

NONNEN *against* KETTLEWELL.

valued at 1100*l.*, and on 61 casks of sugar on board thereof, valued at 2800*l.*; *the sugar free of particular average*, at and from *Landscrona* to *Wolgast*, free of capture in either port, at a premium of 3 guineas per cent. The declaration stated the interest on the ship and goods differently in different counts; but the fourth count on each of the two policies respectively stated the interest to be in one *A. E. Berg*, as to the ship, and *A. R. Lorent*, as to the goods, and averred the loss to be by capture. The defendant pleaded the general issue, and paid the amount of the premium into court on the count for money had and received; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, the jury found a verdict for the plaintiffs for 350*l.*, (the amount of the insurance) subject to the opinion of the Court on the following case. And it was agreed that the several orders in council and instructions mentioned, and the sentence of condemnation annexed, should be referred to as part of the case.

The *Tre Systra* was the property of *A. E. Berg*, a *Swede*: she had been a *Danish* ship captured by a *British* ship of war, and sold by the captors to *A. E. Berg*; and the sugars were in fact the property of *A. R. Lorent*. Both *Berg* and *Lorent* were *Swedish* subjects, and the ship and cargo had in fact the usual *Swedish* documents. The insurance was effected by the plaintiff, on account of the proprietors, on the 28th of *April* 1810, in consequence of orders received for that purpose from *Gottenburgh*, dated the 17th of *April* 1810; and the ship and cargo were both represented by the plaintiff, in his instructions to the brokers, (which instructions were shewn to the defendant,) "to belong to one and the same proprietor, all *Swedish property*." It was also stated by him in the same instructions, *that the cargoes had been shipped at* Gotten-

1812.

NONNEN *against* KETTLEWELL.

burgh *on board the same vessel some months before*, and *that the said cargo had not been unloaded after its arrival at* Landscrona. The ship was originally loaded at *Gottenburgh*, and proceeded with her cargo to *Landscrona*, where she arrived safe on the 18th or 19th of *April*; and after the order for insurance had been dispatched from *Gottenburgh*, a part of the cargo was taken out of the ship's hold and landed on the quay, and replaced in the ship: a sufficient quantity was taken out to enable the custom-house officers at *Landscrona* to inspect and examine the whole cargo on board, the duties on which were paid. The ship with the sugars on board sailed from *Landscrona* on the 25th of *April* 1810, and on the 28th of the same month was captured by a *French* privateer, and carried into *Dantzig*; and on the 1st of *August* 1810 was condemned by the imperial court of prizes at *Paris*, by a decree, of which the following is a copy, translated from the *French* language.

The imperial council of prizes have pronounced the following decree:—Seen the report of the 3d *May* 1810 made to the *French* consul-general at *Dantzig* by Mr. *Brandenburgh*, an officer on board the *French* private ship of war *Wagram*, respecting the capture made by the said private ship of war on the 28th *April* preceding, off *Withermunde*, at the distance of about eight miles from the shore, of the ship called the *Tre Systrar*, under *Swedish* colours, commanded by Capt. *Volcher*, having on board a cargo of sugar, *unprovided with a certificate of origin*.—In which report Mr. *Brandenburgh* acquaints the consul that the prize is just arrived in that port, and adds, that notwithstanding five shots had been fired at the said ship, she had attempted to escape by favour of the night, and refused to bring-to until the last moment. —Seen the deposition of *Erich Gusta Ederstrom*, mate

on

1812.

NONNEN *against* KETTLEWELL.

on board the ship *Tre Systrar*, taken on the 5th of the same month, before the consul-general; stating that she was proceeding from *Landscrona*, where her cargo had been taken in. That the said cargo was originally shipped at *Gottenburgh* under destination for *Landscrona*, but discharged in the latter port, and afterwards re-laden. To the interrogatory inquiring why there was no certificate of origin on board from the *French* consul; he answered, that there was no *French* consul at *Landscrona*; and that moreover it was no concern of his. To that inquiry why he had not taken a certificate from the magistrates of the place, he answered, that it was the business of the broker or expeditor, and not his. With regard to the rest, he affirmed that he had not been visited or fallen-in with by any *English* vessel since his departure. These answers were confirmed by those of the two seamen; and the verbal process drawn up on occasion of the examination, shews that the Captain *Carl Gustar Volcher* could not be examined in consequence of an inflammation on the lungs.—Seen the papers on board the ship, consisting of 1st, A certificate, dated *Gottenburgh*, 14th *Nov.* 1809, from Mr. *John Norris*, then the consul of the *English* government in that place, stating the *Danish* galliot *Three Sisters*, *Peter Thusen* master, to have been taken and carried into *Gottenburgh* by his *Britannic* majesty's sloop of war *Avenger*, *Thomas White* commander: that the said captain was examined before the court of vice admiralty, and that his deposition was transmitted to the judge of the high court of admiralty of *England*, in order to obtaining a regular condemnation of the said galliot and her cargo. The signature of the said Mr. *Norris* was legalized on the 12th of *Feb.* 1810 by a notary, who styles himself *English* vice-consul. 2d, Act under private signature, passed on the said 14th of *Nov.* 1809, in the

1812.

NOWNEN *against* KETTLEWELL.

presence of two witnesses, whereby Messrs. *Lasseune, Lander*, and Co. declare that under and by virtue of the capture, effected by the *Avenger* sloop, of the galliot *Tre Systrar*, and in execution of the orders of Mr. *Thomas White*, and in his presence, they have sold and do sell to *A. E. Berg* of *Gottenburgh*, Esquire, the said ship *Tre Systrar*, for 900*l.*, of which they give him acquittance. 3d, Measuring bill, dated *Gottenburgh*, 13th *Feb.* 1810, of the galliot *Tre Systrar*, *C. G. Volcher* master, wherein she is stated to have been built at *Ek*, and to be of the burthen of 21½ great lasts. 4th. Certificate from the custom-house of *Landscrona* of the 21st of *April* 1810, stating that Captain *C. G. Volcher* of *Gottenburgh*, last from that port, and purposing to proceed from *Landscrona* to *Wolgast* with the galliot *Tre Systrar* under his command, laden with sixty-one casks of *Muscovado* sugar, has reported the said goods, and paid the duties thereon, in consideration whereof he may freely depart from the said port after search. 5th. Certificate of the 26th of *May* 1810, ascertaining Capt. *Volcher* to have presented himself at the *Danish* custom-house of the *Sound*, bound from *Gottenburgh* to *Landscrona*, with 64,300lbs. sugar, and 160 ro. of cork. 6th. Muster-roll of the crew, dated *Landscrona*, 21st of *April* 1810, stating the ship to be on the point of sailing for *Wolgast*. 7th. Letter, dated *Gottenburgh*, 12th *April* 1810, from Mr. *A. E. Berg*, the owner of the ship, addressed to Mr. *Sylvander* at *Wolgast*; wherein he gives him instructions for the sale of the cargo and realization of the funds for his own account. 8th. Instructions dated at *Gottenburgh* on the 13th of the same month, delivered by the said owner to Capt. *Volcher*, which are drawn up to the same effect, and charged the captain to address himself to Mr. *Sylvander*. 9th. Bill of lading in duplicate, dated *Landscrona*,

1812.

NONNEN *against* KETTLEWELL.

crona, 21st of *April* 1810, for 61 casks of sugar, shipped by Messrs. *Edell*, *Berg*, and *Tenyewall*, on board the *Tre Systrar*, under destination for *Wolgast*, and to the consignment of Mr. *J. F. Sylvander*, without the account being more specifically stated. 10th. Invoice of the said 61 casks of sugar, whereof the total weight is calculated at 64,300*lb*. 11th. Another duplicate bill of lading for eight ship pounds of cork, without specifying account. 12th. Letter of advice of the departure of the ship, written from *Landscrona* on the 22d *April* 1810, by Mr. *Juleius* to Mr. *Sylvander*, in the name of the expeditors: and 13th. The ship journal. Seen the memorial presented to the council on the 10th *July* last, in the name of the outfitters and crew of the privateer captor, stating that it appears by the certificate of the 14th *Nov.* 1809, signed (*Norris*), that the ship *Three Sisters* was originally a *Danish* vessel captured by the *English* sloop the *Avenger*. That the bill of sale of the 16th of *November* has no certain date: that it is the less doubtful since they antedated the act, in order to represent the sale as effected antecedently to the treaty of peace between *France* and *Sweden*. That the said bill of sale confers upon Mr. *Berg* the purchaser the title of esquire, a title that is only given to an *Englishman*. That the sale does not imply any adjudication by public auction, which is contrary to the rules generally observed in the disposal of prizes taken by the ships of the state. That the purchaser did not sign the bill of sale; and that the only precise date that can be given to it being that of the legalization by a notary public, that is to say, that of the 12th of *March*, the sale consequently can only be considered as having taken place subsequently to the treaty of peace between *France* and *Sweden*. That with regard to the cargo of sugar, it was taken in at *Gottenburgh*. That there was

no

1812.

NONNEN *against* KETTLEWELL.

no certificate on board ascertaining the origin thereof, and that the want of that document makes it liable to confiscation whereupon the said outfitter and crew pray the confiscation of the ship and cargo to their use. Seen the memorial presented on the 14th of the same month in the name of the owners and shippers. To the argument urged for the condemnation of the ship, they replied that she was originally *Danish* property. That the purchaser, Mr. *A E Berg*, a *Swede*, having acquired it after she had become by the chance of war *English* property, in no wise contravenes the laws of neutrality; *Sweden* being then at war with *France*. That the title of esquire given to the purchaser is a mere expression of politeness and courtesy, which does not confer upon him the character of an *Englishman*. That the signature of the purchaser would not have added any strength to the bill of sale. That it only required to render it perfect the presence of the captors, and the signature of the representative of their government. That these two conditions are complied with in the bill of sale of the 14th of *November* with regard to the cargo. They ascribe the want of a certificate of origin to the circumstance of there having been no fresh consul at *Landscrona* at the period of the ship's departure: and they moreover contend against the necessity of such certificate, by reason that the port of departure and that of the destination were equally *Swedish*. That the navigation was inland; and that it ought to be therefore exempt from the rules imposed by the circumstances of the war when it respects a long voyage from one state to another. The said owners and shippers consequently pray the council would be pleased to declare the seizure void, and decree restitution of the whole to the proprietors. Seen the memorial furnished on behalf of the privateer, dated the 16th of the same month, wherein

1812.

NONNEN *against* KETTLEWELL.

wherein they reply, that Mr. *Norris* did not sign the bill of sale of the 14th *Nov.* 1809, and that he merely certified the capture. That there is a contradiction between the measuring bill, stating the ship to have been built at *Ek*, a small *Swedish* port near *Gottenburgh*, and the certificate, where the *English* commissary asserts the capture to have been effected by the *Danes*. That the ship was bound from *Gottenburgh* in the *North Sea*, to *Wolgast* in the *Baltic*; and that she was unprovided with a passport; a circumstance decisive against her. With regard to the cargo, they say, that if there were no *French* consul at the port of lading, at least recourse ought to have been had to the magistrates of the place, in order to ascertain the origin of the goods. That the ships must unquestionably have sailed from *Gottenburgh* with the cargo she had on board, and which she is supposed to have taken in at *Landscrona*. That the muster-roll of the crew is dated at the latter port, although the seamen declared they were hired at *Gottenburgh*. They conclude from thence that the expedition is fraudulent; and declare that they persist in the prayer of their former memorial. Seen the conclusions of the imperial attorney-general this day deposited in writing on the table, and heard the report of Mr. *Henry Decornel*, member of the council. *Considering* that there was neither a passport nor a licence: that according to a certificate from the *English* vice-consul at *Gottenburgh*, the ship had been taken from the *Danes* by the *English*: that in endeavouring to prove the *Swedish* property, they have strongly relied on a bill of sale dated the 14th of *November* 1809, whereby the *English* captors are presumed to have sold the ship to a *Swedish* subject antecedently to the treaty of peace between *France* and *Sweden*; but that this instrument, which is perfectly destitute of every species of authenticity, which even was

not

1812.

NONNEN *against* KETTLEWELL.

not legalized by a notary until long after the existence of the treaty, cannot under the provisions of the 7th article of the ordinance of the 26th of *July* 1778, make the ship, which has constantly belonged to the enemy, considered as the property of a neutral or ally: that consequently she ought to be confiscated with the whole of her cargo. *Considering* moreover that she was laden with colonial produce, destitute of every species of certificate of origin, and captured in a port where the *English*, during their alliance with *Sweden*, established an entrepot for their merchandise, which leaves no doubt but that the cargo of the *Three Sisters*, whereof the property remains uncertain from the ship's papers, arises from *English* commerce. *The council decree* that the capture made by the *French* private ship of war *Wagram* of the ship *Tre Systrar*, carried into *Dantzig*, is good and valid; consequently adjudged to the owner and crew of the said private ship of war, as well the said ship, with all and singular her tackle, apparel, furniture, and appurtenances, as the goods, wares, and merchandises composing her cargo, in order to the whole being sold in manner and form prescribed by law.

Landscrona is a port of the kingdom of *Sweden*, and *Wolgast* is a port of the kingdom of *Sweden* in *Swedish Pomerania*, both in the *Baltic* sea. *Great Britain* and *Sweden* were in alliance together, and at war with *France* at the time of the order in council of the 7th of *January* 1807, hereinafter mentioned; and *Great Britain* and *Sweden*, and likewise *France* and *Sweden*, were said by one of the witnesses to be at peace at the time of the insurance and capture. The *British* flag was at the time of the insurance and of the commencement of the voyage, excluded from both ports, so that the *British* vessels could not freely trade thereat: but whether

1812.

NONNEN *against* KETTLEWELL.

ther this exclusion was produced by the influence or control of *France*, or her allies, does not appear. The question was whether the plaintiff was entitled to recover? If the Court should be of opinion the plaintiff was entitled to recover, then the verdict was to stand: or otherwise, a nonsuit was to be entered. By an order of council of the 7th of *January* 1807, duly notified to foreign powers, his majesty, after reciting the attempts made by the *French* government, in violation of the laws of nations, to prohibit the commerce of all neutral nations with his majesty's dominions, and also to prevent such nations from trading with any other country in any articles the growth, produce, or manufacture of his majesty's dominions, and to declare his majesty's dominions to be in a state of blockade: and reciting that his majesty, though unwilling to follow the example of his enemies, by proceeding to an extremity so distressing to all nations not concerned in the war, was pleased to order that no vessel should be permitted to trade from one port to another, both which ports should belong to or be in possession of *France* or her allies, or shall be so far under their control as that *British* vessels may not freely trade thereat: and every neutral vessel coming from any such port, after being warned by any of his majesty's ships, or after reasonable time for receiving the information of the order, shall be captured and brought in, and, together with her cargo, shall be condemned as lawful prize. And by an instruction, dated 10th of *June* 1810, his majesty was pleased to order as follows: Our will and pleasure is that *Swedish* vessels, employed in the coasting trade from one port of *Sweden* to another port of *Sweden*, shall not be molested or detained under the order of the 7th of *January* 1807, till further order. But this instruction shall not be con-

.strued

1812.

NONNEN *against* KETTLEWELL.

strued to extend to vessels trading between the ports of *Sweden* and *Swedish Pomerania*.

These cases were first argued in the last term by *Courtenay*, jun. for the plaintiff, and *Spankie* for the defendants; and again on a former day in this term by *Park* for the plaintiff, and *Marshall*, Serjt. for the defendants. Four objections were taken on the part of the defendants, 1st, That the policy never attached upon the subject-matter of the insurance, which was on goods *at and from* Landscrona to *Wolgast*; whereas the goods in question were loaded on board before the ship arrived at *Landscrona*; which it was contended brought the case within the objection which prevailed in *Spitta* v. *Woodman* (*a*). 2dly, That the representation of the ship and cargo being *Swedish* and neutral property was negatived by the *French* sentence of condemnation: and *Christie* v. *Secretan* (*b*), was cited. 3dly, That the ship was not duly documented for the purpose of its protection; for which *Bell* v. *Carstairs* (*c*) was cited. 4thly, That the voyage, being in contravention of the order in council of the 7th of *January* 1807, could not lawfully be insured by a *British* underwriter. The three last points were disposed of during the argument, and over-ruled by the Court. As to the second, the representation was coupled with a refusal to warrant, which shewed the intention to exclude it from the contract. As to the third, it arose merely out of a *French* ordinance, which did not bind *Sweden*. And as to *Bell* v. *Carstairs*, it was observed that the Court did not lay it down as a necessary condition to an insurance that every ship must be properly documented; but only that if a loss happened for want of it, the under-

(*a*) 2 *Taunt.* 416. (*b*) 8 *Term Rep.* 192. (*c*) 14 *East*, 374.

writer

1812.

NONNEN *against* KETTLEWELL.

writer was discharged. To the last point it was answered, that in order to bring the voyage insured in contravention with the order in council two things must concur, exclusion of the *British* flag from the foreign port, and that exclusion by means of *French* influence; the latter of which was here negatived by the jury. The word *allies* meant co-belligerents, which was not the character of *Sweden* at that time. Upon the first point, which was reserved by the Court for further consideration, the cases of *Robertson* v. *French* (*a*), and *Hodgson* v. *Richardson* (*b*), and the case of the *William* (*c*), where other cases are collected, were cited in addition to *Spitta* v. *Woodman*. The principal arguments upon this point were adverted to in the judgment.

Lord ELLENBOROUGH, C. J. The first of these causes was an action upon a policy on the ship the *Husaren*, effected on ship and goods: the second, upon the *Tre Systrar*, on ship and goods also: in both the voyage was *at and from* Landscrona *to* Wolgast, and the risk on goods was declared to be *at and from the loading thereof aboard the ship*. In both instances the goods had been shipped *at Gottenburgh* on board these vessels respectively some months *before* the voyage insured commenced; but in each instance a part of the cargo was taken out of the ship's hold, and landed on the quay, and replaced in the ship: and a sufficient quantity is stated to have been taken out to enable "the custom-house officers at *Landscrona to inspect and examine the whole cargo on board;*" the duties of which were paid. This, therefore, was an actual reloading at *Landscrona* of so much of the cargo as was thought necessary to be taken out in order to ascertain

(*a*) 4 *East*, 130. (*b*) 1 *Blac.* 463. (*c*) 5 *Rob.* 385.

the

1812.

NONNEN *against* KETTLEWELL.

the quality of the whole, and to adjust the amount of the duties to be paid in respect of the whole, and which were paid for the whole accordingly. It is an actual unloading and reloading of part, and a virtual reloading of the whole, as far as unloading and reloading were necessary for the purpose of ascertaining and paying the duties at that port, which, according to the policy, is to be regarded as the loading port. This circumstance, we think, distinguishes the present case from *Spitta* v. *Woodman*, in *C. P.* 2 *Taunt.* 416 (*a*), which authority we followed

(*a*) The following note of that case was referred to in the argument:

S. C. 2 *Taunt.* 416.

SPITTA and Others *v.* WOODMAN.—Goods were insured "at and from *Gottenburgh* to the ship's port of discharge in the *Baltic*, not higher than *Riga*; beginning the adventure upon the said goods from the loading thereof on board the said ship," without saying where. The ship was an *American*, and having received on board at *London* a cargo of sugar, coffee, and indigo, the goods insured, sailed from thence to *Gottenburgh*, from whence, without landing any part of the cargo, she sailed to *Pillau* Roads, where she was captured. It appeared that the defendant was well aware that the goods insured were the same that had been shipped at *London*; having himself been an insurer upon them from thence to *Gottenburgh*: one question was, that the loading of goods mentioned in the policy must mean a loading thereof at *Gottenburgh*, that being the only port mentioned in the policy where the risk could commence. But as the goods were laden in *London*, either the risk never attached, or if the declaration meant to aver a loading at *Gottenburgh*, there was a fatal variance. Upon this objection Lord C. J. *Mansfield*, delivering the judgment of the Court, said it must be intended from the words of the policy that the goods were loaded at *Gottenburgh*: for if that were not the true interpretation, and the adventure were to commence from the loading, a risk would be incurred which was not in the policy, namely, from *London* to *Gottenburgh*. But it is stated in the case, that a part of the goods were taken out of the ship's hold, and landed on the quay, and replaced in the ship. That a sufficient quantity was taken out to enable the officers at *Landskrona* to inspect the whole cargo on board: but the quantity taken out of the hold needed not to be very great to enable the officers to inspect the whole cargo, and a great part of this would of course be kept on the ship's deck till the inspection took place. It would, therefore, be a mere mockery to call this a loading

followed in *Homeyer* v. *Lushington*, in *Hilary* term last. Indeed, if the circumstance had existed in the case of *Spitta* v. *Woodman* which exists in this, it is to be supposed, from what fell from Lord C. J. *Mansfield*, as reported in 2 *Taunt.* 423., that it would have received a different decision. In that case it was expressly stated, "that the cargo was *not* taken out and reladen at *Gottenburgh*." It was argued by the defendant's counsel, that if the goods had been barely landed and reshipped at *Gottenburgh*, so as to entitle the vessel to have had *real* papers from that port, perhaps the Court might have supported the plaintiff's claim. Lord C. J. *Mansfield* says, "I think with you the goods might have been landed and reshipped; and that is not mere form; for in a certain degree the parties can judge from the outside of the packages whether up to that time any damage has been sustained, and without such examination, if an average loss should arise, it would be almost impossible to determine whether it was sustained before the ship's arrival at *Gottenburgh*, or afterwards." In this case it will be recollected that a more perfect examination of the condition of the goods than what took place was immaterial for the purpose of ascertaining whether any damage had been sustained by the goods before the ship's arrival, inasmuch as the policy is *free of average*. The period of time from which the responsibility of the underwriter is to commence as to goods, and to which the

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ing at *Landscrona*. At all events, supposing a part shipped at *Landscrona*, then, as goods would be shipped at two places, and the quantity at each not at all ascertained, the commencement of the risk in the policy would be too uncertain if described from the loading thereof. The very port of loading, when discovered, may in many cases decide the question of prime or not. The cargo might have suffered material injury from *London* to *Gothenburgh*.

policy

1812.

NONNEN *against* KETTLEWELL.

policy refers for that purpose, is as well fixed by this partial unloading and reloading at *Landscrona*, as by a more perfect and entire shipment there it is sufficient for the purpose of supplying a date, which is the only object of the reference in question. All the information which was wanting in the case of *Hodgson* v. *Richardson*, 2 *Blac.* 463., and which induced the decision of the Court in that case, was fully communicated here in respect to the place of original shipment; so that any actual fraud on the ground of non-communication is out of the question here; as indeed it was in *Spitta* v. *Woodman*: though that circumstance was not sufficient to induce the Court to come to a conclusion, which, upon the same premises, it must be supposed that Lord *Mansfield* and the other Judges who decided *Hodgson* v. *Richardson*, would have come to. The latter point is, however, rather a matter of speculative curiosity than of certainty, as the precise case never came before the Judges last referred to. All the other grounds of defence urged in argument on the part of the defendant were disposed of by the Court as insufficient in the course of the argument. The point above mentioned, as to the ship's being loaded before her arrival at *Landscrona*, and the effect of that circumstance upon the judgment to be given in this case, was the only point which the Court reserved for its consideration, as to which, for the reasons given, we are of opinion that the objection urged on this ground is not sufficient to prevent the plaintiff from having the benefit of his verdict.

Judgment for the Plaintiff.

1812.

RANKIN and Others, Assignees of MILLER, *against* HORNER, Sheriff of SOMERSETSHIRE, and LAUDAY.

Wednesday, June 17th.

In trover by the assignees of a bankrupt, against the sheriff and an execution creditor, where the defendants had given notice under the stat. 49 G. 3. c. 121. that they intended to dispute the petitioning creditor's debt; proof by the plaintiffs that one of the defendants, the execution creditor, had proved his debt under the commission, is no proof of the petitioning creditor's debt, either against the sheriff or such execution creditor.

LORD ELLENBOROUGH, C. J. now delivered the opinion of the Court in this case, which had been argued on a former day of this term by *Pell*, Serjt. and *Giffard*, against the rule; and by *Lens*, Serjt. and *Jekyll*, in support of it. The facts and point of the case, with the arguments and authorities cited, appear by the judgment.

This came on upon a rule to shew cause for a new trial in an action of trover against the late sheriff of *Somersetshire* and an execution creditor, and the only question was whether the bankruptcy of *Miller*, the supposed bankrupt, was sufficiently established. The plaintiffs had had notice, under the stat. 49 *Geo.* 3. *c.* 121., that the defendants intended to dispute the petitioning creditor's debt; but instead of producing the ordinary proof of the trading and act of bankruptcy, they contented themselves with proving that the defendant *Lauday*, the execution creditor, had proved a debt under the commission; and this, they insisted, was sufficient primâ facie evidence against both the defendants, that there was such a debt as would support the commission. The Court expressed its opinion upon the argument, that however this evidence might affect the defendant *Lauday*, who had proved his debt, it was no evidence whatever against the sheriff, *Horner*: and we are of opinion, upon consideration, that it is not evidence against the other defendant *Lauday*. When a commission issues, the creditor, who

1812.

RANKIN and Others *against* HORNER and Another.

who sues it out, is to be prepared at his peril with evidence to support it: the commissioners are not to declare the party a bankrupt unless there be satisfactory proof that he is so; and when they have so declared him, creditors are to come in, under the peril of being barred by a certificate, to prove their debts. The creditors have not the means of knowing what was the evidence upon which the party was declared a bankrupt; they had no right to be present when that evidence was given; they have no right to look at the proceedings under the commission in order to see what that evidence was: and is it reasonable that they should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed, when they had not the means of judging whether such acts existed or not, and of having such their supposed admission received as evidence against them in every case in which the question could arise? The certificate, when obtained, is conclusive evidence of every fact necessary to support the commission; so that they would be conclusively barred of their debt in case of a certificate, if they did not prove it under the commission: and it should seem to require some strong authority to establish that, by proving, they had admitted facts, respecting the existence of which they had no means of inquiring. By proving a debt, the party at most only gives credit to the petitioning creditor, and to the commissioners, that the former has not sued out the commission, nor the latter declared the party bankrupt, without proper grounds. The petitioning creditor and the commissioners hold out to the world that there are such grounds; and the party who proves his debt cannot in reason be considered as admitting more than that he knows

1812.

RANKIN and Others *against* HORNER and Another.

knows nothing at the time to the contrary. It is to be considered indeed, before the proof of a debt is to be taken as an admission by a creditor of every thing necessary to sustain the commission, how a creditor, as such, is capable of disputing a commission. The only step he can take is by petition to the great seal to supersede the commission: and is a creditor to be driven to the expense of such a step? If the proof be primâ facie evidence, how is it to be rebutted? How is the negative, that there was no petitioning creditor's debt, no trading, no act of bankruptcy to be established? The only cases cited for the plaintiffs were *Maltby* v. *Christie*, 1 *Esp. N. P. Cas.* 340., and *Walker* v. *Burnell*, *Dougl.* 303., and 3 *Term Rep.* 321. The former was an action by the assignees of *Durouveray* to recover from the defendant the price of some glasses which the defendant had received from *Durouveray* to sell, and which he had sold after his bankruptcy; and the defendant having described the goods in his catalogue as "*the property of* Durouveray, *a bankrupt*." Lord *Kenyon* held this to be evidence against the defendant that *Durouveray* was a bankrupt, and precluded the defendant from disputing it. This therefore was an express declaration by the defendant, that *Durouveray* was a bankrupt, and imported that the defendant was acting under his assignees; inasmuch as his bankruptcy would have countermanded any authority *Durouveray* himself might have given for the sale. In *Walker* v. *Burnell*, Lord *Mansfield* certainly is reported to have said that "he "thought that as the plaintiffs had proved a debt under "the commission, they could not question its validity, "though they might at the time of the act of bankruptcy;" or, according to 3 *Term Rep.* 322., "proving a debt "under the second commission estopped them from liti-

1812.

RANKIN and Others *against* HORNER and Another.

"gating the regularity of the proceedings under it." But the jury found for the plaintiff, against whom this evidence was to have operated, and the Court refused to grant a new trial; so that the point did not ultimately become material. This dictum however goes beyond what it is now contended for; for if, after proving a debt, the plaintiffs could not have questioned the validity of the commission, the proof would have been, not merely *primâ facie*, but *conclusive* evidence; and as the other Judges did not notice the point; as it does not appear to have been discussed; as it was not decided; as no instance appears in which it has since been acted upon; and as, upon the grounds already stated, it would be unreasonable to bind the creditor by such proof, and it is difficult to see how he could resist it, if it were admitted as primâ facie evidence; we are of opinion that the proof in this case ought to have been received, as proof of the validity of the commission, and that the rule for a nonsuit should be therefore made absolute.

Wednesday, June 17th.

The KING *against* DEWSNAP and Another.

Persons dwelling near to a steam-engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for it, are *parties grieved*, entitled to have their costs taxed under the stat. *W.* & *M. c.* 11. *s.* 3., upon removal of the indictment by certiorari from the sessions into this court by the defendants, and their subsequent conviction.

THE defendants were indicted for a nusance in the town of *Sheffield*, in unlawfully and injuriously erecting near the dwelling-houses of several liege subjects, and also near divers streets and common highways, a steam-engine with a furnace for the burning of coals, &c. and burning coals, &c. therein, whereby divers noisome and unwholesome smokes and smells from thence arose, so that the air was greatly corrupted and infected, to

1812.

The KING *against* DEWSNAP and Another.

the great damage and common nusance of all the king's subjects not only near the same place inhabiting and residing, but also through the said highways and streets passing, &c. After plea of not guilty, the indictment was removed by certiorari at the instance of the defendants, and tried at the assizes, where they were found guilty; and the Master taxed costs for *the parties grieved*, who had prosecuted the indictment, under the statute 5 *W. & M. c.* 11. *s.* 3.

Whereupon *Scarlett* obtained a rule for setting aside the side-bar rule for the taxation of the costs to the *parties grieved*, upon the ground that the prosecutors of the indictment, whose names were indorsed upon it as witnesses, were not *parties grieved* within the meaning of the statute, which did not relate to general grievances, as this was to all the king's subjects inhabiting near or passing by.

Park, and *Clayton*, Serjt. opposed the rule, and referred to the affidavits of several of the prosecutors and witnesses, one of whom swore that the steam-engine was erected within 50 yards of his dwelling-house in *Sheffield*, and when working it emitted great volumes of sulphurous smoke which annoyed him very much in his house; and when he approached nearer to it, as he had occasion to do at times, it affected his breathing and oppressed his breast. Another, whose house was 32 yards from the nusance, swore that when the wind blew in a certain direction the smoke of the engine was very offensive to him and his family, and at times he could scarcely see any thing for it, and could not venture to leave his doors or windows open. That it deposited great

1812.

The KING *against* DEWSNAP and Another.

quantities of soot on the flags of his back yard. Others living at the distance of 48 and 52 yards deposed to the same effect, as well as to the unpleasantness of the smell and the soiling of their clothes and furniture; and further, that the adjoining streets were at times filled with the smoke.

Lord ELLENBOROUGH, C. J. I did not expect that it would have been disputed at this day, that though a nusance may be public, yet that there may be a special grievance arising out of the common cause of injury which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustains a special injury from it, he has an action. This must necessarily be a special grievance to those who live within the direct influence of the nusance, and are therefore parties grieved within the statute.

Per Curiam, Rule discharged.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED 1812.

IN THE

Court of KING'S BENCH,

IN

Michaelmas Term,

In the Fifty-third Year of the Reign of GEORGE III.

FEISE and Another *against* NEWNHAM.

Saturday, Nov. 7th.

A licence to trade with an enemy granted to *F.* and Co. *and others* may be used by the person for whom *F.* and Co. were the acting agents in procuring such licence and in carrying on the adventure, though the person was a foreigner residing here under an alien licence at the time.

THIS was an action on a policy of insurance on goods on board the ship *Eleonora* from *London* to *Gottenburg*, and from thence to *Dantzig*, or any port or ports, place or places in the *Baltic*, with leave to seek, join, and exchange convoys, carry and exchange simulated papers, &c. sail under any flag, touch, stay, trade, load and unload at any ports or places, &c. at a premium of 10 guineas per cent., to return 2*l.* per cent. for arrival. The declaration alleged the interest to be in *C. F. Schnekonig*, and stated a loss by seizure and detention by persons unknown. *Russia* being an enemy at the time of the insurance, a licence was previously obtained, granting leave to *Favenc* and Co., without more description, *and others*, to export the goods on board the ship *Eleonora to Riga*, which was the ultimate destination of the ship.

1812.

FEISE *against* NEWNHAM.

Favenc and Co., it appeared at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, were in fact agents for *C. F. Schnekonig*, the person in whom the interest was averred in the declaration, but whose name did not appear on the licence; and it was obtained by them on his account: and *Schnekonig* was at the time residing here under licence as an alien, granted under the alien act; in which licence he was described as "a native of and lastly from *Prussia*, merchant, known to Messrs. *Favenc* and Co., No. 58, *Coleman-street*." It further appeared at the trial that the ship sailed on the voyage insured bound for *Riga*, unless orders should be given to the contrary on her arrival off *Dantzig*; that when off *Dantzig* she was immediately ordered to proceed to *Riga*; but in consequence of damage at sea was obliged to put into *Memel* on the 11th of *November* 1810, where the ship and cargo were seized and condemned by the *Prussian* government. *Schnekonig* being described in his alien licence as a native of *Prussia*, it was proved on the part of the plaintiffs, in order to obviate an objection, that *Schnekonig* was a native of and resident before he came here of *Dantzig*, which though formerly *Prussian* had been separated from that state, and was now considered as an independent state. After a verdict for the plaintiff;

Scarlett moved now to set it aside and to enter a nonsuit or to have a new trial, upon the general ground of objection that the licence to export having been granted to *Favenc* and Co. as for themselves, and not in quality of agents, they were not at liberty to transfer it to *Schnekonig*, notwithstanding the words *and others*. That this was a fraud upon the government; for by means of it

one

1812.

FEISE *against* NEWNHAM.

one person, whom the government would trust on his own account, might obtain a licence for a principal, to whom or for whose use it would not have been granted, and who might afterwards change his agent. That it did not follow because the government had granted *Schnekonig* a licence to reside here as an alien, within a certain district, and under control, they would grant him a licence to trade and thereby communicate with an enemy. [*Le Blanc*, J. observed that the argument would be the same if *Schnekonig* had been a natural-born subject: which was admitted. Lord *Ellenborough*, C. J. This licence was granted to a responsible person, who was at the very time in privity with the person for whom it was procured; being his agent in the very concern to which the licence was afterwards applied; and that is the security to which government looked in these matters; for it was granted to him *and others*.] Those *others* must be persons ejusdem generis, which the principal in this instance was not in relation to his agent. [Lord *Ellenborough*, C. J. While the principal is domiciled here and owing a temporary allegiance, he is ejusdem generis for this purpose. It is a grant to *Favenc* and Co. *and others;* and admitting that any *other* must have a connection in the business with *Favenc* and Co., here he had such a connection with them, through their agency.] He then argued generally, as in a former case of *Mennett* v. *Bonham* (*a*), that the crown could not delegate to *Favenc* and Co. the power which they in effect had exercised, of granting its licence to any other. For supposing *Schnekonig* to be a person ejusdem generis with *Favenc*, this would operate in effect as a licence to

(*a*) 15 *East*, 484.

1812.

FEISE against NEWNHAM.

all the king's subjects; which if the crown meant to grant, it would have said so in terms. It is the peculiar prerogative of the crown to exercise its discretion in respect of the individuals to whom a trading licence with an enemy should be granted. The words "*and others*" have not been held to extend to alien enemies, or foreigners residing abroad, though they may extend to *British* merchants resident here (*a*).

Lord ELLENBOROUGH, C. J. This is an attempt to carry the principle of those cases further than the Court intended. They have held that the *others* using the licence must connect themselves with the persons to whom it is particularly granted; and here the licensees were the very agents of the party in the adventure.

The other Judges concurred; and BAYLEY, J. added, that if the government had intended to confine the use of the licence to the very persons named, they would have guarded against the use of it by any other by rejecting the words *and others*.

Rule refused.

(*a*) *Rawlinson* v. *Janson*, 12 *East*, 224.

1812.

SJOERDS *against* LUSCOMBE.

Saturday, Nov. 7th.

THE plaintiff declared upon a charter-party of affreightment made in *London* on the 9th of *November* 1807, between himself, as master of the ship *Gute Sache*, and the defendant, a merchant of *London;* whereby the plaintiff covenanted that the *Gute Sache* should be properly furnished as a *Kniphausen* (neutral) ship, and should forthwith sail from *Dover* to *Wilmington* in *North Carolina*, and there give notice to the freighter's agents, and receive and take on board the said ship from them a complete cargo of pine-timber, &c.; and, being dispatched, should (wind and weather permitting) sail therewith to *Plymouth* dock-yard, and there make true delivery to the defendant of the cargo agreeably to bills of lading, (the act of God, the king's enemies, restraints of princes and rulers, and all dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted.) That the ship should tarry at her loading and unloading ports 50 running days in the whole, if required, to commence on her arrival at *Wilmington*, and after notice by the plaintiff to the defendant's agents there that she was ready to load, to cease on her being laden there, and re-commence on her arrival at *Plymouth;* and having given notice that he was ready to deliver the said cargo, such cargo to be sent alongside, and taken from alongside, at the sole expense of the defendant,

Where the master of a ship covenanted in a charter-party to go to a certain port of *America* and receive a loading from the freighter, alongside the ship, and bring home the same; with an exception of the restraints of rulers, &c.: but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the *American* port, which prevented the freighter from loading the ship did not discharge him from his covenant; but the plea alleging that the defendant did provide a cargo, and was ready and willing, and offered to send it alongside the ship, but that the plaintiff refused to receive it there, and discharged the defendant from sending it alongside, on which issue was taken by the replication, was held not to be sustained by evidence of the master's written acknowledgment of the defendant having offered to load the cargo on board, on his (the master's) being ready to take it, for the purpose of raising the question of law on the embargo.

1812.

SJOERDS *against* LUSCOMBE.

defendant, the plaintiff giving the customary assistance with his boats and crew. In consideration of which the defendant covenanted at his own costs to procure a licence or order in council for the ship for that voyage, and that he would not only provide loading for the ship at *Wilmington* with a full cargo of pine-timber, &c. and receive the same from alongside of her at *Plymouth* within the limited days; but also would, upon a right and true delivery of the cargo agreeably to the bills of lading, pay the plaintiff freight after a certain rate, &c. The plaintiff also covenanted that it should be lawful for the freighter to keep the ship on demurrage at her port of loading and unloading for 30 running days beyond the time before limited, paying the plaintiff 5 guineas a-day. The declaration then stated that the ship, being properly fitted and documented, sailed from *Dover* on the voyage, and arrived at *Wilmington* on the 15th of *June* 1808, and immediately gave notice of it to the defendant's agents there, and that he was ready to take on board her cargo; that the ship remained at *W.* for that purpose not only for the 50 days and 30 days, &c. allowed, but for 150 days longer, being so long detained there by the defendant's agents: and though the plaintiff was during all those times ready and willing to receive and take on board from the defendant and his agents the cargo in the charter-party mentioned, if sent alongside the ship, &c. and to proceed therewith to *Plymouth*, &c.: yet the defendant did not provide loading for the ship at *Wilmington* with a full cargo, &c. and send alongside the ship at *W.* or elsewhere any cargo of pine-timber, &c. within the days limited, &c. but made default, &c.; to the plaintiff's damage of 3000*l.*, &c. There were also other breaches assigned. The defendant pleaded several pleas, traversing

traversing the different breaches assigned; but the only plea material to the question before the Court was the 8th; in which he stated that he did provide loading for the ship at *Wilmington* with a complete cargo of pine timber, &c. within the days in the charter party limited for so doing, and was then and there within those days ready and willing and offered to the plaintiff to send the same alongside the ship at *W.* within the days so limited, but the plaintiff then and there refused to receive the same from the defendant alongside the ship, and wholly discharged the defendant from sending the same alongside of the ship at *W.* within the days in the charter-party limited. To this the plaintiff replied that the defendant did not provide loading for the ship at *W.* with a complete cargo, &c. within the days in the charter-party limited for so doing, and offer to the plaintiff to send the same alongside the ship at *W.* in manner and form as in the 8th plea alleged. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, it appeared that this ship, thus chartered by the defendant, sailed in *December* 1807 in ballast upon the voyage in question, under the plaintiff as master, and after some delay at *Cowes*, in consequence of damage received at sea in *April* 1808, pursued her voyage to *America* under *Kniphausen* colours, and arrived at *Wilmington* on the 15th of *June*, and was ready to receive her cargo by the 24th of the same month, of which notice was given to *Giles* and *Burgwin*, the agents of the defendant, one of whom came on board to see how she could best be loaded. But at that time there was an embargo on all shipping in the *American* ports, which he first said he hoped would be taken off in *September*, afterwards in *December*: in fact however it continued till about *April* 1809, and the ship remained there

1812.

SJOERDS *against* LUSCOMBE.

for the time mentioned in the declaration, and came away about the end of *January* 1809, after the following papers were signed by the plaintiff, which were proved at the trial by the defendant, who rested his defence upon them. The first of these was a paper dated "Port of *Wilmington*, *North Carolina*. I do hereby admit and acknowledge that *Giles* and *Burgwin*, agents for *M. Luscombe*, immediately on my being ready to take in cargo on board the *Gute Sache* on their account, duly offered the same in manner and place as agreed upon and subscribed by charter-party. And I further acknowledge that the said agents on behalf of *M. Luscombe* have at all times since continued to offer and were ready to deliver the cargo as aforesaid agreed and prescribed for shipment on board the said *Gute Sache*. The sole reason why the same has hitherto not been taken on board has been the refusal of permit at the custom-house to load the said *Gute Sache*, and which refusal is still continued to be made, predicated, as I understand, on the embargo law of the United States. Witness my hand and seal, this 4th of *August* 1808." (Signed and sealed by the plaintiff, and witnessed.) The other writing was: "I *A. Sjoerds*, master of the *Gute Sache*, hereby confirm the declarations made by me and under my hand and seal on the other side, under date of the 4th of *August* last; and further acknowledge that all the circumstances therein by me declared and admitted have ever since and do still continue to this day, as witness my hand and seal this 27th of *January* 1809." (Signed and sealed by the plaintiff, and witnessed.) After a verdict for the plaintiff on the 8th, and other pleas, a new trial was moved for, on the ground of the verdict being against the evidence, and disregarding the acknowledgment

ment made by the plaintiff in the papers which he had signed; the genuineness of which had been doubted at the trial, but without any foundation.

But *The Solicitor General* and *Marryat*, on shewing cause, argued on the legal effect of that acknowledgment, that as the charterer does not exempt himself from liability on account of the restraints of governments, as the ship-owner does, he continued liable upon his covenant, notwithstanding the failure of loading a cargo was caused by the *American* embargo. *Blight* v. *Page* (*a*) was referred to. That notwithstanding the terms of the papers it was clear that no cargo had in fact been sent alongside the ship; nor could it have been, as it would have been seized as soon as it was put into the craft to go alongside: although it might be admitted that the defendant was ready to have shipped it if a permit could have been obtained.

Park, in support of the rule, contended that the plaintiff, the master of the ship, was competent to vacate the bargain, and to discharge the defendant; and that the plaintiff had so done. The paper states that the cargo was offered by the defendant in manner and place as agreed upon by the charter-party: but finding that the loading could not possibly take place, both parties agreed to abandon the charter-party: that is the fair import of the terms.

Lord ELLENBOROUGH, C. J. Giving that acknowledgment its full effect, I cannot, according to the doc-

(*a*) 3 *Bos. & Pull.* 295, in note.

trine

1812.

SJOERDS *against* LUSCOMBE.

trine of the case cited, give it the legal effect contended for. Supposing all the facts stated appeared upon the record, the restraint of the government would not operate as an excuse for the freighter, who was to load the goods on board at all events, even if by the law of the country it could not be done, but only for the shipowner, who covenanted with that exception. I assume the fact that nothing but the embargo prevented the loading of the cargo: but the result of *Blight* v. *Page* is, that if the freighter undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. If then the plaintiff had exhibited his case properly on the record, there could have been no doubt; my only embarrassment at present is upon the mode in which this record is shaped: It is averred in the 8th plea that the defendant offered to send the cargo *alongside the ship*; but that the plaintiff refused to receive it from the defendant *alongside the ship*, and discharged the defendant from sending it alongside: to which the plaintiff replies that the defendant did not provide the loading, and offer to send it alongside in manner and form. But the answer is that the paper does not sustain that allegation, and therefore does not sustain the terms of the issue.

The rest of the Court concurred in discharging the rule on that ground: and *Le Blanc*, J., at the conclusion of the argument, observed that the paper amounted to no more than this, that the captain had agreed to admit that but for the embargo the defendant would have loaded the cargo, &c.; and then if by law that would relieve him from the obligation of the

the charter-party, he would not have the benefit of the admission; but it was no agreement to abandon the charter-party.

1812.

SJOERDS *against* LUSCOMBE.

Rule discharged.

GRANT *against* WELCHMAN.

Monday, Nov. 9th.

PELL, Serjt. moved to enter a nonsuit or for a new trial in this case, which was tried before *Graham*, B. at *Wells*. It was an action on a note of hand for 6*l.* given by the defendant to the plaintiff, three years ago, in part of an apprentice-fee, on his taking the defendant's son. The entire fee was 12*l.* of which the note in question was taken in part, the remainder being paid at the time. The plaintiff recovered a verdict by the direction of the learned Judge. The objections made at the trial, and now renewed, were, 1st, that the apprentice went into his master's service on the 29th of *March* 1809, but the indenture, which purported to be for seven years, was not executed till the 27th of *May* following, and then it was made to commence from the 25th of *March* 1809, which it was contended made it void by the statute of *Elizabeth*, being for less than seven years by four days, in consequence of the antedating. And *Jackson* v. *Warwick* (*a*) was cited.

But *The Court* said that an indenture of apprenticeship for less than seven years had lately (*b*) been held to be voidable and not void.

Secondly, it was objected, that at the end of two years from the execution of the indenture, the apprentice

It is no objection to an action on a promissory note, that it was given as part of the consideration of an indenture of apprenticeship for less than 7 years, by being antedated; such indenture being only voidable. Nor does the consideration of the note fail because the apprentice was discharged by a magistrate after two years on account of the master having enticed him to commit felony, particularly when the apprentice-fee was to be paid in the first instance, though in case of the defendant a note was taken for part of it payable at a distant day.

(*a*) 7 *Term Rep.* 121. (*b*) 16 *East*, 13. *Gray* v. *Cookson*.

on

1812.

GRANT *against* WELCHMAN.

on the application of his father, was discharged from the indenture by a magistrate, on proof that the master had enticed the apprentice to commit felony. But no notice was taken at the time of this note. On this it was contended that the consideration of the note had failed; but the learned Judge thought that the consideration was executed, and that the only remedy was by counteraction against the master.

Lord ELLENBOROUGH, C. J. having first asked how the consideration-money for the apprentice was reserved, and being answered that the 12*l.* was all to be paid at the time, but that the defendant's note for 6*l.* was taken as an indulgence to him, said that that made a great difference in the question; for that now it must be taken that the whole consideration was then payable, though out of indulgence to the defendant, the note was taken for part.

Per Curiam, Rule refused.

Monday, Nov. 9th.

DOE, Lessee of BENNINGTON, *against* HALL.

A surrender of and admittance to a copyhold may be proved by the original entries on the court-rolls, without shewing a copy stamped as required by st. 48 G. 3. c. 149.

An admittance of the surrenderee before trial will maintain ejectment brought by him before admittance upon a demise laid between the time of surrender and admittance.

IN ejectment for a copyhold, which was tried before *Mansfield*, C. J. at the last summer assizes at *Cambridge*, the demise was laid on the 5th of *March* 1812, and the lessor of the plaintiff made title by shewing a surrender to him on the 26th of *April* 1808, but no admittance under it till the 18th of *July* 1812, which was within a week before the trial, and consequently after the day of the demise and action brought. The

defendant

1812.

DOE, Lessee of BENNINGTON, *against* HALL.

defendant was a stranger to the title, and not the surrenderor. This raised one objection to the recovery of the plaintiff, who had obtained a verdict at the trial. Another objection was that no stamped copy of court-roll was given in evidence, to prove the surrender and admittance; but the steward of the manor merely produced the original books containing the entries of them; which it was contended was not sufficient since the stat. 48 *G.* 3. *c.* 149. (page 613-14.), under title copyhold, which imposes a stamp of not less than 5*s.* on any admittance or copies of court-roll of any admittance in court, &c.

Blosset, Serjt. on moving for a new trial, stated these facts and objections to the Court. He enforced the objection upon the stamp act by urging that if the evidence of the original entry on the court-roll could be received, the stamp would be always evaded. But Lord *Ellenborough*, C. J. answered, and *The Court* agreed, that the statute not having required a stamp upon the original court-roll itself, but only on the copy, it would not be deemed an evasion, and the Court could not supply it. It was not necessary for the tenant to produce his copy, if he chooses to risk the evidence of his title in not taking a copy. The original order-book for granting administration is evidence (*a*) of administration granted; though the letters of administration issued thereon are the more useful evidence of it. How can a copy be evidence unless the original be evidence?

Upon the other point, his Lordship referred to the case of *Holdfast d. Woollams* v. *Clapham* (*b*), to shew the

(*a*) *Elden* v. *Keddell*, 8 *East*, 187. (*b*) 1 *Term Rep.* 600.

relation

1812.

DOE, Lessee of BENNINGTON, *against* HALL.

relation of the admittance, when made, to the surrender; to which *Blosset* answered that in that case the Court had only refused to permit the legal title to be set up by the surrenderor against the surrenderee, for whom he held the legal estate in trust; against a principle, which was at that period much relaxed, but cannot now be questioned, that in a court of law the legal title must prevail, and no notice can be taken of the trust. And since that time this Court in *Tofield* v. *Tofield* (*a*) have held that a surrenderee before admittance cannot surrender to the use of his will. [*Bayley*, J. thought that this point as to the relation had been settled by a case in the Common Pleas a few years ago; and Lord *Ellenborough*, C. J. referred *Blosset*, Serjt. to the case of *Roe d. Jeffereys* v. *Hicks* (*b*), where it had been laid down that the tenant might maintain an action for mesne profits from the time of the surrender after admittance; and desired him to mention this case again the next day. With respect to *Tofield* v. *Tofield*, his Lordship observed that admittance being the surrenderee's own act, he could not assume as a tenant to make a new surrender before he had done that which was necessary for him to do, in order to perfect his title as tenant.] On the next day *Blosset* again mentioned this point, said he had looked into the case in *Wilson*, and had not found any authority for sustaining an ejectment upon such a relation. He contended that the doctrine of relation did not apply at all to the case of a stranger, as this defendant was, or to torts and trespasses, on which the action of ejectment was founded; or in any case to confirm an action brought by a person, who had no right of action in him

(*a*) 11 *East*, 246. (*b*) 2 *Wils.* 25.

at

at the time it was brought. [Lord *Ellenborough*, C. J. asked how that agreed with the case in *Wilson?*] He said that was only an obiter dictum, without authority, and not the point then decided, which was only that the land descended to the heir of the surrenderor, who had surrendered to the use of his will and died, where the devisee was attainted and executed before admittance. The second resolution in *Butler* v. *Baker* (*a*) is, that relation helps acts in law, but not acts of the party: up to the time of admittance the surrenderor is legal tenant and owner to all purposes, and may treat the surrenderee as a trespasser. [Lord *Ellenborough*, C. J. That is only because courts of law will not look at the title of the surrenderee till admittance, but when he is admitted, all is perfected by the relation, and they will look at his real title. In *Benson* v. *Scott* (*b*), it was held that if the surrenderor die before the admittance of the surrenderee, yet, on his admission, his title relates back. The title under a bargain and sale, when inrolled, relates back.] A bargain and sale was a perfect conveyance in itself at common law; but by statute it must be enrolled within six months: and in the interim it is established by many cases that the estate is in the bargainee (*c*), which is essentially different from the case of surrender and surrenderee, where the estate is in the surrenderor till admittance of the surrenderee.

Lord ELLENBOROUGH, C. J. This is pushing too far the effect of the fictitious demise of the plaintiff in ejectment. We will not look at his title till admittance, but, when admitted, and his legal title perfected, we will look

(*a*) 3 *Rep.* 29. (*b*) *Salk.* 185.
(*c*) *Com. Dig.* Bargain and Sale, B. 9.

to

1812.

DOE, Lessee of BENNINGTON, *against* HALL.

to his real title derived from the act of the party surrendering to him, which has been made perfect by the subsequent admittance. The case in 2 *Wilson*, *Vaughan* v. *Atkins* (*a*), and *Holdfast d. Woollams* v. *Clapham* (*b*), support the same principle.

The Court refused the rule upon both points.

(*a*) 5 *Burr.* 2764. (*b*) 1 *Term Rep.* 600.

Monday, Nov. 9th.

DOE, Lessee of PARRY, *against* JAMES.

Though a purchaser for a valuable consideration may recover in ejectment against one who claims only under a voluntary settlement of which such purchaser had notice: yet it seems that the inadequacy of consideration for such purchase is material if it extend so far as to shew that it was not made bonâ fide, but merely colourably, to get rid of the first settlement, and make another, which was also in truth a voluntary settlement.

THE lessor of the plaintiff having obtained a verdict, in this ejectment, tried before *Le Blanc*, J. at *Monmouth*;

Abbott moved, by leave, to set aside it and enter a nonsuit, upon an objection taken at the trial. Both parties claimed under *David Lewis*; the defendant as heir of the body, under a prior marriage settlement, made by *Lewis*; the plaintiff under a subsequent conveyance from him in 1797, for a valuable consideration, as he contended, which entitled him to claim against a voluntary settlement made after marriage, though he had notice of the settlement. The defendant contested the adequacy of the consideration of this conveyance, and entered into evidence to shew it. The consideration for it was 400*l.* of which 100*l.* only was paid at the time, according to the acknowledgment of *David Lewis*, given in evidence, and the 300*l.* was to remain as a charge upon the estate. It also appeared that instructions had been given about the same time by *D. Lewis* for making

1812.

DOE Lessee of PARRY *against* JAMES.

making his will, by which the 300*l.* was bequeathed to Mrs. *Parry*, the lessor's wife, and her son. He referred to *Doe d. Watson* v. *Routledge* (*a*).

Lord ELLENBOROUGH, C. J. asked if it had been left to the jury whether the conveyance was made bonâ fide. To which *Le Blanc*, J. answered, that the case was not put upon that ground at the trial; but merely on the ground of the purchaser's notice of the settlement, and inadequacy of consideration; and the verdict was found under his direction in point of law, that notice of the settlement made no difference: and then the case rested upon the other question, whether adequacy of consideration was necessary to sustain it.

Lord ELLENBOROUGH, C. J. The defendant should at least have shewn such an inadequacy of consideration as amounted to evidence that it was not a bonâ fide conveyance, but colourable to get rid of the settlement. Was the estate shewn to be of the value of 4000*l.* instead of 400*l.*?

Abbott said that he had no such evidence, though it was certainly more than 400*l.*

Lord ELLENBOROUGH, C. J. Taking it then to have been conveyed for an adequate consideration, there is nothing to vary this from the common case of a purchaser claiming against a prior voluntary settlement. It is clear that notice of such a settlement cannot vary the question: it amounts only to notice of a settlement

(*a*) *Cowp.* 705.

1812.

DOE Lessee of PARRY *against* JAMES.

which was void against a subsequent purchaser for a valuable consideration. Nor can the giving the 300*l.* back by the will to the purchaser's family make a difference; for that might have been altered.

Per Curiam, Rule refused.

Tuesday, Nov. 10th.

THOMPSON *against* The ROYAL EXCHANGE Assurance Company.

Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: Held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment.

THIS was an action upon a policy on goods (tobacco and sugar) on board the ship *Jane,* at and from *Heligoland* to *London,* and the policy contained a clause making the underwriters free from particular average. The ship, with her cargo on board, was driven from her anchor at *Heligoland,* and wrecked; but the goods in question were afterwards got on shore and saved, though in a very damaged and unprofitable state; and the ship was obliged to be broken up. The assured gave immediate notice of abandonment. But Lord *Ellenborough,* C. J. at the trial at *Guildhall,* nonsuited the plaintiff upon the construction of the clause against particular average.

Topping moved to set aside the nonsuit, and contended that this was a total loss, or a case of general and not of particular average. The sugars he said were mostly washed out of the hogsheads, and the tobacco was quite spoiled by the sea-water, and though brought to shore, yet it was in such a state that it was worth nothing to the assured, and he never received any thing. He referred to *Anderson* v. *The Royal Exchange Assurance Company* (*a*),

1812.

THOMPSON *against* THE ROYAL EXCHANGE Assurance Company.

pany (*a*), where he said that upon a loss similar to the present, the Court would have holden it a total loss if the assured had abandoned in due time.

Lord ELLENBOROUGH, C. J. All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average, may as well be struck out of the policy. We can only look to the time when the loss happened, and the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be.

BAYLEY, J. The very object of the exception is to free the underwriters from liability for damaged goods. They say in effect that they will be liable if the goods are wholly lost, but not if they are only damaged.

Per Curiam, Rule refused.

(*a*) 7 *East*, 38.

ROBERTS *against* READ and Others.

Tuesday, Nov. 10th.

IN an action on the case, the plaintiff declared that on the 1st of *December* 1809, at *Penzance*, in *Cornwall*, she was and still is seised for her life, of a garden, with the appurtenances, in which, until the grievance aftermentioned, there was a wall 200 feet long, &c. abutting on a public street in *Penzance*; and that the defendants,

Though the general highway act, 13 *G.* 3. *c.* 78. *s.* 81. directs that actions against any persons for any thing *done* or *acted* in pursuance thereof, shall be commenced within three calendar months after the fact committed, and not afterwards; yet if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which does not fall till more than three months afterwards, they are subject to an action on the case, for the consequential injury within three months after the falling of the wall.

1812.

ROBERTS against READ.

on the 1st of *May* 1810, and on other days, wrongfully and injuriously dug up so much of the soil adjoining and near to the wall, on the side next the street for 200 feet, and removed the same, and thereby not only exposed and laid open the foundation of the wall to the rain and flowing of waters thereto, and to the frost and inclemency of the weather, but greatly weakened the wall; by reason whereof 100 feet afterwards, on the 1st of *September* 1810, fell down, and the remainder was greatly injured. At the trial before *Graham*, B., at *Bodmin*, the case opened on the part of the plaintiff was, that she sought to recover damages against the defendants for a wrong done by them in their capacity of surveyors of the highways for the town of *Penzance*, in undermining her wall; and it appeared in evidence that the act done by their order for the purpose of making some improvement in the street, and which ultimately occasioned the mischief, was in *May* 1810, though the wall did not fall till the 31st of *January* 1811, and that this action was not commenced till the 13th of *April* 1811; whereupon the defendants' counsel objected that the action was brought too late by the stat. 13 *G.* 3. *c.* 78. *s.* 81., which enacts, "that if any action shall be commenced against any persons for any thing *done* or *acted* in pursuance of this act, such action shall be commenced within three calendar months after the fact committed, and not afterwards." And he contended that here the "thing *done* or *acted*" by the defendants was the undermining of the wall by digging up the highway by their order, and not the falling of the wall, which was a mere consequence of such wrongful act. The plaintiff, however, recovered a verdict for the amount of the damage sustained, by the direction of the learned Judge,

who

who gave leave to the defendants' counsel to move to set it aside, and enter a nonsuit, if the Court should be of a different opinion.

1812.

ROBERTS *against* READ.

Jekyll now moved accordingly, and contended that the wrongful thing *done* or *acted* by the defendants, was the undermining of the wall, which happened more than three calendar months before the action commenced. The legislature limited the time so narrowly, in order that officers of this description sued for what they did ex officio might have the means of indemnifying themselves, if sued, while they were in office, or at least before they finally passed their accounts. [*Bayley*, J. How was the damage to be estimated before it actually happened?] The probable damage might have been estimated by persons of skill. In *Goding* v. *Ferris* (*a*), it was considered that an action could not be maintained against custom-house officers for seizing goods, unless brought within three months after the actual seizure, although there was a continuing detention of the goods at the time of action brought.

Lord ELLENBOROUGH, C. J. It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen: the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of; but being an action on the case for the consequential damage, it could not have been brought till the specific wrong had been suffered; and that only happened within three months before the action brought.

Per Curiam, Rule refused.

(*a*) 2 *H. Black.* 14.

EYRE

1812.

Tuesday, Nov. 10th.

EYRE and Another *against* GLOVER.

An insurance may be effected on *profits* generally without more description, and engrafted upon a policy on ship and goods in the common printed form for a certain voyage; with a return of premium for short interest: the assured proving an interest in the cargo.

THIS was an action on a policy of insurance, dated *London*, 26th of *August* 1809, in the common printed form, on a voyage, as described in written words (*a*) *from* Riga *to* Hull, *including the risk in craft to and from the ship, with liberty to carry and exchange licences, clearances, and assimulated papers of any description whatever*, upon goods, and also upon the body of the ship *Elizabeth*, &c. "The said ship, &c. "goods and merchandises, &c. for so much as concerns "the assureds by agreement between the assureds and "assurers in the policy are and shall be (*b*) *on profits*," (without further description,) at a premium of "20 *guineas per cent., to return* 5*l. per cent. for convoy in the* Baltic, *a place of rendezvous, and* 5*l. per cent. for convoy from thence to* Great Britain, *and* 10*l. per cent. for convoy for the voyage or cessation of hostilities in the* Baltic *and arrival, and the whole premium on short interest.*" The declaration after setting out the policy, alleged the promise of the defendant as an underwriter thereon for 200*l.* in consideration of 40 guineas premium, and then stated that the ship on the said 26th of *August* 1809 was in good safety at *Riga*, and that divers goods of great value were then loaded on board her to be carried on the voyage insured, and that the plaintiffs were then and from thence until and at the time of the loss aftermentioned interested in the said goods, and in the profits expected to be made

(*a*) The written words are printed in italics.

(*b*) Here the words "valued at" in the common printed form were struck out.

thereon,

thereon, to the amount of all the money insured on the said goods and the said profits respectively; and that the said policy was made on the said profits and for the use and benefit of the plaintiffs. And then the plaintiffs averred that after the loading of the goods on board the ship, to wit, on the 31st of *October* 1809, the ship with the goods on board set sail from *Riga* on the voyage insured, and in the course of the same was captured with the goods by the king's enemies, and thereby the said goods with divers great profits to the amount of all the money insured thereon, which the plaintiffs would have gained if the said goods had arrived at *Hull*, were lost to them; whereof the defendant on the 30th of *November* 1809 had notice, and by reason thereof became liable to pay the said 200*l.*, &c. The declaration also contained the common money counts. The defendant pleaded non assumpsit, and paid the whole premium into court upon the count for money had and received.

At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, it appeared that the plaintiffs had chartered the *Elizabeth* from *Hull* for *Riga*, to receive from their agents there a full cargo of hemp or flax. That she sailed from *Hull* under the king's licence, and complied with all the terms of it, and arrived at *Riga* on the 23d of *September* 1809. That the plaintiffs' agents, on the 24th of *October* 1809, shipped a cargo of flax on board the *Elizabeth* at *Riga* for *Hull*, in which the plaintiffs were interested from thence to the time of the loss, of the invoice value of 5116*l.* 4*s.* 6*d.*, the profit on which, supposing it to have been shipped and to have arrived in a sound state, would have been to the amount insured, which was 1000*l.* The ship and cargo were captured by the *Danes* on the 17th of *November*. Objection was taken at the trial that this was a gambling policy, and therefore void: but Lord *Ellen-*

1812.

EYRE *against* GLOVER.

borough, C. J. overruled the objection, seeing no distinction in principle between an insurance on profits valued, which had been held to be legal, and on profits without the valuation being ascertained in the policy, but left open to proof afterwards: id certum est quod certum reddi potest: and that the flax must be taken to have been shipped in a sound state, the contrary not appearing. The plaintiffs having recovered a verdict,

Richardson moved for a new trial, or in arrest of judgment, on the ground that *profits* generally, without more certainty, could not be insured. It is uncertain upon what they are to be calculated. Insurances of this nature have crept in by degrees. In *Grant* v. *Parkinson* (*a*) the profits insured were reduced nearly to a certainty. That case was followed by *Henricksen* v. *Margetson* (*b*), *Barclay* v. *Cousins* (*c*), and in all of them the profits were valued upon a specific cargo. But this case goes a step further than any of those; for here, in order to ascertain the loss, evidence must be given of the state of the market. Then there is also to be a return of premium in the event of short interest; which means in case there shall be *no profit* on the cargo; not in case there shall be no cargo.

Lord ELLENBOROUGH, C. J. Are profits any thing more than an excrescence upon the value of the goods beyond the prime cost? The difficulty of the calculation cannot affect the question of interest, or the legality of the contract. Short interest means no more than a short profit on the cargo to the extent of the whole sum insured.

Per Curiam, Rule refused (*d*).

(*a*) *Park*, 267. 4th edit. (*b*) 2 *East*, 549. in note. (*c*) 2 *East*, 544.
(*d*) Vid. *Hodson* v. *Glover*, 6 *East*, 316. and *King* v. *Glover*, 2 *New Rep.* 206.

1812.

ROE, Lessee of SHELL, *against* PATTISON.

Tuesday, Nov. 10th.

Where the testator after several bequests of stock in the 4 per cents. devised all the remainder in the above stocks *with my freehold property* to *M. S.*: Held that *M. S.* took a fee in the real estate.

HOLROYD moved to set aside a nonsuit, and to enter a verdict for the plaintiff, under leave reserved by *Bayley*, J. upon the trial of this ejectment at the last assizes in *Northumberland*. The question arose upon a will, under which the defendant claimed as heir of the devisee, and the lessor of the plaintiff claimed as heir of the devisor, whether the devisee took a fee in the premises sought to be recovered, or only a life estate. The will, after making bequests to several of the testator's relations out of his stock in the 4 per cent. consols, and of all his wearing apparel, devised as follows: "and after all my just debts and funeral expenses paid, I leave all the remainder in the above stocks *with my freehold property* to my sister *Margaret Stoker*, and all other monies due to me." It was contended that the word property was of equivocal meaning, and might denote a description of the interest, or only of the estate or thing devised, according to the intention of the testator; but unless it was clear that his intention was to dispose of all his interest, the heir at law ought not to be disinherited, and the devisee would take only for life. In *Hogan* v. *Jackson* (*a*) it is true the words *real effects* were held to carry a fee; and Lord *Mansfield* is reported to have said that if effects meant *property*, there was an end of the question, because it would pass a fee: but in that case there could be no doubt from other parts of the will, that the testator intended to part with the whole interest. Here there is

(*a*) *Cowp.* 299.

nothing

1812.

ROE *against* PATTISON.

nothing to shew that by freehold property he meant any thing more than lands.

Lord ELLENBOROUGH, C. J. I think it was clearly the intention of the testator to give as absolute an estate and interest in his freehold property as in his stock. There can be no doubt about his stock; and Lord *Mansfield*, in the case referred to in argument, was of opinion that the word "effects" was synonymous to property, and would carry a fee. Indeed there are no words of such an inflexible nature as will not bend to the intention of a testator, when it can be collected from the context of his will. Accordingly we have lately decided that the real estate passed under a devise of the personal estate, because it was clear that such was the intention of the testator (*a*). Here there is no other disposition of the real property, and it is plain the testator meant to give the same estate in the real as in the personal property.

GROSE, J. The testator meant to give all his interest in the stock, and the same in his real property.

LE BLANC, J. Property is a word large enough to carry the interest in the estate; and here it appears the testator meant to dispose of his real in like manner as his personal property.

Per Curiam, Rule refused.

(*a*) 11 *East*, 246.

The

1812.

The KING *against* The Inhabitants of OXFORDSHIRE.

Tuesday, Nov. 10th.

Indictment against a county for not repairing a bridge. Plea, that *J. S.* is liable ratione tenuræ. The plea not sustained by evidence that the estate of *J. S.* was part of a larger estate, which part *J. S.* purchased of the former owner, who retained the rest in his own hands, and as well before the purchase as since has repaired the bridge. But where in such case the county was found guilty, the Court gave leave to stay the judgment upon payment of costs until another indictment was preferred in order to try the liability.

INDICTMENT for not repairing a bridge. The defendants pleaded that *Marsack* was liable ratione tenuræ. At the trial before *Le Blanc*, J. at *Abingdon*, it appeared that the bridge had always been repaired by the *Cadogan* family, who were formerly owners of the estate now the property of Mr. *Marsack*. Mr. *Marsack* purchased the whole of the *Cadogan* estate, except about 100 acres called *Dirty Coppice*, which Lord *Cadogan* still retained, and since the conveyance to *Marsack* had continued to repair the bridge. The learned Judge was of opinion that this evidence was not sufficient to charge *Marsack* with the liability, for as Lord *Cadogan* still remained owner of a part of the property, and had repaired since the parting with the estate to *Marsack*, it was rather to be inferred from these facts that he was still liable in respect of the portion which he retained. A verdict was therefore given against the defendants.

W. E. Taunton moved for a new trial, or for a stay of judgment against the defendants, until another indictment was tried. He said that the plea had been framed under a conception that the *Cadogan* family was liable in respect of the larger estate sold to *Marsack*; but admitting upon the evidence as it now stood that they still remained liable, it only proved that the liability subsisted not in respect of *Marsack*'s estate only, but of the whole estate; and if so, both Lord *Cadogan* and *Marsack* would be jointly liable, and each would be chargeable with the whole

1812.

The KING *against* The Inhabitants of OXFORDSHIRE.

whole repairs, although he would have his remedy against the other for contribution. *Regin.* v. *Duchess of Buccleugh* (*a*). At all events it is clear that the county is not liable.

LE BLANC, J. The only evidence adduced at the trial was, that Lord *Cadogan*, who had been formerly owner of the whole estate, had sold the greater part of it to Mr. *Marsack*. That before that time he had repaired the bridge, but in respect of what lands he had so done it did not appear, but only that he sold lands to Mr. *Marsack*. It was proved that since the sale Lord *Cadogan* had continued to repair the whole as he had before done; and I thought that this was not evidence to charge Mr. *Marsack* with the liability.

Lord ELLENBOROUGH, C. J. The defendants have not maintained their plea. It is pleaded that *Marsack* and all those whose estate he has have immemorially repaired. Now there is no evidence that he and those who had the estate have repaired, for it appears that since he purchased the estate another person has repaired. It would have been more correct to have pleaded that he and those whose estate he has with others have repaired, instead of which the burthen is cast on him impartibly, without giving him the benefit of a contribution from Lord *Cadogan*. But I should be sorry to conclude the county from bringing forward their case, as it is clear they have never repaired.

The Court directed that the rule should be drawn up for staying the judgment upon payment of the costs of

(*a*) *Salk.* 358.

1812.

The KING *against* The Inhabitants of OXFORDSHIRE.

the prosecution; and Lord *Ellenborough*, C. J. added, that if the public exigency required it, the county must repair without prejudice to their case; and *Le Blanc*, J. said, that the county might proceed to indict the parties whom they contended to be liable.

COVERLY *against* MORLEY.

Tuesday, Nov. 10th.

In an action against a bankrupt who has obtained his certificate under a second commission, the certificate is no bar unless it appears affirmatively that his estate has produced 15*s.* in the pound; evidence that it probably will produce so much is not sufficient.

THIS was an action by the payee against the maker of a promissory note for 100*l.*, dated the 8th of *January* 1811, payable one month after date: to which the defendant pleaded, that after the making of the promise, and before the commencement of this action, namely, on the 9th of *February* 1811, he became bankrupt, and that the cause of action accrued before that time: on which issue was joined. The defendant, at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, put in the commission, dated the 9th of *February* 1811, (this action having been commenced within the year after that commission issued, viz. in *Hilary* term 1812,) and also his certificate allowed by the Lord Chancellor, which by stat. 5 *Geo.* 2. *c.* 30. operates as a discharge of the person and future effects of the bankrupt, except in certain cases, and amongst others that of a subsequent commission of bankruptcy, in which case the future effects of the bankrupt remain liable to his creditors, "unless (by *s.* 9.) "the estate of such person shall produce clear, after all "charges, sufficient to pay every creditor under the "commission 15*s.* in the pound for their respective "debts." But this was shewn to be the second commission of bankruptcy issued against this defendant, and the plaintiff called the assignee under this commission, in order

1812.

COVERLY against MORLEY.

order to prove that the bankrupt's effects would not produce 15*s.* in the pound: the witness however said that *he thought it probable that the effects would produce* 15*s. in the pound.* Whereupon it was objected, that it was incumbent on the plaintiff to prove that the bankrupt's estate would not produce 15*s.* in the pound; whereas the plaintiff's own witness had proved the probability of such a payment. But his Lordship overruled this objection, being of opinion that the certificate under a second commission was no bar to execution in this action against the bankrupt's effects, unless it appeared affirmatively that his estate had produced clear after all charges sufficient to pay every creditor under the commission 15*s.* in the pound in the words of the act; and that proof of the probability only of this was not sufficient. A verdict was thereupon given for the plaintiff.

Puller moved for a nonsuit or new trial, insisting that unless the objection taken at the trial was allowed to prevail, a bankrupt could never avail himself of a certificate under a second commission, provided the creditor brought his action immediately, and before a dividend was declared under such commission. And he cited *Philpott* v. *Carden* (*a*), where the plaintiff proved that 15*s.* in the pound had not been paid under the second commission; and *Jelfs* v. *Ballard* (*b*), where a dividend not having been declared under the second commission, the plaintiff adduced evidence to shew that it was not probable that the bankrupt's estate would pay 15*s.* in the pound: and he said that it had never yet been decided that if there be evidence that the estate will probably pay 15*s.* in the

(*a*) 3 T. R. 287. (*b*) 2 Bos. & Pull. 467.

pound,

pound, that the certificate will not protect the bankrupt's effects. [Lord *Ellenborough*, C. J. inquired why the defendant did not move to stay further proceedings in the action until a dividend was declared.] To which it was answered, that there was not any instance of such a motion.

Lord ELLENBOROUGH, C. J. The statute has not imposed upon the court and jury the duty of judging by anticipation to what extent the bankrupt's estate will answer the demands of his creditors. If it has produced sufficient to pay 15*s.* in the pound, that is clear and intelligible; but whether it will produce so much is another question. The words of the statute are plain and explicit, and I dare not go against its directions; and if it has been done in any case, I do not feel myself at liberty to follow the example.

BAYLEY, J. None of the cases have decided contrary. In *Jelfs* v. *Ballard* the Court of Common Pleas seem to have considered the payment of 15*s.* in the pound as a condition precedent.

Per Curiam, Rule refused.

1812.

Wednesday, Nov. 11th.

The KING *against* The Inhabitants of NANTWICH.

Since the 13 & 14 *Car.* 2. *c.* 12. an indenture of apprenticeship executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately, is a valid indenture, although neither of the churchwardens of the parish at large within which the township is situate join in the execution; therefore a service under such indenture was held to confer a settlement.

UPON appeal against an order of two justices for the removal of *Samuel Jones*, *Margaret* his wife, and their children by name, from the township of *Pendleton* in the county of *Lancaster*, to the township of *Nantwich* in the county of *Chester*; the only question was, whether the head of the family, *Samuel Jones*, had acquired a settlement by apprenticeship in the township of *Pendleton*. The parish of *Nantwich* consists of five townships, of which the township of *Nantwich* is one. These townships act separately in all matters relative to the management of the poor, and separate overseers are regularly appointed, two for each township. Two churchwardens are appointed for the parish at large, who have not been accustomed to interfere at all in the management of the poor in any of the townships. There are no churchwardens or chapelwardens appointed in any of the townships. In the year 1787 *Samuel Jones*, being then a poor boy, settled in the township of *Nantwich*, was put out for seven years as an apprentice to *W.* and *T. Douglas*, cotton machine workers, by an indenture duly stamped and executed by the overseers of the township of *Nantwich*, by the pauper, and by *W.* and *T. Douglas*, and duly allowed by two magistrates for the county of *Chester*, *but not executed by either of the churchwardens.* Under this indenture *Samuel Jones* served Messrs. *Douglas* for seven years in the township of *Pendleton*, and resided there during the whole time. *Margaret*, mentioned in the order, is the wife, and the other paupers are the legitimate children of *Samuel Jones*. The Sessions being of opinion that the indenture was void because not executed by the majority of the churchwardens and

1812.

The KING *against* The Inhabitants of NANTWICH.

and overseers, confirmed the order of removal, subject to the opinion of this Court on the question, whether under the circumstances of the case it was necessary that the churchwardens of the parish, or one of them, should have executed this indenture to make it valid.

J. Williams in support of the order of sessions, after premising that there was no decision upon this point, stated that the question would turn principally, upon the construction of the two statutes of 43 *Eliz. c.* 2. and 13 & 14 *Car.* 2. *c.* 12., as they are to be considered with reference to the extent and nature of the duty of churchwardens. If the question had stood upon the first of those statutes alone, there could have been no doubt that the churchwardens were an integral part, and must have joined in executing this indenture. But the doubt arises on 13 & 14 *Car.* 2. *c.* 12. *s.* 21., which subdivided parishes into townships, and enabled the latter to maintain their own poor. That section enacts, that there shall be two or more overseers within every township, who shall execute *all acts for the relief of the poor, as is appointed by the* 43 *Eliz.* These words, it must be admitted, are very general, and might seem at first sight to confer on them all the powers of churchwardens and overseers united; but it appears that the legislature have put a more limited construction upon them; for by the 8 & 9 *W.* 3. *c.* 30. they thought it necessary expressly to empower the overseers, where there are no churchwardens, to act alone in granting certificates. Now it is evident that this provision would have been nugatory if the words of the stat. *Car.* 2. are to be taken in their most enlarged sense. As to what is reported to have fallen from two of the learned Judges

1812.

The KING *against* The Inhabitants of NANTWICH.

in *Rex* v. *Clifton* (*a*), upon the question whether it was necessary for the churchwardens of the parish to join in granting a township certificate, it may be observed that they expressly abstained from deciding it. Then the 17 *G.* 2. *c.* 38. *s.* 15. makes a similar provision with that in the 8 & 9 *W.* 3., for it enacts, "that the overseers within every township or place where there are no churchwardens, shall act in all matters relating to the poor, as churchwardens and overseers may do by that or any former act:" which enactment cannot be said to apply to this case, because this is not a township where there are no churchwardens. Thus it was considered by the Court in the case of *Spitalfields* v. *Bromley* (*b*), that two townships within a parish are the same as two parishes, yet the churchwardens are overseers of the whole parish, and have a superintendence over the whole. As to the argument which seems to have weighed with the Court in *Rex* v. *Clifton*, that a churchwarden appointed for a whole parish, who resides in one of the townships within it, may have an interest to act in opposition to his duty in order to exonerate his own township, that may be the case in the granting of certificates by which the township is immediately charged, but the interest is too remote in the case of binding out apprentices. Then it may be urged that the policy of the law, with respect to parish apprentices, seems to be to interpose as many checks as possible upon the act of binding them out; and that policy will best be sustained, by interposing the necessity of the churchwardens concurring.

(*a*) 2 *East*, 168.

(*b*) 18 *Vin. Abr.* 468. S. C. 2 *Bott*, 684., last edit.

1812.

The KING *against* The Inhabitants of NANTWICH.

Nolan and *Coltman*, contrà, denied that under the 43 *Eliz. c* 2. the churchwardens were to be considered as an integral part, although they were a component part of the body of overseers, and a majority of the whole would be competent to act. That statute directed the churchwardens and overseers to provide for the relief of the poor, and amongst other things, for the binding out poor children apprentices (*a*); so that there can be no doubt of that being one of the acts for the relief of the poor. Afterwards the 13 & 14 *Car.* 2., in terms as general as possible, enabled overseers within townships to execute *all acts for the relief of the poor, as is appointed by the* 43 *Eliz.* Thus far there seems to be no difficulty; but it is contended that the 8 & 9 *W.* 3. by making a special provision enabling overseers, where there are no churchwardens, to act in the case of granting certificates, is a legislative recognition that they had not a general power given them before. In answer to this, it may be observed, that the 13 & 14 *Car.* 2. only enabled the overseers generally to execute all acts for the relief of the poor, with reference to what the 43 *Eliz.* had before directed the churchwardens and overseers jointly to execute; and therefore as the granting certificates was a new power, originating with the 8 & 9 *W.* 3., and not one which was directed by the 43 *Eliz.*, there might be doubt whether it was strictly within the meaning of the 13 & 14 *Car.* 2.; and thus the special provision in the 8 & 9 *W.* 3. may well be accounted for. And if this were to be a reason why the 13 & 14 *Car.* 2. should not be holden to extend to the binding out apprentices, it would equally apply to every other case specified in the

(*a*) 43 *Eliz. c.* 2. s. 3.

1812.

The KING *against* The Inhabitants of NANTWICH.

43 *Eliz.*, as the providing a fund for setting the poor to work, &c.; and so would operate as a complete repeal of the 13 & 14 *Car.* 2. As to *Rex* v. *Clifton*, it is true that the question more immediately before the Court was different from the present, but what was there laid down by *Lawrence*, J. and *Le Blanc*, J., respecting the question whether it was necessary for the churchwardens to join in the certificate, is very material to this decision; and if any doubt remained, the 17 *G.* 2. *c.* 38. *s.* 15. has removed it; and as to what is said in answer, that this is not a township where there are no churchwardens, the same might be said of every other township in the kingdom, and would reduce the clause in 17 *G.* 2. to a dead letter. And the 2 & 3 *Ann*, *c.* 6., which gives the same powers to overseers, in the case of binding out parish-apprentices to the sea service (*a*), that the 17 *G.* 2. afterwards gave them in all cases, and is in pari materiâ, altogether omits the words "where there are no churchwardens." As to the argument arising from convenience, although it is enough to stand upon the positive regulations of the 13 & 14 *Car.* 2., it may, however, be observed, that it would be doing away the remedy which was expressly intended by that act, if the churchwardens for the whole parish were bound to intermeddle with the several townships; which in some instances are very numerous and far distant, and in others locally situate in a different parish; and therefore of many of them, the churchwardens cannot be supposed to have any local or personal knowledge, which is necessary for the due exercise of the office of overseer. As to the case of *Spitalfields* v. *Bromley* the decision is beside this case, and that which bears upon it was a

(*a*) 2 & 3 *Ann*, *c.* 6. *s.* 3.

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mere obiter dictum, and upon examination will be found not sustainable.

Lord ELLENBOROUGH, C. J. In the course of the argument my mind has certainly fluctuated, but the preponderance of my opinion at last is that this is a well executed indenture. The 43 of *Eliz. c.* 2. required an execution of the indenture by a majority of the churchwardens and overseers. I have very little doubt that the policy of the 13 & 14 *Car.* 2. *c.* 12. *s.* 21. was to vest the powers then subsisting in the churchwardens and overseers of the parish, in the overseers of each subdivision; and if the question stood upon that statute, I should have thought that it was a repeal of the 43 *Eliz.* to that extent. My doubt arises on the language of the certificate act, 8 & 9 *W.* 3. *c.* 30., and of the 17 *G.* 2. *c.* 38. The certificate act empowers the overseers of any place where there are no churchwardens, to sign and seal certificates; but I think that may be considered only as giving a special authority to those persons, to execute certificates in the particular instance there mentioned; and if this were a certificate instead of an indenture, the question would have been whether this case did not fall within their authority, so as to have enabled the overseers alone to act. But it is not necessary at present to decide that question, nor was it decided in *Rex* v. *Clifton*, for that was holden a bad certificate, upon a distinct ground; but the question was touched upon, and it seems to have been the opinion of two of the learned Judges, that the certificate might be given by the overseers of the township alone. Then as to the policy of requiring the churchwardens of the parish at large to interfere in the management of the poor of the several townships, it is quite at variance with

1812.

The KING *against* The Inhabitants of NANTWICH.

with the 13 & 14 *Car.* 2.; for after permission was given by that act to remove from township to township; to require the churchwardens to intermeddle in such removals, would be placing them in the singular situation of becoming both appellants and respondents at the same time; which is so incongruous, that it must have been the intention of the legislature to effect a complete separation of the townships: and that affords an argument to shew that the legislature meant to give to the overseers of each township, distinct powers to all purposes for the relief of the poor. But it might be thought that the granting certificates did not necessarily relate to the relief of the poor; and that will account for the introduction into the certificate act of the clause giving them a distinct power. Then a further doubt is raised by the language of the 17 *G.* 2. *c.* 38. *s.* 15., the words of which are, "that the overseers within every township or place where there are no churchwardens, shall act as churchwardens and overseers." It may be said that this is not inconsistent, because by no churchwardens may be meant no persons answering to that description within the township, such as chapelwardens; but I cannot think the legislature used the word in that sense; for, in truth, there are properly no chapelwardens of a township, but only of a chapelry; but whatever the inference arising from this enactment may be, I do not think it of such weight as to cut down the necessary effect and operation of the 13 & 14 *Car.* 2. With respect to what is laid down in the case of *Spitalfields* v. *Bromley*, that does appear an adverse authority, as far as it can be called an authority, against the opinion that in conclusion I draw; and that opinion is, that the 43 *Eliz.* is repealed as far as it respects townships by the 13 & 14 *Car.* 2.

GROSE, J.

1812.

The KING *against* The Inhabitants of NANTWICH.

GROSE, J. I have so much doubt upon this case, that I am not prepared to form an opinion. There are difficulties on both sides, which at present I cannot get over.

LE BLANC, J. As far as I have been able to form an opinion in the course of this argument, I think that the decision of the court of quarter sessions is a wrong one. The question is whether the pauper gained a settlement in *Pendleton*, by serving under indentures of apprenticeship executed by the two overseers of the township of *Nantwich*, the parish of *Nantwich* consisting of that and several other townships, maintaining their poor separately, with separate overseers; and there are also two churchwardens in the parish, appointed for the parish at large. That question depends upon another, viz., whether the binding was good, the indenture having been executed by the two overseers, without the concurrence of the churchwardens. There can be no doubt that the binding out of poor children as apprentices is one of the modes pointed out for relieving the poor of the parish. By the 43 *Eliz. c.* 2. "the churchwardens of every parish with two or more substantial householders, are appointed to be overseers of the poor;" and by another clause "the said churchwardens and overseers, or the greater part of them, with the assent of two justices, may bind out poor children to be apprentices." I take it to be clear that the churchwardens do not act as an integral part, but that a majority of the conjoint body would be sufficient; *i. e.* if there were four overseers and two churchwardens, an indenture executed by all the overseers, without the churchwardens, would be valid. Afterwards, when the wisdom of parliament was directed to the

1812.

The KING *against* The Inhabitants of NANTWICH.

the existence of large parishes in the Northern counties, which by reason of their extent could not conveniently maintain their own poor, it passed the statute of *Car.* 2.; which reciting the mischief, provided the remedy, viz. that separate overseers should be appointed for each township, to perform all and every the acts for the necessary relief of the poor, as was appointed by the 43 *Eliz.* If then this question had been agitated shortly after the passing of the statute of *Car.* 2., I should have thought that there could not have existed a doubt, after the recital of the inconvenience, and the remedy there prescribed by the appointment of overseers for the distinct townships, that the overseers so appointed, united in themselves all the powers of churchwardens and overseers appointed for parishes under the 43 *Eliz.* The inconvenience of any other construction would be monstrous. Removals from one township to another must necessarily take place, and adverse questions of settlement must from time to time arise between them; and thus the churchwardens of the whole parish, if bound to interfere in the townships, would necessarily have conflicting interests. I should have thought therefore upon this statute, that the overseers of a township with the assent of the justices might have acted alone in binding out apprentices. But the difficulty, which has been urged, arises from subsequent acts of parliament, and particularly the 8 & 9 *W.* 3., the certificate act; which enables the overseers of any place where there are no churchwardens to act in the granting of certificates. Now where the statute of *Car.* 2. has already made express provision for townships, and where the 8 & 9 *W.* 3. was passed with a particular object regarding certificates, and does not profess to meddle with the former act, I should

should not be disposed to give such a construction to one of its clauses, which gives a special power to the overseers, as to repeal the clause in the former act, which gives them a general power; but I should rather read the words of the enabling clause in the 8 & 9 *W.* 3., as relating to a case where there are no churchwardens to look to townships; and so I would read the words of 17 *G.* 2. "in townships where there are no churchwardens," *i. e.* who can act as in a parish. In *Rex* v. *Clifton* the power of the overseers alone to grant certificates was made a point in argument, but it was unnecessary to decide it, because there the certificate was only signed by one overseer; and upon that it was contended, that if it were a certificate given under the statute of *Car.* 2., then there should have been two overseers; if not, but the township was to be taken as part of the parish, then the churchwardens should have joined. What was thrown out by some of the Judges upon the question whether the churchwardens of the parish at large must join in the certificate with the overseers of the township, was not meant to decide that question, for it became unnecessary. The only dictum which seems contrary to our present decision is in the case of *Spitalfields* v. *Bromley*, but it may be observed that the point was not properly before the Court. As a general proposition, I am not inclined to accede to it, that in every case where there are townships within a parish, the churchwardens are to superintend the whole as overseers; it would be engrafting on their duty as overseers of townships great difficulties, and the poor laws could not be administered. But I am of opinion that when overseers are appointed under the statute of *Car.* 2., they alone continue overseers for the township, and that the township is to be considered as not having churchwardens.

BAYLEY, J.

1812.

The KING *against* The Inhabitants of NANTWICH.

BAYLEY, J. It seems to me that the overseers of this township have full power to bind out an apprentice, and that it was not necessary for the churchwardens to join in the execution. By the 43 *Eliz.* the churchwardens and two or more substantial householders are to be overseers, and they are to take order for the relief of the poor, and amongst other things to bind out poor children apprentices. But this power was not given to the churchwardens as a check upon the overseers, or as a distinct body from them, but only as constituting a part of the same body of overseers; and in that character only they were required to join. Then by the 13 & 14 *Car.* 2. it was provided, that where a parish was not able to reap the benefit of the 43 *Eliz.*, the townships within it should have separate overseers of their own; and the statute farther provided that such overseers should do all and every the acts for the necessary relief of the poor, as was appointed by the 43 *Eliz.* They were therefore from that time the only overseers to act for their township, and whether or not the churchwardens retained the power of concurring, at all events they were not required to concur; but the overseers might do all acts for the necessary relief for the poor independent of the churchwardens. Then the binding of apprentices, no doubt, comes within the meaning of an act for the relief of the poor, because it is so treated by the 43 *Eliz.* Much inconvenience would ensue from holding it necessary for the churchwardens of the parish to concur with the overseers of the township in the ordering of the poor; for they would have conflicting interests to bias their minds; and therefore I think the 13 & 14 *Car.* 2. was designed to place townships for all such purposes upon the footing of distinct parishes. Then

1812.

The KING *against* The Inhabitants of NANTWICH.

Then the 8 & 9 *W.* 3. did not mean to interfere with the 13 & 14 *Car.* 2., neither did the 17 *G.* 2. The words of the former are material to be considered, for it would seem from the use of the words, "the churchwardens and overseers of any parish, township, or place, or the overseers of any other place where there are no churchwardens," that the legislature considered that the word churchwardens would apply to a township as well as a parish. Perhaps it may be inaccurate so to apply it, for there may be no instance of a church for a township; but still if there were a chapel within it, the legislature might think the word not inapplicable. The act therefore probably meant that if there were persons within a township exercising a similar function to that of churchwardens, they should join: but it seems to me that it would be incongruous to hold that it meant that the churchwardens of a parish were to concur in granting a township certificate, for then the churchwardens who were resident in township *A.* might have to certify that the pauper was settled in township *B.* Then the 17 *G.* 2. has not made such an impression on my mind, as to induce me to think this construction of the stat. of *Car.* 2. is a wrong one. The words of sect. 15. are, "the overseers of the poor within any township or place where there are no churchwardens shall act in all matters relating to the poor as churchwardens and overseers," &c. The object of it seems to me to have been this, that as there might be acts necessary to be done by the overseers of townships, which might not immediately fall under the description of acts for the relief of the poor, and therefore would not be included in the stat. *Car.* 2; provision should be made for giving them all parochial powers whatsoever. The words "where no churchwardens" mean where there

1812.

The KING *against* The Inhabitants of NANTWICH.

there are no such churchwardens as with the overseers constitute the officers of that place. Therefore I think the 13 & 14 *Car.* 2. warrants such an indenture as the present, and that this construction is not broken in upon by the 8 & 9 *W.* 3. or 17 *G.* 2; and notwithstanding what was said in the case of *Spitalfields* v. *Bromley*, the principle seems to be that where the parish is divided into townships, each township is to provide for its own poor as a distinct parish. In *Rex* v. *Kirby Stephen* (*a*) the Court so considered it, in holding an order of removal to the township of *Kirby Stephen*, although directed to the parish of *Kirby Stephen*, to be conclusive on the township which neglected to appeal; and that rather breaks in upon the doctrine in *Spitalfields* v. *Bromley*.

Order of sessions quashed.

(*a*) 2 *Bott.* 687. last edit.

Wednesday, Nov. 11th.

BELL and Others *against* HOBSON.

Policy on goods at and from *G.* to any port in the *Baltic*, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy; which was a policy from *V.* to her port of discharge in the united kingdom, or any ports in the *Baltic*, with liberty to take in and discharge goods wheresoever, to return 12 per cent. if the voyage ended at *G.*: Held that the assured were entitled to recover, although the goods were not loaded on board at *G.* but at *V.* and although the defendant was not an underwriter on the former policy.

THIS was an action on a policy of insurance on goods, tried before Lord *Ellenborough*, C. J. at *Guildhall*. The policy was effected on the 15th of *June* 1810, "*at and from* Gottenburgh to any port or ports, place or places, in the *Baltic*, backwards and forwards, and forwards and backwards, with leave to seek, join, and exchange convoy, carry, use, and exchange simulated papers, clearances, and ship's papers, touch at all ports, places, and islands, for all purposes whatsoever, *take in and discharge goods wherever the ship may touch at*, includ-

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ing risk in crafts, &c., and transhipment, &c. If not allowed to enter any ports or discharge the cargo, &c. to return to any ports or places whatsoever until the cargo is landed in perfect safety; to wait for information off any ports or places, without being deemed a deviation;" "on tobacco valued at 40*l.* per hhd." "at a premium of 15 guineas per cent., to return 7*l.* per cent. for arrival." The policy contained the usual printed words, "beginning the adventure upon the said goods, from the loading thereof on board the said ship:" at the foot of it were added these words: "*In continuation* of five policies, one for 15,000*l.* dated 16th *March* 1810. No. 14., one for 4000*l.* dated 20th *March* 1810. No. 300., one for 2300*l.*, dated 11th *April* 1810. No. 149., one for 500*l.* dated 2d *October* 1809. No. 169., and one for 1200*l.* dated 23d *February* 1810. No. 14." It was proved that all the goods were in fact loaded at *Virginia*, from whence the ship sailed with her cargo on the voyage intended, which was described in the former policies, (one of which was given in evidence,) to be "at and from *Virginia* to her port or ports of discharge in the united kingdom, or any port or ports, place or places in the *Baltic*," &c. with the like liberties as stated in the policy in question, inter alia, to "*take in and discharge goods wheresoever the ship may touch at;* at 20 guineas per cent., to return 5*l.* for arrival; 12*l. per cent. if voyage ended at* Gottenburgh, or 15*l.* per cent. if in the united kingdom." The ship with her original cargo arrived at *Gottenburgh*, and afterwards proceeded with the same cargo to another port in the *Baltic*, and was captured. This defendant was not an underwriter upon any of the former policies. It was objected upon the authority

1812.

BELL against HOBSON.

authority of *Spitta* v. *Woodman* (*a*), that the insurance in question being "at and from *Gottenburgh*," and "beginning the adventure on the said goods from the loading thereof on board," must be confined to such goods as were loaded on board *at Gottenburgh*, particularly as a liberty was reserved in the former policies to take in and discharge goods wherever the ship might touch at: but Lord *Ellenborough*, C. J. was of opinion that the words at the foot of this policy, stating it to be *in continuation* of former policies, shewed that the parties contemplated the taking up the insurance on goods loaded before the ship arrived at *Gottenburgh*; and that the circumstance of *this* defendant not having been an underwriter upon the former policies, which was pressed upon his Lordship, would not vary the case. The jury found a verdict for the plaintiff.

The Solicitor-General moved for a new trial, renewing the above objections, and insisted more fully upon the effect of the liberty reserved in the former policy, to take in and discharge goods wheresoever, &c. and also of the stipulation for the return of premium if the voyage ended at *Gottenburgh*; as shewing that the parties contemplated an entire change of cargo in the voyage from *Virginia*, and that probably it would be determined and a new voyage commenced at *Gottenburgh*: and that even if these inferences failed, still that the defendant would not be liable as upon a continued voyage from *Virginia*, unless the policy underwritten by him was in clear and distinct terms upon a continuation of the identical cargo loaded in *Virginia*.

(*a*) 2 *Taunt.* 416.

Lord

1812.

BELL *against* HOBSON.

Lord ELLENBOROUGH, C. J. A very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in the case of *Spitta* v. *Woodman*, where it was holden that the words beginning the adventure from the loading on board, were to be confined to the place from whence the risk commenced. But if there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. Then can there be any thing more indicative of such an understanding between the parties, than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from *Virginia*. This was taking up the voyage from a period in the former policies. The conclusion therefore, which was drawn in *Spitta* v. *Woodman*, is completely rebutted by the reference in this policy to an antecedent loading.

LE BLANC, J. The statement inserted at the foot of this policy seems intended to take it out of the strict construction adopted in *Spitta* v. *Woodman*.

Per Curiam, Rule refused.

1812.

Wednesday, Nov. 11th.

BECK and Others *against* EVANS and Another.

A public notice given by carriers that they will not be answerable for certain specified articles or any other goods of what nature or kind soever above the value of 5*l.*, if lost, stolen, or damaged, unless a special agreement is made, and a premium paid, such value to be entered at the time of delivery, seems not to extend to goods which do not fall within any of the specified articles, and which from their bulk and quality, communicated to the carriers at the time of delivery, must be known to them to exceed the value of 5*l.*; and therefore it seems they will be liable for any damage to the goods arising from the carriage, although no special agreement be made, nor any premium paid; but at all events they will be liable for damage arising from gross negligence notwithstanding such notice.

THE plaintiffs were spirit merchants at *Shrewsbury*, and brought this action on the case, for damages, against the defendants, as common carriers, for improperly and negligently carrying a cask of brandy, which the plaintiff sent by the defendants' waggon from *Shrewsbury* to *London*, by which it was damaged and the greater part of the brandy lost. The case proved before *Le Blanc*, J., at *Shrewsbury*, was in substance this: The cask of brandy, which was of the value of 70*l.* and upwards, was sent by the defendants' waggon, and 1*s.* 6*d.* were paid at the time for booking, which was the common charge independent of the carriage price: a permit was delivered with it, which shewed that the contents of the cask were brandy; but no special agreement was made for the price of the carriage, nor any thing said as to the value of the cask. Before the waggon got to *Birmingham* it was perceived by persons in the waggon, that the cask was leaking fast, and the waggoner was informed of the circumstance; but though he staid three hours in *Birmingham* after his arrival there, he made no examination of the cask, nor took any step to prevent the leakage. He passed in like manner through *Wolverhampton*, where the waggon also made some stay, without regard to the cask, though the leakage still continued and increased, and he was again informed of it: but at the next stage beyond *Wolverhampton*, having some parcels to deliver

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1812.

BECK *against* EVANS.

out of the waggon, he there took the cask out, and the remainder of the brandy was saved. There was some attempt in defence to shew that the cask was in a damaged state when it was put into the waggon; which attempt however failed in the opinion of the Court and jury; but the principal ground of defence was a public notice given by the defendants, which was conspicuously exhibited over their warehouse, where the goods to be carried were received, and which was in these terms: "The proprietors of the *London* and *Salop* waggons give this public notice, that they will not be answerable for cash, bank-notes, writings, jewels, plate, watches, lace, silk, hose, wool, muslins, china, glass, paintings, *or any other goods of what nature or kind soever*, above the value of 5*l.*, if lost, stolen, or damaged, unless a special agreement is made, and an adequate premium paid, over and above the common carriage; such value to be specified and entered at the time of the delivery here, or to any of their officers or agents in the different parts of the kingdom." Upon this evidence the learned Judge left it to the jury to consider, whether the injury arose from the negligence of the defendants' waggoner, in not examining the cask, after he was informed of its leaky state, at either of the places where he halted; and he was also of opinion that the notice given by the defendants did not apply to a case of this kind, where the cask had been signified to them to be a cask of brandy, and therefore they must have known its value exceeded 5*l.*; but that such notices applied only to packages which, from their dimension and quality, could not be known to be necessarily above that value. The jury found a verdict for the plaintiffs, and the learned Judge reserved to the defendants liberty to move to enter a nonsuit, in case the

1812.

BECK against EVANS.

Court should be of opinion that the defendants were protected by their notice.

Jervis accordingly moved upon this point, and also upon the ground of a misdirection; upon the first he cited *Clay* v. *Willan* (*a*), *Izett* v. *Mountain* (*b*), and *Nicholson* v. *Willan* (*c*), to shew that these notices had been established to be binding on the public; and in *Ellis* v. *Turner* (*d*), where the carrier, notwithstanding such notice, was held liable for the loss of the goods, it appeared that he had carried them beyond the place to which they were consigned, and that was the ground on which he was held liable. Upon the ground of misdirection, he contended that the waggoner was not bound upon notice of the leekage to unload his waggon at any intermediate stage of the journey; and that it appeared, that as soon as he had occasion to unload the first parcel of goods for delivery, he looked to the cask and removed it, which was all that he was bound by law to do.

Lord ELLENBOROUGH, C. J. If the first point, upon which this rule is prayed, was unmixed with any other upon which the defendants were liable, I should be disposed to have it considered; not that my opinion upon it is in favour of the defendants, but on the contrary I am inclined against them. The notice, although in its terms it is made to extend to any goods of what nature or kind soever, cannot be indefinite, but must be construed with reference to the subject-matter, and

(*a*) 1 *H. Bl.* 298. (*b*) 4 *East*, 371.
(*c*) 5 *East*, 507. (*d*) 8 *T. R.* 531.

1812.

BECK *against* EVANS.

to cases where the party has no means of knowing of what nature the goods are. In that case the party stipulates that he will not be answerable for goods above the value of 5*l.*, unless the value has been notified to him, and they are paid for as such. But this was known to the defendants to be a cask of brandy, and does not fall within the description of cash or notes, or of any of the goods enumerated in the notice. Such is the inclination of my opinion upon this point, and yet it i singular enough that it has never presented itself at *Guildhall*, for these last ten years that I have sat there. But upon the other point, I think the carrier does not stipulate for exemption from the consequences of his own misfeazance; and if goods are confided to him, and it is proved that he has misconducted himself in not performing a duty which by his servant he was bound to perform, that is such a misfeazance as, if the goods thereby become damaged, his notice will not protect him from. Now here it appears that the waggoner was informed more than once of the leakage, after which notice, it was a duty he owed to his employers to have the leak examined and stopped at one of the stages where he halted. That being so, the carrier became clearly liable on this ground, independently of the other point in the case, and therefore I cannot consent to disturbing the verdict.

GROSE, J. The carrier could entertain no doubt that the goods were above the value of 5*l.*

LE BLANC, J. I think the exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on

1812.

BECK *against* EVANS.

any other ground than this, that they shall not be held liable to a large amount, where they only get a small reward for the carriage. They are therefore exempted from liability, where the goods are of a much larger value than from a knowledge of their bulk or quality they could possibly guess them to be. But that cannot apply to goods of a large bulk and known quality, where the value must be obvious. It is singular that the question has not arisen before this; perhaps the way to account for it is that carriers have acquiesced in their liability in such cases.

BAYLEY, J. I doubt whether the damage here falls within the terms of the notice, "lost, stolen, or damaged," for this was owing to gross negligence.

Rule refused.

Thursday, Nov. 12th.

ANDERTON *against* BECK and PEARSON.

Where the plaintiff in *Yorkshire* on the 26th of *December* received a bill of exchange, payable in *London*, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at *Lincoln*, who duly forwarded it to *London* for presentment, and the bill was dishonoured: Held that the plaintiff by keeping it in his hands until the 29th, was guilty of laches.

THE plaintiff declared for goods sold and delivered to the amount of 66*l.*, and upon the common money counts. The defendants pleaded the general issue; and the question turned upon whether one of two bills of exchange, which had been remitted by the post from the defendants to the plaintiff after the delivery of the goods and in satisfaction of the demand, which bill had been ultimately dishonoured, was to be taken as payment, on account of the plaintiff's having made it his own by laches; for if so, the goods were paid for, and the defendants

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were entitled to a verdict; and *Bayley*, J. was of this opinion at the trial before him at *York*, where the verdict passed for the defendants under his direction; but he reserved leave to move to set it aside and enter a verdict for the plaintiff for 30*l.*, the amount of the dishonoured bill.

Richardson now moved accordingly, and after some assistance from the learned Judge's report, and the finding of the jury, the facts appeared to be these. The plaintiff lived at *Cullingworth*, four miles from *Keighley*, the post town where the defendant *Beck* lived: *Pearson*, the other defendant, lived at *Steeton*, where the business was carried on, four miles also from *Keighley* in an opposite direction from the plaintiff's residence, and in the line of the post from *Bradford* to *Skipton*. The bill in question was dated *Leeds*, 26th of *October* 1811, and drawn by *W.* and *E. Prest* on Messrs. *Boldero*, *Lushington*, and Co. for 30*l.*, payable two months after date to *J. Tyne* or order, and specially indorsed by the defendants to the plaintiff. This bill became due in *London* on *Saturday* the 28th of *December*, and it appeared from circumstances that the letter from the defendants inclosing this and the other bill had been received by the plaintiff at *Cullingworth* on the 26th, and that he acknowledged the receipt of it by a letter which was put into the post at *Keighley* before one o'clock on *Friday* the 27th, within the post hours of that day. The plaintiff had no agent in *London*, but having dealings with *Smith*, *Ellison*, and Co., bankers at *Lincoln*, he inclosed the bill to them in a letter put into the post at *Keighley* on *Sunday* the 29th of *December*, and they received it either on the evening of *Monday* the 30th, after their bank had closed, or on the morning of *Tuesday* the 31st,

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1812.

ANDERTON *against* BECK.

and it was by them sent by *Tuesday*'s post to *Smith, Paine*, and Co., their bankers in *London*, by whom it was received on *Thursday* morning the 2d of *January*, (the course of the post from *Lincoln* to *London* being two days,) and presented the same day for payment at *Boldero* and Co.'s, who had stopped payment at the close of the 1st of *January*, and by whom it was dishonoured, of which immediate notice was given to the bankers at *Lincoln*, by them to the plaintiff by the next post, and by him to the defendants the same day. It was proved that a letter put into the *Keighley* post-office on *Friday* before one o'clock, would be delivered to *Beck* on the *Saturday*, and he might have sent it to *Pearson* on the forenoon of that day.

Upon these facts he contended that the plaintiff was not bound to send the bill direct to *London*, not having any agent there, but might, as he had done, forward it through the hands of his bankers at *Lincoln*; by which course it would have been impossible, even if the bill had been forwarded immediately after its receipt by the plaintiff, that it should have reached *London* by the day of payment. That the bill being so near due when the plaintiff received it, as to make it impossible to present it on the day of payment, was like a bill payable at sight (*a*), or on demand; in which case, it was only incumbent on the plaintiff to present it for payment, or put it into a course of negotiation, within a reasonable time. That the bankers at *Lincoln* had caused no delay in forwarding it, and the bankers in *London* had even presented it a day sooner than by law they were bound (*b*). If the plaintiff had sent the bill to *Lincoln* the next day

(*a*) 1 *Show.* 164., *Debers* v. *Harriot.*

(*b*) 2 *Camp. N. P. C.* 537., *Rickford* v. *Ridge.*

after

1812.

ANDERTON *against* BECK.

after its receipt, it would not have reached his bankers there to be in time for the *London* post before *Sunday*, on which day they would not have been bound to forward it, and if they had kept it until *Monday*, it could not have reached *London* before *Wednesday*, and then if *Smith* and Co. had not presented it until the next day, which would have been in due course, the bill would not have been honoured: so that if all which the law requires had been strictly observed, the case would have been the same; and therefore even if there were laches, no damage can be said to have arisen therefrom.

Lord ELLENBOROUGH, C. J. The party who agreed to take the bill so near the time of its becoming due, as to make it necessary to present it without delay, might have renounced it if he did not choose to undertake that duty, and have sent the bill back again; but if he keeps it, he is bound to use reasonable and due diligence in presenting it. Here he has not so done; he was bound to send the bill off sooner; he might have sent it on *Friday*, but by delaying until *Sunday*, he deprived the defendants who were parties to the bill of the chance of its being presented at least one day sooner.

LE BLANC, J. The plaintiff is not at liberty to calculate that probably each of the parties, who receive the bill in its progress to being presented, will hold it in their hands to the utmost extent of time which the law allows them, in order to excuse his own delay when their dispatch has exceeded his calculation.

BAYLEY, J. The plaintiff suffered *Friday*'s and *Saturday*'s post to pass without forwarding the bill, and I thought that as he had neither taken the necessary steps

to

1812.

ANDERTON *against* BECK.

to get it paid, nor apprized the defendants that he meant to renounce it, therefore he had made the bill his own. The party must use due diligence, and is not at liberty to take the chances of being in time to the prejudice of other parties.

Per Curiam, Rule refused.

Thursday, Nov. 12th.

YOUNG and Others *against* D. and A. HUNTER, R. RAINEY and J. W. GLASS.

Where separate commissions of bankruptcy were issued against three of four partners, to which they conformed and passed their examination, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three, under which commission the plaintiffs proved their joint debt, and afterwards sued all the partners for the same debt, and arrested one of the other two under whose commission they had not proved: Held that he was not entitled to be discharged out of custody.

THIS was a rule obtained on a former day for staying the proceedings, and discharging the defendant *Glass* out of custody in this action. In *July* 1811 the defendant *Glass* being in partnership with the other defendants under the firm of *Hunter, Rainey,* and Co., a separate commission of bankruptcy issued against him as partner with them under that firm, upon which he was declared a bankrupt, and surrendered and passed his examination, and *F. Robertson,* one of the plaintiffs, was chosen and acted as assignee under that commission. Separate commissions of bankruptcy were also about the same time issued against the two defendants *D. Hunter* and *R. Rainey,* (but not against *A. Hunter,* he being resident in *Scotland,*) as being respectively partners of the said firm; under which they were also declared bankrupts, and surrendered and passed their examinations. Upon application to the Lord Chancellor, for an order to allow proof of the joint debts, and distribution of the joint effects of the said firm, under one of the separate commissions, his Lordship directed that such proof and distribution should be allowed to be made under the commission against *Rainey.*

1812.

YOUNG *against* GLASS.

Rainey. In pursuance of this order, the plaintiffs proved their joint debt under the commission against *Rainey* for the purpose of receiving a dividend upon it, and afterwards brought this action for the same debt, and thereupon, in *October* last, arrested the defendant *Glass* for the sum of 30,000*l*. In support of the rule it was now contended, that by proving their debt under the commission against *Rainey*, the plaintiffs must be deemed to have made their election to take the benefit of such commission within the meaning of stat. 49 *G*. 3. *c*. 121. *s*. 14., and therefore could not afterwards proceed by action for the same debt, and that it would be hard upon the defendant *Glass*, who was stripped of all his property both joint and separate, to be considered as still liable to this debt.

But the Court were of opinion, that the language of the act of parliament would not bear the construction contended for; if it was so meant, non ita lex scripta est; that the words "proving a debt under a commission shall be deemed an election to take the benefit of such commission," must be taken to relate to cases where a party, who has proved under a commission, sues the same person under whose commission he has proved. And BAYLEY, J. added, that a part of the argument assumed that the Lord Chancellor's order extended to making the joint property of *Glass*, in the possession of his separate assignees, liable to the joint creditors who had proved under *Rainey*'s commission, but no such order appeared to be made.

Per Curiam, **Rule discharged.**

***Campbell* was in support of the rule.**

***Marryat* and *Carr* contrà.**

THURSTON,

Friday, Nov. 13th.

THURSTON, Widow, *against* MILLS, late Sheriff of *Suffolk*.

Where goods were taken in execution by the sheriff on a fi. fa., and whilst they remained in his hands unsold, an extent came at the king's suit tested after the entry of the sheriff under the fi. fa.; and the sheriff thereupon seized the said goods subject to the former seizure, and afterwards sold them *under a venditioni exponas issued upon such extent*, and paid over the proceeds of such sale by order of the Court of Exchequer: Held that at all events, without determining whether the king's extent was under the circumstances entitled to priority, the Plaintiff could not maintain *money had and received* against the sheriff for the proceeds of such sale.

IN assumpsit for *money had and received*, and on an account stated, which was tried before Lord *Ellenborough*, C. J., at the *Middlesex* sittings, after *Hilary* term, 1809, the jury found a verdict for the plaintiff, for 2077*l.* 3*s.* 2*d.*, subject to the opinion of the Court upon a case stated, which was to be changed into a special verdict, if the Court, on the hearing of the argument, should think fit: and after one argument, the case, being considered to be of great moment, was ordered to be converted into a special verdict, which was accordingly so entered on the record, and stated in substance that on the 17th of *June* 1807, a writ of fieri facias issued out of the court of *C. P.*, at the suit of the plaintiff, tested on that day, returnable on the morrow of All Souls, and directed to the sheriff of *Suffolk*, on a judgment before that time recovered in the said court by the plaintiff against *S. Thurston* the elder, *which writ was on the* 18*th delivered to the under-sheriff* of the defendant, then sheriff of the county, and commanded the sheriff to levy of the goods and chattels of *S. Thurston* the elder, 6000*l.* debt, and 80*s.* damages and costs, and was indorsed to levy 3006*l.* 9*s.*, besides 20*s.*, for execution, warrant, and attorney's trouble, sheriff's poundage, and officer's fees. Immediately upon the receipt of the writ, a warrant to a sheriff's officer for the execution of the same, was forwarded by the under-sheriff, on the same day, to the plaintiff's attorney at *Ipswich*, by a special messenger whom the plaintiff's at-

torney had sent for that purpose. And the sheriff's officer named in the warrant, *on the same day entered into the premises* of *S. Thurston*, and *seized and took possession of his goods* under that execution. The plaintiff is sister-in-law to *S. Thurston*, and the judgment on which the fieri facias issued, was entered upon the 17th of *June* 1807, on a warrant of attorney, dated on the 11th of the same month. *On the 22nd of the same month a fiat was granted* by a baron of the Court of Exchequer, for an extent against *S. Thurston* for 2066*l.* 15*s.* 8*d.* due to his majesty for malt duties; which debt had been previously found on an inquisition taken the same day, by virtue of a commission duly issued from the Court of Exchequer for that purpose, which was also issued and tested on the same day; and the *writ of extent was tested and issued on the same 22nd of* June, returnable on the 6th of *November* then next, and was *delivered to the sheriff on the 23d of* June, who thereupon issued a warrant to the same officer, for the execution of the writ of extent, and he, by virtue of that writ and warrant, took possession of the same goods under the extent on the same 23d of *June*; and no sale had been made of the goods under the fieri facias at the time of the officer's entry under the extent. Before the return of the extent an inquisition was duly taken thereon by the sheriff, which found the foregoing facts, and also that the goods were seized and taken into his majesty's hands, subject and liable, as far as the same were by law subject and liable, to the said writ of fieri facias; and which extent and inquisition were returned into the Court of Exchequer on the return of the extent. In *December* following the defendant, by the hands of his under-sheriff, received from the Court of Exchequer his majesty's writ of *venditioni*

1812.

THURSTON *against* MILLS.

ditioni exponas, returnable on the 23d of *January* then next, *under which the sheriff sold the goods and received the proceeds*, to the amount of 2382*l.* 10*s.* 6*d.*, and afterwards returned the said writ of venditioni exponas into the Court of Exchequer, having received an order of that court for returning the same. In *February* following the under-sheriff was served with the copy of an order of the Court of Exchequer, whereby he was ordered to pay into the hands of the collector of excise for the king's use the said sum for which the extent was issued, after deducting his poundage; in obedience to which order the money was paid to the collector. The sheriff was ruled by the Court of *C. P.*, to return the writ of fieri facias, and thereupon applied to that court for time to return it; but afterwards, and after the payment of the money pursuant to the order of the Court of Exchequer, he made a special return to the fieri facias, stating "that he received the said writ on the 18th of "*June* last, and on the same day seized goods by virtue "thereof to the value of 2382*l.* 10*s.* 6*d.* That on the "23d of *June* last he received an extent duly issued "out of the Court of Exchequer, commanding him "to levy of the goods of *S. Thurston* the sum of "2066*l.* 15*s.* 8*d.* for a debt due from the said *S.* "*Thurston* to his majesty for malt duties. That by virtue "of that writ of extent, he did on the 26th of *October* "last take an inquisition, upon which the writ of fieri "facias and the seizure under the same were duly found, "and did thereupon certify to the Court of Exchequer, "that he seized the said goods into the hands of his majesty, subject and liable nevertheless, as far as by law "the same were liable, to the said writ of fieri facias; and "that he did seize the said goods accordingly. That

1812.

THURSTON *against* MILLS.

" by virtue of and in obedience to his majesty's writ of " venditioni exponas, he sold the goods, which produced " 2382*l.* 10*s.* 6*d.* That on the 3d of *February* last he " was ordered by the said Court of Exchequer to pay " 1960*l.* 18*s.* 11*d.*, being the balance of the said " 2066*l.* 15*s.* 8*d.*, after deducting 105*l.* 16*s.* 9*d.* for " poundage for the same 2066*l.* 16*s.* 8*d.* to *Powell*, " collector of excise, &c. and paid the same accordingly, " and that he had 305*l.* 7*s.* 4*d.*, the residue of " the 2382*l.* 10*s.* 6*d.*, and 10*l.* 7*s.* 6*d* for poundage, " ready to be paid to the plaintiff *Thurston*; and that *S.* " *Thurston* had no other goods, &c. whereon to levy the " residue of the debt, &c." The special verdict then stated that the 305*l.* 7*s.* 4*d.* was by the consent of the plaintiff and defendant paid to the plaintiff's bankers on her account, and that 10*l.* 7*s.* 6*d.* were due to the sheriff on the sum of 305*l.* 7*s.* 4*d.* for poundage and other charges, and that if the whole of the 2382*l.* 10*s.* 6*d.* had been levied under the fi. fa. there would have been due to the sheriff the further sum of 51*l.* 13*s.* 6*d.* But whether, &c., and if the Court should be of opinion that the defendant promised in manner and form as declared against him, the jury assess the damages at 2015*l.* 2*s.* 2*d.*

This case was three times argued, first by *Frere*, Serjt. in *Michaelmas* term 1809, 2dly, by *Park* in *Trinity* term 1811, and again by *Frere*, Serjt., on this day for the plaintiff; and by *Dampier* on the first, and *Abbott* on the two last arguments, for the defendant. The question made upon the two first arguments was whether, under the circumstances stated in the special verdict, the king's writ of extent was entitled to priority over the plaintiff's

1812.

THURSTON *against* MILLS.

plaintiff's execution. Upon that question the arguments for the plaintiff were in substance as follow:

As the writ of fieri facias was actually delivered to the sheriff, and he entered under it, and took possession of the goods, before teste of the writ in the king's suit commenced in the Exchequer, the question is, whether the king's extent is to have the priority. In this Court (*a*) and in the Court of C. P. (*b*), this question has been decided in favour of the subject; but, it must be admitted that in another case in the Court of Exch. (*c*), it has been decided in favour of the crown. Much will depend upon the construction of the 33 *H.* 8. *c.* 39., and if it shall be found that the words of that act are clear, the Court, especially where there are conflicting decisions, will look no farther. By *s.* 74. it is enacted, "that if any suit be commenced or taken, or any pro-"cess be hereafter awarded, for the king for the reco-"very of any of the king's debts, the same suit and pro-"cess shall be preferred before the suit of any person, "and the king shall have first execution against any "defendant, of and for his said debts, before any other "person, *so always that the king's said suit be taken and* "*commenced, or process awarded for the said debt at the* "*suit of the king, before judgment given for the other per-*"*son.*" Now here the king's suit was not commenced until the 22d of *June*, (the date of the fiat,) whereas the plaintiff obtained judgment, and her writ of fieri facias issued on the 17th, and the sheriff took possession under

(*a*) 4 *T. R. Rorke* v. *Dayrell.*

(*b*) *Black. R.* 1251. 1294, *Uppom* v. *Sumner.*

(*c*) *The King* v. *Wells and Allnutt.* See MS. note at the end of this case.

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1812.

THURSTON *against* MILLS.

it on the next day. It has been said, however, that this act is restrained to executions against lands; but there are no words so to restrain it; on the contrary, *s.* 77., which enables the crown to recover against the assets in the hands of executors and administrators, shews that it was meant to extend to executions against personalty. In some of the cases the act has been said to be in extension, in others in restriction of the subject's right. In Sir *T. Cecil's case* (*a*), the Court resolved that the act was intended to give a new benefit to the subject as a compensation for the advantage given to the crown, and such was the view which *Buller*, J. took of it in *Rorke* v. *Dayrell* The authorities on which the plaintiff's title may be supported are the following; *Lechmere* v. *Thoroughgood* (*b*), which perhaps, after the observations made upon it in *Payne* v. *Drewe* (*c*), is not much to be relied upon; *The Attorney-General* v. *Andrew* (*d*), and *Rex* v. *Dickenson* (*e*), and in *Com. Dig.* (*f*), it is said, "If execution be upon a judgment against the king's debtor, and before venditioni exponas, an extent comes at the king's suit, those goods cannot be taken upon the extent:" and this is given as a summary of all the cases. It may also be observed that the case of *Uppom* v. *Sumner* (*g*) was a judgment delivered after consideration, and with the unanimous concurrence of all the judges of the court, some of whom were very eminent persons. That judgment was followed by *Rorke* v. *Dayrell* in this Court, upon which also the Court was unanimous. [Lord *Ellenborough*, C. J., Lord C. J. *De Grey*, and Lord *Kenyon*,

(*a*) 7 *Rep.* 19. (*b*) 2 *Vent.* 169. 3 *Mod.* 236. S. C.
(*c*) 4 *East*, 540. (*d*) *Hardr.* 23. (*e*) *Parker*, 262.
(*f*) *Com. Dig. Debt*, G. 8. (*g*) 2 *Black. R.* 1294.

who

1812.

THURSTON *against* MILLS.

who concurred in those judgments, had been attornies-general, and must have been conversant with the rights of the crown upon such questions.] The case of *Rorke* v. *Dayrell* is precisely in point, and although Lord *Kenyon* fully acceded to the authority of *Uppom* v. *Sumner*, yet he did not rest upon that alone, but went de novo into the grounds of his decision; and *Ashhurst*, J. said, that the words of the statute were clear and decisive. It may be said that the case in the Exchequer, where the Court put a different construction upon the statute, is a later decision; but it is a single decision against all the above authorities. [*Le Blanc*, J. said, that *Eyre*, C. J. when he was Chief Baron, upon the question coming before him on motion, expressed very considerable doubts upon the case of *Uppom* v. *Sumner*, and desired that the question might be brought on again upon demurrer, in order that it might be considered.]

Arguments for the Defendant.—There being conflicting authorities upon this question, it must be argued as if it were res integra. It will not be easy to maintain that the words of the statute are so clear as they have been supposed to be in some of the decisions relied upon by the plaintiff, when the consequences of those decisions are adverted to; for if the king is not to be allowed to take out his execution if the subject has first obtained judgment, it will follow that although the subject after judgment obtained should delay taking out execution for any length of time, yet the king cannot proceed to take out his execution; which would be giving a greater effect to a prior judgment as against the king, than it would have as against a subject. Perhaps a short reference to the history of this branch of the prerogative will

1812.

THURSTON *against* MILLS.

will tend to elucidate the argument. By the ancient prerogative of the crown, as it stood at common law, the king was to be paid first, and was entitled to stay the suits of other creditors against the king's debtor, until the king's debt was paid: and the means by which that was effected was to grant a protection to the debtor (*a*). This appears from Sir *Edw. Coke*'s case (*b*), and also from the *Registr. Brev.* 281. *b.*, where is to be found a form of such writ in favour of some *Lombard* merchants, who were indebted to the crown in debts payable at a future day, and the writ forbids that they should be taken, distrained, or arrested on account of any other debts; and in case judgment should have been given in the king's courts to recover those debts, it directs execution to be suspended until the crown debts be satisfied. There is also another writ of the same sort in *Dyer* (*c*), but that was not allowed; and the reason was that it was after the 25 *Ed.* 3. *stat.* 5. *c.* 19. Thus stood the prerogative whilst the debtor lived, but if the debtor died, the king was to be first paid out of his goods; the debtor could not make a will, neither could his executors intermeddle, without the king's permission, until the king's debt was satisfied. The sheriff was to secure the debt to the crown by Magna Charta (*d*), and *Madox*, in his *History of the Exchequer* (*e*), quotes several instances of permission to the king's debtors to make wills, and to the executors to take the goods. The first alteration that was made by statute in the king's prerogative was by 25 *Ed.* 3. *stat.* 5. *c.* 19., which narrowed the prerogative, by allowing the suits of other creditors

(*a*) *Co. Lit.* 131. *b.*
(*b*) *Godbolt*, 290., 2 *Roll's Rep.* 294.
(*c*) *Dyer* 328. *Hunt's* case.
(*d*) 9 *H.* 3. *c.* 18.
(*e*) 2 *Madox Hist. of Exch.* 183. *et seq.*

1812.

THURSTON *against* MILLS.

to proceed to judgment notwithstanding such protections, but the execution was to be suspended, unless the creditor should undertake for the king's debt. And this was done in 41 *Ed.* 3. (*a*) There execution was sued on a statute merchant; the sheriff returned that he had extended the lands, but did not return that he had delivered them: whereupon a motion was made to attach the sheriff, and one came on the part of the defendant and said that he was the king's debtor, and had a writ out of Chancery reciting that he was debtor in the Exchequer, and prayed that execution might cease until the king's debt was paid. On the other side it was prayed that process might be continued on the roll until the king's debt was levied, and that a capias might be awarded: the capias was objected to, and at last a continuance of the process was prayed without a capias, and that was granted." The next alteration was by the statute now under discussion, 33 *H.* 8. *c.* 39., which is very obscurely worded; for it would appear to one not conversant with the law as it then stood, from a view of this clause of the statute, as if it gave to the king something which he had not before, but at the same time gave it with qualifications; whereas it is quite clear from the above considerations, that although worded in the form of a gift, it gives nothing to the crown, nor enables it to do any thing which it might not have done before. But it imposes conditions, and therefore must be considered as a restraining clause. Now the rule is that the prerogative of the crown shall not be taken away, except by clear and unambiguous words. According to that rule, the statute must be taken to have worked this re-

(*a*) *Fitzh. Abr. Execution, pl.* 38., cited in *Rex* v. *Cotton, Parker* 123.

straint,

straint, and no farther, viz. that the king shall not prevent the subject from taking out execution upon a judgment obtained against the king's debtor, unless before the time when the subject shall have obtained such judgment, the king shall have commenced his suit, or instituted process for the recovery of his debt. This will be an abridgment of the prerogative, (for under the 25 *Edw.* 3. it has been shewn, that the king might have prevented the subject's execution, although the king's suit was not commenced before the subject had obtained judgment,) and will satisfy the words of the statute, and also conform to all the authorities prior to *Uppom* v. *Sumner*. The words of the statute cannot possibly be taken in their literal sense; for then if the subject's judgment were first, he would have precedence although his execution were last, which is not the case even between subject and subject. That sense therefore must prevail, which the words will best admit of, upon a reference to the law as it stood before the act. The substance of the enactment is this, that the king's suit and process, (which is intended of mesne process,) and the king's execution, are to be preferred to that of the subject; which is so far the same as at common law: but he is only to have first execution, *i. e.* a right to prevent the subject from issuing execution until the king's debt be satisfied, in the case there provided for: but the statute was never intended to be applied to concurrent executions. With respect to them, before the case of *Uppom* v. *Sumner*, it was considered that if the king's writ came before the execution of the subject was completely executed, the king's execution was to prevail; and that execution is then only completely executed, when upon an elegit the goods and land are delivered by the writ of liberate, or

1812.

THURSTON *against* MILLS.

1812.

THURSTON *against* MILLS.

when upon a levari facias the goods are sold as well as seized by the sheriff. Therefore in *Stringefellow* v. *Brownesoppe* (*a*), where the king's extent came after the extent of the subject upon a statute staple was returnable, but before liberate; it was holden that the sheriff should be amerced if he would not prefer the king's writ. The reporter adds a quære to that case, because he says it was against the opinion of many in the Temple; but notwithstanding that, it was thought by *Parker*, C. B. to be good law (*b*). [*Bayley*, J. It was agreed to in Lord *Lincoln's case* (*c*).] So in *Rex* v. *Peck* (*d*), the extent was tested after seizure under a fi. fa.; the sheriff made a special return, and afterwards moved in the Exchequer to amend it, which was allowed; and there it was taken for granted that although the goods were levied by virtue of the fi. fa. three days before the teste of the extent, yet that was no bar to the crown; but it is added, "quære if they had been sold, for then execution would have been executed." The same doctrine is to be found in *The Attorney-General* v. *Capel* (*e*). The next cases are those of *Rex* v. *Cotton* (*f*), which was the case of a prior distress, but was considered the same as a prior execution; and *Curson's case* (*g*), where it was held that the queen should not avoid the execution of the subject, after a liberate; but it was also said "that if the land had been extended at the suit of the queen, then the execution of the queen should hold place, although her's was a statute of a puisne date." All these, taken together, are strong authorities to shew that if the king's extent comes before

(*a*) *Dyer*, 67. *b*. (*b*) *Parker*, 125. (*c*) *Dyer*, 67. *b*. in note.
(*d*) *Bunb.* 8. (*e*) 2 *Show.* 482. (*f*) *Parker* 112.
(*g*) 3 *Leon.* 239, 240. 4 *Leon.* 10, S. C.

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execution executed, it shall prevail. [*Bayley*, J. cited *Gilb. Exch.* 90. (in some editions p. 113.) which he said agreed with the argument, that although there be a seizure under a fi. fa., yet if an extent comes, the crown shall be preferred.] *Gilbert* is there speaking of an execution upon a judgment, and not upon an extent, and therefore his opinion may be set against that of Lord C. B. *Comyns*, which has been cited. Thus it appears that until the case of *Uppom* v. *Sumner*, all the authorities were in favour of the prerogative; and it is observable that the counsel in that case at first thought it too clear in favour of the crown to admit of argument. *Lechmere* v. *Thoroughgood*, on which that case mainly rests, is now abandoned: and as to *The Attorney-General* v. *Andrew* (*a*), although it is not stated in the report whether there had been a liberate, yet it seems clear from the whole taken together that there must have been; and that the elegits were completely executed. The record has been searched for but cannot be found. *Rex* v. *Dickenson* was also relied upon in *Uppom* v. *Sumner;* which was a scire facias against an executor on a simple contract debt due from his testator to a third person, and seized into the king's hands. The executor pleaded a judgment recovered against his testator in his lifetime, and other judgments recovered against himself before the return of the scire facias upon bonds given by his testator: and it was holden that the crown was entitled to priority over the subsequent judgments, but not over the precedent, by reason of the words of the stat. of *H.* 8. Now these two cases taken at their utmost, only decide that where a judgment can of itself give a

(*a*) *Hard.* 23.

right,

1812.

THURSTON against MILLS.

right, title, or lien to a subject, the king's subsequent execution shall not take it away. A judgment gives a right, title to, or lien upon the land and upon the assets; but it gives no right, title to, or lien upon the goods of the debtor while living. Upon the whole therefore the decision in *Uppom* v. *Sumner* is at least so doubtful as to require revision: and *Rorke* v. *Dayrell*, which is founded upon it, stands in the like doubt. Lord *Kenyon* was certainly mistaken in that case when he concluded that the property was altered, because bound by the delivery of the writ: for if so, it would be immaterial whether the sheriff had actually seized or not. But by the goods being bound by the delivery of the writ, can only be meant that the debtor himself cannot afterwards aliene. It is clear that the sheriff may if he please execute a second writ first, and the party to the second writ shall have the benefit of such execution, although the sheriff may be answerable for his neglect (*a*); which shews to what extent the goods can be said to be bound by the delivery of the first writ. In truth, the delivery of the writ is but the inception of an execution, and cannot bind the king; nor does it bind even in the case of a prior title which is by relation only, as in the case of bankruptcy (*b*). It may be added that the decision in *Rorke* v. *Dayrell* was not generally approved of at the time, and has since been much shaken by *The King* v. *Wells and Allnutt*, which was a decision in favour of the crown, and being upon demurrer might have been carried farther.

(*a*) 1 *Ld. Raym.* 252. *Smallcomb* v. *Cross*, S. C. cited 4 *East*, 538.

(*b*) 3 *Lev.* 191. *Phillips* v. *Thompson*, 1 *Burr.* 20. *Cooper* v. *Chitty*, 4 *East*, 538, 9. *Payne* v. *Drewe*. 2 *Eq. Ca. Abr.* 381. *Lowthal* v. *Tonkins*.

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1812.

THURSTON *against* MILLS.

In reply.—The question must be decided upon the statute, and not upon a consideration of what might have been the common law prerogative in ancient times. It is admitted that the statute is an abridgment of that prerogative, and the restraining words have already received a construction, that they operate as a benefit to the subject. But what benefit is given by permitting the subject to proceed to judgment, and thereby incur all the expense of such a proceeding, if after judgment obtained the crown may still supersede him? As to *Rorke* v. *Dayrell*, admitting what Lord *Kenyon* said upon the effect of the delivery of the writ to be erroneous, as it was said to be by *Macdonald*, C. B. in the conclusion of his judgment in *Rex* v. *Wells and Allnutt*, it does not follow because one argument fails that therefore the whole is erroneous. Lord *Kenyon*'s judgment was formed upon a review of all the authorities, and not as has been said upon *Lechmere* v. *Thoroughgood*. The report of *The Attorney-General* v. *Andrew* does not warrant the assumption that there was a liberate; nothing of the kind is stated in it: and as to setting the authority of *Gilbert's Exch.* against that of *Comyns' Dig.*, if that is to be done, it may be observed in favour of the latter that it was written after, and probably upon due consideration of the former, and it is given as the result of all the authorities. In *Rex* v. *Wells and Allnutt* the parties were not in affluent circumstances, and the amount in dispute was not large; which accounts for its not having been carried further.

June 21, 1811.

At the conclusion of the second argument, Lord ELLENBOROUGH, C. J. said, that before the Court proceeded to determine upon conflicting decisions, it would become

1812.

THURSTON *against* MILLS. *June* 17, 1812.

come them to consider very deliberately of their judgment. Afterwards in *Trinity* term 1812 his Lordship expressed himself to the following effect: The Court were prepared to have given judgment in this case upon the principal point on which it has been argued, viz. as to the priority of the extent; but another difficulty has occurred to us, viz. whether this, which is an action for money had and received, can be maintained against the sheriff, where it appears that he has acted under the peremptory order of the Court of Exchequer. The doubt is, how far money had and received is maintainable against the sheriff, where he has converted the goods into money by sale of them under the writ of venditioni exponas, and afterwards paid over that money under the order of the Court. We wish therefore to have a further argument upon that point only; and when the Court have formed their judgment upon that point, they will be prepared to give the judgment which they have formed upon the other principal point, and were prepared to have delivered on this day.

Arguments for the plaintiff upon the last point.—This question may be divided into three heads: first, whether the action is well brought against the sheriff himself; secondly, whether money had and received is the proper form of action; thirdly, whether the sheriff in general is protected against every form of action, by reason of the order of the Court of Exchequer. Upon the first point there seems no difficulty; it is said in *Laicock's case* (*a*), that the sheriff shall answer for his under-sheriff civilly but not criminally; and in *Saunderson* v. *Baker* (*b*), he

(*a*) *Latch.* 187. (*b*) 3 *Wils.* 309.

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was held so liable to trespass, and *Woodgate* v. *Knatchbull* (*a*) is to the same effect. Secondly, the proper form of action here is not trespass or case, but money had and received. A plaintiff when he has issued and delivered a fi. fa. to the sheriff, and goods are taken under it, has a double remedy, either by rule of Court upon the sheriff, or by action of debt. Therefore in *Perkinson* v. *Gilford* (*b*) it was resolved that debt lies against the executors of the sheriff for money levied under a fi. fa., the goods having been sold by the sheriff, although he had not returned the writ. So here the goods have been sold; and although the sale was made alio intuitu, still if the sheriff be not justified in such sale, it will not protect him: the plaintiff, who had a prior right under her execution, is not to be prejudiced by the mistake of the sheriff in having sold under the order of the Court of Exchequer. Before the sale, by the seizure alone, the sheriff became answerable to the plaintiff (the act of God excepted) for the value of the goods; *Clerk* v. *Withers* (*c*). He was compellable to return the writ, and he has returned that he sold the goods, and such return is at his peril (*d*): and if the plaintiff is entitled to the proceeds of the sale, debt will lie against him; and if debt will lie, so will money had and received. It may be said, however, that this was not a sale under the fi. fa. as in *Perkinson* v. *Gilford*, but under another writ, and that the question here is whether if a sheriff having two authorities to act, acts under that one which is an improper authority, his act can be referred to the autho-

(*a*) 2 *T. R.* 148. (*b*) *Cro. Car.* 539.

(*c*) *Salk.* 323., 3d Resolution. S. C. 2 *Ld. Raym.* 1075, 2d Resolution. 2 *Saund.* 343. *Mildmay* v. *Smith.*

(*d*) 1 *Taunt.* 120.

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1812.

THURSTON *against* MILLS.

rity under which he ought to have acted. But admitting the act of the sheriff not to be referable to the plaintiff's execution, but to have been tortious as it regards the plaintiff, still according to Lord *Mansfield* in *Feltham* v. *Terry* (*a*), the party may waive the trespass and bring his action for the money which the goods sold for. That is the very question now under discussion, and seems decisive of it. Unless therefore it can be shewn that the sheriff, because he acted under the writ of the Court of Exchequer, is protected against every species of action, he is not against the present. It is thirdly submitted, upon the authorities already cited, and from the constant practice, that the sheriff is not so protected. [Ld. *Ellenborough*, C. J. The case of *Feltham* v. *Terry* was the case of a void authority, but can we say that the authority under the order of the Court of Exchequer was void? In *Allen* v. *Dundas* (*b*) it was considered that the probate of a forged will was not void so long as it continued unrepealed. The oldest case upon this subject is, I believe, that of *Sir R. Newdigate* v. *Davy* (*c*), where *Treby*, C. J. held that an action would lie for money paid under a sentence of the court of high commissioners; for when money is paid in pursuance of a void authority, indeb. assumpsit lies for it. That case goes further than any other that I am aware of; and it was with a view of considering the point as it is presented in that case that we directed this argument.] The order of the Court of Exchequer cannot be considered as res judicata like the case of *Marriott* v. *Hampton* (*d*); it was ex parte, and the plaintiff was not heard against it: it would therefore be contrary to justice to hold her bound by it. Besides, the plaintiff has no

(*a*) *Cowp.* 419.
(*b*) 3 *T. R.* 125.
(*c*) *Ld. Raym.* 742. S. C. *Bull. N. P.* 133.
(*d*) 7 *T. R.* 269.

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farther remedy against the defendant in the original action, who is discharged by the levy, and may plead in his discharge that his goods were seized upon the fi. fa. (*a*); and can it be said that the plaintiff, supposing her entitled to the priority, is to suffer for the wrongful act of the sheriff? The sheriff if liable cannot protect himself by his own return, *Rybot* v. *Peckham* (*b*).

Arguments for the Defendant.—This question must be decided rather on principle, than on the authority of any express decisions upon it. Without considering whether the plaintiff had any other remedy, it will be enough to shew that this action does not lie; but it may be observed that if the plaintiff can succeed in this or any other form of action against the sheriff, the latter will be placed in a situation of peculiar hardship. In every other case where a third party is brought into controversy and peril by two litigant parties, he may relieve himself by a bill of interpleader. What the sheriff has done here is in the nature of a bill of interpleader. If (as it has been said), this process of venditioni exponas was ex parte, it was the plaintiff's fault: she might have resisted it in the Court of Exchequer; but the sheriff could not withdraw himself from the order of the Court. Any person who claims an interest in goods seized under the king's extent, may come in and put in his claim on the record. Rules are issued, and proper time is always allowed by the Court for such claims. It is called a plea to the extent, and that is the proper course which the law has prescribed for the trial of questions of this sort; for the Court of Exchequer is the court in which

(*a*) 2 *Ld. Raym.* 1075., 3d Resolution. (*b*) 1 *T. R.* 731. in nota.

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1812.

THURSTON *against* MILLS.

matters of revenue and the king's rights are peculiarly triable. This was the course which the plaintiff ought to have pursued; she had notice of the proceedings, for they are notice of themselves; she should therefore have intervened by plea upon the record, and a writ of error would have lain thereon from the judgment of the Exchequer. Supposing then that she was entitled to priority, the answer to this action is, that she should have litigated her title at the proper time and place. Therefore in *Lindon* v. *Hooper* (*a*) it was held, that the plaintiff could not maintain money had and received, because replevin or trespass were the remedies peculiarly applicable. It is said that money had and received will lie where goods are wrongfully seized and sold, for that the party whose goods they were may waive the trespass. That may be admitted; and so it is where a party is compelled to pay money by duress. But it will be found that all the cases where money had and received will lie, are nearly reducible to one of these three: first, where the money was originally the money of the plaintiff; secondly, where it is the produce of goods his property, and wrongfully taken by another; or thirdly, where the money is the plaintiff's by virtue of a title to some office. In all these cases the money is due ex æquo et bono; but in this the sheriff has acted in discharge of his duty, under the authority of a Court of competent jurisdiction, and has given the plaintiff an opportunity of contesting her rights, and no blame is imputable to him. There is therefore neither justice, equity, or conscience to sustain the action in this case.

(*a*) *Coup.* 414.

In

1812.

THURSTON *against* MILLS.

In reply.—Much of the argument on the other side tends to shew that no action at all would lie against the sheriff, because the plaintiff might have proceeded in the Court of Exchequer; but that argument proves too much, for it is contrary to *Uppom* v. *Sumner* (*a*), and *Rorke* v. *Dayrell* (*b*). Then as to the sheriff's having acted under the order of a Court of competent jurisdiction, the venditioni exponas is of no higher authority than any other process issuing out of the other courts; but the cases before cited shew that it is the constant practice to bring actions against the sheriff for acts done under such process.

Lord ELLENBOROUGH, C. J. It is very much to be regretted in this case, which involves two questions, one of them of considerable importance, and connected with another of general and paramount importance, which has already been twice argued before us, that this, which may be deemed the preliminary question, was not adverted to sooner. The parties might have been saved considerable expense, if upon this question being adverted to in the earlier stages of the case, the Court had considered that this particular form of action was not maintainable. It would have been extremely desirable also to the Court, to have been spared the trouble of having been engaged, with great diligence, in the consideration of a point involving conflicting authorities, and the necessity of consulting other authorities which appeared to them conclusive. It would be improper, however, as the case now stands, to intimate the inclination of the Court upon that point, because it is

(*a*) *Black. R.* 1251. 1294. (*b*) 4 *T. R.* 402.

not

1812.

THURSTON *against* MILLS.

not now ripe for decision; but it is sufficient to state the ground of our present decision. The question then is whether this action is maintainable. It may not be amiss to state thus much of the circumstances, viz., that execution issued at the suit of the plaintiff, and the goods were seized thereon by the sheriff: afterwards comes the extent from the crown, and the sheriff under the authority of the venditioni exponas sells the goods. The question is whether such sale, made under the compulsory order of the Court of Exchequer, can be overset, and the propriety of the proceedings in that court be gone into upon this action for money had and received. Now in order to maintain money had and received, either the money or the goods, for which the plaintiff claims the proceeds, must originally, or at the time of the action brought, have belonged to the plaintiff. Here neither the money nor the goods were originally, or at the time of action brought, the property of the plaintiff: the sheriff indeed had seized the goods under the fi. fa., but the plaintiff acquired no property in them by the sheriff's seizure; if they had been burnt whilst in the hands of the sheriff, the plaintiff would not have borne the loss. There is no case which has determined that a mere seizure will charge the sheriff in an action for money had and received. Then the fi. fa. commanded the sheriff to levy the money of the goods, and until the money was levied under it by sale of the goods, the plaintiff could have no interest in it. But the sheriff never did levy the money under the fi. fa., but only under the venditioni exponas, authorized by the Court of Exchequer. Then how can it be said that that which was not the money of the plaintiff, but was a conversion of the goods into money under another authority,

1812.

THURSTON *against* MILLS.

in defiance, as it may be termed, of the plaintiff's writ, is money had and received to the use of the plaintiff under that writ; or in other words, that it is money had and received to the use of that party, for whose use the sheriff did not sell, but on the contrary, sold for the use of another, and that, under the authority of the Court of Exchequer. Unless it can be shewn that where a sheriff is clothed with two authorities, one legal and the other illegal, and sells under that which is illegal, such sale may be referred to that which is legal, so as to entitle the party to an action for money had and received, I am afraid that the plaintiff's title to priority cannot be set right in this form of action. But I know of no case which goes so far. It is said that another species of action would have lain against the sheriff, without precisely saying whether an action for a false return, or what other form of action. I do not think it necessary to suggest an opinion upon that point: possibly it may be so. There was, however, an opportunity for the plaintiff to have litigated the return in the Court of Exchequer. On praying oyer of the writ and inquisition (as in *Rex* v. *Wells and Allnutt* (*a*),) she might have interposed and tried the question. It is said she had no notice, but an inquisition must be deemed notice to all the world, and therefore she was bound to take notice of it. In a case then like this, where there was no property in the plaintiff either in the goods or in the money, and where the plaintiff might have had an opportunity interpellandi, but has chosen to neglect it, I think it may be very properly asked what justice, equity, or conscience is there in requiring the sheriff to pay to the

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

plaintiff

1812.

THURSTON *against* MILLS.

plaintiff that money which he has parted with to another, in obedience to the order of the Court of Exchequer. Allowing the utmost latitude to this form of action, I find no case that will warrant its being carried to such an extent. I regret it, because the main object of the proceeding is rendered abortive; but upon no authority nor principle of equity or good conscience can this action be maintained.

GROSE, J. I have little to observe in addition to what has fallen from my Lord; and that is merely to remark upon the nature of the action, and the ground upon which I conceive the plaintiff must entitle herself to recover. This is an implied assumpsit, and the plaintiff must entitle herself to recover upon a promise which the law will raise: but how can the law raise a promise to pay to the plaintiff in one suit, that money which was received under the process of the Court of Exchequer in another suit? It seems to me that it would be confounding the forms of action, and their principles, to hold that the law will imply such a promise.

LE BLANC, J. The plaintiff here was plaintiff in a former action, and obtained judgment, and issued a fi. fa. thereon, and delivered it to the sheriff, who seized the goods. After that, and before the sale of the goods, an extent issued out of the Court of Exchequer at the suit of the crown, and was delivered to the same sheriff, and an inquisition was taken thereon and returned into that court; after which the Court commanded the sheriff, by writ of venditioni exponas, to sell the goods, which he was bound to do under the peril of an attachment. He accordingly sold them and returned the writ, and the

Court

1812.

THURSTON *against* MILLS.

Court further ordered him to pay over the money, which he also did. Now it is perfectly clear that the plaintiff might at that time have gone to the Court of Exchequer, and put in her claim upon record, and had her rights determined in that court. However nothing of that sort was done. Afterwards the sheriff being ruled to return the fi. fa., made a special return to the Court of *C. P.* of all the circumstances. Again, we do not find that any application was made, or proceeding instituted in the Court of *C. P.* to obtain a decision upon the sheriff's return: so that in neither of the courts from which the process issued was any step taken. But an action for money had and received is commenced in this court, out of which no part of the process issued, and complaint is here made of the sheriff's return. Although the Court must always lament any delays which arise in litigation, although a party has a right to litigate in this Court the validity of the process of other courts, yet I cannot but think that where the plaintiff has omitted to resort to those courts out of which the process issued, and where perhaps it might have been more properly considered, and with more advantage, she herself is not entirely unconnected with the causes of delay; and therefore perhaps it may be the less to be regretted. Upon the two former arguments, the form of action was certainly not so much adverted to as it might have been: another argument was therefore directed; and now the question is whether the sheriff can be said to have received money to the use of the plaintiff. This is not like a case where there being two concurrent writs of fi. fa. the sheriff has levied, and the question is for the Court to determine under which the money was levied. But here the sheriff having two executions, applies to

1812.

THURSTON *against* MILLS.

the Court to know under which writ he shall execute process, and he is ordered to execute it under the vendit. expon. Then if it be money had and received to the use of any one, it is money had and received to the use of the crown, under whose execution the sheriff was directed by the Court of Exchequer to levy. It seems impossible to consider this as money had and received to the plaintiff's use, under the most favourable consideration of this form of action, because it is clear that neither the money nor the goods were the property of the plaintiff, but money levied under the order of the Court of Exchequer for another party in that court. This makes it unnecessary to go into any question as to the priority of the right of the crown.

BAYLEY, J. I believe the sheriff acted in this matter under the advice which I gave, and therefore I have cautiously abstained from interfering with any advice upon this occasion; but as all the Court have agreed that this was not money received to the plaintiff's use, I have no hesitation in adding, that I concur in the opinion which has been delivered.

Judgment for the Defendant.

The KING *against* EDWARD WELLS and JOHN ALLNUTT. (*a*)

Goods seized under a fi. fa. at the suit of a subject are before sale liable to be taken by virtue of the king's extent, tested after the delivery of the fi. fa. to the sheriff.

THE following is a statement of the proceedings had in the Court of Exchequer, and of the notes of the Lord Chief Baron *Macdonald*'s judgment in this case:

Extent tested the 15th *September* 1796, reciting an inquisition of the same date, whereon *Richard Pickman* was found to be indebted to the king in 722*l.* 8*s.* 7½*d.* for duties on malt. Inquisition by the sheriff of *Surry* the 27th *October* 1796 finding *Pickman*'s property, and farther, that on the 12th of *September* 1796, (three days before the issuing of the extent,) the sheriff of *Surry* by virtue of a fieri facias from the *K. B.* (on a judgment between *Wells* and *Allnutt* plaintiffs, and *Pickman* defendant for 1500*l.* debt and

(*a*) See 7 *T. R.* 174.

1812.

The KING *against* ALLNUTT.

63*s.* damages, returnable *Monday* next after the morrow of *All Souls*, indorsed to levy 366*l.* 0*s.* 6*d.*) seized all *Pickman*'s goods, which were sold for 57*l.* 18*s.*, in part satisfaction of the said debt and costs, and that *Wells* and *Allnutt* insist they have a right to be satisfied, and then went on to find debts due to *Pickman*. Plea to the extent, *Trin.* 1797. Prays oyer of the writ and inquisition, and pleads the judgment in *K. B.*, (before the issuing and teste of the extent,) in *Trin.* 1796, by *Wells* and *Allnutt* against *Pickman* for 1500*l.* debt and 63*s.* costs, and before the issuing and teste of the extent, ss. on the 15th of *June* 1796, the issuing of a fi. fa. to levy 366*l.* 0*s.* 6*d.*, directed to the sheriff of *Surry*, which was delivered to the sheriff before the issuing or teste of the extent, by virtue whereof the sheriff seized before the issuing or teste of the extent ss. on the 13th of *September* 1796, and the goods remained in execution in the sheriff's hands at the time of issuing the extent and taking the inquisition. Traverse that *Pickman* was possessed at the issuing of the extent or taking the inquisition.

Replication *Michaelmas* term 1801. That *Pickman* made malt, on which duties arose, and for which the extent issued, and that the sheriff had made no sale, and the property in the goods was not divested at the time of issuing the extent, but remained, with respect to the king and the duties, in *Pickman*; 2d, that the duties accrued before the delivery of the writ to the sheriff. There were other replications which did not apply to the present question.

Special demurrer to 1st replication. Causes that no fact in the plea is denied, or issue taken on the traverse, matter of law attempted to be put in issue. General demurrer to all the other replications.

Joinder in demurrer *Hilary* 1804.

Upon the 1st argument Mr. *Wood* was heard for the crown, and Mr. *Abbott* for the defendant, on the 27th of *Nov.* 1804.

Upon the 2d argument Mr. *Attorney-General* (*Perceval*) for the crown, Mr. Serjt. *Williams* for the defendant, in *January* 1805.

Judgment for the crown 28th *February* 1807. Generally.

Notes of the Lord C. B. *Macdonald*'s judgment.

The principle on which *The King* v. *Cotton* was decided was, that if the king's execution bore teste before the property was altered, it bound that property. If the premises are just, it reaches goods taken in execution, but not sold. *Cooper* v. *Chitty*, 1 *Burr.* 20. seems decisive; it is there laid down, that on sale by the sheriff before assignment under a commission of bankruptcy, no action can be maintained by the assignees. But if assignment took place after the delivery of the writ, but before sale, an action would lie against him, and it would be a trespass in him to sell, when the property was altered by assignment. It is fair to argue from thence, that the hands of the sheriff are equally tied up, if before sale any other matter occurred, which it did not absolutely alter, yet would bind the property which he had taken in execution. This case has occurred; two writs, one delivered to the sheriff the day before the other; the sheriff takes possession under the second writ first, then bailiffs are put in under the first writ; then the sheriff sells under that by which he took possession, and returns nulla

1812.

The KING *against* ALLNUTT.

bona to the first. This is a false return, for by the statute of frauds, the goods were bound by delivery of the first writ, as they would have been before the stat. by the teste. I doubt therefore whether it be satisfactorily made out, either that the property is altered before the sale, or that the sheriff having once seized, is bound to proceed to sale, and that the property is to be considered as altered from the delivery of the writ. Between subject and subject the property is bound by delivery of the writ, but not altered; if only bound as between subject and subject, it may consist with that obligation, that a superior obligation by force of the king's process may intervene before a sale, and overpower it. I take it before the statute of frauds, the subject's writ of execution of a prior teste would have been preferred to another subject's writ of a subsequent teste, although the latter was first delivered to the sheriff, and was begun to be executed, provided the writ of prior teste came to the sheriff's hands before sale. If so, the question is reduced to this, whether the king's execution of a subsequent teste is not as effectual against the subject's execution, as a subject's writ of a prior teste before the statute of frauds, or as a prior delivery since the statute, would be against a subject's subsequent teste or subsequent delivery. As to which see *Stringfellow's case*, (*Dyer*, 67. *b.*) recognized in *The King* v. *Cotton*, (*Parker* 112.) I agree that *Stringfellow's case* was a case which the letter of 33 *Hen.* 8. could not reach, and so was *The King* v. *Cotton*, because in neither was there judgment by the subject. But it may safely be concluded from the two cases, that *The King* v. *Cotton* was determined upon a principle which applies with equal force to the case of the king's and the subject's execution, in cases to which the statute 33 *Hen.* 8. cannot be applied. That there should exist a case of executions on the part of the king and of the subject, which (the king's execution being of a teste subsequent to the subject' writ of execution partly executed,) the statute of *Hen.* 8. could not touch, first led me to doubt of the construction of that statute in *Uppom* v. *Sumner* and *Rorke* v. *Dayrell*. Statutes *Merchant* and *Staple* were sufficiently familiar in *Henry* 8th's time, to have been an object of the attention of the legislature; they were common assurances, perhaps more in use than judgment. And it does not readily occur, why a judgment which might be confessed as expeditiously as a statute could be acknowledged, and was in truth a less beneficial security to the subject than a statute, should be protected, and the others remain unprotected. But the thing which led me to doubt whether a true construction had been put upon this statute was this, that the priority of the judgment was no criterion, by which the priority or preference of executions could be determined as between subject and subject; and that if the priority of judgment were literally adhered to, it must have the effect of postponing the king's execution, though it should happen to be prior both in teste and delivery to the subject's execution on his prior judgment. *Buller*, J. (4 *T. R.* 413.) hesitates respecting the effect of the statute, if the crown's prior execution should have happened to be completely executed, before the subject's execution upon his prior judgment was delivered to the sheriff. But he seems to be aware, that his construction of the statute would oblige him to maintain, that if the subject's subsequent execution upon his prior judgment came into the hands of the sheriff

sheriff at any time before the crown's execution (prior both in teste and delivery) was completely executed, it must be preferred. Now this is putting the crown, as to its execution, upon a worse footing than a subject, inasmuch as between subject and subject, the priority of the delivery of the writ of execution alway determines the question of preference without regard to the priority of judgment. My apprehension is, that when these cases were determined, it was not sufficiently considered how the law stood with respect to the prerogative of the crown, both in respect of the general preference which it claims to be entitled to for all its rights, and as to the particular prerogative in respect of execution for its debts. By the common law the crown was entitled to prior execution for its debts This does not mean preference as between two executions sued out, the one by the crown, the other by the subject; but the crown was to be first satisfied its debt, before the subject could take out any execution at all. The crown protected its debtor against all executions by the subject, till the crown's debt was paid. We have a writ of protection in the register and *Fitz. Nat. Brev.* 28. B.; and notice is taken of this prerogative in *Cr. Ly.* and *Madox*; and this explains one of the cases cited in *The King* v. *Cotton*, *Parker*, 123., where the king sent his writ out of Chancery to the justices of the *C. B.*, commanding them to surcease execution in a suit between subject and subject, the defendant being his debtor, till the debt should be satisfied: which was considered as so much of course, that the plaintiff asked no more of the Court than that the cause should be left on foot in court by continuance on the roll, in order that when the king's debt should be satisfied, there should be an award of execution for him. Whether it may not be too critical to say that there is a legal distinction between prior execution, and preference in execution, I am not quite sure; the language of 33 *Hen.* 8. is that the king's suit and process shall be preferred before the suit of any person, and that he shall have first execution. It is not, that his execution shall be preferred, but that he shall have first execution; that is, he shall have execution before the subject shall be permitted to have his execution, which seems to have a pretty plain reference to this prerogative which went to restrain the subject from taking any execution at all, till the crown's debt was satisfied. This prerogative was carried so high formerly that an executor of one indebted to the king could not take probate till the king's debt was paid or secured to him. Instances are vouched by *Madox*, and the records of this court, of licences stating the prerogative, and stating that the king's debt had been in some manner compounded for or secured. At this day, in the case of an execution, the king's suit and process is preferred, and he is entitled to prior execution in respect of all his debts upon record. The diem clausit extremum issues without waiting for an executor or administrator; and when there is an executor or administrator, in the administration of assets, it would be a devastavit in him, if he were to pay the debt of the subject before the crown's debt upon record. But it has been held that since 33 *Hen.* 8. there is the single case of execution upon a judgment which they say is to be preferred to the king's debt, by force of the statute. This appears to me to go a great way to shew what prerogative of the crown it was

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1812.

The KING *against* ALLNUTT.

to which the statute applies: that it was to the prerogative of having first execution in the sense in which I have explained the words, and not to any prerogative which goes to determine the preference between two executions, one of the crown and the other of the subject subsisting at the same time. This latter prerogative will be found to depend upon another principle, perfectly distinct from this, and far more general; determining a preference in favour of the crown in all cases, and touching all rights of what kind soever, where the crown's and the subject's right concur, and so come into competition. I take it to be an incontrovertible rule of law, that where the king's and the subject's title concur, the king's shall be preferred. The books are full of instances to that effect. A great number are cited in *The Attorney-General* v. *Andrew*, *Hard.* 24., and among them *Stringfellow*'s case, which is the case of an execution. But there is a multitude of other cases, which have nothing to do with executions. If 33 *Hen.* 8. had meant to have taken away or abridged this prerogative, it can hardly be imagined that it would have controlled the effect of it in the particular instance of an execution, and left it to operate in its full force, in the multitude of other cases to which it applies. That in the case of two executions subsisting at the same time, the crown's and the subject's title do concur; and that this is a different case from the case of a first execution, which supposes tha to exist before the other, appears to be manifest: each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some one point of time before either is executed; the instant they thus concur, the king's prerogative to be preferred attaches. *Stringfellow*'s case proves that priority of teste and even part execution avail nothing; an imperfect and even barely inchoate title gives way to a title of the same nature in the crown, whenever they are found to exist together. An execution executed by the subject alters the property, and there is then nothing left upon which the crown's execution can attach; in that case the crown's and the subject's title do not concur; but in the expressive language of *Steel*, C. B., in *The Attorney-General* v. *Andrew*, the subject's title is prior to the king's, and is executed. I observe that in the case of *Rorke* v. *Dayrell* it seems to be assumed in a part of the argument that as soon as the execution was begun to be executed, the property was altered; which to be sure would decide the question, I take that to be erroneous. The property is so far bound by delivery of the writ, that as between subject and subject, the question of priority is determined; but as against the crown it is not bound at all. But I take it the property is in no sense and to no purpose in the world altered either by delivery of the writ or by the actual taking possession of the goods.

SMITH

SMITH, on the Demises of ARABELLA DENNISON and Others, *against* KING and DURNFORD.

Friday, Nov. 13th.

THIS was an action of ejectment brought to recover certain premises described in the will hereinafter mentioned. The defendants were admitted to defend as landlords on the usual rule. The action was tried at the assizes for the county of *Northumberland* 1811, before *Chambre*, J., when a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case.

Frances Isaacson being seised in fee of the premises in question by her will dated the 29th of *March* 1750, devised as follows: " I do hereby order and dispose of " my estates in the following manner: I give, devise, " and bequeath all that my manor, or reputed manor of " *Fenton*, and all that my mill called *Fenton-Mill*, and all " my demesne lands of *Fenton*, and all my village or " township of *Nesbytt*, all of them situate, and being in " the county of *Northumberland*, with all and every the " messuages, cottages, lands, tenements, hereditaments, " rights, members, and appurtenants whatsoever, to the " same respectively belonging or in any wise apper- " taining, or therewith held, used, or enjoyed, and all " other my real estate whatsoever, and wheresoever, unto " my cousin *Mary Altham*, wife of *R. Altham*, Esquire, " and to my cousin *Arabella Isaacson and their heirs and*

Devise of all the testatrix's real estate to her cousins *M. A.* and *A. I.* (who were females) their heirs and assigns for ever, subject to certain annuities, (*inter alia*,) one to her brother *A.*, (her heir at law,) and another to her sister *S.*, and their children, for life; and the testatrix charged her real estate therewith, and directed that the surplus profits should go to *A.* for life, remainder to his children for life, remainder to *S.* for life, remainder to the surviving children of her brothers and sisters for life, *but gave no directions as to the remainder in fee.* Held that *M. A.* and *A. I.* took the remainder to their own use, although they also took legacies under the will; and that there was no resulting use to the heir at law.

Possession of *cestui que* trust not adverse to the title of the trustee.

" *assigns*

1812.

SMITH *against* KING.

" *assigns for ever*, subject nevertheless to and chargeable " with the payment of the following annuities herein- " after mentioned; (that is to say)" the testatrix then gave several annuities, (inter alia,) one of 150*l.* to her brother *W. Isaacson* during his life; another of 150*l.* to her sister *Sarah Isaacson* during her life, for her sole, separate, and personal use, exclusive of her husband, and not to be subject to his debts or control; and for which her receipts should be a good discharge; remainder to her son *Henry Creagh Isaacson* for life; remainder to any other her child or children that should be living at the time of the testatrix's death, and to the survivors and survivor of such children during their respective lives in equal proportions if more than one, and if but one then to such one for his or her life; and lastly, from and after the decease of her aunt *Margaret*, (to whom she gave an annuity of 100*l.*) to her brother *Anthony Isaacson* for life an annuity of 150*l* ; remainder unto and amongst all and every the children of her said brother, in the same manner as before limited to the children of her sister. " *All which annuities I will and direct shall be paid quarterly,* " *without any deduction, from the day of my death ; and I do* " *hereby charge my real estate with the payment thereof.* " And as concerning all and every my leasehold estates " in the county of *Northumberland*, &c., I do give, " devise, and bequeath the same, together with all " the rest and residue of my personal estate except " my wearing apparel, &c., to *R. Altham*, *E. Byron*, " and *G. Alcock*, their executors and administrators, " subject to and chargeable with the payment of my " just debts, and of the legacies hereinafter mentioned; " that is to say, (amongst other legacies), to my cousin " *M. Altham* 100*l.*; to my cousin *Arabella Isaacson* 300*l.*; " and

1812.

SMITH *against* KING.

" and I also give her (several pieces of plate and trinkets.) " I give the aforesaid *R. Altham*, *E. Byron*, and *G.* " *Alcock*, the sum of 200*l.* a-piece." The testatrix then directed that the annuity before devised to her brother *William*, should, upon his death, go to such of his children as should be living at the time of her decease, and after their deaths she gave one moiety thereof to her sister *Sarah* for her life, and after her death to such of her children, &c. in the same manner, and to the survivors or survivor of them. The will then proceeded thus: " And the other moiety of the said annuity, *together with* " *the surplus profits of the said real estate, to be computed from* " *the time of my decease*, I give to my brother *Anthony Isaac-* " *son* for his life; and after his death to such of his chil- " dren that shall be living at the time of my death, and " to the survivors and survivor of them during their re- " spective natural lives; and my further will is, that after " the several deceases of my said sister and her children, " then the said annuities of 150*l.* and the 75*l.* as aforesaid, " given to her and them shall go to my said brother *An-* " *thony* for life, if he shall be then living, and if he be " dead, then to such of his children and the survivors " and survivor of them that shall be living at my death; " and in case of his and their deaths first happening, " then my will is, *that the whole rents and profits of my* " *said real estate* shall go and be paid to my said sister " *Sarah Isaacson* during her life, if she should be then " living, and if she should be dead, then to be paid to " such of the surviving child or children of my said bro- " thers and sister that shall be living at the time of my " decease, for his, her, or their natural life or lives; and, " lastly, I do constitute and appoint the said *R. Altham*, " *E. Byron*, and *G. Alcock*, executors of this my will."

The

1812.

SMITH *against* KING.

The testatrix died without issue in *May* 1752, and without revoking this will. *Arabella Dennison*, late *Isaacson*, one of the devisees in fee in the will mentioned, is one of the lessors of the plaintiff, and the other lessors of the plaintiff derive title by descent, on conveyance from *M. Altham*, the other devisee in fee in the will mentioned; and the lessors of the plaintiff (if entitled to recover at all) are entitled to recover, as tenants in common, in the proportions stated in the declaration. Upon the death of the testatrix, *Anthony Isaacson*, her elder brother, by the consent of *R. Altham*, became the receiver of the rents and profits for the purposes of the will; and from that time down to the year 1810, the several persons successively entitled under the will to the surplus rents and profits, have been in the receipt of the rents and profits of the estate. Previously to the year 1798, *J. M. Durnford*, the mother of one of the defendants, *H. King*, the mother of the other defendant, and *S. Isaacson* (which *J. M. Durnford*, *H. King*, and *S. Isaacson* were the three surviving children of *Ant. Isaacson*, all of whom were living at the death of the testatrix,) were in the receipt of the rents and profits. After the death of *J. M. Durnford* in 1798, *H. King* and *S. Isaacson* received the rents and profits during their joint lives; and after the death of *H. King*, *S. Isaacson* was in the receipt of the rents and profits during the remainder of her life. *S. Isaacson* having survived all the persons to whom annuities or life-interests were given under the will, died in *July* 1810. The question was, Whether the plaintiff was entitled to recover? If the Court should be of that opinion the verdict to stand, if otherwise to be entered for the defendants.

Coltman

1812.

SMITH *against* KING.

Coltman for the lessors of the plaintiff stated the question to be, Whether the devise to *M. Altham* and *Arabella Isaacson*, and their heirs and assigns for ever, was a devise to their own use after the payments and other devises contained in the will were satisfied; or a devise to them only in trust, with a resulting use to the heirs of the testatrix, executed by the statute of uses? He contended for the former, and read the will as being in substance a devise of the real estate to *Anthony Isaacson* for life, and after several intermediate contingent remainders for life, with an ultimate remainder in fee to *M. Altham* and *Arabella Isaacson*. The singularity of the devise consists in this, that the testatrix has reversed the usual order of disposition by devising away the fee in the first instance, and afterwards carving out the life estates; but such a disposition must be understood according to the substance and not the form of the devise. It is submitted, therefore, in the first place, that *M. Altham* and *Arabella Isaacson* cannot be considered as trustees at all; and, 2dly, supposing they are to be considered as taking the legal estate at first as trustees, still they ultimately take for their own benefit, without any resulting use for the heir. 1st, They are not named as *trustees*; and in *Hill* v. *The Bishop of London* (*a*) Lord *Hardwicke* relied upon the word *trust* not being used, and said if it were a trust, it must be by construction, and then the intent of the testator must be chiefly considered as a guide to that construction. Now here, there is not any intent shewn to create a trust; on the contrary, there are several reasons against it; as, 1st, the estate being given subject to and chargeable with the annuities, which are afterwards expressly charged on the land, they are, therefore, more

(*a*) 1 *Atk.* 618.

properly

1812.

SMITH *against* KING.

properly rents than annuities. Thus a devise upon condition that he pay yearly so much to *A.*, will be a rent to him, and not a sum in gross (*a*). Then there is nothing in the will which refers to the personal interference of trustees; the annuities are to be paid, but not by the trustees. Again, both the devisees were women, and one of them unmarried; which rendered her still more objectionable as a trustee, than the other, from the uncertainty with whom she might marry. If it should be said that the Court must construe this a trust in the devisees, in order to protect the interests of *Sarah Isaacson*, who was a married woman; it may be answered, that there is no such necessity, because, according to the case of *Bennet* v. *Davis* (*b*), a court of equity would make the husband a trustee for the wife. But, 2dly, supposing that they are to be considered as trustees for specific purposes, still they will take the remainder for their own benefit, and not as trustees for the heir at law. In *Walton* v. *Walton* (*c*), the Master of the Rolls said, "It is not universally true that the expression of a purpose, for which a devise of land is made, confines and limits the devise to the purpose so expressed. It is decided in several cases noticed in *Hill* v. *The Bishop of London*, and *Rogers* v. *Rogers* (*d*), that where there is a devise of land for payment of debts, it does not necessarily follow, that there is a trust for the heir after the debts are paid. Lord *Hardwicke* says, that no general rule can be laid down; but every case must depend on the circumstances." Now this devise shews an intent that there should be no trust for the heir; for there could be no reason for making women trustees, except giving

(*a*) 1 *Leon.* 137. *Com. Dig. Rent.* B. 2.
(*b*) 2 *P. Wms.* 316.
(*c*) 14 *Ves.* 322.
(*d*) 3 *P. Wms.* 193.

them

them a beneficial interest in the remainder. The circumstance also of their being the testatrix's cousins is confirmatory of the same intent, and it was relied upon in *Coningham* v. *Mellish* (*a*), *Hobart* v. *The Countess of Suffolk* (*b*), *Rogers* v. *Rogers* (*c*). Again, *Anth. Isaacson* the heir at law, for whose benefit it is said that there is an implied trust, already takes under an express devise to him for life; *North* v. *Crompton* (*d*), and *Rogers* v. *Rogers*. If it should be said that here particular legacies being given to the devisees out of the personal estate, it shall exclude them from this remainder; as a particular legacy does exclude an executor from the surplus; it may be answered, that the reason of such a construction in the one case, (viz. that it is inconsistent with an intention of giving the whole, to give a part,) shews that it does not apply to the other; because there is no such inconsistency where the devise is of the real estate. Besides, here the legacies given to the devisees are unequal; and that has been relied on even in the case of executors, as not rebutting the presumption that they were intended to take the surplus. As little can it be contended that there has been an adverse possession of 20 years against the devisees; for if they are trustees, the possession of the cestui que trusts with the consent of the trustees can never be said to be adverse; *Earl Pomfret* v. *Lord Windsor* (*e*), and *Keene* v. *Deardon* (*f*): and if they take simply as devisees in remainder, their title did not accrue until 1810.

Holroyd, contrà, insisted that this was not a beneficial remainder to the devisees, but that they took only as

(*a*) *Prec. in Ch.* 31. (*b*) 2 *Vern.* 64.
(*c*) 3 *P. Wms.* 193. *Ca. temp. Talb.* 269. (*d*) 1 *Ch. Cas.* 196.
(*e*) 2 *Ves.* 472. (*f*) 8 *East*, 248. 3d resolution.

trustees.

1812.
— —
SMITH *against* KING.

trustees. It is not necessary that the words *use* or *trust* should be mentioned in a will in order to raise that kind of estate; but where it appears to be the intention to give an estate to one for the benefit of another, that will be sufficient to raise an use or trust. Now here, the real estate being devised to them and their heirs, subject to the payment of annuities, it may be admitted that they would take a beneficial remainder, if this devise stood alone; but the testatrix disposes also of her personal estate in the same way, viz. to her executors, subject to legacies; and yet it is clear that she did not intend them to take a beneficial interest in the residue; because she afterwards gives them 200*l.* each; and it is not disputed that if equal legacies are given to executors, it rebuts the presumption that they are to take the surplus. Then coupling these two devises together, and expounding the one by the other, it seems to have been the intention, that the surplus, if real, should result to the heir at law, and to the next of kin, if personal. The whole beneficial interest is expressly given away from the trustees for two generations. What is that but separating the legal from the beneficial interest? The estate is also given to them as *joint tenants*, which is the usual mode of devising a trust estate, but not such as is intended for the benefit of the devisees themselves. Before the statute of uses they would have been seised of the legal estate in trust for the lives of the several devisees for life; and there being no devise of the residue, there would have been a resulting trust for the heir at law. But since the statute, the legal estate was executed in the tenant for life; for the lands are not given in trust to receive and pay over the annuities, but only subject to the annuities; and the annuitants either had rent-charges, or, as one of them was a married woman,

1812.

SMITH *against* KING.

woman, the trustees were interposed to protect her interest. But supposing the trust to have been executed by the statute in the trustees and their heirs; still, according to *Doe* v. *Simpson* (*a*), *Lord Say and Sele* v. *Lady Jones* (*b*), and *Bagshaw* v. *Spencer* (*c*), it would only be executed for the lives of the annuitants, or at the utmost of the tenants for life, and upon the death of the survivor of them there would be a resulting trust to the heir at law; or, more properly speaking, the heir would take the undisposed of residue to his own use. And although the estate is given to the trustees and their heirs, and trusts only created as to part, yet the remainder shall not go to the trustees in exclusion of the heir, because the heir shall take whatever is not expressly devised away from him; and therefore in *Challenger* v. *Sheppard* (*d*), which was a devise to trustees and their heirs in trust for *A.*, the only question made was, whether *A.* or the heir at law took the fee; but not whether the trustees did. And so in *Cruise* (*e*), the rule is laid down, that where the legal estate is given to a trustee, and part only disposed of for particular trusts, the trust results to the real owner. Again, in *Lloyd* v. *Spillet* (*f*), Lord *Hardwicke* said, "Where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir." The same doctrine will be found in *Randell* v. *Bookey* (*g*), *Emblyn* v. *Freeman* (*h*), and *Arnold* v. *Chapman* (*i*). As to the inference arising from the testatrix naming them her cousins, it is too vague without other circumstances to indicate an intention; and the cases

(*a*) 5 *East*, 162. (*b*) 3 *Bro. P. C.* 458. 8 *Vin. Ab.* 262.
(*c*) 1 *Ves.* 142. (*d*) 8 *T. R.* 597.
(*e*) 1 *Cr. on R. Prop.* 475. (*f*) 2 *Atk.* 150.
(*g*) *Prec. in Ch.* 162. (*h*) *Prec. in Ch.* 542. (*i*) 1 *Ves.* 108.

1812.

SMITH *against* KING.

cited did not rest upon that alone; and besides here she also names other relations in her will, and amongst them her heir at law. Then as to there being an express devise to *Ant. Isaacson* the heir at law, she could not have done otherwise, if she meant that he should only take for life in the first instance; and though a man devises lands to his heir for life, yet that shall not hinder but that he shall have the reversion too (*a*). With respect to what is said of the unfitness of women to become trustees, it may be answered that they were her relations; and it was more natural to appoint them her trustees, than the husband of one, or strangers; but surely it cannot raise such a necessary implication as to disinherit the heir at law.

Lord ELLENBOROUGH, C. J. That is but a small matter in the argument, only they were certainly better objects of bounty than of trust. But if they are trustees, for what are they trustees? I own I have no doubt that it is a clear devise of the remainder, subject to these specific charges, and that no trusts are created.

BAYLEY, J. It is not suggested that they are trustees for any purposes which they are to execute; and there are no words of trust in the will.

Per Curiam, Judgment for the Plaintiff.

Holroyd declined insisting on the adverse possession.

(*a*) *Prec. in Ch.* 163.

BRETT

1812.

BRETT and TOMLINSON *against* CLOSE.

Tuesday, Nov. 17th.

ASSUMPSIT upon two promissory notes, dated the 10th of *March* 1809, made by the defendant and one *John Dent*, jointly and severally, one for 480*l.*, and the other for 140*l.* 5*s.* 4*d.*, payable to the plaintiffs or their order one month after date. The defendant pleaded non-assumpsit, and at the trial before Lord *Ellenborough*, C. J., at the *Middlesex* sittings after last *Hilary* term, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

The plaintiff *Brett* having become a purchaser of the interest in one-fourth part of certain real and personal property, devised by the will of one *Shelley* to his son *T. Shelley*, respecting which a suit in Chancery was pending between the said *T. Shelley* and the other devisees in the will, in which suit the plaintiff *Tomlinson* acted as solicitor for *T. Shelley*, and made various payments and disbursements, which were still unpaid; it was proposed by *Brett* that *Tomlinson* should take a half-share of his purchase, to which *Tomlinson* acceded. The suit went on, and *Dent* was appointed, under an order of the Court, receiver of the estates in question. Afterwards the plaintiff *Brett* was made a party to the suit, and *Dent*, as receiver, having possessed himself of rents to a considerable amount, which he retained in his own

A warrant of the Lord Chancellor for the commitment of a person, appointed a receiver by the Court of Chancery, for the non-payment of a balance certified against him, is only in the nature of a civil execution; therefore where *D.*, being appointed receiver in a suit in Chancery, was in custody of the officer under such warrant, and the defendant, in order to procure his discharge, joined with him as surety in two promissory notes to the plaintiff, who was a party to the suit in Chancery, and his solicitor, who sued out the warrant, for the amount of the debt and costs, was thereupon discharged by the direction of the solicitor: Held that the discharge was a sufficient consideration for the notes, and that an action might be maintained on them; and although there were other parties to the suit in Chancery, who did not concur in the discharge, and therefore *D.* remained liable to be taken again, yet the consideration had not failed; and that it was no objection to the validity of the notes, that the sum given to cover costs exceeded the costs due, no fraud being intended.

1812.

BRETT and Another *against* CLOSE.

hands without duly paying over the same, proceedings were taken at the instance of *Brett*, as a party in the suit, to compel him to pass his accounts; and on the 21st of *November* 1808 the Master certified that 471*l.* 19*s.* 5*d.* was the balance in his hands for rents received up to that time. He afterwards received further rents, making an additional balance of 98*l.* 5*s.* 11*d.*, as admitted by an account in his own hand-writing, which he sent to *Tomlinson*, dated 30th *January* 1809; making together a total due from him of 570*l.* 5*s.* 4*d.* Orders, for payment of the certified balance into the Bank by *Dent*, were obtained at the instance of *Brett*; but not being complied with, the Lord Chancellor's warrant, directed to the warden of the *Fleet* or his deputy attending the Court of Chancery, was sued out by *Tomlinson*, which, reciting a former order for the commitment of *Dent*, ran in this form: "These are therefore "in pursuance thereof to will and require you upon "receipt hereof to make diligent search after the body "of the said *John Dent*, wheresoever you shall find him, "and him safely convey to his majesty's prison of the *Fleet*, "there to remain *until my further order*," &c. *Tomlinson* acted as solicitor for *Brett* and himself in the whole of these proceedings, which were left entirely to his management, and various payments, fees, and disbursements were consequently made by him in the course of the same. On the 10th *March* 1809 the officer attending the Court of Chancery appointed to execute the warrant, went down to the place where both *Dent* and *Tomlinson* resided, and applied to *Tomlinson* as the solicitor for instructions, who desired him to proceed in a regular course. However, on *Dent* being taken into custody, he made proposals to *Tomlinson* by letter for his liberation;

upon

1812.

BRETT and Another against CLOSE.

upon which *Tomlinson* agreed with *Dent* and the defendant *Close*, whom *Dent* proposed as his surety, that *Tomlinson* should cause *Dent* to be discharged out of custody by giving directions to the officer for that purpose, upon *Dent* and *Close* giving the notes in question, (which would become due about the time that the accountant-general's office was expected to open, and which included in their amount both the certified and subsequent balance, together with the sum of 50*l.* to cover costs,) and also giving their joint written engagement, that *Dent*'s father, or a third person, who should be satisfactory to *Tomlinson*, should join in the said notes on the following day. In pursuance of this agreement the notes and the other written engagement were given by *Dent* and *Close*, as his surety, and *Dent* was immediately discharged by the officer, by virtue of directions given to him by *Tomlinson* for that purpose. *Dent* has ever since been at large, and no steps have been taken in the said suit against him in consequence of his having been so discharged.

The costs which the plaintiffs were put to in the proceedings to compel *Dent* to pass his accounts and pay the balance, amount to 37*l.* 3*s.* 8*d.*; which include the sum of 10*l.* 2*s.* 4*d.* paid to the Master's clerk, for fees incurred in passing *Dent*'s accounts, which he should have paid, but *Tomlinson* was obliged to pay, in order to obtain the report, without which he could not go on with further proceedings. *Dent*, soon after giving the said notes, became a bankrupt, and his estate is not expected to pay more than seven shillings in the pound, and no part of the money mentioned in the notes or either of them has been paid by *Dent* or *Close*. The question was, whether the plaintiffs were entitled to

1812.

BARTT and Another against CLOSE.

recover: if they were, the verdict was to be entered for such sum as the Court should direct; if otherwise, a nonsuit to be entered.

Bayley, for the plaintiffs, contended that these notes, which were given for the purpose of procuring the discharge of *Dent* out of custody on the attachment, were available in the hands of the plaintiffs. In order to maintain the contrary, it must be shewn that such discharge with the consent of the party who issued the warrant, was unlawful, without the authority of the Court; and that process of this description, being process for a contempt, must be executed according to the very letter and rigour of it, and not according to its spirit and intention, which was to secure the payment of the money. There is no case directly in point upon process of attachment out of the Court of Chancery, but by analogy to the acts of the sheriff executing the process of fieri facias, it may be argued that it is sufficient if the full purpose of the process is answered. Thus in *Cockram* v. *Welby* (*a*), it was held a sufficient execution of a fi. fa. that the sheriff, though directed to take the goods, took the money of the defendant; and debt to recover such money lay before the return of the writ. So, in *Taylor* v. *Bekon* (*b*) it is said that payment to the sheriff on a fi. fa. is a good plea; which shews that the sheriff is not bound to execute the writ according to its rigour. And although in that case, it is also said that payment to him on a ca. sa. would not be good, and so it was adjudged in 12 *Mod.* (*c*); yet even there, if the party himself who sued out the process, or his agent, agree to the dis-

(*a*) 2 *Show.* 79. (*b*) 2 *Lev.* 203. (*c*) P. 385. *Anon.*

charge,

1812.

BRETT and Another *against* CLOSE.

charge, it seems that it will be good (*a*); and yet on a ca. sa. the sheriff is directed to take the body. It may be said that those were all cases of civil process, whereas this is in the nature of criminal process. It is true that the warrant of commitment is so in form, but in substance it is only ancillary to the compelling payment; and upon the same principle, in *Rex* v. *Myers* (*b*), *Buller*, J. said that it had been settled that an attachment for non-performance of an award is only in the nature of a civil execution. The same point was held in *Benafous* v. *Schoole* (*c*). So, in *Rex* v. *Pickerill* (*d*), the Court considered that it was no objection to the defendant's being discharged under the Lord's act, that he was in execution for a contempt on a quo warranto information. And in 2 *P. Wms.* (*e*), it was held at the Rolls, that if a man be in contempt for want of answering, and the plaintiff's clerk in court accept the costs of the contempt, it purges the contempt. So here, *Dent* was in contempt for non-payment of a certified balance, and a warrant of commitment was issued thereon; when, therefore, the plaintiff or his solicitor were paid the balance, or, what is the same thing, were satisfied by accepting the promissory notes, it purged the contempt, and the officer was at liberty to discharge him. And here the party has had the benefit of such discharge; so that the consideration of the notes has not wholly failed, even supposing him liable to be again taken by the other parties to the suit. It may be observed also, that these notes were not given to the officer, which has sometimes afforded an objection, but to the plaintiffs themselves; and that makes it a stronger case than *Pilkington* v.

(*a*) 14 *East*, 474. *Slackford* v. *Austen*. (*b*) 1 *T. R.* 266.
(*c*) 4 *T. R.* 316. (*d*) Ibid. 809. (*e*) P. 482. *Anon.*

Green,

1812.

BRETT and Another *against* CLOSE.

Green (*a*), where the note was given to the officer, and yet held good.

Puller, contrà, insisted that the notes were bad, 1st, for want of consideration; and, 2dly, that if there were any consideration, it was against law, being founded on a breach of duty of the officer entrusted with the execution of process. 1st, There were several parties to the suit in Chancery, and the solicitor for the party on whose behalf the notes were taken, had no authority to bind the others, so that *Dent*, the very instant after he was discharged, was liable to be taken again. In *Nerot* v. *Wallace* (*b*), *Ashhurst*, J. was of opinion that it was necessary, to found a consideration, that the party promising should have the power of carrying it into effect. Here the discharge was the consideration. In order therefore to have carried it into effect, and have made a good consideration, the notes should have been taken for the benefit, and with the concurrence of all the parties interested; and then they would have been bound, and *Dent* would have reaped the fruits of his discharge; but as it now stands it is nudum pactum. This is to be inferred from the reason of the decision in *Pilkington* v. *Green*, because there it was held that as the note was accepted by the parties interested, it had a sufficient consideration. But, 2dly, supposing there was a consideration, it was unlawful; for the officer was bound to execute the warrant according to its tenor, by taking his prisoner to the gaol, and detaining him there until further order. It may be sufficient upon process merely civil, to execute it according to its spirit and the intention of the parties, but criminal process ought to be under the guidance of the court out of which

(*a*) 2 *Bos. & Pull.* 151. (*b*) 3 *T. R.* 23.

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1812.

BRETT and Another against CLOSE.

it issues. Even upon a ca. sa. a gaoler cannot liberate his prisoner, upon an undertaking to pay the debt. In *Martyn* v. *Blithman* (*a*) it was considered as an escape so to do; and in *Love*'s case (*b*) the Court said that by the capias, the sheriff is to take and keep in salvâ custodiâ, and to give liberty is contrary to the writ; and *Slackford* v. *Austen* (*c*) is to the same effect. A farther objection may be made to these notes, that they include in their amount a larger sum for costs than was due; and that affords a ground for suspecting that the authority of the Court of Chancery has been used as an instrument of extortion; which is a case, according to *Beeley* v. *Wingfield* (*d*), that this Court will watch very jealously.

Lord ELLENBOROUGH, C. J. If in this case I saw that there was any purposed contempt of the process of the Court of Chancery, in order to defeat any of the objects of that process, or if the taking of these notes had obviated the ulterior justice of the case, I should have said that it was illegal. But if all the justice meant to be attained by the Chancellor's warrant has been attained, in what consists the illegality? Here a person having a balance certified against him as receiver, an attachment issued upon it out of the Court of Chancery, and he is taken under the attachment, and in order to obtain liberation of his person, gives two notes for the amount of all that he was liable to pay, which the other party agrees to accept. The question is, whether such notes are illegal in respect of the consideration, that consideration, as it is said, involving a contempt of court. It seems that the

(*a*) *Yelv.* 197.
(*b*) *Salk.* 28.
(*c*) 14 *East*, 468.
(*d*) 11 *East*, 48.

process,

1812.

BRETT and Another *against* CLOSE.

process, although criminal in its form, was merely ancillary to civil purposes; the party who sued out the process, had the control over it as at common law, and he has obtained his redress by accepting the notes, and has superseded his own process, after taking satisfaction for it. Can it be fairly said that in so doing he has been guilty of a contempt of court? An attachment for the non-performance of an award is also criminal in its form, but being for the attainment of a civil satisfaction, it has been treated as such in our own times. Then it is argued that this is nudum pactum, inasmuch as the other parties to the suit are not bound by it, but may sue out another attachment against him; but that does not shew it to be nudum pactum, although perhaps it is a bad bargain, because the party does not reap all the benefit he might expect from it, but remains liable to be taken again. But no person complains of this as a contempt of court, or as fraudulent in its intention, nor is it suggested that there is the least shadow of complaint by any of the parties interested on which the Court of Chancery is likely to animadvert; but the surety now attempts to take advantage of it, in order to exempt himself from liability. As to the sum given to cover the costs, the parties were obliged in that stage of the proceeding to take it at hazard for an unascertained sum, which would only be good for the real amount when ascertained; and nothing is stated to shew that the party has refused to allow for the surplus. This process therefore being merely ancillary to civil objects, and there being no contempt of court, nor any fraud intended upon any of the parties, I do not think there was any thing illegal in the transaction.

1812.

BRETT and Another *against* CLOSE.

GROSE, J. This process, though criminal in its form, is in reality civil to all purposes for which it was sued out by the party; and when they are attained, it does not seem to me that the permitting this mode of discharge will be productive of any inconvenience.

LE BLANC, J. If this proceeding went to defeat any object of the criminal jurisdiction of the Court of Chancery, there would be much weight in the argument. But it has not been shewn to us that there was any other object in view, than that of compelling the party to place in the hands of the Master a sum of money found to be due from him, together with the costs; and it is now settled that an attachment, which is merely to enforce the payment of money, is to be considered as civil process. These notes were not given to the officer who executed the process, but to one of the parties to the suit who issued the process, and under the sanction of his solicitor, he authorizing the officer (while the accountant-general's office was shut) to discharge the party on payment of such a sum as was then supposed due; and if so much should not be due, then the notes would be good only for so much as was due. The officer derives no advantage from taking the notes. Then may not the party dispense with his own process? It is in effect civil and not criminal process, and has been dispensed with by the party himself and not the officer. I think therefore the consideration of the notes was not illegal, and that there is no ground for saying it was nudum pactum.

BAYLEY, J. I see nothing against the policy of the law in allowing the plaintiffs to maintain this action. There

1812.

BRETT and Another against CLOSE.

There was no impropriety in *Tomlinson*'s taking the notes and discharging the party. This was a writ for the purpose of enforcing the payment of a sum of money, which *Tomlinson* had the means of enforcing or not; he need not have put the writ into the hands of the officer at all, and after he had placed it with the officer, he might have withdrawn it at his pleasure. The officer could not take bail, nor could he have taken the money without the concurrence of the party who sued out the writ; but the party may authorize him so to do. Now this was in vacation whilst the office was shut, and the party therefore, in order to give a reasonable indulgence to his debtor, agrees that he shall be released from the custody of the officer, upon giving security that the money shall be forthcoming when the office opened; and he does give that security and is released. It is said that all the parties interested have not concurred; but it does not appear that any of them have complained, nor has the Lord Chancellor made any order thereupon against the officer, or directed the securities to be given up; and *Tomlinson* might very easily have obviated any inconvenience by paying the money into the office. Then no unfair advantage nor improper use seems to have been intended to be made of this process, nor is there any injustice to any one. I cannot therefore say that these notes were bad, or such as ought not to be enforced.

Judgment for the Plaintiffs.

The

1812.

THE KING *against* The Inhabitants of SAINT MARTIN AT OAK.

Wednesday, Nov. 18th.

A pauper may be removed from a parish where residing under a certificate to a parish in which he gained a settlement before the granting of the certificate, and need not of necessity be removed to the certifying parish.

TWO justices removed *Thomas Gardener*, *Elizabeth* his wife, and their three children by name, from the parish of *Saint Martin at Oak* in *Norwich* to the parish of *Drayton* in *Norfolk*; which order was quashed by the Sessions, upon appeal, subject to the opinion of this Court upon the following case:

The pauper, *Thomas Gardener*, was in the year 1769 duly bound apprentice by indenture for seven years to *John Miller* of *Costessey*, cordwainer, and served him for one year and three quarters in *Costessey*, when *Miller*, having purchased an estate at *Felthorpe*, removed thither to reside on it. The pauper accompanied *Miller*, and continued to serve him in *Felthorpe* until within sixteen weeks of the expiration of the said term of seven years, when *Miller*, having taken a public house, deemed it improper for the pauper to continue with him, and told the pauper so, and that he had provided for him another master of the name of *Thaxter*, who lived at *Drayton*, and who was to pay at the end of the sixteen weeks one guinea for the service of the pauper; which sum the pauper was to receive in lieu of the guinea which he was entitled to at the end of the term under the indenture. The indenture remained in the hands of *Miller* uncancelled. The pauper went to *Thaxter's* accordingly, and served him in *Drayton* for the unexpired term of 16 weeks, when *Thaxter* paid him the guinea which had been agreed upon, in lieu of that which he was entitled to have received from *Miller*, and the pauper continued

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1812.

The KING *against* The Inhabitants of ST. MARTIN AT OAK.

to serve *Thaxter* for one month further. In 1787 the parish of *Felthorpe* granted a certificate to the parish of *Saint Martin at Oak*, which was admitted on the trial of the appeal, acknowledging the pauper his wife and children to be inhabitants legally settled in *Felthorpe*; and the pauper and his family continued to reside in *Saint Martin at Oak* under this certificate, receiving occasional relief from the parish officers of *Felthorpe*, until *June* last, when the pauper, his wife, and children, were removed by an order of two justices to *Felthorpe*. From this order the parish officers of *Felthorpe* at the next sessions entered an appeal, which was respited until the following sessions: at which sessions the parish officers of *Saint Martin at Oak* withdrew the order of removal, and the paupers were afterwards removed to *Drayton* as above stated.

Storks, in support of the order of sessions, did not dispute that the pauper *T. Gardener* gained a settlement in *Drayton* by service with *Thaxter* under the indenture, but endeavoured to shew that the parish of *St. Martin at Oak*, into which the pauper and his family came by certificate, were bound to remove them back to the certifying parish; which, as between those two parishes, must be taken to be their last legal settlement, unless a subsequent settlement could be shewn. And as to the withdrawing the first order of removal after appeal against it, that was not an abandonment of the certificate, which therefore still subsisted at the time of the present order of removal. That being so, the 8 & 9 *W.* 3. *c.* 30. imposed on the justices the necessity of removing to the certifying parish. The statute enacts, "that the certificate shall oblige the certifying parish to receive the pauper and his family whenever

1812.

The KING *against* The Inhabitants of ST. MARTIN AT OAK.

whenever they shall become chargeable to the parish to which that certificate was given, and that then it shall be lawful to remove such pauper to the parish from whence such certificate was brought."

But the Court were clearly of opinion that the act was not restrictive of the power of removal from the parish to which the certificate is granted to any other parish, but only conclusive upon the certifying parish as between that and the parish to which the certificate is granted. This was considered to be the object of the act in *Rex* v. *Lubbenham* (*a*), and in a prior case of *Rex* v. *St. Giles* (*b*). All the authorities agree that it signifies nothing when the certificate was granted, it is only an estoppel upon the parish granting it as between the two parishes.

Order of sessions quashed.

Park and *E. Alderson* were to have opposed the order of sessions.

(*a*) 4 *T. R.* 251. (*b*) *Salk.* 530.

The KING *against* The Inhabitants of the County of SOMERSET.

Wednesday, Nov. 18th.

A Presentment, made by a justice of peace of the county of *Somerset* on his own view, stated in substance, that from time immemorial there has been

The 49 *G.* 3. *c.* 84. appoints trustees for taking down the old and building a new bridge over the river *Tone*, and empowers them to take tolls, and that it shall be lawful for them, out of the monies received to build a new bridge, &c., and vests the property in the old and new bridge during the continuance of the act in the trustees, and that as soon as the purposes of the act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c. shall be repaired by such persons as are by law liable to repair the old bridge: Held that during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge.

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1812.

The KING *against* The Inhabitants of SOMERSET.

a common public stone-bridge, called *Tone-bridge*, with the approaches thereto, 100 yards in length, and 10 yards in breadth, at each end of the bridge, situate in the parishes of *Taunton St. James* and *Taunton St. Mary Magdalen*, in the said county, for carriages, &c., and that the said bridge, with the approaches thereto, on the 1st of *July*, 51 *G.* 3. was out of repair; and that the said bridge and approaches thereto are not within any city or town corporate, and that it cannot be known or proved that any persons, lands, tenements, or bodies politic ought to make and repair the same, and that the inhabitants of the whole county of *Somerset* ought to make, build, and repair the same as often as need requires, according to the form of the statute.

The defendants pleaded that after the passing of the statute 49 *Geo.* 3. *c.* 84. (*a*), entitled an act for building a new

(*a*) The 49 *Geo.* 3. *c.* 84. (local and personal), reciting that *Tone bridge*, &c. was very ancient and narrow, and inconvenient, and dangerous, and that it was necessary to rebuild it, and that the approaches leading to it should be widened; enacts that certain persons shall be trustees for taking down the old and erecting a new bridge there, and for widening and improving the approaches to it, and empowers them to collect tolls. It then enacts that it shall be lawful for the trustees, out of the monies raised by virtue of the act, to build the new bridge and pull down the old one, and erect a temporary bridge till the new one should be built, and to turn, widen, and alter the approaches to it, and to do all such other acts, matters, and things as they should think necessary, useful, and convenient for those purposes. It also empowers the trustees to borrow money and mortgage the tolls for not exceeding 10,000*l.* and apply the tolls to pay the expenses of the act, the interest of the money borrowed, and the expenses of making the bridge, &c. By another clause it is enacted that from and after the passing of the act, "The *Tone-bridge*, &c. and all the materials, and also the new bridge, turnpikes, toll-houses, and other matters and things to be erected and provided by virtue of this act, shall *during the continuance thereof* belong to and be the property of and vested in the said trustees; and it shall be lawful for the said trustees to bring actions or direct the preferring of bills of indictment as the case may require, against any

1812.

The KING *against* The Inhabitants of SOMERSET.

a new bridge across the river *Tone*, &c., and after the 24th of *June* 1809, in that act mentioned, and before the 1st of *July* in the presentment mentioned, the said act being then and still in force, the trustees therein named under and by virtue of the authority and powers vested in them by the said act, and to procure and raise the tolls imposed and payable by the said act, to wit, on the 1st of *July* in the presentment mentioned, did pull down, and cause to be pulled down the bridge then and at the time of passing of the said act standing across the river *Tone*, called *Tone-bridge*, in the presentment mentioned, and did begin to build the same upon a much larger and more expensive scale than the same was before, and did also begin to widen and alter the approaches leading to the said bridge, within 100 yards of each end thereof, whereby the said bridge and the approaches thereto became ruinous, &c. and so remained continually from thenceforth to the making of the said presentment; the same bridge remaining incomplete and unfinished; neither the said trustees, nor any of them, nor any other person having rebuilt or repaired the

any person or persons who shall steal, take, or carry away, spoil, injure, or destroy the said bridge or other erections, &c., or the materials thereof, or other matters or things hereby vested in them as aforesaid, or any part thereof," &c. By another clause, "as soon as the several purposes of this act shall be carried into execution, and the principal and interest borrowed and secured on the credit thereof be paid, *then and from thenceforth* all the tolls hereby imposed shall cease and determine, and the said bridge and the ground forming the highways or approaches thereto, within 100 yards on each side thereof respectively, shall for ever thereafter be repaired and kept in repair by such person or persons as are by law liable to repair the said present bridge and highways or approaches, and such bridge and highways shall be vested in and belong to such person and persons in the same manner and no other, as the person or persons now liable to repair the said bridge are possessed of the same."

1812.

The KING against The Inhabitants of SOMERSET.

same; and that the purposes of the said act are not yet carried into execution, to wit, at the parishes of *Taunton St. James*, and *Taunton St. Mary Magdalen* aforesaid in the county aforesaid: by reason of which said premises the trustees aforesaid were and are bound and of right ought to repair the same bridge and the said approaches thereto during the continuance of the said act in force; without this, that the inhabitants of the said county, the said bridge and the said approaches thereto in the said presentment mentioned, during the continuance of the said act in force, ought to repair and amend, when and as often as it shall be necessary in manner and form as in and by the said presentment is above supposed, &c. To this there was a general demurrer.

Burrough, in support of the demurrer, relied upon the rule that the county is liable to the reparation of a public bridge at all times, unless it can shew a discharge, and contended that this plea was bad, inasmuch as it did not amount to a discharge. The act of parliament upon which it is founded does not put the trustees in the place of the county, but contains provisions similar to those in almost every turnpike act, and only empowers the trustees, (it shall be lawful for them) but does not make it imperative upon them to build a new bridge; and therefore whilst it remains uncertain whether the trustees will do so or not, the common law liability must remain, otherwise the public would not be protected.

Lord ELLENBOROUGH, C. J. If the trustees are dilatory in executing the powers of the act, I am inclined to think that the Court, upon application, would lend

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1812.

The KING *against* The Inhabitants of SOMERSET.

its aid to expedite their functions. Such at least is my present opinion upon that point; but upon the question of liability I am decidedly of opinion that until the trustees have rebuilt the bridge the county is not liable. The words "then and from thenceforth" necessarily lead to that conclusion.

LE BLANC, J. During the time the act is in force the liability of the county is suspended; when the trustees have completed the object of it, then the liability is to revert back to the common channel.

BAYLEY, J. It would be useless to make the county repair, for the trustees might afterwards undo what the county had done.

Moore contrà, mentioned *Rex* v. *Barlow* (*a*), where the 13 & 14 *Car.* 2. *c.* 12. *s.* 18., which enacts that the churchwardens, &c. "*shall have power and authority*" (not "*may*" as stated by mistake in the report) was construed to be compulsory.

Per Curiam, Judgment for the defendants.

(*a*) *Salk.* 609.

Wednesday, Nov. 18th.

The KING *against* The Justices of MIDDLESEX.

The 14 G. 3. *c.* 78. *s.* 96. (a building act) does not enable the district surveyor, who lodges a complaint before two justices on account of a projection made in front of a house, contrary to the provisions of that act, to appeal to the quarter sessions against the admissal of the complaint of the two causes.

JEKYLL moved for a mandamus to the justices of *Middlesex*, commanding them at their next general quarter sessions to hear an appeal made against an order of two justices, under the 14 *G.* 3. *c.* 78. (*a*), (the building act).

On the 7th of *October* last the district surveyor appointed under that act, lodged a complaint before two justices, within whose jurisdiction the complaint arose, against one *Soane*, on account of a projection made by him beyond the line of the front of his house in *Lincoln's-Inn-Fields*. *Soane* appeared before the justices, who after having heard the complaint dismissed it, conceiving that the projection was not within the meaning of the act; and thereupon the district surveyor appealed to the sessions against that dismissal, and the appeal coming on to be heard on the 29th of *October*, it was objected that the surveyor had no right to appeal, as not coming within the 96th section, which gives the appeal. The justices, after argument, being of that opinion, refused to entertain the appeal. The 96th section enacts "that if any persons think themselves aggrieved by any conviction, commitment, distress, order, or judgment of any justice or justices of the peace made out of sessions by virtue of this act, such persons may appeal to the justices at their general quarter sessions, &c." It was admitted that by the words conviction, commitment, and distress, and perhaps even

(*a*) *S.* 49, 65, 96.

order,

order, the party to be affected by such conviction, &c. seemed to be pointed out as the person to whom the appeal was meant to be limited; but it was contended that the word judgment was large enough to give it to the district surveyor.

Lord ELLENBOROUGH, C. J. The appeal is given to the party aggrieved, therefore must not that apply to affirmative orders? The surveyor may apply to two other justices, who perhaps may entertain a different opinion. What grievance has this person more than every subject of the realm has from an infringement of the law? He is not the person to whom the right of appeal is given. Order or judgment means when something is ordered to be done, not a mere dismissal of a complaint. It all imports some act to be done under an order of justices, which may be a grievance to the party.

BAYLEY, J. It must be an order or judgment against the party who appeals.

Per Curiam, Rule refused.

1812.

Wednesday, Nov. 18th.

MELLISH and Another *against* ANDREWS.

A policy of insurance on goods at and from *London* to the ship's discharging port or ports in the *Baltic, with liberty to touch at any port or ports for orders*, or any other purpose, does not warrant the assured, after having touched at *C.* for orders, and gone on to *S.*, a more distant port, in retouching at *C.* for orders; but if the policy be to any and all ports and places in the *Baltic forwards and backwards, and backwards and forwards*, it is otherwise.

IN assumpsit the plaintiffs declared in the first count upon a valued policy of insurance on goods in the ship Minerva, "at and from *London* to the ship's discharging port or ports in the *Baltic; with liberty to touch at any port or ports for orders, or any other purpose;* with leave to carry, use, and exchange simulated papers, and to seek, join, and exchange convoys; *warranted free from capture and seizure in the ship's port or ports of discharge.*" The policy also contained a clause "that it should be lawful for the said ship, &c. in that voyage to proceed and sail to, *and touch and stay at*, any ports or places whatsoever and wheresoever, and to load and unload goods, particularly in *Sweden*, without being deemed a deviation;" "at a premium of 12 guineas per cent., to return 6*l.* per cent. for arrival:" and then they alleged a loss by seizure in the voyage and before its completion by persons unknown, and negatived a loss by capture and seizure in the ship's port or ports of discharge. There was another count upon a second policy upon goods in the same ship, the interest in which was averred to be in different persons, and in this the insurance was "at and from *London* to any and all ports and places in the *Baltic Sea, forwards and backwards, and backwards and forwards*, from port to port and place to place, during the ship's whole stay and trade, and until her safe arrival at her port of final discharge; with liberty to sail under any flag, carry, use, and exchange simulated papers, &c. (including other liberties mentioned in the first policy.) Upon the second count the defendant

1812.

MELLISH *against* ANDREWS.

defendant paid money into court. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, the material facts proved, which raised the question afterwards made, were these: The *Minerva* sailed with the goods insured from *London* in *August* 1810 under convoy to *Gottenburgh*, where she was detained with the convoy till the 30th of *October*, when she sailed to and arrived at the *Swedish* port of *Carlshamn* on the 1st of *November*, and there received orders from the agent for the ship to proceed to the *Prussian* port of *Swinemunde* for orders. She arrived off *Swinemunde* on the 8th of *November*, when the captain went on shore, and saw the ship's agent the next morning, who told him that it was impossible to enter the port, a *French* military force being then in the actual possession of it: and directed the captain to return back to *Carlshamn*, and there wait for orders. He accordingly returned thither on the 15th of *November*, and went on shore for orders (*a*), and while he was staying there under repair, his ship's papers were seized on the 6th of *December* by the *Swedish* government, and the ship and cargo taken possession of, and finally confiscated. Notice of abandonment was given; but no question was now made upon that point, and therefore it is unnecessary to state the circumstances of it. The plaintiffs obtained a verdict on both counts.

In *Easter* term last *Park* moved for a new trial upon the ground that the captain was not warranted, after

(*a*) This was at last agreed to be the fact, as found by the jury, though the captain afterwards, on cross-examination, had stated that he put into the port for shelter and to repair the damage which his ship had met with at sea. Perhaps the whole of his evidence might be reconciled by stating that in fact he left *Swinemunde* to return off *Carlshamn* again to wait for orders, but having received damage in the way, when he came off *Carlshamn*, instead of waiting off the port for orders, he entered it to repair.

having

1812.

MELLISH *against* ANDREWS.

having once touched at *Carlshamn* for orders, in returning back thither from *Swinemunde*, which port it appeared was meant to be the port of discharge, if the ship could with safety have gone into it. In the first policy, there were not any words to authorize such an irregular course; and even upon the second, which contained the words backwards and forwards, &c. they only meant until such time as the ship got to her port of destination; but when once she reached that, and thereby an option was made, the captain was no longer at liberty to return. The Court, however, refused the rule on the second policy, observing that the words backwards and forwards, &c. seemed to intend an inverted course, and that "until her safe arrival at her port of final discharge" meant, not where it might be intended that the ship should discharge, but where her last port of discharge should be; final being used in contradistinction to elective port of discharge. On the other policy, however, upon the authority of *Beatson* v. *Haworth* (*a*), which was mentioned, the Court granted the rule.

The Solicitor-General and *Puller* shewed cause, and contended that the question had been left to the jury, whether the ship went to *Swinemunde* for orders, or for the purpose of her discharge, and the jury had found by their verdict that she only went thither for orders; in which case she was warranted in returning back to *Carlshamn*, under the liberty given her to touch at any port for orders, which meant any port before her arrival at her discharging port. In *Beatson* v. *Haworth* it was only decided that where a regular course of voyage is

(*a*) 6 *T. R.* 531.

marked

marked out by the policy, such course must be attended to; but here no particular course is pointed out; it is from *London* to the ship's discharging port in the *Baltic*; which port the assured is to seek, and it may be the nearest or the most distant port. Therefore the rule which governed *Beatson* v. *Haworth*, and also the case of *Hogg* v. *Horner* (*a*), does not apply.

Park, *Topping*, and *Taddy*, contrà, maintained that the ship having once touched at a port, and proceeded onwards, was not at liberty to retrace her way and return to the same port; if she might do so at all, she might for any number of times, and thus protract the liability of the underwriter to an indefinite period. It is true that a terminus is not fixed by the policy, and that so far the ship's destination was left uncertain; but that was reduced to certainty as soon as the port of her discharge was contemplated. From that time the captain was at liberty to touch at any ports for orders in the progress of his voyage to the destined port, but not to turn back for orders upon finding that port shut against him, which was not a peril insured against, according to *Hadkinson* v. *Robinson* (*b*). In *Clason* v. *Simmons* (*c*), it was held that the ports intended to be touched at must be taken in their order, and that it was not competent, after going to a more distant one first, to turn back to a nearer port; and there, as here, the insurance was general to the ship's port of discharge.

Lord ELLENBOROUGH, C. J. On looking at my note it appears that I adopted the construction of the de-

(*a*) *Park, Insur.* 298., a. 4th edit.
(*b*) 3 *B.* & *P.* 388.
(*c*) *Park, Insur.* 4th edit. 298. a.

fendant,

1812.

MELLISH *against* ANDREWS.

fendant, as to the liberty to go to the same place a second time for orders; but I left it to the jury upon the going thither ex necessitate for the purpose of repairs, whether it was not going thither ex justâ causâ; and the jury found the fact in favour of the plaintiffs. I observed to the jury that without the words backwards and forwards, which were in one of the policies, the ship could not go back again to the same port for orders; that the liberty to touch did not mean to retouch without the words backwards and forwards. I acceded to the proposition therefore that the captain could not go to *Carlshamn* for orders without those words; but I left it to the jury, that though he had not the liberty to go for orders, yet that would not prevent him going back to *Carlshamn* ex necessitate for the purpose of repairs; and the jury seem to have found that he did go into *Carlshamn* for repairs. But if the ship sailed at first from *Swinemunde* to *Carlshamn* for orders, there was a deviation instanter, and a necessity arising afterwards will not protect her. Let us see what the evidence was as to that point: the captain said he got directions at *Swinemunde* to return to *Carlshamn*, and there wait for orders; that he went back to *Carlshamn* and went on shore for orders. The case therefore comes to a very nice point upon this evidence. It looks like a deviation, for he set out from *Swinemunde* to return for orders, and that I think is a deviation, being an excess of the liberty included in this policy; which is to touch at any ports, and not to retouch at the same for orders.

Per Curiam, Rule absolute.

The

1812.

Friday, Nov. 20th.

The Chancellor, Masters, and Scholars of the University of CAMBRIDGE *against* BRYER.

THIS was an action brought by the plaintiffs on the statute 8 *Ann. c.* 19., against the defendant, as printer of a book called "A Vindication of Mr. Fox's History of the early Part of the Reign of James the Second," to recover a penalty of 5*l.* and also 1*l.* 16*s.* as the value of a printed copy, for not having delivered a printed copy, upon the best paper, of such book to the warehouse-keeper of the Company of Stationers at Stationers'-hall for the use of the library of the University of *Cambridge*. The defendant pleaded the general issue; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, at the sittings after *Michaelmas* term, a verdict was found for the plaintiffs for one penalty of 5*l.*, and 1*l.* 16*s.*, the value of the copy of the said book, upon the best paper, subject to the opinion of this Court on the following case; and with liberty to turn the same into a special verdict, if the Court should so please:

The 8 *Anne*, c. 19. *s.* 5. makes it necessary for the printer of a book, composed after the passing of the act, and published for the first time after the composition, which book is printed and published with the consent of the proprietor of the copy-right, to deliver a copy upon the best paper to the warehouse-keeper of the Company of Stationers for the use of the library of the University of *Cambridge*, notwithstanding the title to the copy of such book, and the consent of the proprietor to the publication, be not entered in the register-book of the said Company.

The defendant was the printer of the book in the declaration mentioned, which was composed after the passing of the statute of 8 *Ann. c.* 19, and published for the first time after the composition thereof, and also printed within three months before the commencement of the suit. The book was printed and published with the consent of the proprietor of the copy-right. The defendant did not deliver a printed copy of the said book upon the best paper to the warehouse-keeper of the Company of Stationers, at the hall of the said Company, for the use of the library of the University of *Cambridge*, at

1812.

CAMBRIDGE University *against* BRYER.

at any time after the printing and before the publication of the said book. The title to the copy of the said book was not entered before publication in the register-book of the Company of Stationers in the usual manner; nor has the consent of the proprietor to the publication been entered in the same manner. The question was, whether the plaintiffs were entitled to recover: if they were, the verdict was to be entered for *6l.* 16*s.*; otherwise, a verdict was to be entered for the defendant.

This case was argued by *Littledale* for the plaintiffs, and *Brougham* for the defendant, and the argument turned upon the meaning of the fifth section of the statute 8 *Anne*, *c.* 19., which enacts that nine copies of each book *that shall be printed and published as aforesaid* shall be delivered to the warehouse-keeper, &c. for the use of the Universities. For the plaintiffs it was contended that the words "that shall be printed and published as aforesaid" related to the printing and publishing mentioned in the first section, viz. such a printing and publishing as gave the author or purchaser the copy-right; and therefore the plaintiffs were entitled to recover, notwithstanding the title to the copy of the book had not been entered at Stationers'-hall: for the defendant it was urged, that the words related not only to the printing and publishing, but to the entry at Stationers'-hall, prescribed by sect. 2., and therefore without such an entry the defendant was not liable. In support of each of these propositions the several clauses in the 8 *Ann.* *c.* 19. were examined on each side, and very fully commented on; and the statutes 13 & 14 *Car.* 2. *c.* 33. *s.* 17., and 17 *Car.* 2. *c.* 4. *s.* 2., which gave to the Universities a right to copies of every book printed, were adverted to.

1812.

CAMBRIDGE University *against* BRYER.

to. The 15 *G.* 3. *c.* 53. *s.* 6. was also pressed in argument for the defendants, as amounting in its recital and enactment to a declaration by the legislature, that the 8 *Ann. c.* 19. did not make the delivery of a copy to the Universities necessary, unless an entry of the book was first made at Stationers-hall; for it recites that the provision in the statute of *Anne*, for the delivery of the nine copies, had been eluded by an imperfect entry at Stationers'-hall of the title of the book, thereby admitting that the delivery was connected with and made to depend on the entry; and then, in order to prevent this, it provides that the title of the whole of such book shall be entered. The 41 *G.* 3. *c.* 107. *s.* 6. was likewise relied upon as being a direct legislative interpretation of the statute of *Anne* to the same effect; and *Beckford* v. *Hood* was cited (*a*). The Court, however, in giving judgment went so fully into these arguments, and into the grounds of their decision, that it is conceived any farther detail would be superfluous.

Lord ELLENBOROUGH, C. J. I think the sound rule of construing any statute, as indeed it is of construing any instrument, whether it be statute, will, or deed, is to look into the body of the thing to be construed, and to collect, as far as may be done, what is the intrinsic meaning of the thing; and if that be clearly discernible by reference to its own context, I shall not be inclined to raise a doubt upon a construction drawn aliunde, if I can avoid it. I may certainly be obliged by subsequent statutes to put a perverse, and what I should consider an unnatural interpretation on the statute as originally

(*a*) 7 *T. R.* 620.

passed.

1812.

CAMBRIDGE University *against* BRYER.

passed. I may be under such compulsion, but I shall certainly endeavour, as far as I can without violating the fair rules of construction, to maintain the integrity of the original text, unvitiated by subsequent misconstruction, if I may so say. Now the statute of 8 *Anne* is susceptible of one doubt, and that has been pointed out, which is in the 5th section respecting the delivery, where it is enjoined that the copies shall by the printer be delivered to the warehouse-keeper, and by him, after demand made, to a person duly authorized, for the use of the respective libraries; and then it goes on, "and if any proprietor, bookseller, or printer, or the warehouse-keeper of the said company, shall not observe the directions of this act therein, that then he and they so making default in not delivering the said printed copies as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds, for every copy not so delivered." By this it appears that a duty is enjoined to be performed by the printer and the warehouse-keeper only, and yet a penalty is imposed on the proprietor and bookseller, in respect of whom no particular duty has been previously enjoined; that is therefore susceptible of some doubt: but perhaps it was intended that these persons were to procure the thing to be done by the printer and warehouse-keeper, and that they should not be exempt from the penalty unless it were done. It has been said that the statute has three objects; but I cannot subdivide the two first; I think it has only two. The counsel for the plaintiffs contended that there was no right at common law; and perhaps there might not be; but with that we have not particularly any thing to do. He has considered the three objects to be, first, the protection of authors, by vesting the right in them; then the fortifying their right

1812.

CAMBRIDGE University *against* BRYER.

right by penalties; and, thirdly, the encouragement of literature. But I think it has properly but two, viz. the object of protecting the copyright, and that of the advancement of learning; and there is a section in this statute which has that in view, and which it is singular enough has not been adverted to in the argument. The first, second, and third sections relate to the protection of the right of authors, or of the person having the property in the copy, or the purchaser; the fourth and fifth have especially for their object the advancement of literature; and the fourth is pregnant with this purpose, that literature should be made accessible at easy rates and prices, to persons desirous of purchasing books; and therefore it subjects to the archbishop, and the chiefs of the courts of law, the power of settling the prices of books. I am aware that this section has been repealed, but although repealed, it makes a part of one entire act, and shews the object of the legislature was to make learning easy of access. With the same purpose the fifth section provided for a delivery of nine copies of the books printed to certain public libraries, five out of those nine being to be transmitted to *Scotland*, in order to secure a deposit accessible to literary persons; for the books might have been of such considerable price, as not to be easily attainable by scholars of ordinary means. These therefore are the two objects, and in furtherance of these objects are the provisions contained in this statute to be construed. The first branch of the first section provides, " that the author of any book already printed shall have the sole right of printing for the term of 21 years, to commence from a given day; and that the author of any book already composed, and not printed and published, or that shall hereafter be composed,

1812.

CAMBRIDGE University *against* BRYER.

posed, and his assignee or assigns shall have the sole liberty of printing and reprinting the same for the term of 14 years, to commence from the day of the first publishing the same. This may be considered as a substantive provision vesting the copyright; and for the violation of that right, it was considered in *Beckford* v. *Hood*, that an action was maintainable, independently of the penalties, which are ancillary to the protection of that right. It was very properly observed in *Beckford* v. *Hood*, that unless the proprietor of the book had a right of action independent of that given for the penalties, his remedy might be anticipated, or rather precluded by a common informer; who might by some species of collusion difficult to detect, have stopped the course of his remedy entirely; and therefore the action was upheld in that case, and I think it has not been impeached; it was afterwards brought before the Court, but I think it was generally recognized as law, that an action was maintainable on this branch of the section independently of the penalties. It was considered also in the same case that the penalties given in the latter branch of the first section for the printing, reprinting, or importing any book, or selling the same without consent of the proprietor, accrue upon the entry at Stationers'-hall, and are made to depend thereon. The second section indeed expressly so provides, for after reciting "that many persons may through ignorance offend against the act, unless some provision be made whereby the property in such book, as is intended to be secured to the proprietor thereof, may be ascertained, it enacts that no person shall be subjected to the forfeitures or penalties therein mentioned for printing or reprinting of any book without such consent as aforesaid, unless the title to the copy of

1812.

CAMBRIDGE University *against* BRYER.

such book shall, before such publication, be entered in the register-book of the Company of Stationers;" therefore it is clear that, by the express provisions of the statute, there must be a previous entry at Stationers'-hall to found an action for these penalties. The third section provides "that if the clerk of the Company of Stationers shall refuse or neglect to make such entry, or to give a certificate, the proprietor shall supply the place of such entry in a way there pointed out." Then the fourth section is directed to the settling the prices of books, with reference to that which is a very prominent object of this act, the cheapness of books; and then comes the fifth section, and that provides, "that nine copies of each book or books, upon the best paper, that shall be printed and published as aforesaid, or reprinted and published with additions, shall by the printer be delivered to the warehouse-keeper of the Company of Stationers for the time being, at the hall of the company, before such publication made." Now the question arises upon this section, what is the meaning of the words "shall be printed and published as aforesaid." "Printed and published as aforesaid" relates not merely to the mode of printing and publishing, but likewise to the persons entitled to print and publish; it relates to the persons whose property is protected for the period for which it is protected; that shall be printed by the owner or purchaser entitled to protection during the respective periods, that is, twenty-one years for works printed before the act, and fourteen years for works printed after the act. When it directs that nine copies shall be delivered, it relates therefore to every person standing in that situation; the act directs that the copy shall be delivered to the warehouse-keeper, and it has not in this case been

delivered

1812.

CAMBRIDGE University *against* BRYER.

delivered to the warehouse-keeper. It is said that the entry at Stationers'-hall is necessary to make a delivery of the nine copies requisite; but the entry by the terms of the act is required only to enable persons to recover the forfeitures and penalties, and not the value of the book, distinct from the forfeitures. I do not advert particularly to the prior statutes of *Car.* 2., the object of which was to give the Universities copies, nor to the policy of them, which only shew that this was a matter not perfectly new, but that under former statutes the Universities had derived similar benefits. But there come two farther statutes; and it is contended that by the 15 *G.* 3. *c.* 53., and the 41 *G.* 3. *c.* 107., a sense is put upon the statute of *Anne*, which we are bound to adopt, in our construction of it to-day. The 15 *G.* 3. *c.* 53. says, "Whereas the said provision has not proved effectual, but the same hath been eluded, by the entry only of the title to a single volume, or of some part of such book or books so printed and published, or reprinted and republished." What is the meaning of the word eluded? It means that the person entitled to the right has by some deception or other lost the benefit of it. Eluded means that he was tricked or deceived as to the thing he was otherwise entitled to have. It does not mean that he was effectually defeated; and unless it means that, it is not pregnant of the construction endeavoured to be put upon it. At the same time, my difficulty has arisen here, and here only. The framers of this statute did certainly, in framing it, advert to that as the supposed construction of the act of *Anne*; but have they imposed upon the Court, by any enactment, the necessity of adopting that which I must assume to be their error, if the words of the act are intelligible in themselves. If the entry

1812.

CAMBRIDGE University *against* BRYER.

entry is not a condition precedent to the right of the University to recover the value of the copy, which by looking at the act per se I must say is very clear, I cannot think that this recital in the 15 *G.* 3. can overrule the plain intelligible sense of the act of *Anne*. There is a farther provision in the 15 *G.* 3. and a farther condition precedent to the right of recovering the penalties, viz. "That no person shall be subject to the penalties in the act of *Anne* for printing or reprinting, importing or exposing to sale, any book or books, without the consent mentioned in that act, unless the title to the copy of the whole of such book, and every volume thereof, be entered in the manner directed by that act, and unless nine copies of the whole of such book, and every volume, shall be actually delivered to the warehouse-keeper of the Company, as therein directed, for the several uses of the several libraries in the said act mentioned." Therefore the delivery of the nine copies, in furtherance of the object of the act, is made a condition precedent to the right of maintaining an action for the penalties. The statute of the 41 *G.* 3. *c.* 107. *s.* 6. certainly was meant to place the University of *Dublin* on the same footing in point of benefit with those of *Great Britain*, and the other bodies entitled to copies under the statute of *Anne*. It says, "that in addition to the nine copies, now required by law to be delivered to the warehouse-keeper of the Company of Stationers, of each book which shall be entered in the register-book of the said company, one other copy shall in like manner be delivered for the use of the library of the College of the *Holy Trinity* of *Dublin*, and also one other copy for the use of the library of the Society of the *King's Inns, Dublin*." It has been argued,

1812.

CAMBRIDGE University *against* BRYER.

that inasmuch as both these things were required to be done by the statute of *Anne*, viz. the copies to be delivered and the entry made, the legislature presumed that both would be done, in obedience to the law; but when the legislature make the title of the University of *Dublin* to depend upon the book being entered, it certainly appears to me, at present, that they make the entry a condition precedent to the vesting of the right in that University. Certainly therefore there is some difficulty in the construction, arising out of these two statutes; but I think the construction, as it is to be collected from these acts of the legislature at subsequent periods, is not sufficiently strong and cogent to overturn what I understand to be the clear distinct sense of the statute of *Anne*, in which there is nothing ambiguous. Upon these grounds it appears to me, from the clear understanding of the statute of *Anne*, not impeached by a reference to the other statutes, that the plaintiffs are entitled to recover.

LE BLANC, J. (*a*). The question arises upon the construction to be put on the statute of *Anne*. That construction may certainly be materially aided and explained by the language of other statutes, but it is upon the construction of that statute that the Court must act; and if the Court are clear in their construction of it, they will be bound to give it effect, although they should be of opinion that an erroneous construction has been put upon it by other acts. The previous acts of *Car.* 2. seem to me to be so far only material to be

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

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1812.

CAMBRIDGE University *against* BRYER.

called in aid, as shewing that the attention of the legislature was at former periods directed to the Universities, when they were making any provisions respecting the publication of books; and that when such publications were under their consideration, they imposed a restriction upon the authors, that copies should be sent to the universities; thereby shewing that they considered that learning would be advanced by these libraries being kept constantly supplied with books. Then came the statute of *Anne*, which gave the copyright to authors for a certain time; the title of which is "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." The legislature thought that learning would be encouraged by vesting the right, for a certain time, in the copies of printed books, in the authors or purchasers of those books; and they therefore enacted that the authors, or purchasers, should have a right vested in them, in one case for twenty-one years, and in the other for fourteen years; and then the legislature went on to guard that by penalties, which are imposed by the first section of the act, that is, to guard that right which they had given in the one case for twenty-one years, and for fourteen in the other. Then comes the second clause of the act, which contains the direction that the title to the copy shall be entered with the Stationers' Company, and the object of it is this, as contained in the recital to that clause; "whereas many persons may, through ignorance, offend against this act, unless provision be made, whereby the property in every such book, as is intended by this act to be secured to the proprietor thereof, may be ascertained, as likewise the consent of such proprietor for the printing

1812.

CAMBRIDGE University *against* BRYER.

or re-printing of such book or books may from time to time be known;" and it is therefore enacted, "that nothing shall extend to subject any bookseller, printer, or other person, to the forfeitures or penalties mentioned therein, (which forfeitures and penalties are those mentioned in the first section, and the first section only,) for or by reason of the printing or re-printing of any book or books without such consent as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register-book of the Company of Stationers." Therefore it shews clearly, that the object of this provision was to prevent persons being misled by publishing works, the sole copyright of which was given to the author, or the purchaser under the author, for a certain limited time, which they might be, unless they had notice of such right or such title; and therefore that which was required to be entered in the book of the Stationers' Company was with reference only to the penalties contained in the first section of the act. I will pass over that clause which has been referred to by my Lord, the object of which appears to be the rendering books easy of access; and then comes the fifth section, in which there is no reference to the preventing persons being unwarily led into the penalties given by the first section: that provides, "that nine copies of each book that shall be printed and published, as aforesaid, or re-printed and published with additions, shall be delivered to the ware-house-keeper of the Company of Stationers, at the hall of the Company, before such publication made, for the use of the libraries therein mentioned." The doubt arises upon the words, "printed and published as aforesaid." Suppose the clause had been only that nine

1812.

CAMBRIDGE University *against* BRYER.

nine copies of each book that shall be printed and published, or re-printed and published, shall be delivered to the warehouse-keeper; that would not have answered the intention of the legislature, because they never meant, I apprehend, to enact that nine copies of every book, which at any time should be printed and published, or re-printed and published, should be delivered, but only that nine copies of every book which should be printed or re-printed and published by any persons, to whom the exclusive right of printing or reprinting is given by the first clause, shall be delivered to the warehouse-keeper or clerk of the Company for the use of the Universities; "as aforesaid" therefore means, that it shall be printed and published, not under the restrictions of the registry, but that shall be printed and published by the persons to whom this right or privilege is given by the first section of the act, and that appears to me to be the meaning of the term "as aforesaid," instead of construing it, as contended for on the part of the defendant, printed and published and entered as aforesaid; for if that had been the meaning, the legislature would have said, that nine copies of each book which shall be printed and published, and entered as aforesaid, shall be delivered to the clerk for the use of the Universities; instead of which they say printed and published as aforesaid, which means printed and published by those to whom the exclusive right of printing and publishing is given by the preceding section of the act; and that appears to me perfectly clear. It then goes on to direct "that if any proprietor, bookseller, or printer, or the warehouse-keeper of the Company of Stationers, shall not observe the direction of the act, the person making default shall forfeit, besides the value of the printed copies, the sum

1812.

CAMBRIDGE University *against* BRYER.

sum of five pounds." It directs the printer to deliver the copy, the warehouse-keeper to transmit it to the public libraries, and then it says, that if any proprietor, bookseller, or printer, or the warehouse-keeper shall not observe the direction of the act, he shall incur a penalty; which meant perhaps that if the proprietor insisted on the printer not doing it, he should be subject to the penalty. It seems to me, therefore, that if it stood simply upon the construction of this act of parliament, and if we had been called upon to put a construction upon it the day after it passed, this would have been the clear obvious meaning of the act of parliament, and that connecting the fifth with the second section, requiring the copy to be delivered to the clerk of the Company, would be fettering the act by a provision made diverso intuitu. But it has been stated, that a construction has since been put by the legislature upon this act of parliament, and by those persons under whose consideration this act may be supposed to have been brought, and great reliance is placed on the provisions of the 15 *G.* 3. and the 41 *G.* 3. The 15 *G.* 3. was brought in for the purpose of securing to the Universities their right to the copies, and an argument arises upon the particular recital rather than the provision; but coupling the recital with the provision in the sixth section of the act, that section recites the provision made by the statute of *Anne* for securing to the Universities the nine copies, which are to be delivered to the warehouse-keeper of the Stationers' Company, for their use; it recites that nine copies of each book that should be printed and published, as therein mentioned, or re-printed and published, shall be delivered, not that nine copies only of each book that should be printed and entered shall be delivered, but it

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1812.

CAMBRIDGE University *against* BRYER.

uses the language of the provision in the fifth section; and then it recites, "And whereas the said provision has not proved effectual, but the same hath been eluded by the entry of the title to a single volume, or of some part of such book or books so printed and published, or re-printed and published;" and then it goes on to enact, that no person shall be subject to the penalties inflicted by the statute of *Anne*, which are the penalties of the first section of that act, "for printing or re-printing, importing or exposing to sale, any book or books, without the consent mentioned in the said act, unless the title to the copy of the whole of such book, and every volume be entered in the manner directed by the said act, and unless nine such copies shall be delivered to the warehouse-keeper for the use of the Universities, &c.;" therefore, in order to prevent that elusion or evasion by entering only the title of a single volume, where perhaps the work might consist of a great number of volumes, the legislature make it necessary that the title of all the volumes should be entered with the clerk of the Company, and that which was not a condition precedent before, namely, the delivery of the nine copies to the Universities, they now make a condition precedent to the party's suing for the penalties under the first section. Now, how can it be said that this right of the Universities can be rendered not so effectual, or eluded by the entry of the title of a single volume in the books of the Stationers' Company? That entry is originally directed by the statute of *Anne* to be made for the purpose of giving notice, that there may be a place whither every person may resort and see every thing which is published, lest through ignorance they should be led into penalties. The clause however giving the

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1812.

CAMBRIDGE University *against* BAYER.

nine copies to the different libraries is only guarded by a penalty to be recovered and sued for within three months after the offence committed, and therefore that would be ineffectual, if the Universities or the owners of the libraries could be kept in the dark, three months, as to the books published; and if this register, which is the public notice, contains only the title of a single volume, and that is the place they are to have resort to, the three months may elapse before they have notice of any more than a single volume being published, and then their whole remedy would be at an end, as it respected the right vested in them by the 8 *Anne;* but to prevent this, the 15 *Geo.* 3. provides, that the title to the copy of the whole shall be entered in the register-book. It seems to me, therefore, that the words of the recital of the 6th clause in the 15 *Geo.* 3. are perfectly consistent with the construction of this act, though they may appear at first sight to have a different effect; for as the right to protect the privileges of the libraries could be exercised only within three months after the publication of the book, it was an elusion of and rendering ineffectual that provision in their favour, if a false account were given of the number of volumes. The next act is the 41st *Geo.* 3. *c.* 107.; and it appears at the passing of that act, that the construction of the statute of *Anne* was misunderstood; for at that time it is recited as if the entry of the book at the Company's hall was a condition precedent; it is provided at least, that, in future, copies shall be delivered to the University and the other body in *Ireland,* in the same manner as before they had been delivered to the Universities in *England* and *Scotland;* and in future it makes it a condition precedent to the delivery of those copies, that they shall have

1812.

CAMBRIDGE University *against* BRYER.

have been entered. This act certainly proceeds upon a misunderstanding, and a misconstruction, in my opinion, of the statute of *Anne*; for it must certainly have been the intention of the legislature, to put these learned bodies of *Ireland* on the same footing as those of *England* and *Scotland* were before placed by the statute of *Anne*; but as the construction of the statute of *Anne* appears to be clear, I am of opinion that we ought to abide by it, without being controlled by that misconstruction of it, which in latter times seems to have prevailed. I admit the force of the observations; but here it is to be remembered that this is not a positive interpretation of a former act imposed by the legislature in a subsequent act, but only by the provisions which the legislature have made they seem to have apprehended that such was the construction of the statute of *Anne*. But if the Court is clear that the construction is otherwise, that cannot bind us in the construction we are to put upon it; and it appears to me, that notwithstanding the title of the book has not been entered with the Clerk of the Stationers' Company, yet inasmuch as the author of this book is, according to the decision of this Court in *Beckford* v *Hood*, entitled to all the privileges granted by the statute of *Anne*, and secured by a much more effectual remedy than the penalties which are given by the first section of the act, namely, by action to recover damages against any person who shall infringe his right, this privilege to the different libraries is also given by the fifth section of this act, notwithstanding there may not have been any such entry as is required by the second section; which is for a totally different purpose than that of securing the right to the Universities; therefore it appears to me, upon these

1812.

CAMBRIDGE University *against* BAYER.

these grounds, that the postea ought to be delivered to the plaintiffs.

BAYLEY, J. I am entirely of the same opinion; but as my Lord, and my Brother *Le Blanc*, have gone so fully into the subject, I shall not enter into it.

Postea to the Plaintiffs.

Upon the application of *Brougham*, the Court allowed the case to be turned into a special verdict.

Saturday, Nov. 21st.

The Countess Dowager of DARTMOUTH and Others, Executrix and Executors of GEORGE Earl of DARTMOUTH, *against* ROBERTS.

In an action on 2 & 3 *Ed.* 6. by the plaintiff, as owner of tithe-hay, against the defendant, as occupier of a close, for not setting out the tithe, *copies* of a bill and answer, in a suit by the vicar for tithe-hay against *S. L.*, then occupier of the close, and from whom defendant purchased, denying the vicar's right, and setting up a right in the ancestor of plaintiff, on which the vicar abandoned the suit, were holden evidence against the defendant.

In favour of uninterrupted enjoyment by the perception of tithe-hay by plaintiff and his ancestors, although an endowment of the vicarage in 1253 with the said tithe be shewn, it shall be presumed that the tithe came into lay-lands before the restraining statutes.

THIS was an action of debt upon the stat. 2 & 3 *Ed.* 6. *c.* 13., for not setting out tithes, in which the declaration stated that *George* Earl of *Dartmouth*, the testator, on the 1st of *July* 1810 until the 3d of *October* 1811, was owner and proprietor of the tithes of hay arising from a parcel of land called the *Four-days-work-close*, in the parish of *Batley*, in the county of *York*, of which parcel of land the defendant was, during all that time, the occupier; that the tithes of hay growing on the said land within 40 years next before the statute were of right yielded and payable and yielded and paid to the owner, proprietor, or farmer of those tithes for the time being; that the defendant, on the 1st of *August* 1810,

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1812.

Lady DARTMOUTH *against* ROBERTS.

mowed the grass growing on the said land, and made it into hay, the tithes of which hay belonged to the said *George* Earl of *Dartmouth*, as owner and proprietor of the same, and ought to have been set out and paid to him: yet the defendant took and carried away all the said hay, without setting out the tenth part, &c.

At the trial before *Thomson*, B., at *York*, the plaintiffs made title to the tithes in question under the Marquis of *Halifax*, to whom the same had been conveyed by an indenture of the 21st of *October* 1676, and they produced copies of a bill and answer in a certain cause after mentioned; and also gave parol evidence of the receipt of the tithes, or payments in lieu thereof, as far back as living memory could trace. The defendant gave counter evidence of title, the tendency of which was to shew that the right to the tithes was in the vicar of *Batley*, under an endowment of the vicarage with the tithes of hay of the whole parish, in 1253, by *Walter Gray*, Archbishop of *York*, in the 37th year of his pontificate; and that the same appeared to have remained annexed to the vicarage after the dissolution of the monastery of *St. Oswald de Rostell* by an ecclesiastical survey in the 26 *H.* 8. (1535), and by ministers' accounts in the 33 & 34 *H.* 8. The parish of *Batley* consisted of three townships, *Batley*, *Morley*, and *Churwell*; and there were three terriers proved by the defendant of the dates of 1727, 1743, and 1748, each intitled, "A true and perfect terrier of glebe and other possessions belonging to the church of *Batley*, &c." mentioning "The great tithes of *Scolecroft* in the township of *Morley*," and also "Fineden composition-money for tithe hay." But there was no evidence of the vicar having ever in fact taken the tithe of hay, or any composition for it. It was answered

upon

1812.

Lady DARTMOUTH *against* ROBERTS.

upon the merits, that as this evidence related to a period before the restraining statutes of the 13 *Eliz. c.* 10. and 13 *Eliz. c.* 20., and as there was no evidence that since those statutes the tithes of hay in this place had belonged to or been enjoyed by the vicar, it was open to the jury to presume that before the restraining statutes the vicar, with the consent of the patron and ordinary, had conveyed away the tithes in exchange for a valuable consideration to some other monastery, the property of which afterwards, on its dissolution, went to the crown, from which it passed into the hands of the grantee of this rectory. And this question, as it affected the general merits of the case, went to the jury, who found a verdict for the plaintiffs.

In the last term a new trial was moved for, 1st, upon the general merits of the title, which stood upon the argument already briefly adverted to; and, 2dly, upon the admissibility of the evidence of the bill and answer offered by the plaintiffs in disproof of the vicar's title; as to which the case stood thus: The plaintiffs produced *copies* of a bill and *answers* in the Court of Exchequer in a cause instituted in 1777 by *Henry Elmsall*, clerk, vicar of *Batley*, against *William* Earl of *Dartmouth*, (the father of the late Earl) and *S. Leathley* and others (owners of lands), claiming tithe-hay under the ancient endowment in 1253. The defendants, *Leathley* and others, in their answers, denied the vicar's right, and stated that tithe-hay, or some annual payment, modus, or composition, had been constantly or for a long series of years paid to the Earl of *Dartmouth*, or those under whom he claimed, and that they believed that the tithe-hay belonged to him, and that they had paid 1*s.* 4*d.* annually per acre for arable, meadow, and pasture, within the

townships of *Morley* and *Churwell*, in the parish of *Batley*, for all rectorial tithes. It was admitted that *Leathley*, one of the defendants in that suit, was the then owner and occupier of the land now held by the defendant *Roberts*, who had purchased it from him. The *copies* of the bill and answers were proved to have been examined with the originals; but it was objected on the part of the defendant, that they were not evidence at all, as being res inter alios acta; or, if admissible, that the original answer of *Leathley* ought to have been produced; but the learned Judge overruled the objections, and received the evidence, which went to the jury with the rest of the evidence in the cause. No decree was shewn to have been made in this suit; but in the result the claim was abandoned, without costs; and from that time the vicar had acquiesced.

1812.

Lady DARTMOUTH *against* ROBERTS.

Park and *Holroyd* shewed cause, and, upon the first point, relied on the argument already adverted to; upon the 2d, they insisted that in all matters of public record, the copy is admissible evidence; it is a rule adopted for the preservation of the originals, and it is also to be presumed that they may be wanted in different places at the same time; so that public convenience requires that copies of them should be received; and, therefore, except in the care of perjury, it is held that there is no need to produce the original.

Scarlett and *Richardson*, contrà. This answer, considered as a proceeding in a suit, was not evidence against the defendant, because it was res inter alios acta, and also because it was not followed up by any decree.

1812.

Lady DARTMOUTH *against* ROBERTS.

decree. In *Ford* v. *Gray* (*a*) the Court said that "if one make answer in Chancery which is prejudicial to his own estate, it may be evidence against him, but it shall not be evidence against his alienee;" and though an answer may be evidence where there has not been a decree, yet it is then only evidence as a declaration of the party making it. Now admitting this to be evidence as the declaration of *Leathley*, under whom the defendant claims, the objection to the examined copy is good, because, in order to prove it a declaration in writing by the party, the signature or hand-writing of the party making it must be proved, which can only be done by the production of the original.

Lord ELLENBOROUGH, C. J. The question before the Court is, whether this matter should undergo a revision either on the ground of the evidence being not sufficient to sustain the verdict, or on that of the Judge's having received inadmissible evidence. In a case like this, where the verdict is not conclusive on the rights of the party, but those rights may be reagitated in another suit, if upon consideration the party is dissatisfied, the Court will not be inclined to send it down again unnecessarily. On the question as to the sufficiency of evidence of title, I am inclined to think that in 1253 the tithe of hay was in the vicar, under the endowment of the Archbishop of *York*, with the consent of the Prior and his convent. But assuming that under the endowment the vicar was once well entitled to the tithe of hay, co-extensive with the limits of his parish, he might, before the restraining statutes, have granted it to another ecclesiastical person with

(*a*) *Salk.* 286.

the

1812.

Lady DARTMOUTH *against* ROBERTS.

the consent of patron and ordinary. There would then have been a portion of tithes dissevered from the vicarage, and there was evidence that it was so dissevered, from the conveyance of the tithe in 1676 to Lord *Halifax*, which after their disseverance, but prior to the restraining statutes, might have got into lay hands. We therefore want to pray in aid only this supposition, as to these portions of tithe which appear to have been enjoyed dissevered from the vicarage, that they were so dissevered; and in favour of modern enjoyment, which is the best interpreter of right, where documentary evidence does not exist, we will, in conformity with Lord *Kenyon*, who said that he would presume 200 deeds if necessary, presume here that a disseverance took place. The actual perception of tithe hay, either in kind, or by composition, never appeared to be in the vicar from the time of the first endowment; but a perception of 1*s.* 4*d.* annually, for a considerable time, under a general composition with the rector, which though not so strong as if the rector had taken it in kind, will virtually include it, nothing appearing to the contrary. Therefore there was not only evidence to be left in the balance to the jury, but that evidence preponderated in favour of the rector's claim. The only question remaining is, whether the answer of *Leathley*, a co-defendant with a former Earl of *Dartmouth* in a cause instituted against them by the vicar of *Batley*, was properly received in evidence. It appears to me that this was not res inter alios acta, but inter eosdem acta, and was not only evidence but strong evidence against the defendant, who stood in the same place by derivation of title and by legal obligation as *Leathley*; and *Leathley* upon his oath in a suit against him by the vicar has declared that the tithe is due to the rector, and

1812.

Lady DARTMOUTH *against* ROBERTS.

cross-examining. There is another ground on which it may be sustained, for it was a proceeding in a suit which the vicar had instituted, and upon the coming in of the answer had abandoned. Now the contention here is that the vicar had the right; it seems reasonable then that any medium of proof, by which it could be shewn that the vicar had not the right, should be admissible; but that is shewn by proving that the vicar made his claim, and upon an adverse title being set up against him, abandoned such claim, and since that time the tithe has been taken by the rector; surely that is strong evidence. As to the question upon the weight of evidence, it has already been fully considered; and it does not appear to involve a right of any great extent. The vicar does not set up a claim, but only the defendant, who does not choose to pay tithe to any one, and so when the rector claims he sets up the vicar's right, and vice versâ. If this had been a claim by the vicar to the whole tithe, and involved all the parish, the case might have been more nice; but here supposing this action conclusive, it can only be so in respect of four acres, and the costs of another trial would exceed the value. In a case then where the right of Lord *Dartmouth* is not impeached, but is consistent with the enjoyment, and where the vicar having once made his claim has abandoned it, I think it would be going too far to send the case down to a new trial, for so small a value.

Rule discharged.

1812.

Saturday, Nov. 21st.

STOTT *against* STOTT and PILLING.

Trespass quare clausum fregit, &c.; plea, that defendant was seised in his demesne as of fee of a message, &c., in the parish, and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, *occupiers* of the messuage, &c. over the locus in quo to and from the messuage, &c. as appertaining thereto; replication, that defendant and all those, &c. have not the said way as appertaining to the said messuage, &c.: Held that the defendant's shewing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the locus in quo belonged, was evidence sufficient to support his plea, although the messuage was let to and in the occupation of a tenant, and the defendant only occupied a newly built house in the parish at the time of the trespass.

Plea that defendant was seised in his demesne as of fee, &c. and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, *occupiers*, &c. is good, without alleging that the defendant is occupier.

THE plaintiff brought an action of trespass for breaking and entering her close called the *Lane*, in the parish of *Rochdale*, in the county of *Lancaster*, and breaking gates, &c., and with horses and carriages damaging the grass. The defendants pleaded, 1st, not guilty; 2dly, a justification under a public right of way over the locus in quo, which was wrongfully stopped up; 3dly, (upon which the question turned,) that the defendant *Pilling* before and at the time when, &c. was and still is *seised in his demesne as of fee* of and in a certain messuage, and divers, to wit, 50 acres of land, with the appurtenances, situate at *Spotland* in the said parish of *Rochdale* in the said county, and that he, *Pilling*, and all those whose estate he now hath, and at the said time when, &c. had, of and in the said messuage and land, with the appurtenances, from time immemorial have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said *Pilling*, at the time when, &c. ought to have had and used for himself and themselves, and his and their farmers and tenants, *occupiers* of the said messuage and land, with the appurtenances, and his and their servants, a certain way on foot and horseback, and with carriages, &c. from the said messuage and land with the appurtenances, unto, into, &c. over and along the said close of

1812.

STOTT *against* STOTT.

the plaintiff called the *Lane*, in which, &c. unto and into a certain common, &c., and back again, &c. as to the said messuage and land, with the appurtenances belonging and appertaining; and the said defendant *Pilling*, being so seised of his said messuage and land, with the appurtenances, and having occasion to use the said way with horses and carriages, and the other defendant *Stott*, as his servant, and by his command, at the said time when, &c. did pass from the said messuage and land, with the appurtenances unto, into, &c. through and over the said close of the plaintiff, called the *Lane*, in which, &c. unto the said common, and so back again, using the said way, there for the purposes and on the occasion aforesaid, as they lawfully might, and so the defendant proceeded to justify the trespass alleged, and the breaking of the gate which wrongfully obstructed the way. There was a fourth plea to the same effect, only claiming the prescriptive right of way from *Pilling*'s messuage and land over the locus in quo to *Whitworth* and back again. The plaintiff after joining issue on the not guilty, and traversing the public right of way, 2dly pleaded in bar; as to the 3d plea, replied that the defendant *Pilling* and all those whose estate he now hath, and at the time when, &c. had of and in the said messuage and land, with the appurtenances, for the time being, from time immemorial *have not nor have been used nor accustomed to have*, nor of right ought to have had, nor ought the defendant *P.* still of right to have for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, and his and their servants, *the said way*, &c. as to the said messuages and land with the appurtenances belonging

1812.

STORR *against* STORR.

and appertaining in manner and form as the said defendants have in their said plea alleged, and this the plaintiff prays may be inquired of, &c. There was the like replication to the 4th plea.

The facts proved before *Le Blanc*, J., at the trial, which gave rise to the question now made, were that the trespass was committed by the defendant *Pilling*, and his servants in passing over the locus in quo; that the defendant *Pilling* was the owner of an ancient messuage on his estate in the parish of *Rochdale*, to and from which the prescriptive rights of way stated in the 3d and 4th pleas led; but he had before then let that messuage to a tenant who was in the occupation of it at the time of the trespass stated; and he had about 10 years before built for himself a new house on a different part of the same estate, which he was occupying at the time. These facts came out upon the cross-examination of the defendants' witnesses; upon which the plaintiff insisted that the justification applied only to the new house occupied by *Pilling* at the time, and not to the old house, which was in the occupation of his tenant, and that she was entitled to a verdict upon the proof of their justification, as applied to the ancient house in the occupation of *Pilling*'s tenant in the same parish. The learned Judge entertained some doubt on the question, as to the applicability of such evidence, but he suffered the cause to go on; and a verdict was taken for the plaintiff on the general issue, and the first special plea insisting upon the way as a public way; and a verdict for the defendants on the 3d and 4th special pleas, with leave to the plaintiff to move to set aside the verdict for the defendants on the two last issues, and enter the verdict for the plaintiff on those issues.

A rule

1812.

STOTT *against* STOTT.

A rule nisi for that purpose, or for the purpose of arresting the judgment on these pleas, having been obtained in the last term,

Scarlett and *Richardson* now shewed cause, and relied on this being the invariable form of pleading such a right as the present; the plea, whether it be pleaded by the tenant or owner, always alleges the right to be in the owner of the fee, for himself, his farmers, and tenants, occupiers of the premises, with this difference, that where the tenant pleads it, he goes on farther to allege his occupation. Here if the plaintiff had meant to question the defendant *Pilling*'s right as occupier, she should have pleaded that he was not in possession, instead of traversing the prescription; because unless that be done, the possession is admitted by admitting the general allegation of the defendant's seisin; so much so, that even upon a traverse of the seisin, it would not have been open to the plaintiff to shew that the defendant was not in possession, because it must appear upon the record, if the party would avail himself of it.

Holroyd and *J. Williams* contrà, said that this involved a very important rule of pleading, as it regarded the evidence which might be applied to it; which they contended to be this, that where a defendant justifies in respect of a right of way to be exercised only by the occupier of land, and alleges a seisin in fee in himself, there he can only apply his justification to such land as he is the occupier of, because coupling his allegation with the right claimed, it imports that he claims in right of his possession. So here the right claimed by

1812.

STOTT *against* STOTT.

the defendant is a right founded on the occupation; it is for himself, his farmers, and tenants, occupiers of the messuage, &c.; therefore when he is justifying a trespass under such a right, he cannot shift his ground, and prove another right in respect of a messuage not in his occupation. It is an easement which, if it exist at all, is annexed to a messuage of which he is occupier, and of which he alleges himself to be seised in fee; his evidence therefore must apply itself to such a description of messuage and no other. It may be said perhaps that the plaintiff should have new-assigned, so as to have fixed the defendant with a trespass in using the way to one particular house, and thus have restrained his proof to a right of way in respect of that house; but how could the plaintiff know that the defendant had two houses, one in his own occupation and the other not, or that the way was pleaded in right of any other house than that which he occupied, and to and from which it had been exercised? All therefore that the replication could do was to traverse the prescriptive right in respect of the house which he occupied; neither his seisin in fee, nor his right of way in respect of the other house, could be traversed, because both were true. If a new assignment was necessary in this case, it would be necessary in every case where the defendant has no right in respect of the house he occupies, unless the plaintiff can be sure that he has no right in respect of any other house. It may be said that if trespass be brought and liberum tenementum pleaded, it is enough, in maintenance of such plea, to shew any freehold within the parish, and that a new assignment is necessary to fix the defendant, with the trespass, at a particular

1812.

STOTT *against* STOTT.

particular place; but liberum tenementum, like demesne, does not import that he is in the actual possession; for although the land be actually in the possession of a termor, yet is it the demesne and freehold of the owner, and if the termor be ejected, the possession shall vest in the owner, and he shall have an assize for it, and shall say that he was seised in his demesne as of fee; *Co. Lit.* 17 *a. Plowd.* 191. The case of *Savile* v. *Grinsditch* (*a*) shews that the seisin in fee may be disapproved, though the traverse be only on the prescription. That was trespass, and prescription was made by a que estate, as here, and issue taken on the prescription; and because the estate in one *Vavesour*, under whom the defendant claimed, was an estate tail only, therefore the prescription was held not good, which sounded in fee simple; and for this *Clayt.* 30., *pl.* 52. is cited.

Lord ELLENBOROUGH, C. J. As at present advised I have no hesitation in saying that the case from *Viner* is not law nor any thing like it. To hold that upon issue taken on the prescription, evidence could be given to shew that he was only seised in fee tail instead of fee simple, was going a great way, if indeed the case be of any weight at all. As to the question now before us, whenever a doubt appears to exist in the minds of intelligent advocates, the Court are always inclined to pause before they decide it; but here it seems to me that we are confined to the matter of this traverse. Here is a plea that the defendant is seised in fee, and that draws to it all the rights annexed to such a seisin. But it is

(*a*) 18 *Vin.* 135, tit. *que estate*, B.

said

1812.

STOTT *against* STOTT.

said that this imports an occupation, in respect of which the claim is made to a right of way. Be it so; but, on the other hand, all that which is not traversed is admitted; it is admitted therefore on the record, that the defendant was seised in such manner as to be entitled to a right of way, if the right of way exist. Then we come to the subject-matter of traverse, and that is, that the defendant and all those whose estate he has in the said messuage, &c., from time immemorial have used the said way, &c. What is there here that draws into question his seisin in fee? the only question is, whether as incident to that estate, of which he is admitted to be seised in fee, he has such a right; and it appears that he has. If the plaintiff had meant to insist that such right would not cover the exercise of a right of way to the new house, he should have done so either by a new assignment or by a special replication to that effect.

LE BLANC, J. (*a*). At the trial the objection struck me forcibly, but not so as to induce me to stop the cause, and therefore the right was tried, and I am glad of it. It came out upon the evidence that the house in which the defendant *Pilling* lived, was only a new house, having been built about 10 years, but it also appeared that he had an ancient messuage and garden in the occupation of his tenant. The only point on which a doubt occurred to me at the trial, (for his seisin in fee was admitted) was whether he was tied down by the form of pleading to shew his occupation. It seems to me now that the plaintiff might have replied the facts

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

by

1812.

STOTT *against* STOTT.

by way of new assignment, viz. that true it is that the defendant was seised in fee of a messuage, &c. but that he had let it to another, and at the time of the trespass was only the occupier of a newly built messuage, and that this action was brought for a trespass in passing to and from such newly built messuage. If the plaintiff had so replied he would have brought the pleadings to the issue for which he now contends; or perhaps according to modern practice, he might have obliged the defendant, by a proper application, to state in respect of which messuage he claimed the right of way.

BAYLEY, J. I do not think that this form of pleading tied the defendant down to shew that the house he occupied was the house in respect of which he claimed the right of way; the occupation is not made part of the issue of this traverse. What the defendant has pleaded is true, he is seised in fee of an ancient messuage and land; and the word seisin in pleading does not necessarily import that the land is in his occupation and possession. In pleading it is continually the practice for the lessee to justify under his landlord, as servant to the landlord, and for that purpose he pleads a seisin in fee in his landlord, and if the seisin be traversed, such traverse would not be upheld by proving that the landlord had underlet; which shews that this allegation does not of necessity import that he was possessed. The defendant's plea is therefore true, for he has a right of way for himself, his farmers and tenants, &c. to and from the messuage of which he is seised; and the proper course for the plaintiff, upon the defendant's setting up a claim in respect of a messuage and 50 acres of land, would have been to have inquired whether

ther there was any other messuage on that land; and if he found that there was an old messuage, he should have admitted the claim, and pleaded that there was a new house, and that the trespass complained of was committed extra viam, and in the way to the new house.

Holroyd then insisted upon that part of the rule which went to arrest the judgment, that the pleas should have gone farther, and alleged that the defendant was the occupier of the messuage and land, in right of which he claimed the prescription, in order to bring him within the prescription which was for occupiers only. But the Court said that the allegation of seisin was sufficient, and primâ facie implied occupation unless the contrary be shewn in pleading; and that the plaintiff should have replied that the occupation was in another, if she had meant to insist upon it.

Richardson contrà, observed that this form of plea had been the constant form since the time of *Rastal*.

Per Curiam, Rule discharged.

1812.

Monday, Nov. 23d.

The Duke of ST. ALBANS *against* ELLIS.

Covenant by lessee that he will at all times during the term plough, sow, manure, and cultivate the demised premises (*except the rabbit-warren and sheep-walk*) in a due course of husbandry; if lessee plough the rabbit-warren and sheep-walk, covenant lies against him.

THE plaintiff declared in covenant upon an indenture of demise, dated 29th of *September* 1796, whereby the late Duke demised to the defendant "all that park or place, or large tract of ground, situate in the parish of *Lenton and Arnold*, in the county of *Nottingham*, called *Bestwood Park*, and which was inclosed by a ring fence, and also all the messuages, &c. closes, farms, lands, tenements, and hereditaments comprehended within the said park or ring fence, with the appurtenances, (except as therein excepted,) to hold for 21 years from the date." The declaration then set forth covenants by the defendant to keep the buildings and fences in repair, and to make certain plantations yearly, "and also that the defendant should not at any time during the said term plough, break up, sow, or grow with corn, or convert into tillage any of the meadows or pasture ground thereby demised, or any part thereof, under the penalty of forfeiting and paying to the Duke, &c. 20*l.* for every acre that the defendant should so plough, &c." Then followed another covenant by the defendant, not to sell or carry off the premises straw, &c., but consume it upon the premises, &c. "and further, that the defendant should at all times during the said term plough, sow, manure, and cultivate the said premises thereby demised, (*except the rabbit-warren and sheep-walk,*) in a regular and due course of husbandry according to the custom of the country." The declaration then stated that the defendant entered on the demised premises, and that the reversion descended on the plaintiff; and then it proceeded to set out different breaches of covenant, inter alia, 8thly, "that

1812.

The Duke of ST. ALBANS *against* ELLIS.

"that the defendant ploughed and sowed 500 acres of the said rabbit-warren and 500 acres of the said sheep-walk in the said indenture mentioned, contrary to the form and effect of the said indenture and of the covenant of the defendant." To this breach the defendant pleaded that he "did plough, sow, manure, and cultivate the said rabbit-warren and sheep-walk in a regular and due course of husbandry, according to the custom of the country, and according to the form and effect of the said indenture, and of the said covenant of the defendant by him in that behalf made as aforesaid." To this there was a general demurrer.

Reader, in support of the demurrer, observed, that no particular form of words was requisite towards making a covenant, and therefore wherever the intent of the parties could be collected out of a deed for the doing or not doing a thing, that was sufficient to constitute a covenant; in support of which proposition he cited *Lant* v. *Norris* (*a*) and *Hill* v. *Carr* (*b*). He then contended that the breach alleged fell either within the express covenant, not to plough any of the meadow or pasture ground, under which description both the sheep-walk and rabbit-warren might well be considered; or within the implied covenant arising out of the exception of the rabbit-warren and sheep-walk; by which exception the parties clearly meant that neither the rabbit-warren nor the sheep-walk should be ploughed. The very nature of this property demands such a construction; for to allow its being ploughed would be nothing less than allowing of its destruction; and he cited *Cole*'s case (*c*).

(*a*) 1 *Burr.* 290. (*b*) 1 *Ch. Ca.* 294. (*c*) *Salk.* 196.

Richardson,

1812.

The Duke of ST. ALBANS *against* ELLIS.

Richardson, contrà, argued that if it had been intended to restrain the defendant from ploughing up the sheep-walk or rabbit-warren, it would have been so expressed amongst the negative covenants, and not allowed to rest upon words introduced by way of exception to the affirmative covenants; which was in reality an exception for the benefit, and not in restraint of the tenant. By the covenant the tenant was bound to plough, sow, and manure in a husbandlike manner all the arable, but as to the excepted parts he was not to be under the same obligation. Suppose this, instead of being a covenant to cultivate the arable, had been a covenant to keep in repair the house, except the main timbers; would it be a breach of such covenant, that the tenant had repaired the main timbers; or would he not in so doing be rather considered as having done more than by his covenant he was compellable to do? So here the object of the exception was to exempt and not to restrain the tenant.

Cur. ad. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court. After stating the declaration, the plea, and the demurrer; and particularly the covenant stated in the declaration, whereby the defendant agreed that "he would from time to time, and at all times during the said term, plough, sow, manure, and cultivate the said premises thereby demised (*except the rabbit-warren and sheep-walk*) in a regular and due course of husbandry, according to the custom of the country," &c.; on which a breach was assigned for ploughing, &c. the rabbit-warren and sheep-walk, as upon an implied covenant that the parts so excepted should not be ploughed, &c. at all: his Lordship continued, Upon consideration we think that the object

1812.

The Duke of ST. ALBANS *against* ELLIS.

object of introducing this exception (which is as much a covenant or agreement as the rest of the stipulation in which it is placed), was to obviate a conclusion which might otherwise be drawn from the generality of the antecedent words, that the duty of the lessee under the covenant extended to the ploughing, sowing, manuring, and cultivating all the demised premises, including the rabbit-warren and sheep-walk; which were not in their own nature the proper subject of such cultivation; and to declare that they should not be so dealt with; as indeed they could not, in any "regular and due course of husbandry according to the custom of the country," which are the words which follow the provision for ploughing, sowing, and cultivating: and not only, to obviate the conclusion above mentioned, but to negative the doing thereof; or, in other words, to agree that it should *not* be done; considering the words "*except* the rabbit-warren and sheep-walk," in this place, as tantamount to the words "*but not* the rabbit-warren and sheep-walk;" which would have imported more directly perhaps a negative of ploughing the rabbit-warren and sheep-walk. But by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it. If the breach be well assigned, the plea is wholly immaterial and impertinent: for it is no answer that the lessee ploughed in a due course of husbandry that which he was bound by his covenant not to have ploughed at all. The plaintiff therefore is entitled to judgment upon his demurrer to this plea.

Judgment for the Plaintiff.

1812.

Tuesday, Nov. 24th.

PHILLIPS *against* BATEMAN and Others. In Error.

The defendant, on occasion of there being a great run upon a banking-house, went to the bank and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders then present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper, "I do hereby authorize *G. B.* to assure the inhabitants of *Pembroke* and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the *Milford* Bank, as far as the sum of 30,000*l.* will extend to pay:" Held that the bank having afterwards stopped payment, the defendant was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage.

BATEMAN and others brought their action on the case in the Court of Common Pleas against *N. Phillipps*, and declared in the first count, that whereas before the making of the promise of the defendant, &c. *C. A. Phillipps* and *T. Phillipps* were carrying on the business of bankers, at a banking-house called the *Milford* and *Pembrokeshire* bank, at *Milford*, in the county of *Pembroke*, and as such bankers had made and issued divers promissory notes, payable to bearer on demand, which notes at the time of making the promise, &c. were outstanding in the hands of divers and very many holders, and were wholly unsatisfied by the said *C. A. P.* and *T. P.* and whereas the credit of the said *C. A. P.* and *T. P.* as such bankers, had become suspected, and their sufficiency doubted, whereof the defendant had notice, and was desirous of supporting and maintaining the credit of the said *C. A. P.* and *T. P.* as such bankers, and thereupon afterwards, on the 22d of *March*, 1810, *in consideration* of the premises and also in consideration that the plaintiffs at the request of the defendant would, *among other persons of the public*, accept and receive as current money such of the said notes then issued by the said *C. A. P.* and *T. P.* as such bankers, of and from the holders thereof, as might be tendered to them in that behalf, the defendant under-

took

1812.

PHILLIPPS *against* BATEMAN. In Error.

took and promised the plaintiffs *to be accountable to such of the public as were or should be holders of the said notes* so made and issued as aforesaid, for the payment of the same, *as far as the sum of* 30,000*l. would extend to pay.* And then the plaintiffs averred that *they* confiding in the said promise of the defendant did, *amongst other persons of the public*, afterwards, to wit, on the same day and year aforesaid, and on divers other days, &c., accept and receive as current money of and from sundry holders thereof all such of the said notes so made and issued by the said *C. A. P.* and *T. P.* as such bankers, as were tendered to them in that behalf; the sums of money payable by which notes so accepted and received by the plaintiffs, in the whole amounted to 3000*l.*; and although the said *C. A. P.* and *T. P.* afterwards, and while the plaintiffs held the said last-mentioned notes, to wit, on the 28th of *August* 1810 became bankrupt, and wholly unable to pay and satisfy the last mentioned notes; of all which premises the defendant had notice; and although the defendant hath not since the making of his promise, been accountable to such of the public as were or became holders of the said notes so made and issued as aforesaid for the payment of, or paid or satisfied, so many of the said notes so made and issued as aforesaid, as the sum of 30,000*l.* would extend to pay, or any note whatsoever so made and issued by the said *C. A. P.* and *T. P.* but hath therein wholly failed and made default; and although the defendant was afterwards requested by the plaintiffs to pay to them the amount of the said sums made payable by the said notes so by them accepted and received as aforesaid; yet the defendant would not, when so requested, or at any

1812.

PHILLIPPS *against* BATEMAN. In ERROR.

time afterwards, be accountable for the payment, nor did pay or satisfy the said notes so accepted and received by the plaintiffs, but refused so to do; whereby the said notes so accepted and received by the plaintiffs have been and still are wholly due and unpaid to them. The second count only differed from the first in these respects, that after making an additional recital that *C. A. P.* and *T. P.* as such bankers, had before the making of the defendant's promise, and until the suspicion of their credit aftermentioned, received credit as solvent and sufficient persons, and made and issued divers notes, &c. (as before) it stated the consideration and promise thus. *In consideration* of the premises, and also in consideration that the said several persons who were then or thereafter should become the holders of the said notes would give the same credit to the said *C. A. P.* and *T. P.* as such bankers, touching the said notes, as the said *C. A. P.* and *T. P.* had at any time before the said suspicion of their credit received, and would also consider and treat the said notes as good, the defendant *promised* such of the public severally and respectively as then were or thereafter should become the holders of the said notes to be accountable for the payment of the said notes as far as 30,000*l.* would extend to pay. And then the plaintiffs averred that they, at the time of making the defendant's promise, and *before the insolvency* of the said *C. A. P.* and *T. P.* became the holders of sundry of the said notes, to the amount of 3000*l.*, and so continued to be and were until the insolvency of the said *C. A. P.* and *T. P.*; and that they, confiding in the promise of the defendant, did, from the making of the said promise until the insolvency of the said *C. A. P.* and *T. P.* give

give the same credit to them as such bankers touching the said notes, as the said *C. A. P.* and *T. P.* at any time before the suspicion of their credit received, and did also consider and treat the said notes as good; and although the said *C. A. P.* and *T. P.* did afterwards, and while the plaintiffs were such holders of the said notes, to wit, on the 28th of *August* 1810 become insolvent, and wholly unable to pay and satisfy the said notes, &c.: and so it concluded as in the first count. The third count, after reciting as in the first, that before the defendant's promise *C. A. P.* and *T. P.* were carrying on business as bankers, at *Milford*, and had made and issued divers promissory notes, for divers sums, payable to bearer on demand, of which very many persons were holders (proceeded) and whereas before and at the time of the defendant's promise the credit and sufficiency of the said *C. A. P.* and *T. P.* as such bankers, had become suspected, and were greatly doubted by divers and very many persons, as well holders of the said notes as others, and payment of divers sums of money due and owing by the said *C. A. P.* and *T. P.*, as well upon and by virtue of certain promissory notes made and issued by them as such bankers, as otherwise, had been demanded of them by divers persons, and it was inconvenient to the said *C. A. P.* and *T. P.* forthwith to pay and satisfy, and they were unable forthwith to pay and satisfy the several promissory notes so made and signed by them, and which were outstanding and unsatisfied in the hands of divers persons; of all which premises the defendant had notice; and the *defendant being desirous of supporting the credit of the said* C. A. P. *and* T. P. and of promoting the currency and circulation of the said promissory notes so by them made and

1812.

PHILLIPPS *against* BATEMAN. In Error.

issued, did then and there, to wit, on, &c. make and subscribe a certain declaration or assurance in writing, touching the said notes, as follows: "I do hereby undertake to be accountable for the payment of the notes issued by the *Milford* Bank, (meaning by the said *C. A. P.* and *T. P.*) at their said banking-house called the *Milford* and *Pembrokeshire* Bank, as far as the sum of 30,000*l.* will extend to pay; which will be an additional security to the public to that amount to the estate and effects of *Charles Allen Phillipps* and *Thomas Phillipps*, Esqrs. partners in the said bank. (Signed) *Nathaniel Phillipps*." And the defendant did also then and there, to wit on the same day, &c., and on divers other days, publish the contents in substance and effect of the said declaration or assurance in writing, to wit, at &c.: and then the plaintiffs averred that they having notice of the said declaration or assurance of the defendant, and giving credit thereto, and relying on the faithful performance thereof, did afterwards, to wit on the same day, &c. and on divers other days, &c. take and receive in payment from divers and very many persons, divers and very many of the said notes for payment of divers sums, amounting in the whole to a large sum, but less than 30,000*l.*, to wit, to 3000*l.* *and did hold and keep the same without forthwith demanding payment thereof* from the said *C. A. P.* and *T. P.*; and then the plaintiffs averred that the said *C. A. P.* and *T. P.* afterwards, and while the plaintiffs so had and held the said several last-mentioned notes in their possession, to wit, on the 25th of *August* 1810, became bankrupt and wholly unable to pay and satisfy the said notes, so made and issued by the said *C. A. P.* and *T. P.* whereby the plaintiffs could not nor can obtain from the

the said *C. A. P* and *T. P.* the payment of the said notes so received and taken, and kept and held by the plaintiffs as aforesaid; of all which premises the defendant had notice, and the defendant has not since the making of his promise aforesaid been accountable for the payment of or paid or satisfied so many of the said notes so made and issued by the said *C. A. P.* and *T. P.* as aforesaid, as 30,000*l.* would extend to pay, or any of such notes whatever, but hath wholly made default; by reason of all which premises the defendant became liable to pay to the plaintiffs upon request the amount of the several sums payable by the said notes so by them taken and received, and held and kept as aforesaid; *and being so liable, the defendant in consideration thereof promised*, &c. The fourth count stated that whereas before and at the time of the defendant's promise the said *C. A. P.* and *T. P.* were indebted to the plaintiffs in 3000*l.*, upon certain promissory notes payable on demand for divers sums therein respectively mentioned, before that time, among other promissory notes of the same sort and description, made and issued by the said *C. A. P.* and *T. P.*, and then in the possession of the plaintiffs as the holders thereof, and then wholly unpaid and unsatisfied, and thereupon afterwards on the 22d of *March* 1810, *in consideration* of the premises, and also in consideration that the plaintiffs at the instance and request of the defendant would *forbear to sue* the said *C. A. P.* and *T. P.* for the recovery of the value of the said several notes so in the possession of the plaintiffs, the defendant promised the plaintiffs to be accountable for the payment of all the said promissory notes then issued by the said *C. A. P.* and *T. P.* as far as 30,000*l.*

1812.

PHILLIPPS *against* BATEMAN. In Error.

30,000*l.* would extend to pay; and then the plaintiffs alleged their forbearance from that time to sue *C. A. P.* and *T. P.*; and that though the said *C. A. P.* and *T. P.* afterwards, and while they continued so indebted to the plaintiffs, became bankrupt and unable to pay, &c., of all which the defendant had notice; yet that the defendant, though requested, had not been accountable to them for the payment of, nor had paid the said notes, &c. The fifth count was similar to the last, alleging a promise by the defendant in consideration that the plaintiffs would *forbear and give time* to the said *C. A. P.* and *T. P.* for the payment of 3000*l.* upon their notes. The defendant pleaded that he did not undertake and promise in manner and form as the plaintiffs had complained against him, on which issue was joined. And at the trial before the Lord Chief Justice of *C. B.*, a verdict was found for the plaintiffs upon those five counts for 3119*l.* 4*s.*, for which they afterwards obtained judgment, and their costs. A bill of exception was tendered at the trial to the direction of the learned Chief Justice to the jury, upon the evidence; which was signed and recorded by him, and error assigned thereupon, that he declared and delivered his opinion to the jury that the evidence offered and produced on the part of the plaintiffs was sufficient, and that the same was admissible and ought to be allowed to entitle the plaintiffs to a verdict on the five counts stated; whereas the evidence was not admissible nor sufficient for that purpose; and error was also assigned in giving the verdict and judgment thereupon.

The bill of exceptions stated that upon the trial of

1812.

PHILLIPPS *against* BATEMAN. In Error.

of the issue the counsel for the plaintiffs called *G. Bowling*, a witness, who proved that *C. A. Phillipps* and *T. Phillipps* were partners, and carried on business as bankers at the *Milford* Bank, long before the 22d of *March* 1810, and until their failure in *July* following. That on the 21st of *March* 1810 there was a great run on the *Milford* Bank, and on that day the witness was at the bank, and saw the defendant, who lived at *Slebeck*, and was a man of property there, but who had no concern in the bank, come in, and heard him ask what was the cause of the run upon the bank, and heard him also say, "the notes of the bank are good, and if the holders will bring them to *Slebeck*, I will take them for corn, or at *Bristol*, for sugar." That the defendant then went into a room with the bankers, and in about an hour and an half afterwards came out again into the bank, where the witness still was, and where many persons were waiting for payment of the notes of the *Milford* Bank, and the defendant, in the presence of the witness, spoke generally to the persons, and said, "I have come to a resolution to support the bank with 30,000*l.*" The witness then told the defendant that he had kept the persons there to hear it, and that it would be of great satisfaction to the country. The witness further proved, that the persons who were there for payment of their notes were satisfied, and said they would take no more money than was necessary for their present occasions, and would keep the rest of their notes until they got into currency again. The witness further stated, that nothing was said at that time about any written paper, but after the persons had left the place, he represented to the defendant that many of the persons who

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1812.

PHILLIPPS *against* BATEMAN. In Error.

were holders of notes lived in his neighbourhood, and that he should be glad of an authority in writing for using the defendant's name, and that he would sketch out such an authority in writing as he thought would be sufficient; and that he did draw out the following form, which was signed by the defendant on the next day, and which was duly proved by a subscribing witness, and was duly stamped, viz. "I *Nathaniel Phillipps*, of "*Slebeck*, in the county of *Pembroke*, Esq. do hereby "authorize Mr. *Geo. Bowling* to assure the inhabitants "of the town of *Pembroke* and its vicinity, that I do "hereby undertake to be accountable for the payment "of the notes issued by the *Milford* Bank, as far as the "sum of 30,000*l.* will extend to pay; which will be an "additional security to the public to that amount to the "estate and effects of *Charles Allen Phillipps* and *Thomas* "*Phillipps*, Esqrs. the partners in the said bank. *Mil-*"*ford*, 22d *March* 1810. (Signed) "*Nath. Phillipps*," and witnessed. The witness then stated that he read this paper at the door to the multitude who were there, and that it was afterwards printed and dispersed about by messengers amongst the different bankers in the neighbourhood. But upon his cross-examination by the defendant's counsel, he stated that the plaintiffs, who were bankers at *Haverford West*, were not present that day at the *Milford* Bank, and that he did not know of the delivery of any copy of the said written paper to them; that the witness was an agent for the *Milford* Bank, employed in circulating their notes; that he continued to circulate them until the time of their failure in the *July* following; and that in the interval between the signing the said written paper and the failure of the *Milford* Bank,

1812.

PHILLIPPS *against* BATEMAN. In Error.

Bank, he circulated several thousand pounds worth of notes, and has no doubt that they were all paid. The plaintiffs' counsel then called *W. Reynolds*, who stated that he was a clerk to the plaintiffs' banking-house in 1810, at *Haverford West*, which was seven miles from the *Milford* Bank; and then he produced a bundle of notes, amounting in value to 319*l.* 4*s.*, all which bore date prior to the 22d of *March* 1810; that these notes were notes of the *Milford* Bank, drawn by *C. A. P.* and *T. P.* and payable to bearer on demand for the sums therein respectively mentioned; that these notes came into the possession of the plaintiffs *after* the time of the said paper having been signed by the defendant, and before the *Milford* Bank stopped payment; and that the plaintiffs heard of the engagement made by the defendant on or about the day of its date. That the plaintiffs were in the habit of exchanging notes with the *Milford* Bank every week, and that all these notes came into their hands since the last exchange, and that the plaintiffs took none of them after the breaking of the *Milford* Bank. That he went to the *Milford* Bank on the 17th of *August* 1810, and made there a formal demand of payment of these notes, but there was nobody there to pay them; and with this evidence the plaintiffs' counsel closed their case. Whereupon the defendant's counsel objected that the evidence produced on the part of the plaintiffs was not sufficient, nor admissible to entitle the plaintiffs to a verdict, on the following grounds; first, that there was no evidence whatever of any *contract* between the plaintiffs and the defendant. Secondly, that there was no evidence whatever of any *consideration* having existed between the plaintiffs and the defendant to support any undertaking on the part of the defendant to guaranty the payment

1812.

PHILLIPPS *against* BATEMAN. In Error.

payment of these notes. And, lastly, that, admitting such a contract to have been entered into as is stated in the declaration, and admitting that there was a sufficient consideration for it, yet that such contract was an agreement by the defendant to answer for the default of third persons, and was therefore a promise within the statute of frauds, and must be proved by writing, and by writing only; but that the written paper produced in evidence, and signed by the defendant, was not a sufficient agreement within that statute, because it only stated the undertaking of the defendant, but did not state the *consideration* on which such undertaking was founded. But to this the plaintiffs' counsel insisted upon the admissibility and sufficiency of the evidence offered by them to entitle the plaintiffs to a verdict. And thereupon the Chief Justice delivered his opinion, that the evidence offered by the plaintiffs was sufficient, and that the same was admissible and ought to be allowed to entitle the plaintiffs to a verdict, and with that direction he left the issue to the jury, who thereupon found a verdict for the plaintiffs on the first five counts of the declaration, and 3119*l.* 4*s.* damages, and a verdict for the defendant as to the other counts. Whereupon the defendant's counsel excepted to the said opinion and directions of the Chief Justice, for the reasons stated, and tendered their bill of exceptions, which the Chief Justice signed, &c.

Tindal, for the plaintiff in error, insisted upon the three foregoing grounds of objection: first, that there was no contract between the plaintiff and defendants; 2dly, no consideration for any contract; 3dly, the consideration,

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1812.

PHILLIPPS *against* BATEMAN. In Error.

if any, was not expressed in the contract; which therefore was void by the statute of frauds.

1st, This was only an engagement on the part of the plaintiff in error that he would support the bank with 30,000*l.*, and not that he would be liable to any individual holders of notes; but supposing it otherwise, still as the defendants were neither holders of notes, nor present at the time when the engagement was made, they were not parties to it, but the engagement, such as it is, was made with other persons, who could not assign it, for it is but a chose in action; and except in the case of the king, or where by the law merchant bills of exchange, or by the statute promissory notes, are made transferrable, a chose in action cannot be assigned. If it should be said that the engagement was made with the persons present, as trustees for or representatives of the then holders, and all future holders of notes, it may be answered, that then the action should have been in the names of the persons to whom the promise was made; 1 *Roll. Abr.* 30. tit *Action sur Case*, Z. Qui avera action; *Clifford* v. *Berry* (*a*), and *Norris* v. *Pine* (*b*). And as to the promise itself as laid in the declaration, it is not supported by the evidence; for the declaration states the promise in two ways, viz. to be accountable to such of the public as were or should be holders of the notes, whereas according to the evidence the promise was only to the inhabitants of *Pembroke* and its vicinity; and to be accountable to the defendants in error, of which there was no evidence. 2dly, There was not any consideration, for there was no mutuality between the parties, neither the inhabitants of *Pembroke* and its vicinity, nor the public,

(*a*) 1 *Vin. Abr.* 334. (*b*) 2 *Lev.* 211. cited in *Dutton* v. *Poole.*

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1812.

PHILLIPPS *against* BATEMAN. In Error.

being bound to take the notes or to forbear demanding payment of them; but a promise is not good unless there be a consideration at the time; it cannot be made good by matter ex post facto, *Earle* v. *Peale* (*a*); and it must be a consideration moving to the party himself, and not to a stranger, *Crow* v. *Rogers* (*b*). 3dly, The case is within the statute of frauds (*c*), because there is no consideration stated in the written contract, which, according to *Wain* v. *Warlters* (*d*), is an essential part of the agreement, and must be shewn upon the face of it. Again, the consideration is differently stated in the different counts, and in the third there is no consideration whatever; all that is stated is, that the defendant being desirous of supporting the credit of the house, made a certain declaration, and the promise is laid as consequent on the legal liability of the defendant to pay; but there is no legal liability from that which is nudum pactum. Then if there be one count that is clearly bad, it is sufficient for the plaintiff in error, because joint damages being given on all the counts, they cannot be severed, but the whole is bad.

W. E. Taunton, contrà. The consideration for the promise was, that the persons present at the making of it would forbear to press the bank for immediate payment, and though the promise was no doubt limited to the notes then issued, yet it was not limited to the persons then present, or the then holders of the notes, but extended to all those who might thereafter become holders. And this promise is not, as it has been contended, like a

(*a*) *Salk.* 386. (*b*) *Str.* 592.
(*c*) 29 *Car.* 2. *c.* 3. *s.* 4. (*d*) 5 *East*, 10.

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1812.

PHILLIPPS *against* BATEMAN. In Error.

mere chose in action which cannot be assigned, because the notes themselves, which are the subject-matter of the promise, being assignable, the promise may well accompany them. Then as to the objection that the consideration is not to be found in the written agreement, the answer is, that it is apparent on the face of the undertaking, it results from the words and obvious meaning of the written agreement; and this also affords an answer to the objection made to the 3d count, that it sets out no consideration but only the written agreement. Again, forbearance is a consideration, although it be for never so short a time; for, according to *Com. Dig.* (*a*), that which is for the benefit of the defendant, or to the trouble or prejudice of the plaintiff, will amount to a consideration. Now here it appears that many persons upon hearing the promise were satisfied, and said they would forbear to demand payment of the notes, at that time, so that there was a prejudice to some persons. In *Pillans* v. *Van Mierop* (*b*) the defendants were held liable on their promise, because the effect of it was to make the plaintiffs forbear, and to divert them from using due diligence, and yet it was forbearance, not in favour of the defendants, but of a third person; but nevertheless that was held a sufficient consideration. So in *Reynolds* v. *Prosser* (*c*) it was contended in a very learned argument of the reporter, that the plaintiff had not any real prejudice by the forbearance stated as the consideration of the defendant's promise; but the Court, notwithstanding the forbearance was short, and that only during the pleasure of a third person, was of opinion that the consideration was sufficient, and the plaintiff had his judgment. Again, in 1 *Roll. Abr.* 27. *Action sur Case, pl.* 47.

(*a*) *Action upon the Case upon Assumpsit.* B. 1.

(*b*) 3 *Burr.* 1663. (*c*) *Hardr.* 71.

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1812.

PHILLIPPS *against* BATEMAN. In Error.

it is laid down, that if *A.* be arrested by *B.* for a debt, and a stranger undertake to pay *B.* if he will forbear *A.* per paululum temporis, and *B.* discharge *A.*, this is a good consideration, although *B.* arrest him an hour after. But, 2dly, upon the question first made, whether the defendants in error can take advantage of the promise; the rule is, that assumpsit may be brought either by the person to whom the benefit accrues, or by the person to whom the promise is made; *Jordan*'s case (*a*), *Dutton* v. *Poole* (*b*), *Martyn* v. *Hind* (*c*), *Sadler* v. *Payne* (*d*), 1 *Roll. Ab.* 31, *Action sur Case, pl.* 8. *Marchinton* v. *Vernon* (*e*), *Potter* v. *Rayworth* (*f*). Lastly, as to the objection arising out of the decision of *Wain* v. *Warlters* on the 4th sect. of the statute of frauds, not only has the propriety of that decision been questioned by the Lord Chancellor in a case *Ex parte Minet* (*g*), who said that it had been contradicted by a variety of authorities, but it has been expressly overruled in *Ex parte Gordon* (*h*); and the same clause of the statute has received a different construction in cases relating to the sale of lands, in *Cotton* v. *Lee* (*i*), and *Fowle* v. *Freeman* (*k*); and in *Egerton* v. *Matthews* (*l*), which indeed turned upon the 17th section of the act, but which section only differs from the 4th in using the word bargain instead of agreement, this Court did not adopt the same construction as in *Wain* v. *Warlters*.

Tindal in reply. As to *Jordan*'s case, the promise was made to the plaintiff's wife, who was considered as his

(*a*) 27 *H.* 8. 24. (*b*) 1 *Vent.* 318. 332. (*c*) *Cowp.* 437.
(*d*) *Saville*, 23, 4. (*e*) 1 *B.* & *P.* 101. n. (*f*) 13 *East*, 417.
(*g*) 14 *Ves.* 190. (*h*) 15 *Ves.* 286.
(*i*) Cited in 2 *Bro. Ch. Rep.* 564. (*k*) 9 *Ves.* 351. (*l*) 6 *East*, 307.

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agent; and *Dutton* v. *Poole* (*a*) was a special case which turned principally upon the nearness of kindred in which the plaintiff stood to the promisee; *Marchinton* v. *Vernon* is but a loose note at nisi prius, and *Martyn* v. *Hind*, and *Potter* v. *Rayworth* went upon the ground that there was evidence of an admission by the defendant that he had contracted with the plaintiff.

Lord ELLENBOROUGH, C. J. This case has led to a line of argument of very considerable extent, and as three matters of exception were taken to the learned Judge's direction, the duty owing to them has been well satisfied by arguing the case to that extent; but when the Court come to their decision, it would be losing time if they were to decide on a more extended ground than that which the case itself calls for. It appears that this is not a case of an individual promise, for there is not any promise to an individual, but only a promise to add 30,000*l.* to the then failing funds of the *Milford* Bank, and not a promise to the holder of any aliquot part of the notes of the house. The promise is to be accountable for the payment of the notes issued by the *Milford* Bank as far as the sum of 30,000*l.* will extend to pay; thus far the promise goes; what follows, viz. that this would be an additional security to the public to that amount, &c. is only matter of observation upon the effect of the foregoing promise. Such then is the promise in its nature, supposing there was a consideration for it, which is quite another thing; and in its extent, I cannot carry it farther than a promise to the inhabitants of *Pembroke* and its vicinity; if therefore the party would avail himself of it,

(*a*) 2 *Lev.* 210.

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1812.

PHILLIPPS *against* BATEMAN. In Error.

he should bring himself within that class of persons, by stating that he was an inhabitant of *Pembroke* or its vicinity. But the engagement is to be accountable as far as 30,000*l.*; then can that be considered as an undertaking to each individual holder of a 1*l.* note, that the party will become liable to an action at the instance of each; or is it not rather the obvious construction of such an engagement that he will furnish the house with 30,000*l.* in aid of their funds, distributable, as their funds, amongst the creditors of the house? He could not contemplate each individual holder, who were at that time *in nubibus* as to him, and still less could he contemplate a promise to every individual constituting the public at large. Therefore it seems to me that admitting there was a consideration, there was no promise to support this action. But it may be asked, what consideration was there, for without touching upon *Wain* v. *Warlters*, which I shall forbear to do, is there any consideration of forbearance even for a moment? I admit if there be any consideration, the Court will not weigh the extent of it. But here the individual holder might immediately have brought forward his demand, and pressed for payment: nothing is expressed about forbearance, and nothing of that sort is to be inferred from the promise. Therefore without considering the objection as it arises out of the case of *Wain* v. *Warlters*, it appears to me that neither in respect of the promise nor of the consideration can this action be supported. Forbearance is stated in one of the counts as the consideration, but the case fails in making that out.

GROSE, J. I think it clear upon both objections stated by my Lord, that this action is not maintainable.

LE BLANC,

1812.

PHILLIPPS *against* BATEMAN. In Error.

LE BLANC, J. There is a variety of other objections which arise out of this record, but this goes to the substance of the engagement, and the very cause of action. The question is, whether this was a promise to each individual holder of a note, to the extent of 30,000*l.*, or only a promise to supply 30,000*l.* to the general fund of the bank. And it appears to me that it must be considered in the latter point of view, and that the party never intended to make himself liable to each individual holder. The intention seems to have been this; suppose there were 100,000*l.* worth of notes in circulation, the party then comes forward with an undertaking to be accountable to the extent of 30,000*l.*, that is, to secure to the holders, by supplying the funds of the bank to that amount, at least 6*s.* in the pound, in addition to their former security. This seems to me the fair meaning of the undertaking, and this makes it unnecessary to go into the other objections.

BAYLEY, J. I think it never could be the intention of the defendant in the original action to do more than contribute 30,000*l.* towards the supply of the funds of the bank, his neglecting to do which would either be the subject of an action by the whole body of note-holders, if that could be, or of a bill in equity to compel performance; if the defendant's intention went farther, then if notes to the amount of 100,000*l.* were in circulation, he would become liable to as many actions; but such an intention is not fairly to be attributed to this engagement. It will be unnecessary to go through the different objections made to the several special counts, because I agree with the Court that this defendant did not engage to become liable to the

1812.

PHILLIPPS *against* BATEMAN. In Error.

individual holders of the notes, but only to supply so much to the funds of the bank.

Judgment reversed.

Tuesday, Nov. 24th.

WILLIAM LESTER'S Case.

The 50 *G.* 3. *c.* 49., which requires the churchwardens and overseers to submit their accounts to two justices at special sessions to be holden within the 14 days appointed by the 17 *G.* 2. *c.* 38. for delivering in the said account to the succeeding overseers, is not a substitution in lieu of that provision in the 17 *G.* 2., but is cumulative, and if the overseer refuse to deliver in such account to the succeeding overseers within the 14 days, he may be committed by two justices for such refusal.

CAMPBELL moved for a habeas corpus on the behalf of *William Lester*, late overseer of the poor of the parish of *Paddington*, who was detained in custody, under a warrant of commitment signed by two justices, for not delivering in his accounts to the succeeding overseers, within 14 days from the time of their appointment. The warrant of commitment recited the appointment of *Lester* as one of the overseers, and the subsequent appointment of two persons to succeed him in the office, and recited also the 17 *Geo.* 2. *c.* 38. whereby churchwardens and overseers are directed, within 14 days from the appointment of their successors, to deliver in to their successors a just, true, and perfect account, &c. to be verified by oath, &c. and that it had been duly proved before them the justices, that *Lester* had refused to make and yield up to his successors such account as aforesaid, *within the time therein-before mentioned, and limited or appointed for that purpose;* and then went on to direct that *Lester* should be taken into custody, and detained until he should make and yield up such account verified as aforesaid.

It was contended that the 50 *Geo.* 3. *c.* 49. which directs the accounts to be submitted to two justices at a special sessions within the 14 days appointed by the former act, was substituted in place of the obligation to deliver them over to the succeeding overseers. By the

50 *Geo.*

50 *Geo* 3. the overseers who refuse or neglect to submit the accounts to the justices, are made liable to be committed; if, therefore, they have 14 days allowed them for submitting their accounts to the justices, how can they be required within that time to deliver them over to the succeeding overseers? The duty imposed by one act is inconsistent with and would interfere with the other.

Lord ELLENBOROUGH, C. J. The provision in the 50 *G.* 3. seems rather to apply to the manner of examining the accounts when yielded, leaving the accounts still, as before, to be delivered over to the succeeding overseers; but they are also within the 14 days to be submitted to the justices for examination. An ulterior means is afforded of investigating them before the justices; the act only means that they shall be exhibited to the justices; it is, therefore, for a different object. It is very expedient that the succeeding overseers should have the accounts delivered in to them immediately from the former overseers, which is the object of the 17 *G.* 2.; then the 50 *G.* 3. directs that the account so to be delivered shall be submitted to the justices to be examined and approved by them; that, therefore, is manifestly cumulative.

LE BLANC, J. The churchwardens and overseers are to deliver in to the succeeding overseers their accounts verified on oath before one or more justices, who are to sign and attest the same; that is provided for by the 17 *G.* 2. By the subsequent act the accounts are to be submitted to two or more justices at a special sessions; and power is given to them to examine and approve

1812.

LESTER's Case.

such accounts, and they are required to signify their approbation of them under their hands, and then to sign and arrest as directed by the former act. This provision, therefore, is perfectly consistent with the provision in the former act.

Per Curiam, Rule refused.

Tuesday, Nov. 24th.

The KING *against* COOKSON.

The shipper of beer, on which the duty has been paid, which is shipped for exportation to the *West Indies*, is entitled to take the oath appointed by 38 *G.* 3. *c.* 54. *s.* 4. in order to obtain a drawback upon such beer, without being subject to any deduction out of such drawback, in respect of the quantity of beer to be charged in the victualling-bill of the master, for the consumption of the voyage, on which no drawback is allowed: and therefore the Court granted a mandamus to the collector of the excise to administer such oath.

THIS came on upon a rule for a mandamus to the defendant, collector of the excise for the port of *Liverpool*, to administer to *David Paton* the oath touching the exportation of beer, mentioned in the stat. 38 *G.* 3. *c.* 54. *s.* 4., and thereupon to allow or repay the excise duty on five barrels of strong beer exported in the ship *Irlam*, *George Kenzar*, master. This application was made on behalf of *Gladstone* and *Paton*, brewers, at *Liverpool*, the shippers of the beer, on which the duty had been before paid, and which was shipped for exportation to *Barbadoes*. The objection made was that the whole quantity of beer shipped on board the *Irlam* was no more than adequate to the consumption of the crew during the voyage. There was some doubt upon the affidavits whether this beer had not been sold by the shippers to *Kenzar*, the master of the *Irlam*; but as this was denied on the part of those who applied, and as the excise officers were desirous of having the opinion of the Court upon the general question, it was agreed to take the fact, as sworn to on the part of *Gladstone* and *Paton*, that they had shipped the beer for exportation and foreign consumption, on account

1812.

The KING *against* COOKSON.

account of *Barton, Irlam*, and *Higginson* merchants in *Liverpool*. The general question raised was, whether the officers of excise were warranted in refusing the drawback of the duty, to any general shippers of beer on board a certain ship, until a sufficient quantity had been shipped by the master for the consumption of the voyage, on which no drawback was allowed, or until the master should have paid the duty on such quantity. This question had not before occurred in the port of *Liverpool*; but it appeared from the affidavits of several of the excise officers in the port of *London*, that it had always been the invariable practice there upon making out debentures for the drawback on strong-beer exported, to deduct from the total quantity of strong-beer shipped in any ship going from the port of *London* to the *West Indies*, to be exported as merchandise, a certain quantity of the said beer for the stores of the ship, to be spent on the voyage, unless a sufficient quantity, (which was estimated in proportion to the number of persons on board,) was shipped as stores; and to make out the debenture for the drawback only upon the residue, apportioning it amongst the different shippers. This practice appeared to have originated with a view to obviate fraud in the master shipping his beer, as merchandise for exportation and foreign consumption, in order to get the drawback, and afterwards using it as sea-stores.

Abbott shewed cause, and in support of the practice above stated, referred to 1 *G.* 3. *c.* 7. *s.* 5., which allows a drawback on beer shipped for exportation; but to prevent fraud, the seventh section provides that the master of every vessel shall be charged in his victualling bill

1812.

The KING *against* COOKSON.

bill with so much beer as the number of men used to spend in the voyage; the excise whereof is to be recovered according to the laws and rules already established. Now the laws and rules already established, can only refer to the practice above stated, the existence of which has been traced to a period long before the date of this ct; these words therefore are confirmatory of the practice, and as it is a convenient one for preventing fraud, that the party may not obtain the drawback as for beer to be exported, and then dispose of it to the master for the use of the ship's company, the Court will be disposed to sanction it. This will be effected by construing the enactment, requiring the master to be charged in his victualling bill with so much beer, &c. to mean that so much beer shall at all events be placed to his account out of the whole quantity shipped.

Scarlett, in support of the rule, referred to the 12 *Car.* 2. *c.* 24. (*a*)., which imposes a duty on beer, to be paid by the common brewer or seller; and to the 1 *W.* & *M. c.* 22., which allows a drawback on beer shipped for exportation, to be consumed beyond the seas; and contended that all fraud was obviated by the second section of that act, which charges the master with so much beer as the number of men used to spend, and by the 38 *G.* 3. *c.* 54. *s.* 4., which imposes a form of oath on the exporter, that no part of the beer is exported for the ship's use.

Lord ELLENBOROUGH, C. J. This beer has been shipped for exportation, and therefore is within the terms of

(*a*) *Sect.* 15, 16, 17.

the

1812.

The KING *against* COOKSON.

the act. It is said, however, that the officers find a difficulty in charging the master with the duty; but they must recover from the master what they are entitled to recover, and cannot, in order to obviate this difficulty, take the beer of one person to pay the duty of another. Does not the right to the drawback attach on shipping the beer on board? and if the master afterwards use it on board, that cannot divest the right of the shipper to the drawback. It would require an express provision to make him liable for the duty. It appears to me that the practice applies solely to the beer shipped by the captain, but does not apply to a distinct quantity shipped by a general shipper. I cannot see why the officers should not charge the master, in the victualling-bill, with so much duty as he is likely to consume of the beer shipped by others.

BAYLEY, J. The officers may prevent the master from clearing out unless he pays all the duties that he is bound to pay. The construction now put on the act is, that no person is entitled to the drawback on beer shipped for exportation, until the duty is paid by the master upon a quantity equal to the supposed consumption of the crew on board.

Per Curiam, Rule absolute.

The

1812.

Wednesday, Nov. 25th.

The KING *against* The Inhabitants of AMBLESIDE.

Stock in trade is rateable to the poor, notwithstanding it has never been rated in the parish, unless there be some circumstances to take it out of the general rule; but on appeal against a rate on the ground that *A.* is not rated for his stock in trade, the sessions ought to amend the rate, and not quash it.

ROWLAND STUART appealed to the sessions against a rate for the relief of the poor of the township of *Ambleside*, in the county of *Westmorland*. The notice of appeal given by the appellant was addressed to the churchwardens and overseers of the said township, and to *William Wilcock* and others, upon all of whom it was also served, and contained the following objection to the rate, viz. "Because the said *William Wilcock* and the other persons therein named were not then assessed or rated for or in respect of his and their stocks in trade." *Ambleside* is a township having its own overseers and maintaining its own poor. In *May* 1812 a rate was made for the relief of the poor there, intitled "An assessment or rate for the necessary relief of the poor belonging to the township of *Ambleside*, made and assessed the 14th day of *May* 1812, being the first rate at sixpence in the pound, according to a late valuation for the present year;" and was duly allowed and published. This rate was made upon the different persons named therein, amongst whom was the appellant, in respect of their *real* property only, and no stock in trade or other personal property was included in the rate. Upon the trial of the appeal it was admitted that *William Wilcock*, in the notice of appeal mentioned, had stock in trade, which was visible personal property within the said township producing profit, and that no assessment was made upon him in the said rate in respect thereof; but no stock in trade or other personal property had ever been rated within the township. The sessions thereupon quashed

1812.

The KING *against* The Inhabitants of AMBLESIDE.

quashed the rate, and stated the above facts in a case for the opinion of the Court, upon the question whether the rate was properly quashed, because *William Wilcock* was not rated therein in respect of such stock in trade.

Upon this case being called on, after *P. Courteney* in support of the order of sessions, had stated that the question intended to be submitted, was, whether if stock in trade produce a profit, the usage can vary its rateability.

Lord ELLENBOROUGH, C. J. said, Is there not another question, whether the rate ought not to have been amended, instead of being quashed? As to the rateability of stock in trade, that has been settled in *Rex* v. *Darlington* (*a*), if it be ascertained to be profitable. It is then an objection applicable to one person, and the justices should have amended the rate, and not quashed it. The 41 *G.* 3. *c.* 23. was passed for the very purpose of enabling them so to do, in order to prevent the inconvenience of the parish being without funds for the maintenance of its poor in the mean time. We say, therefore, that this rate was not properly quashed, but ought to have been amended. If there are any circumstances to take it out of the general rule, as stated in *Rex* v *Darlington*, they should be stated; if there are none such, the property is rateable. *Rex* v. *White* (*b*) is also to the same effect.

Per Curiam, Order of Sessions quashed.

Fell was against the order of sessions.

(*a*) 6 *T. R.* 468. (*b*) 4 *T. R.* 774.

Thursday, Nov. 26th.

WM. PARKER and Another, Assignees of SAMUEL PARKER, a Bankrupt, *against* SMITH and Others.

In an action by the assignees of a bankrupt underwriter, against defendants, insurance brokers, for the balance of an adjusted account between the bankrupt and defendants, and also for premiums of insurance on policies underwritten by the bankrupt with them as brokers, before the bankruptcy, the brokers are not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, but where the events entitling them to such returns were not known till after such adjustment; nor can they deduct for returns of premium on some of the policies for the premiums of which the action is brought, the events entitling them to which returns happened before the bankruptcy, but the returns were not adjusted; nor can they deduct for returns on other policies for the premiums of which the action is brought, the events entitling them to which returns happened since the bankruptcy but before the commencement of the action; the brokers not having a commission del credere, nor being personally interested in any of the insurances.

THIS was an action of assumpsit brought by the assignees of the bankrupt, in which the first and second counts of the declaration were for money due for premiums of insurance, upon divers policies of insurance, on ships and goods, subscribed by *S. Parker* before he became a bankrupt, for the defendants; the third count was for money had and received by the defendants to the use of *S. Parker* before his bankruptcy; the fourth, for money had and received by the defendants, to the use of the plaintiffs as assignees; the fifth, on an account stated by the defendants with the bankrupt before his bankruptcy; and the sixth, on an account stated by the defendants with the plaintiffs as assignees since the bankruptcy. The defendants pleaded the general issue; and at the trial before *Le Blanc*, J. at *Guildhall*, a verdict was found for the plaintiffs for 319*l.* 10*s.* 1*d.*, subject to the opinion of the Court on the following case:

The bankrupt was an underwriter, and the defendants were insurance brokers at *Lloyd's* Coffee-house. Previous to the bankruptcy of *S. Parker*, which took place on the 27th of *August* 1810, namely, in the years 1808, 1809, and 1810, he subscribed various policies of insurance which the defendants effected with him as brokers. In

the

1812.

PARKER *against* SMITH.

the early part of 1810 an account was settled and adjusted between the parties up to the 31st of *December* 1809; and on the balance of such account there was due to the bankrupt 798*l.* 11*s.* 6*d.*; which balance consisted on the one side of the sum of 718*l.* 4*s.* 8*d.*, being the balance of the account of the preceding 1808, as settled and adjusted between them, and of premiums of insurance upon policies of insurance underwritten by him for them as brokers in the said year 1809, and on the other side, of money paid by the defendants to the bankrupt on account, and of other money claimed by and allowed to them in respect of deductions and allowances for returns of premiums, of convoys, and short interest, and otherwise, and also for losses which had been adjusted by the bankrupt. This balance of 798*l.* 11*s.* 6*d.* was reduced by payments in *March* and *July* following to 98*l.* 11*s.* 6*d.*; and in the year 1810, previous to his bankruptcy, the bankrupt subscribed for the defendants, as brokers, policies of insurance, the premiums on which (after making the usual deduction and allowance to the defendants as brokers after the rate of 5*l.* for every 105*l.*) amounted to 1178*l.*, for which two last-mentioned sums this action was brought amounting together to 1276*l.* 11*s.* 6*d.* From this sum however the plaintiffs deduct, for returns for convoy, and short interest, allowed and settled by the bankrupt with the defendants before his bankruptcy, 91*l.* 1*s.* 2*d.*; leaving their actual demand in this action 1135*l.* 10*s.* 4*d.* The defendants have paid into Court 866*l.* 0*s.* 3*d.*; and claim to deduct or retain the further sum of 319*l.* 10*s.* 1*d.* for returns of premium for convoy and short interest, under the three following heads: first, the sum of 41*l.* 12*s.* 4*d.*, being returns upon three policies of insurance, the premiums of which form part of the account of 1809 adjusted and settled up to the 31st of

1812.

PARKER *against* SMITH.

of *December* in that year, and in part liquidated as aforesaid; but the events entitling to these returns *were not known to have happened until after that settlement.* Secondly, the sum of 232*l.* 17*s* 9*d.* for returns upon some of the policies underwritten by the bankrupt in 1810, the events entitling to which returns *happened before his bankruptcy, but the returns were never adjusted or settled by him.* And, thirdly, the sum of 45*l.* for returns in other of the policies underwritten by the bankrupt in 1810; the events entitling to these returns having happened *since the bankruptcy but before the commencement of this action.* The defendants have no *del credere* commission, nor were they personally interested in any of the insurances The question was, whether the defendants were entitled to deduct all or any of the said three sums, so claimed by them to be deducted from the plaintiffs' demand as aforesaid. If they were entitled to deduct all the three sums, then a nonsuit was to be entered: if any of the three sums, then the verdict was to be reduced accordingly: and if they were not entitled to deduct any of the three sums, then the verdict was to stand.

This case was argued in *Michaelmas* term 1811, by *Parnther* for the plaintiffs, and *Abbott* for the defendants. On the part of the plaintiffs, the case of *Shee* v. *Clarkson* (*a*) was distinguished from this, inasmuch as that was an action between the underwriter and broker, who was the common agent both of the underwriter and the assured, whereas here a bankruptcy had intervened, and determined the agency, and the assignees of the underwriter were the plaintiffs; and therefore it was said to be precisely similar to *Minett and Another, Assignees of Barchard,*

(*a*) 12 *East*, 507.

v. *For-*

v. *Forrester*, *C. B. Easter*, 51 *G.* 3., which the Court of *C. B.* decided upon that distinction. On the other hand it was contended, that the brokers were debtors to the assignees in so much only as they were bound in equity and good conscience to pay to the bankrupt; which was the amount of the premiums minus the returns which the bankrupt according to events had undertaken to pay; and which by the settlements between them before the bankruptcy, it appeared that the bankrupt had authorized the defendants, as agents for the assured, to deduct.

The case stood over for consideration, and on this day

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

It appears by the case, that the bankrupt, *Samuel Parker*, as an underwriter, and the defendants as brokers, had been in a course of dealing together in the years 1808, 1809, and up to the period of *Samuel Parker*'s bankruptcy, on the 27th of *August* 1810. That in the course of those dealings, at the time of adjusting their last balance, which was up to 31st *December* 1809, *Samuel Parker*, the underwriter, allowed the brokers to deduct from the money otherwise payable to him for premiums, what was due to the assured on various policies effected and held by them as brokers, for returns of premium *for convoys* and *short interest, and otherwise*, as the case states it; in effect, to deduct, as we must understand it, all that was claimable from the underwriter on account of the assured As there was in this case no *del credere* commission paid to the brokers, the dealings with them must be considered as dealings with them merely in the character of *agents* for the assured, and not as dealings

1812.

PARKER *against* SMITH.

virtually had with the assured themselves; on which special ground, in respect of the commission *del credere* in that case, *Grove* v. *Dubois*, 1 *Term Rep.* 112, was determined. In their character of agents, the defendants' authority as to acts done, that is to say, payments in fact made, and transactions actually executed and consummated, cannot be questioned. The underwriter and his assignees are precluded by the adjustments which took place from contending that the brokers were not then well entitled to deduct and retain what on the behalf of the assured they in fact then deducted and retained in account with the underwriter for losses, short interest, and returns of premium: but still more deductions were made, and acts done, under a determinable authority, as to all subsequent concerns; and inasmuch as a bankruptcy on the part of the underwriter has in fact taken place, the question is whether that authority to settle on his behalf, to apply his premiums in hand to the satisfaction of demands justly claimable against him by the assured, and which up to that time subsisted, is not in point of law countermanded? And inasmuch as the bankrupt was not competent after his bankruptcy to pay or apply this fund himself in satisfaction of these claims of the assured, it follows as a consequence that he could not authorize his broker so to do; otherwise the derivative and implied authority would be stronger and more extensive than the original and principal authority of the party himself; which cannot be. The consequence is that the authority of the agent, the brokers, was virtually countermanded and extinct by that act of bankruptcy, by which the bankrupt's own original power over the subject-matter ceased and became transferred to others. In conformity, therefore, with what

was

1812.

PARKER *against* SMITH.

was decided by the Court of Common Pleas in *Minett and Another, Assignees of Barchard*, v. *Forrester*, which proceeded expressly on this ground, that the authority given by the bankrupt ceased by his bankruptcy, we are of opinion that the plaintiffs are entitled to recover all the three sums demanded by this action; the same not being retained by virtue of any antecedent adjustment by the bankrupt, nor of any authority from him, express or implied, extending to payments or adjustments to be made subsequent to his bankruptcy. How far these sums could have been recovered from the brokers, if the bankruptcy had not happened, it is unnecessary for us to consider or to decide upon the present occasion.

Judgment for the Plaintiffs.

FARQUHARSON *against* FOUCHECOUR.

Thursday, Nov. 26th.

Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo, after render of the defendant and notice of such render, although such render be made after the day on which the rule for better bail expires.

UPON a rule nisi for setting aside a writ of procedendo for irregularity with costs, it appeared that the cause was commenced in *Trinity* vacation in the Mayor's Court, removed by habeas corpus, and a rule for better bail given on the 2d of *November*, which expired on the 6th; on which day the defendant, being in custody of the sheriff of *Middlesex* in execution in another action, his attorney issued a habeas corpus, directed to the sheriff, &c. and procured a return to it on the same day, intending to have rendered the defendant; but it being lodged with the officer in whose custody the defendant was at a quarter past nine at night, too late to render him, the officer took him to *Newgate* in execution in the other action, and kept him there till the 9th, on which day

1812.

FARQUHARSON *against* FOUCHECOUR.

the defendant was rendered in this cause and committed to the custody of the marshal. On the 11th notice of render was given to the plaintiff's attorney, notwithstanding which the plaintiff, on the 12th, issued a procedendo, which was allowed on the 13th.

Jervis, who shewed cause against the rule, after referring to *Wiggins* v. *Stephens* (*a*), contended that the procedendo was well issued, inasmuch as the render was too late; there being no case in which the Court had extended the indulgence of rendering beyond the rising of the Court on that day when the bail are bound to render.

Marryatt, contrà, contended that it was sufficient that the render was completed on the 9th, before the procedendo issued; and compared it to the case of a render made without justifying, after the regular time of justification is passed, which had been held to entitle the bail to the sheriff to stay proceedings against them on the bail-bond (*b*). He admitted that if the procedendo had issued on the 7th the render would not have been good.

Lord ELLENBOROUGH, C. J. The procedendo was too late. After the 6th the plaintiff might have sued it out immediately, but he waits until the 12th, and in the interval the bail have surrendered the principal. Therefore the plaintiff is too late.

LE BLANC, J. inquired whether there was any case where it had been held that a party might not render at any time before the procedendo issued.

Per Curiam, Rule absolute.

(*a*) 5 *East*, 533. (*b*) 5 *T. R.* 401. 534. 7 *T. R.* 529. 2 *N. R.* 85.

WINSTANLEY

1812.

WINSTANLEY *against* GAITSKELL and NEWCOME.

Thursday, Nov. 26th.

A CAPIAS ad satisfaciendum issued against the defendants, returnable the last day of last *Trinity* term, on which day, both the defendants being in custody of the sheriffs of *Nottingham* under process of the borough-court, the bail, in order to render them in their discharge, sued out a habeas corpus, under which *Gaitskell* was brought up; but *Newcome*, in consequence of an accident which had caused a dislocation of his ancle and compound fracture of his leg, was incapable of being removed without danger of his life; and the sheriffs made a special return of these circumstances, by reason of which they could not have his body at the time and place commanded in the writ. Whereupon *Gaitskell* only was rendered, and an exoneretur as to him was entered on the bail-piece. On the first day of this term a rule nisi was obtained, that the bail might have time to render *Newcome*, until the fourth day of next term, he being still incapable of being removed.

The Court will allow time to the bail to surrender their principal, where, the principal being in custody under process of another Court, it appears on the return made to a habeas corpus issued by the bail in order to render him, that he cannot be removed out of such custody without danger to his life, and that such impossibility still continues.

Richardson, who shewed cause, relied on *Wynn* v. *Petty* (*a*), where the Court refused, in relief of the bail, to depart from the strict rule which bound the bail either to render the principal or pay the money, and did not admit of any excuse; yet in that case, if the rule could have been dispensed with, there was the same reason, as in this, arising from the act of God, for dispensing with it. The circumstance of this defendant being in other

(*a*) 4 *East*, 102.

1812.

WINSTANLEY *against* GAITSKELL.

custody at the return of the writ, did not create any impossibility of rendering him, if his health had permitted; so that that circumstance carries the case no farther than *Wynn* v. *Petty*.

Reader, contrà, denied that the rule was so strict against the bail as to oblige them at all events either to render or pay the money; and he cited *Merrick* v. *Voucher* (*a*), *Wood* v. *Mitchell* (*b*), *Postell* v. *Williams* (*c*), as shewing that the rule admitted of several exceptions; and referred also to *Cock* v. *Bell* (*d*) for the distinction upon which the Court there acted in refusing further time to render, viz. that it did not appear that the principal could not be removed without danger to his own life or to others. Here that does appear, and therefore would be sufficient excuse even if the bail had it in their power to bring up the principal; but they have no such power in this case, he being in custody under legal process, and they have done every thing they could in order to remove him.

Lord ELLENBOROUGH, C. J. The rule in *Wynn* v. *Petty*, though a very strict one, proceeded on reasons of sound policy. That was a case where it certainly was stated that it would endanger the life of the principal to remove him, and yet time to render him was refused; but the case goes no further than to shew that where the inconvenience arises from the act of God, it ought rather to be borne by the bail than by the plaintiff; and that the Court, in order to obviate false

(*a*) 6 *T.* 50. (*b*) *Ibid.* 247.
(*c*) 7 *T. R.* 517. (*d*) 13 *East*, 355.

and

and delusive pretences, will not interfere in such case. But the Court have never said that it is the same thing where the excuse arises out of a legal impossibility. Such was the case of *Wood* v. *Mitchell*, where the defendant was under sentence of transportation; and there the Court permitted an exoneretur to be entered on the bail-piece. That, however, is not prayed in this case, but only an enlargement of the time. But as long as the principal is without the reach of his manucaptors, so that they cannot take him, and is in the hands of other persons under custody of the law, and a return by them is made, such as the Court will allow, the Court cannot but contemplate such a case as an exception to the rule propounded in *Wynn* v. *Petty*. This case, therefore, is to be distinguished as a case of legal impossibility as contradistinguished from moral impossibility. Here the defendant is in the custody of the law, and not of the party who is to bring him up, and the law will not allow him to be taken out of that custody at the peril of his life.

1812.

WINSTANLEY *against* GAITSKELL.

Per Curiam, Rule absolute.

HOARE and Others *against* CAZENOVE and Another.

Friday, Nov. 27th.

IN an action by the indorsees of the bill of exchange hereinafter set forth against the acceptors, the declaration contained the usual averments, (the 1st count averring that the bill was presented for payment to the

The acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment.

1812.

HOARE *against* CAZENOVE.

drawees and refused, the 2d count omitting that averment,) and charged that the bill having been refused acceptance by the drawees, and being thereupon duly protested for non-acceptance, the defendants, having notice thereof, accepted the bill for the honour of the first indorsers. The defendants pleaded the general issue; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, after *Hilary* term 1811, a verdict was found for the plaintiffs for 816*l.* subject to the opinion of the Court on the following case:

The bill of exchange stated in the declaration was drawn by *S. Hanbury* at *Hamburgh*, on the 23d of *July* 1810, upon *Penn* and *Hanbury* of *London*, in favour of *Quevremont Balleydier* and Co., for 800*l.* sterling, at 130 days after date. It was specially indorsed by *Quevremont Balleydier* and Co. to *Perier Freres*: by them to *F. Farmbacher*, all of whom reside abroad; by *F. Farmbacher* to *Greffuhle Freres* and Co., who reside here; and by the latter to the plaintiffs, who are bankers in *London*. The first of the set of bills was transmitted, with the first special indorsement only, to the defendants to procure acceptance: and they accordingly presented it for acceptance to *Penn* and *Hanbury*, who refused; whereupon the defendants caused a protest to be duly made for non-acceptance. The second of the set of bills was afterwards transmitted, indorsed so as to pass the property to *Greffuhle Freres* and Co., with a reference upon the face of the bill to the defendants in case of need. *Greffuhle Freres* and Co. applied to the defendants for the first bill, and to know if it had been accepted: upon which the defendants delivered the first bill to them with the following acceptance by themselves; "accepted under protest for the honour of the first

1812.

HOARE against CAZENOVE.

first indorsers. The bill became due on the 3d of *December* 1810, *but was not presented to the drawees*, Penn *and* Hanbury, *for payment; nor was it proved to have been protested for non-payment.* The defendants refused to pay the bill, in consequence of orders from the first indorsers. If the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered. This case was argued in *Michaelmas* term 1811, by *Scarlett* for the plaintiffs, and *Taddy* for the defendants; and the Court reserved it for further consideration.

Lord ELLENBOROUGH, C. J. on this day delivered the judgment.

This was an action founded upon a set of bills of exchange for 800*l.*, accepted by the defendants for the honour of the first indorsers. The set was drawn by *Samuel Hanbury*, at *Hamburgh*, 23d *July* 1810, upon *Penn* and *Hanbury* of *London*, and was payable to *Quevremont Balleydier* and Co., at 130 days after date. The first of the set was transmitted to the defendants, that they might procure acceptance, but *Penn* and *Hanbury* refused to accept, and the defendants caused it to be protested for non-acceptance. The second of the set was indorsed to *Greffuhle Freres* and Co.; they applied to the defendants for the first, and the defendants delivered to them the first, accepted by themselves, for the honour of the first indorsers, that is to say, *Quevremont Balleydier* and Co. The bill became due the 3d of *December* 1810, but was not presented to *Penn* and *Hanbury*, the drawees, for payment, nor protested for non-payment. In the first count it was stated, contrary to the fact, that it was presented to the drawees

for

1812.

HOARE *against* CAZENOVE.

for payment, and refused: in the second count this averment was wholly omitted. The defendants (in consequence of orders from the first indorsers,) refused to pay it. The question therefore is, whether a presentment to *Penn* and *Hanbury*, the drawees, for payment, and a protest for non-payment by them, is, or is not essential as a previous requisite to the maintaining an action against these defendants, the acceptors for the honour of the first indorsers; and this depends upon the nature and obligation of an acceptance for the honour of the drawer or indorser. If an acceptance in these terms be an engagement by the person giving it that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any other person, the plaintiffs are in that case entitled to recover upon their second count: but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, i. e. an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonouring this bill, and such dishonour by him should be notified, by protest, to the person who has accepted for the honour of the indorser, then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much consideration, we are of opinion is the case. It is remarkable that no directly adjudged case upon the question is to be found; although the custom of merchants relative to this subject, is stated in the case of *Brunetti* v. *Lewin*, in *K. B.* (affirmed in error in the Exchequer Chamber, in favour of the original plaintiff, *Brunetti*,) as reported in 1 *Lutw.* 896. And *Lutw.* in his report (*a*), says that he

(*a*) 899. *b.*

could not discover that any exception was taken to the validity of the custom, which he states as shortly this, "that "if any merchant, &c. (for the honour of him to whom "a foreign bill of exchange was first payable, and who "had first indorsed the bill to another,) shall pay the "said bill to the last indorsee of it, *the bill being before* "*then protested for non-payment*, then the merchant to "whom the bill was first payable, and who first in- "dorsed the bill, shall have an action against the mer- "chant who first took upon himself, by writing, to pay "the bill, &c. for the honour of the drawer, the bill "*having been first protested likewise for non-acceptance*, for "the value of the bill and all charges," &c. Thus two protests, i. e. for non-payment as well as non-acceptance, were in this case held necessary by the custom of merchants. The immediate point argued in error appears to have been whether it was sufficiently shewn, agreeably to the custom alleged, that payment was in that case in fact made to the last indorsee, so as to found the claim of the first indorser, to payment to be made by the acceptor for honour, within the terms of the custom; but it certainly was also open to the plaintiff in error, to have insisted upon the invalidity of any part of the custom alleged; of which custom the protest for non-payment previously to the payment to the indorsee, and the subsequent claim upon the acceptor for honour, was a material part. In that case the undertaking for the honour of the drawer was not in the form of an acceptance upon the bill, but of "a note in "writing for the honour of the drawer to pay the bill "upon return;" but this, "according to *Pothier on Bills* "*of Exchange, partie* 1. *cap.* 4. *Des Avals*," is a mode substituted by "recent usage in the place of a signature by

1812.

HOARE *against* CAZENOVE.

by the person giving the caution on the bill itself;" and though the mode be different, the effect is for all substantial purposes the same. *Malyne*, *p.* 273., in his 5th observation, says, if this man, (speaking of the acceptor for the honour of the bill, whom he had just mentioned in his foregoing observation,) if this man at the time doth pay the said bill, because the party upon whom it was directed doth not, yet he is to make, first, before he doth pay the same, a protest, with a declaration that he hath paid the same for the honour of the bill of exchange, whereby to receive the money again of him that hath made the bill of exchange. But it may be said that according to this position in *Malyne*, though a protest may be necessary to be made against the drawee by the acceptor for honour, to entitle him to recover against the party for whose honour he has accepted, yet that such protest for non-payment is not equally necessary to be made against the drawee, to enable any other holder to recover against the acceptor for honour himself. But the next observation, the sixth in the same page of *Malyne*, lays down the obligation more generally, and as attaching upon every holder of a bill, whether accepted or not accepted, in whose hands it remains unpaid, up to the time of the appointed payment, i. e. the duty of making a protest for the non-payment of it. His words are these: "If a bill of exchange be accepted, and nevertheless not paid, and that it be not accepted as aforesaid, and remaineth unpaid, then must you cause the notary to make a second protest, (assuming that the bill had been already protested for non-acceptance,) for the non-payment of it." In the same work of *Pothier*, to which I have already referred, *part* 1. *c.* 5. *s.* 131., second branch

1812.

HOARE against CARNOVE.

branch of the section: "When after a protest made for want of acceptance on the part of him upon whom the bill is drawn, a third person has intervened, and has accepted the bill for the honour of the drawer, or some indorser, all agree that at the expiration of the time of grace, the protest ought to be made not only to him upon whom the bill is drawn, and who has refused to accept it, but to the third person, who has accepted it for honour. A bad reason has been assigned to me for the difference, which is, that he, who has accepted for honour, has made himself the debtor of the bill, whereas the person who has been indicated as him from whom the payment of it is to be received, is not the debtor of it. This reason is a bad one, for when I make a protest to any one of my bill of exchange, it is only in his single quality of person indicated to pay me, and not in the quality of debtor of the bill that I make this protest. He upon whom the bill is drawn, when he has not accepted it, is not debtor of the bill of exchange in regard to me; it is only in the single quality which he has, of being the person indicated to pay it, that my protest to him is made." I am aware that *Beawes* in his *Lex Mercatoria, p.* 421. *s.* 43. says, "He "that accepts a bill upon protest, puts himself absolutely in the stead of the first acceptant, and is obliged "to make the payment without any exception, and the "possessor, (i. e. the holder,) hath the same right and "law against such an acceptor as he would have had "against the first intended one, if he had accepted." The literal sense of these words certainly seems to place this writer at variance with the authorities above cited; and if that were necessarily the case, one would not be disposed very readily to surrender the custom of merchants,

as

1812.

HOARE *against* CAZENOVE.

as alleged on record, and not questioned in error in the case of *Brunetti* v. *Lewin*, as it is reported in *Lutw.*, and the positions which are to be found in *Malyne* and *Pothier*, (the latter, a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law-merchant in particular;) to the authority of Mr. *Beawes*. However, the very positions of *Beawes* himself are not necessarily contradictory to those above-mentioned, nor does he advert to any question whether a protest be required or not in such a case. In saying that an acceptor for honour "put himself absolutely in the stead of the first acceptant, and is obliged to make the payment without any exception," &c., he may fairly be understood as representing only the extent of his liability to be equal to that of an original acceptor, when charged upon his acceptance, and not as excluding the necessity of any previous steps, which the custom of merchants may be supposed to require, in order to his being duly so charged. The use and convenience, and indeed the necessity of a protest upon foreign bills of exchange, in order to prove in many cases the regularity of the proceedings thereupon, is too obvious, to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it. And indeed the reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived. And

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the lessee is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort. Upon the whole, therefore, we are of opinion that the postea must be delivered to the defendants.

1812. Hayes against Caseweve.

DOE, on the Demise of GIGG and Others, *against* BRADLEY.

Friday, Nov. 27th.

IN ejectment for lands at *Axminster*, in the county of *Devon*, which was brought on the joint and several demises of *Robert Gigg*, *John Goss*, and *Dorothy*, his wife, *Henry Gigg*, *William Wakely*, and *Susannah*, his wife, *James Gigg*, *Nathaniel Stoker*, and *Ann*, his wife, *Charles Swetland Gigg*, and *Sarah Gigg*, (the demises being laid on the 1st of *July* 1808,) a verdict was taken for the plaintiff at the trial, before *Chambre*, J., at *Exeter*, subject to the opinion of the Court on the following case: *Charels Swetland* being possessed of a tenement in *Axminster*, called *Serts*, (the premises in question,) for the remainder of a term of 4900 years, had at the time of making his will, and of his death, two daughters, *Susannah Staple* and *Sarah Knight*, and two grand-daughters, the issue of *Sarah Knight*: viz., *Joan*, the wife of *John Gigg*, and the mother of the lessors of the plaintiff, and *Sarah*, afterwards the wife of *Henry Bradley*, the defendant. *C. Swetland*, by his will, duly executed, dated 16th *April* 1757, gave to his two daughters, *Susannah Staple*, and *Sarah Knight*, the said tenement called

Devise of a tenement of which testator was possessed for the remainder of a term of years, to his daughter S. K.'s children to be equally divided between them, share and share alike, and to the survivor of them and their children: Held that the children of *S. K.* took an absolute interest in the premises, share and share alike, subject to a survivorship between them for life.

1812.

DOE, dem. GIGG, *against* BRADLEY.

called *Serts*, share and share alike, during their natural lives, and to their own separate uses; neither of their husbands to have any thing to do with it; with survivorship for life, in case his daughter, *Susannah Staple*, died in the life-time of his daughter *Sarah Knight*, to *Sarah Knight*, and after the decease of his two daughters he gave the said estate of *Serts to his daughter* Sarah Knight's *children, to be equally divided between them, share and share alike, and to the survivor of them and their children*; and he made his said two daughters executrixes of his will. The testator died in *March* 1760; his two daughters and grand-daughters survived him; and his two daughters, the executrixes, duly proved the will. By indenture dated *June* 11th, 1771, duly executed between the said *John Gigg* and *Joan*, his wife, of the first part, and *Sarah Knight*, the younger sister of the said *John Gigg*, of the second part, and *William Newberry*, yeoman, of the third part, reciting *Charles Swetland*'s will, and that by virtue thereof the said *Gigg* and his wife, or he in right of his wife, and the said *Sarah Knight* the younger, would on the death of *Sarah* their mother become entitled to one moiety of the said premises, and on the deaths of *Susannah Staple* and *Sarah Knight* the mother, to the whole thereof, during the remainder of the said term, but it being doubted whether as joint-tenants or tenants in common, it was agreed to assign the whole of the said premises to the said *W. Newberry*, during the remainder of the said term, upon the trusts after mentioned: and thereupon in consideration of 5*s*. the said *Gigg* and his wife, and *Sarah Knight* the younger, and each of them, granted and assigned all the said premises to the said *Newberry*, to hold to him and his executors from and after the deaths of *Susannah Staple*,

1812.

DOE, dem. GIGG, *against* BRADLEY.

and *Sarah Knight* the elder, and as they should severally die, during the residue of the said term; as to one undivided moiety in trust for the said *Sarah Knight* the younger, her executors, &c. during the residue of the said term; and as to the other moiety, upon certain trusts mentioned therein, being for the benefit of the said *Gigg*, his wife, and their children. *Susannah Staple* died very shortly after the execution of this deed. *Sarah Knight*, the younger, being about to marry *Henry Bradley*, the defendant, by a deed made before such marriage, dated 15th *October* 1771, conveyed to trustees her undivided moiety of the said tenement, to hold to the trustees for the residue of the said term, in trust for *Sarah Knight*, the younger, till after the marriage, and after the marriage took effect, in trust for *Henry Bradley* for life, with divers remainders over. The marriage took effect: *Sarah Knight*, the elder, died in the latter end of 1771; *Sarah Bradley* died in 1773, leaving one child, *Sarah*, now the wife of *William Smith*; *John Gigg*, the husband of *Joan*, died some time about the year 1801; *Joan Gigg* afterwards died, leaving nine children, eight of whom are the lessors of the plaintiff, the ninth, named *John*, having died; *Robert Gigg*, *John Gigg*, (since dead,) and *Susannah Wakely*, were born in the life-time of the testator, *C. Swetland*; the other six lessors of the plaintiff, and the daughter of *Sarah Bradley*, were born after his death. From the death of *Sarah Knight* the elder, who survived *Susannah Staple*, to the death of *Joan Gigg*, a moiety of the rents of the premises were received by *Henry Bradley*, and the other moiety by *John Gigg*, during his life, and afterwards by *Joan Gigg*, his widow. *Henry Bradley* is now in possession of the moiety of the premises conveyed

1812.

Doe, dem. Gigg, *against* Bradley.

veyed by the settlement of the 15th *October* 1771. The question was whether the lessors of the plaintiffs, or either of them, were entitled to any and what part of that moiety? If they were, the verdict to be entered for the whole, or such part of the said moiety as the Court should direct; if they were not entitled to any part of that moiety, a nonsuit to be entered.

This case was argued in last *Trinity* term by *Moore*, for the lessors of the plaintiff, and *Burrough* for the defendant; on which occasion *Co. Lit.* 9. *a.* *Wild's* case (*a*), *Oates* v. *Jackson* (*b*), and *Armstrong* v. *Eldridge* (*c*) were cited. The Court took time to consider, and on this day,

Lord Ellenborough, C. J. delivered the judgment. This case depends upon the effect of a limitation in the will of *Charles Swetland*. The limitation is of a term for years, and by way of remainder, and it is "to his daughter *Sarah Knight's* children, to be equally divided between them, share and share alike, and to the survivor of them and their children." *Sarah Knight* had then two children, *Joan Gigg*, the mother of the lessors of the plaintiff, and *Sarah Knight*, who afterwards married the defendant, and under this limitation the lessors of the plaintiff contend, 1st, that the survivor of *Sarah Knight's* children, (which their mother was,) was entitled to the whole of this estate by way of survivorship; or if not, that the words "and their children" are words of purchase, and that the grand-children of *Sarah Knight* were entitled, upon *Sarah Knight's* death, to divide the estate per capita. The objection to the first

(*a*) 6 *Rep.* 16. *b.* (*b*) *Str.* 1174. (*c*) 3 *Br. Ch. Rep.* 215.

ground

1812.

DOE, dem. GIGG, against BRADLEY.

ground of claim is, that it rejects the words "and their children," or reads them as though they "had been the children of such survivor," and instead of an equal distribution between *Sarah Knight*'s children, which the words "share and share alike" seem to have intended, it gives the whole in the end exclusively to one, without dividing it into shares at all; and it is not matter of attachment or predilection which is to determine who that one shall be, but it is left entirely to the effect of chance, the accident of survivorship. The objection to the second ground of claim is, that if Mrs. *Knight* had had a third child before the remainder vested in possession, though such child would have been clearly intitled to have taken with Mrs. *Gigg* and Mrs. *Bradley*, (*Baldwin* v. *Karver*, *Cowp.* 309., and *Meredith* v. *Meredith*, 10 *East*, 503.) the issue of such child would have been excluded; a limitation which is to make the child of a yet unborn person take by purchase being too remote; and the only way by which such third child and her issue could have been put upon a footing with Mrs. *Gigg* and Mrs. *Bradley*, and their issue, is by treating the words "and their children" as words of limitation. And it seems to us that the true construction of this will is to treat these words as words of limitation; and then Mrs. *Knight*'s children will take the absolute interest in this property, share and share alike, subject only to a survivorship between them for life. This gives effect to every word in the devise, and produces a certain, equal, and rational disposition of the property, instead of one which is uncertain, unequal, and to depend upon accident. The estate goes to all Mrs. *Knight*'s children, as tenants in common, so long as all remain alive; it passes to the survivor for life, when they are reduced to a survivor;

1812.

DOE, dem. GIGG, *against* BRADLEY.

survivor; and subject to that survivorship, each as tenant in tail of a term of years, has the power of disposing of the absolute interest in her share. The consequence is that the lessors of the plaintiff have no right to any part of the moiety now claimed, and that the postea must be delivered to the defendant.

Friday, Nov. 27th.

The KING *against* READ.

By 1 *G.* 1. *c.* 47. upon an information filed in this court for persuading soldiers to desert, and tried at the assizes, this court is the proper court to award punishment, and if they award imprisonment, besides the penalty of 40*l.*, they are bound also to award the pillory.

THE defendant was convicted before *Bayley*, J. at the last assizes for *Northumberland*, on a record out of this Court, upon an information founded on the 1 *G.* 1. *c.* 47. for persuading soldiers to desert. There were two counts charging separate offences in respect of two soldiers. *Hullock* for the defendant, who was now brought up to receive the sentence of the Court, referred to the 1st section of the act, which imposes a penalty of 40*l.* upon every person convicted of the offence, and then enacts, "that if it shall happen that any such offender hath not any goods, &c. to the value of 40*l.* to satisfy the same, or that from the circumstances and heinousness of the crime, it shall be thought proper and convenient, *the court before which the said conviction shall be made*, shall award the offender to prison, there to remain for any time not exceeding six months, without bail or mainprize, *and also to stand in the pillory* for the space of one hour, &c." He submitted first, that the words of the act which direct the court before which the conviction shall be made to award the offender to prison, &c., seemed to point out that the punishment should be awarded at the assizes, where the trial and conviction took place; but he admitted

mitted that he had been informed by the officer that there were several instances where sentence had been passed by this Court upon similar convictions. He then submitted that if the Court should be disposed to inflict a punishment beyond the forfeiture of the 40*l.* the act left it in their discretion to do so by awarding imprisonment without the pillory.

But *The Court* said, that the question as to the discretionary part of their power to award punishment had been considered in a former case before the Court; and they were of opinion that if they felt it necessary to award farther punishment than for the 40*l.*, they were bound to pass sentence for the pillory as well as imprisonment; and that as to the other objection, this being a record out of this Court, it must be taken to be a conviction before the Court, the Judge at nisi prius, before whom the trial was had, being for that purpose the minister of the Court.

The defendant was sentenced on the first count to a month's imprisonment, and to the pillory; and on the second to a fine of 40*l.*

1812.

Saturday, Nov. 28th.

ROE, on the Demise of JOHN CLEMETT, *against* BRIGGS.

Devise of testator's burgage-house (being burgage held of a manor where there is no custom of entailing,) to his wife for life, or until marriage, and after her decease or marriage to *R. C.*, his younger son, for and during the term of his natural life, and after the decease or marriage of his wife, and also after the decease of his son *R. C. unto the heirs of the body* of *R. C.*, lawfully begotten or to be begotten, *equally amongst them as shall then be living*, share and share alike, (there being not any child of *R. C.* then born,) *and in case* R. C. *die without issue*, lawfully begotten or to be begotten, after his decease remainder over: Held that *R. C.* took either an estate of inheritance in the nature of an estate-tail, or an estate for life, with a contingent remainder to his children, depending on the event of there being a child born and living at the death of *R. C.*; and that in either case, the child of *R. C.* was barred, by the freehold of the lord becoming united, by a deed of enfranchisement, in the owner of the customary estate, who derived title by conveyance from *R. C.* after his estate came into possession.

IN ejectment for a messuage with the appurtenants in *Kirkland*, in the parish of *Kendal*, in the county of *Westmorland*, which was tried before *Graham*, B. at the assizes, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case: *John Clemett*, the grandfather of the lessor of the plaintiff, being seised (inter alia) of an estate descendible and devisable in a burgage-house, in which he dwelt at the time of making his will, situate in *Kirkland*, within the manor of *Kirkland*, held according to the custom of the manor, on the 16th of *April* 1752, by his will, duly executed and attested, devised the same as follows: "I hereby devise to my wife all those my two burgage-"houses, messuages, and tenements, with the appur-"tenants, the one wherein I now dwell, and the "other called *Vicar-Fields-House*, both in *Kirkland*, "for and during the term of her natural life or day "of marriage. And after the decease or marriage "of my said wife, I devise the said two burgage-houses, "messuages, tenements, and premises, and one other "burgage-house situate in *Capper-lane*, in *Kirkland* "aforesaid, unto my younger son *Richard Clemett*, for "and during the term of his natural life, to hold the "same last-mentioned burgage-house *immediately after*

"*my*

" *my decease*, and to hold the said two first-mentioned " burgage-houses, messuages, and premises *immediately* " *after the decease of* Jane, *my said wife, or her day of mar-* " *riage, which shall first happen*, for and during the term " of his natural life; *and after the decease of my said wife,* " *or day of marriage, and after also the decease of my said son* " *R. Clemett*, I do hereby devise the said three several " burgage-houses, messuages, and tenements, with the " appurtenants, *unto the heirs of the body* of my said son " *R. Clemett*, lawfully begotten or to be begotten *equally* " *amongst them*, as shall *then be living, share and share* " *alike.*" And after a further devise of other burgage-houses to his eldest son *Leonard Clemett*, and the heirs of the body of that son, in manner therein mentioned, then he devised as follows: " Also it is my " further will, that in case my son *R. Clemett die without* " *issue* lawfully begotten or to be begotten, that *after his* " *decease* I devise the said three first mentioned burgage-" houses, messuages, tenements, and premises, with the " appurtenants, unto the heirs of the body of my said " son *L. Clemett*, lawfully begotten or to be begotten, " for ever, share and share alike." The testator died seised as aforesaid, soon after making his will, leaving his son *L. Clemett* his heir at law, and his son *R. Clemett*, him surviving. From the death of the testator and his said wife, until the conveyance thereof as after-mentioned, *R. Clemett* was in possession of the said burgage-house, with the appurtenants, in which the testator dwelt as aforesaid, or in receipt of the rents and profits thereof. It is not known that any recoveries have been ever suffered or any fines ever levied of any burgage-tenements, held according to the custom of the manor, nor that any custom exists in the manor for the entailing of such

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

burgage-tenements, or the barring of entails thereof, or in any manner respecting the same. The customary mode of conveyance of such burgage-tenements is by grant, without any lease for a year, livery of seisin, or inrolment. *John Clemett* the lessor of the plaintiff, and son of *R. Clemett*, was born in 1754. On the 14th of *November* 1769 *L.* and *R. Clemett* duly executed a customary conveyance of the said burgage-house wherein the testator dwelt, to *James Thompson*, whereby for valuable consideration they granted and confirmed (as far as by law they could (*a*)) the said premises to *Thompson* and his heirs, to hold to him and his heirs for ever, according to the custom of burgage-tenure used and allowed within *Kirkland* aforesaid. Upon the deed of conveyance *Thompson* entered and took possession of the same burgage-house with the appurtenants. Several similar mesne conveyances thereof were in like manner from time to time made, executed, and delivered by *Thompson* and the respective grantees thereof, the last of which was on the 13th of *February* 1787, to *James Scaife* and his heirs, who thereupon entered into and was possessed thereof. On the 7th of *April* 1787, Lady *Andover* then being lady of the manor of *Kirkland*, and *Edward Shepherd* then being entitled to the lord's rent of the premises in question, and entitled to the freehold thereof in fee, holding the same of the said Lady *Andover*, as chief lady of the manor, he the said *Shepherd* signed, sealed, and delivered to *J. Scaife* a deed of enfranchisement of that date, by way of feoffment, whereon livery of seisin was duly made; whereby, after reciting that *Scaife* had contracted with *Shepherd* for the absolute

(*a*) The words within the brackets were not the words of the conveyance, but of the counsel who settled this case.

purchase

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

purchase to him his heirs and assigns of the messuages and tenements thereinafter mentioned and granted unto a freehold estate of inheritance, and of the yearly rents issuing out of the same, at or for the price therein mentioned; it was witnessed that for the consideration therein mentioned, the said *Shepherd* did grant, bargain, and sell, enfeoff, release, ratify, and confirm unto the said *Scaife*, his heirs and assigns, the premises in question, (amongst others,) to hold the same unto and to the use of the said *Scaife*, his heirs and assigns for ever, absolutely freed and discharged of and from all rents, fines, customary tenures, and services whatsoever. *Scaife*, on the 13th of *February* 1789, signed, sealed, and delivered a feoffment, and delivered seisin according to the same, (as far as by law he could, which is indorsed thereupon,) which feoffment purported that the said *Scaife*, for the consideration therein mentioned, did grant, enfeoff, and confirm unto *John Fletcher*, his heirs and assigns, the said premises therein described, as a *freehold*, messuage, or tenement, with the appurtenances; and on the 17th of *April* 1789, *Fletcher* was admitted to the same, describing it as *freehold*, late burgage, at the court of the said manor. By indentures of lease and release of the 31st of *January* and 1st of *February* 1794, the said *Fletcher* and *Mary* his wife, together with *John Miller*, to whom they had mortgaged the premises, did for the consideration therein mentioned (as far as by law they could,) convey the said premises therein described to be freehold, to *John Romney* in fee; and covenanted to levy a fine sur conuzance de droit come ceo, to enure to the use of *Romney*, his heirs and assigns for ever; which said fine was accordingly levied in *Hilary* term, 34 G. 3. By feoffment, with livery and seisin dated 17th of *February*

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

bruary 1804, the said *Romney* (as far as by law he could) conveyed the premises therein described to be *freehold*, to the defendant in fee. The said *Fletcher*, *Romney*, and the defendant, respectively entered upon and possessed the premises pursuant to the said conveyances to them respectively; and the defendant is now in possession thereof. *R. Clemett* died in 1804, leaving the lessor of the plaintiff, his only son and heir; and within five years after his death, and before the day of the demise laid in the declaration, the lessor of the plaintiff made a due entry thereupon, in order to avoid the fine. If the lessor of the plaintiff were entitled to recover, the verdict was to stand: if not, a verdict was to be entered for the defendant.

This case was argued in *Michaelmas* term 1811, by *Holroyd* for the plaintiff, and *Richardson* for the defendant. For the plaintiff it was contended that the testator's son, *R. Clemett*, took an estate for life only in the first instance; in support of which the cases of *Doe* v. *Giff* (*a*) and *Robinson* v. *Grey* (*b*) were cited; 2dly, that the remainder to his issue was vested, *Bromfield* v. *Crowder* (*c*); or if it was not vested, but contingent, yet still it was not barred; 2 *Roll. Abr.* 794. *pl.* 6 *Styl* 249 273. S. C. 1 *Fearne*, 449. *Hopkins* v. *Hopkins* (*d*). *Podger*'s case (*e*). *Roe* v. *Vernon* (*f*).

For the defendant it was argued that *R. Clemett* took an estate of inheritance; for which the following cases were cited, viz. *Doe* v. *Applin* (*g*), *Doe* v. *Smith* (*h*), *Doe*

(*a*) 11 *East*, 668. (*b*) 9 *East*, 1. (*c*) 1 *N. R.* 313.
(*d*) 1 *Atk.* 588. 590. (*e*) 9 *Rep.* 107. *a.* 3d point.
(*f*) 5 *East*, 51. (*g*) 4 *T. R.* 82. (*h*) 7 *T. R.* 531.

v. *Cooper*,

v. *Cooper* (*a*), *Doe* v. *Agar* (*b*), *Pierson* v. *Vickers* (*c*), *Poole* v. *Poole* (*d*), *Richards* v. *Lady Bergavenny* (*e*); and that this estate (there being no custom to entail) was a fee conditional, and that the condition being performed by the birth of issue, the issue were barred by the subsequent conveyances: or if *R. Clemett* took only an estate for life, then the remainder to the heirs of his body living at the time of his death was a contingent remainder, and was barred by the destruction of the particular estate; *Smith* v. *Belay* (*f*), *Denn* v. *Bagshaw* (*g*), *Archer's* case (*h*).

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. on this day delivered the judgment of the Court.

After stating the case, his Lordship proceeded. On this case it has been argued, on the behalf of the defendant, that under the will of the testator *John Clemett*, his second son *Richard Clemett* took what, in the case of common law lands, would have been an estate-tail, and what in the case of these burgage lands, where there is no custom of entailing, is a fee-simple conditional at common law; in which case the limitation to the heirs of his body as shall be living at his death was barred by the subsequent conveyances and fine: or if he took only an estate for life, with a contingent remainder to his children living at his death, that remainder was destroyed by the subsequent conveyances. On the part of the plaintiff it was insisted that the second son, *Richard*

(*a*) 1 *East*, 229. (*b*) 12 *East*, 253. (*c*) 5 *East*, 548.
(*d*) 3 *Bos. & Pull.* 620. (*e*) 2 *Vern.* 324.
(*f*) *Cro. El.* 630. *Moore*, 545, *pl.* 726. (*g*) 6 *T. R.* 512.
(*h*) 1 *Rep.* 66. *b.*

Clemett,

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

Clemett, took only an estate for life, with a vested remainder to his children as purchasers as they came in esse; or with a contingent remainder to his children living at his death, which remainder, though contingent, was not destroyed by the subsequent conveyances, inasmuch as, it was said, the freehold remaining in the lord or in his alienee, was sufficient to support the contingent remainder. So that, unless the limitation to the heirs of the body of *Richard Clemett* living at his death, can be held to be vested, or unless the freehold remained in the lord, or his alienee, distinct from the particular previous life estate, so as to support the contingent estate, (if it be held contingent,) the case of the plaintiff fails. And upon the fullest consideration, we are of opinion that both these points are against the plaintiff. First, as to the remainder being vested. It was argued that it was vested on the authority of *Bromfield* v. *Crowder* in the House of Lords, and in 1 *New Rep.* in *C. B.* 313., where, after two estates for life, the testator devised his real estate to his godson, *John Davenport Bromfield, if* he shall live to attain the age of 21 years: and in that case, first the Court of Common Pleas, and afterwards the House of Lords, on appeal from a decree of Lord Chancellor *Erskine*, determined that it was a vested interest in *John Davenport Bromfield*, determinable on the contingency of his dying under 21; that is, that the term *if* was used by the testator to denote a condition subsequent, and not a condition precedent. And this was according to former decisions of *Edwards* v. *Hammond* in 3 *Lev.* 132., and in 2 *Show.* 398. But those cases materially differed from the present; the devisee in remainder was a person in esse, and the words of condition, *if* he attained 21, were used only to denote the time

time when the estate should come into possession. Here the estate is limited not to any persons in being, nor to any persons of whom it could be predicated for certain, that they ever would be in being, or that if they ever came into being, they would be so at the death of the testator's son *Richard*; the limitation being after the decease of his son *Richard* "unto the heirs of the body of my said son *Richard Clemett*, lawfully begotten or to be begotten, equally amongst them as shall then be living;" so that the remainder is contingent, and depends not only on the event of there being any child or children born, but on the event of any of them being living at the death of their father. And no case has been shewn where an estate depending on such a contingency has ever been held vested. And this brings me to the second question, whether considering this as a contingent remainder to the children of *Richard Clemett* who should be living at the time of his death there was a freehold in the lord sufficient to support it; this being a customary estate, where the freehold is in the lord. Where a contingent remainder is created out of a common fee-simple estate it must have a previous estate of freehold to support it; and the destruction of every such previous estate, before the remainder vests, destroys the remainder: but where the remainder is created out of what may be called a subordinate fee simple estate, as out of a copyhold, where the ordinary fee-simple is in the lord, or out of an equitable estate, where the ordinary legal fee-simple is in some other person, the destruction of the previous estate will not affect the remainder, but it shall be supported by the ordinary fee-simple estate. 4 *Term Rep.* 64. The estate in this case was a subordinate fee-simple of burgage tenure, where

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

where the ordinary fee-simple was not in the testator, but in the owner of the lord's rent; but see what took place during the life of *Richard Clemett*, the second son of the testator and devisee for life under his will, and after his estate for life came into possession. In 1769 *Richard Clemett*, then tenant for life, for a valuable consideration executed a customary conveyance of this burgage-house to *James Thompson* and his heirs for ever, according to the custom. *James Thompson* entered and was possessed, and afterwards, after several like mesne conveyances of it, in 1787 it was conveyed to *James Scaife* and his heirs, who entered and was possessed; and afterwards, in that same year, *Edward Shepherd* being then entitled to the lord's rent of these premises, and entitled to the freehold thereof in fee, holding the same of Lady *Andover* as chief lady of the manor of *Kirkland*, signed, sealed, and delivered to *Scaife* a deed of enfranchisement, by way of feoffment, whereon livery of seisin was duly made; whereby *Shepherd* granted, bargained, sold, enfeoffed, released, ratified, and confirmed to *Scaife*, his heirs and assigns, the premises in question (among others,) to hold the same to and to the use of the said *Scaife*, his heirs and assigns for ever, absolutely freed and discharged of and from all rents, fines, customary tenures, and services whatsoever. *Scaife* afterwards, in 1789, by feoffment, with livery of seisin, conveyed them as freehold to *Fletcher*, from whom they afterwards passed to *Romney*, after a fine levied of them, in 1794, and from *Romney* they passed by several mesne conveyances to the defendant. By this statement it appears that during the life of *Richard Clemett*, the tenant for life of these premises, his estate in them having been conveyed to *Scaife*, the freehold, which was in *Shepherd*, became

became united with the particular estate, which was in *Scaife*, and he held the estate from that time freed and discharged of and from all rents, fines, customary tenures, and services whatsoever. So that, before the contingency happens, *Scaife* has in himself the whole freehold estate, which he alienes, and his alienee levies a fine. What then is become of the outstanding freehold in the lord which is to support the contingent remainder? It is united with the particular estate, and the estate is no longer an estate, the freehold of which is in the lord, or in any other person than the owner of the customary estate; for a person cannot hold of himself and be at the same time both tenant and lord. But then it was argued for the plaintiff that *Scaife*, and his subsequent alienees, had not the whole customary estate, and that he could not surrender the contingent estate. But that is not necessary to the destruction of the contingent remainder. By the enfranchisement, the estate became severed from the manor; and though the person, to whom the enfranchisement is made, have only a particular estate in the premises, and he take a conveyance of the freehold in fee, it shall be an absolute enfranchisement; the copyhold tenure shall be extinct for ever, and the enfranchisement shall enure for the benefit of those in remainder; that is, their estate shall cease to be held of the manor, and shall become of freehold tenure. After the enfranchisement, the premises being severed from the manor and the tenure changed, all customs, and all rights, and privileges, which before attached to their customary tenure, cease with respect to them. The cases on this subject will be found collected together in *Watkyns' Treatise of Copyholds*, 1 vol. 362. & seq., Chapter on Enfranchisements. We therefore think

1812.

ROE, Lessee of CLEMETT, *against* BRIGGS.

think that after the conveyance to *Scaife* by *Shepherd* of the premises, to hold to him and his heirs and assigns for ever, freed and discharged of and from all rents, fines, customary tenures and services whatsoever, there was an end of the outstanding freehold in the lord, and nothing to protect or preserve the contingent estate from being defeated or destroyed. Whether, therefore, this be considered as in the nature of an estate-tail in *Richard Clemett*, in order to effectuate the general intent of the testator, according to the cases of *Robinson* v. *Robinson* (*a*). *Doe, on dem. of Cock*, v. *Cooper*, *Dodson* v. *Grew* (*b*), and that class of cases; or whether it be considered as an estate for life in *Richard Clemett*, with a contingent remainder to the heirs of his body (or children) living at his death; in either way of considering it, we are of opinion that the lessor of the plaintiff is barred, and that the postea must be delivered to the defendant.

(*a*) 1 *Burr.* 38. (*b*) 2 *Wils.* 323.

Saturday, Nov. 28th.

SERGEAUNT and Another, qui tam, *against* TILBURY.

In an action against a person licensed to let horses to recover a penalty for not inserting in his weekly account the time for which he let to hire two horses, nor the amount of the duty payable in respect of such hiring, where the declaration alleged that the defendant let to hire for a period of time less than 28 successive days, *to wit, for eight days*, &c.: Held that the letting need not be proved to have been for the exact number of days laid under the videlicet.

THE plaintiffs declared in debt for penalties upon the post-horse duty act, 48 *G.* 3. *c.* 98., and the third, which was the only count in question, stated that the defendant, so being such person letting horses to hire, and usually letting horses to hire, and being so licensed as aforesaid, and the plaintiffs so being such farmers, &c. he, the defendant, after the 31st of *January* and within

1812.

SERGEAUNT *against* TILBURY.

the space of six calendar months next before the commencement of this suit, to wit, on the 4th day of *December* 1809, at *Westminster*, in the county aforesaid, did let to hire *for a period of time less than* 28 *successive days*, to wit, *for eight days*, divers, to wit, two horses for drawing a certain carriage used in travelling, to wit, in travelling upon a public road, and such horses were on the day and year last aforesaid, used in drawing such carriage in pursuance of such letting to hire, to wit, &c. *by reason whereof they became due and payable* to the plaintiffs as such farmers, &c. *for the duty payable on such letting to hire* and using as aforesaid, a large sum of money, to wit, the sum of 1*l.* 8*s.* The declaration then went on to charge that the defendant afterwards made out a certain account, as and for the stamp-office weekly account, required to be kept and made out by the defendant, including the day on which the said horses were so let to hire and used as aforesaid, without inserting in it *the time* for which the said horses were so hired as aforesaid, *or the amount of the duty* payable for or in respect of the said horses upon the said hiring, contrary to the form of the statute in such case made and provided. Whereby and by force of the statute defendant hath forfeited for his said offence the sum of 10*l.* &c. Plea, nil debet.

It was objected at the trial, before Lord *Ellenborough*, C. J., at the *Middlesex* sittings, that the evidence did not sustain the count; the count alleging that the defendant let to hire for a period less than 28, to wit, for eight days, and the witness having stated that he was uncertain in his recollection whether the letting was for eight or nine days; whereupon the defendant was allowed to take a verdict, subject to be set aside

1812.

SERGEAUNT *against* TILBURY.

aside and entered for the plaintiff, if the Court should be of opinion that the count was sustained in proof.

A rule nisi was accordingly obtained for entering the verdict for the plaintiff.

Gurney and *Puller* shewed cause, and contended that the count should have been framed differently, in order to have corresponded with the proof; and instead of alleging the contract to have been for eight days absolutely, it should have alleged it in the alternative, according to *Tate* v. *Wellings* (*a* and *Penny* v. *Porter* (*b*). If it should be said that the plaintiff is not bound to allege a hiring for any specific number of days, provided he allege it for any number less than 28 days, because the penalty is the same whether the number of days be more or less, it may be answered, that as the penalty attaches for not inserting the time of the hiring as well as the amount of the duty, therefore the time is material, and the contract as to that must be proved as laid; *Carlisle* v. *Trears* (*c*). The duty also varies with the time, for it is a duty on each day; and it is material, in order to give the defendant notice. Suppose the allegation had only been that the defendant let for a period less than 28 days, without more; would that have been good? if not, it shews that the time is material, and if improperly laid, its being laid under a videlicet will not cure it.

Abbott, contrà, referred to *Radford* v. *M'Intosh* (*d*), where the defendant was charged with letting and not accounting for divers, to wit, eight horses, and the charge

(*a*) 3 *T. R.* 531.
(*b*) 2 *East*, 2.
(*c*) *Cowp.* 671.
(*d*) 3 *T. R.* 632.

was

was held to be sustained by proof that he let and did not account for five.

1812.

SERGEAUNT *against* TILBURY.

Lord ELLENBOROUGH, C. J. The penalty is certainly collateral to the time of the contract; whether it be for eight, nine, or any period short of 28 days, it matters not as to the penalty, it is material only for ascertaining the duty. The gist of the allegation is that the letting was for a less number than 28 days, and the videlicet is not to fix the precise number, but only to shew it less than 28. I should have thought it unnecessary to make any specification at all; but if it be necessary, the specification need not be precisely proved, being under a videlicet, and not material. This is not like the case cited of usury, where the very contract is of the essence of the charge, and therefore must be truly stated. If this had been a letting for more than 28 days, it would have been different.

BAYLEY, J. The defendant is bound to enter in his account every letting to hire for less than 28 days, and the same penalty accrues from his neglect to do it, whether the number of days, within the period of 28, be greater or less. In *Rex* v. *Gillham* (*a*), upon an indictment for extortion, proof that the defendant took a less sum than the sum laid in the indictment was held sufficient to sustain the indictment.

Per Curiam, Rule absolute.

(*a*) 6 *T. R.* 265.

Saturday, Nov. 28th.

LEAPER *against* TATTON.

In assumpsit against the defendant as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of actio non accrevit infra sex annos. The plaintiff may declare on the original promise, although he relies on the subsequent promise to take the case out of the statute of limitations.

THE plaintiff declared in assumpsit as the indorsee of a bill of exchange, drawn on the 10th of *October* 1796, by *M. Smith*, upon the defendant, at two months' date, for 20*l.* 5*s.*, payable to the order of the drawer, which was accepted by the defendant, and afterwards indorsed by the drawer to the plaintiff; and the special count concluded with this averment "of which said indorsement the defendant afterwards, &c. had notice, by reason of which said premises and according to the said custom and by the law of merchants, he the defendant then and there became liable to pay to the plaintiff the said sum of money specified in the said bill of exchange, *according to the tenor and effect of the said bill of exchange*, and of his said acceptance thereof; and being so liable, the defendant, *in consideration thereof*, afterwards promised," &c. The declaration also contained the common money counts. The defendant pleaded non assumpsit, and also that the several causes of action in the declaration mentioned, did not accrue to the plaintiff at any time within six years next before the exhibiting of the plaintiff's bill. To the last plea the plaintiff replied that the said several causes of action did accrue to the plaintiff within six years, &c. At the trial before Lord *Ellenborough*, C. J., at *Guildhall*, the question turned upon evidence of an acknowledgment by the defendant to take the case out of the statute of limitations: a witness swore that the defendant, when applied to for payment, shortly before the action was commenced, said that he had been liable, but was not liable

liable then, because the bill was out of date. He acknowledged that it was his acceptance. The witness said that the plaintiff would take the money by instalments: but the defendant said that he would not pay it: it was not in his power to pay it. His Lordship, on objection taken that this was not sufficient evidence of an acknowledgment of an existing debt to take the case out of the statute, and still less so upon the issue as framed, observed that although the defendant's merely saying that the bill was out of date, and that he had nothing to do with it, might have amounted to nothing more than his pleading the statute of limitations in his own person; yet that his saying that he could not pay it, that it was not in his power to pay it, might be considered as an acknowledgment of his continuing liability to pay it: and thereupon a verdict was taken for the amount of the bill, reserving leave to the defendant's counsel to move to set it aside, 1st, upon the point whether a sufficient acknowledgment was proved to take the case out of the statute; and 2dly, whether the evidence was admissible, as the record was framed.

A rule for setting aside the verdict was accordingly obtained; and now upon its being called on, after Lord *Ellenborough*, C. J. had read the report, and referred to the case of *Gould* v. *Johnson* (*a*), his Lordship observed that the plea of actio non accrevit infra sex annos was quite unexceptionable, as it was a form of pleading which applied either to an executory or an executed contract; and he called on *E. Lawes* to support the rule, who agreed to what his Lordship had stated, but contended upon the evidence that it was not sufficient

(*a*) 2 *Ld. Ray.* 838.

1812.

LEAPER *against* TATTON.

to take the case out of the statute, the proof being only of a promise to pay when he was of sufficient ability, without any proof of his ability, which *Mansfield*, C. J. in *Bicknell* v. *Keppell* (*a*), seemed to think necessary in such a case. In the next place he contended, that supposing the promise sufficient to take the case out of the statute, the plaintiff should have declared on the special promise, and not on that which arises from the legal liability of the defendant to pay the bill according to the tenor of his acceptance; the evidence so far from proving that the defendant was liable, according to the tenor of his acceptance, proving the reverse, viz. that the law had discharged him from all liability on his acceptance. The issue here is upon a promise by this very bill, and therefore it is impossible that evidence of a subsequent promise can prove a promise by this bill; in *Stafford* v. *Forcer* (*b*), where in an action against an administrator upon a promissory note, it appeared on the face of the declaration that the cause of action accrued above six years before the testator's death, it was held that a verdict would not cure the defect, but that it was ground for arresting the judgment. And though in *Williams* v. *Dyde* (*c*) a subsequent promise by a bankrupt after he was discharged by his certificate, was allowed to be given in evidence upon a count for goods sold, and a plea of discharge under his certificate, yet that was a general count, and not like a count on a bill of exchange where the promise is to pay on a day certain.

Lord ELLENBOROUGH, C. J. As to the sufficiency of the evidence of the promise it was an acknowledgment

(*a*) 1 *N. R.* 21. (*b*) 10 *Mod.* 312. cited in *Str.* 22.
(*c*) *Peake's N. P. Cas.* 68.

by

1812.

LEAPER *against* TATTON.

by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid be shewn, it does away the statute. Then as to the form of declaring insisted upon, it is enough to say that it has never been in use, but that it is the common practice to declare on the original contract, and if the statute be pleaded, the only question is, whether the defence given by it has been waived. If the objection were good, it would be necessary to recast all the modes of declaring by way of obviating the possibility of the defendant's taking advantage of the statute of limitations. But there is no occasion to go further into the question, because in this case there is a count on an account stated, which removes all objection.

LE BLANC, J. This was not an express promise to pay when he was able, like the case alluded to in argument.

BAYLEY, J. It was certainly good evidence upon an account stated; it was evidence of a debt; acknowledging his acceptance, and that he has not paid it, creates a debt.

Per Curiam, Rule discharged.

END OF MICHAELMAS TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

such time of absence, or to make satisfaction for it; and in default of such satisfaction, to commit the apprentice: for the remedy given to the master by the latter stat. is cumulative to the punishment inflicted on the apprentice by the former stat. for his offence. *Gray* v. *Cookson and Clayton*, *T.* 52 *G.* 3. Page 13

2. The stat. 5 *Eliz. c.* 4., avoiding all indentures of apprenticeship other than for 7 years, is to be construed as rendering indentures made for a less time voidable only, and not void. *ib.*

3. But such indenture cannot be avoided by the mere act of an apprentice absenting himself from his master's service, which is an offence under the statute 20 *G.* 2. *c.* 19. *ib.*

4. And generally it seems that no act can be relied on as such avoidance, in an action of trespass against the convicting magistrates, except it appears on the face of the conviction. *ib.*

5. So a refusal of the apprentice to return into the service of his master, when urged to it by the magistrates themselves in the course of the inquiry, upon the complaint of the master, on a prior absenting himself by the apprentice from the service; is not available in support of such action against the conviction. *ib.*

6. But where the master had agreed by indorsement (unstamped) on the indenture to cancel it, "*provided* the apprentice *made no engagement* or entered into any person's service in the town of *N.*;" it was held that the apprentice setting up a trade for himself in *N.* was a breach of the condition, which entitled the master to recal him back into his service. *ib.*

ATTORNMENT,

See USE AND OCCUPATION.

AWARD,

See PLEADING, 2.

Where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three or any two of them; and each of the arbitrators proposed to the other a third, who was admitted to be a fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot: held that this was within their authority, and that an award made by such third arbitrator in conjunction with the one by whom he had been originally proposed, could not be impeached on that account. *Neale* v. *Ledger*, *T.* 52 *G.* 3. Page 51

BAIL.

1. A return of non est inventus procured by the plaintiff against the principal, in order to found proceedings against the bail, is irregular, if the principal were at the same time in custody of the same sheriff who made the return, though at the suit of another person; and the subsequent proceedings against the bail will be set aside. *Burks* v. *Maine and Another*, *T.* 52 *G.* 3. 2

2. Bail having rendered their principal in time, according to the practice of the Court, are entitled to stay the proceedings in an action on their recognizance, without costs, though the plaintiff commenced his action before he was served with notice of the render. *Smith* v. *Lewis*, *T.* 52 *G.* 3. 168

3. The Court will allow time to the bail to surrender their principal, where, the principal being in custody under process of another Court, it appears on the return made to a habeas corpus issued by the bail in order to render him, that

that he cannot be removed out of such custody without danger to his life, and that such impossibility still continues. *Winstanley* v. *Gaitskell, M. 53 G. 3.* Page 389

BANKRUPT.

1. Third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance: held that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons. *Fair* v. *M'Iver, T. 52 G. 3.* 130
2. In an action against a bankrupt who has obtained his certificate under a second commission, the certificate is no bar unless it appears affirmatively that his estate has produced 15*s.* in the pound; evidence that it probably will produce so much is not sufficient. *Coverley* v. *Morley, M. 53 G. 3.* 225
3. Where separate commissions of bankruptcy were issued against three of four partners, to which they conformed and passed their examination, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three, under which commission the plaintiffs proved their joint debt, and afterwards sued all the partners for the same debt, and arrested one of the other two under whose commission they had not proved: Held that he was not entitled to be discharged out of custody. *Young* v. *Hunter, M. 53 G. 3.* Page 252
4. In an action by the assignees of a bankrupt, underwriter, against defendants, insurance brokers, for the balance of an adjusted account between the bankrupt and defendants, and also for premiums of insurance on policies underwritten by th bankrupt with them as *brokers*, before the bankruptcy, the brokers are not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, but where the events entitling them to such returns were not known till after such adjustment: nor can they deduct for returns of premium on some of the policies, for the premiums of which the action is brought, the events entitling them to which returns happened before the bankruptcy, but the returns were not adjusted; nor can they deduct for returns on other policies for the premiums of which the action is brought, the events entitling them to which returns happened since the bankruptcy but before the commencement of the action; the brokers not having a commission del credere, nor being personally interested in any of the insurances. *Parker* v. *Smith, M. 53 G. 3.* 382

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where one draws a bill of exchange with a bonâ fide reasonable expectation of having assets in the hands of the drawee; as byhaving shipped goods on his own account which were

were on their way to the drawee, but without the bill of lading or invoice; the drawer is entitled to notice of the dishonour, though in fact the goods had not come to the hands of the drawee at the time when the bill was presented for acceptance, (for he had rejected them) and he returned it marked "no effects." *Rucker* v. *Hiller*, *T. 52 G. 3.* Page 43

2. The holders of a bill of exchange having presented it for payment to the acceptor without effect, gave regular notice of the dishonour to the drawers, who lived at a distance, but informed them at the same time, that having reason to believe that a friend of the acceptor's would take it up in a few days, they would, in order to save expense, hold the bill till the latter end of the week, unless they heard from the drawers to the contrary: Held that such notice gave the holders a remedy upon the bill against the drawers, though no further notice of non-payment was given to them at the end of the week: but if the construction of the letter bound the plaintiffs to give such further notice at the end of the week, they were only answerable for the neglect in their implied character of agents for the drawers, which they had taken upon themselves, without disturbing their remedy upon the bill itself. *Forster* v. *Jurdison*, *T. 52 G. 3.* 105

3. Payment of a promissory note, made payable at a certain place named in it, must be demanded there before the makers can be sued on it. But upon such demand proved in an action by the holder against the makers, it is no objection to the plaintiff's recovery that one of the makers, whose real name was *John Key*, (who had suffered judgment by default,) was sued on the joint-promise by the name of *Thomas Kay*; it being proved that the real person had been served with the process, though under a mistaken Christian name; and the variance between *Key* and *Kay*, which were sounded alike, not being material. There had also been a part-payment on the notes duly presented. *Dickenson* v. *Bowes and Others*, *T. 52 G. 3.* Page 110

4. Though where a promissory note is made payable at a particular place, a demand of payment must be made there, in order to give the holder a cause of action; yet if the makers (who had become insolvent) shut up and abandon their shop, that is evidence of a declaration to all the world of their refusal to pay their notes there. *Howe* v. *Bowes*, *T. 52 G. 3.* 112

5. It is no objection to an action on a promissory note, that it was given as part of the consideration of an indenture of apprenticeship for less than 7 years, by being antedated: such indenture being only voidable. Nor does the consideration of the note fail because the apprentice was discharged by a magistrate after two years on account of the master having enticed him to commit felony, particularly when the apprentice-fee was to be paid in the first instance, though in case of the defendant a note was taken for part of it, payable at a distant day. *Grant* v. *Welchman*, *M. 53 G. 3.* 207

6. Where the plaintiff in *Yorkshire* on the 26th of *December* received a bill of exchange, payable in *London*, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at *Lincoln*, who duly forwarded it to *London* for presentment, and the bill was dishonoured:

honoured: Held that the plaintiff by keeping it in his hands until the 29th was guilty of laches. *Anderton* v. *Beck*, *M.* 53 *G.* 3. Page 248

7. A warrant of the Lord Chancellor for the commitment of a person, appointed a receiver by the Court of Chancery, for the non-payment of a balance certified against him, is only in the nature of a civil execution; therefore where *D.*, being appointed receiver in a suit in Chancery, was in custody of the officer under such warrant, and the defendant, in order to procure his discharge, joined with him as surety in two promissory notes to the plaintiff, who was a party to the suit in Chancery, and his solicitor, who sued out the warrant, for the amount of the debt and costs, and was thereupon discharged by the direction of the solicitor: Held that the discharge was a legal consideration for the notes, and that an action might be maintained on them; and although there were other parties to the suit in Chancery, who did not concur in the discharge, and therefore *D.* remained liable to be taken again, yet the consideration had not failed; and that it was no objection to the validity of the notes, that the sum given to cover costs exceeded the costs due, no fraud being intended. *Brett* v. *Close*, *M.* 53 *G.* 3. 293

8. The acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. *Hoare* v. *Cazenove*, *M.* 53 *G.* 3. 391

BRIDGES,

See INDICTMENT.

BROKERS,

See BANKRUPT, 4.

BUILDING ACT.

The 14 *G.* 3. *c.* 78. *s.* 96. (building act) does not enable the district surveyor, who lodges a complaint before two justices on account of a projection made in front of a house, contrary to the provisions of that act, to appeal to the quarter sessions against the dismissal of such complaint by the two justices. *Rex* v. *The Justices of Middlesex*, *M.* 53 *G.* 3. Page 310

CARRIER.

A public notice given by carriers that they will not be answerable for certain specified articles or any other goods of what nature or kind soever above the value of 5*l.*, if lost, stolen, or damaged, unless a special agreement is made, and a premium paid, such value to be entered at the time of delivery, seems not to extend to goods which do not fall within any of the specified articles, and which from their bulk and quality, communicated to the carrier at the time of delivery, must be known to them to exceed the value of 5*l.*: and therefore it seems they will be liable for any damage to the goods arising from the carriage, although no special agreement be made, nor any premium paid; but at all events they will be liable for damage arising from gross negligence notwithstanding such notice. *Beck* v. *Evans*, *M.* 53 *G.* 3. 244

CHARTER-PARTY.

Where the master of a ship covenanted in a charter-party to go to a certain port

port of *America* and receive a loading from the freighter, alongside the ship, and bring home the same; with an exception of the restraints of rulers, &c.: but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the *American* port, which prevented the freighter from loading the ship did not discharge him from his covenant: but the plea alleging that the defendant did provide a cargo, and was ready and willing, and offered to send it alongside the ship, but that the plaintiff refused to receive it there, and discharged the defendant from sending it alongside, on which issue was taken by the replication, was held not to be sustained by evidence of the master's written acknowledgment of the defendant having offered to load the cargo on board, on his (the master's) being ready to take it, for the purpose of raising the question of law on the embargo. *Sjoerds* v. *Luscombe, M.* 53. *G.* 3. Page 201

CHURCHWARDENS AND OVERSEERS.

See SETTLEMENT BY APPRENTICESHIP.

The 50 *G.* 3. *c.* 49., which requires the churchwardens and overseers to submit their accounts to two justices at special sessions to be holden within the 14 days appointed by the 17 *G.* 2. *c.* 38. for delivering in the said account to the succeeding overseers, is not a substitution in lieu of that provision in the 17 *G.* 2., but is cumulative, and if the overseer refuse to deliver in such account to the succeeding overseers within the 14 days, he may be committed by two justices for such refusal. *Lester's* case, *M.* 53 *G.* 3. 374

CONTEMPT,

See BILLS OF EXCHANGE, 7.

CONTRACT,

See SALE, 1.

The defendant, on occasion of there being a great run upon a banking-house, went to the bank, and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders then present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper, "I do hereby authorize *G. B.* to assure the inhabitants of *Pembroke* and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the *Milford* Bank, as far as the sum of 30,000*l.* will extend to pay:" Held that the bank having afterwards stopped payment, the defendant was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage. *Phillipps* v. *Bateman, M.* 53 *G.* 3. Page 356

CONVICTION,

See MAGISTRATES, 1, 2.

COPYHOLD.

1. A surrender of and admittance to a copyhold may be proved by the original entries on the court-rolls, without shewing a copy stamped as required by stat. 48 *Geo.* 3. *c.* 149. *Doe* d. *Bennington* v. *Hall, M.* 53 *G.* 3. 208
2. An admittance of the surrenderee before trial will maintain ejectment brought

brought by him before admittance upon a demise laid between the time of surrender and admittance. Page 208

COPYRIGHT.

The 8 *Anne*, *c.* 19. *s.* 5. makes it necessary for the printer of a book, composed after the passing of the act, and published for the first time after the composition, which book is printed and published with the consent of the proprietor of the copyright, to deliver a copy upon the best paper to the warehouse-keeper of the Company of Stationers for the use of the library of the University of *Cambridge*, notwithstanding the title to the copy of such book, and the consent of the proprietor to the publication, be not entered in the register-book of the said Company. *Cambridge University* v. *Bryer*, *M.* 53 *G.* 3. 317

CORPORATION,

See ESSOIGN, 1.

Trover lies against a corporation; and if it be essential to their conversion of the property, (*i. e.* in this instance the detainer of bank-notes by the governor and company of the Bank of *England*,) that they should have authorized it under their seal, such authority will be presumed after verdict: but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorized under their seal. *Yarborough* v. *The Bank of England*, *T.* 52 *G.* 3. 6

COSTS.

1. Where a noli prosequi is entered on any of the counts in a declaration, there is no rule for allowing costs on such counts. *Hubbard* v. *Biggs*, *T.* 52 *G.* 3. 129

2. Persons *dwelling near a steam-*engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for it, are parties grieved, entitled to have their costs taxed under the stat. 5 *W.* & *M. c.* 11. *s.* 3., upon removal of the indictment by certiorari from the sessions into this court by the defendants, and their subsequent conviction. *The King* v. *Dewsnap*, *T.* 52 *G.* 3. Page 194

COVENANT,

See CHARTER-PARTY.

1. Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all further or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant is bound to defray all increase of the old as well as any new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent. *Graham* v. *Wade*, *T.* 52 *G.* 3. 29

2. Covenant by lessee that he will at all times during the term plough, sow, manure, and cultivate the demised premises (*except the rabbit warren and sheep-walk*) in a due course of husbandry; if lessee plough the rabbit-warren and sheep-walk, covenant lies against him. *Duke of St. Albans* v. *Ellis*, *M.* 53 *G.* 3. 352

DEVISE.

1. Under a devise, to the son of the testator, of the residue of the testator's

tor's estates, &c.; but in case he should die under 21, *or* (which is to be read *and*) should leave no issue male or female, then to the testator's daughter surviving, and her heirs male or female; but in case his son and daughter should both die, leaving no issue, then to his cousin and his heirs; the son takes a fee with an executory devise to the daughter, upon the event of his dying under 21, and without leaving issue; with another executory devise over. *Right* d. *Day* v *Day*, *T.* 52 *G.* 3. Page 67

2. Where the testator, after several bequests of stock in the 4 per cents., devised all the remainder in the above stocks *with my freehold property* to *M. S.*: Held that *M. S.* took a fee in the real estate. *Roe* d. *Shell* v. *Pattison*, *M.* 53 *G.* 3. 221

3. Devise of all the testatrix's real estate to her cousins, *M. A.* and *A. I.* (who were females) their heirs and assigns for ever, subject to certain annuities (*inter alia*,) one to her brother *A.*, (her heir at law,) and another to her sister *S.*, and their children, for life; and the testatrix charged her real estate therewith, and directed that the surplus profits should go to *A.* for life, remainder to his children for life, remainder to *S.* for life, remainder to the surviving children of her brothers and sisters for life, *but gave no directions as to the remainder in fee*: Held that *M. A.* and *A. I.* took the remainder to their own use, although they also took legacies under the will; and that there was no resulting use to the heir at law.

Possession of the *cestui que* trust not adverse to the title of the trustees. *Smith* v. *King*, *M.* 53 *G.* 3. 283

4. Devise of a tenement, of which testator was possessed for the remainder of a term of years, to his daughter *S. K.*'s children, to be equally divided between them, share and share alike, *and to the survivor of them and their children*: Held that the children of *S. K.* took an absolute interest in the premises, share and share alike, subject to a survivorship between them for life. *Doe* d. *Gigg* v. *Bradley*, *M.* 53 *G.* 3. Page 399

5. Devise of testator's burgage-house (being burgage held of a manor where there is no custom of entailing) to his wife for life or until marriage, and after her decease or marriage to *R. C.* his younger son for and during the term of his natural life, and after the decease or marriage of his wife, and also after the decease of his son *R. C. unto the heirs of the body* of *R. C.* lawfully begotten or to be begotten, *equally amongst them as shall then be living*, share and share alike, (there being not any child of *R. C.* then born,) and in case *R. C.* die without issue lawfully begotten or to be begotten, after his decease, remainder over: Held that *R. C.* took either an estate of inheritance in the nature of an estate tail, or an estate for life with a contingent remainder to his children, depending on the event of there being a child born and living at the death of *R. C.*; and that in either case, the child of *R. C.* was barred by the freehold of the lord becoming united, by a deed of enfranchisement, in the owner of the customary estate, who derived title by conveyance from *R. C.* after his estate came into possession. *Roe d. Clemett* v. *Briggs*, *M.* 53 *G.* 3. 406

DRAWBACK.

The shipper of beer, on which the duty has been paid, which is shipped for exportation to the *West Indies*, is entitled to take the oath appointed by 38 *G.* 3. *c.* 54. *s.* 4. in order

order to obtain a drawback upon such beer, without being subject to any deduction out of such drawback, in respect of the quantity of beer to be charged in the victualling bill of the master, for the consumption of the voyage, on which no drawback is allowed; and therefore the Court granted a mandamus to the collector of the excise to administer such oath. *Rex* v. *Cookson, M.* 53 *G.* 3. Page 376

EJECTMENT,

See COPYHOLD, 2.

Though a purchaser for a valuable consideration may recover in ejectment against one who claims only under a voluntary settlement, of which such purchaser had notice: yet it seems that the inadequacy of consideration for such purchase is material if it extend so far as to shew that it was not made bonâ fide, but merely colourably, to get rid of the first settlement, and make another, which was also in truth a voluntary settlement. *Doe d. Parry* v. *James, M.* 53 *G.* 3. 212

ESSOIGN.

There is no essoign in a personal action, nor can it be cast by a corporation. *Argent* v. *The Dean and Chapter of St. Paul's, T.* 52 *G.* 3. 8 in not.

EVIDENCE,

See CHARTERPARTY. COPYHOLD, 1. LEASE, 2. TITHES, 1.

1. In trover by the assignees of a bankrupt, against the sheriff and an execution creditor, where the defendants had given notice under the stat. 49 *G.* 3. *c.* 121. that they intended to dispute the petitioning creditor's debt; proof by the plaintiffs that one of the defendants, the execution creditor, had proved his debt under the commission is no proof of the petitioning creditor's debt, either against the sheriff or such execution creditor. *Rankin* v. *Horner, T.* 52 *G.* 3. Page 191

2. In an action on 2 and 3 *Ed.* 6. by the plaintiff, as owner of tithe-hay, against the defendant, as occupier of a close, for not setting out the tithe, *copies* of a bill and answer, in a suit by the vicar for tithe-hay against *S. L.*, then occupier of the close, and from whom defendant purchased, denying the vicar's right, and setting up a right in the ancestor of plaintiff, on which the vicar abandoned the suit, were holden evidence against the defendant.

In favour of uninterrupted enjoyment by the perception of tithe-hay by plaintiff and his ancestors, although an endowment of the vicarage in 1253 with the said tithe be shewn, it shall be presumed that the tithe came into lay-lands before the restraining statutes. *Countess of Dartmouth* v. *Roberts, M.* 53 *G.* 3. 334

3. Assumpsit against the defendant as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of actio non accrevit infra sex annos. *Leaper* v. *Tatton, M.* 53 *G.* 3. 420

4. The plaintiff may declare on the original promise, although he relies on the subsequent promise to take the case out of the statute of limitation. *Ibid.*

EXECUTION.

If judgment be entered up for the penalty of a bond given to secure an annuity,

annuity, and the defendant be taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorized the taking out execution for the arrears, the Court will set aside the execution in toto, and not merely charge the defendant pro tanto. *Tilby* v. *Best*, *T.* 52 *G.* 3. Page 163

EXTENT.

1. Where goods were taken in execution by the sheriff on a fi. fa., and whilst they remained in his hands unsold, an extent came at the king's suit tested after the entry of the sheriff under the fi. fa.; and the sheriff thereupon seized the said goods subject to the former seizure, and afterwards sold them *under a venditioni exponas issued upon such extent*, and paid over the proceeds of such sale by order of the Court of Exchequer: Held that at all events, without determining whether the king's extent was under the circumstances entitled to priority, the plaintiff could not maintain *money had and received* against the sheriff for the proceeds of such sale. *Thurston* v. *Mills*, *M.* 53 *G.* 3. 254
2. Goods seized under a fi. fa. at the suit of a subject are before sale liable to be taken by virtue of the king's extent, tested after the delivery of the fi. fa. to the sheriff. *Rex* v. *Wells and Allnutt*, *M.* 53 *G.* 3. 278 in not.

GAME.

An unqualified person going out with the qualified owner of greyhounds to course a hare, which was killed by the dogs, is not liable to the penalty of 5*l.*, given by stat. 5 *Ann.* *c.* 14, for using a greyhound to kill game; although he took an active part in the sport by beating the in order to find a hare, and took it up after it was killed. *Lewis* v. *Taylor*, *T.* 52 *G.* 3. Page 49

HIGHWAY,

See ACTION ON CASE, 2,

IMPRESS, PROTECTION FROM.

1. A protection from the impress service, granted by the favour of the board of admiralty, though for a certain time, may be set aside at pleasure, whenever in their judgment the exigency of the public service requires it: and it matters not that the impress warrant is of a prior date to such protection. *Herbert*'s case, *T.* 52 *G.* 3. 165
2. The Court discharged a mariner who had been impressed out of a fishing smack; he having had an impress protection granted to him by the board of admiralty, under the directions of the stat. 50 *G.* 3. *c.* 108., though by the accident of the vessel's sailing before it reached him, he had it not to produce to the impress officer at the time, as he ought to have had, which warranted the officer in impressing him: and though the master had afterwards received a greater number of mariners on board than were described in the act. *Pratt*'s case, *T.* 52 *G.* 3. 167

INDENTURES,

See APPRENTICE, 2, 3, 4, 6. BILLS OF EXCHANGE, 5.

INDICTMENT,

See COSTS, 2.

1. Indictment against a county for not repairing a bridge. Plea, that *J. S.* is liable ratione tenuræ. The plea not sustained by evidence that the estate of *J. S.* was part of a larger estate, which part *J. S.* pur-

chased of the former owner, who retained the rest in his own hands, and as well before the purchase as since has repaired the bridge. But where in such case the county was found guilty, the Court gave leave to stay the judgment upon payment of costs until another indictment was preferred in order to try the liability. *Rex* v. *Inhabitants of Oxfordshire, M.* 53 *G.* 3. Page 223

2. The 49 *G.* 3. *c.* 84. appoints trustees for taking down the old and building a new bridge over the river *Tone*, and empowers them to take tolls, and that it shall be lawful for them, out of the monies received, to build a new bridge, &c., and vests the property in the old and new bridge during the continuance of the act in the trustees, and that as soon as the purposes of the act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c. shall be repaired by such persons as are by law liable to repair the old bridge: Held that during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. *Rex* v. *The Inhabitants of Somersetshire, M.* 53 *G.* 3. 305

INSURANCE,

See LICENCE, 1, 2.

1. Joint owners of property insured for their joint use and on their joint account, cannot recover upon a count on the policy, averring the interest to be in one of them only. *Bell* v. *Ansley, T.* 52 *G.* 3. 141

2. The plaintiff was entitled to recover a loss of goods insured at and from *Landscrona* to *Wolgast;* though they were shipped at *Gottenburgh* before the ship arrived at *Landscrona*, and though the policy was declared to be *at and from the loading of the goods on board the ship;* it appearing that the underwriter was informed at the time that the goods were loaded on board at *Gottenburgh;* and that part of them were landed and reloaded at *Landscrona, so as* to enable the custom-house officers there to ascertain the qualities of the whole, and to adjust the duties; and the policy being *free of average.* A mere representation that the cargo was *Swedish*, and neutral, which was true in fact, though contradicted by the *French* sentence of condemnation, was no objection to the plaintiff's recovery; nor the want of documents as *Swedish* property, required only by *French* ordinances. The exclusion of the *British* flag from *Swedish* ports, not appearing to be by *French* control, and *Sweden* not being a co-belligerent with *France*, was held not to be within the prohibition of the order in council of the 7th of *January* 1807. *Nonnen* v. *Reid. The same* v. *Kettlewell, T.* 52 *G.* 3. Page 176

3. Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: Held that the underwriters on the goods, who were freed by the policy from the particular average, could not be made liable as for a total loss by a notice of abandonment. *Thompson* v. *Royal Exchange Assurance Company, M.* 53 *G.* 3. 214

4. An insurance may be effected on *profits* generally without more description, and engrafted upon a policy on ship and goods in the common printed form for a certain voyage; with a return of premium for short interest: the assured proving an interest in the cargo. *Eyre* v. *Glover, M.* 53 *G.* 3. 218

5. Policy on goods at and from *G.* to any port in the *Baltic*, beginning the adventure from the loading thereof

thereof on board the ship, and the policy was declared to be in continuation of a former policy; which was a policy from *V.* to her port of discharge in the united kingdom, or any ports in the *Baltic*, with liberty to take in and discharge goods wheresoever, to return 15 per cent. if the voyage ended at *G.*: Held that the assured were entitled to recover, although the goods were not loaded on board at *G.* but at *V.*, and although the defendant was not an underwriter on the former policy. *Bell* v. *Hobson*, *M.* 53 *G.* 3. Page 240

6. A policy of insurance on goods at and from *London* to the ship's discharging port or ports in the *Baltic*, *with liberty to touch at any port or ports for orders*, or any other purpose, does not warrant the assured, after having touched at *C.* for orders, and gone on to *S.*, a more distant port, in retouching at *C.* for orders: but if the policy be to any and all ports and places in the *Baltic forwards and backwards, and backwards and forwards*, it is otherwise. *Mellish* v. *Andrews*, *M.* 53 *G.* 3. 312

LANDLORD AND TENANT.

See COVENANT, 1, 2. TROVER. USE AND OCCUPATION.

LEASE.

1. Under a beneficial long lease, reserving liberty to the lessee to cut down and dispose of all timber and coppice, &c. (the value of which was included in the purchase,) then growing or thereafter to grow during the term; subject, however, to a proviso that *when and so often* as the lessee should intend, during the term, to sell the timber, &c. growing on the premises or any part thereof, he should immediately thereupon give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it; and on the lessor's neglect or refusal to purchase, the lessee might dispose of it absolutely; if the lessee, soon after the execution of the lease bonâ fide, intend to cut down the whole of the then growing timber and coppice, &c. and give notice in writing to that effect, and the lessor do not accept the purchase, but disclaims it; the lessee may proceed to cut down the whole in different seasons according to his convenience, and is not obliged to give a fresh notice at every succeeding cutting: and this, though the lessor had in the interval assigned his interest in the land to another. *Goodtitle* d. *Luxmore* v. *Saville*, *T.* 52 *G.* 3. Page 87

2. But after such assignment, it is sufficient for the lessee, after ejectment brought by the assignee of the lessor for a forfeiture, to give such assignee notice to produce the original notice in writing of the intention to cut the whole, and he is not bound to shew that he applied for the same to the original lessor, (who had left the country) or to his agents, or gave them notice to produce it; for it will be presumed to have been delivered up to the assignee of the reversion as a document relating to the estate; and on default of its production at the trial, he may give parol evidence of it. *ib.*

LICENCE.

1. A licence to trade to an enemy's country, granted to one set of *British* merchants, cannot be used to cover a trading by other *British* merchants, without connecting them together; as by shewing that the licensers were agents at the time for the others. *Busk* v. *Bell*, *T.* 52 *G.* 3. 3

2. A licence to trade with an enemy granted to *F.* and Co. *and others* may be used by the person for whom *F.* and

F. and Co. were the acting agents in procuring such licence and in carrying on the adventure, though the person was a foreigner residing here under an alien licence at the time. *Feise* v. *Newnham, M.* 53 *G.* 3. 197

LIMITATIONS OF ACTIONS,

See EVIDENCE, 3, 4.

MAGISTRATES.

See APPRENTICE, 4, 5.

1. It seems that if a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrates under the general issue in an action of trespass, as well in respect of such facts therein stated as are necessary to give them jurisdiction, as upon the merits of the conviction. *Gray* v. *Cookson and Clayton, T.* 52 *G.* 3. 13
2. But the stat. 43 *G.* 3. *c.* 141., extends to protect magistrates against actions of trespass only in the case of a conviction *quashed;* giving to the party grieved a remedy by action on the case. *ib.*

MISDEMEANOR.

By 1 *G.* 1. *c.* 47. upon an information filed in this court for persuading soldiers to desert, and tried at the assizes, this court is the proper court to award punishment, and if they award imprisonment, besides the penalty of 40*l.*, they are bound also to award the pillory. *Rex* v. *Read, M.* 53 *G.* 3. 404

MISNOMER,

See BILLS OF EXCHANGE, 3.

MONEY HAD AND RECEIVED,

See EXTENT, 1.

NEW ASSIGNMENT,

See PLEADING, 3, 4.

NOTICE,

See BILLS OF EXCHANGE, 1, 2. CARRIER, 1. LEASE, 2.

NOTICE TO QUIT.

See TITHES, 1.

NUISANCE,

See COSTS, 2.

PARTNER.

Where the party sued as a partner for the value of goods furnished for "the *owners* of a ship," was neither a partner in fact at the time, (having parted with his share some time before,) nor held himself out as such, having before withdrawn his name from the description of the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change; he cannot be charged merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees. *M'Iver* v. *Humble, T.* 52 *G.* 3. 169

PLEADING,

See EVIDENCE, 4.

1. The practice of the Court is pleadable where the very merits of the case depend upon it; therefore where bail sued in scire facias upon their recognizance pleaded that no ca. sa. was duly sued, returned, and filed against the principal, according to the custom and practice of the Court; to which the plaintiff in reply shewed a writ of ca. sa. issued in *Middlesex;* it is no departure for

the defendants to rejoin that the venue in the action against the principal was in *London;* for that sustains the plea. *Dudlow* v. *Watchorn*, *T.* 52 *G.* 3. 39

2. To debt on bond, conditioned to perform an award, under a reference of all matters in difference between the parties, it is a good plea in bar that at the time of the submission certain negotiable bills of exchange, drawn by the defendant and accepted by the plaintiff, were then outstanding, and that an indemnity of the defendant against such bills was a matter in difference between the parties, which was notified to the arbitrators before the award made, and that they made no award concerning it; and that some of the bills had not been paid by the plaintiff, and the defendant was still liable to the holders; though it appeared by the award set forth that the arbitrators stated therein that they had heard the allegations of the parties, and examined all the accounts, bills of exchange, &c. and all other evidence and proofs produced to them touching the matters in difference, and awarded of and concerning the same, that the defendant should pay to the plaintiff 1500*l.* in full of all claims and demands upon him, &c.; and so proceeded to award concerning other specific matters; but without mentioning such outstanding bills, or any indemnity concerning the same. *Mitchell* v. *Staveley*, *T.* 52 *G.* 3. 58

3. In trespass for an assault and false imprisonment, the defendant having justified the assault and imprisonment under a writ sued out by him as attorney for *J. M.* against the plaintiff, indorsed for bail for 100*l.*, which was delivered to the sheriff, who, by virtue thereof, arrested and detained the plaintiff; if the plaintiff, (instead of traversing the plea, as he ought to do, if the arrest were irregularly made by the sheriff's officer, without a sufficient warrant from the sheriff,) new assign that the trespass complained of was upon another and different occasion than that stated in the plea; and after the supposed arrest therein mentioned; the defendant, on proof of the fact as before stated, is entitled to a verdict. *Oakley* v. *Davis*, *T.* 52 *G.* 3. 82

4. Trespass quare clausum fregit, &c.; plea, that defendant was seised in his demesne as of fee of a messuage, &c. in the parish, and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, *occupiers* of the messuage, &c. over the locus in quo to and from the messuage, &c. as appertaining thereto; replication that defendant and all those, &c. have not the said way as appertaining to the said messuage, &c.: Held that the defendant's shewing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the locus in quo belonged, was evidence sufficient to support his plea, although the messuage was let to and in the occupation of a tenant, and the defendant only occupied a newly built house in the parish at the time of the trespass.

Plea that defendant was seised in his demesne as of fee, &c., and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, *occupiers*, &c. is good, without alleging that the defendant is occupier. *Stott* v. *Stott*, *M.* 53 *G.* 3. 343

POORS' RATE.

Stock in trade is rateable to the poor, notwithstanding it has never been rated

rated in the parish, unless there be some circumstances to take it out of the general rule; but on appeal against a rate on the ground that *A.* is not rated for his stock in trade, the sessions ought to amend the rate, and not quash it. *Rex* v. *Inhabitants of Ambleside, M.* 53 *G.* 3. 380

POOR-REMOVAL.

A pauper may be removed from a parish where he is residing under a certificate to a parish in which he gained a settlement before the granting of the certificate, and need not of necessity be removed to the certifying parish. *Rex* v. *Inhabitants of St. Martin, M.* 53 *G.* 3. 303

POST HORSE DUTY.

In an action against a person licensed to let horses to recover a penalty for not inserting in his weekly account the time for which he let to hire two horses, nor the amount of the duty payable in respect of such hiring, where the declaration alleged that the defendant let to hire for a period of time less than 28 successive days, *to wit, for* 8 *days*, &c.: Held that the letting need not be proved to have been for the exact number of days laid under the videlicet. *Sergeaunt* v. *Tilbury, M.* 53 *G.* 3. 416

PRACTICE.

See BAIL, *passim.* PLEADING, 1.

Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo, after render of the defendant and notice of such render, although such render be made after the day on which the rule for better bail expires. *Farquharson* v. *Fouchecour, M.* 53 *G.* 3. 387

PRIVILEGE.

Under the *London* court of requests act, 39 & 40 *G.* 3. *c.* 104. a husband domiciled in *Middlesex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London*, as a person *seeking his livelihood* there; for that means seeking the *whole* of his livelihood there. *Stephens* v. *Derry, T.* 52 *G.* 3. 147

PROMISSORY NOTE.

See BILLS OF EXCHANGE, 3, 4, 5, 7.

PROMOTIONS, 1

PROTECTION.

See IMPRESS, 1.

REQUESTS, COURT OF.

See PRIVILEGE.

SALE.

Where a broker sold on *Saturday* certain goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality upon the *Monday* following, and sent the bought note to the plaintiff on the *Saturday*, marked with the words "Quality to be approved on *Monday*;" but did not send the sold note to the defendant then, because he had met and informed him of the contract on the same day; but the plaintiff not having signified his disapproval of the contract on the *Monday*, the broker sent the sold note to the defendant on the *Friday*, with the words "Quality to be approved on *Monday*," struck out; which note the defendant returned within 24 hours, which by the custom of the trade signified his disaffirmance of the contract, as far as in him lay; yet held that at any rate the defendant could no longer disaffirm it after the

Monday, when the plaintiff, not having signified his disapproval, was also bound by it. *Humphries* v. *Carvalho*, *T.* 52 *G.* 3. 45

SET-OFF,

See BANKRUPT, 1, 4.

The defendant cannot plead by way of set-off a bond-debt of the plaintiff, assigned to the defendant by another, to whom and for whose use it was originally given. *Wake* v. *Tinkler*, *T.* 52 *G.* 3. 36

SETTLEMENT—*by Apprenticeship.*

Since the 13 and 14 *Car.* 2. *c.* 12. an indenture of apprenticeship executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately, is a valid indenture, although neither of the churchwardens of the parishes at large within which the township is situate join in the execution; therefore a service under such indenture was held to confer a settlement. *Rex* v. *Inhabitants of Nantwich*, *M.* 53 *G.* 3. 228

SETTLEMENT—*by Certificate.*

The settlement of a son, coming into a parish with his father under a certificate, as part of the father's family, not having before gained any settlement of his own, shifts with the settlement of the father in the certificated parish, though such son were named in the certificate. *The King* v. *The Inhabitants of Leek-Wootton*, *T.* 52 *G.* 3. 118

SETTLEMENT—*by Estate.*

A father having purchased a tenement for less than 30*l.*, devised it in trust to be let to farm during his daughter's life, and to pay her the rents after deducting the expenses. Held, that by 40 days' residence thereon by permission of the trustee, after the father's death, she gained a settlement. *The King* v. *The Inhabitants of Holm East Waver Quarter*, *T.* 52 *G.* 3. 127

SETTLEMENT—*by renting a Tenement of* 10*l. a Year.*

The taking of a tenement which, by having been cropped by the landlord with clover and grass-seeds, when let to the tenant, was worth 10*l.* a-year, but without that circumstance would have been of much less annual value, will confer a settlement. *The King* v. *The Inhabitants of Purley*, *T.* 52 *G.* 3. 126

STATUTES.

Hen. VIII.

33. *c.* 39. *s.* 74. Extent. 258

Edw. VI.

2 & 3. Tithes. 334

Eliz.

5. *c.* 4. Apprentice. 13

Charles II.

13 & 14. *c.* 12. Overseers. 228

Will. & *M.*

5. *c.* 11. *s.* 3. Costs. 194

Anne.

4 & 5. *c.* 16. *s.* 9, 10. Attornment. 99

5. *c.* 14. Game. 49

8. *c.* 19. *s.* 5. Copyright. 317

George I.

1. *c.* 47. Misdemeanor. 404

Geo. II.

5. *c.* 30. *s.* 9. Bankrupt. 225

17. *c.* 38. Overseers' Accounts. 374

20. *c.* 19. *s.* 4. Apprentice. 13

Geo. III.

6. *c.* 25. *s.* 1. Apprentice. 13

13. *c.* 78. *s.* 81. Highway. 215

Geo. III.

38. *c.* 54. *s.* 4. Drawback. 376
39 & 40. *c.* 104, *London* Court of Requests. 147
48. *c.* 141. Magistrates. 13
48. *c.* 98. Post-horse Duty. 416
c. 149. Stamp. 208
49. *c.* 84. Tone Bridge. 305
c. 121. Bankrupt. 191
s. 14. Bankrupt. 253
50. *c.* 49. Overseers' Accounts. 374
c. 108. Impress. 167

TITHES,

See EVIDENCE, 2.

1. In ejectment against a lessee of tithes for holding over, after the expiration of a notice to quit, some evidence must be given to shew that he did not mean to quit the possession; as by his declaration to that effect, or even his silence when questioned about it; or, as it seems, by shewing that the defendant, who claimed by assignment from the original lessee, had entered into the rule to defend as landlord. *Doe d. Brierley* v. *Palmer*, T. 52 G. 3. 53

2. But a second notice to the defendant to quit at *Michaelmas* 1811 is a waver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at *Michaelmas* 1810. *ib.*

TRESPASS,

See MAGISTRATES, 1, 2. PLEADING, 3, 4.

Where the out-gone tenant had covenanted with his landlord to leave the manure made by him on the farm and sell it to the incoming tenant at a valuation, to be made by certain persons; the effect of such covenant is to give the out-gone tenant a right of on-stand for his manure upon the farm; and the possession of and property in it remains in him in the mean time: and therefore if the in-coming tenant remove and use it before such valuation, he is answerable to the out-gone tenant in trespass. *Beaty* v. *Gibbons*, T. 52 G. 3. 116

TROVER,

See CORPORATION, 1. EVIDENCE, 1.

Trover does not lie by an in-coming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right after the end of the term at *Lady-day* "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, *so as the same exceeded not 29 acres, and was summer fallowed and well manured*, &c., and at harvest to reap and carry away the same:" for neither is trover the proper action to try a question as to the right to the land, nor does the proper remedy for any mismanagement of the land during the former term appertain to the in-coming tenant, but to the landlord. And however the in-coming tenant might maintain an action against the off-going tenant for a breach of the custom of husbandry in the place, in not leaving one-third of the away-going crop of wheat sown upon a clover-brush; yet the custom of the country could have no place where the off-going tenant held under a lease expressly making a different provision in respect of the away-going crop, or where he continued to hold over after the expiration of such a lease without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms. *Boraston* v. *Green*, T. 52 G. 3. 71

UNI-

UNIVERSITY.

See COPYRIGHT.

USE AND OCCUPATION.

An action for use and occupation is maintainable without attornment upon the stat. 4 & 5 *Ann. c.* 16. *s.* 9 & 10., by the trustees of one whose title the tenant (defendant) had notice of before he paid over his rent to his original landlord; though the tenant had no notice of the legal title being in the plaintiffs on the record. *Lumley* v. *Hodgson*, *T.* 52 *G.* 3. 99

WAGER.

A wager by which the defendant received from the plaintiff 100 guineas on the 31st of *May* 1802, in consideration of paying the plaintiff a guinea a day as long as *Napoleon Buonaparte* (then first consul of the *French* republic) should live; which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void on the grounds of immorality and impolicy. *Gilbert* v. *Sykes*, *T.* 52 *G.* 3. 150

WAVER,

See TITHES, 2.

END OF THE SIXTEENTH VOLUME.

G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.